ADDING THE CRIME OF INTERNATIONAL TERRORISM INTO THE STATUTE OF INTERNATIONAL CRIMINAL COURT:
DEFINITION, BENEFITS TO JUSTICE AND OBSTACLES

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Abstract

This research is focused on the question of the shifting international terrorism, a crime, well-known to domestic criminal jurisdictions, to the level of the “most serious crime […] of concern to the international community as a whole”. The paper shall explain whether international norms are silent or salient on the matter and discuss the benefits and deficiencies of their incorporation to the body of international criminal law, specifically into the list of crimes, enumerated in the Rome Statute of the International Criminal Court. It will further address the question of the usefulness and effectiveness of having terrorism internationally prosecuted in such frames and demonstrate, what could be the practical improvements in respect of individual defendants, detained all over the world in different legal systems.

The creation of a new article is not an easy task and certainly, shall encounter (and indeed does, as history shows) certain hindrances, be it political discomfort or predetermined legal obstructions. Still, the author is of the view, that addition of the new provision to the Statute is needed as it would not only contribute towards general tendency on progressive codification of international legal norms, but would also substantially ameliorate the treatment and overall attitude in respect of “terrorist” defendants.

Introduction

From the outset, it shall be recalled that it was a response to a terrorist act that resulted in the very first attempt to create a permanent international tribunal. A convention, adopted shortly after Geneva Convention for the Prevention and Punishment of Terrorism of 1937, called for creation of an international criminal court but it never became operative as the instrument was unsuccessful to collect necessary number of ratifications. This paper suggests inclusion of a new article on the crime of international terrorism into the Statute of the International Criminal Court thus making most grave terrorist offences justiciable by an international forum. It is divided into three methodologically dissimilar parts. The first one concentrates on the abstract framework – definition of terrorism in contemporary legal theory, while the second will discuss procedural terms and risks in the absence of strict normative basis. The last chapter will turn the attention of a reader on what can be an obstruction in amending the ICC Statute and whether those impediments are passable.

To begin with, it is vital to understand the notion of international terrorism in the context of law. It shall be noted that the purpose of this paper is to discuss the notion of international terrorism only, as the element of internationalism is the factor, lifting the offence to supranational level. Therefore, only international terrorism, i.e. the terrorist act, which either involves various jurisdictions or has perpetrators of diverse citizenship, is capable to be labeled as a crime “of international concern”. It shall not be excluded, however, that there could be offences, facially non-international but “concerning” international community, due to wide-scale intimidation of the attack, its gravity and exceptionally high number of victims.

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1. CHAPTER. DEFINING THE CRIME

This chapter is dedicated to the problem of definition. As a crime, terrorism is acknowledged in almost all national jurisdictions, especially after urging to do so immediately after horrible events of September 11 by the Security Council in its Resolution 1373. However, there is no common definition of this crime across the world. Moreover, there is no agreement as to whether such a definition shall be general and broad enough to cover multiple acts and those types which has not yet occurred, or specific and detailed to list all types of terrorist acts to avoid any ambiguities.

The acuteness and validity of the problem was appositely put by Tucker, who wrote “[a]bove the gates of hell is the warning that all that enter should abandon hope. Less dire but to the same effect is the warning given to those who try to define terrorism”. Another author compared the search of an apt definition to a quest after the Holy Grail. In contrast, some scholars consider there is no need to have such a term, as long as “it is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.” Still, it cannot be disputed that many values are at stake in the definition.

So the first part of this chapter will concern a phenomenon and nature of terrorism in contemporary politics. The following section will elicit national perspectives in relation to terrorist attacks and crimes related to them. The third and the fourth sections will explain the

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views of supranational institutions, such as regional alliances and the United Nations. In the last section the study will familiarize the reader with the notion of an international crime and current state of the international criminal justice in relation to terrorism.

1.1. The phenomenon of terrorism in the modern world

1.1.1. Roots of the modern notion

The killing of the King Alexander I of Yugoslavia at Marseilles in 1934 prompted luminaries of international law to rejoin their forces to outlaw terrorism for the first time on international level. Instantaneously after the tragic event, the Conference on Unification of International Criminal Law in Copenhagen agreed that an act of terrorism, generated “a general danger or a state of terror, aimed either at changing or disrupting the functioning of government or at disturbing international relations”.\(^8\) International indignation reached its climax in 1937, when under the auspices of the League of Nations a specific convention prohibiting and punishing terrorist attacks was adopted in Geneva.\(^9\) It referred to “criminal acts directed against a State and of which the goal or nature is to cause terror towards determined personalities, groups or people or the population”. The interest in the matter was revived in aftermath of World War II, especially over the past three decades.

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1.1.2. Modern legal philosophy about terrorism

In 1983 Schmidt documented at least 109 definitions of terrorism.\textsuperscript{10} In his study he included various relative aspects such as guerrilla wars, political crimes, anachronism and “terror” and suggested his own general definition, which however, even after a reformulation in 1988, lacked a number of crucial details.\textsuperscript{11} In the opinion of Elagas, consensus is impossible, at least in a short run, as long as there are a number of obstacles on the way to reach an all-encompassing definition, inter alia, too different forms and perpetrators of terrorism, political and often, purely subjective criteria for defining and finally, the motives for terrorism are so various and are entirely dependent on time and governing political ideology. As an example, he recalls the status of Yasir Arafat as a branded terrorist in the United States, who subsequently had become a Palestinian leader and the Nobel Peace Prize laureate.\textsuperscript{12}

Nonetheless, he suggests a definition which embraces “[those] criminal acts, which are based on the use of violence or threat thereof, and which are directed against a country or its inhabitants and calculated to create a state of terror in minds of the government officials, an individual or a group of persons, or the general public at large. It could be the work of one individual, but more often, it is a product of organized groups whose philosophy is based on the theory that “the end justifies the means”.\textsuperscript{13}

Other scholars think that the definition shall be more general to avoid a specific enumeration of objects and subjects, which can, sometimes, create difficulties for prosecution. Thus, Jenkins


\textsuperscript{11} For the critical discussion of Schmid’s work see J.K. Lambert, Terrorism and Hostages in International Law, Grotius, 1992; P.J. van Krieken, Refugee Law in Context, the Exclusion Clause, Asser/Kluwer, 1999, pp.177-194.


\textsuperscript{13} Ibid.
defines terrorism as any use or threat to use force designed to bring about political change.\textsuperscript{14} It cannot be agreed that such a determination is flawless. On the contrary, it so broad that even lawful military actions, such as a humanitarian intervention under the auspices of the UN or by any third country as endorsed by the Security Council will amount to a terrorist attack. Laqueur made a step further by removing this deficiency and adding a requirement of unlawfulness and innocent people as an object of the violence.\textsuperscript{15} Explanation proposed by James Poland makes an accent on “premeditated, deliberate, systematic murder, mayhem” targeted against the innocent and creating “fear and intimidation”.\textsuperscript{16}

1.1.3. Terrorism today: “war” on terrorism

“This is the time that the world should stand together [...]. Terrorism seeks to put itself above and outside of the law”.\textsuperscript{17}

The massacre of September 11 had an enormous impact upon the development of the international legal framework. It fostered the global debate on available measures to counter terrorism, its roots and consequences, it prompted to review traditional perspectives upon migration, refuge and asylum, international criminal cooperation and common security. It had given a great impetus for international \textit{de lege ferenda} and yielded the most fundamental Security Council Resolution - Resolution 1373. This Resolution is outstanding not only because of its tremendous political weight but also from the purely legal point of view. It created \textit{erga}

\textsuperscript{14} B. Jenkins, as cited in \textit{Definitions of Terrorism} at \url{http://www.jewishvirtuallibrary.org/jsource/Terrorism/terrordef.html} [d/a 07/02/2010].

\textsuperscript{15} “Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted”, W. Laqueur, as cited in \textit{Definitions of Terrorism}, ibid.

\textsuperscript{16} as cited in Definitions of Terrorism at \url{http://www.jewishvirtuallibrary.org/jsource/Terrorism/terrordef.html}, [d/a 07/02/2010].

omnes obligation for states (including non-members) to adopt legislative measures to counter international terrorism. By doing this, stricto sensu, it went beyond paramount principle of sovereignty of states, a foundation of the international relations (see infra, p. 23, para 1.3.4.1.2.).

Terrorism may involve thousands of people and may acquire different facets, be it hostage-taking, hijacking, bombing, cyber-terrorism, ecological, biological and chemical terrorism, the list of possible perpetrators is far too long to count them all. From individual criminals and psychopaths to organized clandestine alliances, authorized groups and maphia including the IRA, ETA, PLO, DFLP, Hezbollah, Bolsheviks and the Red Army, PKK, Tamil Tigers, Frelimo, the threat of terrorism today is abrupt and can seize a law-abiding person in any part of the world. The necessity to create a comprehensive, universally applicable and effective law to counter terrorism is therefore obvious.18

1.2. National criminal legislation and case law on terrorism

1.2.1. The United States

The United States, a leading political actor on the international arena, has been continuously declaring their endeavor to counter-terrorism. Still, even in the US there is no single term determining what the crime of terrorism is. Different state agencies have their own view upon the issue and quite often, they do not coincide.

The notion proposed by the US Department of State is rather simple and removes a number of features suggested by individual scholars. It covers “premeditated, politically motivated violence perpetrated against non-combatant targets by substantial groups or clandestine state agents,

18 Van Krieken, supra 11, p. 13.
usually intended to influence an audience”.\textsuperscript{19} While the Federal Bureau of Investigation considers that “terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”\textsuperscript{20} Almost the same definition was proposed by the Vice-President Gore’s Task Force in 1996, with a slight addition suggesting that change in social behavior could also be the end, pursued by terrorists. In contrast, the qualification suggested by the US Department of Defense contains three elements (violence, fear and intimidation): “terrorism is the calculated use of unlawful violence or threat of unlawful violence to inculcate fear; intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.”\textsuperscript{21}

\textbf{1.2.2. The United Kingdom}

Back in 1989, Prevention of Terrorism Act defined the crime as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public or any section of the public in fear.”\textsuperscript{22} However, this definition had a number of drawbacks, specifically, it did not indicate particularly grave level of damage and violence. Therefore, it was repealed by Terrorism Act 2000, s. 1 of which stipulated that terrorism is “the use or threat of action where-

(a) the action falls within subsection (2),

\begin{flushleft}
\textsuperscript{21} \textit{Ibid.}
\end{flushleft}
(b) the use or threat is designed to influence the government [or an international governmental organization]\(^{23}\) or to intimidate the public or a section of the public, and
(c) the use or threat is made for the purpose of advancing a political, religious [racial]\(^ {24}\) or ideological cause.”

While s. 2 covers any action if it

“(a) involves serious violence against a person,
(b) involves serious damage to property,
(c) endangers a person's life, other than that of the person committing the action,
(d) creates a serious risk to the health or safety of the public or a section of the public, or
(e) is designed seriously to interfere with or to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.”

S. 44 of this Act grants very broad powers to stop and search suspicious groups or individuals. In particular, it does not require any “reasonable cause to believe that an offence is being perpetrated or is planning to be perpetrated”.\(^ {25}\) In January 2010 the Strasbourg Court has declared this provision illegal as unlawful intrusion to privacy, protected under Art. 8 of the European Convention\(^ {26}\) (see infra p. 45, para 2.4.1).

\(^ {23}\) As inserted by Terrorism Act 2006, s 34(a).
\(^ {24}\) As inserted by Counter-Terrorism Act 2008.
\(^ {25}\) For statistical data see Random searches on rail network, 15 December 2007, available at http://news.bbc.co.uk/2/hi/uk_news/scotland/7146080.stm [d/a 08/09/2010], as reported, British Transport Police in Scotland had stopped and searched more than 14,000 people and vehicles in Jan.-Sept.2007; Metropolitan police used anti-terror laws to stop and search 58 under-10s, V. Dodd, 18 August 2009, available at http://www.guardian.co.uk/politics/2009/aug/18/met-police-stop-search-children [d/a 08/09/2010]), reporting that in 2008 the Metropolitan Police conducted 175,000 searches using Section 44, these included over 2313 children (aged 15 or under), of whom 58 where aged under 10.
However, Terrorism Act 2000 does not provide the only definition in force. S. 2(2) of the Reinsurance (Acts of Terrorism) Act 1993 provides: “‘acts of terrorism’ means acts of persons acting on behalf of, or in connection with, any organization which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty’s government in the United Kingdom or any other government \textit{de jure} or \textit{de facto}”.

1.2.3. Israel

Israeli Terrorism Prevention Law interprets any “body of persons resorting in its activities to acts of violence calculated to cause death or injury to a person or to threats of such acts of violence” as a “terrorist organization”.\textsuperscript{27} Notably, under the Ordinance the government is entitled to declare an organization terrorist and this assumption will be valid unless proven otherwise in a court of law.\textsuperscript{28}

Another relevant law reflects somewhat different attitude of the legislator, who attempted to create a comprehensive legal categorization. So in Prohibition on Terrorist Financing Law, “terrorist organization” is “an association of people which acts to perpetrate an act of terrorism or has as its goal enabling or promoting the perpetration of an act of terrorism; for this purpose it is immaterial –

(1) whether or not the members of the organization know the identity of the other members;
(2) if the composition of the members of the organization is fixed or changes;
(3) if the organization also carries out legal activities and if it also acts for legal purposes.”

\textsuperscript{27} S. 1, Prevention of Terrorism Ordinance No. 33 of 5708-1948, with amendments from 1980, 1986, and 1993.
\textsuperscript{28} S. 8, \textit{ibid}.
The “act of terrorism” referred herein implies “an act that constitutes an offence or a threat to commit an act that constitutes an offence that was committed or was planned to be committed in order to influence a matter of policy, ideology or religion if all of the following conditions are fulfilled:

(1) it was committed or was planned to be committed with the goal of causing fear or panic among the public or with the goal of coercing a government or another governing authority, including the government or governing authority of a foreign country to take action or to refrain from taking action; for the purposes of this paragraph – foreseeing, as a nearly certain possibility, that the act or the threat will cause fear or panic among the public is equivalent to having a goal to cause fear or panic among the public;

(2) the act that was committed or that was planned or the threat included:
   (a) actual injury to a person’s body or his freedom, or placing a person in danger of death or danger of grievous bodily injury;
   (b) the creation of actual danger to the health or security of the public;
   (c) serious damage to property;
   (d) serious disruption of vital infrastructures, systems or services.29

It is important to emphasize, that Israeli law allows exceptions to the conditions of S.1 and S.2a of this provision, if, for instance, the acts described are committed using chemical, biological or radioactive weapons that are liable, due to their nature, to cause actual mass harm.30

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29 Chapter 1, Definitions, Prohibition of Terrorist Financing Law, No. 5765-2004, (Unofficial translation).
30 Ibid.
1.2.4. The Russian Federation

In the Federal Law “On the Fight against Terrorism” the offence is defined as “violence or the threat of violence against individuals or organizations, and also the destruction (damaging) of or threat to destroy (damage) property and other material objects”. These may include threats to kill, cause significant damage to property, or other socially dangerous consequences which are implemented with a view to provoke public insecurity, intimidation of the population, or to force favorable decision-making by public organs. Encroachment upon the lives of statesmen or public figures perpetrated with a view to ending their state or other political activity or out of revenge; attacks diplomats and their official premises or vehicles of persons, committed with a view to provoking war or worsening international relations are acts of terrorism too.

Remarkably, the Russian approach is unusual to include different stages of terrorist act into the specific law rather than leaving the elements of crime in the respective provisions of penal legislation. Moreover, there is a different type of crime named “international terrorism”, which basically introduces a cross-border segment into offender-victim-consequences relationship.31

1.2.5. Other countries

Another approach has been taken by Turkish anti-terror law. Terrorism is primarily defined as an act directed at the destruction of Turkish statehood. So it is “any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the

existence of the Turkish State and Republic, weakening or destroying or seizing the authority of
the State, eliminating fundamental rights and freedoms, or damaging the internal and external
security of the State, public order or general health by means of pressure, force and violence,
terror, intimidation, oppression or threat.”

While in the UAE the definition includes not only acts, but failure to act as well. It must be
performed by the offender himself with a view to execute a criminal plan, individually or
collectively, with intention to cause terror between people or terrifying them and if the same
causes breach of the public order or endangering the safety and security of the society or injuring
persons or exposing their lives, liberties, security to danger, including Kings, Heads of States and
Governments, Ministers and members of their families or any representative or official of a State
or an intergovernmental organization and members of their families or causes damage to
environment, any of the public, private utilities or domain, occupying, seizing the same or
exposing any of the natural resources to danger.

So it may be safely concluded, that the legal concepts employed by the national jurisdictions are
inhomogeneous in nature and vary from very short and broad terms to specific and detailed ones.
The objects of crime differ from an accent on state order and public safety to protection of
individual rights and freedoms, while the spectrum of inanimate items may include not only
personal and public property but also natural resources and general environment.

1.3. Supranational institutions and the UN v. terrorism

33 Art. 2, Federal Law of the Kingdom of the United Arab Emirates “On Combating Terrorism Offences”, No.1,
2004.
1.3.1. Council of Europe: the Framework Convention

The Council of Europe, comprising all European countries and Belarus, i.e. 47 members has made significant steps forward in combating terrorism on supranational level, by adopting a number of prominent legal instruments\(^{34}\) the Framework Convention\(^{35}\) being the most important of them.

The gist of the Convention lays in agreement of the state parties to cooperate and comply with extradition requests in respect of offences, which otherwise could be labeled “a political offence or as an offence connected with a political offence or as an offence inspired by political motives”. Thus “depoliticized” offences included offences falling within the scope of the Hijacking Convention\(^{36}\), Civil Aviation Safety Convention\(^{37}\) as well as attacks against the life, physical integrity or liberty of internationally protected persons; kidnapping, hostage-taking, bombing, rocking, dangerous usage of automatic firearms and any attempt to commit foregoing offences.\(^{38}\) This list might be expanded if the State Party agrees thereto.\(^{39}\) 2003 Protocol


\(^{35}\) European Convention on the Suppression Of Terrorism, ETS.90, 27.01.1977.


\(^{38}\) Art. 1. European Convention on the Suppression of Terrorism, supra 35.

\(^{39}\) Art. 2, ibid: “For the purpose of extradition between Contracting States, a Contracting State may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by Article 1, against the life, physical integrity or liberty of a person.
introduced amendments to the Convention\textsuperscript{40} and expanded considerably the list of “depoliticized” offences to cover all the acts described in the relevant UN anti-terrorist Conventions and Protocols.

It is important to underline that the Convention neither requires criminalization of the offences listed at domestic level, nor does it prohibit any reservations to key provisions, although in respect of the latter, the situation has been ameliorated by the Protocol which limits their quantity and temporal effect.\textsuperscript{41} 2005 Convention\textsuperscript{42} does not define terrorism either, but simply refers to relevant universal instruments adopted under the auspices of the UN (\textit{infra} p. 17).\textsuperscript{43}

\subsection*{1.3.2. European Union}

As an instant reaction to the terrorist acts of September 11, the European Commission (of EU) had quickly elaborated a “common definition” which embraced “a list of offences to be treated as acts of terrorism where they are committed intentionally by individuals or groups against one or more countries or their institutions or population in order to threaten them and seriously undermine or even destroy their political, economic or social structures.”\textsuperscript{44} So, for the purposes of international cooperation between EU member states, terrorist acts are:

a) attacks upon a person’s life which may cause death;

b) attacks upon the physical integrity of a person;

\footnotesize{\textsuperscript{40} Protocol amending the European Convention on the Suppression of Terrorism, ETS No. 190, 2003.}
\footnotesize{\textsuperscript{42} Convention on the Prevention of Terrorism, CETS No. 196, 2005.}
\footnotesize{\textsuperscript{43} Art.1, \textit{ibid}.}
\footnotesize{\textsuperscript{44} Press release from 19/09/2001: \textit{Europe must have common instruments to tackle terrorism}, IP/01/1284 at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1284&format=HTML&aged=0&language=EN&guiLanguage=en, [d/a 07/02/2010].}
c) kidnapping or hostage taking;

d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility,

e) including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

f) seizure of aircraft, ships or other means of public or goods transport;

g) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

h) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

i) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

j) threatening to commit any of the acts listed in (a) to (h).

Notably, these acts shall be deemed terrorist inasmuch as they correspond to an exhaustive list of objectives: intimidating a population, compelling a government or seriously destabilizing fundamental structures of a society.  

1.3.3. Regional security organizations

As a leading regional arrangement under Chapter VII of the UN Charter, the Organization for Security and Cooperation in Europe “has pledged itself to fully implement UN Security Council

Resolution 1373”.46 Since its very first commitment made in Bucharest in 200147 safety and counter-terrorism are always on its agenda.48 However, Porto Charter49 contains no definition, but for an ambiguous expression of fighting terrorism “in all its forms and manifestations”.50 It can be inferred that such a conduct is considered unjustifiable under “no circumstance or motive”, is contrary to the purposes and principles of the United Nations and the OSCE and shall not be affiliated with any nationality or religion.51

No such definition can be found at official sources of Collective Security Treaty Organization (Organizaciya Dogovora o kollektivnoy bezopasnosti, ODKB), another regional alliance, created to preserve peace and safety in the former USSR region.52 Still, a relevant treaty has been adopted in the framework of the Commonwealth of Independent States, which states that terrorism is any domestically criminalized act, undermining public safety, influencing decision-making by the authorities or terrorizing the population, and taking the form of:

- a) violence or the threat of violence against natural or juridical persons;
- b) destroying (damaging) or threatening to destroy (damage) property and other material objects so as to endanger people’s lives;

46 From the Action against Terrorism Unit Mandate at http://www.osce.org/atu/13397.html, [d/a 07/02/2010].
47 Decision no. 1 Combating Terrorism, MC(9).DEC/1, Bucharest, 04.12.2001 (“The OSCE participating States will not yield to terrorist threats, but will combat them by all means in accordance with their international commitments (...) They will defend freedom and protect their citizens against acts of terrorism, fully respecting international law and human rights. They firmly reject identification of terrorism with any nationality or religion and reconfirm the norms, principles and values of the OSCE.”).
49 OSCE Charter on Preventing and Combating Terrorism, supra.
50 S. 1, ibid.
51 SS 1&2, 4, id.
52 yet, a reference to collective efforts in combating terrorism may be found in Art. 8 of the Treaty, available at http://www.odkb.gov.ru/start/index_uzbengl.htm [d/a 09/09/2010].
c) causing substantial harm to property or the occurrence of other consequences dangerous to society;

d) threatening the life of a statesman or public figure for the purpose of putting an end to his State or other public activity or in revenge for such activity;

e) attacking a representative of a foreign State or an internationally protected staff member of an international organization, as well as the business premises or vehicles of internationally protected persons;

f) other acts classified as terrorist under the national legislation of the Parties or under universally recognized international legal instruments aimed at combating terrorism.53

One of the distinctive features of the CIS Treaty is presence of the reference to mass destruction weapons under a title of “technological terrorism”.

The North Atlantic bloc has not elaborated any definition either.54 American concept of terrorism may be deduced from the language employed by the regional instruments, adopted by the Organization of American States55, even though none of them contain a specific qualification.

1.3.4. The United Nations

The Geneva Convention for the Prevention and Punishment of Terrorism56 was the earliest endeavor to criminalize terrorist attacks on international level. Since 1937 the international


55 E.g. Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), 2002.

community has not returned to the issue till 1963, when a number of universal legal instruments were elaborated.\(^57\) In 2005 international community has introduced substantive changes to three of these universal instruments: in summer the Amendments to the Convention on the Physical Protection of Nuclear Material were adopted, and a few months later a Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and a Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf were adopted.\(^58\)

Currently, there is a global effort to generate an all-encompassing description of terrorism in a form of Comprehensive Convention on International Terrorism under the aegis of the UN


\(^58\) \textit{International Legal Instruments to Counter Terrorism} from UN Action to Counter Terrorism, at \url{http://www.un.org/terrorism/instruments.shtml} [d/a 09/09/2010].
General Assembly\textsuperscript{59} (for the discussion of a need of having such a setting see \textit{infra}, p. 77, para 3.3.1.).

\subsection*{1.3.4.1. UN GA \& SC Resolutions – de lege ferenda?}

Conventionally, international organizations, being secondary subjects of international relations, cannot legislate “hard” or binding, international law, the domain reserved to the discretion of sovereign states. In contrast, international (intergovernmental) organizations, or their organs, could only adopt recommendations to their members, though a few are empowered to adopt international legal rules that could become binding on (a part of) their members. The UN, being their foremost representative, has two distinctive bodies, enabled to legislate so-called “soft law” (and “hard law” in case of the Security Council), which might gradually translate into a norm of customary law or be codified into binding treaties.\textsuperscript{60}

\subsubsection*{1.3.4.1.1. UN General Assembly}

As a unique forum of global opinion exchange, the General Assembly is a leading source for an inquiry. In its Resolution 51/210 on measures to eliminate international terrorism the Assembly concluded that a terrorist attack is any criminal act “intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political reasons”. It was further observed that such acts are not justifiable notwithstanding any kind of racial, ethnic, religious, ideological, philosophical, political or any other ground employed to substantiate...
them.\textsuperscript{61} Due to its clarity and straightforwardness this definition is aptly noted to be the most useful one for an international insight.\textsuperscript{62,63}

In comparison to the Security Council, a body, often reflecting transitional developments in contemporary politics, the General Assembly’s approach to international terrorism was more systematic and long-term. Its first attempt to fight international terrorism dates back to 1972\textsuperscript{64} and there even were proposals to hold an international conference on the matter\textsuperscript{65}, which never took place. By the same Resolution 51/210, the Assembly established the Ad Hoc Committee, in an attempt to elaborate a comprehensive convention on international terrorism, which aimed at regulating many activities that were not covered by international law. However, in light of disagreement among States, the Assembly was unable to adopt such a convention during its 56th session, between September and December 2001.\textsuperscript{66,67} The issue was revisited very recently, as the Ad Hoc Committee recommended establishment of a working group “toward finalizing the draft comprehensive convention” to the Sixth (Legal) Committee.\textsuperscript{68}


\textsuperscript{62} Van Krieken, supra 11, p. 19.

\textsuperscript{63} Full list of the General Assembly resolutions on the matter can be found at http://www.un.org/terrorism/resolutions.shtml [d/a 13/09/2010].

\textsuperscript{64} UN GA Res.3034 (XXVII), 18 December 1972.

\textsuperscript{65} UN GA Res.42/159, 7 December 1987, § 14.

\textsuperscript{66} At the beginning of the session the issue was allocated to the 6\textsuperscript{th} (Legal) Committee, which has in turn, appointed a Working Group. The group made a significant progress on almost all provisions of the Draft Convention, albeit the texts of draft articles 2(definition) and 18(2) (the exceptions for the activities of armed forces during an armed conflict) were ultimately not agreed. These provisions were the sticking points which eventually prevented the adoption of the draft convention in 2001 session, see UN Doc. A/C.6/56/WG.1/CRP.3.

\textsuperscript{67} S. P. Subedi, The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law, 4 International Law FORUM 159, 2002, p. 159, 161.

\textsuperscript{68} Legal Committee Is Told Overall Convention against Terrorism Must Meet International Law, Humanitarian Concerns, 5 October 2010, UNGA 65\textsuperscript{th} Session, 2\textsuperscript{nd} & 3\textsuperscript{rd} Meetings of Sixth Committee at http://www.un.org/News/Press/docs/2010/gal3386.doc.htm [d/a 20/10/2010].
A provisional norm, engendered by the Ad Hoc Committee, which started its activity back in 1996\(^{69}\) and reported no consensus on the issue in 2001\(^{70}\), definitely gives an impression of comprehensiveness and worth to be quoted in its entirety\(^{71}\):

1. Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

   (a) Death or serious bodily injury to any person; or

   (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or

   (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of the present article.

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

4. Any person also commits an offence if that person:

   (a) Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or

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\(^{69}\) Established by the G.A. Res. 51/210, 17/12/1996, see further \url{http://www.un.org/law-terrorism/index.html}

\(^{70}\) In September 2001 on the General Assembly’s 56th session the Ad Hoc Committee submitted that a consensus on a list of matters, including definition, had not been reached. See further S. P. Subedi, \textit{supra} 67, p. 161.

\(^{71}\) Art. 2 of the Draft Comprehensive Convention against International Terrorism (Consolidated text), Annex II to the Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly, 59th Sess., 2005, UN GAOR A/59/894.
(b) Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or

(c) Contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of the present article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of the present article.

Notwithstanding enormous value of having a comprehensive international legal regime on terrorism, some authors suggest, that this attempt is “politically elusive”.72 Implying Art. 18(2) of the Draft Convention (non-qualification of state armed forces conduct as terrorism), petra scandali of 2001, and reminding that statehoods inevitably prevail in the international arena, Bassiouni warns that the definition of terrorism will always be limited to encompass unlawful conduct by non-state actors only, excluding thereby terror-violence committed or executed on behalf of the government. “[G]overnments have avoided developing an international legal regime to prevent, control, and suppress terrorism, preferring instead the hodgepodge of thirteen treaties that currently address its particular manifestations. The absence of a coherent international legislative policy on terrorism is consistent with the ad hoc and discretionary approach that

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governments have taken toward the development of effective international legal responses to terrorism.”

1.3.4.1.2. UN Security Council

Although among the others the resolution 1363 was the first one to characterise the then situation in Afghanistan as “a threat to international peace and security”, it was only the one adopted a day after the notorious events in America - resolution 1368, by which the Security Council had triggered its competence under Chapter VII of the Charter. The key resolution, Res. 1373, designed mainly to outlaw terrorist activities and their financing at the domestic level was adopted in a fortnight on a draft proposed by the United States. It reaffirmed the inherent right of States of individual or collective self-defence, and has embarked an unprecedented ability of the Council to order all states (including non-members) to take or to refrain from specified actions in a context not limited to disciplining a particular country. The

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73 Bassiouni, ibid.
77 S. P. Subedi, supra 67, p. 160.
protagonists of the resolution wanted it to pass it quickly, therefore the text contains no definition of a terrorist act whatsoever, to avoid the stumbling block encountered by the 6th Committee.

1.4. International Criminal Law and the Crime of International Terrorism

As noted before, 1937 Geneva Convention for the Prevention and Punishment of Terrorism was the earliest attempt to attach terrorism to the terrain of international criminal law. The Convention has never came into force and the topic sunk into oblivion until 1947, when General Assembly established International Law Commission (ILC) and mandated to prepare a draft code of the offences against the peace and security of mankind. Even if the period immediately after the World War up to the late 80s was generally marked with political stagnation caused by antagonism between the two leading blocs, impeding any common solution

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82 For further details on related Security Council resolutions, see W. Gehr, The Universal Legal Framework Against Terrorism, Právne Aspekty Boja Proti Medzinárodnému Terorizmu, 2006.

83 Convention for the Prevention and Punishment of Terrorism, supra 9.


on a sensitive matter of crystallizing offences against international order. The Commission has produced a number of working drafts, referring to terrorism in various modes and extents.

1.4.1. Draft Code on the Offences against Peace and Security of the Mankind

The initial draft produced by the Commission in 1951 defined terrorism as “organized activities intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public in another State” [emphasis added]. In 1954 the definition as such was omitted, and terrorist acts, included only activities against a state effectively controlled or hosted by another state. In 1981, after a prolonged reluctance to deal with the issue the General Assembly turned its attention to the Code again.

A Special Rapporteur, appointed by the Commission, reported that various forms of terrorist activity contemplate different legislative approaches and only the one having international dimension shall fall under the scope of the Code. “There is domestic terrorism and there is international terrorism. <...> Domestic terrorism is practiced within a State and undermines the relationship between that State and its nationals. This type of terrorism is equally irrelevant to the draft. The kind of terrorism dealt with here is that which is liable to endanger international

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90 UN GA Res. 36/106, 10 December 1998.
peace and security.” He further observed, that main weapon of terrorists was intimidation, the aim was to impress and create a climate of fear by spectacular acts while the object was collective psyche.

In late 80s the International Law Commission, after a thorough research, arrived at the conclusion that a list of the acts that could qualify as terrorist, should be the following:

a) Any act causing death or grievous bodily harm or loss of liberty to a head of State, persons exercising the prerogatives of the head of State, their hereditary or designated successors, the spouses of such persons, or persons charged with public functions or holding public positions when the act is directed against them in their public capacity;

b) Acts calculated to destroy or damage public property or property devoted to a public purpose;

c) Any act likely to imperil human lives through the creation of a public danger, in particular the seizure of aircraft, the taking of hostages and any form of violence directed against persons who enjoy international protection or diplomatic immunity;

d) The manufacture, obtaining, possession or supplying of arms, ammunition, explosives or harmful substances with a view to the commission of a terrorist act.

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92 ibid, § 128.

Remarkably, in the version adopted by the Commission in 1991, the list of punishable offences included “international terrorism”\textsuperscript{94} while a few years later, in 1996 there is no mention whatsoever, apart from a single reference to “acts of terrorism” and hostage-taking committed in the context of non-international armed conflicts.\textsuperscript{95} This omission, however, was not accidental.

In 1995 in an effort to enumerate the list of international crimes with their possible inclusion to the prospective international court’s statute, simultaneously being elaborated by the Commission, the Code was revised. Draft Art. 24, which dealt with international terrorism, perceived it as a conduct of state agents. However, such an interpretation earned valid and constructive criticism as being too narrow to include all existing types of terrorism. So Belarus insisted the category to be expanded as long as “the draft Code cannot disregard the scale of acts of international terrorism committed by terrorist organizations and groups which are not necessarily linked to a State, and the threat posed by such acts to the peace and security of mankind. In any event, the participation of a State cannot be a criterion for defining terrorism as a crime against the peace and security of mankind”.\textsuperscript{96} This view was supported by the UK and Northern Ireland, who also emphasized that there were types of terrorist acts which were not state-sponsored but nonetheless, could have been adhered as international terrorism, e.g. hijacking and hostage-taking.

\textsuperscript{96} §114, “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 13\textsuperscript{th} report on the draft code of offences against the peace and security of mankind, by D. Thiam, Special Rapporteur, Document A/CN.4/466 (Extract from the Yearbook of the International Law Commission, 1995, vol. II(1)).
The US remained skeptical about any kind of definition of terrorism, claiming that no consensus is reachable on the matter. The US speaker emphasized that the already accepted approach of the UN and separate governments is more efficient: “[b]y focusing upon specific types of actions that are inherently unacceptable, rather than on questions of motivation or context as the draft Code does, the existing approach has enabled the international community to make substantial progress in the effort to use legal tools to combat terrorism”.97

In short, the state-parties could not agree on common definition of international terrorism and it was decided to exclude the crime from a tentative list for inclusion into the draft Code.98 Consensus had clearly developed in the Commission in relation to first four crimes only (genocide, war crimes, crimes against humanity and aggression99), which clearly constituted crimes under general international law, while terrorist acts, which might be acknowledged as crimes of exceptionally serious nature threatening peace and security of mankind, were excluded.100,101

1.4.2. Rejection to add the crime of terrorism into the ICC statute

As an availability of a criminal court for select cases to try individuals accused in grievous wrongs under existing criminal provisions was deemed to have its own inherent rationale, it was decided to detach such a court from the Code of Crimes, the litigation under which, in any case,

97 Ibid, §117.
99 The crime of aggression was defined later on, for details, read further – Kampala Review Conference of Rome Statute at http://www.icc-cpi.int/Menus/ASP/ReviewConference/ [d/a 09/11/2010].
would contradict the principle of *nullum crimen sine lege*. Accordingly, the Draft Statute of International Criminal Court elaborated by the Commission in parallel to its work on Code, was adopted and presented to the General Assembly in 1994. The draft did not mention terrorism, although a reference to other crimes (including certain terrorist acts), outlawed by universal treaties, was present in the Annex.

However, a year later the Ad Hoc Committee, established by the General Assembly to review the main issues raising out of the Draft Statute, decided to limit the jurisdiction of future court to “core crimes”, mentioned in Art.20(a)-(d) of the Draft. Thus the outreach of jurisdiction was limited to genocide, the crime of aggression, serious violations of the laws and customs of war and crimes against humanity. The rationale behind this move was partly based on the considerations, expressed by the Commission back in 1994 – “an unprecedented exercise of creative legislation” needed “to be tampered by a strong sense of practicality” to withstand skeptical international community and implied severe limitations on its scope. Nevertheless, it

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reappeared in discussions in the Working Group on definitions of crimes of the Preparatory Committee\textsuperscript{109}, which replaced the Ad Hoc Committee in 1996.\textsuperscript{110}

In the proposed definition the jurisdiction of the court extended to “terrorist crimes”, taking a form of “undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear and insecurity in the minds of public figures, group of person, the general public or population, for whatever consideration and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them.”\textsuperscript{111} The text further referred to offences under terrorism related treaties and unlawful conduct involving use of firearms, weapons or explosives targeted to cause indiscriminate death toll or serious injury to population or property.

In Rome, principal supporters of the inclusion of international terrorism into the mandate of the Court, Algeria, India, Sri Lanka and Turkey, proposed to include it into Art. 5 of the Statute as a crime against humanity. The language of their definition was scarcely different from the one, proposed by the Preparatory Committee.\textsuperscript{112} Such a suggestion, however, raised severe criticism mainly because of its apparent linkage to the struggle of peoples against colonial and other domination for freedom, self-determination and independence, which may, at times qualify as an act of terror (for further thoughts on this matter, read \textit{infra} Chapter 3). Furthermore, it was

\textsuperscript{109} UN GA Res.50/46, 18 December 1996.

\textsuperscript{110} See A/AC.249/1997/WG.1/C.R.P.4. The text however, made it clear that its consideration of terrorism was not without prejudice to their final inclusion in the Draft Statute and discussed it only in general way (as explained in n. 74, by P. Robinson, \textit{The Missing Crimes}, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, pp. 515-6).

\textsuperscript{111} The text was mainly build on the 1937 Geneva Convention provisions, UN resolutions on terrorism since 1989 and in particular 1994 Declaration (A/Res/51/210, \textit{supra} S 1.3.4.1.1.).

\textsuperscript{112} A/CONF.183/C.1/L.27.
necessary to distinguish between the acts of terrorism which were purely domestic and therefore, a matter of a national jurisdiction, and those creating danger to international peace and safety. In addition, the agreement on a universally acceptable term would have been a lengthy process, going beyond the five-week session in Rome, which ought to conclude and deliver its long-awaited child.\textsuperscript{113}

So the crime of international terrorism was excluded from further discussions and left to the work of a future review conference.\textsuperscript{114}

\textbf{1.4.3. Art. 5 crimes and the crime of terrorism}

Accordingly, the International Criminal Court is mandated to preside over four crimes, namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.\textsuperscript{115} It is suggested that in certain circumstances terrorist acts may be tried in the prism of one of the above. The most oft cited provision here would be Art. 7 on crimes against humanity.\textsuperscript{116}

Alike war crimes, crimes against humanity are probably the most well-established norm of international criminal law as well as a rule of international custom. Their definition stems from the charters of the international tribunals, established to adjudicate on Nazi atrocities.\textsuperscript{117} Remarkably, Art. 7 establishes a high threshold: only those acts committed “as part of a

\begin{itemize}
\item Art. 5 of the Statute of the International Criminal Court, \textit{supra} 1.
\item A. Cassese, International criminal law, 2\textsuperscript{nd} Ed., Oxford, 2003, pp. 120-132.
\item Art.6(c), Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 82 U.N.T.S. 280, entered into force Aug. 8, 1945; Art. 5(c), (Charter of the International Military Tribunal for the Far East) Special Proclamation by the Supreme Commander for the Allied Powers, as amended Apr.26, 1946, T.I.A.S. No. 1589.
\end{itemize}
widespread or systematic attack directed against any civilian population, with knowledge of the attack” can be qualified as crimes against humanity. The attack is further defined as “a course of conduct involving the multiple commission of acts [...] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. The key requirement here is commission of multiple acts which could meet the criteria of “a policy”. For instance, a suicide bombing at public places of Israel spreading terror and fear in early 2002 may well be qualified as “a widespread systematic attack against a civilian population” and fall under the ambit of the Art.7. If it is so, one should fairly suppose that terrorist attacks may be prosecuted successfully by the same ICC even in the absence of a new provision on terrorism.

However, the acts of terrorism may have sporadic, isolated nature and could be committed by separate individuals not furthering any policy of an organized character. Alternatively, a policy element might be present but the object of crime could be different, as in case of cyber-terrorism, where the conduct is directed against computer networks with a particular malicious aim, but not immediately and always against civilian population.

**War crimes** have been continuously codified since more than a century ago due to expansive development of international humanitarian law and fruitful efforts of International Red Cross

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118 the text of Art. 7 provides: “For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health [...]."


Committee.\textsuperscript{121} Certain grave breaches of Geneva Conventions\textsuperscript{122} could be labeled as terrorist, namely, hostage taking, willful killing or serious bodily injury as well as extensive destruction of property. Moreover, a number of serious violations of the laws and customs applicable in international armed conflict listed in Art. 8 of the Statute, on its surface, unambiguously reflect terrorist conduct.\textsuperscript{123} The same is true about similar offences perpetrated in the context of non-international character.\textsuperscript{124} Still, one cannot safely assume that a terrorist act would be necessarily prosecuted as a war crime at least. \textit{Ratione temporis} and \textit{ratione matirae} of Art.8 is limited and applies only as long as an armed conflict exists.\textsuperscript{125} Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature do not fall within such conduct.

\textsuperscript{121} For the historical survey on codification of war crimes see \textit{International Humanitarian Law – Treaties and Documents} at \url{http://www.icrc.org/ihl.nsf/COM/380-600168?OpenDocument} [d/a 16/09/2010].
\textsuperscript{123} E.g. as listed in Art. 8(2)(b): (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives; (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army; (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions; (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123; (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

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not fall under this category.\textsuperscript{126} So terrorism known as “terrorism in armed conflicts” falls within the purview of humanitarian law.\textsuperscript{127}

A terrorist attack may well fall under the qualification of genocide. At least first three subparagraphs of Art. 6\textsuperscript{128} recall usual terrorist conduct and attacks on Palestinian homes, Jewish settlements in occupied territories, US embassies, major US cities, international tourist destinations or civilian facilities could successfully satisfy Art. 6 criteria.\textsuperscript{129} Yet again, the article demands two prerequisites: an intent to destroy a particular distinguishable group and objectively special identity of the victim\textsuperscript{130}, which could be absent in terrorist attacks directed against general public.

Finally, the supreme crime of aggression, as recently defined by Kampala Review Conference, is a crime perpetrated by a state officials against the sovereignty of another state.\textsuperscript{131} It is only subparagraph (g) of a new article 8bis, which might remind of terrorist activities, yet again a palpable link to state, exercising control over them shall be present.\textsuperscript{132}

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\textsuperscript{126} See Art.8(2)(d)&(f) of the Statute.
\textsuperscript{127} “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 3\textsuperscript{rd} report on the draft code of offences against the peace and security of mankind, by D. Thiam, Special Rapporteur, Document A/CN.4/387 and Corr.1 and Corr.2 (Spanish only) (Extract from the Yearbook of the International Law Commission, 1985, vol. II(1)), § 126.
\textsuperscript{128} Namely, (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.
\textsuperscript{130} Common §§ 2-3 of Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000): Art. 6(a,b,c)[as quoted above]: “[affected] person or persons belonged to a particular national, ethnical, racial or religious group. The perpetrator intended to destroy in whole or in part, that national, ethnical, racial or religious group, as such.”
\textsuperscript{131} Art. 8bis, in Annex 1 to Res/RC.6, 11 June 2010.
\textsuperscript{132} The text provides: “[‘an act of aggression’ means] the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein”.  
\end{flushright}
It must be born in mind that according to Rome Statute, the jurisdiction of the Court is limited to “most serious crimes of concern to the international community as a whole”\(^\text{133}\). At the same time, the Security Council Resolution 1373 confirmed that September 11 attacks, like any act of international terrorism, constituted “a threat to international peace and security” and acts, methods, and practices of terrorism were contrary to the purposes and principles of the United Nations. The issue was deemed to be so tremendously important, that the Council decided to establish a special Counter Terrorism Committee, to monitor the implementation of this resolution.\(^\text{134}\) Moreover, back in Rome terrorist offences were acknowledged to be “serious crimes of concern to the international community”.\(^\text{135}\) It would be logical to conclude that in the aftermath of Resolution 1373, especially momentous terrorist acts provide a sound ground for international criminal prosecution, anchored in the Statute of the International Criminal Court.

1.4.4. Kampala Review Conference 2010

In Kampala, as suggested by the Resolution E of the Rome Conference Final Act\(^\text{136}\), the issue should have been brought in front of the State Parties again. The Bureau on the Review Conference reported a number of proposed amendments\(^\text{137}\). The Netherlands, however, was a pioneer to think of terrorism. Condemning this type of “most serious threats to international peace and security” the Netherlands claimed that terrorist acts were “serious crimes of concern to

\(^{133}\text{Art. 5 of the Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force July 1, 2002.}\)

\(^{134}\text{S/Res/1373, 28 September 2001.}\)

\(^{135}\text{Res. E of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, supra 114.}\)

\(^{136}\text{Ibid.}\)

\(^{137}\text{Report of the Bureau on the Review Conference, Doc. ICC-ASP\!/8/43/Add.1, 10 November 2009.}\)
the international community”\textsuperscript{138}. It was suggested that the inclusion of the crime of terrorism into the Statute would strengthen the arsenal of counter-terrorism measures at international level and the absence of commonly acceptable definition shall not be an impediment thereto. Dutch proposal sought to duplicate \textit{modus operandi} agreed in respect of crime of aggression, with a deferral of jurisdiction by the Court until the definition of terrorism and the modalities for the exercise of such jurisdiction had been agreed to.\textsuperscript{139}

Reaffirming their condemnation of terrorism in all its forms and manifestations, the delegations of the Credentials Committee, which held two sessions in 2009, nevertheless opined that it was a premature step to make. Mindful of sectored definitions in 13 counter-terrorism conventions, the plenipotentiaries stressed the necessity of having a clear comprehensive definition supported by the United Nations, but remained skeptical on the possibility of having a swift solution in its forums. Reluctant to take over the issue to the Review Conference due to the risk of politicization and underlying universality of the Court as a priority, discussers saw the issue as a hindrance to negotiations and recalled, that under certain conditions, terrorism could already be justiciable under existing articles.

It was further emphasized that no analogy can be drawn between the crimes of aggression and terrorism as long as a degree of consensus had already existed in respect of the former, in Resolution 3314(XXIX)\textsuperscript{140}. To add, the diplomats saw little value of having a ‘placeholder technique’ and a working group to elaborate the definition of a crime as a routine method of


\textsuperscript{140} General Assembly Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974.
amendment. So the Dutch proposal was eventually excluded from the list of amendments sent for consideration to the Kampala Conference.  

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CHAPTER 2. A NEW CRIME TO PROTECT HUMAN RIGHTS?

Criminal law, by reason of its coercive and punitive nature, in the very interests of those subject to punishment, shall be strictly interpreted, and in principle, every offence must be so defined as to enable the judge to identify it. Criteria of clarity and comprehensiveness of a criminal norm appeal to general principles of law: *nullum crimen sine lege* and *nulla poena sine lege*. Being core standards of trial, these maxims, or principles of legality, may be found in every criminal code and international human rights instruments. The rationale behind them is clear. As Canada Supreme Court put it, “[i]t is essential in a free a democratic society that citizens are able, as far as possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards …”

The purpose of this chapter is to analyze to what extent this principle is followed in certain national jurisdictions where terrorist offences of substantial gravity are common. In doing so, the paper will evaluate the fairness of the adjudication process in national jurisdictions. So in the beginning of this chapter the reader will be provided with an overview of the issue. The second section will shed light to “unlawful combatant” phenomenon, frequently cited by national

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authorities, when dealing with a terrorist suspect. Whereas subsequent sections will elaborate the problem in detail, referring to particular examples of ill-treatment and injustice in frames of certain domestic jurisdictions.

2.1. Inclusion of a new crime as a guarantee of fair trial

It is of paramount importance not to underestimate the significance of possible supranational adjudication over persons, suspected in terrorism in light of fairness of process, guaranteed by an international forum, namely, the International Criminal Court. It cannot be refuted that in certain aspects, the governments, fighting rigorously against possible threat of terrorism, overstep admissible boundaries and often treat such detainees in a way “they deserve to be treated” because of the heinous nature of their acts.145

As it was observed by Kellenberger, such an assumption is inherently wrong. “Human beings, by virtue of being human, are entitled to the protection of law. Just as no state, group or individual can place themselves above the law, so also, no person can be placed outside the law”.146 The analysis of the preceding chapter showed that national legal texts on terrorism may range from a single qualifying phrases elaborated by divergent public agencies, to a separate law with complete enumeration of all unlawful acts, known to date, as terrorist. A total absence thereof or lack of coherent and unequivocal legal provision often provoke mistreatment of detainees and disrespect to their basic due process rights by confining law-enforcement segments.

In its 2003 report the United Nations Working Group on Arbitrary Detention was “deeply concerned at the extremely vague and broad definitions of terrorism in national legislation. On several occasions it has noted that ‘either per se or in their application, [these definitions] bring within their fold the innocent and the suspect alike and thereby increase the risk of arbitrary detention, disproportionately reducing the level of guarantees enjoyed by ordinary persons in normal circumstances.’”\(^{147}\) The problem of indistinct definitions of terrorism is exacerbated in national legislation referring to a hazy term of “extremism”.

In a zealous struggle against terrorism the international community may go far enough to agree finally on the universal definition of this crime and even to include it to the jurisdiction of the International Criminal Court. This trend is the key proposal of this paper. The “side-effect” of this inclusion would be the elevation of procedural guarantees, attached to those suspected in terrorism as detainees and defendants to a substantially new level. Criminal prosecution of major terrorist suspects by a single international body, complementing national judiciary, would not only enlighten the heavy burden laid upon a domestic judge, who alone has to handle a litigation of frequently multinational dimension, but will also significantly decrease possible tensions between various political actors and their undue influence upon domestic courts, precluding miscarriage of justice.

2.2. Unlawful Combatants and International Armed Conflict

According to the definition, combatants are persons, entitled to take part in hostilities during an international armed conflict and thereafter, those who are entitled to have a status of a prisoner of

war upon capture.\textsuperscript{148} To be qualified as a combatant, a person shall belong to an organized military unit, or operate within an organization, having an internal disciplinary system, wearing a fixed distinctive sign recognizable at a distance while carrying arms openly and conduct his operations in accordance with the laws and customs of war.\textsuperscript{149} Remarkably, under newly emerged rules of international humanitarian law, non-compliance with some of these requirements is still acceptable: a person may retain his status of prisoner of war even if he fails to distinguish himself accordingly, provided that, during each military engagement and whilst he is visible to the adversary, he carries his arms visibly.\textsuperscript{150}

International humanitarian law has instantly provided that certain categories of people, involved in hostilities may not have a privilege of prisoners of war (who cannot be punished for their belligerent acts against the detaining state, but nevertheless have to be treated humanely at all times during their custody\textsuperscript{151}). Thus, for instance, mercenaries taking part in hostilities and, under certain conditions, spies, are “unprivileged” fighters, who are not entitled to such protection.\textsuperscript{152} Civilian population, directly engaged in hostilities, also fall under the scope of this category\textsuperscript{153}, unless it is an action \textit{levée en mass}.\textsuperscript{154} It shall be noted, that in case of doubt, persons, having committed a belligerent act and having fallen into the hands of the enemy, shall

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\textsuperscript{149} Art.4(2) of the Geneva Convention relative to the Treatment of Prisoners of War, \textit{supra}; Arts. 43-44, Protocol I, \textit{supra}.
\textsuperscript{150} Art. 44(3), Protocol I, \textit{supra} 148.
\textsuperscript{151} Art.13, Geneva Convention relative to the Treatment of Prisoners of War, \textit{supra} 148.
\textsuperscript{152} See Art. 47(1) and Art.46(1) respectively, Protocol I, \textit{supra} 148.
\textsuperscript{154} See Art. 4(6): “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”, Geneva Convention relative to the Treatment of Prisoners of War, \textit{supra} 148.
\end{flushleft}
be presumed to be lawful combatants, “until such time as their status has been determined by a competent tribunal”. Moreover, the famous Martens clause, calls to apply “the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience” indiscriminately to all persons, in cases where the written law is silent.

In the aftermath of September 11 many questions were arisen asking whether international humanitarian law is applicable to the new security threats posed by terrorism. Perpetrators of the attack were aliens, who prepared and organized their criminal enterprise on the territory of a foreign state. So shall one consider them combatants, whether lawful or not, who, by launching an attack against the United States, have thus provoked an international armed conflict? Shall they face a criminal punishment as terrorists or are they exempt therefrom? Shall the entire body of *jus in bello* be applicable in relations of the US and those countries, harboring terrorist groups?

As ICRC has restated, terrorism shall be tackled by divergent bodies of law, both on domestic and international level. Whereas humanitarian law applies only when the fight against terrorism amounts to or includes an armed conflict. Its provisions are designed specifically for the exceptional situation of armed conflict and therefore, do not apply when such a conflict does not amount to or include armed conflict.

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155 Art. 5, *ibid.*


exist.\textsuperscript{158} In addition to limitation \textit{ratione temporis}, humanitarian law excludes the terrorism in substance, as it unequivocally prohibits acts of terrorism, such as attacks against civilians or civilian objects or other threats of violence the primary purpose of which is to spread terror among the civilian population.\textsuperscript{159} “Needless to say, persons suspected of such acts are liable for criminal prosecution.”\textsuperscript{160} Thus so-called “private wars” are not covered by the laws of armed conflict and “terrorists” may have an entitlement to a prisoner of war status only inasmuch a palpable link to a state or similar entity can be traced.\textsuperscript{161}

\textbf{2.3. Treatment of “terrorist” defendants in national jurisdictions. Overview}

As terrorist activity may take a form of an open combat. The perpetrators may be captured on the spot and subsequently detained. However, as long as the hostilities are not qualified as an international armed conflict, those captured will not be viewed as combatants in light of the elaborations above. Reference to so-called “war on terrorism” is hardly convincing as there no enemy state is involved. It is not the aim of this section to discuss the semantics of this term. Instead, it will focus on the legal status of such a terrorist suspect in a domestic legal process.

So how are those captured as terrorists treated thereafter? What status are they granted and how, if applied, is the process of responsibility allotment arranged? What are the legal norms


\textsuperscript{160} The relevance of IHL in the context of terrorism, \textit{supra}, 153.

\textsuperscript{161} \textit{Ibid.}. 
applicable and who does make justice? How long does the detention last and what are guarantees, if any, against mistreatment and abuse?

Depending on the context, some of these questions may seem easily answerable, while the others may not. For instance, the legal framework is certain: norms of country’s penal legislation, whether contained in criminal codes or specific laws combating terrorism, will apply. The certainty of the letter of law is a secondary question, which will be discussed further, when dealing with specific examples. Adjudicators are, naturally, the judiciary or, under some arrangements, specifically appointed committees or tribunals. The rest of the questions bear different answers in different contexts.

The sections below will sum up practices of usual treatment the “terrorist” defendants may receive. Predominantly, procedural aspects of capture, detention and adjudication will be focused on. Before doing so, it is important to recall relevant provisions of the ICCPR\textsuperscript{162}, setting basic minimums for these practices: Art. 9 (right to liberty and security) and Art. 14 (right to fair trial).

As the underlying aim of this paper is to propose elevation of trial over international terrorists to the level of the ICC, the trial process and detention will be discussed in greater detail, as stop, seizure and arrest are prerogatives of the State Parties.

Briefly, under Art. 14 everybody shall be acknowledged equal before a court and has a set of specific rights, applied indiscriminately to all those in similar position.\textsuperscript{163} A competent,
independent and impartial tribunal established by law is a requisite of every (public) hearing while everyone charged against shall be presumed innocent, until proved guilty. Once convicted, moreover, the person has a right to appeal and shall be compensated if a miscarriage of justice took place. Essentially the same, but truncated form of this could be found in Art. 6 of the European Convention on the Protection of Fundamental Rights and Freedoms (ECHR).\textsuperscript{164} It is assumed that of every jurisdiction have elaborated more or less the same list of pre-trial and trial guarantees in their criminal procedure laws. In case of the US, they are embodied in the Amendments to the Constitution.

### 2.4. Stop, search & arrest

Threat of global terrorism caused the leading democracies to elaborate new law-enforcement techniques, such as racial and ethnic profiling, lower thresholds of probable threat as well as intensive search and seizure practices. Aggressive anti-terrorism campaigning often leads to arbitrary arrests and unlawful detention in breach of the right to liberty, enshrined in the Art.9 of the ICCPR and Art. 5 of ECHR.\textsuperscript{165}

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\textsuperscript{165} \textit{Ibid}, hereinafter “the Convention”. 
2.4.1. The United Kingdom

In the UK whimsical stop and search practices were always a burning issue in light of the right to privacy, security and personal autonomy and non-discrimination.

In the first instance, it is interesting to examine an appealing judgment of the Strasbourg Court on stop and search practices in the UK, where the powers of the police and law-enforcement in general, are traditionally broad.\(^{166}\) The ruling, which received a great deal of public appraisal struck down the practices of British police authorities under the Terrorism Act 2000 (see supra s. 1.2.2) as a violation of the Art. 8 (privacy) of the Convention.\(^{167}\) The police officers, acting under ss. 44-45 of the Act, had stopped and held for short periods of time two pedestrians, heading to a public demonstration, allegedly searching for “articles which could be used in connection with terrorism”.\(^{168}\) The applicants claimed these actions to be an infringement to a number of their rights, including, the right to freedom of expression, movement, peaceful assembly, right to liberty and security as well as their right to respect their private life. Feeling reluctant to consider the entire spectrum of allegations, the Court found an interference with the right to privacy, as “any search effected by the authorities on a person interferes with his or her private life.”\(^{169}\)

Their right was infringed as long as the Act did not indicate with sufficient precision the scope of the authority powers and the manner of their exercise\(^{170}\) and hence the intrusion was not ‘in

\(^{166}\) For the comparison of the UK and the US police practices see C. Feikert, C. Doyle, Anti-Terrorism Authority Under the Laws of the United Kingdom and the United States, CRS Report for Congress, 7 September 2006, p.6, at http://www.fas.org/sgp/crs/intel/RL33726.pdf [d/a 05/05/2010].

\(^{167}\) Gillan and Quinton v. the United Kingdom, Application no. 4158/05, 12 January 2010.

\(^{168}\) ibid, paras 8-9.

\(^{169}\) Foka v. Turkey, Application no. 28940/95, para 85, 24 June 2008.

accordance with the law”. Qualitative criteria of lawfulness,\textsuperscript{171} affording a measure of legal protection against arbitrary interferences by public authorities with the fundamental rights, were not satisfied. Specifically, s.45.1.b. of the Act provided that stop and search powers in a usual situation, in contrast to those conducted against “suspected terrorists” (ss. 41-44) and their premises, may be exercised without a reasonable suspicion, thus leaving a person “extremely vulnerable” to arbitrariness, restrained only by the officer’s personal morals:\textsuperscript{172}

“(1) The power [to stop and search] conferred by an authorization under section 44(1) or (2) - (b) may be exercised whether or not the constable has grounds for suspecting the presence of articles [which could be used in connection with terrorism]...”

Wide area for discretion is not the only tricky aspect for the prevention of an arbitrary stop, search and seizure. It is not infrequent that in their assessment of the possible danger the police authorities rely upon inherent and genetic values of a group or individual, be it race, ethnicity, social origin and religious beliefs.\textsuperscript{173} In the UK, the statistics shows that Asian and black people are respectively four and five times more likely to be stopped than white people under the Terrorism Act.\textsuperscript{174} Though condemned by Strasbourg\textsuperscript{175}, all over Europe, \textit{racial and ethnic profiling} remains a pervasive and ineffective practice.\textsuperscript{176}

\begin{thebibliography}{99}

\bibitem{Elenkov} Anatoliy Elenkov v. Bulgaria, Application no. 14134/02, para 46, ECHR 2007-XI (extracts); Vlasov v. Russia, Application no. 78146/01, para 125, 12 June 2008; Meltex Ltd and Movsesyan v. Armenia, Application no. 32283/04, para 81, 17 June 2008.
\bibitem{Strasbourg} S. and Marper v. the United Kingdom [GC], Applications nos. 30562/04 and 30566/04, paras 95-6, 4 December 2008.
\bibitem{Gillan} Gillan and Quinton v. the United Kingdom, supra 167, para 70.
\bibitem{Racial Profiling} At this point it shall be noted that focusing on a particular group because of prior description of a specific crime suspect including an indication of his ethnicity does not constitute profiling (S.R. Gross, D. Livingston, \textit{Racial profiling under attack}, 102 Columbia Law Review 1413, 2002, p. 1420), although deliberate search of a clearly disproportionate number of members of that group may constitute discrimination (Brown v City of Oneonta, 221 F 3\textsuperscript{rd} 329, 334 (2\textsuperscript{nd} Cir,2000); R.R. Banks, \textit{Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse}, 48 UCLA Law Review 1075, 2001, pp. 1078-81).

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Under British Code of Conduct for police, developed in consonance with the Police and Criminal Evidence Act and the Home Office Stop and Search Interim Guidelines, racial discrimination is prohibited, unless “it is appropriate for officers to take account of a person’s ethnic background when they decide who to stop in response to a specific terrorist threat”. In addition, the government has explicitly admitted that “a palpable increase in stopping and searching of people of Asian origin in particular” may take place in a view of new anti-terrorism legislation. Ethnically biased stop and search practices may in fact have a causal effect on defragmentation of the society and animosity between various religious, ethnic groups who may feel stigmatized and vulnerable against arbitrary interference. In fact, they may create a fruitful environment for those willing to recruit new fighters to combat “intimidating and oppressive West”. As it was aptly remarked by an expert witness in a panel reviewing the use of British anti-terrorism stop and search powers “one of the biggest dangers of counter-terrorism policing must be that it will grow the very terrorism which it seeks to defeat.”

175 See Oršuš and others v. Croatia, Application no. 15766/03, 16 March 2010 (on segregation of Roma children from public schools on the basis of their language).
178 Home Office, Race Relations and the Police, at http://www.homeoffice.gov.uk/police/about/race-relations/ [d/a 06/04/2006]; Having received substantial criticism for racism, the authorities attempted to clear their reputation by adopting the Code of practice for reporting and recording racist incidents, intended to provide setting for effective reporting of racist practices (Code of practice: reporting and recording racist incidents, at http://www.homeoffice.gov.uk/documents/coderi.pdf?view=Binary [d/a 06/05/2010]).
2.4.2. The United States

In contrast to British law-enforcement system, the American scheme relies heavily on the endorsement of the judiciary. So warrants and authorization to search and seizure may be issued by a relevant impartial judicial body only, and not by the Secretary of State, as for instance, in the situation above, where stop and search of the police required authorization for no more than 28 days (but this frames have reportedly been consistently renewed over the period of six years\textsuperscript{181}), but could have been exercised even in the absence thereof without invalidating its effects if the authorization was not finally granted.\textsuperscript{182}

The IV Amendment\textsuperscript{183}, precluding unreasonable searches, extends for those cases where there is “legitimate expectation privacy”\textsuperscript{184}. Moreover, it constructs a presumption of unreasonableness against any searches unless a probable cause to believe that a crime has been committed is demonstrated and confirmed by a neutral magistrate.\textsuperscript{185} However, there are exceptions to this rule: less than probable cause is enough to show if, under certain conditions, police officer has “a particularized and objective basis for suspecting” engagement or readiness to engage into a criminal activity.\textsuperscript{186} Even an arrest may take place without a warrant whereas there is a probable cause to believe that a suspect is in possession of a weapon or has committed a felony.\textsuperscript{187} Fight against terrorism in light of national security considerations shall take place only upon a

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\textsuperscript{181} A. Kundnani, Racial Profiling and Anti Terror Stop and Search, IRR NEWS, Jan. 31, 2006, at \url{http://www.irr.org.uk/2006/january/ba000025.html} [d/a 10/09/2010].
\textsuperscript{182} Gillan and Quinton v. the United Kingdom, supra 167, paras 80-81.
\textsuperscript{185} C. Feikert, C. Doyle, supra 175, p.6, at \url{http://www.fas.org/sgp/crs/intel/RL33726.pdf} [d/a 05/05/2010], p. 4.
\textsuperscript{186} United States v. Arvizu, 534 U.S. 266, 273 (2002); see also United States v. Singh, 415 F.3d 288, 294 (2d Cir. 2005).
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warrant issued by a court\textsuperscript{188}. However, it is vital to note that such a restriction is fully operative only in respect of non-foreigner suspects.\textsuperscript{189}

In the US any invidious discrimination based solely on the basis of race, ethnicity or other similar factors, or even in combination with others is unconstitutional\textsuperscript{190} as it does not yield a rational suspicion, making any such practice “unreasonable” in the language of Amendment IV, as discussed above\textsuperscript{191}. Equal protection clause prohibits ethnic profiling unless, under a strict judicial scrutiny, it appears to be “narrowly tailored” to serve “a compelling interest”.\textsuperscript{192} Such strong assumptions against racism generated devastating criticism against the police, who in response, stated, that they target those who are suspicious and “it is unfortunate that many of them are Black and Hispanic, but this is not our fault”.\textsuperscript{193} In confirmation of this theory, it must be admitted that even if there are diverse ethnic groups conducting terrorist activity on the territory of the US, it is probably true, in the aftermath of September 11, that Al-Qaeda, posing the greatest and immediate threat of mass killings, is an entity comprising Middle Eastern Muslim men only.\textsuperscript{194} Whatever it is, history has already taught us a lesson: hostile international exposure proved to be a fallacious ground for racial profiling in America.\textsuperscript{195}

\textsuperscript{188} United States v. United States District Court (Keith), 407 U.S. 297, 321 (1972).
\textsuperscript{192} City of Richmond v J.A. Croson Co., 488 U.S. 469, 468 (1989).
\textsuperscript{195} See Korematsu v. United States, 323 U.S. 214 (1944), where citizen of Japanese descent were subjected to exclusion zones in time of war with Japan, lately expressively overturned in Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). The U.S. Government officially apologized for the internment in the 1980s and paid reparations totaling $1.2 billion, as well as an additional $400 million in benefits signed into law by George H. W. Bush in 1992. In January 1998, President Bill Clinton named Fred Korematsu a recipient of the Presidential Medal of Freedom (retrieved from Wikipedia, d/a 06/05/2010).
2.5. Power to detain (*habeas corpus*)

Ever since Magna Carta, common law system have always recognized *habeas corpus* rights of everyone incarcerated. Writ of *habeas corpus*, being “a fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action”\(^{196}\), requires presentment *vis-à-vis* detainee of justification for his custody in a court of law. Under European legal theory, a reasonable suspicion has to be shown to detain the suspect. It shall be noted, that the European Court of Human Rights has expressly admitted that “[T]he exigencies of dealing with terrorist crime cannot justify stretching the notion of ‘reasonableness’ to the point where the essence of the safeguard secured by [the Convention] is impaired.”\(^{197}\)

The paragraphs below exemplify common practices present or recently present in certain jurisdictions in this respect.

2.5.1. The US: *Boumediene v. Bush*

“War on terror” launched by the Bush administration created an unusual category of prisoners, who, as insisted, are not entitled to a writ of *habeas corpus* due to a foreign citizenship and who are “enemy” combatants, yet not enjoying the privileges of the classic category. So it was a tough task for American legal scholarship to determine whether these “outlaws” could avail themselves of utilizing entire gamut of the rights, safeguarded by the US Constitution.

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\(^{196}\) *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992)

The prisoners of Guantánamo Bay\textsuperscript{198} were repeatedly denied a right of questioning their detention. However, \textit{Boumediene v. Bush}\textsuperscript{199} destroyed this fiction, stating, by a 5–4 vote that aliens detained as enemy combatants\textsuperscript{200} in Guantánamo have a constitutional right to challenge their detention in courts. The decision represents a landmark change in US constitutional practice as it has never been recognized before that aliens imprisoned by the United States abroad had such rights.\textsuperscript{201} It was not an easy task, though. It took 4 years of legal battle between the Supreme Court and Republican Congress to arrive at such conclusion.

It was back in 2004 when \textit{Hamdi v. Rumsfeld}\textsuperscript{202} opened the debate on the authority of the government to detain people captured from abroad. Then it was agreed that such an authority existed under the \textit{Authorization for Use of Military Force (AUMF)}\textsuperscript{203}, although Hamdi, as a US national, has been afforded some degree of legal protection. A plurality decision, headed by Justice O’Connor, observed that under the Constitution’s due process clause, Hamdi was entitled to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision-maker.” The latter was suggested to take form of military tribunals, such as those mentioned in Geneva Conventions. As a result, Combatant Status Review Tribunals (CSRTs) were established. Yet they bore only few features of the animal, described by O’Connor. So detainees were allowed to have “personal

\begin{itemize}
\item \textsuperscript{198} U.S. Naval Base Guantánamo Bay is the oldest U.S. base overseas, located on the southeast corner of Cuba. For further information see \url{http://www.globalsecurity.org/military/facility/guantanamo-bay.htm} [d/a 04/10/2010].
\item \textsuperscript{199} \textit{Boumediene et al. v. Bush, President of the United States, et al.}, 553 U.S. 723 (2008).
\item \textsuperscript{200} Enemy combatant is “an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.” See at Guantamano Detainee Processes, Update from 2 October 2007, at \url{http://www.defense.gov/news/Sep2005/d20050908process.pdf} [d/a 04/10/2010].
\item \textsuperscript{203} September 18, 2001, Public Law 107-40 [S. J. RES. 23], available at \url{http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html} [d/a 12/10/2010].
\end{itemize}
representatives” appointed for them by the administration but were deprived from a right to confront incriminating witnesses and allowed to call only those approved by the state. *Not only was the threshold of evidence lowered,*\(^\text{204}\) *but also a presumption of validity against the detainee remained.*\(^\text{205}\)

In *Rasul v. Bush*\(^\text{206}\), the Court made a tremendous step further and stipulated that all Guantánamo detainees were entitled to bring a *habeas corpus* petition in the federal district court for the District of Columbia. By doing so it has rejected earlier interpretations of the government, denying aliens, not present on the American soil, to bring a petition in front of the American judiciary. Longstanding, exclusive, and permanent control of the United States over the military base in Cuba was deemed enough to entrench the constitutional guarantees.

Consequently, Boumediene and thirty-six others\(^\text{207}\) held at the bay filled petitions to challenge their detention in federal courts. Congress instantly reacted by passing the Detainee Treatment Act (DTA)\(^\text{208}\), stating that “no court, justice, or judge shall have jurisdiction to hear or consider…an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantánamo Bay, Cuba…” The statute vested the Court of

\(^\text{204}\) Hearsay evidence (“Mobbs Declaration”) were admitted “as the most reliable available evidence” because “the exigencies of the circumstances may demand that …enemy combatant proceedings [are] tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict”.

\(^\text{205}\) “Any process in which the Executive’s factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short”. This belief was confirmed to exist later in *Boumediene et al. v. Bush, President of the United States, et al.*, 553 U.S. 723 (2008), p. 38.


\(^\text{208}\) Detainee Treatment Act of 2005 (H.R. 2863, Title X).
Appeals for the District of Columbia Circuit Court as the only instance to review such petitions and limited its jurisdiction to confirm “consistency with the standards and procedures specified by the Secretary of Defense”. In turn, the Supreme Court recalled the principle of *non ex post facto*, declaring that the provisions of the statute did not apply to those petitions, filled before its entry into force. Congress did not blink an eye and returned with the Military Commissions Act (MCA), ruling that the DTA was indeed meant to apply retroactively.

The Court did not hesitate to proclaim such a proposition unconstitutional, stipulating that writ of *habeas corpus* can be suspended at times of rebellion or invasion only (suspension clause). As it could not be maintained that terrorist attacks constituted either, the Court concluded that even though located outside the formal territory of the US, aliens of Guantánamo were entitled to their Fifth Amendment right not to be deprived of liberty without due process of law and procedures laid out in the Detainee Treatment Act are not adequate substitutes for the *habeas* writ.

*Boumediene* released none of the detainees, while the key petitioner *after long seven years* was eventually released on 20 November 2008 by the US District Court Judge Leon, who, after evaluating classified evidence *in camera*, ruled that there were no credible proof to justify the detention of Boumediene and most of his fellows.

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211 Military Commissions Act of 2006 (HR-6166).

212 The Constitution of the United States, Article 1, Section 9, Clause 2: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”


2.5.2. The UK: A (FC) et al. v. Secretary of State for the Home Department

Armed groups, calling themselves the “Irish Republican Army” (IRA) have been carrying out acts of violence to put an end to British sovereignty in Northern Ireland on several occasions since the foundation of the Irish Free State. It was IRA which caused, from time to time, the legislature to confer upon the Government special powers to deal with the situation created by these unlawful activities; and such powers have sometimes included the power of detention without trial.\(^{215}\) However, the broadest powers were given under Part 4 of the Anti-Terrorism, Crime and Security Act (ATCSA), adopted in 2001 after horrors of September 11.

To enable its smooth operation, a derogation notice from Art. 5 (right to liberty and security) of the European Convention has been issued. It should be noted that the UK was the only state out of 47 Council of Europe members who considered the events to call for declaration of public emergency and derogation under Art. 15\(^{216}\), although Parliamentary Assembly quickly reacted by discouraging such measures in Resolution 1271.\(^ {217}\) In response, relying heavily on the United Nations Security Council’s recognition of the September 11 attacks as a threat to international peace and security, and on its Resolution 1373 requiring all States to take measures to prevent the commission of terrorist attacks, the UK had argued that a state of emergency threatening the life of the nation existed.\(^ {218}\) The British insisted as there were some aliens who “are suspected of

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\(^{215}\) *Lawless v. Ireland* (No. 3), Application No. 332/57, 1 July 2003, para 6.

\(^{216}\) The text states: “1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. <…> 3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”


being concerned in the commission, preparation, or instigation of acts of international
terrorism… and who are a threat to the security of the United Kingdom”\textsuperscript{219}.
S. 21 of ATCSA (Part 4) entrusted the Secretary of State with a power to issue a certificate as to
whether a particular group or person is a terrorist or “a risk to national security”. The Act
specifically allowed detention of “a suspected international terrorist” for an indefinite period of
time, pending deportation, even when such a deportation would be prohibited (s. 23) and
provided that Special Immigration Appeals Commission (SIAC) could review an appeal against
a certification (s. 25). Moreover, it was claimed that inmates were free to leave to their countries
of origin, but the European Committee for the Prevention of Torture and Inhuman or Degrading
Treatment or Punishment, which reported on their treatment in 2003, stressed: “The UK
authorities consider that the detainees in question would be at risk of serious human rights
violations, including death or torture, in case of return to their countries of origin; indeed, this is
the declared reason why they cannot be removed from the United Kingdom”.\textsuperscript{220}
A group of foreigners, \textit{detained since December 2001 brought the issue to the attention of their
lordships in 2004}, stating that there was no “public emergency threatening the life of the nation”
within the meaning of Art. 15(1) of the Convention\textsuperscript{221} and therefore, a derogation from Art. 5(1)
guarantees was moot. Lord Bingham of Cornhill, writing for the majority, at first, evaluated the
issue against the applicants and listed three key reasons for doing so. Firstly, he considered that
“it was not shown that SIAC or the Court of Appeals misdirected themselves”, though it was
only the former, who considered that entire body of the case, including classified materials,
which were never shown again. Secondly, it was concluded that British government “could

\textsuperscript{219} Special Immigration and Appeals Commission Act 1997, Section 5(1).
\textsuperscript{220} as cited in Islamic Human Rights Commission: Briefing: Anti-Terrorism, Crime and Security Act 2001, 28
d/a 06/10/2010].
\textsuperscript{221} \textit{A (FC) et al. v. Secretary of State for the Home Department}, [2004] UKHL 56, para 16.
scarcely be faulted” in their conclusion in light of the hazard created by September 11 catastrophe. Lastly, his Lordship elaborated on separation of powers principle and arrived at phraseology similar to American “political question” doctrine\textsuperscript{222}, leaving purely political matters for the institutional competence of relevant agencies.\textsuperscript{223} One cannot contend that such an approach is the most appropriate one, especially in the light of the severe criticism earned by the Anti-Terrorism Act.\textsuperscript{224} Persons were qualified as terrorists by a political figure, but have never been charged or tried for a crime as such\textsuperscript{225}. Full portfolio of evidence was evaluated by the SIAC only, without an adversarial procedure, while the Court of Appeal ruled in the absence of the closed evidence at all. It has neither reached the examination of Lords, as they were expressively declined in provision thereof.

At the end of the day, however, the decision was taken in favor of the applicants, as Lord Bingham concluded that the Special Immigration Appeals Commission made an error of law and that the appeal ought to be allowed. \textit{The detention was unacceptably lengthy, discriminatory and no observable state of emergency existed.} “The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from

\begin{itemize}
\item \textsuperscript{222} For further information see definition by Cornell University Law School, at http://topics.law.cornell.edu/wex/political_question_doctrine [d/a 06/10/2010].
\item \textsuperscript{223} \textit{A (FC) et al. supra }\textsuperscript{221}, paras 27-29.
\item \textsuperscript{224} “The Council of Europe's Human Rights Commissioner has severely criticised the UK's derogation and policy of internment stating that, 'general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention'”. “In December 2003, the Privy Council Review Committee recommended that Part 4 of the ATCSA should be replaced with a measure that "does not require the UK to derogate from the right to liberty under the European Convention on Human Rights". As cited in Islamic Human Rights Commission: Briefing: Anti-Terrorism, Crime and Security Act 2001, 28 January 2004, at http://www.ihrc.org.uk/publications/briefings/7057-briefing-anti-terrorism-crime-and-security-act-2001 [d/a 06/10/2010]. See also reports of (Parliamentary) Joint Committee on Human Rights, specifically, 6\textsuperscript{th} Report of the Session 2003-2004, HL, Paper 38, HC 381, para 34: “Insufficient evidence has been presented to Parliament to make it possible for us to accept that derogation under ECHR Article 15 is strictly required by the exigencies of the situation to deal with a public emergency threatening the life of the nation.”
\item \textsuperscript{225} \textit{A (FC) et al. v. Secretary of State for the Home Department, }[2004] UKHL 56, para 3.
\end{itemize}
terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory.”

It is alleviating to know that ATCSA has been replaced by the Prevention of Terrorism Act in 2005.

2.5.3. Israel: A v Minister of Defense

Notorious detentions of Lebanese “terrorists” by Israel have become a legend in modern criminal law theory. The country inherited provisions allowing for administrative detentions for security reasons from the pre-independence legal system governing British Mandatory Palestine, as enacted in the Defense (Emergency) Regulations of 1945. In 1979 this regime was replaced by a new law, the Emergency Powers (Detention) Law which afforded greater procedural safeguards.

In A [John Does] v Ministry of Defense the Supreme Court considered, repeatedly, the matter of several Arabs, caught by Israeli forces in 1986-1987 and put on trial for their membership in “hostile organizations”. They were all accordingly convicted and sentenced for various terms of imprisonment. However, once served the punishment they were still detained by the Israeli security forces under s. 2 of the Emergency Powers Law. So-called “administrative detention” was authorized by the Minister of Defense, who, having “a reasonable basis to assume” detention was necessary for the national security considerations, had prolonged their detention indefinite

226 Ibid, paras 96-7.
227 This Act replaces detention with movement restrictions. Unlike Part 4 of the ATCSA, the powers in the Prevention of Terrorism Act 2005 can be applied to British and non-British suspected terrorists alike. At the time of its enactment there was considerable debate as to the compatibility of this Act’s provisions with domestic and international human rights laws. Eleven control orders were issued on the night the act passed on 11 March 2005 against the terrorist suspects who were due to be released. By October of that year only three were still in force.
number of times. The underlying reason for doing so was the idea of having a “bargaining chip” in negotiations of returning an Israeli navigator, missing in Lebanon since his air-place crash in October, 1986. The process had made no progress so far and the petitioners challenged whether it was lawful to detain a group of people, not representing any threat to Israeli public security, merely as “bargaining chips” for an irresolute venture.

In their previous decision, the majority concluded that the framework of security included return of prisoners and missing persons and confirmed the power of the executive to carry out the detention for an unspecified duration. After uneasy hesitation and as the repercussion of persuasive argumentation, the judges, headed by President Barak finally admitted that undetermined detention without trial of a person, who has already fully served his sentence, was at least against individual criminal responsibility principle. Granting the release of the petitioners, held in prison for 14 years, he further noted, “administrative detention cannot go endlessly. The more the period of detention that has passed lengthens, so too are weightier considerations need to justify an additional extension of the detention. With the passage of time the means of administrative detention is no longer proportional”.230

2.6. Torture and inhuman and degrading treatment or punishment

Absolutely inhuman and totally disgusting human rights abuse is torture. Under certain conditions, torture and similar treatment may amount to a crime against humanity. Moreover, prohibition on torture is one of the most widely acknowledged *jus cogens* rule. Systematic infliction of pain to a person, unable to defend himself because of his incarceration and tight handcuffs, is, however, a very common practice in respect of persons, detained as terrorists. Below are only few publicly acknowledged instances of ill-treatment in respect of inmates. The most outrageous examples known to wide public is the treatment of Arabian detainees by Israeli secret police (the Shin Bet).

### 2.6.1. Israel: Landau Report

As early as 1977 the *London Sunday Times* reported that “torture of Arab prisoners is so widespread and systematic that it cannot be dismissed as ‘rough cops’ exceeding orders. It appears to be sanctioned as deliberate policy.” Also, documentation shows that torture, deaths of Palestinians under detention, and other abuses increased in the late 1970s. Following the Israeli invasion and occupation of Lebanon in 1982 reports of torture, especially at the Ansar detention camp, became widespread. Outrageous death of two young men, desperately concealed by the Shin Bet, led to the Landau Commission investigation into their practices. The commission admitted the use of torture to extract confessions, yet declined to reverse convictions based thereupon.

The Commission of Inquiry established in 1987 to scrutinize the investigations methods and procedures of General Security Service (GSS) in respect of Hostile Terrorist Activity (HTA) was...

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231 Art. 7(1)(f) of the Statute, *supra* 1.
lead by Justice Moshe Landau.\textsuperscript{234} The produced “Landau Report” covered a number of moral, procedural and substantive legal issues, condemning extreme use of torture by investigators in respect of detainees, who claimed to be tortured. At some points, the report even depicted in details what methods of treatment one of the claimants received. It included pulling hair, shaking, throwing to the ground, kicks, slaps, insults, stripping and cold water bathing, sleep deprivation, prolonged standing outside and threats to arrest family members.\textsuperscript{235}

Remarkably enough, the report drew a difference between usual criminal detention by the police, aiming at the collection of evidence and uncovering a criminal offence and administrative detention and interrogation carried out by GSS. The former is designed against individuals within the society, suspected of criminal offences and the purpose is to bring the accused to justice and deter from committing future crimes. Whereas the latter aims “to protect the very existence of the society and the State against terrorist acts, directed against citizens, to collect information about terrorists and their modes of organization and to thwart and prevent the perpetration of terrorist attacks whilst they are still at a state of incubation, by apprehending those who carried out such acts in the past – and they surely will continue to do so in the future…”\textsuperscript{236} By doing so the Commission has also concluded that “an effective interrogation of terrorist suspects is impossible without the use of means of pressure”\textsuperscript{237} and analyzing the “principle of ‘lesser evil’” maintained that “the great evil of HTA justifies counter-measures such as the need to act [so], not only when the perpetration of such activity is actually imminent, but also when it exists potentially, so that it is liable to occur at any time”.\textsuperscript{238}

\textsuperscript{235} Ibid, para 2.2.
\textsuperscript{236} Id, para 2.18.
\textsuperscript{237} Id, para 4.6.
\textsuperscript{238} Id, para 4.13.
2.6.2. Public Committee Against Torture in Israel v. State of Israel

In response to controversial practices and as a result of enormous social pressure the Public Committee against Torture was created. Years later it took up an application of a group Arab “terrorist” inmates, who claimed that GSS have been applying unacceptable interrogation techniques, to the Supreme Court. These included shaking, “schabach” or frog positions, beatings, deprivation of sleep, excessively tight hand and foot cuffs, covering with sacks and in addition, playing loud music for prolonged periods of time. It was recorded that shaking method was the most harmful one, as it was likely to cause serious brain damage, harm spinal cord, cause suspect to lose consciousness, vomit and urinate uncontrollably and suffer serious headaches. Yet expert opinions contended that shaking did not present an inherent danger to life.

According to the respondent, such a technique “was indispensable to fighting and winning the war on terrorism”, while others, such as sleep deprivation, were accidental consequences to interrogation. Israel also contended that none of the above should be qualified as “torture”, “cruel and inhuman treatment” or as “degrading treatment”, strictly banned under international law. Moreover, the government justified the “moderate physical pressure” applied by the GSS in light of “necessity defense” available in criminal law. By doing so they referred to the Landau report, which permitted violence as a “lesser evil” to fight HTA. The board of judges, however, were not impressed by such argumentation. Even though they have admitted that a collision of values, where one has to balance dignity, privacy and personhood of the suspect on one hand, and state security considerations on the other, they have nonetheless strictly condemned such practices.

With respect to the necessity clause (section 34(1) of the Penal Law) the judges considered a

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239 For further reference see http://www.stoptorture.org.il/en.
240 Public Committee Against Torture in Israel v. State of Israel, HCJ 5100/94, 1999, pp. 8-9, para 9. It was also noted that one inmate died during after such experience, ibid, para. 10.
“ticking bomb” scenario, still it was distinguished from classic theory, as under the penal code, the defense was available for an individual reacting to a given set of facts, but not as a general security policy. Establishing a policy of any kind was an issue for a parliament to deal with, therefore, unlike Landau Commission, the Court, headed by celebrated Justice Barak, concluded in favor of the petitioners.\textsuperscript{242}

2.6.3. The UK: \textit{Ireland v the United Kingdom}

In early 70s the Irish Republican Army (IRA), a clandestine organization with quasi-military segments, launched, as the UK described, “the longest and most violent terrorist campaign witnessed in either part of the island of Ireland”. The campaign of violence carried out by the IRA had attained unprecedented proportions by mid-1971. To combat it the authorities in Northern Ireland exercised from August 1971 until December 1975 a series of extrajudicial powers,\textsuperscript{243} including swift deprivation of liberty, prolonged detention and internment. A respective notice of derogation from the European Convention\textsuperscript{244} had been submitted by the United Kingdom.

The case of several detainees interned in course of implementation of these practices was brought \textit{vis-à-vis} the judges of Strasbourg Court. Their “interrogation in depth” in unidentified camps, and in particular, five interrogation techniques, were the subject of the matter. As contented by the respondent government, they aimed at “disorientation” and “sensory deprivation”, and, as established, consisted of

1. \textit{wall-standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being “spread eagled

\textsuperscript{242} \textit{ibid}, pp. 33-9.
\textsuperscript{243} \textit{Ireland v. the United Kingdom}, Application no. 5310/71, 18 January, 1978, para. 11.
\textsuperscript{244} Convention for the Protection of Human Rights and Fundamental Freedoms, \textit{supra} 143.
against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers”;

2. hoooding: putting a black or navy coloured bag over the detainees’ heads and, at least initially, keeping it there all the time except during interrogation;

3. subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

4. deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

5. deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.\(^{245}\)

As further asserted by the UK, these techniques led to the obtaining of a considerable quantity of intelligence information, including the identification of 700 members of both IRA factions and the discovery of individual responsibility for about 85 previously unexplained criminal incidents.\(^{246}\) However, the complainants alleged, that these treatment was amounted to torture and should be punishable under Art. 3 of the Convention, as a non-derogable guarantee.

The Court has thus considered whether ill-treatment attained a minimum level of severity to be qualified as such and, relying on the submissions of the Commission, which was “satisfied beyond a reasonable doubt that certain of these injuries ... [were] the result of assaults committed on [detainee A] by the security forces, conceded, by 16 votes to 1, that it constituted inhuman treatment. It was further elaborated that “the five techniques, applied in combination, with premeditation and for hours at a stretch; caused, if not actual bodily injury, at least intense

\(^{245}\) Ireland v. the United Kingdom, Application no. 5310/71, 18 January, 1978, para. 96.

\(^{246}\) ibid, para. 98.
physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation.” They instigated the feelings of fear, anguish and inferiority capable of humiliating and debasing their victims and possibly breaking their physical or moral resistance.247

2.7. Fair trial

Maltreatment and indefinite duration of detention are, utterly, the most acute problems when dealing with those, suspected in terrorism. However, the problems do not end with the initiation of a trial. Even worse, an apple of discord may occur exactly at the courtroom as protection of the sensitive evidence or witnesses may result in negation of basic fair trial rules. In their Guidelines on Human Rights and the Fight against Terrorism248, members of Council of Europe allege that “it is perfectly possible to reconcile the requirements of defending society and the preservation of fundamental rights and freedoms.” The paragraphs below will recapitulate main pitfalls of the zealous fight against terrorism in theatre of court. These deliberations are mainly based on the principles and rules, developed by the European Court of Human Rights, seated in Strasbourg, and dealing with violations of human rights, embodied in the Convention on Human Rights and Fundamental Freedoms. At the outset, it shall be recalled that the fair trial rights are unqualified, “strong” rights, and hence their curtailment can be justified only by an unusually

247 id, para 167.
stringent standard.\textsuperscript{249} It is stressed that fair trial rights are minimal and any derogations thereto shall not exceed those “strictly required by the exigencies of the actual situation”.\textsuperscript{250}

2.7.1. Right to be tried “within a reasonable time”/tried “without undue delay”

Speedy and efficient judicial review of the detention is, most probably, one of the burning issues for terrorist detainees, especially in light of the elaborations above (see \textit{supra} p. 49). It is also inherently linked to the right to be informed promptly of charges against oneself. Notably, the European Convention on Human Rights (Art.5.4) as well as International Covenant on Civil and Political Rights (Art.9.4) are synonymous to allow not only those inmates, charged with specific offence, but “anyone who is deprived of his liberty” to challenge the lawfulness of his detention “without delay”.\textsuperscript{251}

One may add that although successful fight against terrorism may justify prolonged police custody\textsuperscript{252} in the eyes of Strasbourg, it nevertheless shall bear adequate safeguards against arbitrariness, which cannot be dispensed altogether with “prompt” judicial control.\textsuperscript{253} So the sheer fact “that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure

\begin{thebibliography}{9}
\bibitem{250} Human Rights Committee, CCPR General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), 13 April 1984, para 4, \textit{in fine}.
\bibitem{251} Compare respectively: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” And “[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”
\bibitem{252} \textit{Brogan and Others v. the United Kingdom}, 29 November 1998, Series A no. 145-B, para. 61.
\bibitem{253} \textit{Ibid}.
\end{thebibliography}
compliance with the specific requirements of Article 5.3\textsuperscript{254-255}. So a period of detention without judicial control of four days may already fall outside this strict constraints.\textsuperscript{256}

\subsection*{2.7.2. Right to be tried by “an independent and impartial tribunal”}

Establishment of special and military tribunals is not excluded by the right to fair trial.\textsuperscript{257} The only \textit{conditio sine qua non} is the provision of necessary safeguards to exclude doubt as to personal conviction of the judge (subjective judge) and as to arrangement he has made to preclude it (objective test).\textsuperscript{258}

“Separatist propaganda” in support of Kurdish minority in Turkey have provoked the authorities to arrest a communist, Mr. Incal and charge him with incitement to hatred and hostility, punishable by Criminal Code and the Prevention of Terrorism Act (Law no. 3713). The National Security Court, composed of three judges, one of whom was a member of the Military Legal Service, found the applicant guilty of the offences charged and sentenced him to six months and twenty days’ imprisonment and a fine of 55,555 Turkish liras. Appeal on the grounds of procedure was denied, for a reasons not communicated to the convicted. Challenging this decision before the European Court, he stated that “İzmir National Security Court could not be regarded as an “independent and impartial tribunal” within the meaning of Article 6 § 1… [This Court was specifically] set up to protect the State’s interests rather than to do justice as such; in that respect their function was similar to that of the executive. The presence of a military judge in the court’s composition only served to confirm the army’s authority and its intimidating

\begin{itemize}
\item \textsuperscript{254} “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”
\item \textsuperscript{255} \textit{Brannigan and Mc Bride v. the United Kingdom}, 26 May 1993, para. 58.
\item \textsuperscript{256} \textit{Brogan and Others v. the United Kingdom}, supra 252, para. 66 (14 days).
\item \textsuperscript{257} \textit{Findlay v. the United Kingdom}, 25 February 1997, Reports 1997-I, p. 281, para. 73.
\end{itemize}
influence over both the defendant and public opinion in general...”. It was contended that
presence of a military judge at the bench evidenced the tremendous influence of military in
judicial decision-making and its static link to contemporary political modalities in Turkey. The
Court conceded that there was “a legitimate doubt”\textsuperscript{259} and found a violation of the article
referred.\textsuperscript{260}

2.7.3. Presumption of innocence, burden of proof

By the virtue of the presumption of innocence, the burden of proof in the court is always on the
prosecution while \textit{in dubio pro reo} principle applies to the accused. Furthermore, any charge is
confirmed unless proved “beyond reasonable doubt”\textsuperscript{261}. What is outstandingly important in case
of terrorist suspects, the presumption of innocence implies a right to be treated in accordance
with this principle. It also means that those persons, under arrest and trial are treated in the way,
not undermining their innocence, e.g. when incarcerated, untried prisoners shall be kept separate
from convicted prisoners.\textsuperscript{262}

Presumption of innocence is correlated with the \textit{right to keep silence} and \textit{privilege against self-
incrimination}. It is also relative to \textit{proprietary rights of the accused}, as those often, the property
of persons or organizations suspected of terrorist activities may be expropriated by freezing
orders or seizures by prosecution. As this constitutes a shift of the burden of proof, it is vital to

\textsuperscript{259} Objective test: \textit{Fey v. Austria}, 24 February 1993, § 28, Series A no. 255-A.
40984/07, 22 April 2010, paras 135-140 (a judge, hearing the case of a terrorist suspect, had ruled against him in
earlier civil litigations).
\textsuperscript{261} Human Rights Committee, CCPR General Comment No. 13, \textit{supra} 250, para 7.
\textsuperscript{262} Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations
Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), Rules 84(2), 85(1); see also Body of Principles for the Protection of
secure that the owners of the property have the possibility to challenge the lawfulness of such a decision before a court. 263

2.7.4. Right to defend oneself in person (trials in absentia)

Quite often fugitive terrorist suspects are, due to practical considerations, easily tried and convicted in their absence. There is no absolute prohibition on trials in absentia under international law. It seems the legal systems of the countries sometimes do not provide an adequate and effective remedy against a conviction, issued in the absence of the defendant 264, yet it is particularly important to shape the scope of the right to be present in the proceedings appropriately.

Although various considerations occurred in Rome 265, eventually, the State parties arrived at the text, now reflected by Article 63 of the ICC Statute: “If the accused, being present before the Court, continues to disrupt the trial, the Trial Chamber may remove the accused and shall make provision for him or her to observe the trial and instruct counsel from outside the courtroom, through the use of communications technology, if required. Such measures shall be taken only in exceptional circumstances after other reasonable alternatives have proved inadequate, and only for such duration as is strictly required” (emphasis added) 266.

264 See e.g. Collozoa v. Italy, Application no. 9024/80, 12 February 1985, para 7 (the Court condemning trial in absentia as a process, incompatible with the right to defend oneself in person and a right to have a fair hearing).
266 Art. 63(2) of the Statute, supra 1.
2.7.5. Right to have a legal advice, privilege against self-incrimination

Privilege against self-incrimination and right to silence are intrinsically entwined to the right to have a legal advice, especially at pre-trial stages. It is generally accepted that the primary purpose of those guarantees, embodied in the Art. 6 provisions of the European Convention, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings.267

A terrorist suspect, arrested under British Prevention of Terrorism Act 1984 complained that his right to have his solicitor present during his interrogation had been violated as he was not entitled to have one and under the Criminal Evidence (Northern Ireland) Order 1988, adverse inferences might have been drawn from his failure to respond to police questioning during detention. In Strasbourg he argued, quite naturally, that he had been compelled to incriminate himself before he had received any legal advice and that it was only after the police had obtained his signed confession statement that he was allowed to consult with his solicitor.

He severely criticized oppressive and appalling environment in which he was held incommunicado and interrogated intensively for prolonged periods by rotating teams of skilled interrogators in defiance of his clear indication on the first day of his detention that he wished to exercise his right to silence.268 Noting that the applicant was deprived of legal assistance for over forty-eight hours and the incriminating statements which he made at the end of the first twenty-

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268 The applicant also noted a report dated 19 November 1994 of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the reports of the Independent Commissioner for Holding Centres published between 1993 and 1996, and the conclusions and recommendations of the United Nations Committee against Torture contained in its report of 17 November 1995, the applicant maintained that the detention regime in Castlereagh police station is intended to be coercive in order to break the will of the detainee to remain silent and contravenes international human rights norms (see *Magee v. The United Kingdom*, No. 28135/95, 6 June 2000, para 39).
fours of his detention became the central ground of the prosecution’s case against him and the basis for his conviction, the Court unanimously decided that there had been a violation.269

2.7.6. Right to examine the witnesses against him and on his behalf

Art. 6 of the Convention requires that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he was making his statements or at a later stage of the proceedings.270 Its function is to ensure the ability of the accused to shape the proceedings against him and it may take place only if the evidence is examined in his presence. It is also a well established principle of directness, which demands all the evidence to be normally produced in the presence of the accused at a public hearing with a view to adversarial argument271. The doctrine calls for the evaluation of the evidence presented during the trial only and the sole way to ensure this is to allow the defendant to appraise the reliability of the items and thereby influence the court’s decision. So it is a violation if the defendant is denied his right to examine witnesses against him.272 It follows from the Art. 6.3.d273, coupled by the Art. 6.1274, that there is a positive obligation upon the government to enable the accused to examine

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269 Magee v. The United Kingdom, supra.
272 K. Bard, supra 249, p. 230; As it was aptly noted by Judge Trechsel in Unterpertinger v Austria, Art.6.3.d bears three elements: a) the accused is entitled to question the incriminating witness; b) the accused is entitled to obtain the attendance and examination of the witnesses on his behalf; c) the accused has the same rights regarding the examination and enforcing the attendance of witnesses as the prosecution.
273 “Everyone charged with a criminal offence has the following minimum rights… to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.
274 “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the
or have examined witnesses against him in his presence. Failure of national courts to summon witnesses for the defense and to examine exculpatory witnesses or evidence without justification is contrary to the notion of fair trial. It is admitted, however, that this right, along with most other Convention rights, “is not unlimited”. It has been held that anonymous witnesses are not prohibited as such to the extent it is compatible with the Convention. So there are situations in which, as the Court concluded, putting the (incriminating) witness to the box for the purposes of cross-examination may jeopardize vital interests, the protection of which may sufficiently override the rights of defense. Possible risk of retaliation is a tangible threat the proceedings over serious criminal offences such as terrorism face. Thus, in contravention of the principle of equality of arms, anonymous witnesses may be allowed. To prove, at the ICC victims and witnesses “who are at risk on account if testimony” given by them in course of proceedings are delicately treated.

Whether or not anonymity is granted the nature of the criminal charges, the extent of the perceived danger to the witness as well as the nature of his/her functions, be it impartial witnesses, victims, members of the police or undercover agents, must be carefully evaluated and

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277 X. v Belgium, Application no. 841 7/78, 4 May 1979, at 207.
278 Doorson v. the Netherlands, Application no. 20524/92, 26 March 1996, paras. 69-70. Doorson case concerned the fight against drug trafficking. The concluding comments of the Court can nevertheless be extended to the fight against terrorism. See also Van Mechelen and Others v. the Netherlands, supra 271, para. 52.
weighed. Thus, the prosecution is obliged to present “sufficient justifications”\(^{280}\) and apply only least restrictive means vis-à-vis the rights of defense.\(^{281}\)

So judicial fight against terrorism shall not take away the substance of the right to a fair trial.\(^{282}\)

In addition to an obligation to strive for a balance between the parties in the courtroom, Article 6.1 requires the prosecution to disclose all material evidence in its possession for or against the accused.\(^{283}\)

### 2.7.7. Right to silence

John Murray, a British citizen, arrested under section 14 of the Prevention of Terrorism (Temporary Provisions) Act 1989, challenged the domestic decision, arguing that his right to silence, in conjunction to the presumption of innocence, had been denied. He remained silent all over the proceedings as he was warned of “Miranda rights”, available for him under Article 3 of the Criminal Evidence (Northern Ireland) Order 1988\(^{284}\). The European court has nevertheless admitted that a trial over him was a fair one, as the prosecutor had a prima facie evidence against him. Still, it was contended that “he was severely and doubly penalized for choosing to remain silent: once for his silence under police interrogation and once for his failure to testify during the trial. To use against him silence under police questioning and his refusal to testify at trial amounted to subverting the presumption of innocence and the onus of proof resulting from that

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\(^ {280}\) Van Mechelen and Others v. the Netherlands, supra 271, para 60.


\(^ {282}\) See notably, Chahal v. the United Kingdom, 15 November 1996, paras. 131 and 144, and Van Mechelen and Others v. the Netherlands, supra 271, para. 54.

\(^ {283}\) Rowe and Davies v. the United Kingdom, Application no. 28901/95, 16 February 2000, para. 60.

\(^ {284}\) “You do not have to say anything unless you wish to do so but I must warn you that if you fail to mention any fact which you rely on in your defence in court, your failure to take this opportunity to mention it may be treated in court as supporting any relevant evidence against you. If you do wish to say anything, what you say may be given in evidence.”
presumption: it is for the prosecution to prove the guilt of the accused without any assistance from the latter being required” [emphasis added].

2.8. Death penalty

At last, in addition to all the torment, the terrorist suspects are quite often sentenced to death. In the Council of Europe, death penalty for terrorist convicts is severely condemned: “[u]nder no circumstances may a person convicted of terrorist activities be sentenced to the death penalty; in the event of such a sentence being imposed, it may not be carried out.” One can argue about the effectiveness of the death penalty in general, but when it comes to terrorism its value is even more arguable as the execution of terrorists may have counterproductive effects. Thus in addition to retribution and establishment of justice, the executions may have socially negative impact, playing right into the hands of the adversaries. By turning criminals into martyrs, inviting retaliatory strikes only enhance PR and fund-raising strategies of the enemy. Killing terrorists neither shows any practical value. It is not surprising that the United Kingdom repealed death penalty already in 1973, as the parliament concluded that “executing terrorists, whose goal is often to martyr themselves, only increased violence and put soldiers and police at greater risk. In a highly charged political situation, it was argued, the threat of death does not deter terrorism. On the contrary, executing terrorists, the House of Commons decided, has the opposite effect.”

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288 Ibid.
CHAPTER 3. POSSIBLE OBSTACLES TO ACCEPTANCE OF THE NEW ICC MANDATE

To some it might not seem necessary to codify international terrorism, as the crime, as such, is not a novelty for criminal law, therefore the effort might be perceived as a wish to reinvent the wheel. There is no need to do everything *ab ovo*, it can be contended, as there are already comprehensive opportunities to put the guilty on trial. Elevating terrorism onto international level inevitably entails certain problematic factors. Adherence to divergent political moods and differences in perception of certain categories may well be an impediment for the successful elaboration of a common approach and indeed, they have been for many years ever since the discussions started. Furthermore, discrepancies of legal systems and legal values, exercise of jurisdiction and domestic policy could also create impenetrable jungle for a pioneer. This chapter, concluding the author’s effort to shed a small light to international prosecution of terrorism, will be fully devoted to the problems that global community is most likely to encounter or has encountered in this area.

3.1. Political factors: National Liberation Movements and Self-Determination

One shall never forget that terrorism, especially international one, is rarely not a fight of ideologies. The issue is aggravated by the fact, that many liberation movements and those directed against foreign occupation or alien domination are frequently articulated by means,
which could be called terrorist. So a dilemma occurs in the determination of protection level as international law had already acknowledged the supreme right of self-determination by all peoples. At the same time, too generous definition of terrorism can be used to shut down non-violent dissent and undermine democratic society.

UN GA Res. 46/51, 27 January 1992 significantly reaffirmed “the inalienable right to self-determination and independence of peoples under colonial and racist and other forms of alien domination and foreign occupation” and recognized that “the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism”. The resolution specifically affirmed it shall not be construed in a way impeding the exercise of the right to self-determination and independence, as derived from the UN Charter and Declaration on Friendly Relations. Hence the stumbling block in defining terrorism is that it goes in parallel with the notion of struggle for independence, which can be rooted in a legitimate use of violence. From George Washington to Nelson Mandela, most fights for independence against colonialism and alien subjugation have resulted in some form of violence that could be described as terrorism by opponents.

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291 It was recently reiterated in discussions held in the 6th Committee: Legal Committee Is Told Overall Convention against Terrorism Must Meet International Law, Humanitarian Concerns, 5 October 2010, UNGA 65th Session, 2nd & 3rd Meetings of Sixth Committee at http://www.un.org/News/Press/docs/2010/ga13386.doc.htm [d/a 20/10/2010].

292 OSCE Manual, supra 290.
It is thus a stick with two ends. The one’s freedom fighter may be a terrorist of another. To exemplify, it is enough to recall that in June, 2001, President George W. Bush signed an Executive Order freezing all US-based property of persons engaged in or supporting “extremist violence in the Former Yugoslav Republic of Macedonia” (otherwise described as national liberation movement by its proponents), because their actions “constitute[d] an unusual and extraordinary threat to the national security and foreign policy of the United States...” Although the presidential order did not actually use the word “terrorist,” yet it treated them as such.293 It is nevertheless contended that a possibility to differentiate bona fide freedom fighters from those, maliciously using violence does exist. Introducing the report of the Ad Hoc Committee, recommending the establishment of a new working group to finalize the text of the comprehensive convention against terrorism, its Vice-Chairperson said that the current text contained elements that could “bridge the divergent views held on this politically complex matter”294, while larger segments of international community vigorously militated against international terrorism advocate the removal of “veil of liberation” and condemn terrorism irrespective of its motivation and aspirations.295

3.2. Asylum seekers and Refugees
Another claim against the prospective ICC jurisdiction in respect of persons, accused in terrorism could be international obligations owed by states in respect of those recognized as refugees and asylum seekers. So Art. 33.1 of the Convention on refugees\(^{296}\) establishes the principle of *non-refoulement* as a protection for persons, threatened by a persecution on the ground of his or her race, religion, nationality, membership of a particular social group or a political opinion.

From a plain interpretation of this clause it may appear that a person, suspected in terrorism, may well enjoy safe-heavens in the country, granting him refuge on the account of his or her adherence to a particular religion or a social group (in case of religious extremism) or expression of political thoughts not welcomed by a persecuting jurisdiction. However, the Geneva Convention does not impose absolute obligations upon the parties: the principle shall not apply whereas there are “reasonable grounds” to believe that he may pose a danger to the national security of the accepting country or by which he has already been convicted for a particular serious crime, constituting danger to the entire community.

This credo is endorsed by the Art.1F of the Convention, pertaining to certain acts which are “so grave as to render their perpetrators undeserving of international protection as refugees”.\(^{297}\) This section sets down an exhaustive list of “heinous acts” and “serious common crimes”, *inter alia*, (a) crimes against peace (aggression), war crimes, crimes against humanity, (b) serious non-political crimes committed prior to crossing the border of the country of possible refuge and (c) other acts against the principles of the UN.

Notably, the crime of genocide is perceived as a sub-class of the crimes against humanity\(^{298}\) while “non-political crimes” do include terrorist attacks. The logic behind the latter is appealing:


\(^{298}\) ibid, para 13.
“when the act in question is disproportionate to the alleged political objective, nonpolitical motives are predominant”\textsuperscript{299}, so “egregious acts of violence, such as acts those commonly considered to be of a “terrorist” nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective” and in violation of human rights principles.\textsuperscript{300}

The last exclusion clause may also envelop allowing prosecution of acts of terrorism. Thus those terrorist acts “capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights” are regarded to be crimes against the UN principles and for a qualification as such their gravity, international impact, and implications for international peace and security shall be evaluated.\textsuperscript{301}

Furthermore, Articles 32 and 33(2) of the Convention go further by adding that even a recognized refugee may be expelled and deprived from the protection from \textit{refoulement} if he, say by committing serious offences, poses, or may pose a danger to the host State.

\section*{3.3. Legal factors: accepting definition and process of trial}

\subsection*{3.3.1. Substantive law: a redundant provision?}

As it was already discussed in the first chapter, there are a number of international and regional legal instruments to fight against terrorism “in all its forms and manifestations”. September 11 attacks forced entire world to response immediately by adopting relevant legislative measures. Assuming there is a sufficient legal national and intergovernmental framework for the successful

\begin{footnotesize}
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\item \textsuperscript{300} \textit{Guidelines on International Protection: Application of the Exclusion Clauses…}, supra \textsuperscript{297}, para 15.
\item \textsuperscript{301} \textit{id.}, para 17.
\end{itemize}
\end{footnotesize}
combat on terrorism, why should we strive for a single, commonly agreed determination of the crime suitable for all nations? Isn’t it better to leave the world as it is without bothering much for perhaps a superfluous effort?

Notwithstanding this reasonable criticism it cannot be agreed that underlying legal principles are not an essential prerequisite for ultimate success. As stated by Rohan Perera, the Chairman of the Ad Hoc Committee (see supra, p. 20, para 1.3.4.1.1) a comprehensive legal instrument is required “to complement existing sectoral regimes”.302 As it was further noted by Van Krieken, not only should the military or armed action be legalized by a due legal framework, but efforts should also be taken to develop the general framework of conventions, treaties and Security Council resolutions to ensure agreement on the scope of the crime, jurisdictions, extraditions and other forms of cooperation. To put it short, there must be an adequate general legal backdrop.303

To counter terrorism effectively on the global level there is an apparent need to define relevant rules and regulations underpinning such an effort, as legitimate fight needs to trace its legitimization to a precise legal basis.304

Another widespread argument is that sometimes, an act of terrorism may well be defined as a crime against humanity (or, if certain conditions are met, even as a genocide), which is already under the exercise of ICC jurisdiction (supra, p. 31, para 1.4.3.) Yet, there is no much room for such optimism as alas, there are myriad types of terrorist acts, such as cyber-terrorism, biological terrorism, kidnapping and political assassination, which, predominantly, cannot be adjudicated in light of Art. 7.

303 Van Krieken, supra 11, p. 8.
304 ibid, p. 10.
3.3.2. Procedure: witnesses, evidence and national security

National security considerations may be a strong argument against the transfer of trials over international terrorist suspects to the ICC. Rigid rules of procedure as well as elementary considerations of fairness and justice utter for disclosure of exculpatory evidence in the courtroom. However, in case of terrorist defendants this maneuver could appear as an awkward and barely desired task for the State party inasmuch as the information against the suspect is often collected by national intelligence services. Disclosure of such reports and communications may substantially undermine further effective operation of the whole state security system. Moreover, trials of terrorist suspects will involve defendants supported by active and powerful networks capable of endangering witnesses or threatening entire communities. There would be hardly many eye witnesses or insiders in terror networks willing to testify due to the fear of revenge.\textsuperscript{305} Yet, the issue is not as acute as it appears.

Article 72 of the Statute specifically tackles the issue of state security pro tanto provision of evidence is requested. So if the State opines that “disclosure would prejudice its national security interests” it may use its right to intervene in order to obtain a resolution. In doing so the state must actively cooperate with prosecution, Pre-Trial Chamber or Trial Chamber and defense and reach a consensus, inter alia, by agreeing to use in camera or ex parte proceedings. If not feasible to do so, the State may eventually decline to disclose the classified evidence\textsuperscript{306}, even without providing detailed explanations for doing so. Still, under certain conditions, the Court can override the refusal if “the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused”. In this case, the Court may consider to decide upon the existence or


\textsuperscript{306} Art. 72(6), see also Art. 93(4) of the Statute, supra 1.
non-existence of the fact in question or refer the matter to the judgment of the Security Council or the Assembly of State Parties.\textsuperscript{307}

As an alternative to classified sources “evidence from a different sources or in a different form”\textsuperscript{308} might be provided by the State party. It is assumed that at some point, “different sources” might include hearsay evidence, i.e. “evidence that is offered by a witness of which they do not have direct knowledge but, rather, their testimony is based on what others have said to them”.\textsuperscript{309}

In common law systems the threshold of admissible evidence in court is relatively high, in contrast, continental legal systems have always been flexible enough to admit hearsay. Similarly, case law of both ad hoc tribunals\textsuperscript{310} demonstrate occasional admittance of hearsay in trial.\textsuperscript{311} For instance, in \textit{Prosecutor v. Tadić} the Court interpreted Rules 89(c) and 89(d) of the Rules of Procedure and Evidence\textsuperscript{312} to allow evaluation of hearsay, noting that “any relevant evidence” may be admitted provided it has “probative value” and that such value not be “substantially outweighed by the need to ensure a fair trial.”\textsuperscript{313} This view was later endorsed by the adoption of a new Rule 92bis, which unequivocally states that statements shall be admissible if they constitute a “declaration by the person making the written statement that the contents... are true and correct to the best of that person’s knowledge and belief.”\textsuperscript{314} ICC Rules of Procedure are

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\item[\textsuperscript{307}] Art. 72(7)(a)(ii)&(iii) in accordance with Art.87(7), \textit{ibid}.
\item[\textsuperscript{308}] Art. 72(5)(c), \textit{id}.
\item[\textsuperscript{309}] As defined by \textit{Legal Dictionary} at http://www.duhaime.org/LegalDictionary/H/Hearsay.aspx [d/a 22/10/2010]
\item[\textsuperscript{313}] \textit{Prosecutor v. Tadić} (Judgement). Case No. IT-94-aA. 38 ILM 1518 (1999).
\item[\textsuperscript{314}] Read further Practice Direction on Procedure for the Implementation of Rule 92bis(B) of the Rules of Procedure and Evidence, ICTY, IT/192, 20 July 2001 at
\end{itemize}
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silent on the exclusion of hearsay, though the text of Art. 69(4)\textsuperscript{315} of the Statute adopts a test, similar to the approach taken by the ad hoc tribunals.

Subpoena of a witness, who, by testifying could endanger national security of the State party, was specifically addressed by the ICTY in \textit{Blaskic} in respect of French military officer. The Chamber concluded that with certain restrictions upon the questions to be asked the officer was able to testify without compromising “the necessary bounds of confidentiality”. Even more, representatives of the French government were authorized to be present in the courtroom and to address the Court, publicly or behind closed doors through “present[ing] any reasoned request which they believe necessary for the protection of the higher interests they have been assigned to protect”.\textsuperscript{316,317} (At this point, it is vital to recollect and balance earlier deliberations of the author upon the right of defense to question the incriminating witness during the trial, see \textit{supra} p. 69, para 2.7.6.).

Thus \textit{Blaskic} exemplifies the judicial attitude demonstrating lack of enthusiasm to analyze the evidence (witness), the disclosure (appearance) of which could be dangerous to the security of the State party. Although theoretically aggressive measures can be taken against the party deliberately “unwilling to cooperate” and not trying to rectify the situation by providing alternative proof, it is submitted that such a procedure would barely be ever followed, as long as the acceptance of ICC Statute is pure voluntarism.

\textsuperscript{315} “The Court may rule on the relevance or admissibility of any evidence, taking into account, \textit{inter alia}, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”

\textsuperscript{316} \textit{Prosecutor v. Tihomir Blaskic} (Trial Judgement), IT-95-14-T, 3 March 2000, pp. 9-18.

3.4. Superfluous jurisdiction?

Those opposing to the inclusion of a new article on international terrorism to the ICC Statute may also argue that, in fact, such a move is superfluous as there are enough forums for litigations at domestic and regional level. Major criminals had been and continue to be tried by local and regional courts, set up exclusively for this reason. National judiciary follows aut dedere aut judicare principle and, by virtue of universal jurisdiction, prosecutes major international perpetrators, without making resort to a single international criminal tribunal. The landmark importance of the ad hoc criminal tribunals for Former Yugoslavia and Rwanda cannot be denied. They have proven to be effective to prosecute and punish the criminals who had committed the most outrageous crimes\textsuperscript{318}. In light of these, it shall be admitted that there could be no consensus between the State parties as to whether there is a need to have a new, universally accepted wording of the crime of international terrorism at all, as it would be, perhaps, more speedy and convenient to establish a special or ad hoc tribunal, if necessary, as after the wanton murdering of former Lebanese Prime Minister Rafiq Hariri and others\textsuperscript{319}. Conversely, the author cannot agree with such a contention, as long as the exercise of the ICC jurisdiction is not automatic, it is complimentary to the domestic courts. This is an essential feature of the ICC and is rooted in preambular paragraph 10 of Article 1 of the Statute. Consequently, the ICC will exercise its jurisdiction only if a state party is unwilling or unable to prosecute the offender\textsuperscript{320}. One shall not forget that domestic proceedings, in principle, could be

\textsuperscript{318} See further P.J. van Krieken, supra 11, p. 3.
\textsuperscript{320} Article 17(1) of the Statute, supra 1.
undertaken with the purpose of shielding the criminal from meaningful judicial determination by an international tribunal. It could also be true the proceedings are unjustifiably delayed or not conducted independently or impartially\textsuperscript{321} or simply the state, due to total collapse of judicial enterprise, is not in a position to institute proceedings.\textsuperscript{322} In all other instances, however, the states remain the principal prosecutor of terrorist acts, unless in special circumstances where the situation is so appalling, the jurisdiction can be triggered from outside.\textsuperscript{323,324}

While in respect of regional judiciary tools it cannot be agreed that such measures shall have ordinary character and shall be installed every once in a while. Ad hoc judiciary is efficient, but can be financially burdensome on the investing parties as it requires new and substantial infrastructural settings. Furthermore, it is not always an easy task to hire relevant personnel with sufficient level of expertise and level of languages.\textsuperscript{325}

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\textsuperscript{321} Article 17(2), \textit{ibid.}  \\
\textsuperscript{322} Article 17(3), \textit{id.}  \\
\textsuperscript{323} See Article 13(b)7(c): Prosecutor acting \textit{ex proprio motu} (Art.15) and referral by Security Council.  \\
\textsuperscript{324} M. Banchik, \textit{The International Criminal Court & Terrorism}, 2003 at \texttt{http://www.tamilnation.org/terrorism/international\_law/0306iccandterrorism.pdf} [d/a 14/1/2010].  \\
\textsuperscript{325} This was a primary problem with international segment of judges in Iraqi Tribunal. See further L.A. Dickenson, \textit{The Promise of Hybrid Courts}. 97 American Journal of International Law 295, 2003.
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Conclusion

The aim of this paper was not to propose a general, universally acceptable definition of the crime of international terrorism or any other similar concept. Neither it was aimed at elaboration of the text of the respective article in the body of the Rome Statute. Its purpose was rather to familiarize the reader with the notion itself and underline the importance of understanding the crime of terrorism on international plane.

The inclusion of a new provision in the Statute of the International Criminal Court would extend its jurisdiction over detainees suspected in most outrageous terrorist attacks and those having a complicated international element. Such a shift would not only categorize and maintain consistency and uniformity of interpretation with regard to international criminal law rules, but would also fill the gaps of Article 7 by making cyberterrorism, ecoterrorism and other offences punishable. This effort does not seem to be so futile as the dynamics of drafting the comprehensive convention shows its active phase at this moment. It is not a far-fetched declaration that a unique, globally acceptable definition will soon be translated into a single legal provision. Existing sectoral frameworks have served well for the successful prosecution of terrorist offenders worldwide, it is now, however, a high time to adopt a new legal regime, which would comprise all their benefits and assemble the international cooperation tools and techniques under a single umbrella of the International Criminal Court. Such a tendency is, in a way, inevitable in light of global trends towards gradual integration and globalization. The schemes elaborated by the regional institutional networks such as the European Union prove to be effective and easy in use as domestic law-enforcement agents, when assessing the possibility of prosecution, do not have to comply with the legal standards of the own and foreign jurisdictions. They simply proceed with their actions backing their position by the letter of the Framework
Decision on combating terrorism and therefore, are able to respond to the crisis swiftly and proficiently. In light of this successful regional example, as well as due to relatively large number of other regional instruments pertinent to the matter, the author concludes that adoption of the single definition shall not make itself desperately awaited.

The addition of a new article would also excel the situation of the detainees. It would bring fresh air to the dark dungeons, where “terrorists” are kept and safeguard inviolability of their fundamental rights to endurable treatment and just process. Instigation of their adjudication by an international criminal tribunal would unquestionably make their detention transparent, thus precluding any maltreatment or injustice. The detention itself would not be indefinite and last for an undermined period of time anymore, as it is often the case with “unlawful combatants” or “enemy members”. The accused themselves would no longer be viewed by some as hostem humani generis but only as ordinary defendants in a criminal process, enjoying the full spectrum of fair trial rights including the presumption of innocence and right to be silent. Such a cardinal shift would bring a lion’s share of public trust into credibility of trials over terrorists and increase procedural justice to a substantially new level. A “side-effect” of it could be elimination of stigma and profiling in respect of representatives of particular nations.

One shall not be underestimate the factors, which hinder successful resolution of our cause. The classic “pitfalls” of the terrorism criminalization issue call upon reconsideration of certain political motifs of separate jurisdictions, or even groups of jurisdictions. Thus the rights of the peoples, striving for independence shall not be regarded as a barricade, not possible to circumvent. The same is true about the rest of the key arguments which could be raised by opponents.
Overall, the author is convinced that the inclusion of the crime of international terrorism is a necessary measure in contemporary international criminal law. She believes, that it could not only further ally nations and lift their combat against terrorist onto a new pinnacle but would also be an impetus for other reluctant states, isolating themselves from a supranational criminal jurisdiction, to accede to the Rome Statute.
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