

**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”.¹ 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.

¹ Art. 5(1) of the Statute of the International Criminal Court U.N. Doc. 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

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.² 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.

² E. Chadwick, *A tale of two courts: the ‘creation’ of a jurisdiction?* 9 Journal of Conflict and Security Law 1, Oxford University Press, 2004, p. 71.

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 1373.³ 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”.⁴ Another author compared the search of an apt definition to a quest after the Holy Grail.⁵ 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.”⁶ Still, it cannot be disputed that many values are at stake in the definition.⁷

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

³ S/Res/1373, 28 September 2001.

⁴ D. Tucker, *Skirmishes at the Edge of Empire*, Praeger, Westport, 1997, p. 51.

⁵ G. Levitt, *Is Terrorism Worth Defining?* Ohio Northern University Law Review 97, 1986.

⁶ R. Higgins, *The General International Law of Terrorism*, in *Terrorism and international law*, ed. by R. Higgins, M. Flory, London, 1997, p. 24.

⁷ S. Marks, A. Clapham, *International Human Rights Lexicon*, Oxford, 2005, p. 345.

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.

⁸ *Actes de la VI^e Conference Internationale pour l'unification du droit penal*, Paris, Pedone, 1938, p. 420, annex A.III, "Terrorisme", Art. 1.

⁹ Convention for the Prevention and Punishment of Terrorism, League of Nations, document C.546.M.383.1937.V.

1.1.2. Modern legal philosophy about terrorism

In 1983 Schmidt documented at least 109 definitions of terrorism.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.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.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”.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

¹⁰ A. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Databases and Literature*, New Brunswick, CT: Transaction, 1983, pp.119-152.

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.

¹² O.Y. Elagab, *International Law Documents relating to Terrorism*, London/Sydney, 1997, p. xix.

¹³ *Ibid.*

defines terrorism as any use or threat to use force designed to bring about political change.¹⁴ It cannot be agreed that such a determination is flawless. On the contrary, it is 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.¹⁵ Explanation proposed by James Poland makes an accent on “premeditated, deliberate, systematic murder, mayhem” targeted against the innocent and creating “fear and intimidation”.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”.*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 *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 *erga*

¹⁴ B. Jenkins, as cited in *Definitions of Terrorism* at <http://www.jewishvirtuallibrary.org/jsource/Terrorism/terrordef.html> [d/a 07/02/2010].

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

¹⁶ as cited in *Definitions of Terrorism* at <http://www.jewishvirtuallibrary.org/jsource/Terrorism/terrordef.html>, [d/a 07/02/2010].

¹⁷ In joint statement of South African Nobel Prize Laureates (Bishop Desmond Tutu, F.W. Klerk & Nelson Mandela) issued by Nelson Mandela Foundation, 19 September 2001, available at <http://www.southafrica-newyork.net/consulate/pdf/saaw5.pdf>, [d/a 26/01/2010].

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 mafia 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”.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.”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.”²¹

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.”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),

¹⁹ H.G.A. Hughes, *Patterns of Global Terrorism 1985-2005: US Department of State Reports with Supplementary Documents and Statistics*, 2006, Emerald Group Publishing Ltd, Vol. 20, No. 6.

²⁰ *What is Terrorism?* International Terrorism and Security Research, available at <http://www.terrorism-research.com/> [d/a 06/09/2010].

²¹ *Ibid.*

²² Prevention of Terrorism (Temporary Provisions) Act 1989 (c. 4) section 20(1) as cited in *The Definition of Terrorism*, A Report by Lord Carlile of Berriew Q.C., March 2003, p.3, available at <http://www.icj.org/IMG/UK-Carlile-DefTer.pdf> [d/a 06/09/2010].

- (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 Convention²⁶ (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 were aged under 10.

²⁶ *Stop-and-search powers ruled illegal by European court*, 12 January 2010, available at <http://news.bbc.co.uk/2/hi/8453878.stm> [d/a 08/09/2010], for further reference see *Gillian and Quinton v. The United Kingdom*, Application no. 4158/05, 12 January 2010.

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 *de jure* or *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”.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.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.”

²⁷ S. 1, Prevention of Terrorism Ordinance No. 33 of 5708-1948, with amendments from 1980, 1986, and 1993.

²⁸ S. 8, *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

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

³¹ Art. 3, Russian Federation Federal Law No. 130-FZ “On the Fight Against Terrorism”, 1998.

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.”³²

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.³³

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

³² Art. 1, Law of the Republic of Turkey “On Fight against Terrorism”, No. 3713, 1991.

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 instruments³⁴ the Framework Convention³⁵ 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 Convention³⁶, Civil Aviation Safety Convention³⁷ as well as attacks against the life, physical integrity or liberty of internationally protected persons; kidnapping, hostage-taking, bombing, rocketing, 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

³⁴ European Convention on Extradition, ETS No. 24, 13.12.1957 and first and second Additional Protocols, ETS No. 86, 15.10.1975 and ETS No. 98, 17.03.1978; European Convention on Mutual Assistance in Criminal Matters, ETS No. 30, 20.04.1959 and first and second Additional Protocols, ETS No. 99, 17.03.1978 and ETS No. 182, 08.11.2001; European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, 15.05.1972; European Convention on the Compensation of Victims of Violent Crimes, ETS No. 116, 24.11.1983; Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, 08.11.1990; Convention on Cybercrime, ETS No. 185, 23.11.2001 and Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, ETS No. 189, 28.01.2003; Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 16.05.2005; Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, CETS No. 198, 16.05.2005; etc.

³⁵ European Convention on the Suppression Of Terrorism, ETS.90, 27.01.1977.

³⁶ Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971.

³⁷ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178, *entered into force* January 26, 1973.

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 Convention⁴⁰ 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.⁴¹ 2005 Convention⁴² does not define terrorism either, but simply refers to relevant universal instruments adopted under the auspices of the UN (*infra* p. 17).⁴³

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.”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;

The same shall apply to a serious offence involving an act against property, other than one covered by Article 1, if the act created a collective danger for persons.

The same shall apply to an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”

⁴⁰ Protocol amending the European Convention on the Suppression of Terrorism, ETS No. 190, 2003.

⁴¹ Summary of the Protocol amending the European Convention on the Suppression of Terrorism, ETS No. 190, 2003 is available at <http://conventions.coe.int/treaty/en/Summaries/Html/190.htm> [d/a 08/09/2010].

⁴² Convention on the Prevention of Terrorism, CETS No. 196, 2005.

⁴³ Art.1, *ibid.*

⁴⁴ Press release from 19/09/2001: *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.⁴⁵

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

⁴⁵ Art. 1(1), EU Council Framework Decision of 13 June 2002 on combating terrorism, (2002/475/JHA), OJ L 164, 22/06/2002.

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.”).

⁴⁸ see for example, Programme of Action, adopted at Bishkek International Conference on Enhancing Security and Stability in Central Asia: Strengthening Comprehensive Efforts to Counter Terrorism, 13-14.12.2003; OSCE Charter on Preventing and Combating Terrorism, MC(10).JOUR/2, Porto, 07.12.2002; Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy, MC.DOC/3/07, Madrid, 30.11.2007; Decision No. 10/08 Further Promoting the OSCE’s Action in Countering Terrorism, MC.DEC/10/08, Helsinki, 05.12.2008, etc.

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_azbengl.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

⁵³ Art. 1, Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, Minsk, 1999.

⁵⁴ See Press-Conference with NATO Secretary General Jaap de Hoop Scheffer, Informal meeting of NATO Defence Ministers and the Meeting of the NATO-Russia Council answers, Spain, 9 September 2007, at <http://www.nato.int/docu/speech/2007/s070209ca.html> [d/a 09/09/2010]; see also T. G. Ash, *Is There a Good Terrorist?* The New York Review of Books, at <http://www.nybooks.com/articles/archives/2001/nov/29/is-there-a-good-terrorist/#fn2-964990876> [d/a 09/09/2010].

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

⁵⁶ Convention for the Prevention and Punishment of Terrorism, League of Nations, *supra* 9.

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

⁵⁷ Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963. (Deposited with the Secretary-General of the International Civil Aviation Organization); Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178, *entered into force* January 26, 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 167, 13 I.L.M. 41, *entered into force* Feb. 20, 1977; International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983; Convention on the Physical Protection of Nuclear Material, T.I.A.S. 11080, *entered into force* Feb. 8, 1997; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988. (Deposited with the Governments of the Russian Federation, the United Kingdom and the United States of America and with the Secretary-General of the International Civil Aviation Organization); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), *entered into force* March 1, 1992; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. (Deposited with the Secretary-General of the International Maritime Organization); 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991 (Deposited with the Secretary-General of the International Civil Aviation Organization); International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001; International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), *adopted* 9 Dec. 1999, *entered into force* 10 Apr. 2002; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (not entered into force).

⁵⁸ *International Legal Instruments to Counter Terrorism* from UN Action to Counter Terrorism, at <http://www.un.org/terrorism/instruments.shtml> [d/a 09/09/2010].

General Assembly⁵⁹ (for the discussion of a need of having such a setting see *infra*, p. 77, para 3.3.1.).

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.⁶⁰

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

⁵⁹ Draft Comprehensive Convention on International Terrorism, available at *Inventory of International Nonproliferation Organizations and Regimes*, Center for Nonproliferation Studies, last updated 10/05/2010 (at <http://cns.miis.edu/inventory/pdfs/intlterr.pdf> [d/a 09/09/2010]).

⁶⁰ these matters are discussed at greater length in Paul C. Szasz, *General Law-Making Processes*, 1 United Nations Legal Order, ch. 1, Ed. by Oscar Schachter & Christopher C. Joyner, 1995, at p. 35, §§61-67.

them.⁶¹ Due to its clarity and straightforwardness this definition is aptly noted to be the most useful one for an international insight.^{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 1972⁶⁴ and there even were proposals to hold an international conference on the matter⁶⁵, 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.^{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.⁶⁸

⁶¹ Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. res. 51/210, Annex, 51 UN GAOR, Supp.(No.), U.N.Doc. A/51/631 (1996), para (I)2.

⁶² Van Krieken, *supra* 11, p. 19.

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].

⁶⁴ UN GA Res.3034 (XXVII), 18 December 1972.

⁶⁵ UN GA Res.42/159, 7 December 1987, § 14.

⁶⁶ At the beginning of the session the issue was allocated to the 6th (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.

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.

⁶⁸ *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].

A provisional norm, engendered by the Ad Hoc Committee, which started its activity back in 1996⁶⁹ and reported no consensus on the issue in 2001⁷⁰, definitely gives an impression of comprehensiveness and worth to be quoted in its entirety⁷¹:

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

⁶⁹ Established by the G.A. Res. 51/210, 17/12/1996, see further <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, *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

⁷² M. Ch. Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 Harvard International Law Journal 83, Winter 2002, p. 102.

governments have taken toward the development of effective international legal responses to terrorism.”⁷³

1.3.4.1.2. UN Security Council

Although among the others⁷⁴ the resolution 1363⁷⁵ 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 1368⁷⁶, by which the Security Council had triggered its competence under Chapter VII of the Charter.⁷⁷ The key resolution, Res. 1373⁷⁸, 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.⁷⁹ 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.⁸⁰ The

⁷³ Bassiouni, *ibid.*

⁷⁴ S/Res/1267, 15 October 1999; for the full list of Security Council resolutions related to the work of the Committee established pursuant to Resolution 1267 (1999) concerning Al-Qaida, the Taliban and associated individuals and entities, see <http://www.un.org/Docs/sc/committees/1267/1267ResEng.htm> [d/a 13/09/2010].

⁷⁵ S/Res/1363, 30 July 2001.

⁷⁶ S/Res/1368, 12 September 2001.

⁷⁷ S. P. Subedi, *supra* 67, p. 160.

⁷⁸ S/Res/1373, 28 September 2001.

⁷⁹ P. C. Szasz, *The Security Council Starts Legislating*, 96 American Journal of International Law 901, October 2002, p. 903.

⁸⁰ For further discussion of “law-making” capacity of the UN Security Council see P. C. Szasz, *The Security Council Starts Legislating*, 96 American Journal of International Law 901, October 2002, p. 903; E. Rosand, *The*

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.

81,82

1.4. International Criminal Law and the Crime of International Terrorism

As noted before, 1937 Geneva Convention for the Prevention and Punishment of Terrorism⁸³ was the earliest attempt to attach terrorism to the terrain of international criminal law. The Convention has never come into force⁸⁴ 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.⁸⁵ 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

Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?, 28 Fordham International Law Journal 542, February 2005; E. Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/ Taleban Sanctions*, 98 The American Journal of International Law, 2004.

⁸¹ E. Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 American Journal of International Law 333, April 2003, p. 334.

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.

⁸⁴ International Legal Instruments to Counter Terrorism at <http://www.un.org/terrorism/instruments.shtml> [d/a 14/09/2010].

⁸⁵ UN GA Res. 174, UN GAOR, 2nd Sess., UN Doc. A/519 (1947).

on a sensitive matter of crystallizing offences against international order,⁸⁶ 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*”⁸⁷ [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.⁸⁸ In 1981, after a prolonged reluctance to deal with the issue⁸⁹ the General Assembly turned its attention to the Code again.⁹⁰

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*

⁸⁶ A. Cassese, *From Nuremberg to Rome: International Military Tribunal to the International Criminal Court*, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 11.

⁸⁷ Art. 1(5), Draft Code of Offences against the Peace and Security of Mankind (1951), Yearbook of the International Law Commission, 1951, vol. II, Doc. A/1858, p. 58.

⁸⁸ Art. 2(6) (list of offences), Draft Code of Offences against the Peace and Security of Mankind (1954), Yearbook of the International Law Commission, 1954, vol. II, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf [d/a 14/09/2010].

⁸⁹ For the full history of the elaboration of the Draft Code see *Draft Code of Offences against the Peace and Security of Mankind* at http://untreaty.un.org/ilc/summaries/7_3.htm#_ftnref5, last update: 30 June 2005 [d/a 14/09/2010].

⁹⁰ UN GA Res. 36/106, 10 December 1998.

peace and security.”⁹¹ 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 psyche⁹².

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.*⁹³

⁹¹ “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 3rd 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)) , §§. 124-5.

⁹² *ibid*, § 128.

⁹³ As quoted in “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 6th report on the draft code of offences against the peace and security of mankind, by D. Thiam, Special Rapporteur, Document A/CN.4/411 and Corr.1 & 2 (Extract from the Yearbook of the International Law Commission, 1988, vol. II(1)), p. 203.

Remarkably, in the version adopted by the Commission in 1991, the list of punishable offences included “international terrorism”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.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”.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.

⁹⁴ *Draft Code of Crimes Against the Peace and Security of Mankind (Part II)* - including the draft Statute for an international criminal court, at http://untreaty.un.org/ilc/summaries/7_4.htm#_ftnref9, last update: 19 January 2009 [d/a 14/09/2010].

⁹⁵ Art. 20 (f)(iii-iv) [War crimes], *Draft Code of Crimes Against the Peace and Security of Mankind* (1996) Yearbook of the International Law Commission, 1996, vol. II (2).

⁹⁶ §114, “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 13th 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.

⁹⁸ §§. 105-111, Report of the International Law Commission on the work of its forty seventh session, 2 May, 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No.10, Doc. A/50/10 (Extract from the Yearbook of the International Law Commission, 1995, Vol. (II)2), p. 28.

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].

¹⁰⁰ §§. 29, 154 of “Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat”, Report of the International Law Commission on the Work of Its Forty-Seventh Session (1995), A/Cn.4/472.

¹⁰¹ See also P. Robinson, *The Missing Crimes*, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 515.

would contradict the principle of *nullum crimen sine lege*.¹⁰² 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 1994.¹⁰³ The draft did not mention terrorism, although a reference to other crimes (including certain terrorist acts), outlawed by universal treaties,¹⁰⁴ was present in the Annex.¹⁰⁵

However, a year later the Ad Hoc Committee, established by the General Assembly to review the main issues arising out of the Draft Statute¹⁰⁶, 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.¹⁰⁷ 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 tempered by a strong sense of practicality” to withstand skeptical international community and implied severe limitations on its scope.¹⁰⁸ Nevertheless, it

¹⁰² J. Crawford, *The Work of International Law Commission*, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 30.

¹⁰³ Draft Statute for an International Criminal Court (1994), Yearbook of the International Law Commission, 1994, vol. II(2), p. 26, § 91.

¹⁰⁴ E.g. the unlawful seizure of aircraft as defined by article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971; The crimes defined by Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178, *entered into force* January 26, 1973; The crimes defined by article 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 U.N.T.S. 167, 13 I.L.M. 41, *entered into force* Feb. 20, 1977; Hostage-taking and related crimes as defined by Article 1 of the International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983.

¹⁰⁵ As referred to by Art. 20(e) of the Draft Statute for an International Criminal Court (1994), Yearbook of the International Law Commission, 1994, vol. II(2), p. 26.

¹⁰⁶ UN GA Res/49/53, 17 February 1995.

¹⁰⁷ Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 (1995).

¹⁰⁸ Report of the International Law Commission (1994) as cited in J. Crawford, *The Work of International Law Commission*, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 27.

reappeared in discussions in the Working Group on definitions of crimes of the Preparatory Committee¹⁰⁹, which replaced the Ad Hoc Committee in 1996.¹¹⁰

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.”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.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 *infra* Chapter 3). Furthermore, it was

¹⁰⁹ UN GA Res.50/46, 18 December 1996.

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, *The Missing Crimes*, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, pp. 515-6).

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, *supra* S 1.3.4.1.1.).

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.¹¹³

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

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.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.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.¹¹⁷

Remarkably, Art. 7 establishes a high threshold: only those acts committed “as part of a

¹¹³ P. Robinson, *The Missing Crimes*, The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, pp. 516-8.

¹¹⁴ Res. E of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10, 17 July 1998.

¹¹⁵ Art. 5 of the Statute of the International Criminal Court, *supra* 1.

¹¹⁶ A. Cassese, *International criminal law*, 2nd Ed., Oxford, 2003, pp. 120-132.

¹¹⁷ 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.

widespread or systematic attack directed against any civilian population, with knowledge of the attack” can be qualified as crimes against humanity.¹¹⁸ This 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.7.¹¹⁹ 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.¹²⁰

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

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 [...]”.

¹¹⁹ Van Krieken, *supra* 11, p. 107-8.

¹²⁰ For definition of cyber-terrorism and related issues see S. Gordon, *Cyberterrorism?* White paper of Semantec, at <http://www.symantec.com/avcenter/reference/cyberterrorism.pdf> [d/a 16/09/2010].

Committee.¹²¹ Certain grave breaches of Geneva Conventions¹²² 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.¹²³ The same is true about similar offences perpetrated in the context of non-international character.¹²⁴ Still, one cannot safely assume that a terrorist act would be necessarily prosecuted as a war crime at least. *Ratione temporis* and *ratione matirae* of Art.8 is limited and applies only as long as an armed conflict exists.¹²⁵ Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature do

¹²¹ For the historical survey on codification of war crimes see *International Humanitarian Law – Treaties and Documents* at <http://www.icrc.org/ihl.nsf/COM/380-600168?OpenDocument> [d/a 16/09/2010].

¹²² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950; Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

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;

¹²⁴ Notably, there is a direct reference to “acts of terrorism” in Art. 4 (“Violations of common Art. 3 of Geneva Conventions of 1949 and Additional Protocol II”) of the Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

¹²⁵ See for instance, §6 of Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000): Art. 8(2)(a)(viii), Taking hostages [as a grave breach of Geneva Conventions of 1949]: “the conduct took place in the context of and was associated with an international armed conflict”; §6 of Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000): Art. 8(2)(c)(iii), Taking hostages [as a violation of article 3 common to the four Geneva Conventions of 1949]: “the conduct took place in the context of and was associated with an armed conflict of not an international character”.

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

A terrorist attack may well fall under the qualification of genocide. At least first three subparagraphs of Art. 6¹²⁸ 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.¹²⁹ Yet again, the article demands two prerequisites: an intent to destroy a particular distinguishable group and objectively special identity of the victim¹³⁰, 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.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.¹³²

¹²⁶ See Art.8(2)(d)&(f) of the Statute.

¹²⁷ “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 3rd 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.

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.

¹²⁹ *The Challenge for the International Criminal Court: Terrorism* (by unknown author), 2008, at <http://www.legalserviceindia.com/article/1247--International-Criminal-Court---Terrorism.html> [d/a 16/09/2010]

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.”

¹³¹ Art. 8bis, in Annex 1 to Res/RC.6, 11 June 2010.

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”.

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”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.¹³⁴ Moreover, back in Rome terrorist offences were acknowledged to be “serious crimes of concern to the international community”.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 Act¹³⁶, the issue should have been brought in front of the State Parties again. The Bureau on the Review Conference reported a number of proposed amendments¹³⁷. 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 Art. 5 of the Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

¹³⁴ S/Res/1373, 28 September 2001.

¹³⁵ 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 *Ibid.*

¹³⁷ Report of the Bureau on the Review Conference, Doc. ICC-ASP/8/43/Add.1, 10 November 2009.

the international community”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 *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.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 sectoral 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)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

¹³⁸ Proposal of Amendment by The Netherlands, U.N. Doc. C.N.723.2009.TREATIES-5 (Oct. 29, 2009), at <http://www.adh-geneva.ch/RULAC/news/NetherlandsCN723EN.pdf> [d/a 16/09/2010].

¹³⁹ Proposed Art.5(3), Proposal of Amendment by The Netherlands, U.N. Doc. C.N.723.2009.TREATIES-5 (Oct. 29, 2009), at <http://www.adh-geneva.ch/RULAC/news/NetherlandsCN723EN.pdf> [d/a 16/09/2010].

¹⁴⁰ General Assembly Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974.

amendment.¹⁴¹ So the Dutch proposal was eventually excluded from the list of amendments sent for consideration to the Kampala Conference.¹⁴²

¹⁴¹ Report of the Credentials Committee, ICC-ASP/8/20, §§ 44-49 at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Annexes.pdf [d/a 16/09/2010].

¹⁴² § 3, ICC-ASP/8/Res.6, 26 November 2009, see Resolutions adopted by the Assembly of States Parties [on 8th session], p. 35 at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf [d/a 16/09/2010].

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.¹⁴³ 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 ...”¹⁴⁴

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

¹⁴³ Art.11(2), Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); Art.15, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; Sec.V, Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah 1401*; Art.7, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended* by Protocols Nos 3, 5, 8, and 11 which *entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively; Art. 9, American Convention on Human Rights, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992); Art.7, African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

¹⁴⁴ *R v McDonnell*, [1997] 1 S.C.R.948, for the further discussion of the principle see G. Endo, *Nullum Crimen Nulla Poena Sine Lege* Principle and the ICTY and the ICTR, (2002) 15 *Revue québécoise de droit international* 205, pp. 207-8.

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.

¹⁴⁵ *Ridge: Terror suspect doesn't deserve 'full range' of rights*, CNN Report from 29 December 2009 at [http://politicalticker.blogs.cnn.com/2009/12/29/ridge-terror-suspect-doesnt-deserve-full-range-of-rights/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fenn_politicalticker+\(Blog%3A+Political+Ticker\)](http://politicalticker.blogs.cnn.com/2009/12/29/ridge-terror-suspect-doesnt-deserve-full-range-of-rights/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fenn_politicalticker+(Blog%3A+Political+Ticker)) [d/a 17/08/2010].

¹⁴⁶ Statement by the President of the ICRC - 58th Session of the Commission on Human Rights, Geneva, 26 March 2002 at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/59KC9Y> [d/a 17/08/2010].

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

¹⁴⁷ Report of the Working Group on Arbitrary Detention to the UN Commission on Human Rights, doc. E/CN.4/2004/3. 15 December 2003, § 64.

war upon capture.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.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.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 custody¹⁵¹). Thus, for instance, mercenaries taking part in hostilities and, under certain conditions, spies, are “unprivileged” fighters, who are not entitled to such protection.¹⁵² Civilian population, directly engaged in hostilities, also fall under the scope of this category¹⁵³, unless it is an action *levée en mass*.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

¹⁴⁸ Art. 4 of the Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, entered into force Oct. 21, 1950, Art. 44(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.

¹⁴⁹ Art.4(2) of the Geneva Convention relative to the Treatment of Prisoners of War, *supra*; Arts. 43-44, Protocol I, *supra*.

¹⁵⁰ Art. 44(3), Protocol I, *supra* 148.

¹⁵¹ Art.13, Geneva Convention relative to the Treatment of Prisoners of War, *supra* 148.

¹⁵² See Art. 47(1) and Art.46(1) respectively, Protocol I, *supra* 148.

¹⁵³ *The relevance of IHL in the context of terrorism*, ICRC Official Statement, 21 July 2005 at <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> [d/a 20/09/2010].

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, *supra* 148.

be presumed to be lawful combatants, “until such time as their status has been determined by a competent tribunal”.¹⁵⁵ 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.¹⁵⁶

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.¹⁵⁷ 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

¹⁵⁵ Art. 5, *ibid.*

¹⁵⁶ As phrased in Art. 1(2), Protocol I, *supra*, 148; see also Preamble, § 4, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978; Preamble, §5, Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons, Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, Oct.10, 1998; for a historical and analytical overview of Martens Clause, see T. Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 *The American Journal of International Law* 1, Jan.2000, pp. 78-89.

¹⁵⁷ The relevance of IHL in the context of terrorism, *supra* 153.

exist.¹⁵⁸ In addition to limitation *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.¹⁵⁹ “Needless to say, persons suspected of such acts are liable for criminal prosecution.”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.¹⁶¹

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

¹⁵⁸ Statement by the President of the ICRC - 58th Session of the Commission on Human Rights, Geneva, 26 March 2002 at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/59KC9Y> [d/a 17/08/2010].

¹⁵⁹ Art. 51(2), Protocol I, *supra*, 149; Art. 4(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

¹⁶⁰ The relevance of IHL in the context of terrorism, *supra*, 153.

¹⁶¹ *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 ICCPR¹⁶², 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.¹⁶³ A competent,

¹⁶² International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

¹⁶³ “(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
(c) To be tried without undue delay;
(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any

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).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.¹⁶⁵

case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.”

¹⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*; corresponding right to liberty and security is embodied in Art. 5 therein.

¹⁶⁵ *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 hold 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 exercise¹⁷⁰ 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.

¹⁷⁰ *Rotaru v. Romania* [GC], Application no. 28341/95, para 55, ECHR 2000-V; *Hasan and Chaush v. Bulgaria* [GC], Application no. 30985/96, para 4, ECHR 2000-XI; *Maestri v. Italy* [GC], Application no. 39748/98, para 30, ECHR 2004-I; *Al-Nashif v. Bulgaria*, Application no. 50963/99, para 119, 20 June 2002; *Ramazanov and Others v. Azerbaijan*, Application no. 44363/02, para 62, 1 February 2007; *Glas Nadezhda EOOD and*

accordance with the law'. Qualitative criteria of lawfulness,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: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.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.¹⁷⁴ Though condemned by Strasbourg¹⁷⁵, all over Europe, *racial and ethnic profiling* remains a pervasive and ineffective practice.¹⁷⁶

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.

¹⁷¹ *S. and Marper v. the United Kingdom* [GC], Applications nos. 30562/04 and 30566/04, paras 95-6, 4 December 2008.

¹⁷² *Gillan and Quinton v. the United Kingdom*, *supra* 167, para 70.

¹⁷³ 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, *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 3rd 329, 334 (2nd Cir.2000); R.R. Banks, *Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA Law Review 1075, 2001, pp. 1078-81).

¹⁷⁴ A. Kundnani, *Racial Profiling and Anti Terror Stop and Search*, IRR NEWS, Jan. 31, 2006, at <http://www.irr.org.uk/2006/january/ha000025.html> [d/a 10/09/2010].

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”.¹⁷⁷ 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.¹⁷⁸

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”.¹⁷⁹ 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.”¹⁸⁰

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).

¹⁷⁶ *Challenging Ethnic Profiling in Europe*, Open Society Institute: Equality and Citizenship, at http://www.soros.org/initiatives/justice/focus/equality_citizenship/events/challenging-ethnic-profiling-20100317 [d/a 06/05/2010].

¹⁷⁷ *Police and Criminal Evidence Act 1984, Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search*, pp.8-9, at <http://www.homeoffice.gov.uk/docs/paccodea.pdf>, and Home Office, Stop and Search Action Team: Interim Guidelines, at <http://www.privacyinternational.org/issues/terrorism/library/ukstopsearchguidance2004.pdf> [d/a 06/05/2010].

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]).

¹⁷⁹ 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. 7.

¹⁸⁰ *ibid*, citing Metropolitan Police Authority, Progress report on MPA Stop and Search Scrutiny, Report 9, by the Commissioner, Oct. 16, 2003; Metropolitan Police Authority, Report of the MPA Scrutiny on MPS Stop and Search Practice, Feb. 2004.

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 years¹⁸¹), but could have been exercised even in the absence thereof without invalidating its effects if the authorization was not finally granted.¹⁸²

The IV Amendment¹⁸³, precluding unreasonable searches, extends for those cases where there is “legitimate expectation privacy”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.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.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.¹⁸⁷ *Fight against terrorism in light of national security considerations shall take place only upon a*

¹⁸¹ A. Kundnani, *Racial Profiling and Anti Terror Stop and Search*, IRR NEWS, Jan. 31, 2006, at <http://www.irr.org.uk/2006/january/ha000025.html> [d/a 10/09/2010].

¹⁸² *Gillan and Quinton v. the United Kingdom*, *supra* 167, paras 80-81.

¹⁸³ U.S. Const. Amends; 18 U.S.C. 242.

¹⁸⁴ *Katz v. United States*, 389 U.S. 347, 353 (1967); *Smith v. Maryland*, 442 U.S. 735, 739-41 (1979).

¹⁸⁵ C. Feikert, C. Doyle, *supra* 175, p.6, at <http://www.fas.org/sgp/crs/intel/RL33726.pdf> [d/a 05/05/2010], p. 4.

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).

¹⁸⁷ *New York v. Belton*, 453 U.S. 454, 457 (1981); *United States v. Watson*, 423 U.S. 411, 423-24 (1976).

warrant issued by a court¹⁸⁸. However, it is vital to note that such a restriction is fully operative only in respect of non-foreigner suspects.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 unconstitutional¹⁹⁰ as it does not yield a rational suspicion, making any such practice “unreasonable” in the language of Amendment IV, as discussed above¹⁹¹. Equal protection clause prohibits ethnic profiling unless, under a strict judicial scrutiny, it appears to be “narrowly tailored” to serve “a compelling interest”.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”.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.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.¹⁹⁵

¹⁸⁸ *United States v. United States District Court (Keith)*, 407 U.S. 297, 321 (1972).

¹⁸⁹ For the further explanations see *United States v. Bin Laden*, 126 F.Supp.2d 264, 285 (S.D.N.Y. 2000); *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974 (N.D.Cal. 2006); *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754 (E.D.Mich. 2006).

¹⁹⁰ U.S. Const. Amends. V, XIV; 18 U.S.C. 242.

¹⁹¹ See for instance *United States v. Swindle*, 407 F.3d 562, 569-70 (2d Cir. 2005); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975).

¹⁹² *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 468 (1989).

¹⁹³ See S.R. Gross, D. Livingston, *Racial profiling under attack*, 102 Columbia Law Review 1413, 2002, p.1420, citing New York City Police Department Report, 2000.

¹⁹⁴ S.R. Gross, D. Livingston, *Racial profiling under attack*, 102 Columbia Law Review 1413, 2002, p. 1423

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.

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

¹⁹⁷ *McCann and Others v. the United Kingdom*, No. 17/1994/464/545, 27 September 1995, para. 194.

The prisoners of Guantánamo Bay¹⁹⁸ were repeatedly denied a right of questioning their detention. However, *Boumediene v. Bush*¹⁹⁹ destroyed this fiction, stating, by a 5–4 vote that aliens detained as enemy combatants²⁰⁰ 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.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 *Hamdi v. Rumsfeld*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 Authorization for Use of Military Force (AUMF)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

¹⁹⁸ U.S. Naval Base Guantanamo Bay is the oldest U.S. base overseas, located on the southeast corner of Cuba. For further information see <http://www.globalsecurity.org/military/facility/guantanamo-bay.htm> [d/a 04/10/2010].

¹⁹⁹ *Boumediene et al. v. Bush, President of the United States, et al.*, 553 U.S. 723 (2008).

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 Guantanamo Detainee Processes, Update from 2 October 2007, at <http://www.defense.gov/news/Sep2005/d20050908process.pdf> [d/a 04/10/2010].

²⁰¹ R. Dworkin, *Why It Was a Great Victory*, 55 *The New York Review of Books* 13, 2008, p.1 at <http://www.nybooks.com/articles/archives/2008/aug/14/why-it-was-a-great-victory/> [d/a 04/10/2010].

²⁰² *Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et al.*, 542 U.S. 507 (2004).

²⁰³ September 18, 2001, Public Law 107-40 [S. J. RES. 23], available at <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html> [d/a 12/10/2010].

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,*²⁰⁴ *but also a presumption of validity against the detainee remained.*²⁰⁵

In *Rasul v. Bush*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 others²⁰⁷ held at the bay filled petitions to challenge their detention in federal courts. Congress instantly reacted by passing the Detainee Treatment Act (DTA)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

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”.

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.

²⁰⁶ *Shafiq Rasul, et al., Petitioners v. George W. Bush, President of the United States, et al.; Fawzi Khalid Abdullah Fahad al Odah, et al., Petitioners v. United States, et al.* 542 U.S. 466 (2004).

²⁰⁷ Lakhdar Boumediene is an Algerian national, arrested in Bosnia in 2001. He was suspected in preparation of an attack on the US embassy but released by the Bosnian Supreme Court for lack of any evidence against him. American troops located in Bosnia, however, captured him immediately after that and transported to Camp X-Ray at Guantánamo where he was neither charged nor tried for any crime. As described in Ronald Dworkin, *Why It Was a Great Victory*, 55 *The New York Review of Books* 13, 2008, p.2 at <http://www.nybooks.com/articles/archives/2008/aug/14/why-it-was-a-great-victory/> [d/a 04/10/2010]. The list of former Guantanamo detainees may be found at <http://www.defense.gov/news/May2006/d20060515%20List.pdf> [d/a 04/10/2010].

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 “consisten[cy] with the standards and procedures specified by the Secretary of Defense”.²⁰⁹ 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.²¹⁰ Congress did not blink an eye and returned with the Military Commissions Act (MCA)²¹¹, 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 clause²¹²). 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.²¹³

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.²¹⁴

²⁰⁹ *Ibid.*

²¹⁰ See *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, et al.*, 548 U.S. 557 (2006).

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.”

²¹³ *Boumediene v. Bush*, discussed at http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/ [d/a 10/04/2010].

²¹⁴ Release of five Algerians from Guantanamo ordered, Dawn, November 22, 2008 at <http://www.dawn.com/2008/11/22/top17.htm> [d/a 04/10/2010]. According to the Washington Post Leon took the extraordinary step of encouraging the Department of Justice to not appeal his ruling, because seven years was enough. See Judge's ruling in Guantanamo case says it all — 'enough.' November 21, 2008, at <http://www.dawn.com/2008/11/22/top17.htm> [d/a 05/10/2010].

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. 15²¹⁶, 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

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.”

²¹⁷ Combating terrorism and respect for human rights, Res. 1271 (2002), at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta02/ERES1271.htm> [d/a 06/10/2010].

²¹⁸ Islamic Human Rights Commission: Briefing: Anti-Terrorism, Crime and Security Act 2001, 28 January 2004, at <http://www.ihr.org.uk/publications/briefings/7057-briefing-anti-terrorism-crime-and-security-act-2001> [d/a 06/10/2010].

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”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”.²²⁰

A group of foreigners, *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 Convention²²¹ 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

²¹⁹ Special Immigration and Appeals Commission Act 1997, Section 5(1).

²²⁰ as cited in Islamic Human Rights Commission: Briefing: Anti-Terrorism, Crime and Security Act 2001, 28 January 2004, at <http://www.ihr.org.uk/publications/briefings/7057-briefing-anti-terrorism-crime-and-security-act-2001> [d/a 06/10/2010].

²²¹ *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” doctrine²²², leaving purely political matters for the institutional competence of relevant agencies.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.²²⁴ Persons were qualified as terrorists by a political figure, but have never been charged or tried for a crime as such²²⁵. 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. *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

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].

²²³ *A (FC) et al. supra* 221, paras 27-29.

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, 6th 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.”

²²⁵ *A (FC) et al. v. Secretary of State for the Home Department*, [2004] UKHL 56, para 3.

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.”²²⁶

It is alleviating to know that ATCSA has been replaced by the Prevention of Terrorism Act in 2005.²²⁷

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.^{228,229}

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.

²²⁸ D. Barak-Erez, M. C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, Columbia Journal of Transnational Law, 2009, p. 19.

²²⁹ In 2002 Israel enacted the Incarceration of Unlawful Combatants Law (5762-2002, available at <http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AEBE770BD>), which applies to the detention of foreigners suspected in terrorism and residing outside Israel.

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

²³⁰ *A [John Does] v Ministry of Defense*, CrimFH 7048/97, April 12, 2000, p. 14.

Absolutely inhuman and totally disgusting human rights abuse is torture. Under certain conditions, torture and similar treatment may amount to a crime against humanity²³¹. Moreover, prohibition on torture is one of the most widely acknowledged *jus cogens* rule.²³² Systematic infliction of pain to a person, unable to defend himself because of his incarceration and tight hand cuffs, 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.²³³

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

²³¹ Art. 7(1)(f) of the Statute, *supra* 1.

²³² See Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 11.

²³³ S. J. Sosebee, *Speaking About the Unspeakable: Officially Sanctioned Torture*. October 1991. At <http://www.wrmea.com/backissues/1091/9110041.htm> [d/a 08/10/2010].

lead by Justice Moshe Landau.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.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...”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”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”.²³⁸

²³⁴ Landau Commission Report, 23 Israel Law Review 2-3, 1989. pp. 145-7.

²³⁵ *Ibid*, para 2.2.

²³⁶ *Id*, para 2.18.

²³⁷ *Id*, para 4.6.

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 Torture²³⁹ 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.²⁴⁰

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.*²⁴¹ 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

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.

²⁴¹ *Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94, 1999, pp. 12-3, para 15.

“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.²⁴²

2.6.3. The UK: *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,²⁴³ including swift deprivation of liberty, prolonged detention and internment. A respective notice of derogation from the European Convention²⁴⁴ provisions had been submitted by the United Kingdom.

The case of several detainees interned in course of implementation of these practices was brought *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. *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*

²⁴² *ibid*, pp. 33-9.

²⁴³ *Ireland v. the United Kingdom*, Application no. 5310/71, 18 January, 1978, para. 11.

²⁴⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, *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. *hooding: 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.

²⁴⁸ adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, ISBN 92-871-5021-4, published by Council of Europe Publishing, September 2002.

stringent standard.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”.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 *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”.²⁵¹

One may add that although successful fight against terrorism may justify prolonged police custody²⁵² in the eyes of Strasburg, it nevertheless shall bear adequate safeguards against arbitrariness, which cannot be dispensed altogether with “prompt” judicial control.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

²⁴⁹ K. Bard, *Fairness in Criminal Proceedings: Article 6 of the European Convention on Human Rights in Comparative Perspective*, Hungarian Official Journal Publisher, Budapest, 2008, p. 240.

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, *in fine*.

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.”

²⁵² *Brogan and Others v. the United Kingdom*, 29 November 1998, Series A no. 145-B, para. 61.

²⁵³ *Ibid.*

compliance with the specific requirements of Article 5.3^{254,255}. So a period of detention without judicial control of four days may already fall outside this strict constraints.²⁵⁶

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.²⁵⁷ The only *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).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

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.”

²⁵⁵ *Brannigan and Mc Bride v. the United Kingdom*, 26 May 1993, para. 58.

²⁵⁶ *Brogan and Others v. the United Kingdom*, *supra* 252, para. 66 (14 days).

²⁵⁷ *Findlay v. the United Kingdom*, 25 February 1997, Reports 1997-I, p. 281, para. 73.

²⁵⁸ See *mutatis mutandis*, *Gautrin and Others v. France*, 20 May 1998, Reports 1998-III, pp. 1030-31, para. 58.

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”²⁵⁹ and found a violation of the article referred.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 *in dubio pro reo* principle applies to the accused. Furthermore, any charge is confirmed unless proved “beyond reasonable doubt”.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.²⁶²

Presumption of innocence is correlated with the *right to keep silence* and *privilege against self-incrimination*. It is also relative to *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

²⁵⁹ Objective test: *Fey v. Austria*, 24 February 1993, § 28, Series A no. 255-A.

²⁶⁰ See *Incal v. Turkey*, No. 41/1997/825/1031, 9 June 1998; also *Fatullayev v. Azerbaijan*, Application no. 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).

²⁶¹ Human Rights Committee, CCPR General Comment No. 13, *supra* 250, para 7.

²⁶² Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR 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 All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173, 9 December 1988, available at <http://www.un.org/documents/ga/res/43/a43r173.htm>.

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 defendant²⁶⁴, yet it is particularly important to shape the scope of the right to be present in the proceedings appropriately.

Although various considerations occurred in Rome²⁶⁵, 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.

²⁶³ Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, ISBN 92-871-5021-4, published by Council of Europe Publishing, September 2002, Principle XIV. For further reference see International Convention for the Suppression of the Financing of Terrorism, *supra* 57, Art. 8.

²⁶⁴ See *e.g. Collozza 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).

²⁶⁵ O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, Baden-Baden: Nomos Verlagsgesellschaft, 1999, p. 806.

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-

²⁶⁷ *Imbrioscia v. Switzerland*, , Series A no. 275, 24 November 1993, p. 13, para 36; *John Murray v the UK (1)*, No.41/1994/488/570, 25 January 1996, pp. 54-55, para 63.

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 evaluation²⁷¹ 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

²⁶⁹ *Magee v. The United Kingdom*, supra.

²⁷⁰ *Isgro v. Italy*, Application no. 11339/85, 19 February 1991, para 34; *Lüdi v. Switzerland*, Application no. 12433/86, 15 June 1992, para 47.

²⁷¹ *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93; 21364/93 ; 21427/93..., 23 April 1997, para 51; *Luca v Italy*, 27 January 2001 (*Application no. 33354/96*), para 39; *Barberà, Messegué and Jabardo v Spain*, Application no. 10590/83, 6 December 1998, para 78; *Kostovski v the Netherlands*, Application no. 11454/85, 20 November 1989, para 39.

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 presence²⁷⁵. 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.²⁷⁶

It is admitted, however, that this right, along with most other Convention rights, “is not unlimited”.²⁷⁷ It has been held that anonymous witnesses are not prohibited as such to the extent it is compatible with the Convention²⁷⁸. 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.²⁷⁹

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

protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

²⁷⁵ see *Saddak and Others v. Turkey*, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, para 67.

²⁷⁶ *Vidal v Belgium*, Application no. 12351/86, 22 April 1992; *Destrehem v France*, Application No. 56651/00, 18 May 2004; *Papageorgiou v Greece (2)*, Application No. 21032/08, 15 October 2009; *Thomas v UK*, Application No. 19354/02, 10 May 2005.

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.

²⁷⁹ International Criminal Court, Rules of Procedure and Evidence, U.N. Doc. PCNICC/2000/1/Add.1 (2000), Rule 16(2).

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 1988²⁸⁴. 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*

²⁸⁰ *Van Mechelen and Others v. the Netherlands*, supra 271, para 60.

²⁸¹ Y.A. Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, NY 2002, p. 57.

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].*²⁸⁵

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.”²⁸⁶ 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.²⁸⁷ 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.”²⁸⁸

²⁸⁵ *John Murray v the UK (1)*, Application no. 18731/91, 25 January 1996, para 41.

²⁸⁶ Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies, ISBN 92-871-5021-4, published by Council of Europe Publishing, September 2002, Principle X(2).

²⁸⁷ J. Stern, *Execute Terrorists at Our Own Risk*, New York Times, 28 February 2001, at <http://www.deathpenaltyinfo.org/node/572> [d/a 15/10/2010].

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.²⁸⁹ At the same time, too generous definition of terrorism can be used to shut down non-violent dissent and undermine democratic society.²⁹⁰

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.²⁹¹ 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.²⁹²

²⁸⁹ Art. 1(2), Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970); Art. 1, International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; Art. 1, International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961); Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962).

²⁹⁰ OSCE Manual: *Countering Terrorism, Protecting Human Rights*, ODIHR, Warsaw, 2007, p. 23.

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/gal3386.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 fidae* 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

²⁹³ T. G. Ash, *Is there a Good Terrorist?* The New York Review of Books, 29 November 2001, at <http://www.nybooks.com/articles/archives/2001/nov/29/is-there-a-good-terrorist/> [d/a 09/09/2010].

²⁹⁴ *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/gal3386.doc.htm> [d/a 20/10/2010].

²⁹⁵ See specifically declarations made by Israel, Non-Aligned Movement, the European Union, and the Organization of the Islamic Conference at 44th Ad Hoc Committee meeting, see *Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens One-Week Headquarters Session*, 44th Meeting, 12 April 2010, at <http://www.un.org/News/Press/docs/2010/13154.doc.htm> [d/a 20/10/2010].

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 refugees²⁹⁶ 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 humanity²⁹⁸ while “non-political crimes” do include terrorist attacks. The logic behind the latter is appealing:

²⁹⁶ Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.

²⁹⁷ *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 04/09/2003, UNHCR/UN Refugee Agency, para. 2.

²⁹⁸ *ibid*, para 13.

“when the act in question is disproportionate to the alleged political objective, nonpolitical motives are predominant”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.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.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 *refoulement* if he, say by committing serious offences, poses, or may pose a danger to the host State.

3.3. Legal factors: accepting definition and process of trial

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 respond immediately by adopting relevant legislative measures. Assuming there is a sufficient legal national and intergovernmental framework for the successful

²⁹⁹ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/Eng/REV.1, Geneva, 1992 Ed., para 152, at <http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf> [d/a 05/06/2010].

³⁰⁰ *Guidelines on International Protection: Application of the Exclusion Clauses...*, *supra* 297, para 15.

³⁰¹ *id.*, para 17.

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.

³⁰² *Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens One-Week Headquarters Session*, 44th Meeting, 12 April 2010, at <http://www.un.org/News/Press/docs/2010/13154.doc.htm> [d/a 20/10/2010]

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.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 evidence³⁰⁶, 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

³⁰⁵ *The Practice of International Criminal Tribunals and their Relevance to Military Commissions in Light of Hamdan v Rumsfeld*. Testimony of G. Gahima, Senior Fellow, before the House Armed Services Committee, July 2006, at <http://www.usip.org/publications/practice-international-criminal-tribunals-and-their-relevance-military-commissions-light-h> [d/a 22/10/2010].

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.³⁰⁷

As an alternative to classified sources “evidence from a different sources or in a different form”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”.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 tribunals³¹⁰ demonstrate occasional admittance of hearsay in trial.³¹¹ For instance, in *Prosecutor v. Tadic* the Court interpreted Rules 89(c) and 89(d) of the Rules of Procedure and Evidence³¹² 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.”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.”³¹⁴ ICC Rules of Procedure are

³⁰⁷ Art. 72(7)(a)(ii)&(iii) in accordance with Art.87(7), *ibid*.

³⁰⁸ Art. 72(5)(c), *id*.

³⁰⁹ As defined by *Legal Dictionary* at <http://www.duhaime.org/LegalDictionary/H/Hearsay.aspx> [d/a 22/10/2010]

³¹⁰ International Criminal Tribunal for the Former Yugoslavia, Statute adopted by S C. Res. 827 on 25 May 1993, International Criminal Tribunal for Rwanda, decision adopted by SC Res. 955 on 8 November 1994.

³¹¹ G-J.A. Knoops, *An Introduction to the Law of International Criminal Tribunals. A Comparative Study*. Transnational Publishers, Inc., Ardsley, New York, 2003, pp. 136-140.

³¹² International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 March 1994, *amendments adopted* 8 January 1996.

³¹³ *Prosecutor v. Tadić* (Judgement). Case No. IT-94-aA. 38 ILM 1518 (1999).

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

silent on the exclusion of hearsay, though the text of Art. 69(4)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 *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”.^{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 *supra* p. 69, para 2.7.6.).

Thus *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.

http://www.icty.org/x/file/Legal%20Library/Practice_Directions/it192_rule92bis_procedure_en.pdf [d/a 22/10/2010].

³¹⁵ “The Court may rule on the relevance or admissibility of any evidence, taking into account, *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.”

³¹⁶ *Prosecutor v. Tihomir Blaskic* (Trial Judgement), IT-95-14-T, 3 March 2000, pp. 9-18.

³¹⁷ *The Practice of International Criminal Tribunals and their Relevance to Military Commissions in Light of Hamdan v Rumsfeld*. Testimony of G. Gahima, Senior Fellow, before the House Armed Services Committee, July 2006, at <http://www.usip.org/publications/practice-international-criminal-tribunals-and-their-relevance-military-commissions-light-h> [d/a 22/10/2010].

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 crimes³¹⁸. 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.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 offender³²⁰. One shall not forget that domestic proceedings, in principle, could be

³¹⁸ See further P.J. van Krieken, *supra* 11, p. 3.

³¹⁹ I.e. Special Court for Lebanon, established pursuant to the Agreement between the United Nations and the Lebanese Republic in light of the Security Council resolution 1664 (2006) of 29 March 2006, Statute available at <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statue-EN.pdf> [d/a 27/10/2010].

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 impartially³²¹ or simply the state, due to total collapse of judicial enterprise, is not in a position to institute proceedings.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.^{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.³²⁵

³²¹ Article 17(2), *ibid.*

³²² Article 17(3), *id.*

³²³ See Article 13(b)7(c): Prosecutor acting *ex proprio motu* (Art.15) and referral by Security Council.

³²⁴ M. Banchik, *The International Criminal Court & Terrorism*, 2003 at http://www.tamilnation.org/terrorism/international_law/0306iccandterrorism.pdf [d/a 14/1/2010].

³²⁵ This was a primary problem with international segment of judges in Iraqi Tribunal. See further L.A. Dickenson, *The Promise of Hybrid Courts*. 97 *American Journal of International Law* 295, 2003.

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.

BIBLIOGRAPHY

Treaties and conventions

1. Convention for the Prevention and Punishment of Terrorism, League of Nations, document C.546.M.383.1937.V.
2. Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963. (Deposited with the Secretary-General of the International Civil Aviation Organization)
3. Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178, *entered into force* January 26, 1973
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 167, 13 I.L.M. 41, *entered into force* Feb. 20, 1977
5. International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983
6. Convention on the Physical Protection of Nuclear Material, T.I.A.S. 11080, *entered into force* Feb. 8, 1997
7. Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988. (Deposited with the Governments of the Russian Federation, the United Kingdom and the United States of America and with the Secretary-General of the International Civil Aviation Organization)
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), *entered into force* March 1, 1992 and 2005 Protocol (not entered into force yet)
9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. (Deposited with the Secretary-General of the International Maritime Organization)
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991 (Deposited with the Secretary-General of the International Civil Aviation Organization)
11. International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), *entered into force* May 23, 2001
12. International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), *adopted* 9 Dec. 1999, *entered into force* 10 Apr. 2002
13. International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (not entered into force yet)
14. Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971 Convention for the Suppression of Unlawful Acts

against the Safety of Civil Aviation, 974 U.N.T.S. 178, *entered into force* January 26, 1973

15. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 U.N.T.S. 167, 13 I.L.M. 41, *entered into force* Feb. 20, 1977
16. International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983.
17. Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* Oct. 24, 1945
18. 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
19. 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
20. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950
21. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950
22. Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950
23. Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.
24. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978
25. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.
26. Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons, Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 1342 UNTS 137, Oct. 10, 1998
27. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.
28. Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).
29. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993).
30. Statute of the International Criminal Court, 2187 U.N.T.S. 90, *entered into force* July 1, 2002.

31. International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976
32. International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.
33. Convention relating to the Status of Refugees, 189 U.N.T.S. 150, *entered into force* April 22, 1954.

Regional instruments

34. European Convention on Extradition, ETS No. 24, 13.12.1957 and first and second Additional Protocols, ETS No. 86, 15.10.1975 and ETS No. 98, 17.03.1978
35. European Convention on Mutual Assistance in Criminal Matters, ETS No. 30, 20.04.1959 and first and second Additional Protocols, ETS No. 99, 17.03.1978 and ETS No. 182, 08.11.2001
36. European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73, 15.05.1972
37. European Convention on the Compensation of Victims of Violent Crimes, ETS No. 116, 24.11.1983
38. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141, 08.11.1990
39. Convention on Cybercrime, ETS No. 185, 23.11.2001 and Additional Protocol concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, ETS No. 189, 28.01.2003
40. Council of Europe Convention on the Prevention of Terrorism, CETS No. 196, 16.05.2005
41. Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism, CETS No. 198, 16.05.2005
42. European Convention on the Suppression of Terrorism, ETS.90, 27.01.1977
43. Protocol amending the European Convention on the Suppression of Terrorism, ETS No. 190, 2003
44. EU Council Framework Decision of 13 June 2002 on combating terrorism, (2002/475/JHA), OJ L 164, 22/06/2002
45. Decision no. 1 Combating Terrorism, MC(9).DEC/1, Bucharest, 04.12.
46. OSCE Charter on Preventing and Combating Terrorism, MC(10).JOUR/2, Porto, 07.12.2002
47. Programme of Action, adopted at Bishkek International Conference on Enhancing Security and Stability in Central Asia: Strengthening Comprehensive Efforts to Counter Terrorism, 13-14.12.2003
48. Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy, MC.DOC/3/07, Madrid, 30.11.2007
49. Decision No. 10/08 Further Promoting the OSCE's Action in Countering Terrorism, MC.DEC/10/08, Helsinki, 05.12.2008.

50. Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, Minsk, 1999 at http://www.odkb.gov.ru/start/index_azbengl.htm [d/a 09/09/2010]
51. Inter-American Convention against Terrorism, AG/RES. 1840 (XXXII-O/02), 2002
52. Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe* on 19 September 1981/21 *Dhul Qaidah 1401*
53. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended* by Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively
54. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992)
55. African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.
56. Combating terrorism and respect for human rights, Res.1271 (2002), at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta02/ERES1271.htm> [d/a 06/10/2010].

UN General Assembly Resolutions

57. Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, G.A. res. 51/210, Annex, 51 UN GAOR, Supp.(No.), U.N.Doc. A/51/631 (1996), para (I)2.
58. General Assembly Resolution 3314 (XXIX), Definition of Aggression, 14 December 1974
59. Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)
60. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. res. 2625, Annex, 25 UN GAOR, Supp. (No. 28), U.N. Doc. A/5217 at 121 (1970)
61. Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. res. 1514 (XV), 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1961)
62. Permanent Sovereignty over Natural Resources, G.A. res. 1803 (XVII), 17 U.N. GAOR Supp. (No.17) at 15, U.N. Doc. A/5217 (1962)
63. UN GA Res.3034 (XXVII), 18 December 1972
64. UN GA Res.42/159, 7 December 1987
65. UN GA Res. 51/210, 17/12/1996
66. UN GA Res. 174, UN GAOR, 2nd Sess., UN Doc. A/519 (1947)
67. UN GA Res. 36/106, 10 December 1998
68. UN GA Res/49/53, 17 February 1995
69. UN GA Res.50/46, 18 December 1996

UN Security Council Resolutions

70. S/Res/1267, 15 October 1999
71. S/Res/1363, 30 July 2001
72. S/Res/1368, 12 September 2001

73. S/Res/1373, 28 September 2001
 74. S/Res/1664, 29 March 2006

Judicial decisions

International ad hoc tribunals

75. *Prosecutor v. Tadić* (Judgment). Case No. IT-94-aA. 38 ILM 1518 (1999)
 76. *Prosecutor v. Tihomir Blaskić* (Trial Judgement), IT-95-14-T, 3 March 2000, pp. 9-18

The European Court for Human Rights

77. *Gillian and Quinton v. The United Kingdom*, Application no. 4158/05, 12 January 2010
 78. *Foka v. Turkey*, Application no. 28940/95, para 85, 24 June 2008
 79. *Rotaru v. Romania* [GC], Application no. 28341/95, para 55, ECHR 2000-V
 80. *Hasan and Chaush v. Bulgaria* [GC], Application no. 30985/96, para 4, ECHR 2000-XI
 81. *Maestri v. Italy* [GC], Application no. 39748/98, para 30, ECHR 2004-I
 82. *Al-Nashif v. Bulgaria*, Application no. 50963/99, para 119, 20 June 2002
 83. *Ramazanov and Others v. Azerbaijan*, Application no. 44363/02, para 62, 1 February 2007
 84. *Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria*, Application no. 14134/02, para 46
 85. *Vlasov v. Russia*, Application no. 78146/01, 12 June 2008, para 125
 86. *Meltex Ltd and Movsesyan v. Armenia*, Application no. 32283/04, para 81, 17 June 2008
 87. *S. and Marper v. the United Kingdom* [GC], Applications nos. 30562/04 and 30566/04, paras 95-6, 4 December 2008
 88. *Oršuš and others v. Croatia*, Application no. 15766/03, 16 March 2010
 89. *McCann and Others v. the United Kingdom* [GC], Application no. 18984/91, 27 September 1995, para. 194
 90. *Lawless v. Ireland* (3), Application No. 332/57, 1 July 2003, para 6.
 91. *Ireland v. the United Kingdom*, Application no. 5310/71, 18 January, 1978, para. 96
 92. *Brogan and Others v. the United Kingdom*, Application Nos. 11209/84 ; 11234/84 ; 11266/84, 29 November 1998, para. 61.
 93. *Brannigan and Mc Bride v. the United Kingdom*, Application nos. 14553/89; 14554/89, 26 May 1993, para. 58.
 94. *Aksoy v. Turkey*, Application no. 21987/93, 12 December 1996, para. 66
 95. *Findlay v. the United Kingdom*, Application no. 22107/93, 25 February 1997, para. 73
 96. *Gautrin and Others v. France*, Application nos. 21257/93 ; 21258/93 ; 21259/93, 20 May 1998, para. 58
 97. *Fey v. Austria*, Application no. 14396/88, 24 February 1993
 98. *Incal v. Turkey*, Application no. 22678/93, 9 June 1998
 99. *Fatullayev v. Azerbaijan*, Application no. 40984/07, 22 April 2010, paras 135-140
 100. *Collozza v. Italy*, Application no. 9024/80, 12 February 1985, para 7
 101. *Imbrioscia v. Switzerland*, Application no. 13972/88, 24 November 1993, p. 13, para 36
 102. *John Murray v the UK (1)*, Application no. 18731/91, 25 January 1996
 103. *Magee v. The United Kingdom*, Application no. 28135/95, 6 June 2000, para 39
 104. *Isgroè v. Italy*, Application no. 11339/85, 19 February 1991, para 34
 105. *Lüdi v. Switzerland*, Application no. 12433/86, 15 June 1992, para 47

106. *Luca v Italy*, Application no. 33354/96, 27 January 2001, para 39
107. *Barberà, Messegué and Jabardo v Spain*, Application no. 10590/83, 6 December 1998, para 78
108. *Kostovski v the Netherlands*, Application no. 11454/85, 20 November 1989, para 39
109. *Saddak and Others v. Turkey*, Application nos. 29900/96, 29901/96, 29902/96 and 29903/96, 17 July 2001, para 67
110. *Vidal v Belgium*, Application no. 12351/86, 22 April 1992
111. *Destrehem v France*, Application No. 56651/00, 18 May 2004
112. *Papageorgiou v Greece (2)*, Application No. 21032/08, 15 October 2009
113. *Thomas v UK*, Application No. 19354/0210, May 2005
114. *X. v Belgium*, Application no. 841 7/78, 4 May 1979, para 207
115. *Doorson v. the Netherlands*, Application no. 20524/92, 26 March 1996, paras. 69-70.
116. *Van Mechelen and Others v. the Netherlands*, Application Nos. 21363/93;
117. 21364/93 ; 21427/93..., 23 April 1997
118. *Chahal v. the United Kingdom*, Application no. 22414/93, 15 November 1996, paras. 131 and 144
119. *Rowe and Davies v. the United Kingdom*, Application no. 28901/95, 16 February 2000, para. 60

The United States courts

120. *R v McDonnell*, 1 S.C.R.948 (1997)
121. *Brown v City of Oneonta*, 221 F 3rd 329, 334 (2nd Cir.2000)
122. *Katz v. United States*, 389 U.S. 347, 353 (1967)
123. *Smith v. Maryland*, 442 U.S. 735, 739-41 (1979)
124. *United States v. Arvizu*, 534 U.S. 266, 273 (2002)
125. *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005)
126. *New York v. Belton*, 453 U.S. 454, 457 (1981)
127. *United States v. Watson*, 423 U.S. 411, 423-24 (1976)
128. *United States v. United States District Court (Keith)*, 407 U.S. 297, 321 (1972)
129. *United States v. Bin Laden*, 126 F.Supp.2d 264, 285 (S.D.N.Y. 2000)
130. *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974 (N.D.Cal. 2006)
131. *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754 (E.D.Mich. 2006)
132. *United States v. Swindle*, 407 F.3d 562, 569-70 (2d Cir. 2005)
133. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975)
134. *City of Richmond v J.A. Croson Co.*, 488 U.S. 469, 468 (1989)
135. *Korematsu v. United States*, 323 U.S. 214 (1944)
136. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984)
137. *Brown v. Vasquez*, 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992)
138. *Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners v. Donald H. Rumsfeld, Secretary of Defense, et al.*, 542 U.S. 507 (2004)
139. *Boumediene et al. v. Bush, President of the United States, et al.*, 553 U.S. 723 (2008), p. 38

140. *Shafiq Rasul, et al., Petitioners v. George W. Bush, President of the United States, et al.* 542 U.S. 466 (2004)
141. *Fawzi Khalid Abdullah Fahad al Odah, et al., Petitioners v. United States, et al.* 542 U.S. 466 (2004)
142. *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, et al.,* 548 U.S. 557 (2006)

The United Kingdom, House of Lords

143. *A (FC) et al. v. Secretary of State for the Home Department,* [2004] UKHL 56

Israel, Supreme Court

144. *A [John Does] v Ministry of Defense,* CrimFH 7048/97, April 12, 2000, p. 14
145. *Public Committee Against Torture in Israel v. State of Israel,* HCJ 5100/94, 1999, pp. 12-3, para 15

Books

146. D. Tucker, *Skirmishes at the Edge of Empire,* Praeger, Westport, 1997, p. 51
147. R. Higgins, *The General International Law of Terrorism,* in *Terrorism and international law,* ed. by R. Higgins, M. Flory, London, 1997, p. 24.
148. S. Marks, A. Clapham, *International Human Rights Lexicon,* Oxford, 2005, p. 345.
149. *Actes de la VI' Conference Internationale pour l'unification du droit p6nal* (Paris, Pedone, 1938), p. 420, annex A.III, « Terrorisme », Article 1.
150. A. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Databases and Literature,* New Brunswick, CT: Transaction, 1983, pp.119-152
151. J.K. Lambert, *Terrorism and Hostages in International Law,* Grotius, 1992
152. P.J. van Krieken, *Refugee Law in Context, the Exclusion Clause,* Asser/Kluwer, 1999, pp.177-194.
153. O.Y. Elagab, *International Law Documents relating to Terrorism,* London/Sydney, 1997, p. xix
154. P. C. Szasz, *General Law-Making Processes,* 1 United Nations Legal Order, ch. 1, Ed. by Oscar Schachter & Ch. C. Joyner, 1995, at p. 35, §§61-67
155. A. Cassese, *From Nuremberg to Rome: International Military Tribunal to the International Criminal Court,* The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 11
156. P. Robinson, *The Missing Crimes,* The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 515
157. J. Crawford, *The Work of International Law Commission,* The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, p. 27
158. P. Robinson, *The Missing Crimes,* The Rome Statute of the International Criminal Court, A Commentary, Vol 1, A. Cassese, Oxford University Press, 2003, pp. 516-8
A. Cassese, *International Criminal Law,* 2nd Ed., Oxford, 2003, pp. 120-132.

159. O. Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes*, Article by Article, Baden-Baden: Nomos Verlagsgesellschaft, 1999, p. 806.
160. K. Bard, *Fairness in Criminal Proceedings: Article 6 of the European Convention on Human Rights in Comparative Perspective*, Hungarian Official Journal Publisher, Budapest, 2008, p. 230
161. Y.A. Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, Antwerp, NY 2002, p. 57
162. G.-J. A. Knoops, *An Introduction to the Law of International Criminal Tribunals. A Comparative Study*. Transnational Publishers, Inc., Ardsley, New York, 2003, pp. 136-140
163. P.J. van Krieken, *Terrorism and the International Legal Order*, Asser Press, The Hague, 2002

Scholarly articles

164. D. Chadwick, *A tale of two courts: the 'creation' of a jurisdiction?*, 9 Journal of Conflict and Security Law 1, Oxford University Press, 2004 p. 71
165. G. Levitt, *Is Terrorism Worth Defining?* Ohio Northern University Law Review 97, 1986
166. Lord Carlile of Berriew Q.C., *The Definition of Terrorism*, March 2003, p.3, available at <http://www.icj.org/IMG/UK-Carlile-DefTer.pdf> [d/a 06/09/2010]
167. Summary of the Protocol amending the European Convention on the Suppression of Terrorism, ETS No. 190, 2003 is available at <http://conventions.coe.int/treaty/en/Summaries/Html/190.htm> [d/a 08/09/2010]
168. T. G. Ash, *Is There a Good Terrorist?* The New York Review of Books, at <http://www.nybooks.com/articles/archives/2001/nov/29/is-there-a-good-terrorist/#fn2-964990876> [d/a 09/09/2010]
169. M. Ch. Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 Harvard International Law Journal 83, Winter 2002, p. 102
170. 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, pp. 159, 160-1
171. P. C. Szasz, *The Security Council Starts Legislating*, 96 American Journal of International Law 901, October 2002, p. 903
172. E. Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?*, 28 Fordham International Law Journal 542, February 2005;
173. E. Rosand, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda/ Taleban Sanctions*, 98 The American Journal of International Law, 2004
174. E. Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism*, 97 American Journal of International Law 333, April 2003, p. 334
175. W. Gehr, *The Universal Legal Framework Against Terrorism*, Právne Aspekty Boja Proti Medzinárodnému Terorizmu, 2006

176. *The Challenge For The International Criminal Court: Terrorism* (by unknown author), 2008, at <http://www.legalserviceindia.com/article/I247--International-Criminal-Court---Terrorism.html> [d/a 16/09/2010]
177. G. Endo, *Nullum Crimen Nullum Poena Sine Lege* Principle and the ICTY and the ICTR, (2002) 15 *Revue québécoise de droit international* 205, pp.207-8
178. T. Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 *The American Journal of International Law* 1, Jan.2000, pp. 78-89
179. S.R. Gross, D. Livingston, *Racial profiling under attack*, 102 *Columbia Law Review* 1413, 2002
180. R.R. Banks, *Race-based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *UCLA Law Review* 1075, 2001, pp. 1078-81
181. R. Dworkin, *Why It Was a Great Victory*, 55 *The New York Review of Books* 13, 2008, p.2 at <http://www.nybooks.com/articles/archives/2008/aug/14/why-it-was-a-great-victory/> [d/a 04/10/2010].
182. D. Barak-Erez, M. C. Waxman, *Secret Evidence and the Due Process of Terrorist Detentions*, *Columbia Journal of Transnational Law*, 2009, p. 19
183. S. J. Sosebee, *Speaking About the Unspeakable: Officially Sanctioned Torture*. October 1991. At <http://www.wrmea.com/backissues/1091/9110041.htm> [d/a 08/10/2010]
184. T. G. Ash, *Is there a Good Terrorist?* *The New York Review of Books*, 29 November 2001, at <http://www.nybooks.com/articles/archives/2001/nov/29/is-there-a-good-terrorist/> [d/a 09/09/2010]
185. M. Banchik, *The International Criminal Court & Terrorism*, 2003 at http://www.tamilnation.org/terrorism/international_law/0306iccandterrorism.pdf [d/a 14/1/2010]
186. L. A. Dickenson, *The Promise of Hybrid Courts*. 97 *American Journal of International Law* 295, 2003.

Official reports and other documents

187. Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994), para 7.
188. Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para 11
189. Report of the Working Group on Arbitrary Detention to the UN Commission on Human Rights, doc. E/CN.4/2004/3, 15 December 2003, § 64.
190. Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977), Rules 84(2), 85(1)
191. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, U.N. Doc. A/RES/43/173, 9 December 1988

192. Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, HCR/GIP/03/05, 04/09/2003, UNHCR/UN Refugee Agency
193. UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*, HCR/IP/4/Eng/REV.1, Geneva, 1992 Ed., para 152, at <http://www.unhcr.org/refworld/pdfid/3ae6b3314.pdf> [d/a 05/06/2010]
194. OSCE Manual: *Countering Terrorism, Protecting Human Rights*, ODIHR, Warsaw, 2007, p. 23
195. *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers' Deputies, ISBN 92-871-5021-4, published by Council of Europe Publishing, September 2002
196. International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.7 (1996), *entered into force* 14 March 1994, *amendments adopted* 8 January 1996.
197. *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 http://www.icty.org/x/file/Legal%20Library/Practice_Directions/it192_rule92bis_procedure_en.pdf [d/a 22/10/2010]
198. Special Court for Lebanon Statute, at <http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statue-EN.pdf> [d/a 27/10/2010]
199. *Draft Code of Offences against the Peace and Security of Mankind* at http://untreaty.un.org/ilc/summaries/7_3.htm#_ftnref5 , last update: 30 June 2005 [d/a 14/09/2010]
200. Landau Commission Report, 23 *Israel Law Review* 2-3, 1989. pp.145-186
201. *The Practice of International Criminal Tribunals and their Relevance to Military Commissions in Light of Hamdan v Rumsfeld*. Testimony of G. Gahima, Senior Fellow, before the House Armed Services Committee, July 2006, at <http://www.usip.org/publications/practice-international-criminal-tribunals-and-their-relevance-military-commissions-light-h> [d/a 22/10/2010].
202. H.G.A. Hughes, *Patterns of Global Terrorism 1985-2005: US Department of State Reports with Supplementary Documents and Statistics*, 2006, Emerald Group Publishing Ltd, Vol. 20, No. 6
203. Statement by the President of the ICRC - 58th Session of the Commission on Human Rights, Geneva, 26 March 2002 at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/59KC9Y> [d/a 17/08/2010]
204. *IHL in the context of terrorism*, ICRC Official Statement, 21 July 2005 at <http://www.icrc.org/web/eng/siteeng0.nsf/html/terrorism-ihl-210705> [d/a 20/09/2010]
205. Action against Terrorism Unit Mandate at <http://www.osce.org/atu/13397.html>, [d/a 07/02/2010]

News and fact-sheets

206. Statement of South African Nobel Prize Laureates (Bishop Desmond Tutu, F.W. Klerk & Nelson Mandela) issued by Nelson Mandela Foundation, 19 September 2001, available at <http://www.southafrica-newyork.net/consulate/pdf/saaw5.pdf>, [d/a 26/01/2010]

207. *What is Terrorism?* International Terrorism and Security Research, available at <http://www.terrorism-research.com/> [d/a 06/09/2010]
208. *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],
209. V. Dodd, *Metropolitan police used anti-terror laws to stop and search 58 under-10s*, 18 August 2009, available at <http://www.guardian.co.uk/politics/2009/aug/18/met-police-stop-search-children> [d/a 08/09/2010]
210. *Stop-and-search powers ruled illegal by European court*, 12 January 2010, available at <http://news.bbc.co.uk/2/hi/8453878.stm> [d/a 08/09/2010]
211. Press release from 19/09/2001, *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=e>, [d/a 07/02/2010]
212. Press-Conference with NATO Secretary General J. de H. Scheffer, Informal meeting of NATO Defence Ministers and the Meeting of the NATO-Russia Council answers, Spain, 9 September 2007, at <http://www.nato.int/docu/speech/2007/s070209ca.html> [d/a 09/09/2010]
213. *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/gal3386.doc.htm> [d/a 20/10/2010]
214. S. Gordon, *Cyberterrorism?* White paper of Semantec, at <http://www.symantec.com/avcenter/reference/cyberterrorism.pdf> [d/a 16/09/2010]
215. International Humanitarian Law – Treaties and Documents at <http://www.icrc.org/ihl.nsf/COM/380-600168?OpenDocument> [d/a 16/09/2010]
216. *Ridge: Terror suspect doesn't deserve 'full range' of rights*, CNN Report from 29 December 2009 at [http://politicalticker.blogs.cnn.com/2009/12/29/ridge-terror-suspect-doesnt-deserve-full-range-of-rights/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fcnn_politicalticker+\(Blog%3A+Political+Ticker\)](http://politicalticker.blogs.cnn.com/2009/12/29/ridge-terror-suspect-doesnt-deserve-full-range-of-rights/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+rss%2Fcnn_politicalticker+(Blog%3A+Political+Ticker)) [d/a 17/08/2010]
217. *Challenging Ethnic Profiling in Europe*, Open Society Institute: Equality and Citizenship, at http://www.soros.org/initiatives/justice/focus/equality_citizenship/events/challenging-ethnic-profiling-20100317 [d/a 06/05/2010]
218. *Police and Criminal Evidence Act 1984, Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search*, pp.8-9, at <http://www.homeoffice.gov.uk/docs/pacecodea.pdf> [d/a 06/05/2010]
219. Home Office, Stop and Search Action Team: Interim Guidelines, at <http://www.privacyinternational.org/issues/terrorism/library/ukstopsearchguidance2004.pdf> [d/a 06/05/2010]
220. Home Office, Race Relations and the Police, at <http://www.homeoffice.gov.uk/police/about/race-relations/> [d/a 06/04/2006]
221. *Code of practice: reporting and recording racist incidents*, at <http://www.homeoffice.gov.uk/documents/coderi.pdf?view=Binary> [d/a 06/05/2010]
222. A. Kundnani, *Racial Profiling and Anti Terror Stop and Search*, IRR NEWS, Jan. 31, 2006, at <http://www.irr.org.uk/2006/january/ha000025.html> [d/a 10/09/2010]

223. A. Feikert, C. Doyle, *Anti-Terrorism Authority Under the Laws of the United Kingdom and the United States*, CRS Report for Congress, 7 September 2006, at <http://www.fas.org/sgp/crs/intel/RL33726.pdf> [d/a 05/05/2010], p. 4
224. U.S. Naval Base Guantanamo Bay at <http://www.globalsecurity.org/military/facility/guantanamo-bay.htm> [d/a 04/10/2010]
225. Guantanamo Detainee Processes, Update from 2 October 2007, at <http://www.defense.gov/news/Sep2005/d20050908process.pdf> [d/a 04/10/2010]
226. September 18, 2001, Public Law 107-40 [S. J. RES. 23], available at <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>
227. *Boumediene v. Bush* at http://www.oyez.org/cases/2000-2009/2007/2007_06_1195/ [d/a 10/04/2010]
228. *Release of five Algerians from Guantanamo ordered*, Dawn, November 22, 2008 at <http://www.dawn.com/2008/11/22/top17.htm> [d/a 04/10/2010].
229. Guantanamo case says it all — 'enough.' Washington Post, November 21, 2008, at <http://www.dawn.com/2008/11/22/top17.htm> [d/a 05/10/2010].
230. List of former Guantanamo detainees at <http://www.defense.gov/news/May2006/d20060515%20List.pdf> [d/a 04/10/2010].
231. 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]
232. 6th Report of the Session 2003-2004 (Joint Committee on Human Rights), HL, Paper 38, HC 381, para 34
233. J. Stern, *Execute Terrorists at Our Own Risk*, New York Times, 28 February 2001, at <http://www.deathpenaltyinfo.org/node/572> [d/a 15/10/2010]
234. *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/gal3386.doc.htm> [d/a 20/10/2010]
235. *Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens One-Week Headquarters Session*, 44th Meeting, 12 April 2010, at <http://www.un.org/News/Press/docs/2010/l3154.doc.htm> [d/a 20/10/2010]
236. *International Legal Instruments to Counter Terrorism from UN Action to Counter Terrorism*, at <http://www.un.org/terrorism/instruments.shtml> [d/a 09/09/2010]

National laws

237. The Constitution, Article 1, Section 9, Clause 2, the United States
238. Const. Amends. V, XIV; 18 U.S.C. 242, the United States
239. The Detainee Treatment Act of 2005, H.R. 2863, Title X, the United States
240. Military Commissions Act of 2006, HR-6166, the United States
241. Prevention of Terrorism (Temporary Provisions) Act 1989, the United Kingdom
242. Special Immigration and Appeals Commission Act 1997, the United Kingdom
243. Terrorism Act 2006, the United Kingdom
244. Counter-Terrorism Act 2008, the United Kingdom

245. *Prevention of Terrorism* Ordinance No. 33 of 5708-1948, with amendments from 1980, 1986, and 1993, Israel
246. *Prohibition of Terrorist Financing* Law, No. 5765-2004, (Unofficial translation), Israel
247. *Incarceration of Unlawful Combatants* Law, 5762-2002, available at <http://www.justice.gov.il/NR/rdonlyres/7E86D098-0463-4F37-A38D-8AE770BD>, Israel
248. Federal Law No. 130-FZ *On the Fight Against Terrorism*, 1998, the Russian Federation
249. Law *On Fight against Terrorism*, No. 3713, 1991, the Republic of Turkey
250. Federal Law *On Combating Terrorism Offences*, No.1, 2004, the Kingdom of the United Arab Emirates

UN working documents

251. UN Doc. A/C.6/56/WG.1/CRP.3.
252. 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
253. Art. 1(5), Draft Code of Offences against the Peace and Security of Mankind (1951), Yearbook of the International Law Commission, 1951, vol. II, Doc. A/1858, p. 58
254. Draft Code of Offences against the Peace and Security of Mankind (1954), Yearbook of the International Law Commission, 1954, vol. II, available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_3_1954.pdf [d/a 14/09/2010]
255. “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 3rd 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)) , §§. 124-5
256. “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 6th report on the draft code of offences against the peace and security of mankind, by D. Thiam, Special Rapporteur, Document A/CN.4/411 and Corr.1 & 2 (Extract from the Yearbook of the International Law Commission, 1988, vol. II(1)), p. 203
257. Draft Code of Crimes Against the Peace and Security of Mankind (Part II) - including the draft Statute for an international criminal court, at http://untreaty.un.org/ilc/summaries/7_4.htm#_ftnref9 , *last update*: 19 January 2009 [d/a 14/09/2010]
258. Art. 20 (f)(iii-iv) [War crimes], Draft Code of Crimes Against the Peace and Security of Mankind (1996) Yearbook of the International Law Commission, 1996, vol. II (2)
259. §§114, 117, “Draft code of crimes against the peace and security of mankind (Part II)- including the draft statute for an international criminal court”, 13th 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))

260. §§. 105-111, Report of the International Law Commission on the work of its forty seventh session, 2 May, 21 July 1995, Official Records of the General Assembly, Fiftieth session, Supplement No.10, Doc. A/50/10 (Extract from the Yearbook of the International Law Commission, 1995, Vol. (II)2), p. 28
261. §§. 29, 154 of “Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fiftieth session prepared by the Secretariat”, Report of the International Law Commission on the Work of Its Forty-Seventh Session (1995), A/Cn.4/472.
262. Draft Statute for an International Criminal Court (1994), Yearbook of the International Law Commission, 1994, vol. II(2), p. 26
263. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22 (1995)
264. 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.
265. Draft Comprehensive Convention on International Terrorism, available at *Inventory of International Nonproliferation Organizations and Regimes*, Center for Nonproliferation Studies, last updated 10/05/2010 (at <http://cns.miis.edu/inventory/pdfs/intlterr.pdf> [d/a 09/09/2010]).
266. Declarations made by Israel, Non-Aligned Movement, the European Union, and the Organization of the Islamic Conference at 44th Ad Hoc Committee meeting, see *Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens One-Week Headquarters Session*, 44th Meeting, 12 April 2010, at <http://www.un.org/News/Press/docs/2010/13154.doc.htm> [d/a 20/10/2010]

ICC documents

267. Res. E of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF.183/10, 17 July 1998
268. International Criminal Court, Rules of Procedure and Evidence, U.N.Doc.PCNICC/2000/1/Add.1 (2000)
269. Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (2000)
270. A/AC.249/1997/WG.1/C.R.P.4
271. A/CONF.183/C.1/L.27
272. Art. 8bis, in Annex 1 to Res/RC.6, 11 June 2010
273. Report of the Bureau on the Review Conference, Doc. ICC-ASP/8/43/Add.1, 10 November 2009.
274. Report of the Credentials Committee, ICC-ASP/8/20, §§ 44-49 at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Annexes.pdf [d/a 16/09/2010]
275. Proposal of Amendment by the Netherlands, U.N. Doc. C.N.723.2009.TREATIES-5 (Oct. 29, 2009), at <http://www.adh-geneva.ch/RULAC/news/NetherlandsCN723EN.pdf> [d/a 16/09/2010]

276. § 3, ICC-ASP/8/Res.6, 26 November 2009, see Resolutions adopted by the Assembly of States Parties [on 8th session], p. 35 at http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/OR/OR-ASP8-Vol.I-ENG.Part.II.pdf [d/a 16/09/2010]

Dictionaries

277. Definitions of Terrorism at <http://www.jewishvirtuallibrary.org/jsource/Terrorism/terrordef.html>, [d/a 07/02/2010].
278. *Political question*, Cornell University Law School, at http://topics.law.cornell.edu/wex/political_question_doctrine [d/a 06/10/2010].
279. *Hearsay evidence*, Legal Dictionary at <http://www.duhaime.org/LegalDictionary/H/Hearsay.aspx> [d/a 22/10/2010].