

IUL School of Sociology and Public Policy
Department of History

**Terrorism and Counter-Terrorism:
Impact of Ambiguous and Disputed Definitions
on Fundamental Human Rights**

Marco Marsili

Thesis specially presented for the fulfilment of the degree of
Doctor in History, Studies of Security and Defence

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June 2019

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ABSTRACT

The role of terrorism in political discourse changed dramatically over the last fifty years, moving from ambiguity to the forefront of public policy and security concern. After the 9/11 attacks, terrorism has earned the news headlines, and has become a global security priority. Governments and the international community have enhanced measures to counter international and transnational terrorism, although there is no universally accepted definition of the term. The lack of an undisputed and legally binding definition of terrorism leaves significant room for free interpretation by policymakers. Governments are given what is essentially a *carte blanche* to develop programs and counter-terrorism initiatives that may lead, or have already led, to the development of policy that infringes on fundamental human rights.

This thesis investigates the connection between terrorism and fundamental human rights. The question that guided this dissertation is the potential consequence of arbitrary and politically-driven definitions of terrorism over counter-terrorism policy and fundamental human rights. The thesis moves from a historical framing of the concept of terrorism that changes with time. There are many definitions of the term, and there is no common definition with legal value. The current debate on terrorism is linked almost exclusively with non-state actors, which implies that state and terrorism have no linkage, even if there are evidences of these ties.

The thesis scrutinizes the instrumentalization of terrorism, starting from an analysis of the concept based on three pillars: historical, theoretical-conceptual and legal (in the light of international law and human rights law). Then an empirical analysis based on these tools through the use of political and legal mechanisms to obtain a political output was conducted. To answer the starting question, the research moved from a historical-documentary analysis, then took into consideration the literature, and focused on how the states use the justification of the fight against international terrorism to restrict fundamental human rights.

After the theoretical-conceptual and legal analysis, the research focuses on the legal aspects of the War on Terror and security policies. Large part of the empirical research is dedicated to scrutinize the case of Turkey after the 2016 coup d'état attempt, to review some rulings of the European Courts, and to examine some prominent 'terrorist' organizations.

While this topic presents a serious challenge, it does open much room for possible explorations of new fields of research without necessitating a fixed point of departure – or arrival. The thesis ends suggesting some future research directions.

KEYWORDS: Terrorism; Security; Defense; Fundamental Human Rights; International Law

RESUMO

O papel do terrorismo no discurso político mudou drasticamente nos últimos cinquenta anos, passando da ambiguidade para a linha de frente da política pública e das preocupações de segurança. Após os ataques de 11 de setembro, o terrorismo ganhou as manchetes dos jornais e se tornou uma prioridade de segurança global. Os governos e a comunidade internacional aumentaram as medidas para combater o terrorismo internacional e transnacional, embora não haja uma definição universalmente aceita do termo. A falta de uma definição indiscutível e juridicamente vinculativa de terrorismo deixa espaço significativo para a livre interpretação dos decisores políticos. Os governos recebem basicamente o que é uma 'carta branca' para desenvolver programas e iniciativas de combate ao terrorismo que possam levar, ou já conduziram, ao desenvolvimento de políticas que infrinjam os direitos humanos fundamentais.

A tese investiga a conexão entre o terrorismo e os direitos humanos fundamentais. A questão que orientou esta dissertação é a consequência potencial de definições arbitrárias e politicamente dirigidas do terrorismo sobre a política antiterrorista e os direitos humanos fundamentais. A tese se move a partir de um enquadramento histórico do conceito de terrorismo que muda com o tempo. Existem muitas definições do termo e não há uma com valor legal. O atual debate sobre o terrorismo está ligado quase exclusivamente a atores não estatais, o que implica que o Estado e o terrorismo não têm vínculo, mesmo que haja evidências desta ligação.

A tese examina a instrumentalização do terrorismo, a partir de uma análise do conceito baseada em três pilares: histórico, teórico-conceitual e jurídico (à luz do direito internacional e do direito internacional humanitário). Em seguida, é realizada uma análise empírica baseada nessas ferramentas por meio do uso de mecanismos políticos e legais para obter um resultado político. Para responder à questão inicial, a pesquisa partiu de uma análise histórico-documental, depois levou em consideração a literatura e enfocou como os estados usam a justificação da luta contra o terrorismo internacional para restringir os direitos humanos fundamentais.

Após a análise teórico-conceitual e jurídica, a pesquisa enfoca os aspectos legais da Guerra ao Terrorismo e das políticas de segurança. Grande parte da pesquisa empírica é dedicada a investigar o caso da Turquia após a tentativa de golpe de Estado de 2016, a rever algumas decisões dos tribunais europeus, e a examinar algumas proeminentes organizações 'terroristas'.

Embora este tópico represente um desafio sério, abre muito espaço para possíveis explorações de novos campos de pesquisa sem precisar de um ponto de partida fixo - ou de chegada. A tese termina sugerindo algumas direções futuras de investigação.

PALAVRAS CHAVE: Terrorismo; Segurança; Defesa; Direitos humanos fundamentais; Direito int.

Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.

— **Benjamin Franklin**

Pennsylvania Assembly: Reply to the Governor, 11 November 1755

Printed in *Votes and Proceedings of the House of Representatives, 1755–1756* (Philadelphia, 1756), pp. 19–21.

GLOSSARY OF ABBREVIATIONS AND ACRONYMS

4 th Cir.	U.S. Court of Appeals for the Fourth Circuit
9 th Cir.	U.S. Court of Appeals for the Ninth Circuit
ACCT	ASEAN Convention on Counter Terrorism
ACHP	African Charter on Human and Peoples' Rights
ACHR	Arab Charter on Human Rights
AGLOSO	Attorney General's List of Subversive Organisations
AGOWA	Attorney General of the State of Washington
AGWA	Attorney General of Washington
AHRD	ASEAN Human Rights Declaration
AI	Amnesty International
AIHRC	Afghan Independent Human Rights Commission
AKP or AK Parti	Adalet ve Kalkınma Partisi (Justice and Development Party)
ALF	Animal Liberation Front
ANI	Agência Nacional de Informações
AQAP	Al-Qaeda in the Arabian Peninsula
AQIM	Al-Qaeda in the Islamic Maghreb
AECA	Arms Export Control Act
AS/Jur	PACE Committee on Legal Affairs and Human Rights
AS/Mon	PACE Monitoring Committee
ASALA	Armenian Secret Army for the Liberation of Armenia
ASEAN	Association of Southeast Asian Nations
AU	African Union
AUMF	Authorization for Use of Military Force Against Terrorists
BND	Bundesnachrichtendienst (German Federal Intelligence Service)
BR	Brigate Rosse (Red Brigades)
BVerfG	Bundesverfassungsgericht (German Federal Constitutional Court)
CAT	Committee against Torture
CCJE	Consultative Council of European Judges
CDHRI	Cairo Declaration on Human Rights in Islam
CDHRI	Cairo Declaration on Human Rights in Islam
CECPT	Council of Europe Convention on the Prevention of Terrorism
CEMAC	Communauté Economique et Monétaire de l'Afrique Centrale (Economic and Monetary Community of Central Africa)

CEN-SAD	Communauté des Etats Sahélo-Sahariens (Community of Sahel-Saharan States)
CENTCOM	U.S. Air Forces Central Command
CETS or ETS	Council of Europe Treaty Series; European Treaty Series
CFR	Code of Federal Regulations
CHP	Cumhuriyet Halk Partisi (Republican People's Party)
CIA	Central Intelligence Agency
CICA	Conference on Interaction and Confidence Building Measures in Asia
CICTE	Inter-American Committee against Terrorism
CIS	Commonwealth of Independent States
CJCS	Chairman of the Joint Chiefs of Staff
CJEU	Court of Justice of the European Union
CJTF–OIR	Combined Joint Task Force – Operation Inherent Resolve
CoE	Council of Europe
CoI	Commission of Inquiry
CPP	Communist Party of the Philippines
CPPCG	Convention on the Prevention and Punishment of the Crime of Genocide
CPPNM	Convention on the Physical Protection of Nuclear Material
CPS	Crown Prosecution Service
CRS	Congressional Research Service
CSIS	Canadian Security Intelligence Service
CSRT	Combatant Status Review Tribunal
CSTO	Collective Security Treaty Organization
CT	Counter-terrorism
CTC	Counter Terrorism Committee
CTAG	Counter-terrorism Action Group
CTED	Counter-Terrorism Committee Executive Directorate
CTM	Counter-terrorism measure
CTS	Consolidated Treaty Serie
CWRIC	Commission on Wartime Relocation and Internment of Civilians
D.C. Circuit	U.S. Court of Appeals for the District of Columbia Circuit
D.D.C.	District Court for the District of Columbia
DEVCO	European Commission's Directorate General for International Cooperation and Development
DFLP	Democratic Front for the Liberation of Palestine
DHKP-C	Devrimci Halk Kurtuluş Partisi-Cephesi (Revolutionary People's Liberation

	Party/Front)
DHS	U.S. Department of Homeland Security
DoD	U.S. Department of Defense
DoDI	U.S. Department of Defense Instruction
DOJ	U.S. Department of Justice
DPRK	Democratic People's Republic of Korea
DRIL	Directório Rivoluzionário Ibérico de Libertação (Iberic Revolutionary Liberation Directory)
DRL	Democracy, Human Rights and Labor
DTA	Detainee Treatment Act 2005
DTM	Directive-Type Memorandum
EO	Executive Order
EC	European Commission
ECCC	Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms or European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EDNY	U.S. District Court Eastern District of New York
EEAS	European External Action Service
EEC	European Economic Community
EGC	General Court of the European Union or EU General Court
ELF	Earth Liberation Front
EOM	Election Observation Mission
EP	European Parliament
EPRP	Ethiopian People's Revolutionary Party
ETA	Euskadi Ta Askatasuna (Basque Homeland and Liberty)
ETS	European Treaty Series
EU	European Union
Europol	European Police Office
EAA	Export Administration Act
EZLN	Ejército Zapatista de Liberación Nacional (Zapatista Army of National Liberation)
FAA	Foreign Assistance Act
FALN	Fuerzas Armadas de Liberacion Nacional (Armed Forces of National Liberation)
FARC-EP	Fuerzas Armadas Revolucionarias de Colombia, Ejército del Pueblo (Revolutionary Armed Forces of Colombia-People's Army)

FARRA	Foreign Affairs Reform and Restructuring Act of 1998
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FDEA	Federal Department of Economic Affairs
FEMA	Federal Emergency Management Agency
FETÖ	Fethullahçı Terör Örgütü (Fethullah Gülen Terrorist Organisation)
Field Manual, or Army FM	Army Field Manual on Intelligence Interrogation (FM 34-52)
FLN	Front de Libération Nationale (National Liberation Front)
FM 34-52	Army Field Manual on Intelligence Interrogation
FMLN	Frente Farabundo Martí para la Liberación Nacional (Farabundo Martí National Liberation Front)
FOIA	Freedom of Information Act
FR	Federal Register
FSA	Free Syrian Army
FSIA	Foreign Sovereign Immunities Act
FTO	Foreign Terrorist Organisations
GAOR	General Assembly Official Records
GCC	Cooperation Council for the Arab States of the Gulf
GCT	Global Counter-Terrorism Strategy
GPO	U.S. Government Publishing Office
GTD	Global Terrorism Database
GTI	Global Terrorism Index
GTMO	Guantánamo Bay U.S. Naval Base
GU	Gazzetta Ufficiale della Repubblica Italiana (Official Gazette of the Italian Republic)
GHRV	Gross human rights violations
Hamas	Ḥarakat al-Muqāwamat al-Islāmiyya (Islamic Resistance Movement)
HDP	Halkların Demokratik Partisi (Peoples' Democratic Party)
HR	House of Representatives
UNHRC or HRC	UN Human Rights Committee
HRIC	Human Rights in China
HRV	Human rights violations
HRW	Human Rights Watch
HSYK or HCJP	Hâkimler ve Savcılar Yüksek Kurulu (High Council of Judges and Prosecutors)
I/A Court H.R.	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IAEA	International Atomic Energy Agency

IAHRS	Inter-American system for the protection of human rights
IC	Intelligence Community
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDF	Israel Defense Forces
IEA	Islamic Emirate of Afghanistan
IEEPA	International Emergency Economic Powers Act
IEP	Institute for Economics and Peace
IGO	International governmental organisation
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
INA	Immigration and Nationality Act
INL	International Narcotics and Law Enforcement Affairs
Interpol or ICPO	International Criminal Police Organization
IPA	Interpretative Phenomenological Analysis
IPHRC	Independent Permanent Human Rights Commission
IPU	Inter-Parliamentary Union
IRA	Irish Republican Army
IS, or ISIL, or ISIS, or Daesh	Islamic State; Islamic State of Iraq and the Levant; Islamic State of Iraq and Syria or Islamic State of Iraq and al-Sham
ISSG	International Syria Support Group
ITACG	Interagency Threat Assessment and Coordination Group
JAA	Jund al-Aqsa
JASTA	Justice Against Sponsors of Terrorism Act
JCAG	Justice Commandos for the Armenian Genocide
JCAT	Joint Counterterrorism Assessment Team
JCPOA	Joint Comprehensive Plan of Action
JCS	Joint Chiefs of Staff
JFS	Jabhat Fateh al-Sham (Front for the Conquest of the Levant)
JIM	Joint Investigative Mechanism
JN or ANF	Jabhat Al-Nusra li-Ahl Al-Sham (Al-Nusra Front)
JP	Joint Publication

JURI	EP Committee on Legal Affairs
KADEK	Kurdistan Freedom and Democracy Congress
KPD	Kommunistische Partei Deutschlands (Communist Party of Germany)
KRG	Kurdistan Regional Government
KRP	Kurdistan Region Presidency
LN	League of Nations
LNTS	League of Nations Treaty Series
LTTE	Liberation Tigers of Tamil Eelam
MB	Society of the Muslim Brothers (shortened to the Muslim Brotherhood)
MCA	Military Commissions Act of 2006
MEK	Mujahedin-e Khalq (see: PMOI)
MENA	Middle East News Agency
MI5	Military Intelligence, Section 5
MOFA or MFA	Ministry of Foreign Affairs
MP	Member of Parliament
MPF	Ministerio Público Fiscal
MRTA	Movimiento Revolucionario Túpac Amaru (Túpac Amaru Revolution Movement)
MTF	Mobile Task Force
NAD	Negotiation Affairs Department
NARA	National Archives and Records Administration
NATO	North Atlantic Treaty Organization
NATO-PA	NATO Parliamentary Assembly
NCIS	Naval Criminal Investigative Service
NCIS	National Criminal Intelligence Service
NCTC	National Counterterrorism Center
NDAA	National Defense Authorization Act
NEA	National Emergencies Act
NGO	Non-governmental organisation
NPD	Nationaldemokratische Partei Deutschlands (National Democratic Party of Germany)
NSC	National Security Council
NSO	NATO Standardization Office
NSPD	Nationalsozialistische Deutsche Arbeiterpartei (National Socialist German Workers' Party or Nazi Party)
OAS	Organization of American States
OAU	Organisation of African Unity
ODIHR	Office for Democratic Institutions and Human Rights
OECD	Organisation for Economic Co-operation and Development
OFAC	Office of Foreign Assets Control
OHCHR	Office of the High Commissioner for Human Rights

OIC	Organisation of Islamic Cooperation
OJ	Official Journal of the European Union
OPCW	Organisation for the Prohibition of Chemical Weapons
OSCE	Organization for Security and Co-operation in Europe
OSS	Office for Strategic Services
PA	Palestinian Authority
PACE	Parliamentary Assembly of the Council of Europe
PCCH	Procuraduría de Crímenes contra la Humanidad
PDPA	People's Democratic Party of Afghanistan
PDPR-EPR	Partido Democrático Popular Revolucionario (Popular Revolutionary Democratic Party)
PDY	Paralel Devlet Yapılanması (Parallel State Structure)
PJA	Partiya Jina Azad (Party of Free Women)
PKK	Partiya Karkerên Kurdistanê (Kurdistan Workers' Party)
PLO	Palestine Liberation Organisation
PM	Prime Minister
PMOI	People's Mojahedin Organization of Iran (see MEK)
PNA	Palestinian National Authority
POAC	Proscribed Organisations Appeal Commission
POW	Prisoner of war
PRB	Periodic Review Board
PRS	Periodic Review Secretariat
PYD	Partiya Yekîtiya Demokrat (Democratic Union Party)
RAF	Rote Armee Fraktion (Red Army Faction)
RATS	Regional Anti-Terrorist Structure
RCMP	Royal Canadian Mounted Police
RFoM	Representative on Freedom of the Media
RIAA	Reports of International Arbitral Awards
RSCSL	Residual Special Court for Sierra Leone
S.D.N.Y.	Southern District of New York
SAARC	South Asian Association for Regional Cooperation
SAC	Syrian Arab Coalition
SAF	Syrian Armed Forces
SAF, or SAAF, or SyAAF	Syrian Arab Air Force(s)
SAHRC	South African Human Rights Commission
SC or UNSC	UN Security Council
SCO	Shanghai Cooperation Organization
SCOTUS	Supreme Court of the United States

SCSL	Special Court for Sierra Leone
SDF	Syrian Democratic Forces
SDGT	Specially Designated Global Terrorist
SDN	Specially Designated Nationals
SDNT	Specially Designated Narcotics Traffickers
SDT	Specially Designated Terrorist
SIS	Egypt State Information Service
SISMI	Servizio informazioni e sicurezza militare (Italian Military Intelligence and Security Service)
SJAC	Syria Justice and Accountability Centre
SMOM	Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta
SNC	National Coalition for the Revolution and Opposition Forces or Syrian National Coalition
SOF	Special Operations Forces
SOTI	Syria Survivors of Torture Initiative
SS	Schutzstaffel
SSCI	Senate Select Committee on Intelligence
START	National Consortium for the Study of Terrorism and Responses to Terrorism
STL	Special Tribunal for Lebanon
TACT 2000	Terrorism Act 2000
TACT 2006	Terrorism Act 2006
TBMM or GNAT	Türkiye Büyük Millet Meclisi (Grand National Assembly of Turkey)
TCE	Treaty establishing a Constitution for Europe
TE-SAT	European Union Terrorism Situation and Trend Report
TIAS	Treaties and Other International Acts Series
TIM	Temporary International Mechanism
TNP	Turkish National Police
TRO	Temporary Restraining Order
U.S.	United States of America
U.S.C.	Code of Laws of the United States of America (variously abbreviated to Code of Laws of the United States, United States Code, U.S. Code)
UCMJ	Uniform Code of Military Justice
UDHR	Universal Declaration of Human Rights
UEMOA	Union Economique et Monétaire Ouest Africaine (West African Economic and Monetary Union)
UK	United Kingdom
UN	United Nations
UNCHR	UN Commission on Human Rights
UNCLOS	UN Law of the Sea Convention

UNColSyria	Independent International Commission of Inquiry on the Syrian Arab Republic
UNGA or GA	UN General Assembly
UNHRC	UN Human Rights Council
UNIIB	UN Independent Investigation on Burundi
UNPA	UN Participation Act of 1945
UNSG	UN Secretary-General
UNTS	UN Treaty Series
UNWCC	UN War Crimes Commission
USAF	U.S. Air Force
USAFCENT	U.S. Air Forces Central Command
USSR	Union of Soviet Socialist Republics
UST	United States Treaties and Other International Agreements
VCLT	Vienna Convention on the Law of Treaties
VCLTIO	Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations
VDPA	Vienna Declaration and Programme of Action
VRS	Vojska Republike Srpske (Army of Republika Srpska)
W.D. Wash.	Western District of Washington
WoT	War on Terror
WWII or WW2	World War II / Second World War
YÖK	Yükseköğretim Kurulu (Council for Higher Education)
YPG	Yekîneyên Parastina Gel (People's Protection Units or People's Defence Units)

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INTRODUCTION

To open the discussion about terrorism with the constataion that there is no universally accepted definition of the term may appear unwarranted, or even as an alibi to avoid certain aspects of research and questions. However, to remain on the surface is to miss out on the complexity of the matter, and in doing so reaching the wrong conclusion about the nature of a phenomenon. Deeper insight into the problem reveals a singular truth that is the crux of the arguments presented in this dissertation – that modern view of terrorism necessarily reduces its connection to state agents. In other words, terrorism is linked almost exclusively with non-state actors, which implies that state and terrorism have no linkage.

It is a well-proven fact that the state has a monopoly on legitimate use of force, but state action over time has frequently left the confines of legitimacy, legality, and morality.¹ Such actions are not frequently investigated, and if they are, they are rarely presented as acts of state-terror. As a subject of terrorism, the state has been systematically ignored and has no profound locale in history. There are but a few examples of state terror and even those are limited to the most abhorrent acts committed in history – namely Nazism, Stalinism, Fascism – and even then they are not classified as terrorism, but rather as (i)legitimate political movements.

The push for the current understanding of terrorism as a non-state actor began in the 1970s, mainly due to the activities of groups in Europe and elsewhere that were targeted, specifically, against the state, and which led to the almost complete ostracization of the term "state terror". In a semantic sleight of hand, terrorism was confined to an activity that is necessarily committed by non-state actors at the express detriment of the nation-state. This, of course, paved the way for the adoption and legalization of the War on Terror (WoT) in the post 9/11 world, which was touted as a strategic emphasis used to combat non-state actors. While it would be unrealistic to expect any significant shift in the understanding of terrorism as both state and non-state activity, this dissertation aims to shed light on the problem and elaborate on some critical elements within the modern understanding of the interplay between terrorism, counter-terrorism, and fundamental human rights.

¹ Marsili, Marco (2012a), *Il libro nero della polizia. Piccoli omicidi di stato tra amici 2001-2011*, Milano, Termidoro.

Part of the problem undoubtedly lies in the exacerbated brutality and effectiveness of terrorist attacks since 2001, which has led most if not all governments and individuals to denounce them as inhumane and uncivilized, which in turn moved the discussion even farther away from the examination of the true origin and content of terrorism. In continuation, the new paradigm did not allow for any scrutiny of the concept of anti-terrorism, and eventually curbed most discussions in respect to human rights.

METHODOLOGY

The specific nature of the methodology employed in this dissertation is reflected in its structure, which is divided into three principal parts – the first part considers the theoretical elements, definitions, and current research centered on the topic of terrorism, counter-terrorism, and fundamental human rights. The second part analyzes the legal aspects of the War on Terror and security policies of the U.S., the EU, and NATO and nests them within the broader discussion of judicial procedures in and around terrorism. The third part is based on an analysis of case studies of individual nations' counter-terrorist policies. Under most circumstances, an analysis of this type requires an empirical, positivist framework that rests on either a qualitative or quantitative data analysis.

However, this approach to the problem has been tried and tested many times over, which implies that another examination of the currently available research using the same matrix would not be productive. Instead, this dissertation was formulated as an interpretative phenomenological analysis (IPA).² The IPA is based on the examination of specific experiences of nations and individual actors in the context of terrorism and counter-terrorism policy, and the immediate effects of policy on fundamental human rights. The crux of such an approach lies in the ability to interpret patterns based on the breadth of theoretical knowledge. Although initially based in health and psychology, the IPA has since been incorporated as a viable research method in many fields, including history and other humanities studies.

² For a definition of IPA, see: Smith, Jonathan A. and Mike Osborn, "Interpretative Phenomenological Analysis", in J.A. Smith (ed.), *Qualitative Psychology: A Practical Guide to Research Methods*, London, Sage.

Unlike the positivist models, the interpretative approach does not rest on pre-defined hypotheses, which is why this dissertation offers none, but rather relies on the ability of the researcher to divulge meaning from different elements of research without being bound by pre-existing limitations. While this presents a serious challenge, it does open much room for possible explorations of new fields of research without necessitating a fixed point of departure – or arrival.³

The emphasis in interpretative studies is, predominantly, on the collection of various points of view that are not predicated on previous knowledge of the literature. Instead, the researcher begins with a specific question or an idea, which is then introduced in the text and combined with a careful selection of the literature. However, there are significant problems associated with this methodological approach, not the least of which is bias. As is the case with every research problem, researcher bias tends to influence reasoning and can lead to confirmation bias, where the ideas presented are affirmed through the selection of the literature – namely, the researcher can always select only those works that align with the specific point of view they are assigning to.⁴

To avoid this, the present research did not employ the standard process, but focused on finding as broad as possible swath of literature in and around the selected topic, and only after carefully examining this body of literature did the researcher begin the process of developing this dissertation. Hopefully, this would have limited the possibility of bias, which is the primary concern with all interpretive studies, regardless of discipline. All the pertinent theoretical positions have been examined before the formulation of the data and case studies, which ensures theoretical sensitivity and preparedness for the emergence of conflicting information.⁵

THE SIGNIFICANCE OF THE STUDY

³ Schwandt, Thomas A. (2000), "Three Epistemological Stances for Qualitative Inquiry: Interpretivism, Hermeneutics, and Social Constructionism", in Norman K. Denzin and Yvonna S. Lincoln (eds.), *Handbook of Qualitative Research*, Thousand Oaks, Sage (2nd edition), pp. 189-192.

⁴ Elliott, Robert and Ladislav Timulak (2005), "Descriptive and interpretive approaches to qualitative research", in Jeremy Miles and Paul Gilbert (eds.), *A Handbook of Research Methods for Clinical and Health Psychology*, New York, Oxford University Press, pp. 147-155. DOI: <https://dx.doi.org/10.1093/med:psych/9780198527565.003.0011>.

⁵ Strauss, Anselm and Juliet Corbin (1998), *Basics of Qualitative Research: Procedures and Techniques for Developing Grounded Theory*, Thousand Oaks, Sage (2nd edition), pp. 3-40. DOI: <http://dx.doi.org/10.4135/9781452230153>.

The use of interpretative analysis as a research method draws a lot of questions – primarily linked to objectivity and support from evidence and past research. As an inherently subjective method of research, interpretation draws predominantly on the ability of the researcher to make sense of the specific theoretical assumptions within the context of the research question. Moreover, the topic of terrorism and its linkage to modern security policy is extremely important but has largely been examined through the lens of traditional research – positivist, empirical analyses based on quantitative or qualitative methods. With this in mind, it becomes apparent that a novel approach to the problem is not only warranted but necessary.

Without a doubt, the field of terrorism and counter-terrorism is full of controversial claims, to say the least, and not defined clearly enough which gives further credence to the chosen topic and research method. The basic premise of this dissertation is that terrorism, lacking a universally accepted definition leaves plenty of space for individual interpretations that may, or already did, lead to the development of policy that infringes on the fundamental human rights of individuals. Given that such policy is based on an incomplete or even flawed definition of terrorism, the implications are obvious – governments are given what is essentially a *carte blanche* to develop programs and counter-terrorism initiatives that infringe on the rights of the citizenry while being ineffective against the perpetrators of terrorist acts.

RESEARCH QUESTIONS AND THESIS

The problem of definition of terrorism exacerbates these points perfectly – there exists no uniformly accepted definition, even though there are specific elements found in most definitions that circle the same grounds. Regardless, the scientific and political reality is that the only unity regarding a complete definition of terrorism is that no definition could encompass all of its forms. The role of the state has been abolished, almost completely, from any discussion about terrorism. This is part of the reason why this dissertation chose to employ an interpretive phenomenological analysis instead of a positivist, quantitative (or qualitative) analysis. Since the traditional examinations of terrorism led to its constraint as a solely non-state phenomenon, then it is justified to question whether another similar study would achieve its intended purpose since

it would necessarily be rooted in the same theoretical and methodological grounds as all other studies on the topic. The other reasons for this will be discussed at length in the methodology section of this dissertation.

This thesis investigates the connection between terrorism and fundamental human rights. The question that guided this dissertation is the potential consequence of arbitrary and politically-driven definitions of terrorism over counter-terrorism policy and fundamental human rights. The thesis moves from a historical framing of the concept of terrorism that changes with time. There are many definitions of the term, and there is no common definition with legal value. The differences between terrorism and revolution, and between terrorists and insurgents – whatever one chooses to call them - are not just lexical. On the one hand, there are the definitions of the scholars, and on the other, those provided by the national legislation or by some regional instruments, lacking a UN convention legally binding for everyone – even though the UN definitions are widely accepted, they are not universal. A dual approach, then, seems to be the best way forward – a theoretical-conceptual one and a legal one. It can be useful to develop a new way of understanding in the broad spectrum of interpretations of terrorism.

The thesis scrutinizes the instrumentalization of terrorism, starting from an analysis of the concept based on three pillars: historical, theoretical-conceptual and legal (in the light of international law and human rights law). Then an empirical analysis based on these tools through the use of political and legal mechanisms to obtain a political output was conducted. To answer the starting question, the research moved from a historical-documentary analysis, then took into consideration the literature, and focused on how the states use the justification of the fight against international terrorism to restrict fundamental human rights.

The role of terrorism in political discourse changed dramatically over the last fifty years, moving from ambiguity to the forefront of public policy and security concern. With this change came a paradigmatic shift, where terrorism became affiliated exclusively with non-state actors, which then prompted the development of specific anti-terrorist policies that infringed on basic human rights of individuals, and left significant room for free interpretation by policymakers.

After the theoretical-conceptual and legal analysis, the research focuses on counter-terrorism measures adopted by the United States and other countries, the blacklisting system, and the rulings of the European Courts. A substantial part of the empirical research has been devoted to Turkey, which represents the challenge to the values of Western civilization, and pillories all

the contradictions and the limits of the latter concerning defending fundamental human rights while countering terrorism. The thesis then analyzes some prominent 'terrorist' organizations: PKK, Hamas, Hezbollah, the Muslim Brothers, the Islamic State, al-Qaeda, and the Taliban. All these organizations are instrumental in better framing the problem of defining terrorism and the measures adopted to combat it.

Addressing the issue of international terrorism is a difficult task. The factors at stake are manifold. They concern various dimensions: political; spatial-temporal; historical; geographical; human; social; philosophical; ethical; religious; legal. One can consider terrorism and counter-terrorism to be a prism. There are many ways to approach terrorism and counter-terrorism, one for each face of the prism. Different disciplines and academic approaches contribute to terrorism studies: political science; international relations, history, military science, war studies, international law; economics, communication studies, psychology, and social psychology.

To deepen the understanding of terrorism, it is necessary to conduct a multidisciplinary assessment, by analyzing this issue from different perspectives. The same can be said about the sources on which this study relies on. Academic literature, law and other types of documents are all useful to get to a broader comprehension of the topic.

During the drafting of this thesis, other activities related to the topic of the research were carried out, which aided the production of the thesis. The author participated in national and international conferences, among which those worthy of note are: NATO DeSRA Conference (La Spezia, 2016); Europe as a Global Actor (EGA) conference 2016 and 2019 (Lisbon); conference on "Rights and dignity of the person. At the dawn of the process of European integration: from the European Coal and Steel Community to the Treaty of Rome" (Rome, 2017). Some material will be used for presentations/communications in conferences and publication (e.g., the chapter devoted to "The Crackdown on Political Dissent in Turkey After 15 July 2016. A Challenge to European Values", to be presented at the 6th International Conference on Eurasian Politics & Society-IEPAS2019). In addition, several papers related to the Ph.D. project were written, including "The Islamic State: A Clash within the Muslim Civilization for the New Caliphate" published in *Studies in Conflict and Terrorism*, for which the author has been awarded the ISCTE-IUL scientific prize 2016. The paper "The War on Cyberterrorism", published in *Democracy and Security*, is candidate to current edition of the same scientific award, and is also candidate to the Scientific Research in Military Sciences prize of the Military

University Institute (IUM). Due to the limitations imposed on the length of this thesis, a lot of material processed during the research project was not included in the text. The research on the topic of the thesis led me to open a new research line devoted to unconventional conflicts, that seem to characterize the 21st century, of which the War on Terror constitutes the main one.

The Fundação para a Ciência e a Tecnologia (FCT) funds the further research on unconventional conflicts under Ph.D. grant SFRH/BD/136170/2018, along with the generous support of the Knights of Vartan Fund for Armenian Studies administered by the National Association for Armenian Studies and Research (NAASR), partially used for the final drafting of this thesis.

BACKGROUND

Terrorism is not a new phenomenon, it existed under other names throughout history, and its meaning has changed over the years. Saul dates the 'political' notions of "terror," "terrorism," and "terrorist" back to the late 18th century, at the time of the Reign of Terror in the French Revolution.⁶ He upholds that the idea of terrorism as an instrument of state control - hence state terrorism - persisted until the end of the Second World War. Crenshaw traces the modern meaning of terrorism to the second half of the 19th century.⁷ Rapoport identifies four waves of modern terrorism: the Anarchist wave (1878-1919); the Anti-Colonial wave (the 1920s-early 1960s); the New Left wave (mid-1960s-1990s); the Religious wave (1979-ongoing).⁸

In the contemporary era terrorism burst onto the world stage in the late 1960s and early 1970s, as a corollary of struggles for independence and liberation movements, in the early seventies, it became a revolutionary tactic for subverting the state order, and later it was adopted as a strategy by criminal organizations. Some acts of a violent nature – sabotage, conspiracy, treason, espionage, guerrilla warfare, piracy or banditry – were categorized as "terrorism" from a certain point in time. Let's trace the historical roots of terrorism to understand the origin and evolution of the term.

⁶ Saul, Ben (2006a), *Defining Terrorism in International Law*, Oxford, Oxford University Press, p. 2.

⁷ Crenshaw, Martha (1995) (ed.), *Terrorism in Context*, University Park, Pennsylvania State University Press, pp. 44, 77.

⁸ Rapoport, David C. (2004), "The Four Waves of Modern Terrorism," in Audrey Kurth Cronin and James M. Ludes (eds.), *Attacking Terrorism: Elements of a Grand Strategy*, Washington, D.C., Georgetown University Press.

In the Middle Ages, armed private vessels enjoying their sovereign's tacit consent, if not always an explicit formal commission by "letters of marque", regularly raided shipping from other nations, as was the case of Sir Francis Drake's attacks on Spanish vessels, of which Elizabeth I of England (despite protestations of innocence) shared the spoils.⁹ Drake was considered a hero in England and a pirate in Spain for his raids.¹⁰ Queen Elizabeth awarded Drake a knighthood aboard the *Golden Hind* in Deptford on 4 April 1581. The dubbing was performed by a French diplomat, Monsieur de Marchamont, who was negotiating a marriage between Elizabeth and the King of France's brother, Francis, Duke of Anjou.¹¹ By involving the French diplomat in the knighting, Elizabeth was gaining implicit political support from the French for Drake's actions.¹² Drake also served as a politician. In September 1581, he became the Mayor of Plymouth,¹³ and in the same year was a member of Parliament for an unknown constituency (possibly Camelford), and again in 1584 for Bossiney¹⁴ and Plymouth in 1593.¹⁵

According to the *Oxford English Dictionary*, a letter of marque, was originally "a license granted by a monarch authorizing a subject to take reprisals on the subjects of a hostile state for alleged injuries", and later became "legal authority to fit out an armed vessel and use it in the capture of enemy merchant shipping and to commit acts which would otherwise have constituted piracy".¹⁶ Captured vessels were brought before admiralty courts for condemnation and sale. Cruising for prizes with a letter of marque was considered an honorable calling combining patriotism and profit, in contrast to unlicensed piracy, which was universally reviled.¹⁷ A "letter of marque and reprisal," which included a broader license, would give its holder permission to conduct a reprisal operation abroad.

Governments used to issue letters of marque – the French sometimes used the term *lettre de course* – in wartime to a private person or a ship called "privateer" (sometimes "corsair" or

⁹ Lord Russell of Liverpool, Edward Frederick Langley (2001), *The French Corsairs*, London, Robert Hale, p. 10.

¹⁰ Cummins, John G. (1996), *Francis Drake: The Lives of a Hero*, New York, Palgrave Macmillan, p. 273.

¹¹ *Id.*, p. 127.

¹² Hazard, Mary E. (2000), *Elizabethan Silent Language*, Lincoln, University of Nebraska Press, p. 251. See also: Perry, Maria (1999), *The Word of a Prince: A Life of Elizabeth I from Contemporary Documents*, Woodbridge: Boydell Press, 1999, p. 182.

¹³ Thomson, George Malcolm (1972), *Sir Francis Drake*, New York, William Morrow and Company.

¹⁴ *Ibid.*

¹⁵ Hasler, P. W. (1981) (ed.), Drake, Francis, *The History of Parliament: the House of Commons 1558-1603*, Suffolk, Boydell and Brewer.

¹⁶ Letter of marque (2015), *Oxford English Dictionary (OED)*, Oxford, Oxford University Press.

¹⁷ Upton, Francis (1863), *Maritime Warfare and Prize*, New York, John Voorhies Law Bookseller and Publisher, pp. 170-171, 176.

"buccaneer"). This special license granted a lawful authorization to attack and capture foreign vessels. Privateering was a way of setting up 'irregular' warships. The crew of a privateer might be treated as prisoners of war if captured, enjoying the protection of the laws of war, while without the letter of marque they were considered pirates "at war with all the world," criminals who were properly hanged.¹⁸

The earliest instance of a licensed reprisal recorded in England was in 1295 in the reign of Edward I.¹⁹ King Henry III of England first issued what later became known as "privateering commissions" in 1243.²⁰ This is probably the first case of state terrorism in history. Licensing privateers during wartime was widespread in Europe by the 16th century,²¹ when most countries²² began to enact laws regulating the granting of letters of marque and reprisal.²³ This business became so popular that Captain Luke Ryan, an Irish privateer, in just over two years commanded six vessels under the flags of three different nations and on opposite sides in the same war.²⁴ Ryan today would be called a mercenary, and international law prohibits governments from hiring professional soldiers to serve in a foreign army.

Historically, the distinction between a privateer and a pirate has been subjective, often depending on the source as to which label was correct in particular circumstances.²⁵ It is, therefore, the authorization and perceived legality of the actions that form the distinction. By granting their authorization for privateering lightly, governments allowed would-be pirates to operate legally. We can consider privateers to be 'lawful pirates' with government authorization.

Captain William Kidd, who was tried and executed for piracy on 23 May 1701 after returning from a voyage to the Indian Ocean, was presented with a letter of marque, signed personally by King William III of England.²⁶ This letter reserved 10% of the loot for the Crown.

¹⁸ Petrie, Donald (1999), *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail*, Annapolis, Naval Institute Press, pp. 3-6, 68, 145.

¹⁹ Esatman, Ralph (1927), *Some Famous Privateers of New England*, Boston, Privately printed by State Street Trust Company, p. 1.

²⁰ Stark, Francis Raymond (1897), "The Abolition of Privateering and the Declaration of Paris," *Studies in History, Economics and Public Law*, Vol. 8, No. 3, pp. 221, 270-271.

²¹ Eastman, p. 1.

²² Lord Russell of Liverpool, p. 11.

²³ Upton, p. 176.

²⁴ Petrie, p. 68.

²⁵ Kleinen, John and Manon Osseweijer (2010) (eds.), *Pirates, Ports, and Coasts in Asia: Historical and Contemporary Perspectives*, Leiden, Institute of Southeast Asian Studies, p. 15.

²⁶ Donnelly Mark and Daniel Dieh (2010), *Pirates of New Jersey: Plunder and High Adventure on the Garden State Coastline*, Mechanicsburg, Stackpole Books, p. 9.

Henry Gilbert's *The Book of Pirates*²⁷ suggests that the king may have put up some of the money for the voyage himself — the result of confusion over whether Captain Kidd took prizes legally under a *lettre de course* or illegally as a pirate was death by hanging. King William III also issued a letter to Daniel Kennedy.²⁸

The grant of letters of marque was first banned in 1713 by the *Treaty of Utrecht*, which put an end to the War of Spanish Succession between Spain and Great Britain, and later prohibited for good by the Paris Declaration of 1856.²⁹ The United States was not a signatory and today is still not bound by the declaration, so much so that the U.S. Constitution (Art. 1 § 8) gives Congress the power to grant letters of marque.³⁰

The issuance of letters of marque during civil conflicts poses the question of their legitimacy, due to divided sovereignty. An English court refused to recognize letters of marque issued by rebellious Ireland under James II and hanged eight privateer captains as pirates. Seventy-nine years later, in 1861, during the American Civil War, the Union charged officers and crew of the Confederate privateer *Savannah* with piracy, calling their letters of marque invalid since the Union refused to acknowledge the breakaway Confederacy as a sovereign nation.³¹ The case resulted in a hung jury, and after Confederate President Jefferson Davis threatened to retaliate by hanging one Union officer for each executed Confederate privateer, the Union relented and thereafter treated Confederate privateers honorably as POWs.³²

Privateering was used extensively in conflicts between England and France for 500 years.³³ Robert Surcouf, a French privateer and slave trader, operated in the Indian Ocean in the late 18th and early 19th century with a *lettre de course* issued by the French colonial governor of Mauritius, Anne Joseph Hippolyte de Maurès, Comte de Malartic.³⁴ For services rendered to

²⁷ Gilbert, Henry (1986), *The Book of Pirates*, London, Bracken Books.

²⁸ Lunsford, Virginia West (2005), *Piracy and Privateering in the Golden Age Netherlands*, New York, Palgrave Macmillan, p. 118.

²⁹ Gerard, James W. (1885), *The peace of Utrecht: a historical review of the great treaty of 1713-14, and the principal events of the War of the Spanish Succession*, New York, G.P. Putnam's Sons.

³⁰ Art. 1, § 8, clause 11 of the *Constitution of the United States*: "[The Congress shall have Power] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

³¹ Petrie, p. 81.

³² Robinson, William Morrison, Jr. (1928), *The Confederate Privateers*, Columbia, University of South Carolina Press, pp. 133-151.

³³ Lord Russell of Liverpool, pp. 13-33.

³⁴ Levot, Prosper (1866), *Les gloires maritimes de la France: notices biographiques sur les plus célèbres marins*, Paris, Arthus Bertrand, p. 494. See also: Granier, Hubert (1998), *Histoire des Marins français 1789–1815*, Rennes, Marines éditions, p. 217; See also: Cunat, Charles (1857), *Saint-Malo illustré par ses marins*, Rennes, Imprimerie de F. Péalat, p. 392.

France, Surcouf was awarded the Sabre of Honour³⁵ and the Legion of Honour, and appointed colonel of the National Guard of Saint-Malo.³⁶

The practice of privateering was abolished by the Paris *Declaration Respecting Maritime Law* of 16 April 1856,³⁷ and the Second Hague Peace Conference of 1907³⁸ expanded the provisions of this declaration.³⁹ However, as the United States was not a signatory of the Paris declaration.⁴⁰ Under U.S. Constitution the Congress – not states – is allowed to commission privateers by letters of marque. Given that the early 20th century was marked by significant examples of state-terror, it will be omitted from this review. The contention that Stalinism, Nazism, and other types of revolutionary dictatorships can be classified as terrorism is possible, but it is not the topic of this review. Going into a detailed examination of all of these movements would surely take up a significant portion of the dissertation, and will, therefore, be excluded.

THE EVE OF THE WAR O TERROR

The sixties had begun with the movements for the defense of human and civil rights of African Americans in the United States, which will lead to the first terrorist incidents. Due to African Americans' claims to the Muslim religion and their roots dating back to the slave trade, some of these movements, such as the Black Panthers, enjoyed support from some states that had recently gained independence.

The Algerian government in the 1970s granted political asylum and gave shelter to hijackers and members of the Black Panthers and the Black Liberation Army. This choice represented this choice the final test of the Third World nation's commitment to supporting some

³⁵ Hennequin, Joseph François Gabriel (1835), *Biographie maritime ou notices historiques sur la vie et les campagnes des marins célèbres français et étrangers*, Paris, Regnault, p. 385.

³⁶ Levot, p. 495.

³⁷ *Declaration Respecting Maritime Law*, signed at Paris, on 16 Apr. 1856.

³⁸ *Convention Relative to the Conversion of Merchant Ships into War-Ships*, signed at The Hague, on 18 Oct. 1907.

³⁹ Schindler, Dietrich and Jiří Toman (1988), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, Leiden, Martinus Nihjoff Publisher, pp. 798-800.

⁴⁰ ICRC (2015), "State Parties of the Declaration Respecting Maritime Law." Available at https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=105 (accessed 17 May 2015).

contingents of the African American freedom movement.⁴¹ President Houari Boumediene socialist and revolutionary government in Algeria used to grant political asylum to hijackers, considering seizure of aircraft and vessels to be a political action.⁴² Boumediene offered logistic assistance to anti-colonial movements and other militant groups across Africa and the Arab world.⁴³ In those years, even some European governments supported terrorists. Right-wing Italian terrorists found refuge in Francoist Spain, while far-left terrorists fled to France because President François Mitterrand refused to extradite them to Italy. The French Constitution of 1793 granted asylum to foreigners banished from their native countries on account of liberty.⁴⁴

International terrorism in the contemporary era appears in the early 1970s. According to the National Counterterrorism Center (NCTC), the first act of international terrorism dates back to the unsolved bombing of Swissair Flight 330 on 21 February 1970. This attack followed the first terrorist act, the foundation of the Democratic Front for the Liberation of Palestine (DFLP),⁴⁵ just one year before in Syria.⁴⁶ The U.S. Department of State traces the first act of terrorism back to the Marine Corps Barracks bombing in Lebanon on 23 October 1983, followed by a list of kidnappings and murders.⁴⁷ Terrorist incidents that followed in the eighties were hijackings and flight bombings. After 11 September 2001 international terrorism carved out a leading role on the international political agenda.

Originally, terrorism was an offshoot guerrilla military tactic employed by resistance groups. The history of guerrilla warfare in Latin America confirms the link between terrorism and political issues supported by revolutionary movements. Early examples of insurgencies and guerrilla warfare can be traced back to the Túpac Amaru indigenous uprising in highland Peru against Spanish control in the 1780s and the Caste War in the Yucatán peninsula of Mexico

⁴¹ Meghelli, Samir (2009), "From Harlem to Algiers: Transnational Solidarities Between the African American Freedom Movement and Algeria, 1962-1978", in William Manning Marable and Hishaam D. Aidi (eds.), *Black Routes to Islam*, London, Palgrave Macmillan.

⁴² Bloom, Joshua and Waldo E. Martin Jr. (2013), *Black against Empire: The History and Politics of the Black Panther Party*, Oakland, University of California Press, p. 314.

⁴³ Ibid.

⁴⁴ Art. 120 of the French Constitution of 24 June 1793.

⁴⁵ NCTC (2017a), "Counter Terrorism Guide. Historic Timeline". Available at <https://www.dni.gov/nctc/timeline.html> (accessed 21 Dec. 2017).

⁴⁶ DFLP (2004), "About DFLP." Available at <http://www.dflp-palestine.net/english/about-dflp/dflp-profile.htm> (accessed 1 Mar. 2017)

⁴⁷ U.S. Department of State (2017), "Acts of Terror 1980-1989". Available at <https://www.rewardsforjustice.net/english/acts-of-terror/1980---1989.html> (accessed 14 Mar. 2017).

1847–1901).⁴⁸ Guerrilla warfare was ‘exported’ to Europe, where it was used in Spain against Napoleon’s invasion in the early 1800s. But this was not yet the ‘globalization’ of terrorism. Similar tactics were used by Peruvian irregulars led by Andrés Avelino Cáceres against Chilean invaders during the War of the Pacific (1879–1883) and in a number of other cases in 19th and early 20th century conflicts in the region (e.g., Mexico, Nicaragua, and Colombia).⁴⁹

From the fifties onwards, in the aftermath of the Cuban Revolution, the insurgency in Latin America was grounded on Marxist-Leninist ideology,⁵⁰ and characterized by the use of a variety of violent and nonviolent tactics, including terror, to overthrow governments with guerrilla warfare.⁵¹ This phenomenon, previously qualified as "insurgency" and/or "guerrilla," was then re-branded "terrorism." And it went international.

Guerrilla groups proliferated in the region from the 1960s to the 1990s when, following peace agreements, former guerrilla organizations reinvented themselves as political parties (e.g., Farabundo Martí National Liberation Front or FMLN in El Salvador).⁵² At present, the only guerrilla insurgencies still active operate in Mexico and Peru, where the Communist Party is commonly known as the Shining Path (*Sendero Luminoso*). In Mexico, despite attempts to reach a political settlement,⁵³ operate the Zapatista Army of National Liberation (*Ejército Zapatista de Liberación Nacional*, EZLN) and the Popular Revolutionary Army (*Ejército Popular Revolucionario*, EPR), which founded a militarized political party, the Popular Revolutionary Democratic Party (*Partido Democrático Popular Revolucionario*, PDPR-EPR).

None of these groups is designated as terrorist by the U.S. Department of State.⁵⁴ The only Peruvian insurgent group blacklisted by the U.S. was the Túpac Amaru Revolution Movement (*Movimiento Revolucionario Túpac Amaru*, MRTA), which, ideally, is the ‘historical’ link between insurgency, guerrilla, and terrorism. The MRTA was classed as a terrorist organization in 1997, and removed in 2001, after its military defeat.

⁴⁸ Castro, Daniel (1999) (ed.), *Revolution and Revolutionaries: Guerrilla Movements in Latin America*, Wilmington, Scholarly Resources.

⁴⁹ Ibid.

⁵⁰ Debray, Régis (1967), *Revolution in the Revolution: Armed Struggle and Political Struggle in Latin America*, trans. Bobby Ortiz, New York, Grove.

⁵¹ Ibid.

⁵² Castro.

⁵³ Muñoz Ramírez, Gloria (2008), *The Fire and the Word: A History of the Zapatista Movement*, San Francisco, City Lights Publishers.

⁵⁴ Bureau of Counterterrorism (2017), "Foreign Terrorist Organizations". Available at <http://www.state.gov/j/ct/rls/other/des/123085.htm> (accessed 21 Dec. 2017).

Then it is the turn of the fourth wave of modern terrorism, the religious wave. The year of the Iranian Revolution and Russian intervention in Afghanistan (1979) stands out for the appearance of radical Shiite Islamic movements (e.g., Hezbollah in Lebanon) and Sunni movements (e.g., Hamas, al-Qaeda, and other groups). The funding of the Afghan fighters by the U.S. in response to intervention by the Soviet Union in Vietnam marks the beginning of support to armed Islamic movements, which soon become "uncomfortable" and hard to crack down. As late as December 1979 Soviet leaders remained hesitant about sending troops into the mountainous region of Southwest Asia to fight the Afghan *Mujahideen* ("holy warriors" engaged in *Jihad*, the "Holy War" against invaders). The Afghan guerrilla attracted 5,000-20,000 volunteers from around the world.⁵⁵ The Soviet leaders endorsed an invasion of Afghanistan in 1979 only when they were convinced that they had no choice other than to protect Moscow's dominance in the area against growing Islamic influence.⁵⁶

⁵⁵ Hegghammer, Thomas (2011), "The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jiha," *International Security*, Vol. 35, No. 3 (Winter), p. 63.

⁵⁶ Garthoff, Raymond L. (1994), *Détente and Confrontation: American-Soviet Relations from Nixon to Reagan*, Washington, The Brookings Institution, pp. 985–1046 (rev. edition). See also: Westad, Odd Arne (1994), "Prelude to Invasion: The Soviet Union and the Afghan Communists, 1978–1979", *International History Review*, Vol. 16, No. 4 (Feb.), pp. 49–69; Soviet Central Committee, "Toward the Developments in Afghanistan, 27–28 December 1979", *Istochnik*, No. 3 (1995), pp. 153–156.

1 DEFINITIONS, THEORETICAL UNDERPINNINGS, CURRENT STATE OF THE RESEARCH

SCHOLASTIC AND LEGAL DEFINITIONS OF TERRORISM

The evolution of terrorism, which has political roots, then intertwined with religion, makes it difficult to define unequivocally. Tony Coady counts over one hundred modern definitions of terrorism;⁵⁷ Fletcher concludes that there is no definitive categorization;⁵⁸ Bassiouni, concisely states that "[t]errorism' has never been defined".⁵⁹ Lacking a common definition of terrorism, it is argued that a double approach, a theoretical-conceptual one and a legal one, can help frame this topic better.

Political leaders, philosophers, sociologists, historians, political scientists, law scholars and economists approach the issue of terrorism in different ways, especially its definition. Politicians assign the meaning to the term terrorism that best suits them. Political scientists analyze the actions of those in the geopolitical framework. Moral philosophers look at terrorism from the viewpoint of fairness. Historians make a comparative assessment of the phenomenon through its evolution over time, and scholars of law simply dissect counter-terrorism measures and assess their consistency with customs and current legislation. Sociologists stress the importance of culture, social relationships and social interactions.

Williamson⁶⁰ and Saul⁶¹ conclude that the meaning of the term terrorism has undergone a transformation since the Reign of Terror in the French Revolution. The literal meaning of the word "terror", and its variant terms "terrorism" and "terrorist",⁶² does not serve to obtain a legal concept of terrorism, which depends on its historical and political context.⁶³ Looking for a definition of terrorism is a philosophical exercise on the one hand and legal on the other. The

⁵⁷ Coady, C.A.J. (2004a), "Defining Terrorism", in Igor Primoratz (ed.), *Terrorism—The Philosophical Issues*, New York and London, Palgrave Macmillan, p. 4.

⁵⁸ Fletcher, George P. (2003a), "The Problem of Defining Terrorism", paper presented at the conference *Terrorism—Philosophical Perspectives*, Mar. 2003, Tel-Aviv University.

⁵⁹ Bassiouni, Mahmoud Cherif (2004), "Terrorism: The Persistent Dilemma of Legitimacy", *JIL*, Vol. 36, No. 2 and 3, p. 305.

⁶⁰ Williamson, Myra (2009), *Terrorism, war and international law: the legality of the use of force against Afghanistan in 2001*, Farnham, Ashgate Publishing, p. 43.

⁶¹ Saul (2006a), p. 3.

⁶² The term "terrorism" and "terror" are not the same. See below: ICTY, *Prosecutor v. Galić*.

⁶³ *Ibid.*

former aspect has to deal with ethical and moral issues, while in the latter rules arise from the political will of legislators, who have different points of view influenced by their ideological position. Lawmakers are not immune to the influence of the common morals of their own societies and the uses and habits of their own cultures, including religious aspects. Nardin concludes that the rule of law is a moral idea, that cannot distinguish between law as an instrument of power from law as a constraint on the exercise of the power itself.⁶⁴ Hurd argues that the international rule of law simply reflects the way in which states use law to justify and pursue foreign policy.⁶⁵

Leaving aside numerous definitions provided by dictionaries and encyclopedias, there are some interesting scholastic definitions. Political dimension of terrorism and violence are two aspects commonly taken into consideration by academics, for example Saul emphasizes the political dimension of terrorism.⁶⁶ Saul believes that the peculiar semantic power of the term terrorism, beyond its literal meaning, is its capacity to stigmatize, delegitimize, denigrate and dehumanize those at whom it is directed, including legitimate political opponents.⁶⁷

By excluding military targets among the definition of terrorism, some scholars seem to consider it a legitimate action. Richardson gathers that terrorism is “politically motivated violence directed against non-combatant or symbolic targets which is designed to communicate a message to a broader audience”.⁶⁸ Richardson concludes that “[t]he critical feature of terrorism is the deliberate targeting of innocents in an effort to convey a message to another party”.⁶⁹ While the term “non-combatants” includes troops but excludes civilians, the term “symbolic targets” seems to encompass even political figures.

Schreiber finds that terrorism is "a political act, ordinarily committed by an organized group, involving death or the threat of death to non-combatants".⁷⁰ Mearsheimer and Walt argue that terrorism is not an organization or a movement; it is simply the tactic of indiscriminately

⁶⁴ Nardin, Terry (2008), "Theorizing the International Rule of Law", *Rev. Int'l. Stud.*, Vol. 34, No. 3, p. 385. DOI: 10.1017/S0260210508008085.

⁶⁵ Hurd, Ian (2015), "The International Rule of Law and the Domestic Analogy", *Global Constitutionalism*, Vol. 4, No. 3, p. 365-95. DOI: 10.1017/S2045381715000131.

⁶⁶ Saul, Ben (2008), "Forgiving Terrorism: Trading Justice for Peace, or Imperiling the Peace?", Sydney Law School Research Paper No. 08/126, in Miriam Gani and Penelope Mathew (eds.), *Fresh Perspectives on the 'War on Terror'*, Canberra, ANU E-Press, p. 190.

⁶⁷ Id., p. 3.

⁶⁸ Richardson, Louise (1999), "Terrorists as Transnational Actors", *Terrorism and Political Violence*, Vol. 11, No. 4, p. 209-219.

⁶⁹ Ibid.

⁷⁰ Schreiber, Jean (1978), *The Ultimate Weapon: Terrorists and World Order*, New York, Morrow, p. 20.

attacking enemy targets, especially civilians, employed when there is no good option for fighting against superior military forces.⁷¹ Palmer-Fernandez adopts a wide definition that includes any target: "Terrorism is the organized use of violence against civilians or their property, the political leadership of a nation, or soldiers (who are not combatants in a war) for political purposes".⁷²

Few academics explicitly include state terrorism in their definition. Among these is Rodin, according to whom "[t]errorism is the deliberate, negligent, or reckless use of force against noncombatants, by state or nonstate actors for ideological ends and in the absence of a substantively just legal process".⁷³ Goodin perceives terrorism as tactic with which Western politicians deliberately frighten people for their own political advantage.⁷⁴ Lutz and Lutz rule out that terrorism may involve a state actor in any way "as either the perpetrator, the victim of the violence, or both".⁷⁵

Some definitions exclude completely state responsibility for terrorism. The Institute for Economics and Peace (IEP), which produces the Global Terrorism Index (GTI) based on data from the Global Terrorism Database (GTD), adopts the same definition of terrorism of the National Consortium for the Study of Terrorism and Responses to Terrorism (START): "the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation".⁷⁶

Hoffman and Williamson⁷⁷ share the definition provided in the U.S. Code,⁷⁸ and consider terrorism to be violence that is politically motivated, conducted by a subnational group or non-state entity.⁷⁹ Dipak Gupta infers that the U.S. law, defining terrorism as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or

⁷¹ Mearsheimer, John J. and Stephen M. Walt (2007), *The Israel Lobby and U.S. Foreign Policy*, New York, Farrar, Straus and Giroux, p. 62.

⁷² Palmer-Fernandez, Gabriel (2005), "Terrorism, Innocence and Justice", *Philosophy and Public Quarterly*, Vol. 25, No. 3 (Summer), p. 24.

⁷³ Rodin, David (2004), "Terrorism without Intention", *Ethics*, Vol. 114, No. 4 (July), p. 755. DOI: 10.1086/383442.

⁷⁴ Goodin, Robert E. (2006), *What's Wrong with Terrorism?*, Oxford, Polity, p. 2.

⁷⁵ Lutz, James M. and Brenda J. Lutz (2008), *Global Terrorism*, London, Routledge, p. 9.

⁷⁶ IEP (2017), *Global Terrorism Index 2017*, IEP Report 55, Sidney; New York, IEP.

⁷⁷ Williamson, p. 43.

⁷⁸ 22 U.S.C. 2656f(d)(2)).

⁷⁹ Hoffman, Bruce (2006), *Inside terrorism*, New York, Columbia University Press (2nd edition), p. 41.

clandestine agents, usually intended to influence an audience", excludes acts carried out by governments.⁸⁰

Bockstette argues that terrorism is “political violence in an asymmetrical conflict that is designed to induce terror and psychic fear (sometimes indiscriminate) through the violent victimization and destruction of non-combatant targets (sometimes iconic symbols)”.⁸¹ Deeming that terror acts are performed by “an illicit clandestine organization”, Bockstette excludes terrorist actions carried out by a government or its agents.

Novotný and Meisels go beyond excluding state responsibility, and seem to grant governments the license to commit violent acts against civilians. Novotný argues that a terrorist act is an action carried out by means of fear-provoking violence without the legitimate authority of a recognized state, and directed indiscriminately against non-combatants to achieve a political goal.⁸² This definition safeguards states from being blamed for committing acts of terrorism.

Meisels believes that terrorism is “the intentional random murder of defenseless non-combatants, with the intent of instilling fear of mortal danger amidst a civilian population as a strategy designed to advance political ends”.⁸³ The definition of the Israeli political theorist underlines the intentionality of the act, thus excluding casual civilian victims. The unusual term "defenseless non-combatants" seems to exclude from this definition of terrorism the killing of "non-combatants" who are able to defend themselves, e.g. Palestinian protesters active in the *intifada*.

Some definitions legitimize attacks targeting politicians and the military, suggesting that any unintentional civilian casualty is to be considered 'collateral damage'. Saul infers that there are no established borders between terrorism and other forms of political violence – riot, revolt, rebellion, war, conflict, uprising, revolution, subversion, intervention, guerrilla – and that the argument about terrorism is also a discussion of the classification of political violence.⁸⁴ Further,

⁸⁰ Gupta, Dipak K. (2008), *Understanding terrorism and political violence: the life cycle of birth, growth, transformation, and demise*, London, Taylor and Francis, p. 8. See also: Sinai, Joshua (2008), "How to Define Terrorism", *Perspectives on Terrorism*, Vol. 2, No. 4 (2008), pp. 9-11.

⁸¹ Bockstette, Carsten (2008), "Jihadist Terrorist Use of Strategic Communication Management Techniques", Paper No. 20, Garmisch-Partenkirchen, George C. Marshall Center for European Security Studies, p. 8.

⁸² Novotny, Daniel D. (2007), "What is Terrorism?", in Edward V. Linden (ed.), *Focus on Terrorism, Vol. 8*, New York, Nova Science Publishers.

⁸³ Meisels, Tamar (2006), "The Trouble with Terror: The Apologetics of Terrorism: A Refutation", *Terrorism and Political Violence*, Vol. 18, No. 3, p. 480. DOI: 10.1080/09546550600752030.

⁸⁴ *Id.*, p. 5.

“every form of violence is potentially terror-inspiring to its victim', from mugging to warfare”.⁸⁵ Marsavelski believes that true freedom fighters, driven by a just cause, resort to violence only as an extreme means of fighting oppression, and that they do not tolerate any civilian casualties.⁸⁶ Marsavelski inflexibly argues that permitting civilian casualties marks revolutionaries as terrorists and turns them into oppressors once they seize power.⁸⁷

Honderich summarizes terrorism as “violence, short of war, political, illegal and *prima facie* wrong”.⁸⁸ This introduces a moral and ethical justification of terrorism that will be addressed further in the text.

Some scholars adopt a wide definition of terrorism and leave room for interpretations. Marcello Di Filippo considers violence an essential feature of terrorism, when targets civilians. According to the Italian professor of international law, this is the absolute minimum standard under which an act could properly be considered terrorism.⁸⁹ Gibbs does not take it into account the political dimension of terrorism, and considers it simply as illegal or threatened violence directed against human or nonhuman targets.⁹⁰ Accordingly, Walzer defines terrorism as the “deliberate killing of innocent people, at random, in order to spread fear through a whole population and force the hand of its political leaders”.⁹¹ Walzer concludes that terrorism is the random killing of innocent people, in the hope of creating pervasive fear.⁹² Violence is not an essential component of terrorism to all scholars. By affirming that “violence is not essential to terrorism and, in fact, most acts of terrorism are nonviolent”, the American philosopher Carl Wellman broadens the ‘classic’ definition of terrorism as “the use or attempted use of terror as a means of coercion”.⁹³ Corlett,⁹⁴ Young⁹⁵ and Meggle⁹⁶ also adopt a wide notion of terrorism.

⁸⁵ Saul (2006a), p. 2.

⁸⁶ Marsavelski, Aleksandar (2013), “The Crime of Terrorism and the Right of Revolution in International Law”, *CJIL*, Vol. 28, No. 241 (Spring), p. 294.

⁸⁷ *Id.*, p. 283.

⁸⁸ Honderich, Ted (2006), *Humanity, Terrorism, Terrorist War*, London; New York, Continuum, p. 88.

⁸⁹ Di Filippo, Marcello (2008), “Terrorist Crimes and International Co-Operation: Critical Remarks on the Definition of Terrorism in the Category of International Crimes”, *EJIL*, Vol. 19, No. 3, p. 533. DOI: 10.1093/ejil/chn027.

⁹⁰ Gibbs, Jack P. (1989), “The Conceptualization of Terrorism”, *American Sociological Review*, Vol. 54, No. 2 (June), p. 30.

⁹¹ Walzer, Michael (2002), “9/11: five questions about terrorism”, *Dissent*, Vol. 49, No. 1 (Winter), pp. 5-16. Republished in Walzer, Michael (2004), *Arguing About War*, New Haven, Yale University Press, pp. 130-142.

⁹² Walzer (1977), p. 197 and 203.

⁹³ Wellman, Carl (1979), “On Terrorism Itself”, *Journal of Value Inquiry*, Vol. 13, p. 250-1.

⁹⁴ Corlett, J. Angelo (2003), *Terrorism: A Philosophical Analysis*, Dordrecht, Kluwer, pp. 114–120.

⁹⁵ Young, Robert (2004), “Political Terrorism as a Weapon of the Politically Powerless”, in Igor Primoratz (ed.), *Terrorism: The Philosophical Issues*, New York, Palgrave Macmillan, p. 57.

According to John Philip Jenkins in *Encyclopædia Britannica*⁹⁷, terrorism is "the systematic use of violence to create a general climate of fear in a population and thereby to bring about a particular political objective" which "has been practiced by political organizations with both rightist and leftist objectives, by nationalistic and religious groups, by revolutionaries, and even by state institutions such as armies, intelligence services, and police". In a comprehensive book on the topic, Schmid and Jongman⁹⁸ provide a longer and more detailed definition:

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.

In an attempt to address the problem of the legal definition of terrorism, Schmid has collected many definitions used by the U.S. government and the UN, and those included in international conventions and protocols.⁹⁹ Rosalyn Higgins, a former judge at the International Court of Justice, concludes that "[t]errorism is a term without legal significance".¹⁰⁰ Antonio Cassese, considers that a definition of terrorism "has gradually emerged" in customary international law.¹⁰¹

⁹⁶ Meggle, Gerg (2005), "Terror and Counter-Terror: Initial Ethical Reflections", in Greg Meggle (ed.), *Ethics of Terrorism and Counter-Terrorism*, Frankfurt/M., Ontos Verlag, p. 161–175.

⁹⁷ Terrorism (2014), *Encyclopædia Britannica Online*, Chicago, Encyclopædia Britannica. Available at <http://www.britannica.com/topic/terrorism> updated: 10.06.2017 (accessed 21 Dec. 2016).

⁹⁸ Schmid, Alex P. and Albert J. Jongman (1988), *Political terrorism: a new guide to actors, authors, concepts, data bases, theories, and literature*, Amsterdam, Transaction Books, p. 28.

⁹⁹ Schmid, Alex P. (2004), "Terrorism-The Definitional Problem", JIL, Vol. 36, No. 2.

¹⁰⁰ Higgins, Rosalyn (1997), "The general international law of terrorism", in Rosalyn Higgins and Maurice Flory (eds.), *International Law and Terrorism*, London, Routledge, p. 28.

¹⁰¹ *Prosecutor v. Ayyash et al.*

One can find a definition of terrorism in a ruling delivered in 2011 by the Special Tribunal for Lebanon (STL) presided over by Cassese.¹⁰² In this landmark decision, the STL Appeals Chamber states that the international crime of terrorism consists of three key elements:

- (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act;
- (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it;
- (iii) when the act involves a transnational element.

The NATO *Glossary of Terms and Definitions* provides a broad and clear-cut definition of terrorism: "[t]he unlawful use or threatened use of force or violence against individuals or property in an attempt to coerce or intimidate governments or societies to achieve political, religious or ideological objectives".¹⁰³ This definition involves two essential elements: violence and politics. In the absence of a UN convention on terrorism, two resolutions provide definitions of the term:

criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them;¹⁰⁴

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to

¹⁰² *Prosecutor v. Ayyash et al.*, § 85.

¹⁰³ NATO Standardization Office-NSO (2016), *AAP-06(2016)-NATO Glossary of Terms and Definitions* [MC 0472/1, 2016], Brussels, NATO (Edition 2016, Ver. 1), p. 136.

¹⁰⁴ UNGA, Resolution A/RES/50/53, adopted on 29 Jan. 1996.

abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.¹⁰⁵

These resolutions, while not accepting any justification for acts of terrorism, which are considered crimes, acknowledge political, philosophical, ideological, racial, ethnic and religious motivations. Nevertheless the text of both the resolutions clears the field from any political justification, as it does not distinguish between motivations (religion, ideology, etc.) and goals (usually political), referring at the same time to conventions and protocols which are the result of different approaches.

The Geneva Conventions prohibit: all measures of intimidation or of terrorism (Art. 33 of Convention IV of 1949); acts or threats of violence the primary purpose of which is to spread terror among the civilian population (Article 51(2) of Additional Protocol I); acts or threats of violence the primary purpose of which is to spread terror among the civilian population (Art. 13(2) of Additional Protocol II).

The United Nations address terrorism in the latter half of the seventies, when the U.S. administration starts codifying the phenomenon under such name. In resolutions to eliminate international terrorism adopted by the General Assembly before 9/11, the UN declare themselves initially "[d]eeply perturbed over acts of international terrorism"¹⁰⁶ and then subsequently "[d]eeply disturbed by the persistence of terrorist acts".¹⁰⁷ Terrorism, at first does not seem a phenomenon considered seriously, beyond the issue concerning relationships between states.

The genesis and the historical evolution of terrorism, make it, above all, an instrument of political struggle. Terrorism has been commonly used as a means of struggle by some political group, mainly in colonized countries.¹⁰⁸ While African countries imagine anti-colonialist terrorists as "freedom fighters",¹⁰⁹ Western governments consider them criminals. Former colonies, now independent countries, presume that armed struggle is as a legitimate instrument to

¹⁰⁵ UNSC, Resolution 1566 (2004) [Threats to international peace and security caused by terrorist acts], adopted on 8 Oct. 2004, S/RES/1566 (2004), § 3.

¹⁰⁶ UNGA, Resolutions: A/RES/3034(XXVII) of 18 Dec. 1972; A/RES/31/102 of 15 Dec. 1976; A/RES/32/147 of 16 Dec. 1977.

¹⁰⁷ This sentence appears for the first time in A/RES/34/145.

¹⁰⁸ *Gran Diccionario Enciclopédico* (1978), Vol. XI, Barcelona, Plaza and Janés (8th edition).

¹⁰⁹ Rapoport, p. 55-56.

gain independence and national sovereignty. This difference of opinion prevents the achievement of a common definition of terrorism.

The principle of self-determination becomes a milestone of *jus cogens* during World War II, and is proclaimed in the *Declaration of Principles of the Atlantic Charter* of 14 August 1941,¹¹⁰ restated in the *Declaration by United Nations* signed on 1 Jan 1942,¹¹¹ in the *Moscow Declaration* of 1943,¹¹² and ultimately incorporated into the UN Charter, and as a result of the practice under chapters XI to XIII of the same Charter.¹¹³

The UN General Assembly *Declaration on the Granting of Independence to Colonial Countries and Peoples* of 1960, also known as the *Declaration on Decolonization*, says that “the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations”.¹¹⁴ The Declaration stresses the inalienable right of all peoples to self-determination and to have complete freedom, the exercise of their sovereignty and the integrity of their national territory; it calls for transferring all powers to the peoples of trust and non-self-governing territories or all other territories which have not yet attained independence, in order to enable them to enjoy complete independence and freedom. The right of peoples under alien domination or foreign occupation to take any legitimate action to realize their inalienable right of self-determination is recalled also in the *Vienna Declaration*. According to the UN, as far there are still 17 non-self-governing territories, including Western Sahara: 10 administered by the UK, 3 by the U.S., 2 by France, 1 New Zealand.¹¹⁵

The first six UN General Assembly resolutions addressing state terrorism reaffirm the inalienable right to self-determination and independence of peoples enshrined in the UN Charter against all forms of alien domination and foreign occupation, upholding the legitimacy of the

¹¹⁰ *The Atlantic Charter*, Yearbook of the United Nations 1946-47 (Nov. 1947), p. 2.

¹¹¹ *Declaration by United Nations*, signed in Washington, on 1 Jan. 1942, Yearbook of the United Nations 1946-47, p. 1.

¹¹² *The Moscow Declaration on General Security*, signed in Moscow, on 30 Oct. 1943, Yearbook of the United Nations 1946-47, p. 3.

¹¹³ Art. 1(2), 55, 73, and 76(b).

¹¹⁴ UNGA, Resolution 1514 (XV) [Declaration on the Granting of Independence to Colonial Countries and Peoples], adopted on 14 Dec. 1960.

¹¹⁵ UN (2017a), “The United Nations and Decolonization. Non-Self-Governing Territories”. Available at <http://www.un.org/en/decolonization/nonselvgovterritories.shtml#foot1> (accessed 16 Jan. 2017).

struggle of national liberation movements.¹¹⁶ These references, expressing concepts included in the *Declaration on Decolonization*, disappear in all subsequent resolutions adopted after 1991, namely from 1994 onwards.

Resolution A/RES/39/159 of 17 December 1984 on the “Inadmissibility of the policy of State terrorism”,¹¹⁷ speaks about "military intervention" and “military actions" as terrorism acts. This GA resolution recalls generally recognized principles and norms of international relations enshrined in the UN Charter:

renunciation of the threat or use of force against the territorial integrity or political independence of any [s]tate, non-intervention and non-interference in the internal and external affairs of [s]tates, permanent sovereignty of [s]tates and peoples over their natural resources and self-determination and independence of peoples under colonial domination, foreign occupation or racist régimes.

Following resolutions adopted between 1985 and 1991,¹¹⁸ reaffirming principles stressed in above mentioned resolutions - the inalienable right to self-determination and independence of peoples against all forms of alien domination and foreign occupation, upholding the legitimacy of the struggle of national liberation movements – recall relevant instruments of IHL applicable in armed conflict. This last reference disappears in all subsequent resolutions adopted after 1991, from 1994 resolutions onwards.

An Ad Hoc Committee established by Resolution 49/60 of 9 December 1994¹¹⁹ and Resolution 51/210 of 17 December 1996,¹²⁰ drafted a *Comprehensive Convention on International Terrorism*, intended to criminalize all forms of international terrorism, which was not adopted. Since the Committee is not able to achieve substantive progress, in 2013 recommends to establish a working group within the Sixth Committee (Legal) of the General

¹¹⁶ UNGA, Resolutions: A/RES/3034 (XXVII) of 18 Dec. 1972; A/RES/31/102 of 15 Dec. 1976; A/RES/32/147 of 16 Dec. 1977; A/RES/34/145 of 17 Dec. 1979; A/RES/36/109 of 10 Dec. 1981; A/RES/38/130 of 19 Dec. 1983.

¹¹⁷ UNGA, Resolution A/RES/39/159 [Inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States], adopted on 17 Dec. 1984.

¹¹⁸ UNGA, Resolutions: A/RES/40/61 of 9 Dec. 1985; A/RES/42/159 of 7 Dec. 1987; A/RES/44/29 of 4 Dec. 1989; A/RES/46/51 of 9 Dec. 1991.

¹¹⁹ UNGA, Resolution 49/60 [Declaration on Measures to Eliminate International Terrorism], adopted on 9 Dec. 1994.

¹²⁰ UNGA, Resolution 51/210 [Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism], adopted on 17 Dec. 1996.

Assembly. Since then, a text to complement the existing CT instruments is under elaboration by the Sixth Committee,¹²¹ which efforts are not successful. The negotiations of the treaty are deadlocked because of differences over the definition of terrorism. It is not possible to reach an agreement on the definition of terrorism, especially due to the position of the Arab and non-aligned countries. Although they agree on the need to arrive at a clear and shared definition, they believe that they should expressly exclude struggles for self-determination and the liberation of peoples under domination or foreign occupation.¹²²

Yet even in the aftermath of the terrorist attacks of 11 September 2001 the international community was divided on the definition of the term “terrorism”. Commenting the general debate over the attacks, the president of the UN General Assembly, Han Seung-soo, complained that “[s]ome delegations had said that any definition of terrorism must distinguish between acts of terrorism and acts in the exercise of the legitimate right to self-determination and defense against foreign occupation”.¹²³

DEFINITIONS OF THE TERM "TERRORIST"

As evidenced by the many definitions and possible interpretations of the term terrorism, it stands to reason that there exists some ambiguity about the definition of the actors, as well. A hypothetical answer to the question what is a terrorist would be: a person or persons that engage in violent activities on the behalf of state or non-state actors outside of the provisions of international law and wish to inflict harm on innocent civilians, military personnel and equipment, politicians and members of the civil society. While this is an overly broad definition, it can be accepted as somewhat correct, as it includes nearly every substantial element of

¹²¹ See: Ad Hoc Committee reports: A/57/37; A/59/894; A/C.6/60/L.6; A/61/37; A/C.6/61/SR.21; A/62/37; A/C.6/62/SR.16; A/63/37; A/C.6/63/SR.14; A/64/37; A/C.6/64/SR.14; A/65/37; A/C.6/65/L.10; A/66/37; A/C.6/66/SR.28; A/C.6/67/SR.23; A/68/37; A/C.6/69/SR.28; A/C.6/70/SR.27; A/C.6/71/SR.31.

¹²² UN Sixth Committee (Legal) (2015), “Measures to Eliminate International Terrorism. Consideration at the sixty-fifth session”. Available at <http://www.un.org/en/ga/sixth/65/ElimIntTerror.shtml> (accessed 25 Apr. 2015).

¹²³ Seung-soo, Han (2001), “Terrorism Must be Addressed in Parallel with Poverty, Underdevelopment, Inequality, General Assembly Told, as General Debate Concludes”, 11 Nov. 2001. Available at <http://www.un.org/press/en/2001/ga9971.doc.htm> (accessed 6 Dec. 2015).

terrorism as defined by the numerous examples in this chapter. Hacker divides terrorists into three groups – criminals, lunatics (mentally unstable), and crusaders.¹²⁴

Criminals are organized in groups, and they perform terrorist activities with the end goal of frightening the population and/or achieving some form of material gain. The lunatics (mentally unstable) are those that terrorize others due to psychological deficiencies, lack of empathy, and are generally only interested in terror insofar as it provides them with psychological or physiological satisfaction – the feeling of excitement and power over the victims. Finally, crusaders are the only true terrorists, who perform terrorist acts in an effort to change the world. Unlike the first two groups, which tend to fall within the confines of public safety policy and are relatively easy to differentiate, crusaders are exceedingly difficult to profile and differentiate from the general public.¹²⁵

Psychological research indicates that the formation of a terrorists' personality is influenced by two processes – group motivation and integration into the collective. The second factor is relatively simple, whenever an individual joins an organization, they feel welcomed, and this feeling is exacerbated through communal activities such as training and education. Shortly after, most individuals develop a cult of devotion to the organization and become ready to sacrifice their lives for the greater good. As social entities, terrorist organizations have developed instruments for indoctrination of members, and are general closed systems that influence the consciousness of the individual, turning them into a tool that can help the organization achieve its goals. In most cases, members are socially awkward, or isolated individuals who do not have a developed identity.¹²⁶

According to Ross, there are five psychological factors that formulate the persona of a terrorist – personality, frustration, narcissism, aggression, proclivity to organize, ability to learn, cost analysis. However, Ross argues that there is no definitive way to recognize or diagnose according to these factors since there is no extensive database that would be available to the public.¹²⁷

¹²⁴ Fredrick, Hacker F. (1976), *Crusaders Criminals Crazyies: Terror and Terrorism in Our Time*, New York, W.W. Norton and Company, pp. 12-38.

¹²⁵ Ibid.

¹²⁶ Twemlow, Stuart W. and Frank C. Sacco (2002), "Reflections on the Making of a Terrorist", in Jean Arundale (ed.), *Terrorism and War. Unconscious Dynamics of Political Violence*, London, Routledge, pp. 97-123.

¹²⁷ Ross, Jeffrey Ian (1996), "A Model of Psychological Causes of Oppositional Political Terrorism", *Peace and Conflict: Journal of Peace Psychology*, Vol. 2, No. 2 (June), p. 133.

Some theorists, such as Post, argue that terrorists cannot be profiled because they are “regular people” with different religious and national affiliations, ideologies, and levels of education. This is why no current method exists that can accurately profile a terrorist, or a potential terrorist without relying on specific elements of policy – for example, after the 9/11, Muslims were the target of increased profiling due to the nature of the attacks in New York.¹²⁸

Marsavelski finds that the difference between terrorists and freedom fighters resides in justification of the use of violence,¹²⁹ as both employ it to achieve their goals.¹³⁰ Nielsen¹³¹ argues that terrorist acts must be justified by their political effects and their moral consequences, particularly in a revolutionary struggle. Walzer thinks that the random targeting of civilians sets terrorism apart from guerrilla and political assassinations.¹³² Also Meisels avoids the distinction between terrorism and guerrilla or other forms of irregular warfare, arguing that all irregular belligerents are unlawful combatants and as such not eligible for the protection accorded by international conventions.¹³³ Klabbers assumes that the main difference between terrorists and lawful combatants is that the former do not fight for a state.¹³⁴ The literature defines an unlawful combatant a civilian or other non-combatant engaged in belligerent acts or participating directly in hostilities.¹³⁵

Modern terrorists are predominantly male, twentysomethings, and in sound physical condition, as the activity requires specific abilities and necessitates constant state of readiness. This, however, does not apply for members of anarchy groups such as the German Rote Armee Fraktion (Red Army Faction or RAF) or the Italian Red Brigades (*Brigate Rosse* or BR), who only engage in terrorist activity during pre-planned protests or marches. Members of the related to the Irish Republican Army (IRA), on the other hand, frequently employed sleeper agents, whose sole purpose was to collect as much information through their daily professions. They

¹²⁸ Post, Jerrold M. (2015), "Terrorism and Right-Wing Extremism: The Changing Face of Terrorism and Political Violence in the 21st Century: The Virtual Community of Hatred", *IJGP*, Vol. 65, No. 2 (Apr.), pp. 242-271. DOI: 10.1521/ijgp.2015.65.2.242.

¹²⁹ Marsavelski, p. 246.

¹³⁰ *Id.*, p. 266.

¹³¹ Nielsen, Kai (1981), “Violence and Terrorism: Its Uses and Abuses”, in Burton M. Leiser (ed.), *Values in Conflict* New York, Macmillan, p. 446.

¹³² Walzer, Michael (1977), *Just and Unjust Wars*, New York, Basic Books, pp. 176-206.

¹³³ Meisels, p. 32.

¹³⁴ Klabbers, Jan (2003), "Rebel with a Cause? Terrorists and Humanitarian Law", *EJIL*, Vol. 14, No. 2 (Apr.), p. 301. DOI: <https://doi.org/10.1093/ejil/14.2.299>.

¹³⁵ Gill, Terry and Elies van Sliedregt (2005), "Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants'", *Utrecht Law Review*, Vol. 1, No. 1 (Sept.), p. 33.

were fully integrated in the community, and completely undistinguishable from their peers. Islamic terrorists, for the most part, do not fit this description as they are either on terror watch lists or in hiding, which makes blending in nearly impossible, albeit with some exceptions.¹³⁶

What is clear is that there exist two diametrically different approaches to the definition of terrorists – those that claim that the causes of terrorist behavior are found in individual psychological factors, and those that explain such behavior through psycho-pathological changes in individuals. The first group relies on generalizable traits which is problematic, to say the least. Given that terrorists come from a variety of social, economic, and educational backgrounds, it is clear that there is no way to find a single thread that links them, besides their ideology. On the other hand, there is a relatively small subset of terrorists who actually suffer from any sort of mental disorder, which makes the second possibility moot, at best.¹³⁷

The only way to define, at least approximately, what a terrorist is, or a possible terrorist candidate is, is to look at a multitude of factors that indicate some sort of disenfranchisement with the establishment. Coupled with religious or national identity, social seclusion, and quite possibly a strong inferiority complex, one comes to a relatively easily applicable framework for identification.¹³⁸

DIFFERENTIATING BETWEEN ANTI-TERRORISM AND COUNTER-TERRORISM

The crux of the problem, so to speak, of the contemporary fight against terrorism, and in extension any attempt to conceptualize its impact on any number of specific areas – such as human rights violations – falls squarely on the extreme ambiguity of the definition. As was noted in the opening remarks of this dissertation, there exists at least a hundred different definitions of terrorism. Moreover, there are, possibly, at least as many definitions of counter-terrorism, anti-terrorism, fight against terror, or any other approximate term.¹³⁹

¹³⁶ Sageman, Marc (2008), *Leaderless Jihad*, Philadelphia, University of Pennsylvania Press, pp. 47-8.

¹³⁷ Snowden, Lynne L. and Bradley C. Whitsel (2005) (eds.), *Terrorism: Research, Readings, and Realities*, New York, Prentice Hall, pp. 49-62.

¹³⁸ Id., 52-62.

¹³⁹ Omelicheva, Mariya Y. (2010), "Counterterrorism: The state of Scholarship, directions for future data collection and analysis", *Perspectives on Terrorism*, Vol. 1, No. 2.

The reason for this is dual. First, in most cases, the terms counter-terrorism and anti-terrorism are used interchangeably to define the methods with which governments or independent actors try to curb the spread of terrorism, stop terrorist attacks, or act against individuals or groups that have been identified as sponsors or active participants of terrorism.¹⁴⁰

According to Omelicheva, the field of terrorism research increasingly accentuates counterterrorism due to the ever growing awareness of the interconnectivity between the two – cause and consequence. By pointing out that it is necessary to acknowledge specific factors that impact the development and application of counterterrorism policies, Omelicheva basically acknowledges the existence of cacophony of voices and differing opinions about the problem.¹⁴¹ Moreover, it seems that there is some area to improve the classification of counter-terrorism and anti-terrorism in light of the existence of relevant variants and dimensions of policy implications of different nations. Here, Omelicheva primarily points to the U.S. policy, which offers the clearest point of departure for the analysis of the anti – counter dichotomy.¹⁴²

There are, essentially, two prevailing positions about the best way to combat terrorism. The first position can be classified as *ex post facto* response, or retaliation that affects the transgressors only after the attack has happened. The second position is *ex ante*, or the one that is planned in advance with the purpose of preventing an attack or trying to solve the root cause of the issue that may lead to an attack. These two positions have become known as anti terrorism (*ex post facto*) and counter terrorism (*ex ante*).¹⁴³

Although many theoretical analyses of these terms offer nearly identical definitions and make virtually no differentiations between anti-terrorism and counter- terrorism, the matter is far from settled or conceptually resolved. A good example of this can be found in Whittaker, who states that counter-terrorism and counter-insurgency can be viewed as integral parts of the anti-terrorism approach, and that they are defined as proactive approaches, unlike internal anti-terrorism, which is reactive.¹⁴⁴

Research points to the conclusion that the differentiation between counter-terrorism strategies and the fight against insurgencies is becoming blurry, even though these are by default very different doctrines. This can be attributed to the fact that the aftermath of 9/11 led to the

¹⁴⁰ Whittaker, David (2013), *Terrorism: Understanding the global threat*, London, Routledge, pp. 280-299.

¹⁴¹ Omelicheva.

¹⁴² Id.

¹⁴³ Hoffman, pp. 2-49.

¹⁴⁴ Whittaker, pp. 292-294.

invasion of Iraq, which drew the attention from the perpetrators of the attack, and facilitated the analysis of the effectiveness of waging offensive wars against insurgents.¹⁴⁵

This led to the framing of counter-terrorism as a method of prevention. However, it must be noted that the discussion about the nature of anti-terrorism and counter-terrorism, once again, steers off into the dichotomy of counter-terrorism and counter-insurgency. While it is not possible to equate the latter with anti-terrorism, it does seem that the current state of the research largely fails to capitalize on the intricate difference between the two, opting instead to focus on insurgency as a form of response.¹⁴⁶

According to the current understanding, counter-terrorism combines a number of different approaches that can improve the ability of actors to tackle the dangers of terrorism. However, it must be noted that there exists a large swath of data that allows for a strong critique of counter-terrorism's lack of functionality and success. First, it is entirely based on force, has a profoundly negative effect on the human rights of those caught in the legal and political conundrum, it transfers most of the responsibility for its implementation from democratic bodies (Congress, EU Parliament, and others) to non-elected officials and agencies, and so on.

The most appropriate definition of counter-terrorism can be found in the U.S. Army field manual, which defines it as all operations that include offensive measures taken to prevent, deter, and respond to terrorism. This definition includes all of the possible aspects of counter-terrorism, but much like all other definitions, it leaves much to be discussed. If an effective doctrine of counter-terrorism means that whatever is necessary, whenever it is necessary is an acceptable response, then it can create problems in the development of effective strategies, resource allocation, and defining operational parameters.¹⁴⁷

What is more, when nations act to prevent terrorism from emerging in countries that pose some risk, they engage in state-building and try to make the Western ideals as appealing to the local population as possible. Paradoxically, the attempt to quell terrorist activity before it begins may have the opposite effect and actually exacerbate hostility towards the West. Moreover, by trying to improve the local conditions, space can be opened for the emergence of radicalized

¹⁴⁵ Hoffman, pp. 2-49.

¹⁴⁶ Morris, Nancy A. (2012), "Estimating Country-Level Terrorism Trends Using Group-Based Trajectory Analyses: Latent Class Growth Analysis and General Mixture Modeling", *JQC*, Vol. 28, No. 1 (2012), pp. 125-129.

¹⁴⁷ *Ibid.*

groups or cells, as evidenced by the emergence of ISIS. This has an adverse effect on the primary purpose of counter-terrorism initiatives and strategies.¹⁴⁸

However, with that said, there are some advantages to be had from all-encompassing approaches to counter-terrorism. Fighting insurrections abroad can be defined as fighting against any military, para-military, political, economic, psychological, or civil action taken by the government to quell an insurrection. Based on this definition, both counter and anti-terrorism can be understood as an all-encompassing approach to asymmetric warfare, one that acknowledges that the military solution is not a viable option.¹⁴⁹

On the other hand, counter-terrorism can be defined as all actions taken directly against terrorist networks and those that indirectly influence the creation of global and regional environments that are not conducive for terrorist activities. This entails offensive, defensive, and stability oriented initiatives. When Bell's definition is added, it emerges that counter-terrorism represents both the use of force and political and diplomatic means to stop terrorism.¹⁵⁰

The problem can, alternatively, be viewed from the perspective of the relationship between the concept of counter-terrorism and the process of peace-building in conflict zones, as proposed by Stepanova. However, it is necessary to distinguish between a variety of techniques used to ensure stability, and more importantly to distinguish between the different types of combatants – terrorists, guerilla fighters, and insurgents – even when they come from the same organization.¹⁵¹

Moreover, one of the main issues in contemporary studies of counter-terrorism and anti-terrorism relates to the inability to delineate between the responsibility of the military, internal security agencies, and the intelligence community. The lack of coordination between these three branches can lead to serious lapses and open the space for attacks or lead to wrongful actions against potentially innocent targets.¹⁵²

One of the key questions that emerges from this discussion is whether and in what measure can counter-terrorism be considered as an executive activity. What differentiates

¹⁴⁸ Rineheart, Jason (2010), "Counterterrorism and counterinsurgency", *Perspectives on Terrorism*, Vol. 4, No. 5, pp. 10-50.

¹⁴⁹ Ibid.

¹⁵⁰ Bell, Colleen (2011), *The Freedom of Security: Governing Canada in the Age of Counter-Terrorism*, Vancouver, UBC Press, p. 310

¹⁵¹ Stepanova, Ekaterina (2003), *Anti-terrorism and peace-building during and after conflict*, Stockholm, SIPRI, pp. 7-20.

¹⁵² Ibid..

counter-terrorism from other types of security strategies is the fact that its central goals are always based on prevention, disruption, and pre-emptive action against terror activities. What counter-terrorism does not do is take post hoc punitive actions, use extortion to achieve goals, or retaliate against specific groups. Although some counter-terrorism strategies do employ sporadic forms of extortion against enemy agents as a way of prevention, the crux of this strategy is to act before violence ever occurs.¹⁵³

This appears to be a much more salient form of response to terrorism than post hoc retaliation and punishment, which are predominantly used by the U.S. in the aftermath of the 9/11. This led to the creation of the dichotomy between counter-terrorism and anti-terrorism. However, it is clear that such strategies cannot be effective for two main reasons. The first reason is the fact that the current legislative and political assessment of terrorism and counter-terrorism strategy relies on the understanding that terrorists represent non-state actors. They are considered to be illegitimate combatants, which prevents the analysis of the deeper causes of terrorism out of fear it would legitimize their activities.¹⁵⁴

Considering the inefficiency of deterrence in the prevention of terrorism, it must be asked whether the propensity of western nations to use repression and aggression as a way of response through criminal law or military engagement extends the dominance of the deterrence models based on repelling or punishing is worthwhile. This is even more relevant considering that the majority of the literature rejects the deterrence theories as inadequate in the fight against modern terrorism.¹⁵⁵

According to Frey, the identification of the response types to terrorism is useful to determine their possible outcomes, associated costs and benefits. The differences between the models can be distinguished in four spheres. The soft and hard line response, the former attempts to find the key causes of terrorism whereas the latter invokes immediate and powerful response to an attack.

Conciliatory and coercive response, the former attempts to meet the terrorist's demands, engage in negotiations, and can include specific reforms. The latter attempts to adjust the criminal system in a society governed by the rule of law in order to dissuade attacks. Short-term

¹⁵³ Id., p. 13

¹⁵⁴ Id., pp. 11-30

¹⁵⁵ Darnell, Benjamin (2010), "Deterrence in Counter Terrorism", Bailrigg, Lancaster University. Available at <https://www.e-ir.info/2010/05/18/911-the-war-on-terror-and-halo> (accessed 20 May 2019).

and long-term response, the former tackles immediate issues that arise after an attack whereas the latter focuses on prevention or long-term reforms that lead to prevention.

Reactive and proactive response, the former attempts to tackle the fallout from an attack that already took place whereas the latter attempts to identify the surging political conflicts with the potential to lead to new terrorist networks or attacks and prevent them before they manage to manifest themselves.

The task of reconciling antiterrorist priorities and building a lasting peace must be located in the framework of existing counter-terrorist strategies. This demands, at the very least, a basic classification of national and international approaches to counter-terrorism as a way to point out the difference between reactive and proactive measures, short and long term responses, and responses that look at the root causes of terrorism.¹⁵⁶

A good example of this dichotomy can be found in the study by the COT Institute,¹⁵⁷ which delineates the two approaches to the struggle against terrorism, the soft one and the hard one. Alternatively, these two approaches could be named the military (war) approach, and the conciliatory approach to conflict management and countering terrorism. The conceptualization of counter-terrorism policy on the former model is based on the examination of effectiveness of military responses to attacks, such as the drone attacks by the U.S., bombing of Iraq, Libya, Sudan, and Afghanistan.

The main goals of the war approach are to prevent and counter existing threats and the principle of accountability of terrorists for their actions. Essentially, this approach is based on the idea that any violent action against a sovereign nation taken by illegitimate combatants should be met with equal or stronger military response by targeting points of interest in the location from which the attacks emerged.¹⁵⁸

Notably, the effectiveness of the war approach is dubitable, at best, since the retaliatory attacks by U.S. and NATO forces proved as an ineffective deterrent. In fact, terrorist activity has increased since 9/11, especially in the EU, Asia, and Africa. The war approach therefore does not

¹⁵⁶ Stephenson, John D. (2010), *Countering Terrorism: Engagement, Development and Deterrence*, Monterey, CA., Naval Postgraduate School, pp. 10-20. Available at <https://calhoun.nps.edu/handle/10945/5019> (accessed 20 May 2019).

¹⁵⁷ COT Institute for Safety Security and Crisis Management (ed.) (2007), *Notions of Security: Shifting Concepts and Perspectives*, The Hague, COT Institute Institute for Safety Security and Crisis Management, pp. 13-16.

¹⁵⁸ Stephenson, pp. 10-20.

prevent terrorist activity; in fact, an argument can be made that it exacerbates the likelihood of terrorist activities.¹⁵⁹

The latter approach is the soft strategy, which is based on the concept developed by Sederberg,¹⁶⁰ and which assesses the effectiveness of conciliation as a method of countering terrorism. Sederberg points out that time plays a critical role in the assessment of efficacy of individual measures or strategies, based on the idea of terrorism as a form of political struggle. In this view, negotiation is a viable option to counter terror within the broader political context.

Moreover, Sederberg points out that the acceptance of any counter-terrorism strategy depends on the view of terrorism adopted by individual governments, with those who view it as a form of warfare leaning towards the war approach, and those who view it as a form of political struggle leaning to the soft approach. This dichotomy is best viewed when contrasting the positions of the U.S. and the EU in the post 9/11 strategy. While the U.S. opted for the war approach, the EU developed a number of counter-terrorism strategies that were based on the soft approach, namely trying to isolate and mitigate root causes of terror and focusing on legal solutions to the problem.¹⁶¹

In conclusion, the debate around anti-terrorism and counter-terrorism appears to be largely focused on semantics. The reality of the situation is that the vast majority of the literature sees the two as interchangeable terms which pertain to the same thing. One distinction could be made in terms of placing anti-terrorism as a specific form of combating terrorism within the broader context of counter-terrorism strategies. *De facto*, anti-terrorism could be understood as a more aggressive strategy within the corpus of many other strategies used to counter terrorism. However, no definitive resolution of this issue can be reached, since the issue is largely obscured and not well defined in the literature. Much of the debate stems solely from the actions and legislature of the U.S. in the aftermath of the 9/11 attacks, and is not applicable to the broader field of counter-terrorism.

TERRORIST ACTIVITY

¹⁵⁹ Id., pp. 10-30

¹⁶⁰ Sederberg, Peter C. (1995), "Conciliation as counter-terrorist strategy," JPR, Vol. 32, No. 3, pp. 295-308

¹⁶¹ Id., pp. 295-310.

Classification of terrorist activity can be divided into conventional and unconventional, depending on the type of attack. Moreover, according to the methods, terrorism can be divided on classical terrorism, suicide terrorism, cyberterrorism, and narcoterrorism. Conventional terrorism is the form of terrorism that is most common, and is defined as performing actions against targets using light armaments, improvised explosive devices detonated from a distance, and is usually targeted towards civilians. Unconventional terrorism is that which uses any type of weapons of mass destruction – nuclear, biological, chemical, and has been classified as the single most relevant threat to humanity in the 21st century.¹⁶²

According to methods, terrorist acts can be classical, where the attackers use any of the conventional tactics – weapon attacks, bomb attacks, arson, kidnapping, or other. Suicide terrorism is that in which the attacker activates the device while wearing it. This type of attack has the goal of achieving as much damage and casualties as possible, and is usually performed in highly populated areas – airports, shopping centers, during celebrations. Cyber terrorism is based on the ability to execute attacks on enemy digital resources with the purpose of economic or political destabilization of the enemy.¹⁶³ To be classified as terror acts, these attacks must result in widespread fear and panic among the populous, or cause significant civil casualties. Finally, narcoterrorism represents the combination of organized crime (drug trafficking) and terrorism, where the criminal activity acts as a source of finance for terror acts.¹⁶⁴

According to Khan and Bauhn, the political dimension is an aspect of terrorism, but it can not be separated from violence. Khan thinks that “[t]he political dimension of terrorist violence is the key factor that distinguishes it from other crimes”,¹⁶⁵ although fails to define “terrorist violence”. The philosopher Per Bauhn perceives terrorism as “[t]he performance of violent acts, directed against one or more persons, intended by the performing agent to intimidate one or more persons and thereby to bring about one or more of the agent's political goals”.¹⁶⁶ Bauhn avoids

¹⁶² Combs, Cynthia C. (2017), *Terrorism in the Twenty-First Century*, London, Routledge, pp. 10-25.

¹⁶³ Marsili, Marco (2018), "The War on Cyberterrorism", *Democracy and Security* (published online: July), p. 2-3. DOI: 10.1080/17419166.2018.1496826.

¹⁶⁴ Freeman, Michael (2011), "Sources of Terrorist Financing: Theory and Typology", *Studies in Conflict and Terrorism*, Vol. 34, No. 6, pp. 461–475. DOI: 10.1080/1057610X.2011.571193.

¹⁶⁵ Khan, Liaquat Ali (1987), “A Legal Theory of International Terrorism”, *Connecticut Law Review*, Vol. 19, p. 945.

¹⁶⁶ Bauhn, Per (1989), *Ethical Aspects of Political Terrorism: The Sacrificing of the Innocent*, Lund, Lund University Press, p. 28.

distinguishing between civil and political or military targets, thus leaving the issue of what is lawful and what should constitute a criminal offence unresolved.

For many authors civilian casualties are essential to qualify an act as terrorism. Raman defines it as the “premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience”.¹⁶⁷ The American-Bangladeshi economist does not specify what he means by “innocent”, leaving room for extended interpretations that can also encompass political or military targets.

A similar definition is upheld by Primoratz, according to whom terrorism is the “deliberate use of violence, or threat of its use, against innocent people, with the aim of intimidating some other people into a course of action they otherwise would not take”.¹⁶⁸ Ganor considers briefly that “[t]errorism is the deliberate use of violence aimed against civilians in order to achieve political ends”.¹⁶⁹

Simpson, who includes undefined “non-hostile personnel” among the protected targets, seems to exclude attacks on military targets from the definition of terrorist acts. According to the British philosopher “[t]errorism consists of acts of indiscriminate violence directed at civilians or non-hostile personnel, in order to terrorize them, or their governments, into carrying out or submitting to the demands of the terrorists”.¹⁷⁰

Citing Walter Laqueur’s *The Age of Terrorism*, Tony Coady shares his definition of “the illegitimate use of force to achieve a political objective when innocent people are targeted”.¹⁷¹ The philosopher gathers that terrorists can be perceived as political representatives, with a range of tactics at their disposal.¹⁷² In *The Morality of Terrorism*¹⁷³ Coady argues that terrorism is not a tactic restricted to revolutionaries and other non-governmental groups, and concludes that terrorist methods are used also by governments and authorized governmental agencies for their

¹⁶⁷ Rahman, A.K.M. Atiqur, (2002), “Economic Cost Of Terrorism In South Asia: The Case Of Bangladesh”, p. 3. Paper presented at the *International Conference on Terrorism in South Asia: Impact on Development and Democratic Process*, Soaltee Crowne Plaza, 23-25 Nov. 2002, Kathmandu.

¹⁶⁸ Primoratz, Igor (2013), *Terrorism: A Philosophical Investigation*, Cambridge, Polity Press, p. 24.

¹⁶⁹ Ganor, Boaz (2005), “The Relationship Between International and Localized Terrorism”, *The Jerusalem Center for Public Affairs*, Vol. 4, No. 26. Available at <http://www.jcpa.org/brief/brief004-26.htm> (accessed 24 Mar. 2017).

¹⁷⁰ Simpson, Peter (2004), “Violence and Terrorism in Northern Ireland”, in Igor Primoratz (ed.), *Terrorism: The Philosophical Issues*, New York, Palgrave Macmillan, p. 161.

¹⁷¹ Coady, C.A.J. et al. (2002), *Terrorism and Justice: Moral Argument in a Threatened World*, Melbourne: Melbourne University Publishing, p. 8.

¹⁷² Coady, C.A.J. (2008), *Morality and Political Violence*, Cambridge, Cambridge University Press.

¹⁷³ Coady, C.A.J. (1985), “The Morality of Terrorism”, *Philosophy*, Vol. 60, No. 231 (Jan.), p. 54.

political purposes. Coady develops this concept, and provides a definition of terrorism in the *Encyclopedia of Ethics*: "The tactic of intentionally targeting non-combatants [or non-combatant property, when significantly related to life and security] with lethal or severe violence... meant to produce political results via the creation of fear".¹⁷⁴

Article 1(2) of the *Convention on Combating Terrorism in Central Africa* adopted in 2005 by the Economic and Monetary Community of Central Africa (*Communauté Economique et Monétaire de l'Afrique Centrale* or CEMAC) provides the same definition of "terrorist act" as the OAU Convention.¹⁷⁵ Art. 2 of the CEMAC Convention recalls the OAU Convention of 1999, as well as certain international instruments. The definition is the same enshrined in Art. 3(22) of the regulation on the prevention and punishment of money laundering and terrorist financing in Central Africa adopted by the ministerial committee in 2003.¹⁷⁶

Section 4(vi) of the African Model Anti-Terrorism Law, endorsed by the AU in 2011 to assist states in harmonizing legislation on terrorism, recalls offences located in CT conventions and incorporated in chapter 2 of the model, and extends the scope of terrorist act:

an act or omission, actual or threatened, inside or outside [AU member state] that is an offence as set out in any of the United Nations and African Union instruments to which [AU member state] is a party and includes an act, actual or threatened, that is intended, or can reasonably be regarded as being intended, to intimidate the public or any section of the public or compel a government or international organization to do or refrain from doing any act and to advance a political, religious or ideological cause, if the act;

- (a) involves serious violence against persons;
- (b) involves serious damage to property;
- (c) endangers a person's life;
- (d) creates a serious risk to the health or safety of the public or any section of the public;

¹⁷⁴ Coady, C.A.J. (2001), "Terrorism", in Lawrence C. Becker and Charlotte B. Becker (eds.), *Encyclopedia of Ethics*, London, Rutledge (2nd edition) (1st edition, 1992), p. 1697.

¹⁷⁵ UEAC (2005), Règlement N. 08/05-UEAC-057-CM-13 portant adoption de la Convention relative à la lutte contre le terrorisme en Afrique Centrale, done at Libreville, on 27 May 2004, adopted on 7 Feb. 2005 upon endorsement by the meeting of the Council of Ministers of 5 Feb. 2005.

¹⁷⁶ CEMAC (2003), Règlement N.01/03 CEMAC-UMAC portant prévention et répression du blanchiment des capitaux et du financement du terrorisme en Afrique Centrale, 28 Mar. 2003.

- (e) involves the use of firearms or explosives;
- (f) involves exposing the public to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical or any microbial or other biological agent or toxin;
- (g) is designed to disrupt, damage, destroy any computer system or the provision of services directly related to communication infrastructure, banking and financial services, utilities, transportation or key infrastructure;
- (h) is designed to disrupt the provision of essential emergency services such as the police, civil defense and medical services; or
- (i) involves prejudice to public security or national security.

The EU, which is culturally ‘homogeneous’ due to Christian roots of member countries,¹⁷⁷ defines “terrorist offences” in Art. 1 of the *Framework Decision on Combating Terrorism*.¹⁷⁸

given their nature or context, may seriously damage a country or an international organization when committed with the aim of: seriously intimidating a population; or unduly compelling a government or international organization to perform or abstain from performing an act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

The wording of these offences leaves room for interpretation; member states are free to adopt their own definitions of terrorism within their jurisdiction. What is interesting here, however, is the ‘political’ approach to the issue; the Council's definition emphasizes the strategic nature of terrorism as means to achieve a political goal.

The European Police Office (Europol) acknowledges that sometimes it can be difficult to assess whether a criminal event should be regarded as an act of terrorism or as an act of

¹⁷⁷ The draft *Treaty establishing a Constitution for Europe* (TCE), widely known as the 'European Constitution', after a long debate failed to include in the Preamble the reference to the common heritage of Christian and other spiritual and cultural values. The TCE was signed at Rome, on 29 Oct. 2004, but failed to reach the number of ratifications to enter in force.

¹⁷⁸ Council Framework Decision 2002/475/JHA of 13 June 2002 and amending Decision 2008/919/JHA of 28 Nov. 2008.

extremism.¹⁷⁹ Contrary to terrorism, not all forms of extremism sanction the use of violence. Nevertheless, the Financial Action Task Force emphasizes that extremism may be related to terrorism and exhibit similar behavioral patterns.¹⁸⁰

In the *European Union Terrorism Situation and Trend Report (TE-SAT)*, Europol includes criminal acts with the potential to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country, when they are reported by EU member states as extremism or terrorism. The Financial Action Task Force (FATF), an independent inter-governmental body, established within the Organisation for Economic Co-operation and Development (OECD), which develops policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction,¹⁸¹ defines terrorism any:

act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, 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.¹⁸²

This definition is more comprehensive and detailed than those previously analyzed, and is based on international humanitarian law and the law of war. Reference to the Geneva Conventions and to the Hague Conventions is evident, as the political purpose of terrorist acts is clearly stressed. In this context, it seems that the FATF considers terrorism used as a tactic within a wider strategy to be a crime. The definition only mentions civilians, hence actions against political or military targets may be deemed lawful. Only a deliberate attack on civilians would therefore be considered a crime, excluding acts against political and military objectives carried out with political purposes.

¹⁷⁹ Europol (2016), *European Union Terrorism Situation and Trend Report (TE-SAT) 2016*, The Hague, Europol, p. 52. DOI: 10.2813/525171.

¹⁸⁰ Violent extremism (2014), FATF Glossary of Terms and Acronyms: "Rigid adherence to an ideological set of religious or political beliefs that propagate violence".

¹⁸¹ FATF (2012), *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations*, Paris, FATF/OECD (updated June 2016), p. 7.

¹⁸² FATF (2012), p. 125.

THE ROOTS OF COUNTER-TERRORISM LEGISLATION

The U.S. anti-terrorism legislation is complex and has evolved after the attacks carried out against the U.S. Most of CT measures have been adopted after 9/11, but others, already in place, have been applied in counter-terrorism. Some of these measures date back to the times of the Cold War; others are even precedents. This confirms that the boundary between conflict (or war), political crime and terrorism has become thinner over time. Terrorism has been articulated in time as a distinctive category of criminal activity and entered into the legal lexicon only since the 1970s.¹⁸³

During the Cold War the U.S. Congress, recognizing that the Communist Party posed a threat to national security with a combination of propaganda, espionage, sabotage and terrorist acts, passed the *Emergency Detention Act of 1950*,¹⁸⁴ which authorized the government to detain any person suspected of espionage or sabotage. The legislation, also known as the *Subversive Activities Control Act of 1950* or the *McCarran Act*, was part of the *Internal Security Act*, and overrode the presidential veto during the McCarthy anti-Communist hysteria – the Act retroactively declared membership of the Communist Party to be illegal.

The *McCarran Act* requiring members of the Communist Party to register with the government, was repealed by the Supreme Court of the United States (SCOTUS), on the grounds that this registration might constitute a basis for prosecution, thereby stripping them of their Fifth Amendment right against self-incrimination.¹⁸⁵ Later SCOTUS deleted the act's provision prohibiting Communists from working for the federal government or at defense installations as a violation of the First Amendment's right to freedom of association.¹⁸⁶

Vetoing the bill, President Harry S. Truman commented: "In a free country, we punish men for the crimes they commit, but never for the opinions they have".¹⁸⁷ The act remained in force for twenty-one years before being repealed by the *Non-Detention Act of 1971*,¹⁸⁸ which prohibited detention of U.S. citizens without authorization from Congress. The part of the act

¹⁸³ FBI (2007), p. 32.

¹⁸⁴ *Emergency Detention Act*, Title II of the *Internal Security Act of 1950*, Pub. L. 81-831, 64 Stat. 987.

¹⁸⁵ *Albertson, et al. v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

¹⁸⁶ *United States v. Robel*, 389 U.S. 258 (1967).

¹⁸⁷ Hayashi, Brian Masaru (2004), *Democratizing the Enemy: The Japanese American Internment*, Princeton, Princeton University Press, p. 212.

¹⁸⁸ *Detention camps; citizen imprisonment, limitation. An act To amend title 18, United States Code, to prohibit the establishment of detention camps, and for other purposes*, Pub. L. 92-128, 85 Stat. 347, 18 U.S.C. § 4001(a).

codified as 50 U.S.C. § 798 was repealed in its entirety for violating the First Amendment of the U.S. Constitution. On signing the bill, President Richard Nixon said that the *Emergency Detention Act* could be "used to apprehend and detain citizens who hold unpopular views", referring to the detention of Japanese Americans during World War II, and stressed "respect for the liberty of the individual" and "the constitutional guarantee that every citizen will be afforded due process of law" on which the U.S. democracy is built.¹⁸⁹

Significant subsequent events situations the Cold War and the McCarthyism. In the witch-hunt atmosphere of the fifties, Julius and Ethel Rosenberg, two American citizens who spied for the Soviet Union, were executed on 19 June 1953 for conspiracy to commit espionage and for passing atomic bomb secrets to the Soviets.¹⁹⁰

The Rosenberg's were indicted in August 1950 under Title 50, § 32(a) and § 34 of the *Espionage Act of 1917*,¹⁹¹ passed in June 1917 to prevent the support of United States enemies during wartime, along with the *Trading with the Enemy Act* (TWEA),¹⁹² just after the United States entered World War I. The *Espionage Act*, which was based on the *Defense Secrets Act of 1911*, imposed much stiffer penalties than the 1911 law, including the death penalty.¹⁹³ It made it a crime to convey information with intent to interfere with the operation or success of the U.S. armed forces or to promote the success of its enemies.

The *Espionage Act* has been amended numerous times over the years. It was originally placed in Title 50 of the U.S. Code (War) but is now found under 18 U.S.C. § 792 et seq.. The law was extended by the *Sedition Act of 1918*, which was actually a set of amendments to the *Espionage Act*, which prohibited many forms of speech, including "any disloyal, profane, scurrilous, or abusive language about the form of government of the United States...or the flag of the United States, or the uniform of the Army or Navy", thus limiting the right to the freedom of speech. The *Sedition Act* was enacted by U.S. Congress during the Red Scare of 1918–19, in response to the 1919 anarchist bombings, and was used to cover a broader range of offences, and

¹⁸⁹ Nixon, Richard (1972), "Statement on Signing Bill Repealing the Emergency Detention Act of 1950", 25 Sept. 1971 [302], in *Public Papers of the Presidents of the United States, Richard Nixon, 1971: Containing the Public Messages, Speeches, and Statements of the President*, Washington, D.C., U.S. GPO, p. 985.

¹⁹⁰ FBI (2017b), "Atom Spy Case/Rosenbergs". Available at <https://www.fbi.gov/history/famous-cases/atom-spy-caserosenbergs> (accessed 21 Dec. 2017).

¹⁹¹ *Espionage Act of 1917*, Pub. L. 65–24, 40 Stat. 217.

¹⁹² *Trading with the Enemy Act* (TWEA), 40 Stat. 411, 12 U.S.C. § 95a–95b and 50 U.S.C. § 1–44.

¹⁹³ Ericson, Timothy L. (2005), "Building Our Own "Iron Curtain": The Emergence of Secrecy in American Government", *American Archivist*, Vol. 68, No. 1 (Spring/Summer), pp. 18-52.

to deport several hundred foreign-born nationals from the U.S.¹⁹⁴ The *Sedition Act* amendments were repealed in 1921, but many provisions of the *Espionage Act* remain, codified under 18 U.S.C. 37.

The fear of espionage by Soviet agents infiltrated in public and private sectors led to a campaign of fear and political repression that began with President Truman's Executive Order 9835 of 21 March 1947, which deemed “disloyal” all government employees linked to any organization determined by the attorney general to be "totalitarian, Fascist, Communist or subversive".¹⁹⁵

Executive Order 9835, which was repealed only in 1995 by President Clinton's E.O. 12968,¹⁹⁶ also expanded the provisions of the U.S. attorney general's list of subversive organizations (AGLOSO), which was drawn up on 3 April 1947.¹⁹⁷ The list, which included many Communist groups, underwent several revisions until President Nixon abolished it in 1974.

The U.S. Code was re-organized in 1918, and much of Title 50 (War and National Defense) was moved to Title 18 (Crimes and Criminal Procedure). Title 50, Espionage (§ 31–39), became Title 18, 794 et seq. The *McCarran Act* added 18 U.S.C. § 793(e) in 1950 and 18 U.S.C. § 798 was added the same year.¹⁹⁸ The *McCarran Act* amended a large body of law, including espionage law. The transfer of some ‘political’ offences from the defense and national security section of the U.S. Code to that of common crimes proved the criminalization of certain behaviors. This process started in the aftermath of WW2, in the first stages of the Cold War.

The consequences of this blacklisting were devastating for fundamental rights and freedoms. Many people were persecuted and suffered heavy consequences, including lost jobs employment and ruined careers. Some were also imprisoned.¹⁹⁹ Johnson compares the political oppression during McCarthyism to the "abuses suffered by aliens thrown into high security U.S.

¹⁹⁴ Finan, Christopher M. (2007), *From the Palmer Raids to the Patriot Act: a history of the fight for free speech in America*, Boston, Beacon Press, pp. 27–37. See also: Ericson.

¹⁹⁵ Truman, Harry S. (1947), Executive Order 9835 of 21 Mar. 1947 [Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government], 12 FR 1935.

¹⁹⁶ Clinton, William J. (1995), Executive Order 12968 of 2 Aug. 1995 [Access to Classified Information], 60 FR 40245 of 7 Aug. 1995.

¹⁹⁷ Goldstein, Robert Justin (2006), “Prelude to McCarthyism: The Making of a Blacklist”, *Prologue Magazine*, Vol. 38, No. 3 (Fall).

¹⁹⁸ Edgar, Harold and Benno C. Schmidt Jr., (1973), "The Espionage Statutes and Publication of Defense Information", *Columbia Law Review*, Vol. 73, No. 5 (May), p. 940.

¹⁹⁹ Fried, Albert (1997), *McCarthyism, The Great American Red Scare: A Documentary History*, Oxford, Oxford University Press. See also: Fried, Richard M. (1990), *Nightmare in Red: The McCarthy Era in Perspective*, Oxford, Oxford University Press.

prisons in the wake of 9/11".²⁰⁰ Cole upholds that the *USA Patriot Act* of 2001 resurrects the philosophy of McCarthyism, simply substituting 'terrorist' for 'communist'.²⁰¹

U.S. legislation, such as the 1917 *Espionage Act* and 1918 *Sabotage Act*, was drafted to address domestic subversion during wartime, but had no significant peacetime extension.²⁰² Early legislation, used to address anarchists, communists, fascists and right-wing and left-wing extremist groups, served as the foundation for terrorism-related amendments.²⁰³ Many pieces of these laws still survive, somehow, in the current counter-terrorism legislation.

THE U.S. DEFINITIONS OF TERRORISM

The U.S. Code provides several definitions of terrorism that address specific legal situations. Under Title 22 of U.S.C. § 2656f(d), the term "terrorism" means "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience". The term "international terrorism" means "terrorism involving citizens or the territory of more than one country". The term "terrorist group" means "any group practicing, or that has significant subgroups that practice, international terrorism". This definition does not make any mention of the motivations nor of the goals of terrorism; the U.S. government has employed it for statistical and analytical purposes since 1983.²⁰⁴ Terrorism section, comprised of a domestic unit and several international counter-terrorism units, was established within the FBI just one year before.²⁰⁵ The Bureau started recording domestic terrorist incidents in 1980, following the threats posed by such organizations as the Puerto Rican separatist group *Fuerzas Armadas de Liberacion Nacional* (FALN) and the

²⁰⁰ Johnson, Haynes (2005), *The Age of Anxiety: McCarthyism to Terrorism*, Orlando, Harcourt, p. 471.

²⁰¹ Cole, David D. (2003), "The New McCarthyism: Repeating History in the War on Terrorism", *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 38, No. 1 (Winter).

²⁰² FBI (2007), *Terrorism 2002-2005*, Washington, D.C., U.S. Department of Justice, p. 35. Available at https://www.fbi.gov/file-repository/stats-services-publications-terrorism-2002-2005-terror02_05.pdf (accessed 6 June 2017).

²⁰³ Id., p. 36.

²⁰⁴ Office of the Secretary of State and Office of the Coordinator for Counterterrorism (2003), *Patterns of Global Terrorism 2002*, Department of State Publication 11038, Washington, D.C.: U.S. Department of State, Introduction and xiii.

²⁰⁵ *Terrorism 2002-2005*, p. 36.

anti-Castro Cuban group Omega 7.²⁰⁶ Prior to the early 1980s the FBI dealt with right- and left-wing extremist groups operating within the U.S.²⁰⁷

Terrorism is defined in the U.S. Code of Federal Regulations (28 C.F.R. § 0.85), which sets out the tasks entrusted to the FBI in counter it, as “the unlawful use of force and 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”.²⁰⁸ This is a broad definition which makes no distinction between international and domestic terrorism, but which emphasizes the political dimension of the phenomenon. The FBI further describes terrorism as either domestic or international, depending on the origin, base, and objectives of the terrorist organization. The FBI adopts the following definitions:²⁰⁹

Domestic terrorism is the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or Puerto Rico without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof in furtherance of political or social objectives.

International terrorism involves violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

²⁰⁶ *Id.*, p. 37.

²⁰⁷ *Id.*, p. 34.

²⁰⁸ 28 CFR § 0.85.

²⁰⁹ *Terrorism 2002-2005*, p. iv.

Between 1991 and 2001 the U.S. government has expanded the FBI's authority to carry on terrorist extraterritorial investigations, in close cooperation with the Department of State and with the assistance of host governments.²¹⁰ According to U.S. Code (18 U.S.C. § 2331(1))²¹¹ activities of international terrorism:

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state;
- (B) appear to be intended to intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or affect the conduct of a government by mass destruction, assassination or kidnapping;
- (C) occur primarily outside the territorial jurisdiction of the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

The definition of domestic terrorism is reshaped under § 802 of the *USA Patriot Act*,²¹² which expands the definition of the term included in the U.S. Code (18 U.S.C. § 2331(5)), and now include activities that involve:

- (A) acts dangerous to human life that are a violation of the criminal laws of the United States or of any state;
- (B) appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by mass destruction, assassination, or kidnapping;

²¹⁰ *Comprehensive Crime Control Act of 1984*, Pub. L. 98-473, 98 Stat. 1976; *Omnibus Diplomatic, Security and Antiterrorist Act of 1986*, Pub. L. 99-399, 100 Stat. 853; *Antiterrorism and Effective Death Penalty Act of 1996* (AEDPA), Pub. L. 104-132, 110 Stat. 1214; Clinton, William J. (1995), Presidential Decision Directive 39 of 21 June 1995 [U.S. Policy on Counterterrorism (U)] (PDD/NSC 39), which clarifies the FBI's designation as the lead U.S. government agency for dealing with terrorism against Americans in the U.S. and overseas.

²¹¹ 18 U.S.C. § 2331.

²¹² *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub. L. 107-56, 115 Stat. 272. This Act authorised the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings, 8 U.S.C. § 1226a(a)(5).

(C) occur primarily within the territorial jurisdiction of the United States.

According to this definition, acts have to occur primarily within the territorial jurisdiction of the U.S. or its territories, without foreign direction, and if they do not, may be regarded as international terrorism. Section 802 of the *Patriot Act* modifies the definitions of terrorism and expands the governmental investigative powers, some of which are applicable to domestic terrorism. The current definition of domestic terrorism offences is too broad, including acts that are "dangerous to human life". A more narrow definition, encompassing only acts which could "cause serious physical injury or death", would exclude from the scope the activities of several non-governmental environmental organizations such as Greenpeace, Earth Liberation Front (ELF), and Animal Liberation Front (ALF). These extreme environmentalist groups carry on actions that are called "ecotage" (a portmanteau of the "eco-" prefix and "sabotage").²¹³ Ecotage is often seen as indistinguishable from acts of civil disobedience or even eco-terrorism.²¹⁴

The FBI defines eco-terrorism as the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally oriented, subnational group for environmental-political reasons, or aimed at an audience beyond the target, often of a symbolic nature.²¹⁵ The Federal Bureau characterizes the Animal Liberation Front and the Earth Liberation Front as a "serious terrorist threat".²¹⁶ The ALF is considered a terrorist group, whose purpose is to bring about social and political change through the use of force and violence.²¹⁷ Acts of sabotage and property destruction against industries and other entities perceived to be damaging to the natural environment are considered terrorist acts.²¹⁸

These behaviors previously fell under other offences now "extinct" or included in the broad definition of terrorism. Is the case with sabotage, that the U.S. Office of Strategic Services

²¹³ Plows, Alexandra, Derek Wall and Brian Doherty (2004), "Covert Repertoires: ecotage in the UK", *Social Movement Studies*, Vol. 3, No. 2, p. 199–219.

²¹⁴ Ibid.

²¹⁵ Jarboe, James F. (2002). "The Threat of Eco-Terrorism", Testimony of James F. Jarboe, Domestic Terrorism Section Chief, Counterterrorism Division, FBI, before the House Resources Committee, Subcommittee on Forests and Forest Health", FBI, 12 Feb. 2002. Available at <https://archives.fbi.gov/archives/news/testimony/the-threat-of-eco-terrorism> (accessed 27 Oct. 2014).

²¹⁶ Ibid.

²¹⁷ Ibid.

²¹⁸ Ibid.

(OSS), later renamed the CIA, encompasses among warfare practices.²¹⁹ According to the *DoD Dictionary of Military and Associated Terms*, a publication that sets forth standard U.S. military and associated terminology to encompass the joint activity of the U.S. Armed Forces, sabotage is “[a]n act or acts with intent to injure, interfere with, or obstruct the national defense of a country by willfully injuring or destroying, or attempting to injure or destroy, any national defense or war materiel, premises, or utilities, to include human and natural resources”.²²⁰ One can find the definition of criminal sabotage, a class B felony punishable according to chapter 9A.20 RCW, in the Revised Code of Washington (RCW) 9.05.060.²²¹ Now, the damage to natural resources is considered an act of terrorism, even by many regional conventions.

The DoD Dictionary encompasses sabotage, espionage, other intelligence activity, and assassinations conducted for or on behalf of foreign powers, organizations or persons or their agents, or international terrorist organizations or activities, as a terrorist tactic (JP 2-01.2). The *Antiterrorism* publication (JP 3-07.2) includes sabotage among tactics, techniques, and procedures employed by terrorists.²²²

The National Counterterrorism Center, the primary organization in the U.S. government for analyzing and integrating information pertaining to international terrorism, whose mission is focused on the terrorism threat emanating from outside the country,²²³ underlines that “[t]here are other organized groups that engage in violent acts – criminal organizations with no political or social agenda, and some are domestic terrorist groups”.²²⁴ According to the NCTC, domestic terrorists include “other types of violent extremists – such as white supremacists and eco-terrorists – who commit violence” on the U.S. soil, and “present significant terrorist threats”.²²⁵ In this definition the term terrorism is associated with groups or “criminal” organizations, which

²¹⁹ OSS (1944), *Simple Sabotage Field Manual No. 3*, Washington, D.C., OSS.

²²⁰ JCS (2010) (ed.), *Dictionary of Military and Associated Terms* (JP 2-01.2), Washington D.C., DoD (as amended through 15 Aug. 2014).

²²¹ Whoever, with intent that his or her act shall, or with reason to believe that it may, injure, interfere with, interrupt, supplant, nullify, impair, or obstruct the owner's or operator's management, operation, or control of any agricultural, stockraising, lumbering, mining, quarrying, fishing, manufacturing, transportation, mercantile, or building enterprise, or any other public or private business or commercial enterprise, wherein any person is employed for wage, shall willfully damage or destroy, or attempt or threaten to damage or destroy, any property whatsoever, or shall unlawfully take or retain, or attempt or threaten unlawfully to take or retain, possession or control of any property, instrumentality, machine, mechanism, or appliance used in such business or enterprise, shall be guilty of criminal sabotage.

²²² CJCS (2010), *Antiterrorism* (JP 3-07.2), Washington, D.C., CJCS, xiv and §7(h) at p. II-11.

²²³ NCTC (2017c), “Who We Are”. Available at <https://www.nctc.gov/whoweare.html> (accessed 9 Mar. 2017).

²²⁴ NCTC (2017d), “Counter-Terrorism Guide”, available at <https://www.dni.gov/nctc/index.html> (accessed 23 Dec. 2017).

²²⁵ *Ibid.*

do not have a political or social goal, although many of these entities, such as eco-activists, have it. Eco-terrorists, already included in the SCO Convention of 2009, are clearly motivated by targets related to the protection and conservation of the environment and animal and plant species.

The *Department of Defense Dictionary* and the glossary of *Antiterrorism*, a publication which sets joint doctrine to govern the activities and performance of the U.S. armed forces, and provides the doctrinal basis, define terrorism "the unlawful use of violence or threat of violence to instill fear and coerce governments or societies". According to the publications edited by the U.S. Joint Chiefs of Staff (JCS) "[t]errorism is often motivated by religious, political, or other ideological beliefs and committed in the pursuit of goals that are usually political". This definition distinguishes between motivations (religion, ideology, etc.) and goals ("usually political"), and points out that the objective of terrorist actions are the states, or the "society" that makes up them as a whole.

The U.S. Federal Emergency Management Agency (FEMA), an agency of the U.S. Department of Homeland Security (DHS), defines terrorism as "the use of force or violence against persons or property in violation of the criminal laws of the United States for purposes of intimidation, coercion, or ransom".²²⁶ Unlawful acts provided by this definition include: threats of terrorism; assassinations; kidnappings; hijackings; bomb scares and bombings; cyber attacks (computer-based); and the use of chemical, biological, nuclear and radiological weapons. The inclusion of nuclear weapons use, among the crimes classified as terrorism, poses some questions about the position of the same United States, and of the other nuclear powers. Leaves also puzzled the inclusion of cyber crimes.

The FEMA specifies that terrorists often use threats to: create fear among the public; try to convince citizens that their government is powerless to prevent terrorism; get immediate publicity for their causes.²²⁷ While not saying explicitly that terrorism acts may be politically motivated, the Federal Emergency Management Agency states that "[h]igh-risk targets for acts of terrorism include military and civilian government facilities, international airports, large cities, and high-profile landmarks".²²⁸ According to the FEMA terrorists, which are "capable of

²²⁶ FEMA (2004), *Are You Ready? An In-depth Guide to Citizen Preparedness*, Washington, D.C., DHS, p. 158.

²²⁷ Ibid.

²²⁸ Ibid.

spreading fear by sending explosives or chemical and biological agents through the mail...might also target large public gatherings, water and food supplies, utilities, and corporate centers”.²²⁹

The same definition of terrorism provided in § 1012 of the U.S. Code is reported in the *Intelligence Guide for First Responders*²³⁰ published by the U.S. Intelligence Community (IC), as established by the *Intelligence Reform and Terrorism Prevention Act of 2004*²³¹ and by Executive Order 12333, and in the *Intelligence Guide for First Responders* produced by the Joint Counterterrorism Assessment Team (JCAT).²³²

Many U.S. government agencies deal with counter terrorism. The Office for Combating Terrorism, which was created in 1972 within the Department of State, following the attack at the Munich Olympics by the Black September Organization, became the Office of the Coordinator for Counterterrorism in 1985, and changed again name in 2012, when became the Bureau of Counterterrorism.²³³ In 2016 it was renamed Bureau of Counterterrorism and Countering Violent Extremism.

Terrorism is something different from violent extremism, which is defined by the FBI as “encouraging, condoning, justifying, or supporting the commission of a violent act to achieve political, ideological, religious, social, or economic goals”.²³⁴ The new term “violent terrorism” was introduced by the INL in 2017,²³⁵ thus mixing terrorism with violent extremism. Due to the difficulties in defining terrorism at international level, it seems that the U.S. administration is trying to affirm violent extremism as a crime for political, ideological, religious, social, or economic goals. It is clear that the inclusion of economic objectives, including the purposes that fall within the definition of violent extremism, considerably broaden the scope of the latter, by extending it to any illegal activity. In this way is reached the goal of criminalizing any act of terrorism, without incurring in the contradictions or the legal limits that the use of this term implies.

²²⁹ Ibid.

²³⁰ ITACG (2011), *Intelligence Guide for First Responders*, Washington, D.C., IC (2nd edition), p. 105.

²³¹ *Intelligence Reform and Terrorism Prevention Act of 2004*, Pub. L. 108-458, 118 Stat. 3638.

²³² JCAT (2015), *Intelligence Guide for First Responders*, Washington, D.C., IC (2nd edition), p. 51.

²³³ The role of the Bureau of Counterterrorism is defined in Pub. L. 103-236 of 1994. In 1998 the U.S. Congress further defined the role of the Coordinator for Counterterrorism in Pub. L. 105-277.

²³⁴ FBI (2017c), “What is Violent Extremism?”. Available at <https://www.fbi.gov/cve508/teen-website/what-is-violent-extremism> (accessed 8 Mar. 2017)-

²³⁵ Luna, David M. (2017), “Trans-Africa Security: Combating Illicit Trafficking and Organized Crime in Africa”, Department of State, 12 May 2017. Available at <https://www.state.gov/j/inl/rls/rm/2017/270858.htm> (accessed 16 May 2017).

Terrorism is defined in President Bush's Executive Order 13224 of 23 September 2001 to be an activity that: involves a violent act or an act dangerous to human life, property, or infrastructure; appears to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking. The E.O. 13224, as amended by E.O. 13268 of 2 July 2002, was issued pursuant to the authorities of the *International Emergency Economic Powers Act* (IEEPA),²³⁶ the *National Emergencies Act*,²³⁷ section 5 of the *United Nations Participation Act of 1945* (UNPA), as amended,²³⁸ and 3 U.S.C. § 301.

Executive Order 13224 authorizes the U.S. government to designate and block the assets of foreign individuals and entities (defined to mean partnerships, associations, corporations, or other organizations, groups, or subgroups) that commit, or pose a significant risk of committing, acts of terrorism, or that provide support, services, or assistance to, or otherwise associate with terrorists and terrorist organizations designated under the order, as well as their subsidiaries, front organizations, agents, and associates.

The U.S. counter-terrorism sanctions represent the implementation of multiple legal authorities. Some of these authorities are in the form of executive orders issued by the President.²³⁹ Other authorities are public laws (statutes) passed by the Congress.²⁴⁰ These authorities are further codified by OFAC in its regulations which are published in the *Code of Federal Regulations* (CFR).²⁴¹ Modifications to these regulations are posted in the *Federal Register*.²⁴² In addition to all of these authorities, OFAC may also

²³⁶ 50 U.S.C. 1701 et seq.

²³⁷ 50 U.S.C. 1601 et seq.

²³⁸ 22 U.S.C. 287c.

²³⁹ E.O. 13372 of 16 Feb. 2005 [Clarification of Certain Executive Orders Blocking Property and Prohibiting Certain Transactions]; E.O. 13268 of 2 July 2002 [Termination of Emergency With Respect to the Taliban and Amendment of Executive Order 13224 of Sept. 23, 2001]; E.O. 13224 of 24 Sept. 2001 [Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism]; E.O. 13099 of 21 Aug. 1998 [Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process]; E.O. 12947 of 23 Jan. 1995 [Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process].

²⁴⁰ *Hizballah International Financing Prevention Act of 2015*, Pub. L. 114-102, 129 Stat. 2205; *Antiterrorism and Effective Death Penalty Act of 1996* (AEDPA), 8 U.S.C. § 1189, 18 U.S.C. § 2339B; *International Emergency Economic Powers Act* (IEEPA), Pub. L. 95-223, 91 Stat. 1626, 50 U.S.C. § 1701-1706; *National Emergencies Act* (NEA), Pub. L. 94-412, 90 Stat. 1255, 50 U.S.C. § 1601-1651; Section 5 of the *United Nations Participation Act of 1945* (UNPA), Pub. L. 79-264, 59 Stat. 619, 22 U.S.C. § 287c.

²⁴¹ 31 CFR Part 566; 31 CFR Part 594; 31 CFR Part 595; 31 CFR Part 596; 31 CFR Part 597.

²⁴² 82 FR 50313-17; 78 FR 38574-13; 75 FR 75904-10; 74 FR 61036-09; 74 FR 23111-09; 73 FR 78631-08; 72 FR 4206-07; 71 FR 58742-06; 71 FR 29251-06; 71 FR 27199-06.

implement UNSC resolutions with regard to the counter-terrorism sanctions (e.g. Resolution 1526 of 2004).

The Department of State is authorized to designate Foreign Terrorist Organizations (FTOs) under the *Immigration and Nationality Act*, and to designate Specially Designated Global Terrorists (SDGTs) under E.O. 13224. While only organizations can be designated as FTOs, a wider range of persons can be designated by the Department of State as SDGTs – including terrorist groups, leaders, and members of terrorist groups, as well as other individuals and entities that have committed or pose a significant risk of committing acts of terrorism. Terrorism designations expose and isolate organizations and individuals and deny them access to the U.S. financial system. Moreover, designations can assist the law enforcement activities of U.S. agencies and other governments.

Designations are made by the secretary of state or by the secretary of the treasury, in consultation with each other and with the attorney general. Once an individual or entity has been designated, the Office of Foreign Assets Control of the Department of the Treasury takes appropriate action to block the assets of the individual or entity, and notice of the designation is published in the *Federal Register*. The OFAC also adds the individual or entity to its list of Specially Designated Nationals (SDNs), by identifying such individuals or entities as Specially Designated Global Terrorists (SDGTs), and posts a notice of this addition on the OFAC Website. SDGT or Specially Designated Terrorist (SDT), provided that any such individuals are not named on OFAC's list of Specially Designated Nationals and Blocked Persons (SDN List). The OFAC list includes also targeted foreign countries and regimes, narcotics traffickers, and other threats to the national security, foreign policy or economy of the United States.²⁴³ Assets of individuals and entities blacklisted are blocked and U.S. persons are generally prohibited from dealing with them. Designations remain in effect until they are revoked or the Executive Order expires or ends in accordance with the U.S. law.

Another definition of "terrorist activity" is provided in the INA, which contains measures applicable to aliens. Under provisions of the INA, "a group of two or more individuals"²⁴⁴ falls

²⁴³ U.S. Department of the Treasury (2017), "Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury". Available at <https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx> (accessed 27 June 2017).

²⁴⁴ 27 June 1952, ch. 477, title II, ch. 2, § 219, as added Pub. L. 104–132, title III, § 302(a) of 24 Apr. 1996, 110 Stat. 1248; amended Pub. L. 104–208, div. C, title III, § 356, title VI, § 671(c)(1) of 30 Sept. 1996, 110 Stat. 3009–

in the scope of U.S.C. § 1189 if poses a threat to the security of U.S. nationals or if threaten the national security (national defense, foreign relations, or the economic interests). Such a group, if it is found that is engaged in "terrorist activities",²⁴⁵ may be designated as an FTO upon publication in the *Federal Register* by the secretary of state in consultation with or upon the request of the attorney general or the secretary of homeland security.

The *Immigration and Nationality Act* is a statute created in 1952, during the Cold War era, to reorganize and govern immigration law by collecting and codifying many existing provisions. The INA, also known as the *McCarran-Walter* bill, has been amended many times over the years, but is still the basic body of immigration law. Provisions that excluded certain classes of immigrants based on their political beliefs were revoked by the *Immigration Act of 1990*.²⁴⁶ Before the drafting of a specific anti-terrorism legislation, alien anarchists were apprehended and removed from the U.S. under various immigration statutes.²⁴⁷

The INA is divided into titles, chapters, and sections. Although it stands alone as a body of law, the Act is also contained in the U.S. Code, which is a collection of all the laws of the United States arranged in fifty subject titles by general alphabetic order. Title 8 of the U.S.C. is but one of the fifty titles and deals with "Aliens and Nationality". Thus, laws passed by the Congress "amend" both the INA and the U.S. Code. When browsing the INA or other statutes you will often see reference to the U.S.C. citation. Although it is correct to refer to a specific section by either its INA citation or its U.S.C., the INA citation is more commonly used.

Pursuant to § 212 (a)(3)(B) of the *Immigration and Nationality Act* (8 U.S.C. § 1182(a)(3)(B)) the term "terrorist activity" means "any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any [s]tate) and which involves any of the following acts:

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

644, 3009–722; Pub. L. 107–56, title IV, § 411(c) of 26 Oct. 2001, 115 Stat. 349; Pub. L. 108–458, title VII, § 7119(a)–(c), of 17 Dec. 2004, 118 Stat. 3801, 3802.

²⁴⁵ INA § 219 (Designation of Foreign Terrorist Organization).

²⁴⁶ *Immigration Act of 1990*, Pub. L. 101–649, 104 Stat. 4978.

²⁴⁷ *Terrorism 2002-2005*, p. 35.

- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in § 1116(b)(4) of title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any
 - (a) biological agent, chemical agent, or nuclear weapon or device, or
 - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

Another legal definition of terrorism is located in § 140(d)(2) of the *Foreign Relations Authorization Act, Fiscal Years 1988 and 1989* (22 U.S.C. § 2656f(d)(2)) which prohibits financial assistance to any country identified "as providing significant support for international terrorism". Under this provision falls Iran (designation of 19 Jan. 1984), Sudan (designated on 12 Aug. 1993), Syria (designated on 29 Dec. 1979),²⁴⁸ and Cuba until delisting in Apr. 2015.²⁴⁹ Countries determined by the secretary of state to have repeatedly provided support for acts of international terrorism are excluded from U.S. foreign assistance; are under a ban on defense exports and sales; suffer certain controls over exports of dual use items; and bear miscellaneous financial and other restrictions.²⁵⁰

According to INA²⁵¹ terrorism-related activities include individuals who: are engaged in "terrorist activity"; are engaged or are likely to engage in terrorist activity after entry in the U.S.;

²⁴⁸ U.S. Department of State, *State Sponsors of Terrorism*.

²⁴⁹ Kerry, John (2015), "Recommendation to Rescind Cuba's Designation as a State Sponsor of Terrorism", Department of State, 14 Apr. 2015. Available at <http://www.state.gov/secretary/remarks/2015/04/240687.htm> (accessed 4 Feb. 2016).

²⁵⁰ Provisions pursuant to three laws: § 6(j) of the *Export Administration Act* (EAA); § 40 of the *Arms Export Control Act* (AECA); § 620A of the *Foreign Assistance Act* (FAA).

²⁵¹ 8 U.S.C. § 1182(a)(3)(B)(iii).

incited terrorist activity with intent to cause serious bodily harm or death; are representatives²⁵² or current members of a terrorist organization; endorsed or espoused terrorist activity; received military-type training from or on behalf of a terrorist organization; or are spouses or children of anyone who has engaged in terrorist activity within the last five years (with certain exceptions). Thus, individuals who retain the capability and intent to engage in terrorist activity or terrorism, as defined by INA, as an individual capacity or as a member of an organization, are banned to enter in the United States.

The prohibition on wives and sons of terrorists raises some perplexity. The Bible says that the son will not share the guilt of the father (Ezekiel 18:20). But also the spouse does not have to bear the responsibility for the husband's iniquity. More generally, this is a precept of juridical civilization, for which responsibility must be subjective. Both the European Court of Human Rights and the Inter-American Court of Human Rights (I/A Court H.R.) have clarified that the right to a fair trial applies not only to judicial proceedings, but also administrative proceedings.²⁵³ Together with the Inter-American Commission on Human Rights (IACHR), the I/A Court H.R. is one of the institutions within the inter-American system for the protection of human rights (IAHRS).²⁵⁴ The I/A Court H.R. serves as autonomous judicial institution within the Organization of American States to uphold and promote basic rights and freedoms in the Americas.²⁵⁵

During the two World Wars the U.S. Congress put in place restrictions on aliens deemed dangerous or likely to engage in espionage or sabotage. Citizens from enemy foreign countries who are thought to present a danger, but who could not be charged with a crime could be interned as enemy aliens under the *Alien Enemies Act of 1798* (50 U.S.C. § 21). According to this law, alien enemies are "all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized".

Enemy Alien Act is part of four laws known as the *Alien and Sedition Acts* (50 U.S.C. § 21-24) that enacted increasing restrictions against aliens. It was used as the basis for

²⁵² The term "representative" includes an officer, official, or spokesman of an organisation, and any person who directs, counsels, commands, or induces an organisation or its members to engage in terrorist activity.

²⁵³ Doebbler, Curtis F.J. (2006), *Introduction to International Human Rights Law*, Washington, D.C., CD Publishing, p. 108.

²⁵⁴ OAS (2017b), "What is the IACHR?". Available at <http://www.oas.org/en/iachr/mandate/what.asp> (accessed 11 May 2017).

²⁵⁵ Ibid.

incarcerating enemy aliens and confiscating their property during World War II. After the end of the war individuals arrested and interned were deported to their nations of origins. Nakamura argues that the law of war permitted the holding of alien enemies as civilian prisoners of war because they were not "taken in battle".²⁵⁶ As happened in Guantánamo after 9/11: history repeats itself.

Aliens engaged in terrorist activity are subject to detention under INA § 236(c), 8 U.S.C. § 1226(c), and can only be released in limited circumstances. Section 236A of the INA, 8 U.S.C. § 1226a, authorizes the detention of an alien where it is certified that there are reasonable grounds to believe that the alien meets the terrorist grounds of removal or is "engaged in any other activity that endangers the national security of the United States". Detention of alien terrorists is authorized also by the *Alien Terrorist Removal Court* provisions in INA § 507(b)(2)(C), 8 U.S.C. § 1537(b)(2)(C).²⁵⁷

The law expressly provides that the "suspect" terrorist must "demonstrate by clear and convincing evidence that one did not know, and should not reasonably have known, that the organization was a terrorist organization". In this way, the burden of proof is reversed by the prosecution to the indicted, who should be deemed innocent until proven otherwise. This provision of law, which reverses the burden of proof to the detriment of the defendant, goes against the principle of *habeas corpus*, intended as an efficacious remedy against the illegal confinement, and a safeguard of individual liberty, and is in conflict with all international conventions on the right to a fair trial. Terrorism pushed some countries to suspend in their jurisdictions, temporarily or permanently, some guarantees and other fundamental rights. In the War on Terror, the U.S. government assumes that the best defense is the constriction of fundamental rights. The only defense to this squeeze are the courts.

COMPARATIVE ANALYSIS OF U.S. AND EU COUNTER-TERRORISM STRATEGY

²⁵⁶ Nakamura, Kelli Y. (2016), "Alien Enemies Act of 1798", *Densho Encyclopedia*, Seattle, Densho. See also: Elsea.

²⁵⁷ Detention of alien terrorists based upon classified information, during proceedings in the Alien Terrorist Removal Court; is authorised by 8 U.S.C. § 1531-1537; the continued detention of aliens whose release would pose serious adverse foreign policy consequences for the United States, or who present national security or terrorism concerns, is authorised under 8 C.F.R. § 241.14(c)(d).

The EU did not linger too much after the 2001 attacks and passed a broad policy for security and counter-terrorism. In many ways, this policy is the same or very similar to those passed in the U.S. and the UK. However, the approach to counter-terrorism in the U.S. and the EU was considerably different. Part of the reason why can be found in the fact that the U.S. has a long history of foreign intervention and has a well-defined set of policies that dictate rules of engagement abroad. Generally speaking, the two sides have decidedly different approach to identity, sovereignty, national security, and these differences have been reflected throughout the 20th century: World War I (1914-18) and World War II (1939-45), and later Korea (1950-1953), Vietnam (1955-1977), and other military interventions. The EU, generally, relies much more on the U.S. for guidance and leadership than the other way around. Boiled down to the crudest possible measurement, the U.S. sees the majority of the world as an enemy, or at least an adversary. Moreover, any threat to their sovereignty that comes from abroad is met with aggressive, and very effective response. The sheer force of the military ensures that the U.S. looks outwards, whereas the EU looks inwards. The EU mostly faces threats through civilian means, compromise, and trying to maintain relative liberty of all involved, whereas the U.S. does not shy away from its military power and influence.²⁵⁸

This position is evident from a cursory reading of the two strategies, they are different in their content, disposition, structure, and many other elements. The areas in which they align pertain to the almost identical definitions of threat and strategic goals, but not in the methods for obtaining those goals. It is important to note that the publication of the EU strategy marked the first consensual approach to security by all member states. This allows the EU to focus on those threats that are common to all the nations, whilst maintaining its position in the broader alliance against terrorism. Much like the Obama strategy, the EU strategy portrays the clear dedication of members for an international order that will be based on multilateral activities, and strong international institutions. This, however, does not negate the fact that the EU, much like the U.S., does not accept the definition of terrorism that includes state actors.

The U.S. approach to national security is based on the use of force, whereas the EU approach is based on what is called soft power – the use of political and diplomatic means, economic measures, humanitarian initiatives, conflict prevention, crisis management, and

²⁵⁸ Kagan, Robert (2002), "Power and Weakness", *Policy Review*, No. 113 (June-July), pp. 3-28; Rifkin, Jeremy (2004), *The European Dream: How Europe's Vision of the Future Is Quietly Eclipsing the American Dream*, New York, Jeremy P. Tarcher, pp. 10-19.

others.²⁵⁹ This does not negate the use of military power, but rather contextualizes it within its proper parameters, and only as the last possible solution.

Interestingly, even though the strategy does not ascribe to ad hoc use of power, the EU members have been more than ready to partake in a variety of international assaults, led by the U.S., and intervened in Syria, Iraq, and other countries. The concept of threat elimination is based on prevention, which could explain some of these activities. The political power and influence of the EU, it is stated, must be used through the proper channels, primarily the UN, in order to reach strategic goals. The U.S., on the other hand, sees the UN as little more than an obstacle, and frequently engages in military response without the approval of the UN. This last element is critical, as it shows the core difference in approach between the allies, who even though share common goals, attain those goals through wholly different means.²⁶⁰

JUDICIAL PRACTICE IN RESPECT TO HUMAN RIGHTS VIOLATIONS

The UN Security Council is the place where powers and blocs confront each other and clash, but it is also the place where are taken decisions that affect the lives of all human beings. Until the 1990s the Council adopted a series of resolutions demanding states to take action, including asset-freezing, against terrorism. This early resolutions call for sanctions and controls on transactions between states. After the 1999 attacks on the U.S. embassies in Kenya and Tanzania, it has become more urgent to prevent such attacks by adopting measures against individuals or entities. The process of identifying and designating persons and entities financing or supporting terrorist acts,²⁶¹ and the freezing of their assets, is called "blacklisting".

In the context of confiscation and provisional measures (e.g. FATF Recommendations 4, 32 and 38), the term "freeze" means to prohibit the transfer, conversion, disposition or movement of any property, equipment or other instrumentalities that are owned or controlled by designated persons or entities on the basis of an action initiated by a competent authority or a

²⁵⁹ Nye, Joseph S. (2004), *Soft Power: The Means to Success in World Politics*, New York, Public Affairs.

²⁶⁰ Rice, Condoleezza (2000), "Promoting the National Interest," *Foreign Affairs*. Vol. 79, No. 1 (Jan.-Feb.), pp. 45-6.

²⁶¹ Supporter (2014), FATF Glossary of Terms and Acronyms: "An individual not actively engaged in terrorist acts, but actively engaged in supporting terrorist entities".

court.²⁶² For the purposes of FATF Recommendations 6 and 7 on the implementation of targeted financial sanctions, the term “freeze” means to prohibit the transfer, conversion, disposition or movement of any funds or other assets that are owned or controlled by designated persons or entities on the basis of an action initiated by the UN Security Council or in accordance with applicable SC resolutions by a competent authority or a court.²⁶³ The frozen funds or other assets remain the property of the owner and are administered by a third party. As part of the implementation of a freeze, states may take control of the property, equipment, instrumentalities, or funds or other assets as a means to protect against flight.²⁶⁴

The criteria for designation as terrorist are established in the following SC resolutions: 1267 (1999), 1989 (2011) and their successors for Al-Qaida; 1267 (1999), 1988 (2011) and their successors for the Afghan Taliban; 1373 (2001) for all other persons and entities who commits or attempts²⁶⁵ to commit terrorist acts, or who participates in or facilitates the commission of terrorist acts; 2253 (2015) for the Islamic State. The criteria for adding a name to the ISIL and Al-Qaida “Sanctions List” is set out in § 3 to § 5 of Res. 2253 (2015).²⁶⁶ States are required to impose the measures upon Al-Qaida or ISIL and other individuals, groups, undertakings and entities associated with them. Designations are made by the Security Council, or by the SC committees established pursuant to these resolutions. Nevertheless there is no specific obligation upon member states to submit proposals for designations, in practice, the committees primarily depend upon requests for designation by member states.

Security Council Res. 1267 (1999) on the situation in Afghanistan was the first of this new kind of resolutions: provides for the freezing of funds and other financial resources derived from or generated from property owned or controlled by the Taliban or by any undertaking owned or controlled by them. It also provides for a centralized list of persons and entities to whom the restrictions should apply (“Consolidated List”) drafted by a SC committee. The 1267 Committee is competent for designating individuals and entities associated to Al-Qaida to be included in the Sanctions List; the 1988 Committee is responsible for sanctioning the Afghan

²⁶² Freeze (2012), FATF General Glossary, p. 120.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Intent (2014), FATF Glossary of Terms and Acronyms: “The desire of an entity to do harm”.

²⁶⁶ UNSC, Resolution 2253 (2015), adopted on 17 Dec. 2015, S/RES/2253 (2015).

Taliban.²⁶⁷ Member states have responsibility for proposing for designation persons or entities that meet the specific criteria for designation to the 1267 Committee, as set forth in UNSC Resolution 1989 (2011) on Al-Qaida and related resolutions, or to the 1988 Committee as set forth in UNSC resolution 1988 (2011) on the Afghan Taliban. By 20 November 2017 the Al-Qaida Sanctions List, effective 1 March 2015, consists of 308 subjects divided into two sections: individuals associated with Al-Qaida (256 individuals) and entities and other groups and undertakings associated with the Al-Qaida (80 entities).

In response to the 9/11 attacks, the Council passed a further set of resolutions requiring states to take greater steps to freeze the assets of those involved in international terrorism, and specifically Osama bin Laden, the Taliban and their associates. Security Council Resolution 1373 (2001) recognizes the need for states to complement international cooperation by taking additional measures to prevent and suppress terrorism financing,²⁶⁸ but do not provide for a centralized list of individuals and entities to which resolution applies, leaving states to determine for themselves who such individuals and entities are. The UN Sanctions Committee, a political organ that lacks clear legal criteria, is the empowered body in listing and delisting. Thus, this regime is not free from political influences and restrictions, and sanctioning remains the result of a purely political process.

Resolution 1373 requests all states: to “deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”; to “ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”; to ensure “that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists”. Eventually, Resolution 1373 calls all states to intensify and accelerate the exchange of information on terrorists.

The Security Council also established the Counter Terrorism Committee (CTC) with the task of monitoring the implementation of the resolution on the basis of reports submitted by states relating to the measures taken in implementation thereof. The Committee is also

²⁶⁷ The relevant SC resolutions do not require countries to identify persons or entities and submit these to the relevant UN Committees, but to have the authority and effective procedures and mechanisms in place to be able to do so.

²⁶⁸ Terrorism financing (2014), FATF Glossary of Terms and Acronyms: "The financing of terrorist acts, and of terrorists and terrorist organisations".

responsible, through the information coming mainly from states and regional organizations, to identify individuals and entities suspected to belong to Al Qaeda.

For Resolution 1373 (2001), designations are made, at the national or supranational level – the EU is considered a supra-national jurisdiction – by a state or states acting on their own motion, or at the request of another state, if the state receiving the request is satisfied, according to applicable legal principles, that a requested designation is supported by reasonable grounds, or a reasonable basis, to suspect or believe that the proposed designee meets the criteria for designation in this resolution. Such proposals for designations should not be conditional upon the existence of a criminal proceeding. Thus, the Sanctions Committee did not act as an independent judicial organ but as a political body, and accordingly, individuals did not have a right to be heard. Individuals were therefore very much dependent on their state of residence or nationality to exercise diplomatic protection. This system allows governments to designate dissidents and political opponents, for whom Interpol issue an arrest warrant. OSCE Representative on Freedom of the Media urged Interpol to carefully consider international arrest warrants – a "red notice" – requested by Turkey, and in particular about journalists, to protect individuals against persecution.²⁶⁹ Governments, IGOs and scholars acknowledge that there is a lack of consensus regarding the specifics of which individuals and entities are deemed to be terrorists.

The Sanctions Committee has been entrusted with new functions by Resolutions 1377 (2001),²⁷⁰ 1455²⁷¹ and 1456²⁷² of 2003 and 1535 of 2004,²⁷³ which further define the action program against terrorism (the latter established the Counter Terrorism Executive Directorate). With these resolutions, the Security Council exercises *de facto* legislative functions by placing binding rules to states without the respective Parliaments could intervene in any way. At an early stage the 1377 (2001) list was drafted using government sources and in the absence of any control and judicial guarantee. People and organizations included in the lists were not aware of

²⁶⁹ Désir, Harlem (2018), "OSCE Representative on Freedom of the Media urges Interpol to carefully consider arrest warrant requests from Turkey", OSCE, 23 Aug. 2017. Available at <https://www.osce.org/fom/336406> (accessed 3 Apr. 2018).

²⁷⁰ UNSC, Resolution 1377 (2001) [on threats to international peace and security caused by terrorist acts], adopted on 12 Nov. 2001, S/RES/1377 (2001).

²⁷¹ UNSC, Resolution 1455 (2003) [on threats to international peace and security caused by terrorist acts], adopted on 17 Jan. 2003, S/RES/1455 (2003).

²⁷² The absence of any specific reference to human rights considerations was remedied in part by S/RES/1456 (2003), which affirms that "[s]tates must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law".

²⁷³ UNSC, Resolution 1535 (2004) [on combatting terrorism], adopted on 26 Mar. 2004, S/RES/1535 (2004).

the reasons which led to associate with terrorist activities. The Committee amended the procedures by providing a mechanism for the removal from the lists, but it can be activated only by governments, which the parties must necessarily address to.

The study of some movements, blacklisted only by some countries, clearly demonstrates how far it is from a common definition of terrorism. The designation often rests on political criteria rather than on factual evidence. Political criteria depend on a set of parameters, including culture, history, religion, ethnic or tribal instances, to end with domestic policy issues and international relations.

Under the U.S. presidency, the Security Council failed to establish a committee to impose sanctions for use of chemical weapons in Syria, which, according to Washington, is a state sponsor of terrorism. Draft resolution S/2017/172, vetoed by China and Russia, would have provided a list of designate individuals, groups and entities to be subjected to the measures of financial and economic freezing, and travel ban. The Russian representative declared that the OPCW-UN Joint Investigative Mechanism (JIM) had relied on various “suspicious sources”, and characterized the draft resolution as a politically motivated text.²⁷⁴

Arbitrary procedures for blacklisting have been revealed by courts. These measures have eroded a number of rights, including the right to privacy, the right to property, the right of association, the right to travel or freedom of movement. Individuals and entities are listed without real evidence, and without the possibility of legal remedies for delisting: to be delisted they can only appeal to the same entity that has determined their inclusion.

Delisting requests about persons and entities designated pursuant to resolution 1267 (1999) and its successor resolutions must be addressed by member states to the Security Council.²⁷⁵ Delisting and unfreezing of funds or other assets of individuals and entities that no longer meet the criteria for designation pursuant to resolution 1373 (2001) it's up to member states. With respect the Al-Qaida Sanctions List, designated individuals and entities should address delisting petitions to the UN Office of the Ombudsperson, pursuant to resolution 1904

²⁷⁴ UNSC (2017), “Double Veto Prevents Security Council from Adopting Draft Resolution Intended to Impose Sanctions for Use of Chemical Weapons in Syria”, SC/12737 of 28 Feb. 2017. Available a <https://www.un.org/press/en/2017/sc12737.doc.htm> (accessed 14 Apr. 2017).

²⁷⁵ In the event of de-listing requests by the 1267 Committee related to Al-Qaida and by the 1988 Committee related to the Taliban, such procedures and criteria should be in accordance with procedures set up under resolutions 1730 (2006), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), and any successor resolutions.

(2009).²⁷⁶ The Ombudsperson receives requests from designated persons who seek to be removed from the Consolidated List and, upon receiving such a request, begins an information gathering process, asking relevant states and UN bodies to provide additional information.

The Leviathan mechanism set up with the Security Council's sanctioning system overrides the principle of separation of powers. The Council actually exercises executive, legislative and judicial powers. The Sanctions Committee does not act as an independent judicial organ but as a political body, and accordingly, individuals do not have a right to be heard. Individuals are therefore very much dependent on their state of residence or nationality to exercise diplomatic protection, which is always denied even by their governments.

The governmental separation of power, which was explicitly rejected by Hobbes,²⁷⁷ was first theorized by Locke in *Two Treatises of Government* (1689). The tripartite system – executive, legislative and judicial – was later deepened by French political philosopher Montesquieu in *The Spirit of the Laws* (1748). In this system of checks and balances, the powers are separated so that no one could usurp complete power. Exactly the opposite of what happens within the Sanctions Committee where all the powers are fused.

The arbitrariness of these procedures is confirmed by two judgments rendered by European courts in 2010. In the case of Yassin Abdullah Kadi, a Saudi Arabia national, the General Court argued the Security Council has still not deemed it appropriate to establish an independent and impartial body, because creation of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for the review of the 1267 Committee's decisions.²⁷⁸ In a similar vein, the UK Supreme Court concluded that although this improvement is to be welcomed, "the fact remains that there [...] still is not any effective judicial remedy" provided.²⁷⁹

²⁷⁶ UNSC, Resolution 1904 (2009) [on Continuation of Measures Imposed Against the Taliban and Al-Qaida], adopted on 17 Dec. 2009, S/RES/1904 (2009).

²⁷⁷ In the *Leviathan*, Hobbes explicitly rejects the idea of separation of powers, in particular the form that would later become the separation of powers under the U.S. Constitution.

²⁷⁸ *Yassin Abdullah Kadi v. Commission of the European Communities* [Kadi II], Case T-85/09 (EGC, Seventh Chamber, 30 Sept. 2010), § 128, ECLI:EU:T:2010:418.

²⁷⁹ *Her Majesty's Treasury v. Mohammed Jabar Ahmed and others; Her Majesty's Treasury v. Mohammed al-Ghabra; R (on the application of Hani El Sayed Sabaei Youssef) v. Her Majesty's Treasury* [Ahmed and Others], UK Supreme Court, 27 Jan. 2010, [2010] UKSC 2 on appeal from [2008] EWCA Civ 1187, § 72.

CRIMINALIZATION OF TERRORISM

If one assumes as true Clausewitz's famous principle, that "war is a mere continuation of policy by other means... is not merely a political act, but also a truly political instrument, a continuation of political commerce, a carrying out of the same by other means",²⁸⁰ then one has to argue that terrorism as a tactic is a tool on the shelf for those who do not have the most effective weapons.

Terror as state policy has been used in international conflicts. In 1936, during the Second Italian-Ethiopian War, Italian PM Benito Mussolini authorized Marshal Rodolfo Graziani, commander of the southern front and newly appointed viceroy of Italian East Africa, "to begin a systematic policy of terror and extermination of the rebels and complicit population".²⁸¹ Graziani used poison gas and mustard gas in both artillery and aerial bombardments against Ethiopians. Civilians were also targeted with the aim of spreading terror among them. Furthermore, gas attacks were carried out against Red Cross camps and ambulances.²⁸² Marshal Pietro Badoglio, then commander-in-chief of the Italian General Staff and viceroy and governor general of Ethiopia (1936), employed mustard gas against the Ethiopian armies. Neither Graziani, nor Badoglio, who served as Italian PM from 25 July 1943 to 8 June 1944, were prosecuted by the UN War Crimes Commission (UNWCC).

The use of gas was banned in 1925 under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol).¹ Early treaties which include the prohibition of gas in conflicts are: note introducing the Hague Declaration (IV, 2) concerning asphyxiating gases of 29 July 1899;¹ *Treaty of Versailles* of 28 June 1919;¹ Art. 5 of the *Treaty of Washington* of 6 February 1922 on the Use of Submarines and Noxious Gases in Warfare;¹ other peace treaties of 1919. Attacks with chemical substances were also carried out by the U.S., which used Agent Orange/dioxin, a substance specifically toxic to plants, during the Vietnam War from 1961 to 1971.²⁸³

²⁸⁰ Carl von Clausewitz (1982), *On War*, edited with an introduction by Anatol Rapoport, Harmondsworth, Penguin (Original edition in German, Berlin, 1832).

²⁸¹ Mussolini, Benito (1981), "Telegram of 8 July 1936 of Mussolini to Graziani", in Giorgio Candeloro, *Storia dell'Italia Moderna*, Milano, Feltrinelli. See also: Barker, A. J. (1971), *Rape of Ethiopia, 1936*, New York, Ballantine Books.

²⁸² Junod, Marcel (1982), *Warrior without weapons*, Geneva, ICRC.

²⁸³ Martini, Edwin A. (2012), *Agent Orange: History, Science, and the Politics of Uncertainty*, Amherst, University of Massachusetts Press. See also: Sills, Peter (2014), *Toxic War: The Story of Agent Orange*, Nashville, Vanderbilt University Press.

The UN Policy Working Group on Terrorism acknowledges that, while terrorism is more commonly used as a tactic, it may also be used as a strategy.²⁸⁴ Rapoport concludes that terrorism can be considered both a strategy to hit political targets and a tactic used to achieve a political objective.²⁸⁵ Before embarking on the path of recognition and dialogue, the Palestine Liberation Organization (PLO) considered terrorism as a strategy to reach its political goal.²⁸⁶

In the autobiography of Ilić Ramírez Sánchez,²⁸⁷ also known as Carlos the Jackal, who was called a professional revolutionary, a soldier, a fighter, and even a political prisoner, terrorism as a weapon of war is defended fiercely. According to Carlos, terrorism is "the weapon of the poor"; "a weapon like the others" used in asymmetric warfare. The Venezuelan revolutionary, who is currently serving a life sentence in France, upholds that terrorism is "a weapon first choice to restore a semblance of balance against the disproportion of the media, whose absolute monopoly is of the enemy". Sanchez mocks the manipulation of language by Western media: "when a bomb misses its target and kills civilians they euphemistically talk about *collateral damages*". In this context, Ramírez Sánchez finds that "terrorist weapon is not illegal, immoral or more monstrous than others" conventional weapons that causes innocent victims.

Carlos accuses the UN to be a "flexible instrument" of U.S. policy, where the votes of the Security Council are bought. Carlos affirms that in the SC the strong impose their will to the weak. Eventually, this raises questions that will be addressed further on: they challenge the assumption that the U.S. and its allies fight for a just cause, and wonders if a war can be just.

As noted above, some authors believe that governments may be responsible for acts of terrorism, i.e. violence against civilians for political purposes, including kidnapping, unlawful detention, extrajudicial killing, torture. For a proper assessment of the impact of counter-terrorism measures on human rights and fundamental freedoms, one cannot bypass state terrorism, which originates in the context of political and military confrontations between and within countries. Falck concludes that, if terrorism as a term of moral and legal opprobrium is to

²⁸⁴ UNGA and UNSC (2002), *Report of the Policy Working Group on the UN and Terrorism*, 6 Aug. 2002, A/57/273, S/2002/875, § 10.

²⁸⁵ Rapoport, p. 51.

²⁸⁶ *Anti-Terrorism Act of 1987*, Pub. L. 100–204, 101 Stat. 1406. See also: 22 U.S.C. § 5201, 5202.

²⁸⁷ Marsili, Marco M. (2012b) (ed.), *Ilić Ramírez Sánchez. Lo Sciacallo La vera storia di Carlos*, trans. Marco Marsili, Milano, Termidoro.

be used at all, then it should apply to violence deliberately targeting civilians, whether committed by state actors or their non-state enemies.²⁸⁸

Chomsky defines state terrorism as "terrorism practiced by states (or governments) and their agents and allies".²⁸⁹ Martin describes it as terrorism "committed by governments and quasi-governmental agencies and personnel against perceived threats".²⁹⁰ In my opinion, state terrorism is simply unlawful state-sanctioned or state-perpetrated violence. In other words, it is previously illicit violence 'legalized' by the state, the only entity able of producing laws to make otherwise unlawful actions legal – *Quod principi placuit, legis habet vigorem* (That which pleases the ruler has the force of law).²⁹¹

State terrorism is deemed by some authors, like Goodin and Williamson, as a tactic to control the population. Williamson dates this system back to the French Terror when this terrorism was used by the Jacobins as an instrument of governance.²⁹² This system was subsequently put in place through the use of police state measures by totalitarian regimes such as the Bolshevik in the Soviet Union from the 1930s onwards, and the Nazi regime in Germany (1933-1945). Some examples noteworthy of state terrorism include the Khmer Rouge ruling over Cambodia (1975–1979), and the military dictatorship in Argentina (1976-1983) and in Ethiopia (1977–1978). Hannah Arendt believes that "terror is the essence of totalitarian domination",²⁹³ but several authors find that this method is used also by Western democracies.²⁹⁴

Whereas governments accuse other executives of supporting terrorism, most of them use this term only for non-state entities.²⁹⁵ Accordingly, most scholars find that the term is only applicable to the actions of non-state actors, while others also think actions by governments can

²⁸⁸ Falck, Richard (1988), *Revolutionaries and Functionaries: The Dual Face of Terrorism*, New York, Dutton.

²⁸⁹ Sluka, Jeffrey, Noam Chomsky and David Price (2002), "What Anthropologists Should Know about the Concept of 'Terrorism'", *Anthropology Today*, Vol. 18, No. 2 (Apr.), pp. 22-23.

²⁹⁰ Martin, Gus (2006), *Understanding terrorism: challenges, perspectives, and issues*, Thousand Oaks, Sage, p. 111.

²⁹¹ Ulpian, in Justinian I (ed.) (533), *Digesta seu Pandectae*, I, 4, 1 pr.

²⁹² Williamson, p. 43

²⁹³ Arendt, Hannah (1958), *The Origins of Totalitarianism*, Cleveland, The World Publishing Co. (2nd edition), p. 464.

²⁹⁴ Chomsky and Herman (1979), Herman (1982), Duvall and Stohl (1983), George (1991), Gareau (2004), Stoh (1986 and 1988), Schmid and Jongman (1988), Coady (1985), Rodin (2004), Stokes (2005), Jenkins (2014), Goodin (2006).

²⁹⁵ Schmid (2011), p. 48.

be labeled as terrorism.²⁹⁶ Stohl wrote two papers on this topic: one written alone,²⁹⁷ and another with Duvall.²⁹⁸ Stohl analyzes the assessments that states may make when choosing to use terror against their own citizens and to help other states to do so. Further, Stohl argues that, due to its ‘unpopularity’, state terrorism is carried out secretly or by paramilitaries whose connections to the government are officially denied.²⁹⁹ The American scholar concludes that state terrorism is used in domestic and international affairs.³⁰⁰ This continues the argument that terrorism can be a strategic or tactical choice by political actors,³⁰¹ and argues that the use of terror tactics is common in international relations and that the state has been and still is a more likely user of terrorism within the international system than insurgents.³⁰²

Early UN resolutions on terrorism adopted up to the eighties address state terrorism.³⁰³ Some regional CT instruments commit signatories to refrain for supporting terrorism both directly and indirectly: the SAARC Convention of 1987;³⁰⁴ the *Arab Convention* of 1998 (Art. 3); the OIC Convention for Combating International Terrorism of 1999 (Art. 3.I et seq.); the CIS Treaty of 1999 (Art. 5(1)(d)); the OAU Convention on the Prevention and Combating of Terrorism of 1999 (Art. 4); the CEMAC Convention on Combating Terrorism in Central Africa (Art. 3); the African Anti-Terrorism Model Law of 2011 (§ 21); the SCO Concept of Cooperation of 2005 (§ II(3)). The commitment of states not to be involved either directly or indirectly in terrorist acts disappears from the text of the GCC convention of 2004.

²⁹⁶ Nairn, Tom and Paul James (2005), *Global Matrix: Nationalism, Globalism and State-Terrorism*, London; New York, Pluto Press. See also: Stohl, Michael and George A. Lopez (1988), *Terrible beyond Endurance?: The Foreign Policy of State Terroris*, Westport, Greenwood Press, pp. 207-208.

²⁹⁷ Stohl, Michael (1984), "National Interests and State Terrorism", *Political Science*, Vol. 36, No. 2, pp. 37-52.

²⁹⁸ Duvall, Raymond D. and Michael Stohl (1983), "Governance by Terror," in Michael Stohl (ed.), *The Politics of Terrorism*, New York, Marcel Dekker (2nd edition).

²⁹⁹ Stohl, Michael (2008), "The Global War on Terror and State Terrorism", *Perspectives on Terrorism*, Vol. 2, No. 9.

³⁰⁰ Stohl, Michael (1988), "States, Terrorism and State Terrorism: The Role of the Superpowers", in Robert O. Slater and Michael Stohl (eds.), *Current Perspectives on International Terrorism*, London, Palgrave Macmillan. DOI: 10.1007/978-1-349-18989-2_6.

³⁰¹ Ibid.

³⁰² Stohl, Michael (1986), "The Superpowers and International Terror", in Michael Stohl and George A. Lopez (eds.), *Government Violence and Repression: An Agenda for Research*, Westport, Greenwood Press.

³⁰³ UNGA Resolutions: A/RES/32/147 of 16 Dec. 1977; A/RES/34/145 of 17 Dec. 1979; A/RES/36/109 of 10 Dec. 1981; A/RES/38/130 of 19 Dec. 1983; A/RES/40/61 of 9 Dec. 1985; A/RES/42/159 of 7 Dec. 1987; A/RES/44/29 of 4 Dec. 1989; A/RES/46/51 of 9 Dec. 1991; A/RES/49/60 of 17 Feb. 1995.

³⁰⁴ The SAARC Convention of 1987 recalls UN Resolution 2625 (XXV) requiring each state to refrain from terrorist acts against another state or from supporting the organisation of such acts within its territory.

As it will be shown later in the text, the courts play a fundamental role in the context of terrorism. The *New Zealand v. France* case³⁰⁵ is considered a leading precedent in the field of state responsibility in a terrorism act. In 1985, action taken by two French secret agents to sink the Greenpeace ship *Rainbow Warrior* by attaching bombs to its hull while it was docked in Auckland, New Zealand resulted with the loss of one life.³⁰⁶ The French secret agents were sentenced to ten years' imprisonment by a New Zealand court and then transferred to a French military facility on the island of Hao under an agreement reached after arbitration before the International Court of Justice.

Libya was held responsible for two terrorist attacks: the explosion of a bomb in the Pan Am Flight 103, which on 21 December 1988 killed all 259 passengers and crew, as well as eleven residents of the town of Lockerbie; the bombing of UTA Flight 772, which was blown up over the Sahara on 19 September 1989, killing all 170 people on board. In 1999 a special court in Paris convicted six Libyan citizens for the sabotage of the UTA aircraft including Abdullah Senussi, then head of internal security and Col. Gaddafi's brother-in-law.³⁰⁷ In 2001 a court established in the Netherlands under Scottish law found guilty and sentenced Abdel Basset Ali al-Megrahi, a Libyan intelligence officer, to life imprisonment for the bombing of the Pan Am aircraft.³⁰⁸

Several scholars accuse the U.S. of using terrorism in its foreign policy. Notable works include: Noam Chomsky and Edward S. Herman's *The political economy of human rights*;³⁰⁹ Herman's *The real terror network*;³¹⁰ George's *Western State Terrorism*;³¹¹ *The Israel Lobby and U.S. Foreign Policy* by Mearsheimer and Walt. In his 1979 book Chomsky assumes that all powers back state terrorism in client states.

Frederick H. Gareau accuses the U.S. of having used terrorism during the Cold War and backing repressive right-wing regimes and dictatorships in Latin America and in the Middle

³⁰⁵ France-New Zealand Arbitration Tribunal, *Rainbow Warrior (New Zealand v. France)*, decision of 30 Apr. 1990, 20 RIAA 215.

³⁰⁶ Ibid.

³⁰⁷ *Judgment of Abdallah Senoussi*, Case No. 0052/98 and No. 1309/98, Assize Court of Paris, 10 Mar. 1999.

³⁰⁸ *Terrorism 2002-2005*, p. 38.

³⁰⁹ Chomsky, Noam and Edward S. Herman (1979), *The Political Economy of Human Rights*, Boston, South End Press.

³¹⁰ Herman, Edward S. (1982), *The Real Terror Network: Terrorism in Fact and Propaganda*, Boston, South End Press.

³¹¹ George, Alexander L. (1991), *Western State Terrorism*, Cambridge, Polity Press.

East.³¹² The American scholar argues that this policy resulted in the tremendous suffering and murder of millions of people. Gareau concludes that Washington would have to include itself in the list of state sponsors of terrorism determined by the secretary of state.³¹³

U.S. policy in South America is the most criticized for the use of terrorism. Doug Stokes accuses Washington of having sponsored state terrorism through covert paramilitary networks in Colombia - one of the largest recipients of U.S. counter-insurgency military aid and training from the Cold War era - to eradicate the Communist guerrillas backed by the Soviet Union.³¹⁴

Examples of state terrorism by the U.S. administrations in the War on Terror include the so called "extraordinary renditions" or "irregular renditions", the government-sponsored abductions and extrajudicial transfers of foreign suspects from one country to another, and extrajudicial killings without any legal process or proceeding.

Terrorism is a tool to achieve a political goal. One must then distinguish between terrorism as a tactic, a weapon used to strike political or military targets, and terrorism as a strategy to indiscriminately hit civilians and instill terror among the population. If terrorism is used as a tactical weapon within an independence or liberation struggle, there may be unintentional civilian casualties, as happens in action by regular troops. In any other case it is just crime, whatever one wants to call it: crimes against humanity, war crimes, genocide, etc.

Much of the problem of the qualification of terrorism as a crime is based on a political decision-making process that is carried out in parallel at national and international level. A thin line divides politicians and criminals in two broad categories. By justifying the violent crackdown of political opposition, Lt. Gen. Jorge Rafael Videla, dictator of Argentina from 1976 to 1981, explains: "[a] terrorist is not just someone with a gun or a bomb, but also someone who spreads ideas that are contrary to Western and Christian civilization".³¹⁵ In a booklet published in April 1983, a few months before its fall, entitled *Documento Final de la Junta Militar sobre la guerra contra la subversión y el terrorismo* (Final Document of the Military Junta on the War against Subversion and Terrorism), the ruling military junta tried to justify its policy against political dissidents. Videla was sentenced to life imprisonment for human rights violations

³¹² Gareau, Frederick H. (2004), *State Terrorism and the United States: From Counterinsurgency to the War on Terrorism*, Atlanta, Clarity Press and Zed Books.

³¹³ Id., p. 15.

³¹⁴ Stokes, Doug (2005), *America's Other War: Terrorizing Colombia*, London, Zed Books.

³¹⁵ McSherry, J. Patrice (2005), *Predatory States: Operation Condor and Covert War in Latin America*, Lanham, Rowman and Littlefield Publishers.

committed during the military dictatorship: kidnapping, torture, forced disappearance, arbitrary arrest and illegal detention in secret prisons, murder, and genocide. The serious violations for which Videla was convicted, along with accomplices, are characterized as state terrorism.³¹⁶

Looking back, many historical figures, who were imprisoned for fomenting riots, could now be accused of terrorism; among these we can include Jesus and Ghandi. Gandhi was arrested on 10 March 1922, tried for sedition and sentenced to six years' imprisonment.³¹⁷ A British Parliament paper declared the *Mahatma* a terrorist in 1932 (he was arrested for sedition in Bombay on 4 January 1932, by order of the British Viceroy). The paper devotes considerable discussion to the Civil Disobedience Movement and Gandhi and refers to his movement as a "terrorist movement". This parliamentary report included a rare account of Gandhi's activities entitled *Special measures taken to counteract the civil disobedience movements and to deal with the terrorist movement in Bengal. Ordinance No. IX of 1932*.

Jesus can also be considered to have been sacrificed on the altar of political relations between the Roman Empire, the Sadducees and Galilee. According to the Synoptic Gospels, after being sentenced to death by the Sanhedrin, the body responsible for the enactment of laws and administration of justice in Jerusalem in the Hasmonean-Roman period of the Second Temple, Jesus was taken to the Roman prefect Pilate with a request for his execution under accusations of terrorism.

Other historical figures also labeled as terrorists, but later redeemed, include: Nelson Mandela (officially considered a terrorist until 2008); Menachem Begin (very active in the Irgun, a Zionist paramilitary organization); Malcolm X; Abby Hoffman; Jacques Lanctôt; Yasser Arafat; Larbi Ben M'hidi (leader of Algeria's FLN); Nguyen Binh (leader of Vetmin fighters in Indochina) and Patrice Lumumba, the Congolese independence leader and the first democratically elected prime minister of his country. They were all considered terrorists at some point or other, yet history remembers them in a much gentler light. Mearsheimer and Walt acknowledge that some former terrorists later reached the status of respected statesmen.³¹⁸ Saul³¹⁹ recalls that Yasser Arafat (PLO), Gerry Adams (IRA) and Nelson Mandela (ANC), who

³¹⁶ MPF/PCCH (2016), "Dossier de sentencias pronunciadas en Juicios de Lesa Humanidad en Argentina", Buenos Aires, MPF. Available at <http://www.fiscales.gob.ar/lesa-humanidad> (accessed 31 Jan. 2018).

³¹⁷ Datta, Amaresh (2005) (ed.), *The Encyclopaedia of Indian Literature*, Vol. Two, New Delhi, Sahitya Akademi (1st edition, 1988), p. 1345.

³¹⁸ Mearsheimer and Walt, p. 62.

³¹⁹ Saul (2008), p. 190.

were once regarded as terrorists, became legitimate politicians, statesmen, or even Nobel Prizes Laureates (Arafat in 1994, Mandela in 1993), and all were absolved of criminal responsibility for terrorism.

Klabbers upholds that authorities in the past would most likely have labeled as terrorists Grotius, Spartacus, Antonio Gramsci, Che Guevara or the Bostonians of the tea party, if the word had been coined by then.³²⁰ Koskenniemi³²¹ underlines the political dimension of their acts. Klabbers argues that "today's terrorist is tomorrow's freedom fighter", due to the "state-centric nature of international law" and to the "sheer supremacy of politics over law".³²²

The American abolitionist John Brown, who believed armed insurrection was the only way to overthrow the institution of slavery in the United States, is a controversial figure today. Brown is sometimes considered a freedom fighter,³²³ and sometimes a terrorist. Historian James Gilbert argues that "Brown's deeds conform to contemporary definitions of terrorism, and the psychological predispositions are consistent with the terrorist model",³²⁴ while David S. Reynolds cautions against identifying Brown with terrorism.³²⁵

The Nuremberg Trials mark a turning point in the criminalization of politics; imprisonment and death penalty are sentenced for the members of the Nazi Germany government. The *Charter of the Nürnberg Tribunal* provides laws and procedures of the trials, sets out three categories of crimes for which the Nazi German leaders can be tried: crimes against peace, war crimes and crimes against humanity.³²⁶ The Charter includes "inhumane acts committed against any civilian population", among crimes against humanity (Art. 6(b)), and "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" (Art. 6(a)) among war crimes. The indictments are based on the violation of the principles of the Lieber Code and of the Hague and Geneva Conventions. For the first time is

³²⁰ Klabbers, pp. 299-302.

³²¹ Koskenniemi, Martti (2002), "Between Impunity and Show Trials", in Jochen A. Frowein and Rüdiger Wolfrum (eds.), *Max Planck UNYB*, Vol. 6, Leiden, Martinus Nijhoff Publishers.

³²² Klabbers, pp. 300-301.

³²³ Long, Roderick (2008), "Brown, John (1800–1859)", in Ronald Hamowy (ed.), *The Encyclopedia of Libertarianism*, Thousand Oaks, Sage; Cato Institute, pp. 39–40. DOI: 10.4135/9781412965811.n26.

³²⁴ Gilbert, James N. (2005), "A Behavioral Analysis of John Brown: Martyr or Terrorist?", in Peggy A. Russo and Paul Finkelman (eds.), *Terrible Swift Sword: The Legacy of John Brown*, Athens, Ohio University Press, p. 112.

³²⁵ Reynolds, David S. (2005), *John Brown, Abolitionist: The Man Who Killed Slavery, Sparked the Civil War, and Seeded Civil Rights*, New York, Alfred A. Knopf.

³²⁶ *Agreement for the prosecution and punishment of the major war criminals of the European Axis and annex Charter of the International Military Tribunal (London Agreement)*, signed at London, on 8 Aug. 1945, 82 UNTS 280. See also: ILC (1949a), *The Charter and Judgment of the Nürnberg Tribunal: History and Analysis*, memorandum submitted by UN Secretary-General, A/CN.4/5, UN publication No. 1949.V.7, Appendix II, p. 89.

introduced to international criminal law crimes against peace and crimes against humanity. Following this path we have come to the criminalization of terrorism, without however establishing uniform definitions for offences.

Terrorism is regarded as a distinctive category of criminal activity although it is not defined unambiguously. A crime is an illegal act for which someone can be punished by the government.³²⁷ There are offences that in time cease to exist because they become obsolete or anachronistic – libertinage, affronts to public decency, honor crimes, homosexuality, mendacity, censorship, possession or use of drugs, etc. – and there are acts that constitute a crime only in some countries. Marsavelski argues that in the past terrorism has been criminalized as murder, battery, arson, etc.³²⁸ There remains the problem of the lack of consensus on the definition of terrorism and its punishment, which are entrusted to domestic and international law.

Some acts are not *mala in se*. Crime is a category created by law,³²⁹ and is subject to a number of considerations including socioeconomic, psychological, biological, and behavioral factors such as religion. A crime is an act harmful not only to some individual or individuals but also to a community, society or the state,³³⁰ which has the power to transform previously legal acts into crimes by positive legislation, human-made law of a given state, a political entity or society.³³¹ The process by which a behavior is transformed into crime is called “criminalization”.³³²

Legal theorist Hans Kelsen, who deepened the relationship between positive law and natural law, affirms that law and justice are two different things, and admits being “unable to tell what justice is”.³³³ According to Kelsen, law regulates state geopolitical and domestic needs³³⁴ as a result of political debate in the sociological and cultural domains of activity.³³⁵

³²⁷ Crime (2015), *Merriam-Webster Online Dictionary*, Springfield, Merriam-Webster.

³²⁸ Marsavelski, p. 248.

³²⁹ Farmer, Lindsay (2008), "Crime, definitions of", in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law*, Oxford, Oxford University Press, p. 263.

³³⁰ Martin, Elizabeth A. (2003), *Oxford Dictionary of Law*, Oxford, Oxford University Press (7th edition).

³³¹ Natural Law (2012), *Columbia Electronic Encyclopedia*, New York, Columbia University Press (6th edition).

³³² Michalowski, Raimond J. (1985), *Order, Law and Crime: An Introduction to Criminology*, New York, Random House.

³³³ Kelsen, Hans (1971), *What is Justice? Justice, Law, and Politics in the Mirror of Science*, Berkeley, University of California Press (First published 1957), p. 24.X2.

³³⁴ Id.

³³⁵ Kelsen, Hans (1960), *Pure Theory of Law*, trans. Mac Knight, Berkeley, University of California Press (First published 1934).

The debate on the legality principle fascinates many scholars.³³⁶ It is a discussion between the positivist and natural law philosophy. The Hart–Fuller debate is a controversy between positivists, who believe in a separation between the law as it is and the law as it should be, who believes that the creation of law should be based on natural laws or common morals.

Cassese explains that two theories collide in the scholarly arena: one tends to protect individuals from the arbitrariness of public power (*favor rei*); the other one puts in the foreground the interest of the community to punish any crime that would constitute a serious breach of fundamental values (*favor societatis*).³³⁷ The punishment of terrorists responds to a social necessity (*opinio necessitatis*), and is hence rendered obligatory by the existence of a rule requiring it (*opinio iuris*).³³⁸

In a memorandum drafted for the Nuremberg Tribunal, Kelsen addresses the issue of norms with retroactive force as a rule of positive national law. Further, attaching *ex post facto* a sanction to the act is retroactive only from a legal, not from a moral point of view, even with regard to international treaties,³³⁹ as it constitutes a violation of the legal maxim *nullum crimen sine lege*. Glaser argues that this principle is still not accepted in customary international law and applies a more adjustable one: *nullum crimen sine iure* (no crime without law).³⁴⁰ It means that, even if not provided for by law, a crime can be inferred from other sources of international law.

Art. 7 § 2 of the ECHR prohibits the retroactive criminalization of acts and omissions. No person may be punished for an act that was not a criminal offence at the time of its commission, under either national or international law. Article 7 incorporates the legal principle *nullum crimen, nulla poena sine lege* (no crime or punishment without a law) into the convention. Article 15 of the 1966 ICCPR states the principle of law, recognized by the community of nations, whereby nobody can be prosecuted and punished for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. This general principles of criminal law are embodied also in the ICC Statute:

³³⁶ Hart, Herbert Lionel Adolphus (1958), “Positivism and the Separation of Law and Morals”, *Harvard Law Review*, Vol. 71, No. 4 (Feb.), p. 593-629; Lon L. Fuller, (1958), “Positivism and Fidelity to Law: A Reply to Professor Hart”, *Harvard Law Review*, Vol. 71, No. 4 (Feb.), p. 630-672. DOI: 10.2307/1338226.

³³⁷ Cassese, Antonio (2008), *International Criminal Law*, Oxford, Oxford University Press (2nd edition), p. 38.

³³⁸ *Prosecutor v. Ayyash et al.*, Case No. STL-11-01/I/AC/R176bis (STL Appeals Chamber), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 Feb. 2011, § 102.

³³⁹ Kelsen, Hans (1945), “The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals”, *The Judge Advocate Journal*, Vol. 2, No. 3 (Fall-Winter), p. 8.

³⁴⁰ Glaser, Stefan (1966), “La méthode d'interprétation en droit international pénal”, *Rivista italiana di diritto e procedura penale*, Vol. 9, p. 766.

Art. 22 (*Nullum crimen sine lege*); Art. 23 (*Nulla poena sine lege*); Art. 24 (*Non-retroactivity ratione personae*).

As highlighted by Carlos Fernando Diaz-Paniagua, who coordinated the negotiations of the UN *Comprehensive Convention on International Terrorism*, the principle of *nullum crimen sine lege* requires that states define precisely which acts are prohibited before anyone can be prosecuted or punished for committing these same acts.³⁴¹ The definition of terrorisms in criminal law treaties helps states to enact domestic legislation to criminalize and punish the wrongful acts defined in the treaty in conformity with their human rights obligations.³⁴² Munivrana Vajda argues that the lack of a common definition of terrorism is an obstacle to prosecute perpetrators by any state under universal jurisdiction.³⁴³

Universal jurisdiction, according to a widely accepted definition by Kenneth Randall, is “a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim”.³⁴⁴ Robinson explains that the rationale behind it is based on the notion that “certain crimes are so harmful to international interests that states are obliged to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim”.³⁴⁵ Universal jurisdiction allows for the trial of international crimes – human rights violations and crimes against humanity, including genocide and war crimes – committed by anybody, anywhere in the world. The concept of universal jurisdiction is therefore closely linked to the idea that some international norms are *erga omnes*, or owed to the entire world community, as well as the concept of *jus cogens* – that certain international law obligations are binding on all states.³⁴⁶

³⁴¹ Diaz-Paniagua, Carlos Fernando (2008), *Negotiating terrorism: The negotiation dynamics of four UN counter-terrorism treaties, 1997-2005*, Dissertation submitted to the Graduate Faculty in Political Science in partial fulfilment of the requirements for the degree of Doctor of Philosophy, The City University of New York, pp. 46-47.

³⁴² Ibid.

³⁴³ Munivrana Vajda, Maja (2008), “A lack of universally accepted definition of terrorism: an obstacle to the exercise of universal jurisdiction”, in Steven W. Becker and Davor Derenčinović (eds.), *International Terrorism: The Future Unchained?*, Zagreb, Pravni fakultet Sveučilišta u Zagrebu, p. 137.

³⁴⁴ Randall, Kenneth C. (1988), “Universal jurisdiction under international law”, *Texas Law Review*, No. 66, pp. 785-8. See also: ILA Committee on International Human Rights Law and Practice (2000), *Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences*, chair Martin Scheinin, rapporteur Yuji Iwasawa, London Conference, p. 2.

³⁴⁵ Robinson, Mary (2001), “Foreword”, *The Princeton Principles on Universal Jurisdiction*, Princeton, Princeton University Press, p. 16.

³⁴⁶ Sunga, Lyal S. (1992), *Individual Responsibility in International Law for Serious Human Rights Violations*, Leiden, Martinus Nijhoff, p. 252.

Serious crimes fall under the principle of *aut dedere aut judicare* (either extradite or punish), the legal obligation of states to prosecute persons who commit serious international crimes, including acts of terrorism, where no other state has requested extradition. This principle was first codified by Grotius in the 16th century, and gradually incorporated into bilateral and multilateral treaties, which deal with different types of crimes, including terrorism, genocide, torture and war crimes.³⁴⁷

Marsavelski gathers that criminalization of terrorism is not as much a matter of international law as it is a matter of policy.³⁴⁸ This infers that the main practical problem is defining the term “political crime”.³⁴⁹ According to Marsavelski, if international law is not clear, the categorization of a crime undergoes political assessment.³⁵⁰

Nowadays, ancient political and military leaders such as Julius Caesar, Attila, Genghis Khan, Tamerlan and Napoleon would probably be referred to an international tribunal for war crimes and crimes against humanity. We could talk about genocide *ante litteram* also about the persecution of Christians by the Roman Empire.

International criminalization of terrorism starts in the 19th century through the introduction of 'political crimes', which led to the adoption of anti-anarchist measures. In 1833 the reactionary powers Austria, Prussia and Russia, sign treaties to extradite fugitives accused of political crimes, such as high treason, *lèse-majesté*, conspiracy against the throne and government, or participation in a revolt.³⁵¹ Contrariwise, the attitude of revolutionary governments is to grant refuge to the opponents of oppressive regimes accused of political crimes.³⁵²

In 1854, a Belgian court refuses to extradite the two attackers of French emperor Napoleon III on the grounds that it is a political crime.³⁵³ By suggesting that not all assassinations of heads of states which are politically driven deserve extradition, Lassa Openheim deems political assassination to be lawful, under certain circumstances.³⁵⁴

³⁴⁷ van Steenberghe, Raphaël (2011), “The Obligation to Extradite or Prosecute: Clarifying its Nature”, JICJ, Vol. 9, pp. 1107–8.

³⁴⁸ Marsavelski, p. 294.

³⁴⁹ Id., p. 348.

³⁵⁰ Id., p. 248.

³⁵¹ Openheim, Lassa Francis (1905), *International Law: A Treatise, Volume I: Peace*, London; New York (etc.), Longmans, Green, and Co., p. 391.

³⁵² Id., p. 392.

³⁵³ Id., p. 394.

³⁵⁴ Id., p. 399.

In an attempt to define an “anarchist act”, in 1898 Russia and Germany sponsor an International Anti-Anarchist Conference in Rome, which leads to the *Secret Protocol of the International War on Anarchism*, signed in Saint Petersburg in 1904.³⁵⁵ The War on Terror, then, is nothing new, compared to the previous War on Anarchism. The definition of the phenomenon is the same (*war*), as are its global scope, political approach and the measures to counter it through inter-police cooperation. The next step to set-up a common framework on political violence is the *Convention for the Prevention and Punishment of Terrorism* drafted by the League of Nations in 1937, which considers as criminal offences only acts against state officials.³⁵⁶

Some regional instruments address the fight against terrorism with the same 'political' approach. Under Art. 1 of the SAARC Convention of 1987 offences included in UN international conventions shall be deemed not to be of a political nature or connected to a political or politically inspired offence. Art. 15 of the Additional Protocol to the Convention³⁵⁷ excludes political exception to refuse an extradition request, but following Art. 17 authorizes member states to refuse to allow an extradition if it is considered a ‘political’ request.

Art. 2(b) of the Arab Convention of 1998 states that none of the terrorist offences provided for in the instrument shall be regarded as a political offence, even if committed for political motives: attacks on the kings, heads of state or rulers of the contracting states, their spouses and families, crown princes, vice-presidents, prime ministers or ministers of the contracting states. Under Art. 6 extradition shall not be permissible in the cases in which the request is deemed by the laws enforced in the requested state as one of a political nature, or if pardon was granted.

Like the Arab Convention on terrorism, Art. 2(c) of the OIC Convention of 1999 provides that none of the terrorist crimes against members of the royal family or senior dignitaries shall be considered political crimes even when politically motivated. The OIC Convention establishes under Art. 6 the same exceptions of the Arab Convention on extradition.

The GCC Convention of 2004, which is inspired by the two previous Islamic regional

³⁵⁵ Jensen, Richard Bach (1981), “The International Anti-Anarchist. Conference of 1898 and the Origins of Interpol”, JCH, Vol. 16, No. 2 (Apr.), p. 323-347.

³⁵⁶ *Convention for the Prevention and Punishment of Terrorism*, opened for signature at Geneva, on 16 Nov. 1937, LNOJ, Jan. 1938, Serie 1937, Vol. 10, No. C.546.M.383.1937.V, p. 22.

³⁵⁷ *Additional Protocol to the SAARC Regional Convention on suppression of terrorism*, done at Islamabad, on 6 Jan. 2004, entered into force on 12 Jan. 2006.

instruments, sets out the same measures that exclude certain offences as political (Art. 2(b)), and the exceptions for the granting of extradition if the offence for which extradition is sought is deemed a political offence under the law of the state concerned (Art. 20(a)).

Preamble and Art. 3(2) of the OAU Convention of 1999 states that terrorism cannot be justified under any circumstances and rejects any political justification. The possibility of political justification for a terrorists act is excluded also in § 4(xl) and § 60 of the *African Anti-Terrorism Model Law* of 2011.

The CSI Treaty of 1999 provides that signatories shall not regard the acts involved as other than criminal (Art. 4), excluding, therefore, falling into the sphere of political offences. Indeed, the Treaty makes no mention of any political, philosophical, ideological, racial, ethnic or religious justification. Article 14 of the ACCT of 2007 excludes the possibility of considering as a reason for non-extradition “a political offence or as an offence connected with a political offence or as an offence inspired by political motives”. Art. 3 of the Shanghai Convention of 2001 rejects political, philosophical, ideological, racial, ethnic, religious motivations as reasons for acquittal.

The criminalization process is witnessed by the inclusion among terrorist crimes provided for in the three Islamic CT conventions, of offences such as murder or theft accompanied by the use of force directed against individuals, the authorities or means of transport and communications; acts of sabotage and destruction of public property and property assigned to a public service and damage to property or to the environment. Article 2(1)(3) of the SCO Convention of 2009 and Art. 1(3) of the OAU Convention considers terrorism any act intended to cause significant property damage or ecological disaster.

The preamble to the SAARC Convention condemns “all acts, methods and practices of terrorism as criminal”. Art. 1(c) includes among terrorist offences murder, culpable homicide not amounting to murder, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property. Art. 2 and Art. 3(2) of the Convention leaves SAARC members free to include any other serious offence involving violence, which shall not be regarded as ‘political’.

An example of how the concept of terrorism, as a crime, is in constant evolution is the judgment delivered by the Special Court for Sierra Leone (SCSL), which, addressing the

situation of people in relation to the offence of acts of terrorism under Art. 4(2)(d) of Additional Protocol II, concludes that property as such is not protected from acts of terrorism, but that the "destruction of people's homes or means of livelihood and...their means of survival" amount to such acts.³⁵⁸ Some regional counter-terrorism instruments include the destruction of property among terrorist acts.

Terrorism undergoes this process of criminalization, but without a precise definition of the crime. As Saul notes, the current definition of terrorism is left to the unilateral interpretations of states.³⁵⁹ Diaz-Paniagua specifies that it has not been possible to reach an undisputed definition of terrorism due to major divergences on the question of the legitimacy of the use of violence for political purposes, either by states or by self-determination and revolutionary groups.³⁶⁰ Zeidan argues that, left to its political meaning, terrorism easily falls prey to change that suits the interests of particular states at particular times.³⁶¹ Higgins gathers that "it is merely a convenient way of alluding to activities, whether of states or of individuals, widely disapproved of and in which either the methods used are unlawful, or the target protected or both".³⁶² Klabbers feels that the language of terrorism is necessary to justify a large-scale response.³⁶³ According to Saul, criminalizing terrorism is only a small part of the overall international response, and that it should not serve as an instrument of "populist vengeance".³⁶⁴ The Australian researcher believes that a plausible basis for criminalizing terrorism is that it directly undermines Western democratic values and institutions.³⁶⁵

The FATF acknowledges that criminality is not terrorism,³⁶⁶ and that there is a "lack of consensus regarding the specifics of which entities are deemed to be terrorists".³⁶⁷ The 2014

³⁵⁸ *Prosecutor v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T (SCSL, Trial Chamber II, 20 June 2007), § 670. See also: *Prosecutor v. Moinina Fofana et al.*, Case No. SCSL-04-14-T (SCSL, Trial Chamber I, 2 Aug. 2007), § 172-173; *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-T (SCSL, Trial Chamber I, 2 Mar. 2009), § 115; *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-T (SCSL, Trial Chamber II, judgment of 18 May 2012), § 2006, 2192.

³⁵⁹ Saul (2006a), p. 11.

³⁶⁰ Diaz-Paniagua, p. 47.

³⁶¹ Zeidan, Sami (2004), "Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism", *Cornell International Law Journal*, Vol. 36, pp. 491-92.

³⁶² Higgins, p. 28.

³⁶³ Klabbers, p. 308.

³⁶⁴ Saul, Ben (2006b), "Reasons for Defining and Criminalizing 'Terrorism' in International Law", *Mexican Yearbook of International Law*, Vol. 6 (2006), pp. 419-460.

³⁶⁵ Saul (2006b), "Reasons for Defining and Criminalizing 'Terrorism' in International Law", *Mexican Yearbook of International Law*, Vol. 6, p. 239.

³⁶⁶ FATF (2014), *Risk of Terrorist Abuse in Non-Profit Organisations*, Paris, FATF/OECD, §177.

³⁶⁷ *Id.*, p. 15.

FATF Report highlights that the lack of consensus leaves the definition of terrorism to the interpretation of states: "While there is relative consensus on the high-level understanding of what constitutes terrorist actions, consensus breaks down in debates over whether some movements or entities warrant the label of 'terrorist.' Often, these debates are driven by different perspectives and interpretations of national threat environments".³⁶⁸

The government of Saudi Arabia argues that the term "terrorism" is ambiguous and undefined due to the contradictory ideologies of states.³⁶⁹ Klabbers supports the idea that the lack of consensus is due to political ambivalence.³⁷⁰ Further, because of the difficulty of containing terrorism and armed conflict within regular categories of criminal law, a way to treat non-state fighters – resistance movements, guerrillas, insurgents, terrorists, etc. – is to consider them simply as common criminals.³⁷¹ The Dutch scholar concludes that even though international law has great difficulty in deciding whether terrorists should be treated as ordinary criminals or political actors, the limit on governments for categorizing freedom fighters as criminals is extremely flexible. Marsavelski expresses his difficulties in judging whether terrorist attacks are crimes against humanity, as both terrorists and freedom fighters use violence to achieve their goals, and thus suggests separating elements of crime from justifications or excuses.³⁷² In a judgment delivered in 2003, the *Consejo de Estado de Colombia* argues that terrorists should be defined from their goal, that is the political purpose of destabilizing public security and peace.³⁷³

The UN Policy Working Group on Terrorism, which stresses the importance of the FATF Recommendations,³⁷⁴ suggests that to overcome terrorism it is necessary to understand its nature, because in most cases it is a political act; it has a political purpose.³⁷⁵ The UN Policy Working Group on Terrorism stigmatizes the labelling of political opponents or adversaries as terrorists since is only a technique for delegitimizing and demonizing them.³⁷⁶ The report of the working group warns about the possibility of the label of counter terrorism being used to consolidate

³⁶⁸ FATF (2014), § 44(2).

³⁶⁹ Ministry of Culture and Information of Saudi Arabia (2010) (ed.), *The Kingdom Versus Terrorism: Stances and Achievements*, Riyadh, Al-Quiman Multimedia (1st edition), p. 20.

³⁷⁰ Klabbers, p. 301.

³⁷¹ Ibid.

³⁷² Marsavelski, pp. 264, 266.

³⁷³ Council of State of Colombia (Third Section), judgment of 11 Dec. 2003, Case No. 12916 and 13627, rapporteur: Ricardo Hoyos Duque.

³⁷⁴ Policy Working Group on the UN and Terrorism, § 45.

³⁷⁵ Id., § 13.

³⁷⁶ Id., § 14.

political power, eliminate political opponents and inhibit and/or suppress legitimate dissent.³⁷⁷ The UN special rapporteur on terrorism and human rights, Kalliopi K. Koufa, infers that some states prefer wrongly describing the situation as “terrorism and counter-terrorism”.³⁷⁸

Saul calculates that the risk is that through the process of criminalization international law becomes an instrument of oppression of legitimate political resistance.³⁷⁹ Pictet thinks that in a civil war the lawful government tends to regard its adversaries as common criminals³⁸⁰ and to describe "civil disturbances" as mere acts of banditry to avoid to apply the provisions of Article 3 and to inflict torture and other inhumane acts prohibited by the Geneva Conventions, as a means of combating its enemies.³⁸¹ Further, Pictet considers that "no [g]overnment can object to respecting, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact respects daily, under its own laws, even when dealing with common criminals".³⁸²

The past attitude of governments to political crimes drive us to suppose that not all those who are persecuted as terrorists are true criminals; some of them are genuine freedom fighters.³⁸³ Klabbers assumes that a terrorist is usually 'politically inspired' and has an interest in being regarded as such, while it is tempting for the state to treat one as a common criminal,³⁸⁴ and to subject political opponents to criminal law.³⁸⁵ Morgan believes that terrorism is both crime and politics, and is culpable on both accounts,³⁸⁶ while Khan argues that the political dimension of terrorism differentiates it from other crimes.³⁸⁷ Hoffman upholds that terrorism is just a form of crime and proposes to distinguish terrorists from other types of criminals and terrorism from other forms of crime.³⁸⁸ Schmid simply suggests treating acts of terrorism as peacetime equivalents of war crimes.³⁸⁹ The UN independent expert on the protection of human rights and

³⁷⁷ Ibid.

³⁷⁸ UN Sub-Commission on the Promotion and Protection of Human Rights, *Terrorism and human rights. Final report of the Special Rapporteur, Kalliopi K. Koufa*, 25 June 2004, E/CN.4/Sub.2/2004/40, § 36.

³⁷⁹ Saul (2006a), p. 69.

³⁸⁰ Pictet (1952), p. 39.

³⁸¹ Id., pp. 50, 52.

³⁸² Ibid.

³⁸³ Marsavelski, p. 263.

³⁸⁴ Klabbers, p. 310.

³⁸⁵ Id., p. 302.

³⁸⁶ Morgan, Ed (2002), "International Law's Literature of Terror", *Can J Law Jurisprud.*, Vol. 15, p. 324. DOI: <https://doi.org/10.1017/S0841820900003647>.

³⁸⁷ Khan, p. 945.

³⁸⁸ Hoffman, p. 41.

³⁸⁹ Schmid (2004), p. 391.

fundamental freedoms while countering terrorism, Robert K. Goldman, stresses the importance of not confusing acts of terrorism with of war.³⁹⁰ The study on customary IHL of the International Committee of the Red Cross (ICRC) asserts that direct participation in hostilities in order to carry out attacks against combatants or against military targets does not necessarily constitute a terrorist act.³⁹¹

The Taliban is considered as a terrorist organization only when it intentionally targets civilians. U.S. officials characterize attacks carried out by the Taliban against civilians not as military, but as “terrorism, pure and simple”.³⁹²

Ruling on an assault to a military base by the Revolutionary Armed Forces of Colombia-People's Army (*Fuerzas Armadas Revolucionarias de Colombia, Ejército del Pueblo, FARC-EP*), the *Consejo de Estado de Colombia* argues that armed attack perpetrated, in the context of an internal armed conflict, exclusively against combatants or against military targets does not constitute, *per se*, a terrorist act,³⁹³ and therefore it should be considered a legitimate military action.³⁹⁴ The State Council of Colombia finds that guerrillas are individually responsible for terrorist acts, war crimes or other breaches of IHL, and that occasional acts of terrorism, committed incidentally while carrying out violent actions aimed at causing panic among the civilian population, should not lead to qualifying a subject as a terrorist, unless terror is systematically used against civilians.³⁹⁵ According to the Colombian supreme administrative tribunal, terrorism is a systematic use of terror to create panic in the population.³⁹⁶

Marsavelski suggests that the definition of terrorism should be precise enough to permit the prosecution of criminal acts without condemning legitimate actions. The Croatian scholar provides four guiding principles for distinguishing legitimate acts of freedom fighters from terrorist acts: principle of democracy, principle of proportionality, principle of just cause and

³⁹⁰ Goldman, Robert K. (2005), *Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism*, 7 Feb. 2005, E/CN.4/2005/103, § 17.

³⁹¹ Henckaerts, Jean-Marie and Louise Doswald-Beck (2005) (eds.), *Customary International Humanitarian Law*, Vol. I and II, Cambridge, Cambridge University Press, pp. 8-10.

³⁹² Garamone (2018a), “Officials Note Progress in Afghanistan, Difficulty for Taliban”, DoD News, Defense Media Activity, 20 Mar. 2018. Available at <https://www.defense.gov/News/Article/Article/1471301/officials-note-progress-in-afghanistan-difficulty-for-taliban> (accessed 24 Mar. 2018).

³⁹³ *Gonzalo Orozco Plazas v. Ministerio de Defensa Nacional-Ejército Nacional*, Case No. 520012331000199800580 01 (32.014), *Consejo de Estado de Colombia*, Third Section-Subsection A, 29 Apr. 2015, coucellor-rapporteur: Hernán Andrade Rincón, § 2.4.3.3 and § 2.4.5(a).

³⁹⁴ *Id.*, § 2.4.5(a).

³⁹⁵ *Id.*, § 2.4.3(1)(2)(3)(4).

³⁹⁶ *Ibid.*

principle of distinction.³⁹⁷ These principles are set forth in IHL, and shared by the Colombian State Council in its 2015 ruling on the FARC.

Brants believes that criminal categories are better applied to individuals than to groups.³⁹⁸ Gill and van Sliedregt think that members of militias and resistance movements can be prosecuted for criminal offences due to incidental violations of the laws of war, and that, as a whole, the group they belong to would lose its belligerent privilege in the event of systematic violations of the laws of war.³⁹⁹ Walzer upholds that combatants are not criminals.⁴⁰⁰ Moreover, Walzer argues that soldiers cannot be held responsible for participating in an unjust war, so that participation in an unjust war does not constitute a crime and is permitted only if it is justified.⁴⁰¹

The theory of the "just war" is inclined to give the right to make war (*jus ad bellum*) only to recognized governments and their armies. The associated theory of the "just combatant" tends to give the right to kill (*jus in bello*) only to regular troops. The limits of this approach are obvious, as it tends to transpose ethical and moral evaluations on a legal level.

Walzer thinks that both just and unjust combatants have "an equal right to kill".⁴⁰² It is argued that it is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules;⁴⁰³ the fact that just combatants fight in a just war while unjust combatants do not is irrelevant to their respective justifications for fighting.

The independence of *jus in bello* from *jus ad bellum* is refused by McMahan.⁴⁰⁴ It was found that unjust combatants in general cannot obey certain requirements of *jus in bello* and therefore act wrongly by participating in an unjust war,⁴⁰⁵ and hence concludes that no unjust war can be fought in a permissible manner. McMahan gathers that in general unjust combatants

³⁹⁷ Marsavelski, p. 285.

³⁹⁸ Brants, Chrisje (2000), "Dealing with the Holocaust and Collaboration: The Dutch Experience of Criminal Justice and Accountability after World War II", *Crime, Law and Social Change*, Vol. 34, No. 3, p. 211. DOI: 10.1023/A:1008358428102.

³⁹⁹ Gill and van Sliedregt, p. 35. See also: Dinstein, Yoram (2004), *The Conduct of Hostilities Under the Law of International Armed Conflict*, Cambridge University Press, pp. 43-44; Art. 82-88, 99-108 of the Third Geneva Convention.

⁴⁰⁰ Walzer (1977).

⁴⁰¹ McMahan, Jeff (2006), "The Ethics of Killing in War", *Philosophia*, Vol. 34, No 1, p. 25. DOI: 10.1007/s11406-006-9007-y. Originally appeared in *Ethics* 114 (2004), p. 693-733.

⁴⁰² Walzer (1977), p. 41.

⁴⁰³ Id., p. 21.

⁴⁰⁴ McMahan (2006), p. 24.

⁴⁰⁵ Id., p. 39.

do wrong merely by fighting, and that because a just war can be fought entirely in a permissible manner, *jus in bello* cannot be independent of *jus ad bellum*.⁴⁰⁶

Norman claims that there is no difference in moral culpability between soldiers and civilians.⁴⁰⁷ Meisels deduces that, whereas irregular combatants are not entitled to the protection afforded by the law of war, they do not enjoy the rights granted to criminals in civil law due to their hybrid identity.⁴⁰⁸ Finally, Meisels concludes that the combatant-civilian hybrid identity does not constitute a prosecutable offence in itself, but that specific acts of war can be deemed war crimes, maybe as terrorism.⁴⁰⁹ Meisels points out that international law and practice leave irregular combatants unprotected even if their unlawful identity is not in itself a criminal offence.⁴¹⁰

In conclusion, due to national interests, and the ambiguity of governments, to date it is not possible to have a legal definition of terrorism, which is universally accepted, according to the definition of the UN Human Rights Committee (HRC): "a norm, to be characterized as a 'law', must be formulated with sufficient precision to enable an individual to regulate conduct accordingly".⁴¹¹

It is suggested to distinguish violent acts with a political purpose from non-political actions, that must be considered 'ordinary' criminal actions. One must seek and adopt a narrow definition of terrorism, which must be different from an 'ordinary' crime, such as kidnapping for ransom or killing for money. It is argued that to this end motivations and goals are significant, and that one cannot blend them, putting any kind of violence or extremism in the same pot. While Western leaders prefer a wide definition of the term terrorism, the developing countries prefer a narrow one.

The definition of terrorism should not depend on the interpretation of states, but should come from facts, assessed according to objective criteria, even when governments deny the real existence of a conflict, that demonstrates that sometimes the characterization is not legal or humanitarian but political. As the differences between terrorist acts and the hostilities of an

⁴⁰⁶ Id., p. 30.

⁴⁰⁷ Norman, Richard (1995), *Ethics, Killing, and War*, Cambridge, Cambridge University Press.

⁴⁰⁸ Meisels, Tamar (2007), "Combatants—Lawful and Unlawful", *Law and Philosophy*, Vol. 26, No. 1, p. 33. DOI 10.1007/s10982-005-5917-2.

⁴⁰⁹ Id., p. 51

⁴¹⁰ Ibid.

⁴¹¹ UNHRC, *General comment No. 34, Article 19, Freedoms of opinion and expression*, 12 Sept. 2011, CCPR/C/GC/34, § 25.

armed conflict, closer to the traditional conception of war formulated by Carl von Clausewitz, begin to emerge, Foucault inverts Clausewitz's traditional conception of war, and says that politics is the continuation of war by other means.⁴¹²

THE WAR ON TERROR

Many scholars argue that a third category of armed conflict is emerging alongside non-international and international ones: transnational, cross-border or extra-state armed conflicts.⁴¹³ NATO concludes that threats can come from state and non-state actors, including terrorism and other asymmetrical threats, cyber attacks and hybrid warfare, where the lines between conventional and unconventional conflicts become blurred.⁴¹⁴ In this context is framed the War on Terror.

Considering that in the fight against terrorism there is no clearly identifiable enemy, the WoT seems to be a worldwide counter-insurgency operation, rather than a classical defensive or aggressive war against a country or a coalition of states. States tackle the WoT by expanding the scope of the law of war and restricting the application of IHL. It is argued that there is no reason for not complying with IHL, whatever the nature of the threat and of the War on Terror.

The UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson wonders whether IHL applies in transnational armed conflict against non-state groups, and if their members cease to be targetable during a pause in their active involvement.⁴¹⁵ Emmerson asks whether there can be a non-international armed conflict which has no finite territorial boundaries with a non-state armed

⁴¹² Foucault, Michel (2003), *Society Must Be Defended: Lectures at the Collège de France, 1975-1976*, trans. David Macey, New York, Picador (1st edition), p. 165.

⁴¹³ See, e.g., Corn, Geoffrey S., "Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaeda, and the Limits of the Associated Militia Concept" (21 Oct. 2008), *International Law Studies* (U.S. Naval War College), Vol. 84 (2009); Milanovic, Marko and Vidan Hadzi-Vidanovic (2012), "A Taxonomy of Armed Conflict", in Nigel White and Christian Henderson (eds.), *Research Handbook on International Conflict and Security Law Jus ad Bellum, Jus in Bello and Jus post Bellum*, Cheltenham, Edward Elgar. DOI: <http://dx.doi.org/10.4337/9781849808576.00013>.

⁴¹⁴ NATO (2016b), "Resilience and Article 3", updated: 22.06.2016 (10:37). Available at http://www.nato.int/cps/en/natohq/topics_132722.htm?selectedLocale=en (accessed 21 Dec. 2017).

⁴¹⁵ UNHRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 28 Feb. 2014, A/HRC/25/59, § 71(g). For a discussion of the issues, see: A/68/389, § 70-72; A/68/382, § 69-71.

group operating transnationally.⁴¹⁶ The UN special rapporteur wonders if attacks carried out by a transnational organizations and its affiliates meet the criteria of qualifying as a state of armed conflict under IHL.⁴¹⁷ These issues are addressed in the following chapter.

Sir Christopher Greenwood, an English judge at the ICJ, gathers that usually military operations are conducted throughout the battlefield, and it cannot be assumed that a state engaged in an armed conflict extends the area of operations beyond what constitutes a necessary and proportionate measure of self-defense, attacking its adversary anywhere.⁴¹⁸ Natalia Lupi finds that sometimes it could be difficult to realize whether the events can be set within a legal context of war or within that of a police operation.⁴¹⁹ Many *jihadist* attacks have not been treated as armed conflicts, but rather have been characterized as crimes.⁴²⁰ Most governments react by using police methods, not employing military force. The Use of Force Committee established by the International Law Association (ILA) considers that IHL may also be applied outside a situation of an armed conflict by analogy with the military law that normally governs members of a state's armed forces.⁴²¹ The term "armed forces" usually indicates the regular armed forces of a state, also in the Geneva Conventions.⁴²²

Some critics argue that the term "war" has been used only to justify unilateral preventive war, human rights abuses and other violations of international law.⁴²³ The ILA considers that the U.S. declaration of a "global war" in 2001 results in the claim to exercise certain rights

⁴¹⁶ A/HRC/25/59, § 71(c). See also: A/68/389, § 62-65; A/68/382, § 64-66.

⁴¹⁷ A/HRC/25/59, § 71(e). See also: A/68/389, § 66-69; A/68/382, § 55-63. For a comprehensive and up-to-date assessment of the threat of armed attack by al-Qaeda and its various affiliate organisations, and the degree of operational coordination, organisation and leadership among the various groups, see the fifteenth report of the Analytical Support and Sanctions Monitoring Team established pursuant to SC Resolution 1526 (2004), transmitted with the letter dated 22 Jan. 2014 from the chair of the Security Council Committee pursuant to Resolution 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities addressed to the president of the Security Council (S/2014/41).

⁴¹⁸ Greenwood, Christopher J. (2008), "Scope of Application of Humanitarian Law", in D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, Oxford University Press (2nd edition), p. 61-62.

⁴¹⁹ Lupi, Natalia (1998), "Report by the Enquiry Commission on the Behaviour of Italian Peace-Keeping Troops in Somalia", *Yearbook of International Humanitarian Law*, Vol. 1 (December), pp. 375-379. DOI: <http://dx.doi.org/10.1017/S138913590000026X>.

⁴²⁰ O'Connell, Mary Ellen (2004), "Enhancing the Status of Non-State Actors Through a Global War on Terror", *Columbia Journal of Transnational Law*, Vol. 43, No. 2, pp. 235 and 445-6.

⁴²¹ ILA Use of the force Committee (2010), *Final Report on the Meaning of Armed Conflict in International Law*, chair Mary Ellen O'Connell, rapporteur Judith G. Gardam, The Hague Conference, p. 31.

⁴²² Art. 4(1)(2) of Geneva Convention (III).

⁴²³ Khan, Borhan Uddin and Muhammad Mahbubur Rahman (2008), "Combating Terrorism under Human Rights and Humanitarian Law Regime", *MJHR*, Vol. 12, p. 379-397.

applicable only in armed conflict, such as the right to kill combatants without warning and detain without trial.⁴²⁴

President George W. Bush talked about the "war against terrorism" on 11 September 2001, addressing the American nation after the attacks occurred that day,⁴²⁵ but used for the first time the term "War on Terror" on 20 September 2001, addressing the Congress in joint session.⁴²⁶ Congress did not formally declare war within the *Authorization for Use of Military Force* (AUMF).⁴²⁷ Since then, U.S. government and Western media used the term to argue a global military, political, legal, and conceptual struggle against both organizations designated terrorist and regimes accused of supporting them, with a particular focus Islamic terrorism.

The use of the term "war" opened the doors to the AUMF, a specific statutory authorization within the meaning of § 5(b) of the *War Powers Resolution* of 1973.⁴²⁸ This act, passed during the Vietnam War (1955-1975), provides that the U.S. president can deploy troops abroad only by a declaration of war by Congress ("statutory authorization") or in case of "a national emergency created by an attack upon the United States, its territories or possessions, or its armed forces". Nevertheless, the president has the right to sign or veto congressional acts, such as a declaration of war.⁴²⁹ Thus, the term "war" is not a purely formal definition, but a conscious choice which led to a new doctrine: the application of the rules provided in time of war against non-state "enemy combatants" who are not nationals of countries at war with the United States.

The term "war" seems to have lost the significance it used to have. According to the classic definition of Lassa Oppenheim, war is "a contention between two or more [s]tates through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases".⁴³⁰ The Use of Force Committee finds that the term "war", while still used, has, in general, been replaced in international law by the broader concept

⁴²⁴ ILA, p. 4

⁴²⁵ Bush, George W. (2001), "Address to the Nation on the September 11 Attacks", 11 Sept. 2001, in *Selected Speeches of President George W. Bush 2001-2008*, Washington, D.C., The White House (2009), p. 58.

⁴²⁶ Bush, George W. (2001), "Address to the Joint Session of the 107th Congress", 20 Sept. 2001, in *Selected Speeches of President George W. Bush 2001-2008*, p. 68.

⁴²⁷ *Authorization for Use of Military Force* (AUMF), Pub. L. 107-40, 115 Stat. 224 (50 U.S.C. § 1541 note).

⁴²⁸ 93rd U.S. Congress, *Joint resolution concerning the war powers of Congress and the President*, 50 U.S.C. 1541–1548, Pub. L. 93-148.

⁴²⁹ Art. 1 § 7 of the U.S. Constitution provides that the Congress can override the President's decision if it musters the necessary two-thirds vote of each house.

⁴³⁰ Oppenheim, Lassa Francis (1952), *II International Law: A Treatise*, Hersch Lauterpacht (ed.), London, Longman, Greens and Co. (7th edition), p. 202.

of armed conflict,⁴³¹ which, lacking of a multilateral treaty that provides a generally applicable definition, remains unclear and subject to customary international law and subsidiary sources. This practice has significant wide-ranging implications for the discipline of international law, such as treaty obligations, UN operations, asylum rights and duties, arms control obligations, and law of neutrality.⁴³²

The Hague Convention (III) of 1907 relative to the Opening of Hostilities, which sets out the accepted procedure for a state making a declaration of war,⁴³³ seems to have become dead letter. Earlier practice of states creating a *de jure* state of war by a declaration is no longer recognized in international law.⁴³⁴

The term "war" is legally undefined and ambiguous, and that is perhaps why it was adopted in the definition of the global confrontation against terrorism. The term "armed conflict" is significant in the 1949 Geneva Conventions,⁴³⁵ which adopted a more general term deliberately to cover the complete range of situations and to avoid legal arguments over the exact definition of war: "[a]n armed conflict arises whenever there is fighting between [s]tates or protracted armed violence between government authorities and organized armed groups or just between organized armed groups".⁴³⁶ Cases not reaching the threshold of an armed conflict are referred to "acts of violence".

Sir Greenwood observes that "many isolated incidents, such as border clashes and naval incidents, are not treated as armed conflicts".⁴³⁷ The author infers that only when fighting reaches a level of intensity which exceeds that of such isolated clashes will it be treated as an armed conflict to which the rules of IHL apply.⁴³⁸

Since international law distinguishes between armed conflict and acts of banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to IHL,⁴³⁹ acts of a terrorist nature may not be taken into account in the determination of the existence of an

⁴³¹ ILA, p. 1.

⁴³² Ibid.

⁴³³ Hague Convention (III) of 1907.

⁴³⁴ ILA, p. 33.

⁴³⁵ Article 2 common to all four Conventions states that the Conventions apply in all situations of "armed conflict", not just in declared wars.

⁴³⁶ ICRS (2002), *The Law of Armed Conflict. Basic Knowledge*, Geneva, ICRS, p. 10. See also: Art. 5 of Geneva Convention (I) and (III); Art. 6 of Geneva Convention (IV); Art. 3(b) of Additional Protocol I.

⁴³⁷ Greenwood (2008), p. 48.

⁴³⁸ Ibid.

⁴³⁹ *Prosecutor v. Tadić* (1997), § 562.

armed conflict. The International Criminal Tribunal for the former Yugoslavia (ICTY) finds that terrorist attacks are not automatically excluded when considering the evidence as to the existence of armed conflict.⁴⁴⁰

The European Commission for Democracy Through Law finds that sporadic bombings and other violent acts which terrorist networks perpetrate in different places around the globe and the ensuing CT measures, even if they are occasionally undertaken by military units, cannot be said to amount to an 'armed conflict' in the sense that they trigger the applicability of IHL.⁴⁴¹

The European Commission for Democracy Through Law (Venice Commission) established by the Council of Europe considers that CT measures which are part of the War on Terror are not part of an armed conflict in the sense of making the regime of IHL applicable to them.⁴⁴² The IHL is an instrument to define a conflict, and *vice versa*. Among the factors to decide if an armed conflict exists, the ICTY identifies the interpretation of certain human rights, such as the right to life and the right to be free from arbitrary detention.⁴⁴³

The Use of Force Committee considers that characterizing an armed conflict as a fighting between organized armed groups renders the concept applicable both to sovereign states and non-state actors engaged in fighting of some intensity, not just in declared wars;⁴⁴⁴ this is not a situation which governments simply declare on their policy preferences.⁴⁴⁵ The ILA finds that the War on Terror meets all the criteria of an armed conflict.⁴⁴⁶ The *Final Report on the Meaning of Armed Conflict in International Law* concludes that provisions of Geneva Conventions apply to any conflict even if it is not declared or formally termed as a war. The *Consejo de Estado de Colombia* finds that IHL protections also apply to irregulars.⁴⁴⁷

Common Article 3, which applies in non-international armed conflicts, provides criteria to distinguish it from lesser forms of violence.⁴⁴⁸ The intensity of the conflict⁴⁴⁹ and the

⁴⁴⁰ *Prosecutor v. Boskoski and Tarculovski*, Case No. IT-04-82-T, ICTY, Trial Chamber II, 10 July 2008, § 184-91. See also: *Public Committee Against Torture in Israel*.

⁴⁴¹ Venice Commission (2006), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, 17-18 Mar. 2006, Op. No. 363/2005, CDL-AD (2006)009, § 78.

⁴⁴² *Id.*, § 79.

⁴⁴³ *Prosecutor v. Boskoski and Tarculovski*, § 178, 193.

⁴⁴⁴ ILA p. 1 and 2.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ ILA, pp. 28-30.

⁴⁴⁷ *Orozco Plazas v. Ministerio de Defensa Nacional-Ejército Nacional*, § 2.4.3.4.

⁴⁴⁸ Pictet (1960), p. 36.

organization of the parties are the solely criteria to distinguish an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities.⁴⁵⁰ These criteria, which have been discussed at the Diplomatic Conference held in Geneva in 1949,⁴⁵¹ seem to be widely accepted in international jurisprudence (see: ICTR⁴⁵² and ICTY).⁴⁵³ An exception is the *Mucić* case, in which the ICTY ruled that the existence of armed force between states is sufficient of itself to speak of a conflict.⁴⁵⁴

The ICTR (International Criminal Tribunal for Rwanda) and the ICTY are *ad hoc* tribunals established to investigate violations of the law (the latter closed its doors at the end of 2017). Serious violations of the law of armed conflict are considered war crimes that can be prosecuted in national courts or in international tribunals such as the above mentioned or in the ICC.

For non-state actors to move from chaotic violence to being able to challenge the armed forces of a state requires organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity.⁴⁵⁵ Territorial scope is a non-essential condition to define an armed conflict as such,⁴⁵⁶ even if according to the declarative theory the control of a territory is a requirement of statehood.⁴⁵⁷ The requirement for rebel forces to control part of the territory, to have a responsible command and to be capable of implementing the requirements of IHL, are among the characteristics to distinguish an armed conflict from other situations such as incidents, clashes, violence, banditry, insurrections or terrorist activities.⁴⁵⁸

⁴⁴⁹ Intensity does not depend on the subjective judgment of the parties, but it objective. See: *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, ICTR, Trial Chamber I, 2 Sept. 1998, § 603. See also: *Prosecutor v. Limaj et al*, Case No. IT-03-66-T, ICTY, Trial Chamber II, 30 Nov. 2005, § 89.

⁴⁵⁰ *Prosecutor v. Tadić*, Case No. IT-94-1-T, ICTY, Trial Chamber, 7 May 1997, § 562.

⁴⁵¹ Diplomatic Conference of Geneva of 1949, *Record of the Diplomatic Conference of Geneva of 1949*, Vol. 11-B, p. 121. Cited in Pictet (1952), p. 49-50.

⁴⁵² *Prosecutor v. Akayesu*, § 620.

⁴⁵³ *Prosecutor v. Blagojevi and Joki*, Case No. IT-02-60-T, ICTY, Trial Chamber, Jan. 2005, § 536; *Prosecutor v. Halilovi*, Case No. IT-01-48-T, ICTY, 16 Nov. 2005, § 24; *Prosecutor v. Limaj et al*, § 84; *Prosecutor v. Gali*, Case No. IT-98-29-T, ICTY, 5 Dec. 2003, § 9; *Prosecutor v. Staki*, Case No. IT-97-24-T, ICTY, 31 July 2003, § 566-68.

⁴⁵⁴ *Prosecutor v. Mucić et al*, Case No. IT-96-21-T, ICTY, Trial Chamber, 16 Nov. 1998, § 184.

⁴⁵⁵ ILA, p. 2 and 29. See also: Bothe, Michael (2004), "Direct Participation in Hostilities in Non-International Armed Conflict", expert paper, *Second Expert Meeting on the Notion of Direct Participation in Hostilities*, 25-26 Oct. 2004, The Hague; ICC Pre-Trial Chamber II (2010), "Decision pursuant to Art. 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", ICC-01/09, 31 Mar. 2010, § 69.

⁴⁵⁶ *Prosecutor v Tadić*, Case No. IT-94-1-T, ICTY, Appeals Chamber, 2 Oct. 1995, § 70.

⁴⁵⁷ Marsili, Marco (2016a), "The Birth of a (Fake?) Nation at the Aftermath of the Decomposition of USSR. The Unsolved Issue of Post-Soviet 'Frozen Conflicts'", *Proelium: Revista Científica da Academia Militar*, Vol. 10, No. 10 (Jan.), pp. 167-168. DOI: 10.5281/zenodo.44945.

⁴⁵⁸ ILA, p. 28 and 29.

ENACTED, ATTEMPTED AND FAILED COUNTER-TERRORISM INSTRUMENTS

States are the only actors in the international system; they constitute the so-called international community, which is represented by the United Nations. According to Bull,⁴⁵⁹ international society exists "when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions".⁴⁶⁰ This perspective seems to be challenged by the lack of a common definition of terrorism.⁴⁶¹

From 1972 to 2016 the UN General Assembly approved 81 resolutions to prevent or eliminate international terrorism,⁴⁶² even it was not possible to reach agreement on the term. Since 1963, the UN has elaborated 13 global conventions related to the prevention and suppression of international terrorism, but failed to adopt a comprehensive treaty.

Attempts to eliminate terrorism through legal means were sought before the United Nations were established. Terrorism has been a concern to the international community since 1937 when, following the assassination of King Alexander of Yugoslavia and French prime minister Louis Barthou in 1934, the League of Nations (LN) drafts a *Convention for the Prevention and Punishment of Terrorism*, and a project for an International Criminal Court, neither of which entered into force.⁴⁶³ Art. 1(1) of the Convention limits terrorism to acts directed against a state, making them a criminal offence. The expression "acts of terrorism", according to Art. 1(2) of the 1937 Convention, means "criminal acts directed against a state and 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 this context, political assassination, which until now is considered an instrument of political struggle, is celebrated as a terrorist tactic. The first effort to tackle international terrorism fails because of national interest of states.⁴⁶⁴

⁴⁵⁹ Bull, Hedley (1977), *The Anarchical Society: A Study of Order in World Politics*, New York City, Columbia University Press.

⁴⁶⁰ Id., p. 13.

⁴⁶¹ Schmid, Alex P. (2011) (ed.), *The Routledge Handbook of Terrorism Research*, London, Taylor and Francis, p. 39. See also: Williamson, p. 38.

⁴⁶² UN News Centre (2017), "News Focus: UN and Counter-Terrorism.Resolutions by UN General Assembly". Available at http://www.un.org/apps/news/infocus/terrorism/ga_resolution.asp (accessed 21 May 2017).

⁴⁶³ ILC (1949b), *Historical Survey of the Question of International Criminal Jurisdiction-Memorandum Submitted by the Secretary-General*, A/CN.4/7/Rev.1, Lake Success, UNGA, Introduction, pp. 3-4, 16-18, Appendix 8.

⁴⁶⁴ Rapoport, p. 53.

In 1987, for the first time, the UN General Assembly recognizes the need of a "general agreed definition of international terrorism".⁴⁶⁵ Still in 1997, the UNGA denounces the lack of legal instruments which define terrorism,⁴⁶⁶ whereas previously resolutions merely have invited member states to incorporate special clauses into bilateral agreements or to conclude special treaties, or have suggested the need for one or more conventions on the topic.

At an early stage, the United Nations, which replaced the ineffective League of Nations, face terrorism as an issue of international relations between member states. First resolutions adopted by the UN General Assembly are oriented to the protection of innocent victims and to the defense of sovereignty, territorial integrity, political independence, and security of states, in the perspective that terrorism poses a threat to international peace and security, and to friendly relations among states. This attitude is due to the fact that early UN resolutions adopted up to the Eighties face state terrorism.⁴⁶⁷ These resolutions, which recall the *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*,⁴⁶⁸ the *Declaration on the Strengthening of International Security*,⁴⁶⁹ the *Definition of Aggression*⁴⁷⁰ and the *Protocols Additional to the Geneva Conventions of 1949*,⁴⁷¹ are usually adopted alongside resolutions addressing peaceful settlement of disputes between member states.⁴⁷² The references to international law regulating relationships between states disappear in UN General Assembly Resolution 50/53 of 1996 (the last resolution to mention them is of February 1995).⁴⁷³

⁴⁶⁵ UNGA, Resolution A/RES/42/159 of 7 Dec. 1987.

⁴⁶⁶ UNGA, Resolution A/RES/51/210 [on the report of the Sixth Committee (A/51/631)], adopted on 16 Jan. 1997.

⁴⁶⁷ UNGA Resolutions: 32/147 of 16 Dec. 1977; 34/145 of 17 Dec. 1979; 36/109 of 10 Dec. 1981; 38/130 of 19 Dec. 1983; 40/61 of 9 Dec. 1985; 42/159 of 7 Dec. 1987; 44/29 of 4 Dec. 1989; 46/51 of 9 Dec. 1991; 49/60 of 17 Feb. 1995.

⁴⁶⁸ UNGA, Resolution A/RES/2625 (XXV) [Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations], adopted on 24 Oct. 1970.

⁴⁶⁹ UNGA, Resolution 2734 (XXV) [Declaration on the Strengthening of International Security], adopted on 16 Dec. 1970. The reference appears for the first time in the text of Resolution A/RES/34/145 adopted on 17 Dec. 1979.

⁴⁷⁰ UNGA, Resolution 3314 (XXIX) [Definition of Aggression], adopted on 14 Dec. 1974. The reference appears for the first time in the text of A/RES/34/145.

⁴⁷¹ The reference appears for the first time in the text of A/RES/34/145.

⁴⁷² UNGA, Resolutions: 36/110 of 10 Dec. 1981; 38/131 of 19 Dec. 1983; 40/68 of 11 Dec. 1985; 44/31 of 4 Dec. 1989.

⁴⁷³ UNGA, Resolution A/RES/49/60, adopted on 17 Feb. 1995.

The first resolutions request a "speedy elimination of the problem" and call for "peaceful solutions" as quickly as possible.⁴⁷⁴ Since 9 December 1991⁴⁷⁵ disappears from text of resolutions any reference to the "quick" solution of the problem. After twenty years of resolutions, without terrorism being eradicated, it is clear that there is no solution to the problem, neither easy nor quick.

In December 1989, there is a change of approach to UN resolutions to fight terrorism. In GA Resolution 44/29 of 1989 and 6/51 of 1991 emerges the connection between terrorist groups and drug traffickers. The GA Resolution 48/122 of 14 February 1994 emphasizes the ties between terrorist groups and drug traffickers and their paramilitary gangs. The linkage of terrorism to drug trafficking "aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of [s]tates and destabilizing legitimately constituted [g]overnments" is reported also in the *Vienna Declaration and Programme of Action* (VDPA) adopted by the World Conference on Human Rights on 25 June 1993.⁴⁷⁶

The Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism calls member states to take the necessary measures to ensure that terrorist offences – including terrorist-linked offences such as: inciting, aiding or abetting, and attempting – are made punishable. This Framework Decision respects fundamental rights as guaranteed by the ECHR,⁴⁷⁷ but avoids to give a definition of terrorist offences, leaving this burden to member states.⁴⁷⁸ Also the amending Framework Decision does not define terrorist offences, neither offences linked to terrorist activities, leaving countries free to set down their own rules for transposition.⁴⁷⁹ The EU Framework Decision on combatting terrorism has been amended pursuant to the UNSC Resolution 1624 (2005), which calls upon states to take measures to prohibit by law incitement to commit terrorist act or acts and to prevent such conduct.⁴⁸⁰

⁴⁷⁴ UNGA, Resolutions: A/RES/3034(XXVII) of 18 Dec. 1972; A/RES/31/102 of 15 Dec. 1976; A/RES/32/147 of 16 Dec. 1977; A/RES/34/145 of 17 Dec. 1979; A/RES/36/109 of 10 Dec. 1981; A/RES/38/130 of 19 Dec. 1983; A/RES/40/61 of 9 Dec. 1985; A/RES/42/159 of 7 Dec. 1987; A/RES/44/29 of 4 Dec. 1989.

⁴⁷⁵ UNGA, Resolution A/RES/46/51, adopted on 9 Dec. 1991.

⁴⁷⁶ UNGA, *Vienna Declaration and Programme of Action*, 25 June 1993, A/CONF 157/24, endorsed by GA Resolution 48/121, adopted on 20 Dec. 1993.

⁴⁷⁷ No. 10 of the Preamble and Art. 2.

⁴⁷⁸ No. 6 of the Preamble.

⁴⁷⁹ No. 10 of the Preamble.

⁴⁸⁰ UNSC, Resolution 1624 (2005) [on threats to international peace and security], 14 Sept. 2005, Resolutions and decisions of the Security Council, 2005, S/INF/61, SCOR, 60th Year.

The measures taken by member states to comply with the amended Framework Decision should not be "in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression" (Art. 2).

Offences linked to terrorist activities, including "public provocation to commit a terrorist offence", "recruitment for terrorism", "training for terrorism". The Decision leaves member states free to take the necessary measures to made punishable aiding or abetting, inciting and attempting (Art. 4).

In March 2007, the EU adopted new rules strengthen the legal framework to prevent terrorist attacks and crackdown on foreign terrorist fighters.⁴⁸¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism replaces Council Framework Decision 2002/475/JHA and amends Council Decision 2005/671/JHA. With this new measure, the EU updates and broadens the counter terrorism instruments, including new offences such as training and travelling for terrorist purposes. In particular, is deemed crime: traveling inside, outside or to the EU for terrorist purposes; the organization and facilitation of such travel, including through logistical and material support, such as buying tickets or route planning; training and being trained for terrorist purposes (e.g., for the manufacture or use of explosives, firearms or noxious or hazardous substances); providing or collecting funds related to terrorist offences or activities. Member states shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 8 September 2018.

In the absence of a UN comprehensive convention on terrorism, alongside the aforementioned instruments, proliferate regional conventions. In the Americas OAS adopted the *Inter-American Convention against Terrorism*⁴⁸² which provides the inapplicability of political offence (Art. 11), and deny to alleged terrorists the status of refugee (Art. 12) and the right of asylum (Art. 13). The Convention adopted by the organization based in Washington, provides that CT measures carried out by states parties shall take place with full respect for the rule of law, human rights, and fundamental freedoms (Art. 15). The OAS CT convention replicates UN resolutions and international conventions already in force, by providing mutual legal assistance between states (Art. 9), money laundering measures (Art. 6), and the seizure and confiscation of

⁴⁸¹ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 Mar. 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ ,Vol. 60, L88 of 31 Mar. 2017, p. 6–21.

⁴⁸² *Inter-American Convention against Terrorism*, adopted by the 32nd regular session of the OAS General Assembly at Bridgetown, on 3 June 2002.

funds and financial assets (Art. 5). The United States of America deposited on 15 November 2005 its instrument of ratification subject to the understanding that the term “international humanitarian law” in Art. 15(2) of the Convention “has the same substantive meaning as the law of war”.⁴⁸³ The attitude of the United States is consistent with the policy adopted by the Bush administration against GTMO detainees.

Beyond the abovementioned regional instrument, the OAS including the 2002 *Inter-American Convention Against Terrorism*, the OAS adopted the *Convention to prevent and punish acts of terrorism taking the form of crimes against persons and related extortion that are of international significance* (1971)⁴⁸⁴ and the *Declaration on Strengthening Cooperation in the Fight Against Terrorism and the Impunity of its Perpetrators* (2007).⁴⁸⁵

The OAS Declaration of 2007 reaffirms the principles and standards set forth in the *Universal Declaration of Human Rights* (UDHR),⁴⁸⁶ in the OAS Charter, in the UN Charter, in the Bogotá Declaration, in the *Inter-American Convention against Terrorism*, in the *Declaration on Security in the Americas*, and in other pertinent regional and international instruments.

The Inter-American Committee against Terrorism (CICTE) of the Organization of American States adopted several declarations to strengthen CT cooperation,⁴⁸⁷ and a resolution

⁴⁸³ OAS (2017a), “Inter-American Convention against Terrorism”. Available at <http://www.oas.org/juridico/english/sigs/a-66.html> (accessed 12 May 2017).

⁴⁸⁴ *Convention to prevent and punish acts of terrorism taking the form of crimes against persons and related extortion that are of international significance*, concluded at Washington, on 2 Feb. 1971, UNTS Vol. 1438 (1986), I-24381, p. 195.

⁴⁸⁵ *Declaration on Strengthening Cooperation in the Fight Against Terrorism and the Impunity of its Perpetrators*, adopted on 28 May 2007, CP/DEC. 36 (1599/07).

⁴⁸⁶ UNGA, Resolution 217 A [Universal Declaration of Human Rights], adopted on 10 Dec. 1948 at the Palais de Chaillot, Paris.

⁴⁸⁷ CICTE, CICTE/DEC. 1/10 [Declaration on Public-Private Partnerships in the Fight Against Terrorism (2010)]; CICTE/DEC.1/09 [Declaration on Strengthening Border Controls and International Cooperation in the Fight Against Terrorism (2009)]; CICTE/DEC. 1/08 [Declaration: Reaffirmation of the Hemispheric Commitment to Fighting Terrorism (2008)]; CICTE/DEC. 1/07 [Declaration of Panama on the Protection of Critical Infrastructure in the Hemisphere in the Face of Terrorism (2007)]; CICTE/DEC. 1/06 [Declaration of San Carlos on Hemispheric Cooperation for Comprehensive Action to Fight Terrorism (2006)]; AG/RESOLUTION. 2238 (XXXVI-O/06) Protecting Human Rights and Fundamental Freedoms while Countering Terrorism, adopted on 6 June 2006; AG/RESOLUTION. 2249 (XXXVI-O/06) Extradition of and Denial of Safe Haven to Terrorists: Mechanisms for Cooperation in the Fight Against Terrorism, adopted on 6 June 2006; CICTE/DEC. 1/05 rev. 1 [Declaration of Port-of-Spain on Strengthening Cooperation on Strategies to Sustain and Advance the Hemispheric Fight Against Terrorism (2005)]; AG/RESOLUTION. 2145 (XXXV-O/05) Denying MANPADS to Terrorists: Control and Security of Man-Portable Air Defense Systems (MANPADS), adopted on 7 June 2005; CICTE/DEC. 1/04 rev. 3 [Declaration of Montevideo (2004)]; CICTE/DEC. 1/03 rev. 2 corr. 1 [Declaration of San Salvador on Strengthening Cooperation in the Fight Against Terrorism (2003)].

on *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism*,⁴⁸⁸ which recalls the principles enshrined in the OAS and UN Charters, and in the UDHR and the ICCPR.

The OAS resolution of 2003 reaffirms that terrorism in all its forms and manifestations, whatever its origin or motivation, has no justification whatsoever. It calls to respect the rule of law and international law, including international humanitarian law, international human rights law, and international refugee law. Among these non-derogable rights the CITE resolution includes the judicial guarantees.

The CICTE resolution reveals the approach of Latin American countries, more inclined to the defense of fundamental rights and freedoms. This approach, different from that of African, Arab and Muslim countries, is affected by the long military dictatorships that ruled the South American continent through most of the 20th century.

TERRORISM AND HUMAN RIGHTS. INTERCONNECTIONS AND DIFFERENT PERSPECTIVES

Terrorism and human right are interrelated. It is not possible to tackle the fight against terrorism without considering the impact on human rights. Islamic and Asian countries adopted two different declarations on human rights: the first providing an overview on the Islamic perspective on human rights, and affirming the Islamic *sharia* law as its sole source;⁴⁸⁹ the latter providing a perspective based on the Asian values.⁴⁹⁰

Ten Asian states, members of the Association of Southeast Asian Nations, which include Indonesia, the largest Muslim country in the world,⁴⁹¹ adopted the *ASEAN Human Rights Declaration* (AHRD).⁴⁹² Preamble to the AHRD recalls the UDHR, the UN Charter, the *Vienna Declaration*, and other international human rights instruments. Nevertheless, the AHRD fails to include several key basic rights and fundamental freedoms, including the right to freedom of

⁴⁸⁸ CICTE General Assembly, AG/RESOLUTION. 2238 (XXXVI-O/06) [Protecting Human Rights and Fundamental Freedoms while Countering Terrorism], adopted at the 4th plenary session, held on 6 June 2006.

⁴⁸⁹ *Cairo Declaration on Human Rights in Islam* (CDHRI), Annex to Res. No. 49/19-P, adopted in Cairo on 5 Aug. 1990 at the 19th Islamic Conference of Foreign Ministers (Session of Peace, Interdependence and Development).

⁴⁹⁰ *ASEAN Declaration* (Bangkok Declaration), signed in Bangkok, on 8 Aug. 1967.

⁴⁹¹ The largest part (87.2%) of the approx. 240 million total population of Indonesia is Muslim. See: Pew Research Center's Forum on Religion and Public Life (2009a), *Global Religious Landscape*, Washington, D.C., Pew Research Center, p. 47.

⁴⁹² *ASEAN Human Rights Declaration (AHRD) and the Phnom Penh Statement on the Adoption of the AHRD*, signed at Phnom Penh, on 18 Nov. 2012.

association. The AHRD provides for the right to life (Art. 11), and affirms all the civil and political rights in the UDHR (Art. 10). The General Principles enshrine the right to fair process (§ 3, 5) codified in subsequent Art. 20. The civil and political rights recognized in the AHRD include: right to life (Art. 11), right to liberty and security (Art. 12), right to freedom of thought, conscience and religion (Art. 22), right to freedom of opinion and expression (Art. 23), right to freedom of peaceful assembly (Art. 24).

Even if the UDHR, which defines fundamental freedoms and human rights, is enlisted by the Organization of the Islamic Conference among the basic international human rights instruments,⁴⁹³ the Muslim world adopted its own instruments. The OIC proclaimed in 1990 the *Cairo Declaration on Human Rights in Islam* (CDHRI), which provides an overview on the Islamic perspective the topic, and affirms the *sharia* as its sole source. The preamble to the *Cairo Declaration*, which is widely acknowledged as an Islamic response to the UDHR, emphasizes “the efforts of mankind to assert human rights, to protect man from exploitation and persecution, and to affirm his freedom and right to a dignified life in accordance with the Islamic Shariah”. The *Cairo Declaration on Human Rights in Islam* provides, in its Art. 2, that the right to life must be protected and may be taken only in accordance with *sharia* law. The principles of the *sharia* do not correspond to those governing human rights according to Western democracies: many Islamic and Arab nations are accused of violating fundamental rights and freedoms.⁴⁹⁴

The League of Arab States adopted the *Arab Charter on Human Rights* (ACHR),⁴⁹⁵ affirming the principles contained in the UDHR, in the CDHRI, and in the international covenants on human rights.⁴⁹⁶ The *Arab Charter* was updated in 2004, after a first version issued on 15 September 1994 was not ratified by any state, and came into force in 2008 when seven of the members of the League of Arab States had ratified it. The UN High Commissioner for Human Rights, Louise Arbour, characterized the charter as incompatible with international

⁴⁹³ OIC-IPHRC (2017), "Legal Instruments. Basic International Human rights Instruments". Available at <http://www.oic-iphrc.org/en/legal> (accessed 23 Dec. 2017).

⁴⁹⁴ HRW (2017b), *World Report 2017*, New York, HRW.

⁴⁹⁵ *Arab Charter on Human Rights* (ACHR), adopted on 22 May 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893 (2005), entered into force on 15 Mar. 2008.

⁴⁹⁶ The *International Bill of Human Rights* was the name given to GA Resolution 217 A (III) of 10 Dec. 1948, A/RES/3/217, and two international treaties established by the UN. It consists of the *Universal Declaration of Human Rights* (A/RES/3/217 A), and the *International Covenant on Civil and Political Rights* (1966) with its two Optional Protocols and the *International Covenant on Economic, Social and Cultural Rights* (1966). The two covenants entered into force in 1976.

norms and standards on human rights.⁴⁹⁷ It is clear that the values of Western democracies and those of the Arab countries diverge substantially, and this is also reflected in the different approach to terrorism, which has so far made it impossible to reach a common definition of the term.

Also African countries have their charter on human rights. The *African (Banjul) Charter on Human and Peoples' Rights* (ACHP),⁴⁹⁸ adopted by the Organization of African Unity (OAU) in 1981, is a human rights instrument, similar to ECHR and ACHR. The ACHP is now the regional human rights system for the African Union (AU), the successor to the OAU. The right to life and personal integrity is guaranteed under Art. 4 of the Charter, in which is clear the legacy of Western colonialism, slavery, racism, and exploitation.

The civil and political rights recognized in the *Banjul Charter* include the right to freedom from discrimination (Art. 2 and Art. 18.3), equality (Art. 3), life and personal integrity (Art. 4), dignity (Art. 5), freedom from slavery (Art. 5), freedom from cruel, inhuman or degrading treatment or punishment (Art. 5), rights to due process concerning arrest and detention (Art. 6), the right to a fair trial (Art. 7 and 25), freedom of religion (Art. 8), freedom of information and expression (Art. 9), freedom of association (Art. 10), freedom to assembly (Art. 11), freedom of movement (Art. 12), freedom to political participation (Art. 13), and the right to property (Art. 14).

All these regional conventions refer to international instruments already in force, such as the UDHR, the UN Charter, the *Vienna Declaration*, and other human rights covenants. There would be no reason to adopt such regional instruments, which, however, cannot derogate from the provisions of the international instruments to which they refer.

The limit of these regional human rights instruments it is a 'cultural relativism'. This approach is also reflected in regional conventions on terrorism. If the UN were not able to adopt a convention on terrorism so far, is due to the Western bias, according to the countries which oppose. From this point of view it is indeed a clash of civilizations. Countries opposed to the Western view see armed struggle as an instrument to achieve the principles, repeatedly mentioned by the instruments of the United Nations, on the right of peoples to freedom and self-

⁴⁹⁷ Arbour, Louise (2008), "Arab rights charter deviates from international standards", 30 Jan. 2008. Available at <http://www.un.org/apps/news/story.asp?NewsID=25447#.WQj2nFLd4qI> (accessed 2 May 2017).

⁴⁹⁸ *African (Banjul) Charter on Human and Peoples' Rights*, adopted on 27 June 1981, entered into force on 21 Oct. 1986, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM. 58 (1982).

determination and to get sovereignty of their national territory, against any alien subjugation, domination and exploitation.

As Samuel P. Huntington wrote in his article published in 1993 in *Foreign Affairs* magazine, which later expanded in *The Clash of Civilizations and the Remaking of World Order* (1996): "Decisions made at the U.N. Security Council [...] reflect the interests of the West" and "the interests of the United States and other Western powers."⁴⁹⁹ The mechanism of the blacklisting is centered around the interests of the U.S. and their allies, but is also convenient for other governments.

All this is reflected in the multiplication of instruments to combat terrorism, each of which reflects the characteristics of the promoter countries and the organizations to which they belong. The World Conference on Human Rights, recognizes the need to avoid proliferation of human rights instruments.⁵⁰⁰ To multiply not only human rights conventions, but also those on terrorism that are related to abide human rights while countering terrorism.

The comparative analysis of regional human rights and CT instruments reveals the different cultural and political approach between Western countries, on the one hand, and African, Islamic and Arab countries on the other, bearing in mind that some Arab countries also belong to the African scene, and that not all the Islamic nations are Arab (but all Arab states are Islamic). The framework is complicated by the division, within the Islamic world, between Sunnis and Shiites.

Apart from the short *Regional Convention on Suppression of Terrorism* adopted in 1987 by the South Asian Association for Regional Cooperation (SAARC),⁵⁰¹ the first regional instrument of some importance is the *Arab Convention on the Suppression of Terrorism*, adopted by the League of Arab States in 1998. The previous *Arab Convention on Extradition* of 1952 establishes the judicial cooperation among member states of the League.⁵⁰² The Arab League, which has 22 member states, does not include non-Arab Islamic nations, which belong to the Organization of Islamic Cooperation.

The preamble to the Arab League Convention recalls the Islamic *sharia* as its sole source, and advocates the protection of human rights according to the principles of international law

⁴⁹⁹ Huntington, Samuel P. (1993), "The Clash of Civilizations?", *Foreign Affairs*, Vol. 72, No. 3 (Summer), p. 39.

⁵⁰⁰ VDPA II(A)(6).

⁵⁰¹ *SAARC Regional Convention on Suppression of Terrorism*, done at Kathmandu, on 4 Nov. 1987.

⁵⁰² *Arab Convention on Extradition*, approved on 14 Sept. 1952, and opened for signature on 3 Nov. 1952.

conform, including the UN Charter and all the other international covenants. The principles of *sharia* law are not consistent with international standards, according to Western democracies.

Art. 1(3) includes among terrorist crimes the offences provided in the following conventions, except where they have been excluded by the legislation of member states: Tokyo 1963, The Hague 1970, Montreal 1971 and 1984 Protocol, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, Hostages taking convention of 1979, and 1982 UNCLOS.

The preamble to the Arab League Convention on terrorism rejects all forms of violence and terrorism. However, the Convention does not consider as terrorism acts aimed at self-determination and independence. The preamble to the *Arab Convention* reaffirms “the right of peoples to combat foreign occupation and aggression by whatever means, including armed struggle, in order to liberate their territories and secure their right to self-determination, and independence and to do so in such a manner as to preserve the territorial integrity of each Arab country”, in accordance with the purposes and principles of the UN Charter and with the Organization’s resolutions. Article 2(a) of the *Arab Convention* provides that all mentioned cases are not regarded as an offence. This clause does not apply to any act prejudicing the territorial integrity of any Arab nation. In a nutshell, armed struggle is lawful only if directed against a non-Arab government. This rule highlights the partiality of the concept of terrorism from the point of view of Arab countries.

Art. 2(b) of the *Arab Convention* states that none of the terrorist crimes provided within the instrument against members of the royal family or senior dignitaries shall be regarded as a political offence, even if committed for political motives. Nothing is said about dignitaries of other countries not members of the Arab League. Under Art. 3 contracting states are prohibited to organize, finance or commit terrorist acts in any manner whatsoever.

Judicial cooperation is detailed in Part Two (Principles of Arab Cooperation for the Suppression of Terrorism) and Part Three (Mechanisms for Implementing Cooperation) of the Convention, which provide that states shall cooperate in accordance with their domestic laws and regulations (Art. 4). Article 3(I)(8) and Art. 4 establish exchange of information between and among states. Art. 4(I)(5) and Art. 21 provide confidentiality of information exchanged.

Art. 3(II)(1) establishes the principle of *aut dedere aut judicare*. The obligation arises regardless of the extraterritorial nature of the crime and regardless of the fact that the perpetrator

and victim may be of alien nationality.⁵⁰³ Extradition shall not be permissible if the offence for which extradition is requested is regarded under the laws in force in the requested State as an offence of a political nature (Art. 6(a)); if the offence for which extradition is requested relates solely to a dereliction of military duties (Art. 6(b)), or if the requesting state has granted amnesty to perpetrators of offences that include the offence in question (Art. 6(g)). Judicial assistance may be refused where granting the request might be prejudicial to the sovereignty, security or public order of the requested state (Art. 9(b)). Additional measure envisaged by the Convention is the seizure of property and assets embodied in Art. 19 and Art. 20.

The *Convention for Combating International Terrorism*, adopted by the Organization of the Islamic Conference in July 1999, is designed on that of the Arab League of the previous year. The OIC includes some Arab nations, which also belong to the Arab League, and African states which are members of one of the two organizations or both. The OIC Convention recalls the principles of international law and the UN Charter, as well as all relevant UN resolutions on terrorism, and all other conventions and international instruments (Art. 1.4).

Also this instrument is strongly affected by the legacy of colonialism of the Western powers. Preamble to the Convention calls, *inter alia*, for the observance of the sovereignty, stability, territorial integrity, political independence and security of states, and non-intervention in their international affairs. The Convention confirms the legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle to liberate their territories and attain their rights to self-determination and independence in compliance with the purposes and principles of the Charter and resolutions of the United Nations. The 1999 OIC Convention does not consider a terrorist crime “peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law” (Art. 2(a)).

The OIC Convention on terrorism prohibits contracting states to support terrorism in any manner (Article 3.I et seq.), but leaves room for what to consider as terrorism, and what a liberation struggle. While the Convention considers crimes of terrorism those offences defined in

⁵⁰³ Hall, Stephen (2006), *International Law*, Sidney, Butterworths Tutorial Series, LexisNexis Butterworths (2nd edition).

international CT instruments, it excludes offences not provided as such by the legislations of OIC member states or by those who have not ratified them (Art. 1.4).

The different approach to terrorism is also witnessed by the request of the OIC for removing Sudan from the U.S. list of terrorism-sponsoring states, and for rescinding the allegations of the ICC against President Omar Hassan Ahmad Al-Bashir.⁵⁰⁴ The OIC calls for respect for sovereignty of Sudan, and expresses its total rejection of “all forms of foreign interference” in the country’s affairs.⁵⁰⁵

The 1999 OIC Convention considers as terrorist crimes only those executed, started or participated in to realize a terrorist objective in any of the member states or against its nationals, assets or interests or foreign facilities and nationals residing in its territory punishable by its internal law (Art. 1.3). This excludes terrorist acts committed outside the territory of the 57 members of the Islamic Organization, including the State of Palestine.⁵⁰⁶ It also excludes acts which are not provided as criminal offence by domestic laws. Article 13, in fact, limits a global phenomenon, such as terrorism, and grants a ‘license’ to states to decide what is deemed to be a terrorist act.

It seems that OIC member states intend to punish only acts of terrorism committed among them, leaving wide discretion to them in considering which crimes are punishable under the Convention. Not foreseeing the punishment of acts against third countries, OIC members will leave ample room for maneuver to differentiate between acts related to liberation struggle and criminal acts included under terrorism offences.

While condemning Hezbollah for conducting terrorist activities in Syria, Bahrain, Kuwait and Yemen and for supporting terrorist movements and groups, the OIC Conference “reiterates its support for Lebanon in completing the liberation of all its territories from Israeli occupation through all legitimate means.⁵⁰⁷ In the light of the OIC Convention on terrorism, this last expression leaves room for actions that can be considered as being aimed at the independence, liberation and self-determination of Palestine. Therefore, it appears that the Organization of Islamic Conference condemns as terrorism the acts carried out by Hezbollah on the soil of OIC

⁵⁰⁴ OIC (2016a), Final communique of the 13th Islamic Summit of The Heads of State/Government of the OIC Member States, held in Istanbul, on 14-16 April 2016, § 77, 78. Available at http://www.oic-oci.org/oicv3/topic/?t_id=11093&ref=4364&lan=en (accessed 24 Oct. 2016).

⁵⁰⁵ Ibid.

⁵⁰⁶ OIC (2017a), “Member States”. Available at <http://www.oic-oci.org/states/?lan=en> (accessed 14 May 2017).

⁵⁰⁷ Final communique of the 13th OIC Summit, § 105.

member countries, as required by the Convention, but considers them a legitimate means of struggle if carried out abroad (Israel).

According to the OIC Convention, extradition shall not be permissible in the cases in which the request is deemed by the laws enforced in the requested state as one of a political nature (Art. 6.6); if crimes committed outside the territory of the requesting contracting state by a person who was not its national and the law of the requested contracting state does not prosecute such a crime if perpetrated outside its territory by such a person (Art. 6.11); if pardon was granted and included the perpetrators of these crimes in the requesting contracting state (Art. 6.12). Here, then, that the qualification of terrorist falls under the discretion of states, which can grant clemency to avoid prosecution to the accused.

Another peculiarity of the OIC Convention is that, while establishing a judicial cooperation between states,⁵⁰⁸ it prohibits to pass information on terrorist crimes to other states which are not involved in the terrorist act (Art. 21). This contradiction is the result of different political and religious positions of the OIC member states.

The heart of the differences between Western democracies and the rest of the world – OIC member states accounts for about a third of UN seats – actually lies in principles set out in this article. These principles cannot find acceptance within the *UN Comprehensive Convention on International Terrorism*. It is clear that OIC states, but not only them, consider lawful that political acts which Western governments might consider terrorism or other crimes.

In 2016, the OIC started drafting additional protocols to the *Convention on Combatting International Terrorism*. The proposed additional protocols include cyber space terrorism, terrorist financing, trans-boundary terrorist networks, and human rights.⁵⁰⁹

The *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism* of 2004 is clearly inspired by the two previous Islamic CT instruments, although it omits explicit references to state terrorism. The GCC is a regional intergovernmental political and economic union consisting of all Arab states of the Persian Gulf (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates) except for Iraq.⁵¹⁰ Tehran is not a member of the Gulf Cooperation Council. More than a third of the world's Shiites live in Iran, while GCC

⁵⁰⁸ Art. 3(B)(5), Art. 4, ch. II of part I, and ch. I of part III of the 1991 OIC Convention.

⁵⁰⁹ OIC (2016b), "OIC to Revisit Convention on Combating International Terrorism", 8 May 2016. Available at http://www.oic-oci.org//topic/?t_id=11148&t_ref=4385&lan=en (accessed 13 May 2017).

⁵¹⁰ GCC (2017), "Member States". Available at <http://www.gcc-sg.org/en-us/AboutGCC/MemberStates/pages/Home.aspx> (accessed 27 May 2017).

nations are Sunni Muslims, except Bahrain (approximately 70% Shia).⁵¹¹ Moreover, while the majority of the population of Iran (approximately 67–80%) consists of Indo-Europeans, and only 2% of Iran's citizens are Arabs,⁵¹² all the Gulf monarchies are Arab. All GCC nations join the OIC, together with Iran.

The GCC Convention provides, more or less, the same CT framework of the regional instruments adopted by the Arab League and the OIC, to which it is inspired, even if it makes no reference to *sharia* law. The OIC Convention recalls the principles of international law and the charters of the Arab League and of the United Nations, as well as the two regional Islamic instruments of the Arab League and the OIC (Art. 1), and the international conventions in force at the time of signature of the GCC convention. The offences provided for in the UN conventions are also considered terrorist offences, with the exception of those excluded by the legislation of contracting states or states that have not ratified those conventions (Art. 1). No reference is made to UN resolutions, but only to those of the Supreme Council of Gulf states.

The preamble to the Convention reaffirm the commitment to respect human rights in countering terrorism, and the right of peoples to struggle by various means, including armed struggle, against foreign occupation and aggression. The right to liberation and self-determination, in accordance with the principles of international law, is recalled in Art. 2(a).

The GCC Convention considers only terrorist offences directed against any of the contracting states or against its assets or interests, or its nationals or their property, and punishable under the domestic law of that state (Art. 1.3), as also provided by the OIC Convention, thus excluding acts committed outside the territory of the six GCC countries.

Chapter II of the GCC Convention insists on the commitment of member states to prevent their territories from becoming operational bases for terrorists, or that their citizens are involved in such activities. Article 20 of the *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism* includes the same exceptions for extradition which are provided by the OIC Convention. Judicial cooperation is provided in chapters IV, V and VI, and confidentiality is granted under Art. 10 and Art. 28 of the CT convention of Gulf Cooperation Council, which in chapter III introduces also financial measures, including the freezing and

⁵¹¹ Pew Research Center's Forum on Religion and Public Life (2009b), *Mapping the Global Muslim Population*, Washington, D.C., Pew Research Center, p. 10.

⁵¹² Iran (2017), *The World Factbook*, Washington, D.C., CIA. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html>, updated: 12.12.2017 (accessed 23 Dec. 2017).

seizing of funds (not assets). The Convention's approach leaves ample room for governments to decide whether it is terrorism or lawful act of struggle, including armed struggle.

The commonality of values between African and Islamic countries on the right to self-determination and the independence of peoples, and the rejection of any form of foreign interference, confirmed by OIC funding to the AU counter-terrorism actions.⁵¹³ African countries developed a CT framework by adopting the 1999 *Convention on the Prevention and Combating of Terrorism* and its 2004 Protocol.⁵¹⁴ Practical CT measures in areas such as police and border control, legislative and judicial measures, exchange of information, and financing of terrorism, including freeze or seize any funds and any other assets, have been implemented through the Plan of Action adopted in the AU High-Level Inter-Governmental Meeting held in Algiers in September 2002.⁵¹⁵ In 2011, the AU Assembly adopted the African Model Law on Counter Terrorism to assist states in harmonizing legislation on terrorism.⁵¹⁶

The AU deviates significantly from the OIC Convention on terrorism and from the CT instrument adopted by the Arab League and the GCC. While reaffirming the right of peoples to self-determination, deeming legitimate the liberation struggles, the AU condemns any act of terrorism, even those committed outside the territory of the member states. Moreover, the references to the UN conventions and resolutions, and invitations to cooperation with not AU countries, are explicit and unambiguous. Even the space left to states to determine whether an act is to be considered terrorism and punishable is reduced compared to the broad discretion allowed to Muslim countries.

The preamble to the OAU CT Convention recalls the UN Charter and UN relevant resolutions, in particular, General Assembly Resolution 49/60 and 51/210 and annexed declarations on Measures to Eliminate International Terrorism. Article 2 of the Convention calls member states to adhere to other international instruments to combat terrorism annexed thereto. Recalling all international conventions and UN resolutions on terrorism approaches African countries to Western governments, more than the Islamic countries.

⁵¹³ UN (2017b), "Counter Terrorism". Available at <https://unoau.unmissions.org/counter-terrorism> (accessed 15 May 2017).

⁵¹⁴ *Protocol to the OAU Convention on the Prevention and Combating of Terrorism*, adopted in Addis Ababa, on 1 July 2004.

⁵¹⁵ *Plan of Action of the AU High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa*, Algiers, 11-14 Sept. 2002, Mtg/HLIG/Conv.Terror/Plan.(I).

⁵¹⁶ AU (2011), *The African Model Anti-Terrorism Law*, final draft as endorsed by the 17th Ordinary Session of the AU Assembly in Malabo, on 30 June-1 July 2011.

Preamble to the 1999 *Convention on the Prevention and Combating of Terrorism* acknowledges that states are involved directly or indirectly in terrorism, and expresses deep concern over the dangers that terrorism poses to the stability and security of states. Article 4 commits state parties to refrain from supporting, financing, committing or inciting to commit terrorist acts, or providing havens for terrorists, directly or indirectly. Terrorist harboring is prohibited under § 21 of the *African Anti-Terrorism Model Law* of 2011,⁵¹⁷ which was endorsed by the AU to enhance CT legislation, intelligence sharing, operational capability and coordination. Section 4(vi) of the African CT model law calls UN and AU member states to cooperate in the fight against terrorism, and recalls the Anti-Terrorism Conventions, listing in ch. 2 the offences provided.

Despite the condemnation of terrorism, preamble to the 1999 OAU Convention on terrorism reaffirms the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the OAU Charters and of the ACHP. Article 3 of the OAU Convention says that armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts. Again, countries that have suffered the yoke of foreign occupation and colonialism, distinguish between acts of terrorism and legitimate struggle for independence and self-determination of peoples. The setting is like that of OIC countries, some of which also belong to the AU and to the Arab League. In this respect, the rift with Western democracies is clear, and sees the Arab-African bloc compact.

By broadening the concept of terrorism act given by the OAU Convention, under § 4(xl) of the African Model Anti-Terrorism law shall not be considered as terrorist acts: (a) any act is the result of advocacy, protest, dissent or industrial action and is not intended to result in the harm or conduct encompassed in the suggested definition of “terrorist act”; (b) the struggle waged by peoples in accordance with the principles of international law for their liberation or self determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces; (c) acts covered by international humanitarian law, committed in the course of an international or non-international conflict by government forces or members of organized armed groups.

⁵¹⁷ African Model Anti-Terrorism Law.

The link and the need to respect human rights in the fight against terrorism is stressed in the preamble to the OAU Convention of 1999, that states that terrorism constitutes a serious violation of human rights, which are deemed not derogable in Art. 22, and therefore it cannot be justified under any circumstances, with any regard to origin, causes and objective. The preamble to the OAU Convention affirms the commitment of adhering states to eliminate terrorism in all its forms and manifestations. Article 3(2) of the Convention affirms that political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defense against a terrorist act. The *African Anti-Terrorism Model Law* excludes the possibility of political justification for a terrorists act (§ 60). Section 4(x1) excludes a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason a justifiable defense.

The OAU Convention requires that states parties criminalize terrorist acts under their national laws as defined in the Convention. Article 4 at seq. defines areas of cooperation among states, establishes state jurisdiction over terrorist acts, and provides a legal framework for extradition as well as extra-territorial investigations and mutual legal assistance. Under Art. 15(c) extra-territorial investigation (*commission rogatoire*) may be refused if its execution of the request would affect the sovereignty of the requested state, its security or public order.

Art. 4(2)(g) of the AU Plan of Action provides assessment on the granting of asylum to alleged terrorists, as similar measure included in the *Inter-American Convention against Terrorism*. As for the OIC Convention, the AU Plan of Action provides confidentiality of the information exchanged among state parties, which undertake not to share such information with another state (Art. 5(3)). The CT Model Law further details the sharing of information with foreign jurisdictions (§ 52), leaving the states to decide whether to disclose information based on evaluations of domestic policy (§ 52.2). Use of anti-terrorism convention as basis for extradition (§ 58) and for mutual legal assistance in criminal matters (§ 59).

Art. 16(F)(b) of the 2002 Plan of Action introduces a blacklisting system such as that adopted by the UN and the EU. The African CT model law strengthens the AU sanctions regime. Part IV introduces the procedure for proscribing entities (§ 47 et seq.) “on reasonable grounds” (§ 47.2); the entity shall be deemed as having been declared proscribed if the UNSC decides that measures, including the freezing of property (§ 47.3 and § 53 et seq.). A proscribed entity may apply to the director of public prosecutions for revocation of the order (§ 47.4). This mechanism

is the same as provided by the UN Security Council, to which reference is made, and does not provide the possibility of appealing to a third party for delisting, failing, thereby, the fairness of the proceedings, although the proscribed entity may challenge the decision in court (§ 47.6 et seq.).

However, the *African Anti-Terrorism Model Law* provides the right of fair trial and due process for alleged terrorists and facilitators by recalling international law, including IHL (§ 51.1). The ICRC shall have the possibility to communicate with and visit the accused persons (§ 51.2).

The AU Model Law develops a capacity to investigate financial support to terrorist groups and strengthen the AU sanctions regime, including the fund freezing model implemented by the UN, the UE, and suggested in the FATF Recommendations. The model aims to develop a capacity to investigate financial support to terrorist groups (§ 6) and money laundering (§ 7, 8). The growing linkage between terrorism and money laundering was already recognized by the Protocol to the OAU Convention (2004). The *African Anti-Terrorism Model Law* suggests preventive measures and transparency in financial transactions to prevent money laundering and financing of terrorism (§ 25 et seq.). Fiscal control instruments, provided by the UN *International Convention for the Suppression of the Financing of Terrorism*, and suggested by the FATF-OECD, therefore, appear also in the African CT law.

The complexity of the African security model based on regional organizations encourages the multiplication of sub regional instruments to combat terrorism. The Economic Community Of West African States (ECOWAS) adopted a convention on the judicial penal cooperation (1992) to address “crime in all its forms and in its new dimensions”,⁵¹⁸ and another on extradition cooperation (1994),⁵¹⁹ applicable to offences designated as such by member states (Art. 1). Both the ECOWAS conventions fail to define terrorism.

The West African Economic and Monetary Union (UEMOA), an eight members organization, adopted: a regulation on the freezing of funds and other financial resources in the fight against the financing of terrorism (2001),⁵²⁰ a directive on combating the financing of

⁵¹⁸ *Convention A/P.1/7/92 relative à l'entraide judiciaire en matière pénale*, ECOWAS, 1992.

⁵¹⁹ *Convention d'Extradition A/P.1/8/94*, ECOWAS, 1994.

⁵²⁰ UEMOA (2002), Règlement N.14/2002/CM/UEMOA relatif au gel des fonds et autres ressources financières dans le cadre de la lutte contre le financement du terrorisme.

terrorism in member states (2007),⁵²¹ a decision on blacklisting system (2008).⁵²² The 2007 Directive defines a “criminal organization any entity or association structured for the purpose to commit, including terrorist financing offences”, but avoids to provide a definition of terrorism, or terrorist offence, or terrorist act. Even the 2008 decision does not define terrorism in any way.

The Economic and Monetary Community of Central Africa (*Communauté Economique et Monétaire de l'Afrique Centrale* or CEMAC) adopted a regulation on the prevention and punishment of money laundering and terrorist financing, and a *Convention on Combating Terrorism in Central Africa*, both providing the same definition of “terrorism act”.

Article 2 of the CEMAC Convention includes offences as referred to in certain international instruments - Tokyo Convention of 1963; The Hague Convention of 1970; Montreal Convention of 1971; New York Convention of 1973; Hostages Convention of 1979; 1982 UNCLOS; AU Convention on the Prevention and Combating of Terrorism – with the exception of the exclusions mentioned in the legislation of the states parties. While making reference to some international instruments the CEMAC Convention does not speak about the need to protect human rights while countering terrorism. Not underlining the need to respect fundamental rights and freedoms in the fight against terrorism, CEMAC countries prove a different sensitivity over these issues than Western democracies.

Art. 3(1) commits member states to prevent by any means in their respective territories the preparation, financing, commission of terrorist acts or the establishment of organizations recognized as terrorist by the United Nations. Art. 3(2) prohibits all forms of propaganda or apology for crime in general and terrorism in particular and support for terrorist organizations, as referred to in previous paragraph, on the territory of the member states. Art. 5(e) provides for the possibility to eject extradition request if the act does not constitute an offence in the requested state, as provided by other conventions. This rules, in addition to admit the existence of state terrorism, leaves wide discretion to governments to add terrorist organizations to their domestic list upon their political convenience. The CEMAC Convention, while providing the same definition of “terrorist act” of the AU, does not make any political, philosophical, ideological,

⁵²¹ UEMOA (2007), Directive N.04/2007/CM/UEMOA relative à la lutte contre le financement du terrorisme dans les États membres de l'UEMOA.

⁵²² UEMOA (2008), Décision N.09/2008/CM/UEMOA relative à la liste des personnes, entités ou organismes visés par le gel des fonds et autres ressources financières dans le cadre de la lutte contre le financement du terrorisme.

racial, ethnic, religious justification for terrorism, nor mentions the peoples' right to self-determination and independence.

Even in Asia proliferate conventions, made between Muslim and secular countries. In 1987 the South Asian Association for Regional Cooperation adopted the *Regional Convention on Suppression of Terrorism*, integrated by Additional Protocol of 2004, along with the Ministerial Declaration on Cooperation in Combating Terrorism (2009).⁵²³ The 1987 SAARC Convention, the first regional CT instrument, and its Additional Protocol constitute a single instrument.

The SAARC is an odd association, which includes Sunni Islamic members (Afghanistan, Bangladesh, Pakistan and Maldives), Hindu nations (India, Nepal), and Buddhist entities (Bhutan and Sri Lanka) where, however, Hinduism is widespread. The fact that SAARC is a heterogeneous organization is reflected in the text of the CT convention.

Preamble to the SAARC Convention of 1987 recalls UN Resolution 2625 (XXV) which requires that each state should refrain from terrorist acts against another state or from supporting the organization of such acts within its territory. This pioneering convention emphasizes that terrorism jeopardizes the sovereignty and territorial integrity of states. In this short convention, supplemented by the Additional Protocol of 2004, which has been drafted with the stated purpose of criminalizing the financing of terrorist acts and money laundering, clearly results the prevalence of the interest in protecting the state's integrity rather than human life. In the SAARC Convention of 1987 there is no reference to human rights and the fairness of judicial proceedings. Only Art. 19 of the Additional Protocol of 2004 points to the respect for international law, in particular, the purposes and principles of the UN Charter, IHL, and international human rights law.

The SAARC Convention, unlike others, does not provide any definition of terrorism; it is another peculiarity, as well as its brevity. Under Art. 1 the SAARC Convention offences included in The Hague Convention of 1970, in the Montreal Convention of 1971, and in the New York Convention of 1973, shall be deemed not to be of a political character or connected with a political offence or politically inspired. Additional Protocol of 2004 adds offences included in: Hostages Convention of 1979, CPPNM of 1980, Montreal Convention of 1988, Rome Convention of 1988, Terrorist Bombings Convention of 1997, and Terrorist Financing Convention of 1999.

⁵²³ SAARC (2009), SAARC Ministerial Declaration on Cooperation in Combating Terrorism of 28 February 2009.

Preamble to the SAARC Convention of 1987 condemns “all acts, methods and practices of terrorism as criminal”. Article 1(c) includes among terrorist offences: murder, culpable homicide not amounting to murder, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property. The Additional Protocol provides the seizure and confiscation of funds or other assets (Art. 8), the cooperation among law enforcement authorities (Art. 11), and mutual legal assistance (Art. 12), including extradition (Art. 13).

Art. 2 and Art. 3(2) of the 1987 Convention leaves SAARC members free to include any other serious offence involving violence, which shall not be regarded as ‘political’. The SAARC Convention provides judicial cooperation, including extradition, exchange of information, intelligence and expertise. Article 18 of Additional Protocol establishes national jurisdiction for offences provided in the Convention, thus refusing the concept of universal jurisdiction.

Additional Protocol of 2004 establishes a set of ‘political’ considerations: Art. 15 of excludes political exception to refuse extradition request; Art. 16 prohibits the granting of refugee status to alleged terrorists; Art. 7 grants discretionary powers in assessing whether the extradition request has not been submitted in good faith or in the interests of justice, or is considered to be an unjust expedient to capture a fugitive; Art. 17 authorizes member states to refuse to allow extradition or mutual legal assistance, if its is deemed to be made for the purpose of prosecuting or punishing a person for his race, religion, nationality, ethnic origin or political opinion. In this way, members implicitly recognize the possibility of instrumental use of the Convention against political opponents. It is also a matter of leaving hands free to the governments, according to their political assessment. These ‘political’ rules introduced by the 2004 Additional Protocol contradict themselves.

This Convention reflects the history and relationships of its signatories. The partition of India and the creation of Pakistan in 1947, and the following secession of Bangladesh from Pakistan in 1971, remain among the causes of much tension on the Indian subcontinent today.⁵²⁴ Probably because of problems arising from the partition of India, and wars, conflicts and disputes that are followed, some of which are unresolved, the convention does not make any reference to

⁵²⁴ Sisson, Richard and Leo Rose (1990), *War and secession: Pakistan, India, and the creation of Bangladesh*, Berkeley, University of California Press.

the right to self-determination and independence of peoples against all forms of alien domination and foreign occupation, upholding the legitimacy of the struggle of national liberation movements. Furthermore Sri Lanka has been affected by a thirty-year civil war (1983-2009) against the Liberation Tigers of Tamil Eelam (LTTE) secessionist insurgency. The Tamil Tigers have been accused of having carried on an "ethnically cleansing" against Muslim inhabitants from areas under its control.⁵²⁵ These reasons explain briefly why in the SAARC Convention are absent those references which are present in the conventions of African, Arab and Islamic organizations, despite also SAARC countries have long been subject to British domination.

In the wake of the anti-terrorism conventions of June-July 1999, the Commonwealth of Independent States (CIS) adopted a *Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism*. Among founding states of the CIS there are secular nations with the majority of Muslim population (Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Uzbekistan, Turkmenistan) and the Russian Federation, a country with an estimate 73% of Christian population (71% Eastern Orthodox) and 10% of Muslims.⁵²⁶ Many former Soviet republics with a Muslim majority have undergone a process of secularization during the 70 years of union, so they are not affected by religious influence in state affairs. The Treaty is open to the accession by states which are not CIS members (Art. 24).

Article 1 of the CIS Treaty emphasizes the political aspect of terrorism, which prevails over civilian victims. The human aspect fades into the background; signatories are certainly not known for respecting fundamental rights and freedoms. The Treaty does not mention the peoples' right to self-determination and independence, and it makes no mention of any political, philosophical, ideological, racial, ethnic or religious justification for terrorism. There is also no reference to the need to respect human rights in the fight against terrorism as well as references to relevant human rights conventions. No wonder this setting, as CIS members are all authoritarian regimes.

For the rest, the cooperation treaty is on the line of other regional CT instruments. The CIS instrument punishes also financing and supporting of terrorism (Art. 1). The Treaty provides exchanging of information, experience, and judicial cooperation; confidentiality is granted under

⁵²⁵ The Permanent Mission of Sri Lanka to the United Nations Office at Geneva (2007), "The LTTE in brief", Colombo, Ministry of Defence of Sri Lanka, p. 6. Available at <http://www.defence.lk/ppls/LTTEinbrief.pdf> (accessed 21 May 2017).

⁵²⁶ Pew Research Center (2017), *Religious Belief and National Belonging in Central and Eastern Europe*, Washington, D.C., Pew Research Center, p. 8.

Art. 8(6) and Art. 10. Article 5(5) leaves the parties free to determine agreements to execute extradition requests. Article 9 states that the rendering of assistance shall be denied in whole or in part if the requested party believes that fulfillment of the request may impair its sovereignty, security, social order or other vital interests or is in contravention of its legislation or international obligations. Under the same provision, the rendering of assistance may be denied if the act in relation to which the request was made is not a crime under the legislation of the requested party. Once again, prevails the national interest and emerge the differences of views. The Treaty leaves hands free to governments, depending on their political convenience; this is the real limit of regional instruments, due to the lack of a UN comprehensive convention on terrorism.

The anti-terrorism framework established by the Shanghai Cooperation Organization deserves a detailed analysis because of its particularities.⁵²⁷ The SCO is an international Eurasian alliance, which constitutes a geo-political “counter-weight” to NATO and represents a quarter of the world’s population, about 1.5 billion people.⁵²⁸ The Shanghai Cooperation Organization includes mostly Muslim secular states (Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan) and Islamic states (Afghanistan is an affiliated member; Pakistan was accepted to join the organization in 2017; Iran has submitted an application for full membership; Azerbaijan, Bangladesh Egypt and Syria applied for observer status; Maldives have applied for dialogue partner status). Here, Sunni majority nations join Shiite-majority countries (Iran and Syria).⁵²⁹

The Shanghai Convention of 2001 and additional documents provide the legal framework and establish cooperation among signatories partners, including China and the Russian Federation. Recalling the principles of the UN Charter, the 2001 Convention do not provide any justification for the provided offences, which are also highly politicized concepts within each of the SCO member states, including dialogue partners Belarus and Sri Lanka.

The 2001 Convention links terrorism with separatism and extremism, which are jointly known as the “Three Forces” or “Three Evils” of the Chinese doctrine. The preamble to the Concept of Cooperation of 2005 recalls that fundamental goals and objectives of cooperation among member states consists in combating the “Three Evils”. These are among the main goals

⁵²⁷ Each of the normative documents referenced to the SCO is available in HRIC (2011), *Counter-Terrorism and Human Rights: The Impact of the Shanghai Cooperation Organization*, New York; Hong Kong, HRIC.

⁵²⁸ HRIC, i.

⁵²⁹ *Mapping the Global Muslim Population*, p. 10.

and tasks included in Art. 1 of the *Charter of the Shanghai Cooperation Organization*.⁵³⁰ Section III(14) of the Concept of Cooperation adds cyberterrorism among the fundamental avenues of cooperation between member states, and Art. 2(1)(3) of the 2009 Convention adds the “ecological disaster” among terrorist acts.

China characterizes the legitimate exercise of religious, ethnic, cultural, and other rights as separatism or extremism.⁵³¹ Beijing masks its repressive campaign against Muslims and other members of religious minorities as legitimate counterterrorism efforts when it is not.⁵³² The U.S. Ambassador at Large for International Religious Freedom, Sam Brownback, accuses China of justifying arbitrary detention of minorities in mass detention centers and internment camps by claiming that it is rooting out terrorism preemptively, but, indeed, is because they are viewed as a threat to the Chinese Communist Party.⁵³³ The Chinese government has not adopted a comprehensive anti-terrorism law, and CT provisions are mainly found in the Criminal Law which in Art. 120 does not provide a clear definition of terrorism nor does it address extremism.⁵³⁴ Pakistan does not have a specific crime of extremism within its laws.⁵³⁵

Unlike conventions adopted by African, Arab or Islamic organizations, the SCO Conventions makes no reference to the right of peoples for self-determination and independence nor does it legitimize armed struggle against occupation, aggression and domination by foreign forces. Art. 3 of the SCO Convention of 2001 rejects political, philosophical, ideological, racial, ethnic, religious motivations to acquittal.

The approach of the SCO Convention of 2001 is aimed at protecting the state's territorial integrity rather than countering forms of terrorism that could indiscriminately strike the civilian population. Preamble to both the SCO Conventions states that terrorism constitutes a threat to the territorial integrity of states and to the development of friendly relations between states.

All the SCO CT documents recall the purposes and principles of the UN Charter and universally recognized principles and norms of international law. Art. 2 of the Statement of 2009

⁵³⁰ *Charter of the Shanghai Cooperation Organisation*, done at Saint-Petersburg, on 7 June 2002.

⁵³¹ HRIC, i-ii.

⁵³² U.S. Department of State Office of the Spokesperson (2019a), "Deputy Secretary Sullivan's Call With United Nations Secretary-General Guterres", 14 June 2019. Available at <https://www.state.gov/deputy-secretary-sullivans-call-with-united-nations-secretary-general-guterres> (accessed 15 June 2019).

⁵³³ Brownback, Samuel D. (2019), Remarks on Religious Freedom, 8 Mar. 2019, <https://www.state.gov/j/drl/rls/rm/2019/290098.htm> (accessed 9 Mar. 2019).

⁵³⁴ Zhang, Laney (2014), "People's Republic of China", in *Legal Provisions on Fighting Extremism: China, Pakistan, Russia, Tajikistan*, Washington, D.C.: The Law Library of Congress.

⁵³⁵ Ahmad, Tariq (2014), "Pakistan", in *Legal Provisions on Fighting Extremism*.

calls for adherence to relevant UNSC resolutions concerning international terrorism, in particular with Resolution 1624 (2005), which condemns all acts of terrorism irrespective of their motivation, and to FATF Recommendations.⁵³⁶ By appealing to UN resolutions and calling for cooperation with other regional organizations, namely UN, EU, CIS, CSTO, OSCE, NATO and CICA, the SCO proves more ecumenical than other regional cartels in combating terrorism.

While emphasizing the priority for the international community to adopt a comprehensive convention on international terrorism as well as the elaboration of regional counter-terrorism legal instruments,⁵³⁷ the SCO challenges the international community's efforts to ensure protection of human rights in countering terrorism.⁵³⁸

Despite SCO Conventions and related instruments constantly make reference to the rule of law, democratic values, fundamental human rights and freedoms, as well as the precepts of international law in countering terrorism, they actually create the conditions for violations of these principles. According to a 2011 report by Human Rights in China (HRIC), the overbroad definition of terrorism provided by the SCO Convention undermines human rights and the rule of law as the fundamental basis for the fight against terrorism.⁵³⁹ HRIC finds that SCO members deliberately use the justification to counter terrorism to implement policies and practices that amounts to abuses of human rights and infringe fundamental rights and freedoms.⁵⁴⁰ Among the violations the report includes blacklists, lack transparency, meaningful safeguards, and accountability mechanisms, denials of asylum without due process protections.⁵⁴¹

Section II(3) of the *Concept of Cooperation Between Member States of the Shanghai Cooperation Organization in Combating Terrorism, Separatism, and Extremism* of 2005 affirms the impermissibility of applying double standards in international efforts to combat terrorism, separatism, and extremism and reciprocal recognition of a terrorist, separatist, or extremist act.⁵⁴² The same section commits members states non providing any kind of support to terrorists, separatists, and extremists, including asylum. Here emerges the awareness of the 'political' use of

⁵³⁶ Ibid.

⁵³⁷ Art. 2 of the *Statement by the Shanghai Cooperation Organization Member States and the Islamic Republic of Afghanistan on combating terrorism, illicit drug trafficking and organized crime* (1999).

⁵³⁸ HRIC, i.

⁵³⁹ Id., ii-iii.

⁵⁴⁰ Id., iv.

⁵⁴¹ Id., iii.

⁵⁴² *Concept of Cooperation Between SCO Member States in Combating Terrorism, Separatism, and Extremism*, adopted by Resolution No. 1 of 5 June 2005 of the Council of Heads of SCO Member States.

the term terrorism, as well as separatism and extremism, and the existence of state policies that tend to use such means as foreign policy instruments.

The 2001 Convention, along with the 2009 supplementing CT Convention, leaves any part free to provide for a broader application of the terms used, leaving large discretion to governments in defining what is meant by terrorism, separatism and extremism. As provided by other CT regional instruments, the 2001 Convention establishes that the execution of a request of information can be denied in case it can cause prejudice or affect the sovereignty, security, public order or other substantial interests of the requested party (Art. 9.6) or if the act does not constitute an offence under the legislation of the requested party (Art. 9.6). The discretionary scope of this provision is evident, as is the use for domestic policy purposes.

Along with the 2001 Convention, the 2009 supplement straightens the exchange of information and provides a legal basis on which agents of a member state may, upon receipt of permission, enter the territory of another state in pursuit of a suspect (Art. 18). Pursuant to the amended Convention, denials of asylum for individuals accused or suspected of acts deemed to be criminally punishable in accordance with the Convention (Art. 23). Article 5(4), Art. 9(3) and Art. 11(6) of the 2009 SCO Convention introduces the universal jurisdiction by not excluding the exercise of any criminal jurisdiction established by a state party in accordance with its domestic laws, and considering a terrorist act prosecutable regardless of whether it was committed.

The *Agreement on the Database of the Regional Anti-Terrorist Structure of the Shanghai Cooperation Organization* signed in 2004 establishes a common Regional Anti-Terrorist Structure (RATS) providing details on “international terrorist, separatist, and extremist organizations, their structures, forms, and methods of action, their leaders, members, and other individuals affiliated”.⁵⁴³ The database includes also NGOs (Art. 6.4). The *Agreement Between the Member States of the Shanghai Cooperation Organization on the Regional Anti-Terrorist Structure* of 2002 regulates the access and the usage of the RATS database.⁵⁴⁴

The framework of Asian regional conventions is completed by the *ASEAN Convention on Counter Terrorism* of 2007. Preamble to the ACCT Convention recalls the relevant international CT conventions and UN resolutions, the 2001 *ASEAN Declaration on Joint Action to Counter*

⁵⁴³ *Agreement on the Database of the Regional Anti-Terrorist Structure of the Shanghai Cooperation Organisation*, done in Moscow, on 28 June 2004 .

⁵⁴⁴ *Agreement Between the Member States of the Shanghai Cooperation Organisation on the Regional Anti-Terrorist Structure*, done at St. Petersburg, on 7 June 2002.

Terrorism and the 2002 *Declaration on Terrorism*. Preamble to the ACCT and Art. 2 recalls the relevant international CT conventions and UN resolutions.

The ACCT reaffirms the commitment of the signatory countries to protect human rights, fair treatment, the rule of law, and due process in countering terrorism. The ASEAN Convention provides mutual legal assistance between the signatories (Art. 12), subordinates the granting of status of refugee to the assessment that the applicant is not a terrorist (Art. 10), and excludes the possibility of political justification (Art. 14).

Currently, the lack of an agreement about the political, philosophical, ideological, racial, ethnic, religious motivations prevents to reach a shared definition of what is to be considered terrorism as a crime. Is not possible to address terrorism without considering all these features. This is reflected in the proliferation of overlapping regional conventions. These instruments are biased by the geopolitical framework within which they are conceived, and do not serve to properly address a global issue.

Beyond etymology, it is clear that one of the distinctive characteristics of terrorism is the generation of fear, terror, against the opponent or the undifferentiated public. The second distinctive sign is the use of violence or the threat of violence. The third is political motivation or a political purpose. Even if terror is not terrorism,⁵⁴⁵ there is a clear causal connection between the former and the latter. To determine whether a terror act is an act of terrorism it is necessary to investigate and assess if there is a scope behind that act and what is its nature.

In conclusion, one can define terrorism as the premeditated and deliberate targeting of civilians to achieve a political goal. Accordingly, the targeting of political or military objectives does not have to be considered a crime; it is a weapon available to those who do not have heavy weaponry, an air force or navy. It is not a strategy, it is a tactic. On the other hand, the voluntary targeting of civilians, as a strategy, no matter if it is with a political goal, must be regarded as murder. The deliberate killing of civilians or inactive combatants, especially given the lack of a trial which proves their liability, remains a serious crime, whether it is committed by a state or a non-state actor. In this case, the choice to apply the international humanitarian law or the laws of war is indifferent, as long as the voluntary killing of civilians or inactive combatants is punished as a homicide.

⁵⁴⁵ See below: ICTY, *Prosecutor v. Galić*, § 134.

2 CHALLENGES IN DEFINING TERRORISM AND COUNTER-TERRORISM

This chapter provides a brief examination of key challenges that emerge in the literature pertaining to the concept of terrorism, its proper definitions, structure, participants, and the involvement of the state. Due to the multitude of definitions that have been presented in chapter 1, this section will address the lack of consensus about the majority of the terms linked to terrorism – including terrorism itself, belligerents, status in war, political status, morality and ethical considerations, the legality of the War on Terror, and the possible implications of a shift in definitions of terrorism. This is necessary because most, if not all definitions that are currently available have to do with the traditional understanding of war, which is becoming obsolete. Terrorism today represents a completely new dynamic in terms of political, social, economic, and military application, which is evidenced by the radical shifts in modalities of terrorist activity, from ISIS to Boko Haram, every cell or organization employs different methods and thus requires different responses. To the point of this dissertation, terrorism as it is understood today is not properly defined, nor are its critical components as listed above.

THE MULTIPLE DEFINITIONS OF TERRORISM

The ability to define and understand terrorism is a problem that persists regardless of how many definitions are developed, or how wide encompassing they might be. The problem lies in the fact that terrorism represents a very wide area of research that is murky, at best, and which is not of equal importance to every researcher, politician, or expert. According to Schmid,⁵⁴⁶ there are four main reasons why this is the case:

- I. Terrorism itself is a problematic concept that causes divergence in opinion between political, legal, social, and public opinion;

⁵⁴⁶ Schmid (2004).

- II. The problem of definition is inherently linked to that of de-legitimization and criminalization of terrorism;
- III. There exists a number of different iterations of terrorism, all purporting to different forms, methods, ideologies, and underlying causes;
- IV. The term itself has been defined in at least a hundred different ways over the last two centuries, whilst still missing a universally acceptable definition.

Even though Schmid is generally considered as the leading authority in the discussion about the definition of terrorism, other scholars have provided arguments as to the elusiveness of such a definition. The definition of terrorism, according to Ganor, is impossible because terrorist organizations by their very nature exist in secret, which makes any objective analysis nearly impossible. Further, the problem of definition is inherently linked to the question of loyalty. Are terrorists working for or against national interests of their homeland; the border between murder, guerrilla warfare, and terrorism; the ability of the state to translate any form of activity into a legitimate show of force; the linkage between terrorism and the question of self-determination; the goals and status of the terrorist acts and terrorists themselves. All of these elements draw out inconsistencies in the many definitions discussed in the previous chapter. If all terrorism is criminal, then surely the practice of concealing prisoners in overseas black sites, which was a common practice of the U.S. government, can be considered terrorism, much like armed attacks against civilians in Afghanistan and Pakistan which had nothing to do with the WoT. Moreover, where is the line between guerilla warfare and terrorism, such as it was in, for example, Ireland in the 20th century, or more recently in the Balkans.⁵⁴⁷

Both Schmid and Ganor recognize the need to create a unified, universally applicable definition of terrorism. There is a number of arguments that support this assertion, linked to a variety of individual aspects of terrorism. As Schmid contends, the ability to create an effective counter-terrorism strategy demands agreement on the core elements of the problem which necessarily requires a definition acceptable to all included parties. While at present most nations accept the UN definitions listed in chapter 1, they are by no means universal and are subject to voluntary adoption and adaptation. Second, there is no possible way to combat terrorism

⁵⁴⁷ Ganor, Boaz (2002), "Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?", *Police Practice and Research*, Vol. 3, No. 4, pp. 287-304. DOI: 10.1080/1561426022000032060.

effectively if every side has a different definition – which has been exemplified by the chaotic situation in Syria, where allied forces attacked targets based on individual understanding of terrorism. Moreover, some blatantly terrorist cells were supported by allied forces precisely due to the lacking definition of the term. The crux of the argument is that terrorism invariably arises from political reality and is therefore within the sphere of policy and judicial persecution. Since there is a number of different interpretations of terrorism, what constitutes a crime in the U.S. need not be a crime in Iran, or Pakistan, or Japan.⁵⁴⁸

It should be noted, here, that the author of this dissertation agrees with these positions, which is part of the reason why this dissertation took the form it did, as it was realized that all past and current attempts to properly define terrorism ended up in a swath of incompatible definitions that just muddy the waters and make congruent and efficient international action against terrorism completely unfeasible – as evidenced by the 20 year struggle that does not seem to yield anything other than more terrorist groups.

On the other side of the argument are those who consider current definitions of terrorism sufficient, and terrorism itself sufficiently recognizable to be fought successfully. According to Hoffman⁵⁴⁹ terrorism is a predominantly political concept that necessitates only recognition in terms of specific goals, motivations, and purposes. Moreover, it is necessary to differentiate terrorism from other forms of violence. To Hoffman, this is not problematic, and therefore does not require a universally acceptable definition.⁵⁵⁰ To this point, Wilkinson⁵⁵¹ states that the public is well aware and able to recognize terrorist activities. This implies that Wilkinson sees conceptual and empirical distinction between terrorism and other forms of political violence as the crux of the problem rather than the existence of a universal definition. However, in both instances it became apparent, especially over the last several years, that terrorist activity is ambiguous in its nature, and that individuals within the public cannot correctly differentiate (in all cases) between political violence and terrorism – for example the 2016/2017 riots in the U.S. have frequently been labeled as terrorist activity, whereas they should have been labeled as politically motivated violence instead.

⁵⁴⁸ Schmid (2004), pp. 399-402.

⁵⁴⁹ Hoffman, p. 2.

⁵⁵⁰ Id., p. 2-3.

⁵⁵¹ Wilkinson, Paul (2006), *Terrorism versus democracy: The liberal state response*, London, Routledge, p. 1.

According to Nacos⁵⁵² individuals can intuitively recognize terrorist activities and differentiate them from other forms of violence, and supports this assertion by arguing that terrorism is in many ways similar to pornography, one can recognize it when one sees it, but cannot place it within a well-defined category. This argument is characteristic for political actors who frequently have no interest in reaching a consensual solution, since the existence of an objective, universal definition would place many of the illegal activities of state actors into the light, and potentially lead to judicial culpability of governments or individual agencies. To further this point, it is indicative to note the words of the UK permanent representative to the United Nations, Jeremy Greenstock, who said that the problematization of the definition of terrorism avails no benefit, what is important is to recognize that terrorism is terrorism.⁵⁵³ This points to the fact that states, much like non-state actors play a critical role in this problem, which adds credibility to the chosen methodology and line of reasoning in this dissertation. Provided that state actors do engage in acts that can be classified as terrorism, it seems plausible to assert that there is no political will to actually define and objectively assess terrorism, as that leaves very little room for maneuvering via security and intelligence agencies on the global scale.⁵⁵⁴

There exists a third line of reasoning that argues terrorism is an overly subjective concept that can best be described by the claim “one man’s terrorist is another man’s freedom fighter,” and that under such circumstances the search for a universal definition of terrorism becomes impossible. As Wardlaw⁵⁵⁵ points out, terrorism is a moral issue, which is why it is impossible to define objectively. This position is very common in individuals who themselves were a part of terrorist organizations – such as Yasser Arafat, who stated such in front of the UN general assembly. To them, the difference between a terrorist and a freedom fighter lies solely in the eye of the beholder—who supports a just cause will call oneself a freedom fighter, the other who is on the other side will see terrorism. The most commonly cited example of this dichotomy is the American Revolutionary War, where the U.S. utilized tactics that some call terrorist activities, whereas the UK used the regular military to suppress rebellion. Translated in modern terms, this could be used to describe the Palestinian problem, albeit with several additional issues. Firstly,

⁵⁵² Nacos, Brigitte L. (2016), *Mass-Mediated Terrorism: Mainstream and Digital Media in Terrorism and Counterterrorism*, Lanham, Rowman and Littlefield (3rd edition), p. 25.

⁵⁵³ Collins, John M. (2002), "Terrorism", in John M. Collins and Ross Glover (eds.), *Collateral Language: A User's Guide to America's New War*, New York, New York Univ Press, p. 167-68.

⁵⁵⁴ Schmid (2011), p. 39.

⁵⁵⁵ Wardlaw, Grant (1989), *Political terrorism: Theory, Tactics and Counter-Measures*, Cambridge, Cambridge University Press (2nd edition), p. 4.

modern terrorism includes purposeful acts of aggression against civilians, which was not the case in the past; second, modern terrorism diverges from that of the 20th century in terms of the level of radicalization—suicide bombers, various attacks whose sole aim is to maximize civilian casualties.⁵⁵⁶

The UN, also, does not have a universal position on the definition of terrorism. In 1998, the UN found that there is no plausible method of reaching a universal consensus on the nature of terrorism, or on the specific nature of threats, challenges, and changes in the modalities of terrorist violence in the world. Moreover, one of the UN panels pointed out that the absence of a universal definition is subversive for the creation of a normative and moral based stance on the fight against terror, and allows individual interpretations to be made.⁵⁵⁷

The argument by Ceci⁵⁵⁸ that terrorism represents a conceptual anomaly is based on five elements that obstruct the process of forming a definition – emotional burden, heterogeneity, subjectivity and lack of value-neutral explanations, definitions made by those who fight terrorism, and pejorative nature of the term itself. All the problems that surround the definition of terrorism, and the inherent nature of the reality in which terrorism exists leads to simplification and generalization, which further alienates any semblance of a consensus. The fact that information today is available at an unprecedented level, and that individuals have the capacity to join terrorist organizations remotely has exacerbated the problem, as it now includes considerations of domestic regulation, information control, securitization of daily life, and a number of other problems that all further problematize the definition of terrorism. In this context, objective reality of terrorism falls behind to make space for highly subjective, opinionated elements which is another critical element that prompted this dissertation—in lack of objective reality (or at least lacking the ability to objectify a problem), the only recourse is to examine the problem from a different standpoint.

⁵⁵⁶ Ibid., p. 4-5.

⁵⁵⁷ Schmid (2004), p. 396-7.

⁵⁵⁸ Ceci, Giovanni Mario (2016), "A 'Historical Turn' in Terrorism Studies?", JCH, Vol. 51, No. 4 (Oct.), pp. 888-890.

MORAL AND ETHICAL ISSUES

Terrorism has not only legal but also political, moral, ethical, and even religious implications. This enters the terrain of relativism where everything is possible; a land of opportunities, available to those who argue better. Therefore, determining what is just and what is not, is a rough passage. It reminds me of Silver Surfer, the fictional superhero created by Jack Kirby for the Marvel Comics, who has a very relative concept of justice.

The American philosopher Jeff McMahan provides an interesting definition of just war: "the collective exercise of individual rights of self- and other-defense in a coordinated manner against a common threat".⁵⁵⁹ Security and justice are two faces of the "common good" or "commonwealth", which can be achieved only through political means. This issue has been addressed by political theorists and moral philosophers since the era of Ancient Greece.⁵⁶⁰

In *The Prince*, Machiavelli concludes that common good can be achieved through military or political action.⁵⁶¹ In chapter 17, exploring cruelty versus mercy, Macchiavelli states very pragmatically that a few exemplary executions would avoid disorder that would give rise to murder and harm the whole community, while an execution ordered by the state harms only a single individual. This requires "inhuman cruelty", which is referred to as a virtue opposed to "excessive mercy". In *Two Treatises of Government*, Locke speaks about the commonwealth as a government goal (§ 133, 134, 137).⁵⁶² Hobbes, the British philosopher who addresses the issue of the commonwealth in the second and third part of *Leviathan*, removes from the concept of natural law any notion of the promotion of the common good⁵⁶³ that Hobbes believes corresponds to state power.⁵⁶⁴

⁵⁵⁹ McMahan (2006), p. 30. See also: McMahan, Jeff (2004), "War as Self-Defense", *Ethics and International Affairs*, Vol. 18, No. 1, pp. 75–80.

⁵⁶⁰ Common good (2013), *Encyclopædia Britannica Online*, Chicago, Encyclopædia Britannica. Available at <https://www.britannica.com/topic/common-good> updated: 15.10.2016 (accessed 30 Apr. 2017).

⁵⁶¹ Ibid.

⁵⁶² Locke, John (1764), *Two Treatises of Government*, London, A. Millar et al. (Original edition, 1689).

⁵⁶³ Stoner, James R., Jr. (1992), *Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American Constitutionalism*, Lawrence, University Press of Kansas, p. 71. See also: Reid, John Phillip (1980), "In the Taught Tradition: The Meaning of Law in Massachusetts-Bay Two-Hundred Years Ago", *Suffolk University Law Review*, Vol. 14, p. 938-40.

⁵⁶⁴ Hobbes, Thomas (1651), *Leviathan, or the Matter, Forme, and Power of a Common-Wealth Ecclesiasticall and Civill* London, A. Crooke, xviii and p. 119.

Immanuel Kant, who was a supporter of the death penalty,⁵⁶⁵ thinks that moral law has a universal value, and not a particular one.⁵⁶⁶ In the second chapter of the *Critique of Practical Reason*, Kant asserts that one can only know that something is morally right by intellectually considering whether a certain action that one wishes to commit could be universally performed. The German philosopher calls the idea that one can know what is right or wrong only through abstract reflection of "moral rationalism". His position on the fundamental nature of morality is that moral goodness, which consists of following the rule of the categorical imperative, is more basic to ethics than good consequences, and that it is the right motivations – an obligation to duty – which is criteria in defining a person as good. This rationalism is at the basis of the determination by which some governments feel morally justified in some actions – i.e. targeting, wars, etc. – on the assumption that such actions are universally recognized and accepted as just.

Walzer states that the morality of war corresponds to our sense of what is right.⁵⁶⁷ McMahan considers that a moral reason for violating a convention should be assessed by individual conscience.⁵⁶⁸ Klabbers argues that previous instruments regulating the law and customs of war, such as the Liber Instructions of 1863 and the Brussels Project of 1874, refused to distinguish between just and unjust combatants.⁵⁶⁹

How do you determine whether an act is just or unjust? As things are not *mala in se*, and morality is an individual category, it cannot serve as an acceptable justification. The concept of "moral combatant" introduced by Sidgwick in his 1891 book *The Elements of Politics*,⁵⁷⁰ must be rejected, as well as the characterization of "moral innocence" and "moral culpability" presented by McMahan, who finds that the moral position of unjust combatants is indistinguishable from that of just combatants.⁵⁷¹

In *The Ethics of Killing in War*, McMahan addresses the issue of just combatants taking up arms in a just cause, most commonly defense against unjust aggression,⁵⁷² or an unjust war of

⁵⁶⁵ Kant, Immanuel (1996), *Groundwork of the Metaphysics of Morals*, trans. Mary Gregor, New York, Cambridge University Press (Original edition, 1785).

⁵⁶⁶ Kant, Immanuel (1889), *Kant's Critique of Practical Reason and Other Works on the Theory of Ethics*, trans. Thomas Kingsmill Abbott, London, Kongmans, Green and Co. (4th revised ed.) (Original edition, 1785).

⁵⁶⁷ Walzer (1977), p. 133.

⁵⁶⁸ McMahan (2006), p. 40.

⁵⁶⁹ Klabbers, p. 302.

⁵⁷⁰ Sidgwick, Henry (1891), *The Elements of Politics*, London, Macmillan, p. 254.

⁵⁷¹ McMahan (2006), p. 24.

⁵⁷² Id., p. 27.

defense.⁵⁷³ It is argued that the laws of war diverge significantly from the "deep morality" of war.⁵⁷⁴ The American philosopher finds that an act of war by unjust combatants against just combatants is proportionate and permissible.⁵⁷⁵ According to McMahan, unjust combatants are justified in fighting according to a 'moral assessment',⁵⁷⁶ even if one admits that both just and unjust combatants cannot participate in war without doing wrong.⁵⁷⁷ McMahan rejects the assumption that unjust combatants are not wrong in fighting if they respect the rules of engagement.⁵⁷⁸

Further, McMahan argues that it is general inadmissible for unjust combatants to attack just combatants.⁵⁷⁹ While there are no legitimate targets for the former, there are legitimate targets for the latter with some limitations regarding enemy non-combatants.⁵⁸⁰ Walzer thinks that one does not lose immunity only by fighting in an unjust war, but by fighting in any war.⁵⁸¹

While admitting that just combatants are not allowed to kill enemy non-combatants, McMahan affirms that it is permissible to use defensive force against anyone who poses an unjust threat.⁵⁸² This upholds non-combatant liability, sometimes to a greater degree than any combatant.⁵⁸³ His theory is based on the "responsibility criterion". McMahan asserts that posing an unjust threat does not make one lose the right not to be attacked if one is no morally responsible for this fact.⁵⁸⁴ What makes a person a legitimate target in war is the moral responsibility for an unjust threat.⁵⁸⁵ Coady believes that only combatants are legitimate targets, while all others are non-combatants, and enjoy immunity.⁵⁸⁶

McMahan considers that moral responsibility is important to liability, and thus the defense against unjust threats is permitted.⁵⁸⁷ Further, posing an unjust threat is neither necessary nor sufficient for moral liability to force or violence that is necessary to eliminate the threat, but

⁵⁷³ Id., p. 30.

⁵⁷⁴ Id., pp. 38-40.

⁵⁷⁵ Id., pp. 28, 34.

⁵⁷⁶ Id., pp. 38-40.

⁵⁷⁷ Id., p. 28.

⁵⁷⁸ Id., p. 26.

⁵⁷⁹ Id., p. 36.

⁵⁸⁰ Id., p. 30-31.

⁵⁸¹ Walzer (2000), pp. 36-41.

⁵⁸² McMahan (2006), p. 31.

⁵⁸³ Id., p. 36.

⁵⁸⁴ Id., p. 31.

⁵⁸⁵ Id., pp. 33-37.

⁵⁸⁶ Coady, C.A.J. (2004b), "Terrorism and Innocence", *Journal of Ethics*, Vol. 8, p. 37-58.

⁵⁸⁷ McMahan (2006), p. 32-33.

then deduces that unjust combatants are almost morally responsible at least to some degree for the unjust threats they pose, and, hence, all unjust combatants are legitimate targets.⁵⁸⁸

Coady, who criticizes Walzer's approach, addresses the moral justification of the use of violence, arguing that only "just warriors" participating in a just war have a license to kill enemies without being charged with murder.⁵⁸⁹ The Australian philosopher admits self-defense as a just cause for the use of violence only if it is a necessary means, and the best means, for preventing abuse in practice, but refuses to characterize it as an ethical justification.

Nielsen argues that terrorism employed in conjunction with guerrilla warfare in a war of liberation may be justified.⁵⁹⁰ According to the Canadian philosopher, acts of terrorism are justified if used as a political weapon in the revolutionary struggle, and if they cause less damage than other types of violence. Fotion believes that terrorism targeting government officials is justifiable under certain circumstances as a means to an end while terrorism targeting innocents never is.⁵⁹¹ Corlett⁵⁹² and Young⁵⁹³ are on the same line of Fotion, while Held,⁵⁹⁴ Bauhn,⁵⁹⁵ Gewirth⁵⁹⁶ and Nathanson⁵⁹⁷ uphold that terrorism targeting non-combatants or common citizens is never justified. Saul suggests that some acts of terrorism, in exceptional cases, can be excused and deemed "illegal but justifiable" (or at least excusable) in stringently limited, objectively verifiable circumstances", maybe as "collective defense of human rights".⁵⁹⁸

Self-defense is also used by Trotsky to justify the Red Terror during the Russian Civil War (1917-1923) that began with the October Revolution.⁵⁹⁹ Also Africa experimented state terror in the 1970s: after taking control of the Derg, the military junta, in 1977, the new head of

⁵⁸⁸ Id., pp. 32-35.

⁵⁸⁹ Coady (2008), p. 19.

⁵⁹⁰ Nielsen, p. 446.

⁵⁹¹ Fotion, Nicholas (1981), "The Burdens of Terrorism", in Burton M. Leiser (ed.), *Values in Conflict*, New York, Macmillan.

⁵⁹² Corlett.

⁵⁹³ Young, Robert (2004).

⁵⁹⁴ Held, Virginia (2008), *How Terrorism Is Wrong: Morality and Political Violence*, Oxford, Oxford University Press.

⁵⁹⁵ Bauhn, ch. 5.

⁵⁹⁶ Gewirth, Alan (1981), "Are There Any Absolute Rights?", *The Philosophical Quarterly*, Vol. 31, p. 16.

⁵⁹⁷ Nathanson, Stephen (2010), *Terrorism and the Ethics of War*, Cambridge, Cambridge University Press, pp. 191-208.

⁵⁹⁸ Saul (2006a), p. 69.

⁵⁹⁹ Trotsky, Leon (1922), *Dictatorship vs. Democracy (Terrorism and Communism) a reply to Karl Kautsky*, New York, Workers party of America, p. 62.

state, Mènghistu Hailè Mariàm, a Marxist-Leninist army officer, started a violent political campaign against members of the competing Ethiopian People's Revolutionary Party (EPRP).⁶⁰⁰

Marsavelski states that terrorism and revolution are two sides of the same coin, and that there has never been a revolution without terrorism or war without war crimes.⁶⁰¹ To name just two that succeeded without terror: the Glorious Revolution, also called the Bloodless Revolution which in 1688 overthrew King James II of England (James VII of Scotland) and ushered in the reign of William III and Mary II; the Carnation Revolution, a military coup in Lisbon, Portugal, on 25 April 1974, supported by massive popular participation, which ended the authoritarian regime of the *Estado Novo*. Revolutions gave birth to many of today's Western democracies (see: American Revolution of 1775-1783, French Revolution of 1789, and European revolutions of 1848). An attempt to overthrow state order cannot be considered by default an act of terrorism as Marsavelski infers. That does not mean that revolutionaries do not commit crimes

Castrén argues that if an insurgency takes on a big size, rebels should not be treated as common criminals.⁶⁰² Walzer believes that anti-insurgents fighting against a resistance movement or a violent uprising that enjoys popular support are fighting an unjust war against the guerrilla forces.⁶⁰³ Meisels doubts that popular, democratic support for an insurgency should automatically render its opposition unjust or confer legitimacy to irregular combatants.⁶⁰⁴ The Bolsheviks probably had the consent of a majority of the population when they overthrew the Tsar in 1917 and established a terror regime.

Terror(ism) and revolution constitute a frequent binomial. Man has rights until one is able to defend them. Marsavelski encompasses the right of revolution (*jus resistendi*) within the right to self-determination against alien occupation and racist regimes,⁶⁰⁵ but acknowledges that it is not an absolute right and has its limits as a *sui generis* right.⁶⁰⁶ Assassination is an ancient method to put an end to tyranny. *Sic semper tyrannis* ("thus always to tyrants"); this phrase, said to have originated with Roman Marcus Junius Brutus during the assassination of Julius Caesar

⁶⁰⁰ Wiebel, Jacob (2017), "The Ethiopian Red Terror", in Thomas Spear (ed.), *Oxford Research Encyclopedia of African History*, Oxford, Oxford University Press. DOI: 10.1093/acrefore/9780190277734.013.188.

⁶⁰¹ Marsavelski, p. 394.

⁶⁰² Castrén, Erik Johannes Sakari (1966), *Civil War*, Helsinki, Suomalainen Tiedeakatemia, p. 97-98.

⁶⁰³ Walzer (1977), p. 187.

⁶⁰⁴ Meisels, p. 42.

⁶⁰⁵ Marsavelski, p. 247.

⁶⁰⁶ Id., p. 290.

on 15 March 44 BC, was repeated two thousand years later by John Wilkes Booth after shooting to death President Lincoln.⁶⁰⁷

Natural law theory provides the basis for challenging the sovereign power and to establishing positive law and government – and thus legal rights – as a derivation of the social contract. Conversely, natural rights are invoked by opponents to challenge the legitimacy of all such establishments. Grotius, who has a view of international law as natural law, rejects the possibility of justifiable use of force against the sovereign.⁶⁰⁸ Hobbes thinks that the sovereign prevails over natural law as the sovereign's decisions need not be grounded in morality. Otherwise, Vattel thinks that the legitimate use of revolution, evolved from the natural right of self-defense, is premised under the principle of proportionality, when no other remedy can be applied to the evil.⁶⁰⁹ Marsavelski gathers that, under natural law, the recognition of the right to self-defense leads to the recognition of the law of necessity.⁶¹⁰

Self-defense is permitted under Art. 51 of the UN Charter. Under this provision, anticipative attacks are carried out as the legitimate exercise of the right of self-defense. Marsavelski states that under the doctrine of self-defense the assassination of the Syrian president, Bashar al-Assad, could be justified.⁶¹¹ It is not clear if assassination would be permitted only in self-defense, or in a state of necessity, to prevent the killing of innocent civilians by regime forces.⁶¹² Blum suggests that humanitarian necessity should be narrowly defined to be a justification to exculpate anyone violating the laws of war in the name of a greater humanitarian good.⁶¹³

In Book 1 of *The Rights of War and Peace*, Grotius advances his concept of war and natural justice, arguing that there are some circumstances in which war is justifiable. In Book II, Grotius determines three 'just causes' for war: self-defense, reparation of injury, and punishment.

⁶⁰⁷ Eisenhower, Robert G. (2008), *After Romanticism*, Bern, Peter Lang, p. 119.

⁶⁰⁸ Grotius, Hugo (1738), *The Rights of War and Peace: In Three Books*, Book 1, Jean Barbeyrac (ed.), London, W. Innys and R. Manby, J. and P. Knapton, D. Brown, T. Osborn, and E. Wicksteed (Original edition, *De jure belli ac pacis libri tres*, 1625).

⁶⁰⁹ de Vattel, Emer (1883), *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, Philadelphia, T. and J.W. Johnson and C. (New edition by Joseph Chitty, with additional notes and references by Edward D. Ingraham), p. 20 and 22.

⁶¹⁰ Marsavelski, p. 285.

⁶¹¹ Id., p. 286.

⁶¹² Art. 31(d) of the Rome Statute defines necessity: “a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided”.

⁶¹³ Blum, Gabriela (2010), “The Laws of War and the 'Lesser Evil'”, *YJIL*, Vol. 35, No. 1. DOI: <http://dx.doi.org/10.2139/ssrn.1315334>.

Although Grotius considers it legitimate for a nation to invade another one to overthrow a tyrant, the author does not recognize the right of oppressed people to revolt.

The right to resist is also allowed by Locke. In *Two Treatises of Government*, the English philosopher argues that, according to the theory of social contract, people have the right to overthrow the unjust government, and to change it with one that serves the interests of citizens (§ 222 et seq.). The author believes that under natural law the people have the right to self-defense when their liberty is threatened by the local government or by a foreign nation. According to Locke, the right of revolution is a safeguard against tyranny. His contributions to liberal theory are reflected in the *United States Declaration of Independence* of 1776,⁶¹⁴ which in its preamble proclaims the right of the people to alter or to abolish a government whenever becomes destructive, and to replace it with a new one. The U.S. government has always recognized the right of revolution,⁶¹⁵ thus making an essential contribution to establish it in international law.⁶¹⁶ By applying this right, the U.S. courts uphold the principle of proportionality in the use of revolutionary force, considering violence the ultimate means to overthrow the government.⁶¹⁷

The right of revolution is incorporated in the preamble of the French Constitution of the Fifth Republic (1958),⁶¹⁸ that recalls the *Declaration of the Rights of Man and of the Citizen* of 1789.⁶¹⁹ Art. 2 of the Declaration of human and civic rights states as imprescriptible the right of man to resist to oppression. Preamble to the Algerian Constitution, issued after the war against France (1954-1962), which led the African country gaining its independence, justifies the Revolution.⁶²⁰ In the First Article, the Constitution of Iran glorifies the Islamic Revolution of 1979.⁶²¹ The right of the use of force by people to resist, as *ultima ratio*, if no other remedy is available, is enshrined in Art. 20(4) of the Basic Law for the Federal Republic of Germany.⁶²²

Preamble to the UDHR speaks about the rebellion against tyranny and oppression as a last resort recourse to protect human rights. The right of colonized or oppressed peoples to free

⁶¹⁴ Becker, Carl Lotus (1922), *The Declaration of Independence: A Study in the History of Political Ideas*, New York, Harcourt, Brace and Company, p. 27.

⁶¹⁵ Hackworth, Green Haywood (1940), *Digest of International Law*, Vol. 1, Washington, D.C., U.S. GPO, p. 177.

⁶¹⁶ Marsavelski, p. 271.

⁶¹⁷ *Dennis v. United States*, 341 U.S. 494 (1951), § 501.

⁶¹⁸ French Constitution of 4 October 1958.

⁶¹⁹ *Declaration of the Rights of Man and of the Citizen of 26 August 1789* (Declaration of Human and Civic Rights).

⁶²⁰ Constitution of the People's Democratic Republic of Algeria of 1989, reinstated on 28 Nov. 1996, and modified in 2002 and 2008.

⁶²¹ Constitution of the Islamic Republic of Iran, adopted by referendum, on 2 and 3 Dec. 1979.

⁶²² Basic Law for the Federal Republic of Germany of 23 May 1949.

themselves in enshrined also in Art. 20(2) of the *Charter on Human and Peoples' Rights* and in the preamble to the OAU CT Convention of 1999, which reaffirms the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the Charters of the Organization of African Unity as well as the ACHP. Article 3 of the OAU Convention says that armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

The *Cairo Declaration on Human Rights in Islam* (CDHRI), an Islamic response to the UDHR, adopted by the Organization of the Islamic Conference in 1990, enshrines the right to the peoples oppressed or suffering from colonialism and of all forms of and occupation have the full right to freedom and self-determination (Art. 11).

These principles are recalled also in the preamble to the three Islamic CT instruments: the *Arab Convention on the Suppression of Terrorism* of 1998, the *OIC Convention for Combating International Terrorism* of 1999, and the *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism* of 2004, which confirm the legitimacy of the right of peoples to struggle against foreign occupation and colonialist and racist regimes by all means, including armed struggle to liberate their territories and attain their rights to self-determination and independence in compliance with their charters and resolutions, and with the purposes and principles of the Charter and the resolutions of the United Nations.

Preamble to the OAU CT Convention of 1999 reaffirms the legitimate right of peoples for self-determination and independence pursuant to the principles of international law and the provisions of the OAU Charters and of the ACHP. Article 3 of the OAU Convention states that armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts. Section 4(xl) of the *African Model Anti-Terrorism Law* of 2011 says that none of such behaviors shall be considered as terrorist acts.

Modern constitutions refer to the sovereignty that resides/emanates from the people; its the principle of democracy. Marsavelski gathers that the right to revolution is a general principle of law which exists in both international law and international customary law even if one recognizes that is not mentioned in any treaty.⁶²³

Addressing the right of revolution under the legal philosophy, one must consider that natural rights (*ius naturale*), among which is the right of revolution, intersect natural law theory,

⁶²³ Marsavelski, p. 276 and 277.

which justifies the supremacy of the strongest. According to the natural law theory (*lex naturalis*), certain rights are inherent by virtue of human nature endowed by nature, God, or a transcendent source, and are universal.⁶²⁴ These binding rules of moral behavior originate from nature's or God's creation of reality and mankind. For some philosophers, jurists and scholars the term natural law is equivalent to natural rights, or natural justice,⁶²⁵ while others differentiate between natural law and natural right.⁶²⁶

In *Leviathan*, Hobbes defines natural law as “a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or takes away the means of preserving the same; and to omit that by which one thinks it may best be preserved”.⁶²⁷ The author believes that in the state of nature nothing can be considered just or unjust, and every man must be considered having a right to all things.⁶²⁸ According to the British philosopher there are nineteen Laws of nature; the first two are expounded in chapter XIV of *Leviathan* (“of the first and second natural laws; and of contracts”), the others in chapter XV (“of other laws of nature”). The first law of nature provides states that every man may seek and use all helps and advantages of war.⁶²⁹ The second law gives a man the right to self-defense.⁶³⁰ The third law of nature provides the motivation to rebel against the authority: “when a covenant is made, then to break it is unjust and the definition of injustice is no other than the not performance of covenant. And whatsoever is not unjust is just”.⁶³¹ The Catholic Church holds the view of natural law introduced by medieval Catholic philosophers such as Albertus Magnus (AKA Saint Albert the Great), and Thomas Aquinas. The Catholic jurisprudence draws the foundations of natural law in the Bible.

If you evaluate the moral aspect of 'killing the enemy', should be considered texts whose strength lies right on morality, and on which are founded the values of the Western civilization. "Thou shalt not kill" is a moral imperative included in the Ten Commandments in the Torah,⁶³² which can be found in Exodus 20:13 and Deuteronomy 5:17. The imperative to not kill is

⁶²⁴ Strauss, Leo (1968), "Natural Law", *International Encyclopedia of the Social Sciences*, London, Macmillan.

⁶²⁵ Shellens, Max Solomon (1959), “Aristotle on Natural Law”, *The American Journal of Jurisprudence*, Vol. 4, No. 1, p. 72-100. DOI: <https://doi.org/10.1093/ajj/4.1.72>.

⁶²⁶ Strauss.

⁶²⁷ Hobbes, p. 100.

⁶²⁸ Id., XIII.13.

⁶²⁹ Id., p. 86 et seq.

⁶³⁰ Ibid.

⁶³¹ Id., p. 97.

⁶³² Exodus 20:1-21 and Deuteronomy 5:1-23.

claimed in the context of 'unlawful' killing resulting in bloodguilt.⁶³³ The Hebrew Bible contains numerous prohibitions against unlawful killing, but also contains prescriptive imperatives for lawful killing in the context of warfare, capital punishment, and self-defense.

According to the Torah (Exodus 22:2-3), justified killing is permitted in certain circumstances as self-defense. A home defender who struck and killed an intruder in the home is not guilty of bloodshed: "If a thief is caught breaking in and is struck so that the thief dies, the defender is not guilty of bloodshed; but if it happens after sunrise, one is guilty of bloodshed". The New Testament agrees that murder is a 'grave moral evil',⁶³⁴ and keeps the same point of view of the Old Testament.⁶³⁵ Jesus himself repeats the commandment: "Do not murder".⁶³⁶ The reference to the Christian roots of the West deserves further study of a theological nature, but the purpose here is just to demonstrate the limits and contradictions of a perspective based on ethics and morals.

The distinction between just and unjust combatants/war based on morals and ethics is weak, as it relies on sources that leaves the door open to different and opposing assessments. These sources sanction, but at the same time justify, the use of extreme force. The concept of what is just or unjust rests on the same moral categories that are not sufficient to justify or condemn an act as lawful or unlawful. On the other side, a strictly legal approach proves inadequate, due to the unlawful nature of irregular combatants. An act can be unjust, but not unlawful, and can be just, although unlawful. Although from a legal point of view the division is between lawful and unlawful combatants, the license to kill lies in the moral division between just and unjust combatants. In the War on Terror the syllogism "just equals lawful" and "unjust equals unlawful" leaves the door open to the national interest, with the consequences that derive from it, and which will be discussed in later chapters.

⁶³³ Genesis 4:10; Genesis 9:6; Genesis 42:22; Exodus 22:2-2; Leviticus 17:4; Leviticus 20; Numbers 20; Deuteronomy 19; Deuteronomy 32:43; Joshua 2:19; Judges 9:24; 1 Samuel 25; 2 Samuel 1; 2 Samuel 21; 1 Kings 2; 1 Kings 21:19; 2 Kings 24:4; Psalm 9:12; Psalm 51:14; Psalm 106:38; Proverbs 6:17; Isaiah 1:15; Isaiah 26:21; Jeremiah 22:17; Lamentations 4:13; Ezekiel 9:9; Ezekiel 36:18; Hosea 4:2; Joel 3:19; Habakkuk 2:8; Matthew 23:30-35; Matthew 27:4; Luke 11:50-51; Romans 3:15; Revelation 6:10; Revelation 18:24.

⁶³⁴ Matthew 5:21; Matthew 15:19; Matthew 19:19; Matthew 22:7; Mark 10:19; Luke 18:20; Romans 13:9; 1 Timothy 1:9; James 2:11; Revelation 21:8.

⁶³⁵ Matthew 23:30-35; Matthew 27:4; Luke 11:50-51; Romans 3:15; Revelation 6:10; Revelation 18:24.

⁶³⁶ Matthew 5:21; Matthew 19:19; Mark 10:19; Luke 18:20.

UNPRIVILEGED PARTICIPANTS

Theoretically volunteering to fight is a crime. If a civilian participates in hostilities, s/he is not privileged under the law of war and may be prosecuted for it. At the same time, s/he does not incur the full liabilities attendant to "combatant status" (e.g., s/he does not enjoy the status of POW if captured), and may be targeted. Unless a civilian adopts a continuous combat function, s/he cannot be targeted except for the periods in which one actually participates in hostilities. There are civilians participating in hostilities without taking up arms, but playing a supporting role. Hence, who are the civilians and who are the combatants in a hybrid conflict?⁶³⁷

Fleck considers that the law of war divides people in the midst of an armed conflict into two broad categories: combatants and civilians.⁶³⁸ This fundamental distinction determines the legal status of people participating in or affected by combat, and determines the legal protections afforded to such persons, as well as the legal consequences of their conduct. Combatants are those who are authorized by international law to fight in accordance with the law of war on behalf of a party to the conflict.⁶³⁹ Detter argues that civilians are not authorized to fight, but are protected from deliberate targeting by combatants as long as they do not take up arms.⁶⁴⁰ Pictet infers that, in order to protect civilians, the law of war requires combatants to conduct military operations in a manner designed to minimize civilian casualties and to limit the amount of damage and suffering to that which can be justified by military necessity.⁶⁴¹

Cullen concludes that, before WW2, three types of actors were identifiable in non-international conflicts:⁶⁴² rebels, insurgents and belligerents. The author concludes that the last two are both armed fighters, but only belligerents have a privileged combatant status under IHL.⁶⁴³ Walzer⁶⁴⁴ and Fletcher⁶⁴⁵ agree that irregulars in civilian clothes do not meet the rules of

⁶³⁷ Marsili (2018), p. 13.

⁶³⁸ Fleck, Dieter (1995) (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, New York, Oxford University Press, p. 65.

⁶³⁹ Fleck, p. 67. See also: McCoubrey, Hilaire (1998), *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, Dartmouth, Ashgate (2nd edition), p. 133-134.

⁶⁴⁰ Detter, Ingrid (2000), *The Law of War*, New York, Cambridge University Press (2nd edition), pp. 285-88.

⁶⁴¹ Pictet, Jean S. (1975), *Humanitarian Law and the Protection of War Victims*, Geneva, Henry Dunant Institute, p. 31.

⁶⁴² Cullen, Anthony (2010), *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge, Cambridge University Press, pp. 7-23.

⁶⁴³ Ibid.

⁶⁴⁴ Walzer (1977), pp. 179-183.

war and hence are not eligible for protection. In analyzing guerrilla warfare, Walzer infers that insurgents, dressed in civilian clothes, morally defy the most fundamental rules of war, not wearing a uniform that distinguishes them from regular soldiers.⁶⁴⁶ Nevertheless, Walzer justifies some kind of guerrilla warfare, such as the partisan struggle against the Nazis, despite the dangers to which it would expose the civilian population.⁶⁴⁷ The author gathers that partisans are unprotected by laws of war.⁶⁴⁸ According to Gill and van Sliedregt, non-combatant civilians are allowed the right to personal self-defense.⁶⁴⁹ Saul goes far beyond and suggests that a narrow class of terrorist acts may be excused by an individual or group defenses and considered as “collective defense of human rights”.⁶⁵⁰ It is argued that there is no difference between rebels, insurgents and belligerents, or however you want to define irregular fighters who, in some way, respect the principles of IHL; they should enjoy privileges of combatant status.

Lieber believes that all captured belligerents must be treated like prisoners of war.⁶⁵¹ Ipsen thinks that the fundamental distinction between lawful and unlawful combatants is between persons who are entitled to POW status and those who are not.⁶⁵² Thus, captured enemies would fail to qualify as POWs because they fail to meet the legal qualification of a lawful belligerent. Meisels argues that irregular combatants are legitimately considered as unlawful, and thus duly denied the rights of regular soldiers, but that, once captured and disarmed, they must enjoy some minimal standard of international humanitarian treatment.⁶⁵³ The author assumes that the distinction between lawful and unlawful combatants lies in the difference between combatants and civilians.⁶⁵⁴

According to Nabulsi, the distinction of combatants from civilians, and the resulting difference between lawful and unlawful combatants, are set out in an international legal system to favor states, specially occupying powers, even when they undertake unjust wars over

⁶⁴⁵ Fletcher, George P. (2003b), *Romantics at War: Glory and Guilt in the Age of Terrorism*, Princeton, Princeton University Press, p. 108.

⁶⁴⁶ Meisels, p. 45-46.

⁶⁴⁷ Walzer (1977), p. 182.

⁶⁴⁸ Ibid.

⁶⁴⁹ Ipsen, Knut (1995), "Combatants and Non-Combatants", in Dieter Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, New York, Oxford University Press, p. 90. See also: Art. 22 of the First Geneva Convention; Art. 33(1) of the Second Geneva Convention; Art. 13(2)(a) of Additional Protocol I.

⁶⁵⁰ Saul (2006a), p. 69.

⁶⁵¹ Lieber, Francis (1862), *Guerrilla Parties Considered With Reference to the Laws and Usages of War*, New York, D. Van Nostrand.

⁶⁵² Ipsen, pp. 65-66. See also: Art. 4 of the Third Geneva Convention.

⁶⁵³ Meisels, p. 34.

⁶⁵⁴ Id., p. 64

irregulars engaged in the struggle for national independence. The author assumes that, as in the traditional laws of war only professional soldiers are granted belligerent status, all civilians are considered outlaws.⁶⁵⁵ Nabulsi refuses the inflexible distinctions drawn by laws of war between civilians and combatants and the offshoot distinction between lawful and unlawful combatants.⁶⁵⁶ The American-born scholar considers that the distinction between the former and the latter was never resolved in international law.⁶⁵⁷ Gill and van Sliedregt acknowledge that the term "unlawful combatant" has become controversial and is now problematic.⁶⁵⁸ The term "unlawful enemy combatants" includes a large category of irregulars, from insurgents – or whatever you want to call them – to terrorists. These categories have been left undifferentiated due to national interest.

The issue of prisoners of war is as old as war itself. Klabbers states that previous instruments regulating the law and customs of war, such as the Lieber Instructions of 24 April 1863 and the Brussels Project of 27 August 1874, refuse to distinguish between just and unjust combatants.⁶⁵⁹ The Lieber Instructions, also known as *Instructions for the Government of Armies of the United States in the Field*, drafted by Francis Lieber during the American Civil War, represent the first attempt to codify the laws of war. They form the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and have stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.⁶⁶⁰ The Brussels *Project of an International Declaration Concerning the Laws and Customs of War*,⁶⁶¹ which form the basis of the two Hague Conventions on land warfare and the Regulations annexed to them,⁶⁶² would have protected resistance movements as “privileged belligerents” whether they had abided by these rules.⁶⁶³ According to Art. 10 of the Brussels Project even non-combatants can form part of the armed forces and hence be treated as POWs.

⁶⁵⁵ Nabulsi, Karma (1999), *Traditions of War: Occupation, Resistance, and the Law*, Oxford, Oxford University Press, p. 16.

⁶⁵⁶ Id., p. 1.

⁶⁵⁷ Id., pp. 15–18, 241.

⁶⁵⁸ Gill and van Sliedregt, note 17 at p. 32.

⁶⁵⁹ Klabbers, p. 302.

⁶⁶⁰ Schindler and Toman, pp. 3-23.

⁶⁶¹ *Project of an International Declaration concerning the Laws and Customs of War*, signed in Brussels, on 27 Aug. 1874, never entered into force, 1 AJIL Supp. 96.

⁶⁶² Schindler and Toman, pp. 22-34.

⁶⁶³ Art. 10 of the *Brussels Project*.

Only spies and mercenaries do not have the right to be treated as combatants or prisoners of war.⁶⁶⁴ Walzer claims that secret agents of a conventional army involved in acts of sabotage and espionage cannot enjoy the protection granted by the laws of war.⁶⁶⁵ A member of regular armed forces engaged in spying or sabotage behind enemy lines does not forfeit the privilege of combatant status and is subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.⁶⁶⁶ An individual caught spying in civilian clothes may be charged with spying, according to the laws of war.⁶⁶⁷ Agents who infiltrate the home territory of a belligerent to commit acts of sabotage or terror are arrested and tried as criminals in civil courts, or, if the accused are members of the enemy's armed forces, they are tried for violation of the law of war in military court.⁶⁶⁸

One wonders if the provisions of the Geneva Conventions apply, in some way, to irregular combatants engaged in the War on Terror. If these protections apply only to fighters engaged in self-determination, independence and liberation wars, then one falls into the philosophical discourse on just/unjust combatants. Regular soldiers who wish to protect their country are also considered patriots. The Geneva Conventions should apply also to insurgents like the Afghan Taliban and similar groups.⁶⁶⁹ Article 1 of Additional Protocol 1 clarifies that armed conflict against colonial domination and foreign occupation also qualifies as an international conflict. This raises a second question: should a huge presence of foreign troops, like in Afghanistan, be considered an occupation, as it *de facto* seems to be? Gill and van Sliedregt gather that the military operations against the Taliban and al-Qaeda in Afghanistan do qualify as an international armed conflict to which the laws and customs of war, including the notion of combatant status, must be applied.⁶⁷⁰

TERRORISM AS A POLITICAL ISSUE

⁶⁶⁴ Art. 46 and Art. 47 of Additional Protocol I.

⁶⁶⁵ Walzer (1977), p. 183-184.

⁶⁶⁶ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁶⁶⁷ Art. 5 of Geneva Convention (IV).

⁶⁶⁸ Elsea, Jennifer K. (2002), "Presidential Authority to Detain 'Enemy Combatants'". Available at http://www.pegc.us/LAW/Elsea_Detainees_psq_ii.pdf (accessed 16 June 2016), p. 2 and 13.

⁶⁶⁹ The U.S. does not characterise the Afghan Taliban as a terrorist organisation, but as an armed insurgency representing an armed opposition.

⁶⁷⁰ Gill and van Sliedregt, pp. 30-31.

Terrorism is a political issue, and therefore, concerns states and governments, whether regards individuals or entities. The national interest is the compass to decide who is a terrorist. Turkey, a U.S. longtime ally and a NATO member, which is accused of supporting terrorism by Germany⁶⁷¹ and Russia,⁶⁷² is not included among the state sponsors of terrorism. Libya, Cuba and North Korea were proscribed for a long time before being de-listed. Iraq was removed from the list in 1982, re-listed in 1990, and removed again in 2004.⁶⁷³ South Yemen was removed in 1990 when it ceased to exist as a sovereign state as it merged with North Yemen.⁶⁷⁴ Listing and de-listing is an instrument of foreign policy, and it is believed that it serves national interest.

In April 2015, U.S. President Barack Obama gives the green light to remove Cuba from the list of countries that support terrorism. The decision comes after the meeting in Panama between Obama and Cuban president, Raúl Castro. President Obama sends a note to Congress, in which Obama indicates his "intent to cancel" the inclusion of Havana in the list.⁶⁷⁵ The President takes the final decision following a review carried out by the State Department.⁶⁷⁶ Secretary of state John Kerry concludes that Cuba meets the conditions for rescinding its designation, and forwards that recommendation to the president, recommending him to submit to Congress the statutorily required report and certification.⁶⁷⁷ If does not agree with the decision of the president, the Congress enacts a joint resolution on the issue prohibiting the rescission; the president can veto and Congress then can further act to override the veto.⁶⁷⁸

⁶⁷¹ German Federal Ministry of the Interior (2016), "Possible influence of the Turkish President Erdoğan in Germany through organizations such UETD and DITIB", supp. answer No. 18/9399 to item No. 17 of the parliamentary question No. 18/9274, 10 Aug. 2016.

⁶⁷² Antonov, Anatoly (2015), "Speech of the Russian Deputy Defence Minister Anatoly Antonov during the briefing 'Russian Federation Armed Forces fighting against international terrorist. New data'", Ministry of Defence of the Russian Federation, 2 Dec. 2015. Available at <http://eng.syria.mil.ru/en/index/syria/news/more.htm?id=12070731@egNews> (accessed 18 Sept. 2016).

⁶⁷³ Rennack, Dianne E. (2016), *State Sponsors of Acts of International Terrorism—Legislative Parameters: In Brief*, CRS Report for Congress R43835, Washington, D.C., CRS, p. 7.

⁶⁷⁴ Ibid.

⁶⁷⁵ Earnest, Josh (2015a), "Statement by the Press Secretary on the Proposed Rescission of Cuba's Designation as a State Sponsor of Terrorism", The White House, 14 Apr. 2015. Available at <https://www.whitehouse.gov/the-press-office/2015/04/14/statement-press-secretary-proposed-rescission-cuba-s-designation-state-s> (accessed 23 Apr. 2015).

⁶⁷⁶ Ibid.

⁶⁷⁷ U.S. Senior Administration Officials (2015), "Background Briefing on the Report Required To Rescind Cuba's State Sponsor of Terrorism Status. Special Briefing via Teleconference", Department of State, 14 Apr. 2015. Available at <http://www.state.gov/r/pa/prs/ps/2015/04/240697.htm> (accessed 20 Oct. 2015).

⁶⁷⁸ Ibid. See also: Rennack, pp. 4-7.

To rescind a country as a state sponsor of terrorism, it must match with criteria established by statute: that the government has not provided any support for international terrorism during the preceding six-month period, and that the government has provided assurances that it will not support acts of international terrorism in the future.⁶⁷⁹ Therefore, as there's no periodic review of countries included in the list of terrorist states, de-listing it's just a political choice which relies on national interest.

The Democratic People's Republic of Korea (DPRK) was blacklisted in January 1988, and rescinded by the Bush administration in October 2008, after the U.S. government verified that it did not harbor terrorists.⁶⁸⁰ In April 2017, following the launch by North Korea of some missiles in the Pacific, with the purpose of threatening South Korea and other U.S. allies in the area, the Trump administration starts reviewing the status of the DPRK.⁶⁸¹ At the same time, the Congress introduces two bills to require a report on the designation of Pakistan⁶⁸² and DPRK.⁶⁸³ When, at a press meeting with the secretary of state, the Japanese foreign minister, Fumio Kishida, is asked by a journalist about the possibility that the U.S. may re-designate the Democratic People's Republic of Korea (DPRK), and responds: "is something to be decided by the U.S. government".⁶⁸⁴

Cuba could have been de-listed since many years, but the decision to remove it from the list of state sponsors of terrorism came only in 2015, when the U.S. decided to review its policy of alliances in the Western Hemisphere.⁶⁸⁵ After the de-listing of Cuba,⁶⁸⁶ which was designated in 1982,⁶⁸⁷ three countries are currently blacklisted: Iran, Sudan and Syria.

In October 2015, President Obama signs a memorandum delegating to the secretary of state certain functions and authorities under the *Iran Threat Reduction and Syria Human Rights*

⁶⁷⁹ Ibid.

⁶⁸⁰ Rennack, p. 8.

⁶⁸¹ Tillerson, Rex W. (2017a), "Secretary of State Rex Tillerson Press Availability", Department of State, 19 Apr. 2017. Available at <https://www.state.gov/secretary/remarks/2017/04/270341.htm> (accessed 20 Apr. 2017).

⁶⁸² *Pakistan State Sponsor of Terrorism Designation Act of 2017* [H.R. 1449], bill introduced in the 115th Congress on 9 Mar. 2017.

⁶⁸³ *North Korea State Sponsor of Terrorism Designation Act of 2017* [H.R. 479], bill introduced in the 115th Congress on 12 Jan. 2017.

⁶⁸⁴ Kishida, Fumio (2017), "Press Availability With Japanese Foreign Minister Fumio Kishida", Department of State, 16 Mar. 2017. Available at <https://www.state.gov/secretary/remarks/2017/03/268476.htm> (accessed 17 Mar. 2017)

⁶⁸⁵ U.S. Senior Administration Officials.

⁶⁸⁶ Rathke, John (2015), "Rescission of Cuba as a State Sponsor of Terrorism", Department of State, 29 May 2015. Available at <http://www.state.gov/r/pa/prs/ps/2015/05/242986.htm> (accessed 19 Oct. 2015).

⁶⁸⁷ U.S. Senior Administration Officials.

Act of 2012.⁶⁸⁸ The presidential move comes after the closure of the Iran nuclear agreement,⁶⁸⁹ and is aimed to remove Tehran from the list where it has been included since January 1984. In April 2017 the U.S. government directs an interagency review of the Iran deal to evaluate whether suspension of sanctions related to Tehran, pursuant to the Joint Comprehensive Plan of Action (JCPOA), is vital to the national security interests of the United States.⁶⁹⁰ Eventually, in May 2018 President Trump decides to withdraw from the JCPOA on the ground that Iran remains the world's leading state sponsor of terrorism,⁶⁹¹ and in April 2019, the State Department designated the Islamic Revolutionary Guard Corps (IRGC) in its entirety, including the Qods Force, as a FTO.⁶⁹² It is the first time that the United States has designated a part of another government as an FTO.

Western governments, including the U.S., remained silent in June 2017, when a twin terrorist attack hit Teheran.⁶⁹³ Twelve people were killed in the deadly attacks on the Iranian Parliament and in the mausoleum of Imam Khomeini. Only a few European governments condemned the attacks and offered condolences.⁶⁹⁴ An embarrassing situation, for some governments: a deadly terrorist attack in the capital of a country accused of being a sponsor of terrorism.

Surprisingly, in November 2017 the Trump administration opens a new chapter in the relationship with Sudan.⁶⁹⁵ The lifting of decades-old sanctions is the first step for removing the

⁶⁸⁸ Obama, Barack (2015a), Presidential Memorandum. Delegation of Certain Functions and Authorities under Section 213(b)(1) of the Iran Threat Reduction and Syria Human Rights Act of 2012, The White House, 18 Oct. 2015. Available at <https://www.whitehouse.gov/the-press-office/2015/10/18/presidential-memorandum-delegation-of-certain-functions-and-authorities-under-iran-threat-reduction-syria-act> (accessed 19 Oct. 2015).

⁶⁸⁹ The White House (2015), "The Historic Deal that Will Prevent Iran from Acquiring a Nuclear Weapon". Available at <https://www.whitehouse.gov/issues/foreign-policy/iran-deal> (accessed 19 Oct. 2015).

⁶⁹⁰ Tillerson, Rex W. (2017b), "Iran Continues To Sponsor Terrorism", Department of State, 27 Apr. 2017. Available at <https://www.state.gov/secretary/remarks/2017/04/270315.htm> (accessed 19 Apr. 2017).

⁶⁹¹ Trump, Donald J. (2018), "Ceasing U.S. Participation in the JCPOA and Taking Additional Action to Counter Iran's Malign Influence and Deny Iran All Paths to a Nuclear Weapon", The White House, 8 May 2018. Available at <https://www.whitehouse.gov/presidential-actions/ceasing-u-s-participation-jcpoa-taking-additional-action-counter-irans-malign-influence-deny-iran-paths-nuclear-weapon> (accessed 9 May 2018).

⁶⁹² U.S. Department of State Office of the Spokesperson (2019b), "Designation of the Islamic Revolutionary Guard Corps", 8 Apr. 2019. Available at <https://www.state.gov/t/pa/prs/ps/2019/04/290963.htm> (accessed 10 Apr. 2019).

⁶⁹³ Tasnim News Agency (2017), "Condemnations Pour in Following Terrorist Attacks in Iran", 7 June 2017. Available at <https://www.tasnimnews.com/en/news/2017/06/07/1430246/condemnations-pour-in-following-terrorist-attacks-in-iran> (accessed 7 June 2017)

⁶⁹⁴ Fars News Agency (2017), "World Officials Rush to Condole with Iran over Terrorist Attacks", 7 June 2017. Available at <http://en.farsnews.com/newstext.aspx?nn=13960317001501> (accessed 7 June 2017).

⁶⁹⁵ Sullivan, John J. (2017), "Democracy, Human Rights, and Labor: Remarks on Human Rights/Religious Freedom in Sudan", Department of State, 17 Nov. 2017. Available at <https://www.state.gov/s/d/17/275752.htm> (accessed 18 Nov. 2017).

African country from the list of state sponsors of terrorism, a designation that has been in place since 1993. And perhaps the ICC will withdraw the arrest warrant against President al-Bashir.

Libya ruled by Col. Muammar Gaddafi was blacklisted in 1979, and subject to UN sanctions, for its involvement in the explosion of two civil flights in 1988 and 1989.⁶⁹⁶ After the conviction of Libyan officials involved in the bombings, the government of Tripoli agreed to pay \$2.7 billion in restitution to the families of the victims,⁶⁹⁷ and the sanctions are lifted in 1999.⁶⁹⁸ In 2003 Tripoli renounces terrorism, and commits itself to cooperate in the fight against it.⁶⁹⁹ In May 2006 Libya's designation as a sponsor of terrorism is rescinded.⁷⁰⁰ In 2008 the U.S. Congress passes the *Libyan Claims Resolution Act*,⁷⁰¹ which provides for the restoration of Libya's sovereign, diplomatic, and official immunities before U.S. courts if the secretary of state certified that the government has received sufficient funds to resolve outstanding terrorism-related death and physical injury claims against Libya.

Libya was the first country to suffer an attack as a reprisal for supporting international terrorism. On 15 April 1986 the United States strikes Libya (Operation El Dorado Canyon) in retaliation for the bombing of *La Belle* discotheque in West Berlin, in which two U.S. soldiers died and 79 of the injured were American servicemen. The United Nations General Assembly condemns the attack as a violation of the UN Charter and of international law.⁷⁰² It was said that the U.S. could not present the strike as a legitimate act of self-defense, which rests on Art. 51 of the Charter, as this provision set limitations on the use of force in the absence of an act of aggression.⁷⁰³

⁶⁹⁶ U.S. Department of State (2006), "Rescission of Libya's Designation as a State Sponsor of Terrorism", fact sheet No. 2006/496, 15 May 2006. Available at <https://2001-2009.state.gov/r/pa/prs/ps/2006/66244.htm> (accessed 15 Feb. 2018).

⁶⁹⁷ *Terrorism 2002-2005*, p. 38.

⁶⁹⁸ UNSC (1999), "Statement by the President of the Security Council", 8 Apr. 1999, S/PRST/1999/10.

⁶⁹⁹ U.S. Department of State (2006).

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Libyan Claims Resolution Act*; Public Law 110-301; 122 Stat. 2999; 28 USC 1605A.

⁷⁰² UNGA, Resolution A/RES/41/38 [Declaration of the Assembly of Heads of State and Government of the Organization of African Unity on the aerial and naval military attack against the Socialist People's Libyan Arab Jamahiriya by the present United States Administration in April 1986], adopted on 20 Nov. 1986.

⁷⁰³ UN (1990), *Yearbook of the United Nations: 1986* (Vol. 40), Dordrecht, Martinus Nijhoff Publishers, p. 247 et seq.

3 THE IMPLICATIONS OF POLICY AND LAW ON THE WAR ON TERROR

The provisions of Additional Protocol I are applicable in international armed conflict, as identified in Common Article 2, including armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the UN Charter.⁷⁰⁴ Article 1(4) of the Additional Protocol I, by extending the scope of Art. 3, includes the so-called “wars of national liberation”, deeming them to be international in nature. Art 1 of Additional Protocol II provides for its scope of application “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory”. Additional Protocol II applies only to traditional interstate conflict, which requires control over territory by organized armed groups.⁷⁰⁵ In the *Milošević* case the ICTY finds that control over territory by insurgents is not a requirement for the existence of a non-international armed conflict.⁷⁰⁶

The UN Security Council Resolutions on Colonies⁷⁰⁷ states that the Fourth Geneva Convention applies to the Israeli–Palestinian conflict.⁷⁰⁸ Travaglio⁷⁰⁹ thinks that the PLO, an entity founded in 1964 with the purpose of the liberation of Palestine through armed struggle, is a case of sufficiently organized group and in adequate control of the population and territory to be considered a quasi-state enabled to behold applied the IHL.

The PLO was designated a terrorist organization by the United States in 1987,⁷¹⁰ it was proscribed until 1991,⁷¹¹ and in 1993 rejected violence and terrorism.⁷¹² After the successful application of Palestine for admission to membership in the United Nations, in April 2014, the

⁷⁰⁴ Art. 1(3)(4) of Additional Protocol I.

⁷⁰⁵ ILA, p. 12.

⁷⁰⁶ *Prosecutor v. Milošević*, Case No. IT-02-54-T, ICTY, Trial Chamber III, 16 June 2004, § 36.

⁷⁰⁷ UNSC Resolutions: 446 (1979) of 22 Mar. 1979; 452 (1979) of 20 July 1979; 465 (1980) of 1 Mar. 1980; 471 (1980) of 5 June 1980; 478 of 20 Aug. 1980; 904 (1994) of 18 Mar. 1994.

⁷⁰⁸ NAD of the State of Palestine/PLO (2017), “Geneva Convention Relative to The Protection of Civilian Persons in Time of War (the ‘Fourth Geneva Convention’)”. Available at <https://www.nad.ps/en/publication-resources/agreements/geneva-convention-relative-protection-civilian-persons-time-war-> (accessed 23 Dec. 2017).

⁷⁰⁹ Travaglio, Gregory M. (2000), “Terrorism, International law, and the use of military force”, *Wisconsin International Law Journal*, Vol. 18 (Winter), p. 183.

⁷¹⁰ *Anti-Terrorism Act of 1987*.

⁷¹¹ Ehrenfeld, Rachel (2003), *Funding Evil, How Terrorism Is Financed--and How to Stop It*, New York, American Center for Democracy. Available at <http://eufunding.org.uk/terror/FundingEvil.pdf> (accessed 28 Dec. 2016).

⁷¹² UN (2008), *The Question of Palestine and the United Nations*, DPI/2499, New York, UN, pp. 55-57. Available at <https://unispal.un.org/pdfs/DPI2499.pdf> (accessed 20 Dec. 2017).

Palestinian Authority presented letters for accession to 15 international conventions and treaties, including the four Geneva Conventions and The Hague Convention (IV).⁷¹³ The PLO is one of the national liberation movements that meet the principle of self-determination, to which the practice of international bodies recognize such a high subjectivity to consider fully applicable IHL, even without the recognition of belligerency by the counter-party.

According to the 'declarative' theory enshrined in the 1933 *Montevideo Convention on Rights and Duties of States*, required criteria of state sovereignty are: a defined territory; a permanent population, government, and capacity to enter into relations with other states.⁷¹⁴ Certain political organizations, such as the Sovereign Military Hospitaller Order of Saint John of Jerusalem of Rhodes and of Malta (SMOM), are considered a subject of international public law, even if they lack a defined territory and do not match all typical requirements of statehood.⁷¹⁵ According to the Badinter Arbitration Committee, the recognition by other states is not a fundamental feature of statehood, but has only a declamatory role, hence sovereignty is characterized just by population, territory and organized political authority.⁷¹⁶ Some *jihadi* organizations governing a significant territory – the Islamic State at its peak – can be deemed "proto state", namely an embryo having some features of unfinished statehood.

The EU refuses to associate ISIS with the notion of statehood, due to political and legal implications.⁷¹⁷ The Special Presidential Envoy to the Global Coalition to Defeat ISIS, Brett McGurk, characterizes the Islamic State as "a state-like entity", because "it controls territory with millions of people".⁷¹⁸ McGurk acknowledges that, at its peak, the Islamic State controlled "a quasi-state", having millions of people under its domain.⁷¹⁹ Defense secretary Ash Carter talks

⁷¹³ UN Secretary-General (2014), "Note to Correspondents in response to questions asked at noon concerning Palestinian letters for accession to international conventions and treaties", 2 Apr. 2014. Available at <https://www.un.org/sg/en/content/sg/note-correspondents/2014-04-02/note-correspondents-response-questions-asked-noon> (accessed 22 Feb. 2017).

⁷¹⁴ *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, signed at Montevideo, on 26 Dec. 1933, LNTS, Vol. 165 (1936), No. 3801-3824, p. 20.

⁷¹⁵ Marsili (2016a), p. 167.

⁷¹⁶ Pellet, Alain (1992), "The Opinion of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples", EJIL, Vol. 3, No. 1 (Jan.), p. 182. DOI: <http://10.0.4.69/oxfordjournals.ejil.a035802>.

⁷¹⁷ EU (2015), "Clustered interactive Dialogue with the Special Rapporteur on extreme poverty and the Special Rapporteur on counter-terrorism at the UNHRC 29th Session", 22 June 2015, pp. 2, 3.

⁷¹⁸ McGurk, Brett (2016a), "Press Briefing by Press Secretary Josh Earnest and Special Presidential Envoy for the Global Coalition to Counter ISIL Brett McGurk", Office of the Press Secretary of the White House, 23 Feb. 2016. Available at <https://www.whitehouse.gov/the-press-office/2016/02/23/press-briefing-press-secretary-josh-earnest-and-special-presidential> (accessed 4 Mar. 2016).

⁷¹⁹ McGurk, Brett (2017), "Update: Global Coalition to Defeat ISIS", Department of State, 4 Aug. 2017. Available at <https://www.state.gov/r/pa/prs/ps/2017/08/273198.htm> (accessed 9 Aug. 2017).

about "ISIL's physical caliphate", and concludes that, without territory, ISIS would be only "an ideology and terrorist insurgent organization".⁷²⁰ This statement would suggest an implicit recognition of the statehood of the Islamic State, at least until it controls a territory and the population within. The definition of ISIS provided by the secretary of defense Carter is a neologism. Usually the U.S. divide the non-state armed groups in two broad categories: insurgencies (e.g. the Afghan Taliban) and terrorists. The term "terrorist insurgent organization" is another neologism within the U.S. counter-terrorism policy.

The Diplomatic Conference held in Geneva in 1949 laid down the conditions for defining a genuine "armed conflict not of an international character", and the subsequent application of the Conventions.⁷²¹ The 1977 Protocols additional to the Conventions combine and update elements of the Hague law and Geneva law and were issued in response to non-international armed conflicts and wars of national liberation which arose in the two decades that followed the adoption of the Conventions. Even if after 1977 the Geneva Conventions offer two separate regimes for non-international armed conflict – one covered by Common Article 3 with a low threshold, and another falling within the scope of Additional Protocol II, whose threshold of application is high – in both cases it falls within the concept of armed conflict as defined, that is a not an incident or an occasional and low-intensity clash, and involves military organizations.⁷²²

The *Tadić* decision by the ICTY⁷²³ is widely relied on as the authority for the meaning of armed conflict in both international and local armed conflicts.⁷²⁴ The ICTY Appeal Chamber finds that an armed conflict:

exists whenever there is a resort to armed force between [s]tates or protracted armed violence between governmental authorities and organized armed groups or between such groups within a [s]tate... These hostilities [fighting among groups within the former Yugoslavia] exceed the intensity requirements applicable to both international

⁷²⁰ Pellerin, Cheryl (2016a), "Carter, Inherent Resolve Commander Brief Operations in Iraq, Syria", DoD News, Defense Media Activity, 24 Oct. 2016. Available at <http://www.defense.gov/News/Article/Article/984184/carter-inherent-resolve-commander-brief-operations-in-iraq-syria> (accessed 25 Oct. 2016).

⁷²¹ Diplomatic Conference of Geneva of 1949, p. 121. Cited in Pictet (1952), p. 49-50.

⁷²² ILA, p. 13.

⁷²³ *Prosecutor v. Tadić* (1995), § 70.

⁷²⁴ *Prosecutor v. Akayesu*, § 619-27.

and internal armed conflicts. There has been protracted,⁷²⁵ large-scale forces and organized insurgent groups.

The difference between international conflict and non-international conflict is fading, as well as the classic definition of war became obsolete. The Venice Commission holds that organized hostilities in Afghanistan before and after 2001 have been an armed conflict which was at first non-international and later became international after the involvement of U.S. troops.⁷²⁶ Gill and van Sliedregt argue that the War on Terror "whatever else it is...is not an international armed conflict in a legal sense".⁷²⁷ As evidence of the disappearance of the difference between international conflict and non-international conflict, many treaties have embraced non-international armed conflict in their area of application,⁷²⁸ included the amended *Conventional Weapons Convention*.

The UK Court of Appeal, considering the interpretation of Art. 15(c) of the Qualification Directive⁷²⁹ that applies the decision of the ECJ in *Elgafaji*,⁷³⁰ finds that reliance on IHL is misplaced to differentiate "situations of international or internal armed conflict", and that Art. 15(c) has an "autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state".⁷³¹

The ICTY has identified many times the criteria of an armed conflict, although not of international character:⁷³² the high number of casualties, intensity and organization. Organizational means: the existence of a command structure and of headquarters; designated zones of operation; rules and discipline; the ability to recruit, train and equip new members; the

⁷²⁵ The term "protracted" is significant in excluding single acts of terrorism in cases of non-international conflicts, in *Prosecutor v Kordić and Čerkez*, Case No. IT-95-14/2-A, ICTY, Appeals Chamber, 17 Dec. 2004, § 336 and 341.

⁷²⁶ *Id.*, § 78.

⁷²⁷ Gill and van Sliedregt, pp. 30-31.

⁷²⁸ Henckaerts and Doswald-Beck, p. 143. Rule 43 states that the general principles on the conduct of hostilities apply to the natural environment is applicable in both international and non-international armed conflicts.

⁷²⁹ Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L304 of 30 Sept. 2004, p. 12-23.

⁷³⁰ *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, Case No. C-465/07, ECJ, Grand Chamber, 17 Feb. 2009.

⁷³¹ *QD and AH v. Secretary of State for the Home Department with the United Nations High Commissioner for Refugees Intervening*, Case No. C5/2008/1706 and C5/2009/0251, UK Court of Appeal, 24 June 2009, [2009] EWCA Civ 620, § 35.

⁷³² *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-T, ICTY, Trial Chamber I, 3 Apr. 2008, § 49, 60. See also: *Prosecutor v. Boskoski and Tarculovski*, § 175-178, 183, 193 196, 199-203; *Prosecutor v. Milošević*, § 23, 24; *Prosecutor v. Limaj et al*, § 88-90, 94-134.

capability to carry out operations in an organized manner; the ability to procure, transport, and distribute arms; the level of logistics; communication skills such as spokesperson and delivering of public statements. Intensity, organization and protraction of a conflict are the criteria to define an armed conflict.⁷³³ The type and quantity of weapons used is a relevant criterion to determine an armed conflict situation.⁷³⁴ These criteria, because of the organization and *modus operandi* of the major *jihadist* groups, may well apply to many ongoing conflicts.

The International Law Commission (ILC), a body established by the UN General Assembly, in 1947, to undertake the mandate of the Assembly, under Art. 13(1)(a) of the Charter, tries to capture the nature of current conflicts, which varies considerably.⁷³⁵ The special rapporteur, Marie G. Jacobsson, concludes that not all rules applicable in relation to international armed conflict are considered applicable during non-international armed conflict.⁷³⁶ Ms. Jacobsson suggests interpreting the law of armed conflict in the light of the realities of modern armed conflict,⁷³⁷ due to the fact that "apart from classic, inter-[s]tate wars, we face non-international armed conflict, internationalized armed conflict and wars by proxy".⁷³⁸ The special rapporteur, while retaining the definition of armed conflict provided by the *Tadić* case,⁷³⁹ does not deepen the question of whether non-state actors are eligible to create, or to contribute to the formation of, customary international law.⁷⁴⁰ The ILC report infers that many legal and political challenges arise when attempts are made to regulate the conduct of hostilities in non-international armed conflict, that's why some developments in this area take place outside the sphere of multilateral treaty negotiations, such as in courts and through national legislation.⁷⁴¹

The global War on Terror breaks the traditional barrier between international conflict and non-international conflict or civil war. The tools available to the international community to deal with transnational and hybrid threats are inadequate. Therefore, states change their behaviors to create new customary law by invoking self-defense to legitimate military intervention. When the

⁷³³ *Prosecutor v. Thomas Luangwa Diylo*, Case No. ICC-01/04-01/06, ICC, Pre-Trial Chamber I, 19 Jan. 2007, § 234.

⁷³⁴ *Prosecutor v. Boskoski and Tarculovski*, § 177.

⁷³⁵ ILC (2015), *Second report on the protection of the environment in relation to armed conflicts*, ILC 67th session, 4 May-5 June and 6 July-7 Aug. 2015, rapporteur Marie G. Jacobsson, A/CN.4/685, § 5.

⁷³⁶ *Id.*, § 6.

⁷³⁷ *Id.*, § 5.

⁷³⁸ *Id.*, § 6.

⁷³⁹ *Id.*, § 26.

⁷⁴⁰ *Id.*, § 9.

⁷⁴¹ *Id.*, § 123.

U.S. invaded and occupied Afghanistan in October 2001 (Operation Enduring Freedom), it breached provisions of Art. 2(4) of the UN Charter. Although the UNSC did not authorize the U.S.-led military campaign, the intervention was presented by Washington as a legitimate form of self-defense under Art. 51. The U.S. invoked Art. 5 of the North Atlantic treaty, which requires partners to come to the aid of any member state subject to an armed attack.⁷⁴² For the first time in NATO's fifty-year history, Alliance assets were deployed in Afghanistan in support of "Article 5 operations".⁷⁴³ The NATO intervention in Afghanistan, acting as an 'authorized agent' of the UN is only summarily legal, and exceeds the geographical limits set by the founding treaty of the Alliance.⁷⁴⁴

A report of the NATO Parliamentary Assembly stresses that "More than 50 years after its founding in the depths of the Cold War, NATO was at war – not with the Soviet Union or any other state, but against a terrorist organization and the regime that gave it shelter".⁷⁴⁵ NATO is evolving in response to new strategic reality,⁷⁴⁶ and ISIS and terrorism are among the most pressing challenges the Alliance faces.⁷⁴⁷ Article 4, which merely entails consultation among NATO members, was invoked by Turkey in 2012 over the Syrian civil war and in 2015 after threats by the Islamic State to Turkish territorial integrity.⁷⁴⁸ Both Art. 4 and 5 were invoked in connection of hybrid conflicts involving state and non-state actors.⁷⁴⁹ Since the fall of the Soviet Union, the parties signatories to the Geneva Conventions often face non-state actors. This would

⁷⁴² NATO (2001), "Invocation of Article 5 confirmed", updated: 3.10.2001. Available at <https://www.nato.int/docu/update/2001/1001/e1002a.htm> (accessed 30 June 2016).

⁷⁴³ NATO (2017), "Collective defence. Article 5", updated: 22.03.2017 (14:32). Available at http://www.nato.int/cps/en/natohq/topics_110496.htm? (accessed 24 Mar. 2016).

⁷⁴⁴ Art. 6 of *The North Atlantic Treaty*, signed in Washington, D.C. on 4 April 1949, reads: "on the territory of any of the Parties in Europe or North America, on the Algerian Departments of France, on the territory of or on the Islands under the jurisdiction of any of the Parties in the North Atlantic area north of the Tropic of Cancer; on the forces, vessels, or aircraft of any of the Parties, when in or over these territories or any other area in Europe in which occupation forces of any of the Parties were stationed on the date when the Treaty entered into force or the Mediterranean Sea or the North Atlantic area north of the Tropic of Cancer".

⁷⁴⁵ NATO-PA (2002), "The war against Terrorism", special rapporteur John Shimkus, AV 181 DSC(02)15, § 3. Available at <http://www.nato-pa.int/default.asp?SHORTCUT=247> (accessed 24 Mar. 2016).

⁷⁴⁶ Pellerin, Cheryl (2017a) "Mattis: NATO is Evolving in Response to New Strategic Reality", DoD News, Defense Media Activity, 16 Feb. 2017. Available at <https://www.defense.gov/News/Article/Article/1085796/mattis-nato-is-evolving-in-response-to-new-strategic-reality> (accessed 17 Febr. 2017).

⁷⁴⁷ Ferdinando, Lisa (2017), "U.S., NATO to Accelerate Counter-ISIS Fight, Mattis Says", DoD News, Defense Media Activity, 16 Feb. 2017. Available at <https://www.defense.gov/News/Article/Article/1085751/us-nato-to-accelerate-counter-isis-fight-mattis-says> (accessed 17 Febr. 2017).

⁷⁴⁸ NATO (2016a), "The consultation process and Article 4", updated: 17.03.2016 (09:58). Available at http://www.nato.int/cps/en/natolive/topics_49187.htm (accessed 30 June 2016).

⁷⁴⁹ Gilbert, Paul (2003), *New Terror, New Wars*, Edinburgh, Edinburgh University Press, pp. 7-8.

imply that the War on Terror, at its core, lies beyond the provisions of the UN treaties, given that it targets non-state actors who operate against the members of NATO.

Again, the U.S.-led intervention in Iraq (Operation Iraqi Freedom) in March 2003, not authorized by the UNSC, was presented as a legitimate form of self-defense under Art. 51. According to the International Commission of Jurists, the invasion of Iraq was neither in self-defense against armed attack nor sanctioned by UN Security Council resolution authorizing the use of force by member states and thus constituted a clear case of war of aggression.⁷⁵⁰ An independent commission of inquiry set up by the government of the Netherlands (the Davids Commission), found that the 2003 invasion of Iraq violated international law.⁷⁵¹ The report concludes that UN Resolution 1441 could not reasonably be interpreted (as the Dutch government did) as authorizing individual member states to use military force to compel Iraq to comply with the Security Council's resolutions. The Iraq Inquiry, a British public inquiry into the nation's role in the Iraq War, concludes that after the invasion, the UK and the U.S. became joint occupying powers.⁷⁵²

The invasion of Afghanistan and Iraq is followed by insurgency against the long U.S.-led occupation. These insurgencies, given the conclusions of several national and international bodies, could then be deemed legitimate acts of resistance. Gill and van Sliedregt argue that the inhabitants of a country under invasion have the right to take up arms against the invaders and to be treated as prisoners of war, if they carry arms openly and conduct operations according to the laws and customs of war.⁷⁵³

Article 42 of the 1907 Hague Convention IV, which deals with the practical military aspects of the conduct of hostilities, reads: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised".⁷⁵⁴ Therefore, in Afghanistan and in

⁷⁵⁰ International Commission of Jurists (2003), "Iraq-ICJ Deplores Moves Toward a War of Aggression on Iraq", 18 Mar. 2003. Available at http://www.icj.org/news.php3?id_article=2770&lang=en (accessed 24 Nov. 2017).

⁷⁵¹ The Independent Commission of Inquiry on Iraq (Davids Commission) (2010), *Rapport Commissie van onderzoek besluitvorming Irak*, Boom-Amsterdam, Government of the Netherlands. Available at <https://www.rijksoverheid.nl/documenten/rapporten/2010/01/12/rapport-commissie-davids> (accessed 24 Nov. 2017).

⁷⁵² Chilcot, John (2016), "Statement by Sir John Chilcot: 6 July 2016", London, The Iraq Inquiry, p. 9. Available at <http://www.iraqinquiry.org.uk/media/247010/2016-09-06-sir-john-chilcots-public-statement.pdf> (24 Nov. 2017).

⁷⁵³ Gill and van Sliedregt, p. 35. See also: Art. 4(6) of the Third Geneva Convention; Art. 2 of the Hague Regulations.

⁷⁵⁴ The Hague Convention (IV) of 1907.

Iraq occurred an occupation by the U.S. and their allies.⁷⁵⁵ These military actions were all undertaken with no explicit UNSC authorization. The Global Coalition against Daesh, which includes NATO, is engaged in a hybrid conflict without a UN mandate. Rules that have so far governed conventional conflict, both international and non-international, have come to an end. While the situation was somewhat different, the Russian foreign minister, Sergey Lavrov while commenting on a U.S. attack on Syria in April 2017, characterized the NATO intervention in Serbia in 1999 as a "very coarse, a blatant violation of international law".⁷⁵⁶ Lavrov concludes that the bombing of the headquarters of the Yugoslav government was "certainly a war crime whichever way you interpret the Geneva Convention".⁷⁵⁷

Given the nature of hybrid conflicts, the distinction between international conflict and non-international conflict is meaningless, while the status of armed conflict of war becomes all-important. To this end, Pictet wonders what happens when an internal conflict turns into a real war.⁷⁵⁸ The WoT as a whole cannot be characterized as non-international conflict. The global scale on which operations are carried out, and the same definition of "War on Terror", as well as the means employed, argue in favor of the international nature of the conflict, in which many powers are involved. The U.S. administration terms "war" the conflict in Afghanistan⁷⁵⁹ and Syria.⁷⁶⁰ Some conflicts, which are part of a wider and international conflict, the WoT, can be characterized as non-international. It can be argued that in the War on Terror and, generally, in most hybrid conflicts, it is necessary to make a case-by-case assessment rather than trying to create a one-size-fits-all approach.

International law, IHL in particular, is beneficial as it deals with conventional conflict, or with civil war within a single country. However it shows limitations when faced with hybrid conflict. The Geneva conventions are tested severely in the WoT, but they can still be applied, mainly due to the contribution of the courts, and by states acting in good faith. Characterizing the

⁷⁵⁵OHCHR (2017a), "Occupied Palestinian Territory". Available at <http://www.ohchr.org/EN/Countries/MENARegion/Pages/PSIndex.aspx> (accessed 22 Dec. 2017).

⁷⁵⁶ Lavrov (12 Apr. 2017).

⁷⁵⁷ Ibid.

⁷⁵⁸ Pictet (1952), p. 59.

⁷⁵⁹ Carter, Ashton (2016), "Remarks by Secretary Carter in a Press Gaggle at Minot Air Force Base, North Dakota", DoD Press Operations, 26 Sept. 2016. Available at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/956084/remarks-by-secretary-carter-in-a-press-gaggle-at-minot-air-force-base-north-dak> (accessed 28 Sept. 2016).

⁷⁶⁰ U.S. Department of State (2016a), "U.S. Humanitarian Assistance in Response to the Syrian Crisis", Office of the Spokesperson of the Department of State, 27 Sept. 2016. Available at <http://www.state.gov/r/pa/prs/ps/2016/09/262482.htm> (accessed 28 Sept. 2016).

WoT as a conflict without quarter with the purpose of applying only the law of war does not exempt from applying the IHL. It is not consistent to treat irregular combatants sometimes as common criminals and sometimes as insurgents to which the IHL applies, depending on policy based on national interest. However, it is unclear as to how exactly to make distinctions between insurgents – such as they were in Iraq – terrorists, such as they are in Afghanistan, and common criminals under the current provisions of the law.

TERRORISM AND INTERNATIONAL LAW

Terrorism is a global issue that needs to be addressed using international instruments. The international community is responsible for the creation and application of these instruments, which, in turn, give rise to the international community. There is no international community without international law nor international law without a community that creates it.

Natural law provides the basis of the law of nations (*ius gentium* or *jus gentium*), a set of rules that has its source in the *naturalis ratio* and is observed equally among all *gentes* ("peoples" or "nations") as customary law, in "reasoned compliance with standards of international conduct".⁷⁶¹ Customary law emerges from traditional practice, establishing an instant *opinio iuris*.⁷⁶² International law is made up of two components: general practice and "accepted as law" (*opinio juris*).⁷⁶³ Part of these norms are recognized as fundamental principles of international law from which no derogation is permitted (*jus cogens* or *ius cogens*). The prohibition of genocide, maritime piracy, slaving, torture, refoulement and wars of aggression and territorial aggrandizement are generally considered *jus cogens*.⁷⁶⁴

Bouvier explains that international law is generally divided into two branches: the natural law of nations, consisting of the rules of justice applicable to the conduct of states, and the

⁷⁶¹ Bederman, David J. (2004), *International Law in Antiquity*, Cambridge, Cambridge University Press, p. 85.

⁷⁶² Simma, Bruno and Philip Alston (1988), "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles", *Australian Yearbook of International Law*, Vol. 12, p. 82-108.

⁷⁶³ Ibid.

⁷⁶⁴ Bassiouni, Mahmoud Cherif (1996), "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'", *Law and Contemporary Problems*, Vol. 59, No. 4 (Autumn), p. 68. DOI: 10.2307/1192190.

positive law of nations.⁷⁶⁵ The latter consists of the voluntary law of nations, derived from the presumed consent of nations, arising out of their general usage; the conventional law of nations, derived from the express consent of nations, as evidenced in treaties and other international compacts; the customary law of nations, derived from the express consent of nations, as evidenced in treaties and other international compacts between themselves.⁷⁶⁶

Public international law, which regulates the use of force between states in wartime, is applied - or should be - even in the War on Terror. A branch of public international law, is the international humanitarian law (IHL), also known as "the law of war" or "the law of armed conflict", a *lex specialis* which regulates the conduct of war (*jus in bello*), and applies to states and non-state armed groups during an armed conflict. IHL restricts and regulates the means and methods of warfare available to combatants, and sets out the responsibility to protect persons who are not participating in hostilities.

Natural law is embodied in positive international law, especially in the law of war through the 1907 Hague Conventions. Ticehurst argues that the dispute on the definition of terrorism arises when the Martens Clause about those who should be considered lawful combatants is introduced into the preamble to the 1899 Hague Convention II, later modified in the 1907 Conventions (Hague IV).⁷⁶⁷ The Martens Clause refers to the “principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity, and the dictates of the public conscience”.

The laws and customs of war – as they were traditionally called – were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899⁷⁶⁸ and

⁷⁶⁵ Bouvier, John (1848), "Law of Nations", *A law dictionary: adapted to the Constitution and laws of the United States of America, and of the several states of the American union; with references to the civil and other systems of foreign law*, Philadelphia, T. and J.W. Johnson (3rd edition) (original edition 1839).

⁷⁶⁶ Ibid.

⁷⁶⁷ Ticehurst, Rupert (1997), "The Martens Clause and the Laws of Armed Conflict", *International Review of the Red Cross*, Vol. 37, No. 317 (Apr.), pp. 125–134. DOI: <https://doi.org/10.1017/S002086040008503X>.

⁷⁶⁸ *The Hague Convention of 1899* consists of three main treaties and three additional declarations: Convention (I) for the Pacific Settlement of International Disputes; Convention (II) with respect to the Laws and Customs of War on Land; Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 Aug. 1864; Declaration (I) concerning the Prohibition of the Discharge of Projectiles and Explosives from Balloons or by Other New Analogous Methods; Declaration (II) concerning the Prohibition of the Use of Projectiles with the Sole Object to Spread Asphyxiating Poisonous Gases; Declaration (III) concerning the Prohibition of the Use of Bullets which can Easily Expand or Change their Form inside the Human Body such as Bullets with a Hard Covering which does not Completely Cover the Core, or containing Indentations.

1907⁷⁶⁹), and were based partly upon the *Saint Petersburg Declaration* relating to Explosive Projectiles of 1868⁷⁷⁰ as well as the results of the Brussels Conference of 1874.⁷⁷¹ This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict.

The law of war enshrines some basic principles: activities which are clearly unnecessary militarily are prohibited pursuant to the preamble to the 1868 *St. Petersburg Declaration* and the Hague Convention IV;⁷⁷² activities which are clearly unnecessary militarily are prohibited (is allowed the use of reasonable and necessary force); excessive use of force clearly violates the law of armed conflict (principle of proportionality). Weapons and tactics that are of a nature to cause unnecessary suffering or superfluous injury are prohibited.⁷⁷³

The *St. Petersburg Declaration* had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable" before this principle was fixed in 22 of the 1907 Hague Regulations, which assert that "the right of belligerents to adopt means of injuring the enemy is not unlimited". The aforementioned Regulations prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23). The Nuremberg International Military Tribunal ruled in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and

⁷⁶⁹ *The Hague Convention of 1907* consists of thirteen treaties and one declaration: Convention (I) for the Pacific Settlement of International Disputes; Convention (II) respecting the Limitation of the Employment of Force for Recovery of Contract Debts; Convention (III) relative to the Opening of Hostilities; Convention (IV) respecting the Laws and Customs of War on Land; Convention (V) relative to the Rights and Duties of Neutral Powers and Persons in case of War on Land; Convention (VI) relative to the Legal Position of Enemy Merchant Ships at the Start of Hostilities; Convention (VII) relative to the Conversion of Merchant Ships into War-ships; Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines; Convention (IX) concerning Bombardment by Naval Forces in Time of War; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 6 July 1906; Convention (XI) relative to Certain Restrictions with regard to the Exercise of the Right of Capture in Naval War; Convention (XII) relative to the Establishment of an International Prize Court; Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War; Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons. Convention XII was ratified only by Nicaragua, and never came into force.

⁷⁷⁰ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*, done at Saint Petersburg, on 29 Nov.-11 Dec. 1868, 138 CTS 297-299.

⁷⁷¹ Bujard, Danièle (1974), "The Geneva Convention of 1864 and the Brussels Conference of 1874", *International Review of the Red Cross*, Vol. 14, No. 163 (Oct.), p. 527-537. DOI: 10.1017/S0020860400016296.

⁷⁷² Art. 23(g) of The Hague Convention (IV) of 1907.

⁷⁷³ Art. 22 and 23 of The Hague Convention (IV); Art. 35 and 57 of Additional Protocol I.

customs of war".⁷⁷⁴ The International Military Tribunal for the Far East expressed, in 1948, an identical view.⁷⁷⁵ Under this post-war decisions, a country must not have ratified the 1907 Hague Convention in order to be bound by it.

The standard-setting of international law for humanitarian treatment in wartime is provided by the Geneva Conventions, which comprise four treaties (1864, 1906, 1929, 1949) and three additional protocols (Protocol I and II of 1977 and Protocol III of 2005). The "Geneva Law", which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities, can be considered part of this system of rules.

Along with the Geneva Conventions, the Hague Conventions are among the first formal statements of the laws of war and war crimes in the body of secular international law. These two branches of the law applicable in armed conflict are so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law (IHL). The provisions of the two Additional Protocols of 1977⁷⁷⁶ attest to the unity and complexity of that law.

As for international law, the sources of IHL are treaties and customary international law, which consists of rules that come from "a general practice accepted as law" and that exist independent of treaty law. Among the treaties that constitute the IHL, an important role is played by the Geneva Conventions of 1949 and their Additional Protocols. The Geneva Conventions are a set of rules that apply only in times of armed conflict and seek to protect people who are not or are no longer taking part in hostilities. The First Convention deals with the treatment of sick and wounded members of armed forces in the field.⁷⁷⁷ The Second Convention deals with sick, wounded, and shipwrecked members of armed forces at sea.⁷⁷⁸ The Third Convention deals with the treatment of prisoners of war during times of conflict.⁷⁷⁹ The Fourth Convention deals with the treatment of civilians and their protection during wartime.⁷⁸⁰

⁷⁷⁴ International Military Tribunal (1947), *Trial of the Major War Criminals*, 14 Nov. 1945–1 Oct. 1946, Nuremberg, 1947, Vol. 1, p. 254 (reprinted in AJIL, Vol. 41, 1947, pp. 248-249).

⁷⁷⁵ Schindler and Toman, pp. 69-93.

⁷⁷⁶ *Protocol Additional to the Geneva Conventions of 12 August 1949 for the protection of victims of war (Protocol I and II)*, 1125 UNTS 17512-17513.

⁷⁷⁷ 75 UNTS 31.

⁷⁷⁸ 75 UNTS 85.

⁷⁷⁹ 75 UNTS 135.

⁷⁸⁰ 75 UNTS 287.

The first three Geneva Conventions were revised, expanded and replaced, and the fourth one was added, in 1949.⁷⁸¹ The *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Geneva Convention I) was adopted in 1864.⁷⁸² It was significantly revised and replaced by the 1906 version,⁷⁸³ the 1929 version,⁷⁸⁴ and later by the *Fourth Geneva Convention* of 1949.⁷⁸⁵ The *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (Geneva Convention II) was adopted in 1906.⁷⁸⁶ It was significantly revised and replaced by the *Fourth Geneva Convention* of 1949.⁷⁸⁷ The *Geneva Convention relative to the Treatment of Prisoners of War* (Geneva Convention III) was adopted in 1929.⁷⁸⁸ It was replaced by the *Third Geneva Convention* of 1949. It is no longer in effect following the universal acceptance of the *Geneva Conventions of 1949*.⁷⁸⁹ The fourth *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (Geneva Convention IV) was adopted in 1949. With three Geneva Conventions revised and adopted, and the fourth added, in 1949 the whole set is referred to as the Geneva Conventions of 1949 or simply the Geneva Conventions.⁷⁹⁰

The 1949 Conventions have been changed by three amendment protocols: Protocol I (1977) relating to the *Protection of Victims of International Armed Conflicts*;⁷⁹¹ Protocol II (1977) relating to the *Protection of Victims of Non-International Armed Conflicts*;⁷⁹² and Protocol III (2005) relating to the *Adoption of an Additional Distinctive Emblem*.⁷⁹³

The Geneva Conventions apply at times of war and armed conflict to governments who have ratified them. The details of applicability are spelled out in Common Articles 2 and 3. Common Article 2 (or simply "Article 2") relating to international armed conflicts states that the

⁷⁸¹ Schindler and Toman, p. 367

⁷⁸² 129 CTS 361.

⁷⁸³ 11 LNTS 440.

⁷⁸⁴ 118 LNTS 303.

⁷⁸⁵ Schindler and Toman, pp. 301-310.

⁷⁸⁶ Forsythe, David P. and Barbara Ann J. Rieffer-Flanagan (2007), *The International Committee of the Red Cross: A Neutral Humanitarian Actor*, London, Routledge, p. 43.

⁷⁸⁷ Schindler and Toman, pp. 301-310.

⁷⁸⁸ 118 LNTS 343.

⁷⁸⁹ Schindler and Toman, pp. 341-364.

⁷⁹⁰ 75 UNTS 970.

⁷⁹¹ 1125 UNTS 3.

⁷⁹² 1125 UNTS 609.

⁷⁹³ 2404 UNTS 261.

Conventions apply to all cases of declared war between signatory nations.⁷⁹⁴ This is the original sense of applicability, which predates the 1949 version. The Conventions apply to all cases of armed conflict between two or more signatory nations, even in the absence of a declaration of war. This language was added in 1949 to accommodate situations in which a state commits a hostile act against another state, pretending that it is not making war, such as police action or legitimate self-defense.⁷⁹⁵ The Conventions apply to a signatory nation even if the opposing nation is not a signatory, but only if the opposing nation accepts and applies the provisions of the Conventions.⁷⁹⁶ When the criteria of international conflict have been met, the full protections of the Geneva Conventions are considered to apply.

In the commentary published in 1952, the director for general affairs of the International Committee of the Red Cross, Jean S. Pictet, argues that the non-recognition by one party of the government of the other party had been invoked as a pretext for not observing one or other of the Geneva Conventions. Pictet concludes that the development in the whole concept of humanitarian conventions points the same way, towards the respect for human beings, which is connected to the concrete fact of recognition of a state of war.⁷⁹⁷

Pictet argues that life and compliance with the principles on which civilization is based are too important to be limited by strict rules.⁷⁹⁸ Further, the principle of respect for human personality, which is at the root of all the Geneva Conventions, "is concerned with persons, not as soldiers but as human beings, without regard to their uniform, their allegiance, their race, or their religious or other beliefs, without regard even to any obligations the authority on which they depend may have assumed in their name or in their behalf".⁷⁹⁹

Common Article 3 (or simply "Article 3") relating to non-international armed conflicts states that the certain minimum rules of war apply to armed conflicts that are not of an international character, but that are contained within the boundaries of a single country. This article refers to the territory of one of the High Contracting Parties. The applicability of Article 3

⁷⁹⁴ The procedure for a state making a declaration of war is set up in the Convention (III) relative to the Opening of Hostilities, adopted at the Second Hague Conference in 1907.

⁷⁹⁵ Pictet, Jean S. (1952) (ed.), *Geneva Conventions of 12 August 1949: Commentary. Volume I: For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, ICRC, p. 33.

⁷⁹⁶ Art. 2 of the 1949 Geneva Convention (I).

⁷⁹⁷ Pictet (1952), p. 28 and 29.

⁷⁹⁸ *Id.*, p. 30.

⁷⁹⁹ *Id.*, p. 39.

rests on the interpretation of the term armed conflict.⁸⁰⁰ For example, it would apply to conflicts between the government and rebel forces, or between two rebel forces, or to other conflicts that have all the characteristics of war but that are carried out within the confines of a single country. A handful of individuals attacking a police station would not be considered an armed conflict subject to this article, but only subject to the laws of the country in question.⁸⁰¹

It was said that Article 3 would cover in advance all forms of insurrection, rebellion, anarchy, and the break-up of states, and even plain brigandage and banditry, giving to a handful of rebels or common brigands, the status of belligerents, and possibly even a certain degree of legal recognition.⁸⁰² There is also a risk that common or ordinary criminals take on the appearance of an organization as an opportunity for requesting application of the Geneva Conventions, representing their crimes as "acts of war" in order to escape punishment for them.⁸⁰³ Article 3 does not restrict the right of a state to suppress an insurrection with any means, including force, and to prosecute, try and convict its opponents for their crimes.⁸⁰⁴ Sometimes insurgents are mere bandits, even though not all insurgents are bandits. Sometimes in a civil war the rebels are true patriots fighting for the independence of their country, and they should be considered genuine soldiers, not terrorists.⁸⁰⁵

The other Geneva Conventions are not applicable in non-international armed conflicts, but only the provisions of Article 3 and Additional Protocol II. The rationale for the limitation is to avoid conflict with the rights of sovereign states that were not part of the treaties. When the provisions of this article apply, it states that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed out of action (*hors de combat*) by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.

For this purpose, Art. 3(1) of Convention (IV) prohibits the following acts with respect to the people mentioned above: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon dignity, in particular

⁸⁰⁰ Pictet (1952), p. 49.

⁸⁰¹ Ibid.

⁸⁰² Id., pp. 43, 44, 49.

⁸⁰³ Id., p. 44.

⁸⁰⁴ Id., p. 61.

⁸⁰⁵ Id., p. 44.

humiliating and degrading treatment; and the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Art. 3(2) provides that the wounded and sick must be collected and cared for.

Although at the time of the drafting of the Common Article 3 was thought to serve as a wildcard for all those situations of hybrid conflict,⁸⁰⁶ recent conflicts demonstrate that, as interpreted and applied, it is unsuitable to present challenges.

THE UN CHARTER, UN COUNTER-TERRORISM LEGISLATION IN THE CONTEXT OF HUMAN RIGHTS VIOLATIONS

The definition provided by Resolution 1566 (2004), which condemns terrorism as a serious threat to peace and calls on member states to strengthened counter-terrorism legislation, has operative effect only for the purposes of SC action, and it does not represent a legal binding definition. That is a task which could only be achieved by way of agreeing to an international treaty under the auspices of the UN General Assembly. Negotiations towards agreeing to such are ongoing, and a Comprehensive Convention exists in draft form, however agreement to its exact terms, most particularly the definition of terrorism, remains elusive.

On 8 September 2006 the UN General Assembly, recalling all General Assembly resolutions on measures to eliminate international terrorism, including resolution 46/51 of 9 December 1991,⁸⁰⁷ and SC resolutions on threats to international peace and security caused by terrorist acts, as well as relevant resolutions of the General Assembly on the protection of human rights and fundamental freedoms while countering terrorism, adopts a Global Counter-Terrorism Strategy, in the form of a resolution and an annexed Plan of Action.⁸⁰⁸ This is the first time that all member states agreed to a common strategic approach to fight terrorism.

⁸⁰⁶ For a definition of the term hybrid conflict, see: Gray, Colin S. (2005), *Another Bloody Century: Future Warfare*, London, Weidenfeld and Nicolson.

⁸⁰⁷ UNGA, Resolution 46/51 [Measures to Eliminate International Terrorism], adopted on 9 Dec. 1991, A/RES/46/51 (1991).

⁸⁰⁸ A/RES/60/288.

Young⁸⁰⁹ suggests that until a terrorism convention is concluded, states should draft their domestic anti-terrorism legislation according to international law, enhancing the protection of human rights. In the absence of a terrorism convention giving a shared definition and identifying with certainty the offence, are applied some conventions already in place, some of which were conceived in the wake of actions typical of the terrorist strategy which has taken shape from the late sixties:

- a) *Convention on Offences and Other Acts Committed on Board of Aircrafts*, signed at Tokyo on 14 September 1963;⁸¹⁰
- b) *Convention for the Suppression of Unlawful Seizure of Aircraft*, done at The Hague on 16 December 1970;⁸¹¹
- c) *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 23 September 1971,⁸¹² and its Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988;⁸¹³
- d) *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted by the UN General Assembly on 14 December 1973;⁸¹⁴
- e) *International Convention against the Taking of Hostages*, adopted by the UN General Assembly on 17 December 1979;⁸¹⁵
- f) *Convention on the Physical Protection of Nuclear Material (CPPNM)*, adopted at Vienna on 3 March 1980,⁸¹⁶ amended on 8 July 2005.⁸¹⁷

⁸⁰⁹ Young, Reuven (2006), "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation", *Boston College International and Comparative Law Review*, Vol. 29 No. 1, p. 23.

⁸¹⁰ 20 UST 2941; 704 UNTS 10106.

⁸¹¹ 22 UST 1641; 860 UNTS 105.

⁸¹² 974 UNTS 177; 24 UST 564; 10 ILM 1151 (1971).

⁸¹³ 27 ILM 627 (1988); 1589 UNTS 473.

⁸¹⁴ 1035 UNTS 167; 28 UST 1975; 13 ILM 41 (1974); 68 AJIL 383.

⁸¹⁵ UNGA, Resolution 34/146 (XXXIV), 34 UN GAOR Supp. (No. 46), p. 245; A/34/46 (1979); 1316 UNTS 205; TIAS No. 11081; 18 ILM 1456 (1979).

⁸¹⁶ 1456 UNTS 101.

⁸¹⁷ IAEA (2005), *Nuclear Security - Measures to Protect Against Nuclear Terrorism. Amendment to the Convention on the Physical Protection of Nuclear. Report by te Director General*, 6 Sept. 2005, GOV/INF/2005/10-GC(49)/INF/6.

- g) *United Nations Law of the Sea Convention* (UNCLOS) of 10 December 1982 and its related provisions on piracy at sea;⁸¹⁸
- h) *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*;⁸¹⁹ Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988,⁸²⁰ and Protocol to the Protocol done at London on 14 October 2005;
- i) *Convention on the Marking of Plastic Explosives for the purposes of Detection*, done at Montreal on 1 March 1991;⁸²¹
- j) *International Convention for the Suppression of Terrorist Bombings*, adopted by UN General Assembly Resolution 52/164 of 15 December 1997;⁸²²
- k) *International Convention for the Suppression of the Financing of Terrorism*, adopted by UN General Assembly Resolution 54/109 of 9 December 1999;⁸²³
- l) *United Nations Convention against Transnational Organized Crime (Palermo Convention)*, adopted by UN General Assembly Resolution 55/25 of 15 November 2000 and the Protocols Thereto;⁸²⁴
- m) *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted by UN General Assembly Resolution A/59/766 of 13 April 2005.⁸²⁵
- n) *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, done at Beijing on 10 September 2010 (Beijing Convention of 2010)⁸²⁶ and Protocol Supplementary.⁸²⁷

⁸¹⁸ 1833 UNTS 3; 21 ILM 1261 (1982). UNCLOS, formally known as the *Third United Nations Convention on the Law of the Sea*, or UNCLOS III, is also called the *Law of the Sea Convention* (LASC) or the *Law of the Sea Treaty* (LOST).

⁸¹⁹ 1678 UNTS 222.

⁸²⁰ 1678 UNTS 374.

⁸²¹ 2122 UNTS 374.

⁸²² 2149 UNTS 256.

⁸²³ 2178 UNTS 197.

⁸²⁴ In Resolution 55/25 of 15 Nov. 2000, the General Assembly adopted the *United Nations Convention against Transnational Organized Crime* and two of its supplementary protocols namely: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* and the *Protocol against the Smuggling of Migrants by Land, Air and Sea*. In Resolution 55/255 of 31 May 2001, the General Assembly adopted the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*.

⁸²⁵ 2555 UNTS 197.

⁸²⁶ DCAS Doc. No. 21 adopted at the Beijing Convention on 8 Sept. 2010.

⁸²⁷ This protocol supplements the *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague, on 16 Dec. 1970. The convention and its protocol shall be read and interpreted together as one single instrument and shall be known as *The Hague Convention as amended by the Beijing Protocol of 2010*.

The analysis of UN resolutions reveals the evolution of the approach to terrorism, and the transformation of this phenomenon. At first it is state terrorism, and as such is tackled; then, in the late Eighties, emerges the relationship between terrorism and drug trafficking in Latin America; finally, since 11 September 2001, the international community becomes aware that *jihadist* terrorism is a global threat.

None of the international conventions speaks about the political motivations of the acts provided as unlawful, being limited to punishing some typical conducts of terrorism without providing a definition of the term. In its anti-terrorism legislation, Europe has only been able to reproduce UN and international conventions:

- a) *European Convention on the Suppression of Terrorism*, done at Strasbourg on Strasbourg, 27 January 1977;⁸²⁸ *Amending Protocol*, done at Strasbourg on 15 May 2003,⁸²⁹ and *Additional Protocol*, done at Riga on 22 October 2015;⁸³⁰
- b) *Council of Europe Convention on the Prevention of Terrorism* (CECPT), done at Warsaw on 16 May 2005;⁸³¹
- c) *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, done at Warsaw on 16 May 2005.⁸³²

The 1977 *European Convention on Terrorism* takes no account of the political motivations of terrorism, treating it as a mere criminal activity. The European Convention states, also for extradition purposes (Art. 2), that none of the offences provided “shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives” (Art. 1). At this point, it is not clear why it should not apply to terrorism punishments and measures already provided for ordinary crimes that it implies.

The European legislation on terrorism recall and replicate the provisions of international conventions and UN resolutions. And the reference to human rights and fundamental freedoms

⁸²⁸ ETS 90.

⁸²⁹ ETS 190.

⁸³⁰ CETS 217.

⁸³¹ CETS 196.

⁸³² CETS 198.

has become gradually more nuanced. The preamble to the 2003 Protocol amending the *European Convention on Terrorism* recalls the *PACE Recommendation 1550 (2002) on Combating terrorism and respect for human rights*.⁸³³ The preamble of the CECPT of 2005 is limited to call member states to respect IHL “where applicable”. In the *Convention on terrorist financing* of 2005 disappears any mention of respect for human rights and fundamental freedoms. Eventually, Additional Protocol of 2015 to the *European Convention on Terrorism* just recalls generally human rights and fundamental freedoms, enshrined, in particular, in the *European Convention on Human Rights* (ECHR)⁸³⁴ and in the *International Covenant on Civil and Political Rights* (ICCPR).⁸³⁵

Also the EU relies on the UN Resolutions, and does not provide a definition of terrorism. The Council Framework Decision 2002/475/JHA⁸³⁶ and amending Decision 2008/919/JHA⁸³⁷ require EU countries to align their legislation and introduce minimum penalties regarding terrorist offences. The decisions does define terrorist offences, neither offences related to terrorist groups or offences linked to terrorist activities.

Violence takes on a distinctive feature of terrorism in some definitions when property and environment damage are included among terrorist offences. Art. 1(3) of the *Arab Convention* defines a terrorist offence as “any offence or attempted offence committed in furtherance of a terrorist objective in any of the contracting states, or against their nationals, property or interests, that is punishable by their domestic law”. The convention includes among terrorist offences the crimes provided for in certain international conventions, except where they have been excluded by the legislation of member states.

Art. 1 of the Treaty adopted by the Commonwealth of Independent States (CSI) speaks about terrorism as "an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorising the population", and taking the form of:

⁸³³ PACE (2002), Recommendation 1550 (2002) [Combating terrorism and respect for human rights], 24 Jan. 2002.

⁸³⁴ *Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols No. 11 and No. 14, signed in Rome on 4 Nov. 1950 and came into force in 1953, ETS 5; 213 UNTS 221.

⁸³⁵ UNGA, Resolution 2200A (XXI) [International Covenant on Civil and Political Rights], adopted and opened for signature, ratification and accession on 16 Dec. 1966; entry into force 23 Mar. 1976.

⁸³⁶ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L164 of 22 June 2002, pp. 3-7.

⁸³⁷ Framework Decision 2008/919/JHA of 28 Nov. 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L330 of 9 Dec. 2008, pp. 21-23.

violence or the threat of violence against natural or legal persons;
destroying (damaging) or threatening to destroy (damage) property and other material objects so as to endanger people's lives;
causing substantial harm to property or the occurrence of other consequences dangerous to society;
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;
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;
other acts classified as terrorist under the national legislation of the parties or under universally recognized international legal instruments aimed at combating terrorism.

The same provision addresses acts of technological terrorism (cyberterrorism) “committed for the purpose of undermining public safety, terrorizing the population or influencing the decisions of the authorities in order to achieve political, mercenary or any other ends”. Here, damage to property is included among terrorist acts, while the political aspect prevails over civilian victims.

Unlike the Arab League Convention, by which it is inspired, the definition of terrorism provided in Art. 1(2) of the Convention adopted by the Organization of Islamic Conference (OIC) emphasizes the priority of state security:

any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honor, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent states.

The idea is the same as the Arab League convention approved one year earlier: violence is the driver, and damage to property or environment is included among terrorist offences. The *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism*, adopted in 2004 by the Cooperation Council for the Arab States of the Gulf (GCC),⁸³⁸ provides a definition of a terrorist act like that found in the previous two Islamic conventions:

any act of violence or threat thereof, notwithstanding its motives or intentions, perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing or harming people or imperiling their lives, freedom or security, or endangering the environment, any facility or any public or private property or occupying or seizing them, or attacking a national resource.⁸³⁹

As in the *Arab Convention*, and unlike the OIC Convention, the GCC Convention does not emphasize the threat that terrorism poses to the state. Like all Islamic conventions, violence is considered a feature of terrorism; property and environment damage are included among terrorist offences. Article 3(3) of the GCC Convention gives the same definition of terrorist offence provided by Art. 1(3) of the *Arab Convention*. The CT convention of the Gulf Cooperation Council includes among terrorist offences the crimes provided for in certain international instruments and in the Arab League and OIC conventions, except where they have been excluded by the legislation of member states.

On the same day the OIC adopted the Islamic CT convention, the African countries, many of which are of Islamic majority, signed the *Convention on the Prevention and Combating of Terrorism*. According to Art. 1(3) of the Convention, a terrorist act is:

- a) any act which is a violation of the criminal laws of a state party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause

⁸³⁸ *Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism*, done at Kuwait City, on 4 May 2004.

⁸³⁹ Translation from original in Arabic is provided by the UN in doc. V.04-59282 (E), but the formulation is identical to that of the *Arab Convention*.

damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

- (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
 - (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
 - (iii) create general insurrection in a state;
- (b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a)(i) to (iii).

The preamble to the OAU Convention recalls GA Resolution 49/60 of 9 December 1994 and GA Resolution 51/210 of 17 December 1996, together with the annexed declarations on Measures to Eliminate International Terrorism, which drafted the not-approved *Comprehensive Convention on International Terrorism*.

This definition broadens the concept of terrorism by including violence and cybercrime, and introducing the innovative concept of serious risk to public health, public safety, public security or national security. The Model confirms damage to property as a terrorist act already included in the associate OAU Convention. Compared to the definition given by the Convention, the legislative model proposed for adoption by individual states refers to political, religious or ideological causes. With respect to the definition provided by the OIC Convention, this proposal also includes actions carried out outside the territory of AU member states.

The conventions on terrorism adopted by the Shanghai Cooperation Organization (SCO) approach terrorism in a different from all others. The *Shanghai Convention on Combating Terrorism, Separatism and Extremism* of 2001⁸⁴⁰ defines terrorism as any act:

intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict or to cause

⁸⁴⁰ *Shanghai Convention on Combating Terrorism, Separatism and Extremism*, done at Shanghai, on 15 June 2001.

major damage to any material facility, as well as to organize, plan, aid and abet such act, when the purpose of such act, by its nature or context, is to intimidate a population, violate public security or to compel public authorities or an international organization to do or to abstain from doing any act, and prosecuted in accordance with the national laws of the parties.⁸⁴¹

In this definition the connection between terrorism and violence is evident. It also emerges that terrorism is part of an armed conflict. It could therefore be said that terrorism is to be considered a legitimate situation of armed conflict, in which the laws of war and international humanitarian law apply. This can be inferred from the prohibition of targeting civilians. The SCO approach to CT is modelled on China's "Three Evils" doctrine: terrorism, separatism and extremism, which are deemed to be part of the same problem. Violence is a decisive factor in qualifying an act as terrorist. According to the Shanghai Convention separatism and extremism are defined respectively:

any act intended to violate territorial integrity of a state including by annexation of any part of its territory or to disintegrate a state, committed in a violent manner, as well as planning and preparing, and abetting such act, and subject to criminal prosecuting in accordance with the national laws of the parties;⁸⁴²

an act aimed at seizing or keeping power through the use of violence or changing violently the constitutional regime of a state, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them, criminally prosecuted in conformity with the national laws of the parties.⁸⁴³

Art. 1(2) leaves the parties free to provide for a broader application of the terms according to their national legislation for domestic policy purposes. The approach of this convention is oriented towards protection of the state's territorial integrity, rather than countering forms of

⁸⁴¹ Art. 1(1)(b).

⁸⁴² Art. 1(1)(2)(2).

⁸⁴³ Art. 1(1)(2)(3).

terrorism that could indiscriminately hit civilians. The *Convention on Counter-Terrorism of the Shanghai Cooperation Organization* of 2009,⁸⁴⁴ that supplements the SCO Convention of 2001 with a focus on terrorism, provides two definitions:

an ideology of violence, and the practice of exerting influence on the decision-making of governments or international organizations by threatening or committing violent and (or) other criminal acts, connected with intimidating the population and aimed at causing injury to private individuals, society or the state;⁸⁴⁵

any act connected with intimidating the population, endangering human life and well-being, and intended to cause significant property damage, ecological disaster or other grave consequences in order to achieve political, religious, ideological or other ends by exerting influence on the decision-making of governments or international organizations, or the threat of committing such acts.⁸⁴⁶

Compared to the 2001 Convention, the 2009 version considers terrorism an act “to achieve political, religious, ideological or other ends”, and introduces the innovative concept of eco-terrorism. Both SCO conventions leave any part free to provide for a broader application of the terms used, leaving large discretion to governments in defining what constitutes terrorism, separatism and extremism. The discretionary scope of this provision is evident, as is its use for domestic policy purposes.

The preamble to the *ASEAN Convention on Counter Terrorism (ACCT)* of 2007⁸⁴⁷ recalls the relevant international CT conventions and UN resolutions, considering acts of terrorism those offences defined in the international treaties (Art 2). The definition provided by GA Resolution 50/53 of 1995 and SC Resolution 1566 of 2004 is embodied in Art. 9(1) of the ACCT, which says that terrorism offences are acts:

⁸⁴⁴ *Convention on Counter-Terrorism of the Shanghai Cooperation Organisation*, done at Yekaterinburg, on 16 June 2009.

⁸⁴⁵ Art. 2(1)(2).

⁸⁴⁶ Art. 2(1)(3).

⁸⁴⁷ *ASEAN Convention on Counter Terrorism*, done at Cebu, on 13 Jan. 2007, entered into force on 27 May 2011.

intended to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

THE APPLICATION OF UN RESOLUTIONS AND HUMAN RIGHTS VIOLATIONS – AN OVERVIEW

The international community has experienced significant shifts in the modalities of combating terrorism following the 9/11 attacks. Even though the UN and other organizations had developed tools to combat terrorism, they were largely unprepared for the increasing systematization of violence that became apparent after 2001. Even today, almost two decades after 9/11, there exists no effective policy or response mechanism that could curtail terrorism or prevent terror attacks, despite the many concessions national governments have made in an effort to increase security – including but not limited to increased surveillance, amendments to human rights codes, violations of said rights, reductions in liberty of citizens.⁸⁴⁸

Although most of the attacks, at least those that were highly publicized in the media, happened in the U.S. and the EU, the counter-terrorism approaches have shifted in a number of international entities, including NATO, the AU, the UN, the G-8, the EU, Interpol, the ICRC, and others. The national agencies frequently follow the developments of international bodies and adjust their own strategies according to theirs.⁸⁴⁹

THE UNITED NATIONS COMMITMENT IN COUNTERING TERRORISM

The first response to the 9/11 attacks was the passing of Resolution 1373 that called for the development of defense strategies in case of further attack. States were asked to curb financing of terrorists, increase border controls, secure points of entry such as airports, sea ports, and others, and develop specialized terrorism legislation to persecute any identified terrorists. Failure

⁸⁴⁸ Guild, Elspeth (2008), "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'", *JCMS*, Vol. 46, No. 1 (2008), pp. 173-193.

⁸⁴⁹ *Ibid.*

to comply with this resolution would be the imposition of sanctions against the offending state. The employment of this resolution was entrusted to the CTC.⁸⁵⁰

However, the main task of the CTC was to coordinate between member states in the development and application of their counter-terrorism policies and strategies. Moreover, the CTC oversaw the application of new legal frameworks linked to the prevention of terrorist activities, including changes to the terms of financial services, persecution and policing, and others. Some of the activities of the CTC were further supported by the Counter-Terrorism Committee Executive Directorate (CTED), the Al-Qaida Sanctions Committee, the 1540 Committee,⁸⁵¹ and the 1566 Working Group.⁸⁵²

The UN, further, developed the five pillar strategy in 2005, aimed solely towards combating terrorism. The report was based on the five key concepts, Dissuade people from resorting to terrorism and supporting it; Deny terrorists access to funds and materials; Deter States from sponsoring terrorism; Develop State capacity to defeat terrorism; and Defend human rights. The vast majority of all UN actions since 2001 is based on strengthening of the multilateral support and cooperation in counter-terrorist activities.⁸⁵³

OVERVIEW OF THE INSTITUTIONS AND THEIR CT ACTIVITIES

The UN Security Council was formed as a way to ensure peace on a global scale. Following the 9/11 attacks, it received much broader authority and has issued several binding resolutions meant to tackle the problem of terrorism. One of these led to the establishment of the CTC, and the CTED. Each member of the UNSC has a seat on the CTC and the CTED.⁸⁵⁴

⁸⁵⁰ Crelinsten, Ronald (2018), "Conceptualising counterterrorism", in Andrew Silke (ed.), *Routledge Handbook of Terrorism and Counterterrorism*, London, Routledge, p. 398.

⁸⁵¹ Established pursuant to UNSC Resolution 1540 (2004) [Non-proliferation of weapons of mass destruction], adopted on 28 Apr. 2004, S/RES/1540 (2004).

⁸⁵² Miller, Alistair, and Daniel Benjamin (2005), "The Future of Multilateral Counter-Terrorism Policy Coordination, Monitoring and Implementation", Center for Strategic and International Studies, University of Notre Dame, Ind., pp. 5-19. The 1566 Working Group was established pursuant Res. 1566 (2004).

⁸⁵³ Ali, Nathanael Tilahun (2018), *Regulatory Counter-terrorism: A Critical Appraisal of Proactive Global Governance*, London, Routledge.

⁸⁵⁴ COT Institute for Safety Security and Crisis Management (ed.) (2008), "Mapping Counter Terrorism: A categorization of policies and the promise of empirically-based systematic comparisons", *Transnational terrorism, Security & the Rule of Law*, The Hague, Centre for Strategic Studies. Available at https://hcss.nl/sites/default/files/files/reports/17.06_2008_-

This body's primary concern is the implementation of counter-terrorism strategies in member states, and providing assistance to countries in developing and implementing new policies. By 2006, at the behest of the UNSC, the UN adopted the GCT (Global Counter-Terrorism Strategy). However, it does appear that its passing, and the efforts of the UNSC and the CTC remain largely limited to the EU and several other member states. The U.S., China, and Russia all have individual strategies and do not conform to the prescriptions of the UNSC or the GCT.⁸⁵⁵

The G-8 also created a body aimed at combating terrorism, the CTAG (Counter-Terrorism Action Group) and the Financial Action Task Force – the FATF was created in 1989 as a way to prevent illegal financial operations, and was later expanded to include financing of terrorism. The CTAG has had no notable effect on the development or implementation of joint, or individual counter-terrorism policy.⁸⁵⁶

The General Assembly of the UN has created an array of documents that operationalize the definitions of terrorism, international law that tackles terrorism, and conventions. These represent the crux of the international legal code that is applied in many member states, including the EU. However, the General Assembly has not passed a comprehensive definition of Terrorism due to internal division on the specific elements to be included.⁸⁵⁷ However, the UNSC passed the *Suppression of Terrorist Bombing, and Suppression of Financing of Terrorism*, adopted by Res. 1368,⁸⁵⁸ which allowed nations to act in self-defense when faced with terrorist threats. Resolution 1373, which is detailed below asked member states to criminalize terrorism and linked national and international agencies in intelligence sharing to prevent terrorism. However, some members do not adhere to these resolutions due to their pervasiveness, arguing that they breach their national legislature and statutes.⁸⁵⁹

Mapping Counterterrorism A categorization of policies and the promise of empirically-based%2C_systematic_comparisons_.pdf (accessed 20 May 2019).

⁸⁵⁵ Crelinsten, Ronald (2018), "Conceptualising counterterrorism", in *Routledge Handbook of Terrorism and Counterterrorism*, London, Routledge, pp. 389-400.

⁸⁵⁶ Hudson, Andrew (2007), "Not a great asset: the UN security council's counter-terrorism regime: violating human rights", *Berkeley J. Int'l Law*, Vol. 25, pp. 203-215. DOI: <https://doi.org/10.15779/Z38BD38>.

⁸⁵⁷ Ibid.

⁸⁵⁸ UNSC, Resolution 1368 (2001) [Threats to international peace and security caused by terrorist acts], adopted on 12 Sept. 2001, S/RES/1368 (2001).

⁸⁵⁹ Nowak, Manfred and Anne Charbord, (eds.) (2018), *Using Human Rights to Counter Terrorism*, Cheltenham, UK/Northampton, Mass., Edward Elgar Publishing, pp. 2-90.

UNSC RESOLUTIONS AND THEIR EFFECTS

The UN developed a Global Counter-terrorism Strategy under circumstances of heightened fear of terrorism in the aftermath of 9/11. While the UN had developed and implemented a number of resolutions in the past, aimed primarily against rogue regimes, they were not nearly as comprehensive. A good starting point would be the situation with Afghanistan, which came under increased scrutiny from the UN in the years preceding the 9/11 attacks.⁸⁶⁰

Following a bloody civil war, Afghanistan came under the control of the Taliban, the extremist Islamist party. This prompted the passing of Resolution 1267 in 1999, which imposed limited diplomatic and traffic sanctions. In 2000, these sanctions were broadened (Res. 1333)⁸⁶¹ to include economic and military embargo. This was, de facto, the UN's way of stating that it did not recognize the Taliban as the official government of Afghanistan. Although the sanctions were imposed on the state, they were aimed at a single element within the state, and not the state itself. While this is a semantic distinction, it is a necessary one for the understanding of the UN policy in the years following the 9/11 attacks.⁸⁶²

The same Resolution 1333 imposed financial sanctions against Al-Qaida, primarily their leader Osama Bin Laden. However, both targets of the resolution remained on course, received ample funding and developed the logistical base for the 9/11 attacks despite the sanctions. This has had significant consequences, both on the terms and the type of measures taken by the UN in the years following 9/11.⁸⁶³ Immediately after the attack, the U.S. launched an attack against the Taliban under the provisions of Res. 1386⁸⁶⁴ and 1373, with the goal of punishing those responsible for the attacks. Resolution 1373, in particular, was an excellent starting point due to its overly broad delegation of the roles in the struggle against terrorism to individual states.⁸⁶⁵

Needless to say that the actions of the U.S., both in Afghanistan and later in Syria and Iraq led to the destabilization of the entire region and opened up the space for the creation of ISIS, which further exacerbated the risk of terrorism. In the meantime, the UN passed a number

⁸⁶⁰ Ibid.

⁸⁶¹ UNSC, Resolution 1333 (2000) [The situation in Afghanistan], adopted on 19 Dec. 2000, S/RES/1333 (2000).

⁸⁶² Kielsingard, Mark D. (2005), "A human rights approach to counter-terrorism", *Cal. W. Int'l LJ*, Vol. 36, No.1 (Fall), pp. 249-270.

⁸⁶³ Hoffman, pp. 1-70.

⁸⁶⁴ UNSC, Resolution 1386 (2001) [The situation in Afghanistan], adopted on 20 Dec. 2001, S/RES/1386 (2001).

⁸⁶⁵ Hudson, pp. 2-90.

of resolutions, such as 1390⁸⁶⁶ and 1455,⁸⁶⁷ which further entrenched the policy of sanctions against rogue elements within legally elected governments, which will prove to be a critical element in the years to come.⁸⁶⁸

The most problematic area in the UN Counter-Terrorism strategy can be found in Art. 51, which opens up the space for unilateral actions by member states against state and non-state actors for the purpose of engaging terrorists. This system of counter-terrorism has the goal to push individual states to determine, on their own, the legal and political value of instruments proposed by the UN, including the adoption of the International Law and conventions of war. To illustrate, the U.S. and other members of the NATO used the provisions of the CTG and especially Art. 51 to completely circumvent international law in respect to the treatment and human rights of enemy combatants.⁸⁶⁹

This opened up the space for gross violations of said rights, especially in terms of imprisonment (Guantánamo and various sites in NATO member states) which allowed the U.S. and its allies to hold suspects indefinitely, without a trial or any other type of legal help. While the stated goal of the CTG and other Resolutions, especially those linked to the protection of human rights, is to limit the ability of individual nations to act aggressively towards others, the reality is somewhat different.⁸⁷⁰

In the CTG, Art. 39 (chapter VII), it is stated that the Security Council is responsible for the determination of the existence of any threat to peace, or acts of aggression, and provides recommendations to the UN and/or individual member states as to the proper method of response. Art. 41, further, states that the SC can determine what measures (bar the use of military force) can be taken to put its decisions into action, and can call upon the UN to enforce these measures. This can be anything from partial economic sanctions to complete interruption of the target's infrastructure, trade, and commerce. However, Art. 42 opens up the space for individual

⁸⁶⁶ UNSC, Resolution 1390 (2002) [The situation in Afghanistan], adopted on 16 Jan. 2002, S/RES/1390 (2002).

⁸⁶⁷ UNSC, 1455 (2003) [Threats to international peace and security caused by terrorist acts], adopted on 17 Jan. 2003, S/RES/1455 (2003).

⁸⁶⁸ Flynn, Edward J. (2007), "The Security Council's Counter-Terrorism Committee and Human Rights", HRLR, Vol. 7, No. 2, pp. 371-384. DOI: <https://doi.org/10.1093/hrlr/ngm009>.

⁸⁶⁹ Ali, pp. 10-70.

⁸⁷⁰ Hudson, p. 210

military acts when and if the provisions of Art. 39 and 41 could not be achieved, or would not achieve their intended goals.⁸⁷¹

Under the influence of the U.S., and following the 2001 attacks, the UNSC tried to equate terrorist acts with any acts of aggression, or in other terms defining a terrorist attack as an act of war of one state against another. Given the inconsistent application and understanding of the nature of terrorist activity, and its almost complete exclusion from the domain of legitimate political and military activity, this is paradoxical, at best.⁸⁷²

One of the main problems with the implementation of these, and later iterations of Resolutions has been the emergence of serious issues in regard to human rights, especially in terms of reconciling the need for security with the need to hold terrorists accountable.⁸⁷³ The overly broad understanding of the Art. 51 and other articles that define the legal requirements of member states has led to the development of situations where even the members of the UN which drafted the resolution cannot agree on its content. A good example of this is Israel, whose erection of the border wall was construed as an aggressive act by some member states, whereas under the same articles it was defended as an act of self-defense.⁸⁷⁴

The problem lies in the definition of who can be targeted. While the state of Palestine does not officially exist, the reading of the CTG allows Israel and other states to act in self-defense against any aggression towards their citizens or territory, regardless whether it emerges from a state or non-state actor. The fact that Res. 1373 and other resolutions allowed far too much leeway to member states was evidenced relatively soon, and led to the passing of Resolution 1452 in 2002,⁸⁷⁵ which made exceptions to sanctions on the basis of humanitarian reasons.⁸⁷⁶ Effectively, Resolution 1373 could be used as a weapon against any state or non state element, regardless of the cause, with the excuse of some type of aggression against a member state. This placed a heavy burden on the UN as it now had to contend with serious breaches of human rights based on its own resolutions.⁸⁷⁷

⁸⁷¹ Joyner, Christopher C. (2004), "The United Nations and terrorism: rethinking legal tensions between national security, human rights, and civil liberties", *ISP*, Vol. 5, No. 3, pp. 240-257.

⁸⁷² *Ibid.*

⁸⁷³ Nowak and Charbord, pp. 1-18.

⁸⁷⁴ *Ibid.*

⁸⁷⁵ UNSC, Resolution 1452 (2002) [Threats to international peace and security caused by terrorist acts], adopted on 20 Dec. 2002, S/RES/1452 (2002).

⁸⁷⁶ Gearty, Conor (2007), "Terrorism and human rights", *Government and Opposition*, Vol. 42, No. 3 (Summer), pp. 340-362. DOI: <https://doi.org/10.1111/j.1477-7053.2007.00227.x>.

⁸⁷⁷ *Ibid.*

One of the first effects of the 2000 and 2001 resolutions was the creation of the so called “black lists” which were simply put exhaustive lists of individuals and organizations who were suspected to have ties with terrorist organizations. Once on the list, these individuals or organizations would have their assets seized, travelling privileges revoked, and were fundamentally imprisoned in whatever country they were at the time they were added to the list.⁸⁷⁸ Needless to say, these lists contained many known and verified terrorists and organizations that supported them, but they also listed many individuals and organizations who had nothing to do with terrorism. And yet, any person or entity who wanted to prove their innocence could not appeal to the UNSC or any other UN entity, but work through mediators. The only way to be removed from the black list was a unanimous decision by the UNSC.⁸⁷⁹

HUMAN RIGHTS VIOLATIONS IN LIGHT OF CTG RESOLUTIONS

The threat of terrorism has sparked a fierce debate in national and international security circles. The question was, is terrorism a sufficient threat to allow nations to curb the rights of their citizens in an effort to increase security. The threats encountered during and after 9/11 attacks were unprecedented, and necessitated a new approach to security and fight against terrorism. However, the development of counter-terrorism strategies has led to serious infractions of the international human rights laws, and represents a serious challenge for the years to come. Even the last, sixth revision of the CTG did not include provisions to protect the rights of some groups due to the fear of some members that such provisions would give increased latitude for potential attackers to exploit.

While, on paper, Resolution 1373, the CTG, and almost all other documents published by the UN accentuate the need to protect human rights, the realities of war are often different. The espousing of views in documents aside, the last two decades have seen a dramatic decrease in the rights of individuals on the basis of increasing security. Surveillance, biometric scanning, travel restrictions, monitoring of online activities, and a variety of other methods were designed and

⁸⁷⁸ Flynn, pp. 371-384.

⁸⁷⁹ Kielsgard, p. 249.

implemented with the sole purpose of finding terrorists and potential terrorists.⁸⁸⁰ Finally, in December 2017, the Security Council unanimously adopted a landmark resolution on terrorist travel, that requires all UN members to use tools like watchlists and the passenger name record (PNR), a record in the database of a computer reservation system that consists of the personal information for a passenger and also contains the itinerary for the passenger, or a group of passengers travelling together.⁸⁸¹

However, this is not the key issue this dissertation touches upon. The primary problem that was identified in the course of the War on Terror, and one that persisted despite a variety of UN resolutions and other binding documents. The right to life, especially, is one of the hallmarks of international law, even during times of urgency or crisis. The application of counter-terrorist measures in light of the documents passed by the UN and other organizations, therefore, comes with added responsibilities, which are often overlooked by member states.⁸⁸²

The current provisions of the international human rights laws allow countries to suspend or limit some rights to ensure safety for the citizens. These provisions allow states to do this both in times of acute crises and outside of them. For them to be utilized, the government must declare a state of emergency, making said limitations the subject of existing regulation. There are some rights, however, which are inalienable under the ICCPR, such as the right to life.⁸⁸³

The same, however, does not apply for terrorists or suspected terrorists. This dissertation discusses the current state of research and legal framework that defines the status of terrorists, so this will not be expanded here. It is suffice to say that, since 2001, some states opted to treat terrorists as individuals devoid of all human rights that are normally awarded to individuals, even prisoners of war. Unlike criminals, or prisoners of war, terrorists and suspected terrorists were apprehended without any legal justification, they were captured domestically or abroad, transported, imprisoned, questioned, detained, and even tortured completely outside of the scope of the provisions of either the UN Charter, the CTG, or any other legally binding document that delineated the form of treatment during war.⁸⁸⁴

⁸⁸⁰ Ali, pp. 3-50.

⁸⁸¹ UNSC, Resolution 2396 (2017) [on threats to international peace and security caused by returning foreign terrorist fighters], adopted on 21 Dec. 2017, S/RES/2396 (2017).

⁸⁸² Ali, pp. 3-50.

⁸⁸³ von Schorlemer, Sabine (2003), "Human rights: substantive and institutional implications of the war against terrorism," EJIL, Vol. 14, No. 2, pp. 265-270.

⁸⁸⁴ Hudson, pp. 203-4.

The violations of human rights, including torture and other types of demeaning punishments is in direct violation of the UN convention against torture, the EU convention to prevent torture, and other binding documents. The fact that the provisions of the Resolutions passed after 2001 attacks left wide open the possibility of gross violations by individual states is worrying, to say the least. The fact remains that despite the well-structured texts of UN resolutions and other documents emanating from the EU or other international entities, human rights violations happen on a daily basis. This is not to say that terrorists or those who support them should not be punished, persecuted, or apprehended, but it does question the validity of some actions taken by individual states over the last two decades in the fight against terror.⁸⁸⁵

The following chapters will delineate, further, the legal and political conditions that allow counter-terrorism to be translated into human rights violations, as well as illustrate some of the more notable cases that were presented in front of the judiciary with the special emphasis on the EU legal system.

THE WAR ON TERROR AND INTERNATIONAL HUMANITARIAN LAW

It could be argued that the rules of war are a little 'dated'; however, with some modification, the IHL can still find application.⁸⁸⁶ Why, then, not apply IHL to irregular combatants in the War on Terror? The main motivation is to be found in the division between just and unjust combatants. Irregular combatants are considered unjust and unlawful; they are denied the privileges of the status. Regular soldiers are deemed lawful and just, and they have access to the protections under the IHL. This division in two broad categories raises many questions. Are irregular combatants also automatically unjust? Can irregular combatants be engaged in a just war against regular combatants; for example in a war of liberation? How should one evaluate the 30,000 volunteers who enrolled in the International Brigades to assist the Popular Front government of the Second Spanish Republic during the civil war, and many other similar cases throughout history?⁸⁸⁷ Whether they are freedom fighters or terrorists depends, it appears, solely on the perception of the opposite side. It could be argued, however, that they are irregular combatants, like the 90,000

⁸⁸⁵ Ibid.

⁸⁸⁶ Marsili (2018), p. 20.

⁸⁸⁷ Thomas, Hugh (2003), *The Spanish Civil War*, London, Penguin (Revised 4th edition).

volunteers who fought alongside the nationalists.⁸⁸⁸ Once again, this is not only a legal issue, but a philosophical discussion, which requires political, moral and ethical evaluations. It ultimately comes to a case by case evaluation of the stakes and the sides included in the conflict.⁸⁸⁹

One must keep in mind that the War on Terror (not the *War on Terrorism*) is not a conventional conflict, nor a civil war, even if it can sometimes be characterized as such. It is an endless transnational conflict, which involves state and non-state actors and civilians who do not carry weapons.⁸⁹⁰ That said, it can be argued that the Geneva Conventions, in one way or another, should apply to all individuals involved in this war. One has a wide selection of historical precedents to choose from: the Third Convention deals with prisoners of war; the Fourth Convention deals with the protection of civilians; Additional Protocol I provides for the protection of victims in international conflict; Additional Protocol II provides for the protection of victims in a non-international conflict, i.e. a civil war.⁸⁹¹ The Geneva Conventions cover all combatants, including "unlawful enemy combatants" or "unprivileged belligerents", granting POWs to be treated in a human manner, and civilians, who are protected persons.

In the ICRC Commentary of 1958 to the Geneva Convention (IV), Pictet writes: "Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can fall outside the law".⁸⁹² If irregular combatants are not protected under the Geneva Convention (III), then they should be considered civilians and protected according to Geneva Convention (IV) and Additional Protocols I and II.

Article 4 of Geneva Convention (III) considers having the status of combatant with belligerent privilege, and thus the status of POWs: members of militias or volunteer corps, including those of organized resistance movements, commanded by a person responsible and carrying arms openly; 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

⁸⁸⁸ Thomas, p. 634-5. See also: Beevor, Antony (2006), [*The Spanish Civil War* (1982)]. *The Battle for Spain: The Spanish Civil War 1936–1939*, London, Weidenfield and Nicolson, p. 196-9.

⁸⁸⁹ Meisels, p. 60.

⁸⁹⁰ Marsili (2018), p. 13.

⁸⁹¹ The Convention's Article 3 says that just/lawful combatants are entitled to POW status.

⁸⁹² Pictet, Jean S. (1958) (ed.), *Commentary on the Fourth Geneva Convention*, Geneva, ICRC, p. 51.

themselves into regular armed units, provided they carry arms openly⁸⁹³ and respect the laws and customs of war; civilians authorized by the armed forces which they accompany.

The Geneva Convention (III) provides that POWs should be released at the end of active hostilities.⁸⁹⁴ Persons labeled as unlawful combatants must be repatriated at the end of hostilities unless they are serving sentences for criminal activity.⁸⁹⁵ As the War on Terror – much more than an international conflict, a global one – is not a conventional war, formally declared by one party to another, it is not even predictable the cessation of hostilities, which usually takes place with the signing of the peace terms imposed by the victor.

In the War on Terror, President George W. Bush determined that Taliban detainees were covered under the Geneva Conventions while al-Qaeda terrorists were not, but that none of the detainees qualified for the status of prisoner of war under Art. 4 of the Third Geneva Convention.⁸⁹⁶ The U.S. administration deemed all detainees, including individuals who had never been anywhere near a battlefield and who were captured thousands of miles from a battle zone, to be "unlawful enemy combatants" who could be held indefinitely without trial, depending on how long America's WoT lasted.⁸⁹⁷ These include nationals of countries not at war with the United States.⁸⁹⁸

The U.S. administration argued that the non-application of POW status to the Taliban was because they do not effectively distinguish themselves from the civilian population, as they do not wear uniforms or insignia, they do not carry weapons in plain sight and do not conduct their operations in accordance with the laws and customs of war.⁸⁹⁹ When White House press secretary, Ari Fleischer, was asked if the U.S. special forces, who do not wear uniforms or carry weapons outwardly, would be treated as prisoners of war if captured, stated: "The terms of the

⁸⁹³ According to Art. 1(1) of the Hague Convention (IV) of 1907, in order to be entitled to POW status, fighters must wear "a fixed distinctive sign visible at a distance" and must "carry their arms openly".

⁸⁹⁴ Art 118 of the 1949 Geneva Convention (III).

⁸⁹⁵ Art. 75(6) of Additional Protocol I.

⁸⁹⁶ Fleischer, Lawrence Ari (2002), "White House Press Secretary announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees", The White House Office of the Press Secretary, 7 Feb. 2002. Available at <http://www.state.gov/s/l/38727.htm> (accessed 8 July 2016).

⁸⁹⁷ *In re Guantánamo Detainees Cases*, Case No. 02–299, decided on 31 Jan. 2005, memorandum opinion by Judge Joyce Hens Green, 355 F.Supp.2d 443 (D.D.C. 2005).

⁸⁹⁸ *Rasul v. Bush* (03–334), 542 U.S. 466; 124 S. Ct. 2686; 159 L. Ed. 2d 548; 2004 U.S. LEXIS 4760; 72 U.S.L.W. 4596; 2004 Fla. L. Weekly Fed. S 457.

⁸⁹⁹ Fleischer.

Geneva Convention apply to all, and those terms speak for themselves," and left the briefing.⁹⁰⁰ He's right, it's not a political choice; they apply automatically to everyone.

The U.S. courts overruled the White House determination, and decided that Taliban fighters or those associated with both the Taliban and al-Qaeda are protected under the Convention (III) on the basis that Afghanistan is a High Contracting Party,⁹⁰¹ although the Kabul government was not recognized by the U.S at the time (1996-2001).⁹⁰²

The U.S. government attempted to put WoT detainees, including civilians, under the jurisdiction of military "commissions", which the U.S. courts declared to be unconstitutional and inconsistent with domestic and international law. Art. 5 of Geneva Convention (III) entitles individuals detained under Art. 4, including members of militias or volunteer corps and members of organized resistance movements, to be treated as POWs until a "competent tribunal" determines their status.

The U.S. courts ruled that the Third Geneva Convention does not permit the determination of POW status in a political way, as the Convention is self-executive.⁹⁰³ After these decisions, the U.S. government was forced to apply to all detainees treatment consistent with the laws of war and with the standards established in the Geneva Conventions: Common Article 3; Art. 4⁹⁰⁴, 5⁹⁰⁵ and 6⁹⁰⁶ of Additional Protocol II during non-international armed conflict; Art. 75 of Additional Protocol I⁹⁰⁷ during international armed conflict and occupation.

Sir Green notes that, although the U.S. has never ratified Additional Protocol I, it has obtained customary status,⁹⁰⁸ particularly Art. 75.⁹⁰⁹ Article 51(8) of Additional Protocol I

⁹⁰⁰ Ibid.

⁹⁰¹ *In re Guantánamo Detainees Cases*.

⁹⁰² Guelke, Adrian (2006), *Terrorism and Global Disorder*, London: I.B. Tauris, p. 55.

⁹⁰³ *In re Guantánamo Detainees Cases*.

⁹⁰⁴ Art. 4 of Additional Protocol II provides that who do not take a direct part or who have ceased to take part in hostilities, shall be treated humanely.

⁹⁰⁵ Art. 5 of Additional Protocol II provides that persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained, should be treated humanely in accordance with Art. 4.

⁹⁰⁶ Art. 6 of Additional Protocol II provides that no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense (§ a); anyone charged with an offence is presumed innocent until proved guilty according to law (§ d); anyone charged with an offence shall have the right to be tried in his presence (§ e).

⁹⁰⁷ Art 75 of Additional Protocol I applies to "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions".

⁹⁰⁸ Greenwood, Christopher J. (1991), "The Customary Law Status of the 1977 Additional Protocols", in Astrid J.M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflicts*, Dordrecht, Martinus Nijhoff, p. 109.

require states to comply anyway with their obligation to respect civilians, even if these obligations are breached by the counterpart. McMahan argues that some people might say that conventional laws of war are updated,⁹¹⁰ and this is probably true, but, if they are not obeyed, the boundary between what is permissible and what is illicit would be entrusted exclusively to moral evaluations. Gill and van Sliedregt⁹¹¹ consider that the refusal of Additional Protocol I is useful for some governments to deny combatant and POW status, and for designating persons as unlawful combatants to strip them of their right to be treated consistently with IHL. Nabulsi argues that the law of war drafted in the Hague and in the Geneva conventions serves the powerful and the strong.⁹¹²

Meisels thinks that selective applications of the rules of war is not a morally viable option, and that none of the parties can demand their protection without assuming their burdens.⁹¹³ Statman writes that conventions require mutuality, and that groups like al-Qaeda and Hamas do not abide by them.⁹¹⁴ As Pictet notes, it would be impossible to constrain provisional governments, or political parties, or groups not yet in existence, by a convention.⁹¹⁵ Not all the organizations characterized as terrorist avoid applying the IHL. Otherwise, it might be inferred that if a "terrorist" group abides by the Conventions, these are to be applied to it. In fact, if one assumes as true the claim that if one side violates a convention, the other side is released from its contractual commitment to respect it,⁹¹⁶ then it is possible to deduce that it is legal for one party to breach a convention following the same violation by the counterpart. For example, if a Western government, like the United States, violates a convention, is legitimate for its opponents to act accordingly.

Here arises the question whether insurgents could be legally bound by a convention which they had not themselves signed. According to Pictet, if an insurgent party does not apply

⁹⁰⁹ Ipsen, pp. 68-69; Greenwood (1991), p. 103. See also: U.S. Navy (1997), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations. Ocean Law and Policy*, NWP 1-14M/MCWP S-2.1/COMDTPUB P5800.1., Newport, U.S. Naval War College. Note 15 at p. 5-9, ch. 5.4.1, reads: "The principles of customary international law codified in such treaties [Additional Protocol I] are identified in the relevant notes to the text".

⁹¹⁰ McMahan (2006), p. 39.

⁹¹¹ Gill and van Sliedregt, pp. 37-38.

⁹¹² Nabulsi, p. 175.

⁹¹³ Meisels, p. 50.

⁹¹⁴ Statman, Daniel (2004), "Targeted Killing", *Theoretical Inquiries in Law*, Vol. 5, No. 1, p. 195. DOI: <https://doi.org/10.2202/1565-3404.1090>.

⁹¹⁵ Pictet (1952), p. 42.

⁹¹⁶ McMahan (2006), p. 46-47.

Article 3, it will prove that those who regard its actions as mere acts of anarchy or banditry are right.⁹¹⁷ He believes that *De jure* governments are afraid to increase the authority of rebels by constituting an implicit recognition of the legal existence and belligerent status of the party concerned through application of Article 3.⁹¹⁸ For this purpose, Art. 3(4) makes absolutely clear that the object of the Geneva Conventions is purely humanitarian, lacking effect on the legal status of the parties to the conflict; it does not confer belligerent status, and consequently increased authority, upon the adverse party.⁹¹⁹ Klabbers claims that there is no good reason for refusing terrorists the protection granted by IHL;⁹²⁰ they have the right to be treated humanely, even if the law does not provide for it in a clear manner.⁹²¹

Article 17 of the *International Convention for the Suppression of Terrorist Bombings* provides for the application of international law, including IHL, to terrorists.⁹²² Art. 6 provides no justification for criminal acts within the scope of the Convention by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature. Under Art. 19(2) of the Convention, however, the activities of armed forces during an armed conflict, and the activities undertaken by military forces of a state in the exercise of their official duties, are not governed by IHL. The notion of "armed forces" appears to include non-state armed groups that are party to an armed conflict, while the term "terrorists" remains vague and indefinite.

From this discussion it stems that in a hybrid conflict, as in a civil war, it is difficult to distinguish between irregular fighters who carry weapons, from civilians who provide them with some kind of non-armed support. This means that it is necessary to evaluate individually which rules to apply, depending on the characterization of the conflict and the behavior of combatants. Drawing from the Third Geneva Convention and Common Article 3, humane treatment for POWs should apply to all detainees in the War on Terror. Moreover, the Additional Protocols I and II should be applied, too. The Conventions should always be applied, no matter what the type of conflict because they are the bedrock of modern war law, and without them every state can, essentially, do anything to any person or group as long as they are classified as non-military personnel. The Conventions can be a compass to determine if the situation can be classified as a

⁹¹⁷ Pictet (1952), p. 52.

⁹¹⁸ *Id.*, p. 60.

⁹¹⁹ *Id.*, p. 61.

⁹²⁰ Klabbers, p. 311.

⁹²¹ *Id.*, p. 299.

⁹²² UNGA, Resolution A/RES/52/164 [International Convention for the Suppression of Terrorist Bombings], adopted on 15 Dec. 1997, 2149 UNTS 284; 37 ILM 249 (1998); [2002] ATS 17.

conflict, and what kind, but their application cannot depend solely on national interest. In turn, the type of conflict should determine which convention apply, even if the War on Terror challenges the rigid division between regular armed forces and irregulars, and between combatants and civilians. The question of justice, then, becomes a critical issue.

THE WAR ON TERROR AND INTERNATIONAL JUSTICE

Every war has its rules; the Hague Conventions and the Geneva Conventions – which are part of international law – are the bedrock of these rules. Lawful combatants are not liable for prosecution, unless they have committed violations of the laws of war. POWs are immune from any personal culpability and criminal proceedings.⁹²³ Enemies captured in an armed conflict should be released at the end of hostilities, unless they are tried in the military justice system, or charged with war crimes. Otherwise, civilian internees included in Geneva Convention (IV) should face trial in civilian courts for common crimes. There are no clear guidelines or jurisdictions delineated, nor are there clearly stated offenses that are prosecutable in the War on Terror.

The sides involved in a conflict must distinguish between military objectives which can be attacked and civilian objects which must be avoided. The principle is considered being a rule of customary law both in international and non-international armed conflict.⁹²⁴ Under IHL the government on whose behalf the military is fighting may be liable in civil law and the combatant may be personally liable under criminal law. But what about terrorists? Does IHL apply to terrorists in the War on Terror, or if they fall into a grey area. Moreover, there are no specific legal conditions for their persecution, since they are considered non-military aggressive actors.

There is a difference between war crimes, crimes against humanity, and genocide, although sometimes they overlap. War crimes are serious breaches of IHL committed against civilians or enemy combatants during a conflict, for which the perpetrators may be held criminally liable on an individual basis.⁹²⁵ Such crimes are set forth in the Geneva Conventions of 1949 and their Additional Protocols I and II, but also in the *Rome Statute of the International*

⁹²³ Art. 99 of the Geneva Convention (III).

⁹²⁴ ILC (2015), para 148.

⁹²⁵ Henckaerts and Doswald-Beck, Rule 156 at p. 568.

Criminal Court.⁹²⁶ Crimes against humanity are defined in Art. 7 of the Rome Statute, and can be defined as the deliberate persecution of civilians on the basis of race, political beliefs, culture, or religion.⁹²⁷ Crimes against humanity, which are often committed by government officials as a way of intimidating or eliminating a group of people within their jurisdiction, can result in acts of sexual violence, extermination, imprisonment, and human enslavement. Genocide has been codified as an independent crime in the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG),⁹²⁸ and embodied in the same terms in Art. 6 of the Rome Statute of the International Criminal Court (ICC), as the specific intention to destroy an identified group either “in whole or in part”.

War crimes are serious violations of Common Article 3, provided in Art. 8 of the Rome Statute, which applies to armed conflict not of an international character and not to internal conflict. The Statute differentiates between crimes committed in international armed conflict and crimes committed in non-international armed conflict.⁹²⁹ The ICC goes beyond the limits of multilateral international criminal justice which has been applied to the Nuremberg Trials.

The Rome Statute essentially codifies customary *jus cogens* war crimes (Art. 5 and Art. 8), including genocide (Art. 5 and Art. 6) and crimes against humanity (Art. 5 and Art. 7).⁹³⁰ War crimes include grave breaches of the Geneva Conventions and other serious violations of laws and customs applicable in international armed conflict, within the established framework of international law.⁹³¹ War crimes committed during conflicts not of an international character, as well as various crime occurring outside of any armed conflict, were included in the ICC jurisdiction upon proposal by the United States.⁹³²

The ICC also has jurisdiction in the event of a non-international armed conflict when there are serious violations of Common Article 3 (excluding internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature), and in case

⁹²⁶ *Rome Statute of the International Criminal Court*, adopted on 17 July 1998, entered into force 1 July 2002, A/CONF.183/9.

⁹²⁷ Bassiouni, Mahmoud Cherif (2011), *Crimes against Humanity*, New York, Cambridge University Press.

⁹²⁸ *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG), approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 Dec. 1948, UNTS, Vol. 78, p. 277.

⁹²⁹ Art. 8(2)(b)(iv) is applicable in international conflict, while Art. 82(c) does not provide similar provision for non-international conflict.

⁹³⁰ Engle, Eric (2014), "The International Criminal Court, The United States And The Domestic Armed Conflict In Syria", *International Law Journal of London*, Vol. 1 (July), p. 193.

⁹³¹ For the complete list of crimes punishable by the ICC, see § 2 of the Rome Statute.

⁹³² Engle, p. 189-190.

of other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law (excluding internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature). These provisions apply to armed conflicts that take place in a state when there is a protracted armed conflict between government authorities and organized armed groups, or between armed groups. Therefore, the problem of the qualification of hybrid conflict reappears: whether it is inherently international or not.

The Syrian conflict (2011-ongoing) is part of the War on Terror and is characterized as a hybrid conflict. Terrorist organizations, some of which are transnational (al-Qaeda, ISIS), have overlapped the rebels in the fight against the government. The intervention of state actors, from the U.S.-led international coalition, which fights the Islamic State and supports the rebels, to Russia, which supports the regime of Damascus, turned a civil war into the largest hybrid conflict in history. The Syrian conflict is a case study because of these special features.

In 2011, the UNHRC established an Independent International Commission of Inquiry (UNCoISyria)⁹³³ with a mandate to investigate IHL violations, including crimes against humanity, during the conflict. Western governments established the Syria Justice and Accountability Centre (SJAC)⁹³⁴ and the Syria Survivors of Torture Initiative (SOTI) to collect evidences on violations and abuses committed by all sides of the conflict, including torture and other gross human rights violations, for transitional justice accountability efforts.⁹³⁵

The UN Secretary-General,⁹³⁶ the UNCoISyria,⁹³⁷ and the U.S. Congress⁹³⁸ hold the Syrian regime responsible for war crimes and crimes against humanity, for violating the provisions of the Geneva Conventions against the civilian population. In its 2017 report, the CoI-Syria confirms the allegations against the government of Damascus of war crimes of deliberately

⁹³³ UNHRC, Resolution S-17/1 [Situation of human rights in the Syrian Arab Republic], adopted on 22 Aug. 2011.

⁹³⁴ SJAC (2016), "About SJAC". Available at <https://syriaaccountability.org/about> (accessed 7 Oct. 2016).

⁹³⁵ Ob), "Donor Conference for the Syria Justice and Accountability Center and the Syria Survivors of Torture Initiative", Department of State, 6 Oct. 2016. Available at <http://www.state.gov/r/pa/prs/ps/2016/10/262883.htm> (accessed 7 Oct. 2016).

⁹³⁶ Ki-moon, Ban (2015), "Statement by the Secretary-General on Fulfilling our Collective Responsibility on Syria", UN, 12 Mar. 2015. Available at <http://www.un.org/sg/statements/index.asp?nid=8457> (accessed 12 Mar. 2015).

⁹³⁷ UNHRC, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 16 Aug. 2012, A/HRC/21/50.

⁹³⁸ 114th U.S. Congress (2016), Concurrent resolution "Expressing the sense of the Congress condemning the gross violations of international law amounting to war crimes and crimes against humanity by the Government of Syria, its allies, and other parties to the conflict in Syria, and asking the President to direct his Ambassador at the United Nations to promote the establishment of a war crimes tribunal where these crimes could be addressed", 15 Mar. 2016, HCON 121 RFS.

attacking protected objects (§ 15, 31), and the use of chemical weapons and cluster munitions (§ 52, 53).⁹³⁹ These accusations are extended to pro-government forces, including the Russians (§ 39, 60).

Both the Syrian and Russian governments are accused by the U.S. of war crimes for having "targeted strategy to terrorize civilians and to kill anybody and everybody who is in the way of their military objectives".⁹⁴⁰ The U.S. repeatedly accuses the Assad regime and its supporters, particularly the Russians and the Iranians, of crimes against humanity, and calls for measures to bring those responsible for war crimes before the ICC or some other tribunal.⁹⁴¹

The UNCoISyria documented war crimes committed by rebel forces since the start of the conflict.⁹⁴² In a report addressed to the General Assembly and to the Security Council, the Secretary-General states that the FSA recruited, killed and raped children,⁹⁴³ acts that amount to war crimes. The Commission of Inquiry determined that ISIS committed genocide against Yazidis, crimes against humanity, and war crimes.⁹⁴⁴ The report of the UNCoISyria, which was unable to carry out field investigations, is mostly based on interviews conducted by telephone and Skype, photographs, video recordings, satellite imagery, forensic and medical, reports from governments and non-governmental sources, academic analyses, and UN reports.⁹⁴⁵ Also the OPCW-UN JIM, which as well did not visit the scenes of the incidents, finds that ISIS is responsible for a sulfur mustard attack on the town of Um Housh in September 2016.⁹⁴⁶

In March 2016, the U.S. House of Representatives passed a bipartisan resolution voted unanimously to declare ISIS committing genocide against Christians and other minorities in Iraq

⁹³⁹ UNHRC, *Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016- 28 Feb. 2017*, UNCoISyria conference room paper, 10 Mar. 2017, A/HRC/34/CRP.3.

⁹⁴⁰ Kerry, John (2016a), "Remarks With French Foreign Minister Jean-Marc Ayrault Before Their Meeting", Department of State, 7 Oct. 2016. Available at <http://www.state.gov/secretary/remarks/2016/10/262913.htm> (accessed 7 Oct. 2016).

⁹⁴¹ Kerry, John (2016b), "Joint Statement From Secretary John Kerry and U.K. Foreign Secretary Boris Johnson", Department of State, 16 Oct. 2016. Available at <http://www.state.gov/secretary/remarks/2016/10/263186.htm> (accessed 17 Oct. 2016).

⁹⁴² UNHRC, *Report of the independent international commission of inquiry on the Syrian Arab Republic*, 5 Feb. 2013, A/HRC/22/59.

⁹⁴³ UNSG, *Children and armed conflict. Report of the Secretary-General*, 5 June 2015, A/69/926-S/2015/409, § 191, 197, 201; UNSG, *Children and armed conflict. Report of the Secretary-General*, 20 Apr. 2016, A/70/836-S/2016/360, § 149, 151.

⁹⁴⁴ HRC, *"They came to destroy": ISIS Crimes Against the Yazidis*, UNCoISyria report, adopted on 15 June 2016, A/HRC/32/CRP.2.

⁹⁴⁵ OHCHR (2017b), "About the Commission of Inquiry". Available at <http://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/AboutCoI.aspx> (accessed 23 Dec. 2017).

⁹⁴⁶ S/2017/904, § 36, and Annex I, § 25.

and Syria,⁹⁴⁷ and calling the UN for the establishment of a tribunal to punish those responsible for war crimes, crimes against humanity, and genocide. Three days later, the U.S. secretary of state, John Kerry, affirmed that Daesh is responsible for genocide against groups in areas under its control, including Yazidis, Christians, and Shia Muslims, and for crimes against humanity and ethnic cleansing directed at these same groups and in some cases also against Sunni Muslims, Kurds, and other minorities.⁹⁴⁸ Kerry later confirmed that Daesh is guilty of genocide, and the U.S. will hold it accountable.⁹⁴⁹ Even CJTF-OIR called to hold ISIS accountable for inhumane actions and violations of the laws of war, including the killing of thousands of innocent civilians.⁹⁵⁰

Bizarrely, Hezbollah, which is blacklisted by the U.S.,⁹⁵¹ it is the only one that denounces the acts ISIS as "terrorist genocides".⁹⁵² None of the alleged GHRV are termed as "terrorism" or "terrorist acts". Only the states are bound by the human rights instruments that they sign, and therefore they refuse to recognize terrorists as subject of international law, preferring to consider them as common criminals. International law, in fact, only binds states; and only those who have signed and ratified the instruments.

The U.S. and Syria are not parties to the Rome Statute,⁹⁵³ and are not members of the ICC, whose jurisdiction is limited to the most serious crimes of concern to the international community.⁹⁵⁴ Therefore, neither Damascus nor Washington recognize the authority of the ICC. As happened with the League of Nations, the United States, which inspired the ICC,⁹⁵⁵ signed but has not ratified the Rome Statute, has no legal obligations arising from such signature.⁹⁵⁶ The

⁹⁴⁷ 114th U.S. Congress, Resolution 75 [Expressing the sense of Congress that the atrocities perpetrated by ISIL against religious and ethnic minorities in Iraq and Syria include war crimes, crimes against humanity, and genocide], Cong. Rec., Vol. 162, No. 40 of 14 Mar. 2016, p. H1314-1317.

⁹⁴⁸ Kerry, John (2016c), "Remarks on Daesh and Genocide", Department of State, 17 Mar. 2016. Available at <http://www.state.gov/secretary/remarks/2016/03/254782.htm> (accessed 17 Mar. 2016).

⁹⁴⁹ Kerry, John (2016d), "Remarks With Students at the University of Chicago's Institute of Politics", 26 Oct. 2016. Available at <http://www.state.gov/secretary/remarks/2016/10/263655.htm> (accessed 28 Oct. 2016).

⁹⁵⁰ Dillon, Ryan (2017), "Department of Defense Press Briefing by Colonel Dillon via teleconference from Baghdad, Iraq", DoD Press Operations, 28 Sept. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1329003/departement-of-defense-press-briefing-by-colonel-dillon-via-teleconference-from> (accessed 29 Sept. 2017).

⁹⁵¹ Bureau of Counterterrorism, *Foreign Terrorist Organizations*.

⁹⁵² Al-Manar (2016), "Hezbollah Condemns ISIL Terrorist Crime against Deir Ezour", 18 Jan. 2016. Available at <http://english.almanar.com.lb/adetails.php?eid=250391&frid=23&cid=23&fromval=1&seccatid=14> (accessed 31 Mar. 2016).

⁹⁵³ Syria signed the Rome Statute on 29 Nov. 2000, and the U.S. on 31 Dec. 2000, but they never ratified it.

⁹⁵⁴ Art. 5 of the Rome Statute.

⁹⁵⁵ Engle, p. 191.

⁹⁵⁶ Id., p. 189.

U.S. also signed but never ratified other treaties such as the *Vienna Convention on the Law of Treaties* (VCLT),⁹⁵⁷ the *Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations* (VCLTIO),⁹⁵⁸ and the *UN Law of the Sea Convention* (UNCLOS), which are evoked before the U.S. courts as a codification of customary international law.⁹⁵⁹ The non-ratification of the VCLT and VCLTIO, which so far are not yet in force, due to the required number of ratifications, does not bind the U.S. to respect treaties such as the Rome Statute.

Because Syria does not accede to the ICC, to prosecute Syrian officials for GHRV it is necessary to establish a UN *ad hoc* tribunal. The international community has already failed to bring to justice those responsible for acts of war such as the bombing and shelling on the civilian population during the two Chechen wars.⁹⁶⁰ The PACE's proposal to establish an international tribunal for war crimes and crimes against humanity committed in the Chechen Republic⁹⁶¹ was not endorsed by the UNSC, where Russia has a right to veto as a permanent member. Here again, international justice depends on national interest.

The second question is that international criminal courts generally do not have jurisdiction over crimes of terrorism. Not “terrorist acts”, but “terror acts” can be prosecuted internationally as war crimes and/or crimes against humanity. The ICC has jurisdiction over acts of terror only if these acts amount to another crime over which the Court has jurisdiction.

The status of other international criminal tribunals, such as ICTY⁹⁶² and ICTR,⁹⁶³ allows them to prosecute only those allegedly responsible for crimes against humanity and war crimes. The ICTY and ICTR statutes are subject to UNSC Resolution 1966 (2010) establishing the Mechanism for International Criminal Tribunals.⁹⁶⁴ One exception is the STL, which has

⁹⁵⁷ *Vienna Convention on the Law of Treaties*, done at Vienna on 23 May 1969.

⁹⁵⁸ *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, done at Vienna on 21 Mar. 1986.

⁹⁵⁹ Engle, p. 193.

⁹⁶⁰ PACE (2010), *Legal remedies for human rights violations in the North-Caucasus Region*, Doc. 12276 of 4 June 2010, rapporteur Dick Marty, § 1, 9.

⁹⁶¹ PACE (2003), Recommendation 1600 (2003) [The human rights situation in the Chechen Republic], § 3.5.

⁹⁶² Art. 2, 3, and 5 of the ICTY Statute (updated Sept. 2009), adopted by UNSC Resolution 827 of 25 May 1993, S/RES/827 (1993).

⁹⁶³ Art. 3 and 4 of the ICTR Statute (updated 31 Jan. 2010), adopted by UNSC Resolution 955 of 8 November 1994, S/RES/955 (1994). The ICTR has been founded by UNSC Resolution 955 its Statute has been amended by following UNSC Resolutions.

⁹⁶⁴ UNSC, Resolution 1966 (2010) of 22 Dec. 2010, S/RES/1966(2010).

jurisdiction over “acts of terrorism” under Lebanese domestic law.⁹⁶⁵ The rulings of international criminal tribunals are useful shed light in such a delicate, controversial issue.

General Stanislav Galić, a Bosnian Serb and former commander of the Sarajevo-Romanija Corps of the Army of Republika Srpska (VRS), is commonly believed to be the first person to be convicted on charges of terrorism as war crimes and crimes against humanity by an international tribunal. The ICTY held Galić responsible for the campaign of shelling and sniping of civilians in Sarajevo (Bosnia and Herzegovina) between 1992 and 1994, with the purpose of terrorizing the civilian population.⁹⁶⁶

The first count of the indictment charges the accused with violations of the laws or customs of war – “unlawfully inflicting terror upon civilians”, as set forth in Art. 51 of Additional Protocol I and in Art. 13 of Additional Protocol II – punishable under Art. 3 of the statute of the tribunal.⁹⁶⁷ The Trial Chamber decides that it has jurisdiction over the crime of terror – not “terrorism” – against the civilian population, but only to the extent relevant to the charge in the present case.⁹⁶⁸ The court refers to the first count as “the crime of terror against the civilian population”, or simply “the crime of terror”,⁹⁶⁹ a purported violation of the laws or customs of war, or the customary international law applicable to all armed conflicts. Citing other cases brought before the ICTY,⁹⁷⁰ the Trial Chamber speaks of “atmosphere of terror”, “terror campaign”, and “crimes of terror” as grave breaches of the Geneva Conventions (torture or inhuman treatment) and as violations of Common Article 3 (torture or cruel treatment). Bearing in mind that terrorism has never been defined under international law,⁹⁷¹ the ICTY states that infliction of terror is not a constitutive legal element of the crime of terror,⁹⁷² and, hence, that the term “terrorism” and the term “terror” are not the same.

The Special Court for Sierra Leone issued several indictments containing counts of ‘acts of terrorism’ (“terrorizing the civilian population”) brought pursuant to Common Article 3 and to

⁹⁶⁵ Art. 2(a) of the STL Statute. The Tribunal was established by UNSC Resolution 1757 (2007) of 30 May 2007, S/RES/1757 (2007), *Resolutions and decisions of the Security Council, 1 Aug. 2007-31 July 2008 - S/INF/63 - (SCOR, 62nd Year)*, p. 4-22.

⁹⁶⁶ *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, ICTY, Trial Chamber I, 5 Dec. 2003, § 178 et seq.

⁹⁶⁷ Galić was charged with four crimes against humanity (murder and inhumane acts) under Art. 5 of the ICTY statute and with three violations of the laws or customs of war (inflicting terror on civilians and attacks on civilians) under Art. 3 of the statute (see § 12 of the indictment in Annex A).

⁹⁶⁸ *Prosecutor v. Galić*, § 87.

⁹⁶⁹ *Id.*, § 65.

⁹⁷⁰ Note 114 at § 66

⁹⁷¹ *Id.*, footnote 150 at § 87.

⁹⁷² *Id.*, § 134.

Additional Protocol II.⁹⁷³ No international criminal court, except the STL, has ever used the term “terrorism” in a judgment.

Lately the concept of war crimes seems to widen to encompass cases yet not included.⁹⁷⁴ In September 2016, the ICC sentenced Ahmad Al Faqi Al Mahdi to nine years' imprisonment for war crimes for the destruction of historical and religious monuments in Timbuktu, Mali.⁹⁷⁵ Al Mahdi is the first person to be jailed on war crimes against property. All individuals previously convicted have been jailed for crimes against humanity. Al Mahdi was very active in the *jihadist* administration of Timbuktu from April 2012 to January 2013, during its control over the Malian city by Ansar Dine, a movement associated with al-Qaeda in the Islamic Maghreb (AQIM). The ICC finds that Al Mahdi is fully implicated in the attack on monuments and personally participated in the destruction of the cultural heritage. The Chamber concludes that Al Mahdi has overall responsibility for the attack on the holy shrines. All these sites were dedicated to religion and historic monuments and were not military objectives. This is an important case law that broadens the range of crimes tried by the Court.

With reference to the above, and in the light of the foregoing later, it appears that international justice is ineffective in the War on Terror for two reasons: on the one hand, the lack of definition of the term "terrorism" which was discussed in chapter 1; and on the other, the lack of judicial competence/jurisdiction of the ICC for terrorist offences. Another reason is the non-ratification of the Rome Statute by the U.S. and other governments, whose political and military leaders could end up in the dock for war crimes committed in the fight against international terrorism. Under customary IHL, commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.⁹⁷⁶

⁹⁷³ See: RSCSL (2017), <https://www.rscsl.org> (accessed 15 Mar. 2017).

⁹⁷⁴ Lambourne, Nicola (2001), *War Damage in Western Europe: The Destruction of Historic Monuments During the Second World War*, Edinburgh: Edinburgh University Press.

⁹⁷⁵ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15-171, 27 Sept. 2016.

⁹⁷⁶ See, e.g., ICRC Customary IHL Rule 153.

The statute of the ICC removed the principle that serving heads of state or governments should be granted immunity from prosecution under international law.⁹⁷⁷ Among former senior officers tried before international criminal courts: members of the cabinet of Nazi Germany; former president of Yugoslavia, Slobodan Milošević;⁹⁷⁸ former president of Libya, Muammar Gaddafi;⁹⁷⁹ former president of Sierra Leone, Johnny Paul Koroma;⁹⁸⁰ former president of Liberia, Charles Taylor;⁹⁸¹ former president of Ivory Coast, Gbagbo Laurent Gbagbo;⁹⁸² former leaders of Democratic Kampuchea.⁹⁸³ While Milošević and Gaddafi died before judgment, Charles Taylor was the first sitting African head of state to be indicted, and the first ruler since Nuremberg to be convicted for war crimes and crimes against humanity by an international criminal tribunal. Koroma is at large, but presumed to be dead.⁹⁸⁴ The president of Sudan, Omar Hassan Ahmad al-Bashir, is the first incumbent ruler for which a warrant has been issued.⁹⁸⁵

According to Art. 14 of the Rome Statute, heads of state or the government, members of a government or parliament, elected representatives or government officials do not enjoy immunity before the ICC. Article 28(a) provides for responsibility of a military commander or person effectively acting as a military commander who shall be indicted for crimes committed by forces under his effective command and control, or effective authority and control. It must be noted that under Art. II, § 2, clause I of the U.S. Constitution, the president of the United States is commander-in-chief of the armed forces. If one adds to these remarks that Art. 12 of the Rome treaty allows the ICC to exercise jurisdiction over the nationals of non-party countries if the crime is committed in the territory of a party country, and that Art. 86 provides that signatory parties shall "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court", Washington's reluctance to ratify the ICC Statute becomes much more understandable.

⁹⁷⁷ ICC (2013), *Understanding the International Criminal Court*, The Hague, ICC, § 14. Available at <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> (accessed 28 Mar. 2016).

⁹⁷⁸ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54.

⁹⁷⁹ *Prosecutor v. Saif Al-Islam Gaddafi*, Case No. ICC-01/11-01/11.

⁹⁸⁰ *Prosecutor v. Johnny Paul Koroma*, Case No. SCSL-03-03-0016.

⁹⁸¹ *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01.

⁹⁸² *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Case No. ICC-02/11-01/15.

⁹⁸³ ECCC (2017), "Introduction to the ECCC". Available at <http://www.eccc.gov.kh/en/about-eccc/introduction> (accessed 23 Dec. 2017).

⁹⁸⁴ SCSL (2010), "Document SCSL-03-01-1108: Public with confidential Annexes A-D Defence motion for admission of documents and drawing of an adverse inference relating to the alleged death of Johnny Paul Koroma", 27 Oct. 2010.

⁹⁸⁵ *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09.

By ratifying the treaty, the United States would have to waive objections to the trial of American citizens, but because the U.S. wants to continue to exercise domestic jurisdiction over its nationals, thereby avoiding the prosecution of the president and other officials for war crimes, this is unlikely to happen. In March 2019, the U.S. announced that visa will be denied to those responsible for any ICC investigation on American and allied military and civilian personnel for alleged international crimes in Afghanistan.⁹⁸⁶ Since 1998, the US has declined to join the ICC because its broad powers could pursue "politically motivated prosecutions of Americans", thus posing a threat to U.S. sovereignty.⁹⁸⁷

Human positive law and the law of nations are both subject to particular interests. Russia accuses the U.S. of "megalomania and mindless tendency to establish extraterritorial jurisdiction to the entire world and ignoring the concept of state sovereignty"⁹⁸⁸ through the *Justice Against Sponsors of Terrorism Act* (JASTA),⁹⁸⁹ which authorizes federal courts to try cases against states suspected of sponsoring terrorism, regardless if they are designated as such by the U.S. Department of State. JASTA amends the U.S. Code with regard to civil claims against a foreign state for injuries, death or damages from an act of international terrorism, overriding the legal doctrine of the foreign sovereign immunity codified by the *Foreign Sovereign Immunities Act* (FSIA) of 1976.⁹⁹⁰ Pursuant to JASTA, the court of original jurisdiction will evaluate actions of foreign governments on other continents and inflict penalties, for example, seizure of foreign property and assets inside the U.S. This Act, which applies to any civil action arising out of an injury to a person, property, or business on or after 11 September 2001, could result in U.S. citizen lawsuits against potentially any country, such as Saudi Arabia,⁹⁹¹ if it is found responsible for having played a role in funding or assisting the 9/11 attacks. Thus, the law applies retroactively, even where the conduct that took place prior to enactment of JASTA. It must be

⁹⁸⁶ Michael R. Pompeo (2019), Remarks to the Press, 15 Mar. 2019, <https://www.state.gov/secretary/remarks/2019/03/290394.htm> (accessed 16 Mar. 2019).

⁹⁸⁷ Ibid.

⁹⁸⁸ MFA of the Russian Federation (2016a), "Comment by the Information and Press Department on the US passing the Justice Against Sponsors of Terrorism Act with extraterritorial jurisdiction", 30 Sept. 2016. Available at http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2479122 (accessed 1 Oct. 2016).

⁹⁸⁹ *Justice Against Sponsors of Terrorism Act*, Pub. L. 114–222, 130 Stat. 852.

⁹⁹⁰ *Foreign Sovereign Immunities Act (FSIA)*, Pub. L. 94-583, 90 Stat. 2891, amending U.S.C. § 1330, 1332, 1391(f), 1441(d), 1602–1611. See also: Marsili, Marco (2012c), *Italia, Svegliati! La più grande truffa del secolo*, Milano, Termidoro, p. 247.

⁹⁹¹ Erdoğan, Recep Tayyip (2016), "Opening statement on the occasion of the opening of the 2nd legislative year of the 26th term of the Turkish Grand National Assembly", Presidency of the Republic of Turkey, 1 Oct. 2016. Available at <https://www.tcgb.gov.tr/assets/dosya/2016-10-01-tbmm-en.pdf> (accessed 2 Oct. 2016).

noted that any reference to state terrorism, that was present in the previous Islamic CT instruments adopted by the Arab League and the OIC, disappeared from the convention of the Saudi Arabia-led Gulf Cooperation Council.

Previously, U.S. based victims of international terrorism were permitted to sue a foreign state⁹⁹² only if it was listed as a sponsor of terrorism by the Department of State, and if the U.S. victims were harmed by that state's aid to international terrorism against them. The U.S. Congress passed the bill amending the FSIA⁹⁹³ into law after overriding a veto from President Obama.

According to the Russian government, the United States is “regularly using its judiciary to further its foreign policy interests” through an “extensive practice of clearly politically-driven and biased court verdicts against Russia and Russian nationals” and “arbitrary treatment and politically motivated accusations against un-favorable states”.⁹⁹⁴ The *Justice Against Sponsors of Terrorism Act* could encourage other countries to enact measures that limit sovereign immunity, including the United States, and could lead to a legal response in other countries against U.S. activities overseas⁹⁹⁵ such as drone strikes.

Saudi foreign minister, Adel al-Jubeir, said JASTA represents a grave danger to the international system by eroding the principle sovereign immunities, and that the U.S. will suffer more by the erosion of this principle than other countries.⁹⁹⁶ The Saudi minister gave examples of drone attacks or support for the moderate Syrian opposition from Washington.⁹⁹⁷ Commenting on the law, Al-Jubeir suggested that if people could sue against policies taken by governments and officials in their discretionary function, international order would become governed by the law of the jungle and there would be no international system.⁹⁹⁸ Basically, the Saudi foreign minister defended the right to national interest, which includes the violation of fundamental human rights without facing justice – neither of the two positions seems reasonable enough to

⁹⁹² Foreign State is defined at 28 U.S.C. § 1603(a)(b).

⁹⁹³ Immunity in cases involving torture, extrajudicial killing, aircraft sabotage, and hostage-taking were added by the *National Defense Authorization Act for Fiscal Year 2008*, Pub. L. 110-181, 122 Stat. 3.

⁹⁹⁴ MFA of the Russian Federation (2016a).

⁹⁹⁵ Obama, Barack (2016a), “Veto Message from the President - S.2040 to the Senate of the United States”, 23 Sept. 2016, Cong. Rec., Vol. 162, No. 145 of 26 Sept. 2016, S6071-6072.

⁹⁹⁶ Al-Jubeir, Adel bin Ahmed (2016), “Joint Press Availability with Saudi Arabian Foreign Minister Adel al-Jubeir”, Department of State, 18 Dec. 2016. Available at <http://www.state.gov/secretary/remarks/2016/12/265750.htm> (accessed 19 Dec. 2016).

⁹⁹⁷ Ibid.

⁹⁹⁸ Ibid.

defend, but nevertheless they are a testament to the inability of international actors to come to terms in respect to the War on Terror.

The international legal system is undermined by the behavior of countries that were its strongest supporters. In autumn 2016, African countries began the process of de-legitimization and destruction of the ICC by withdrawing from it. On 19 October 2016 South Africa denounces the Rome Statute. Justice Minister, Michael Masutha, has justified the decision because of an arrest warrant for crimes against humanity against Sudanese president al-Bashir, who enjoys diplomatic immunity as a head of a state under international customary law.⁹⁹⁹ Pretoria argues that the ICC's Rome Statute is at odds with its laws granting leaders diplomatic immunity.¹⁰⁰⁰ By expressing regret for the South African government's decision to withdraw from the tribunal, the South African Human Rights Commission (SAHRC) recalls the absence of regional courts with criminal jurisdiction.¹⁰⁰¹

In Spring 2016, the OIC Islamic Summit calls for the removal of Sudan from the U.S. list of terrorism-sponsoring states and expresses its total rejection of all forms of foreign interference in Sudan's affairs, especially the ICC allegations against President al-Bashir, calling for the Court's decision to be permanently rescinded.¹⁰⁰²

The government of Burundi sought, unsuccessfully, for international solidarity and called for the persecution of the "terrorists" who promoted the attempted coup on 13 May 2015, but did not receive the same attention that the international community paid in July 2016 to the failed Turkish coup d'état. The ICC prosecutor refused to issue international arrest warrants against the perpetrators of the attempted coup in Burundi. The UNSC did not find any reason to exercise its mandate under the Rome Statute.¹⁰⁰³ Therefore, in October 2016 the president of the Republic of Burundi, Pierre Nkurunziza, joined South Africa and withdrew his country from the ICC.¹⁰⁰⁴

⁹⁹⁹ Masutha, Michael (2016), "Minister Michael Masutha: Media briefing on International Criminal Court and Sudanese President Omar Al Bashir", South African Government, 21 Oct. 2016. Available at <http://www.gov.za/speeches/minister-michael-masutha-media-briefing-international-criminal-court-and-sudanese-president> (accessed 29 Oct. 2016).

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ SAHRC (2016), "Human Rights Commission concerned by South Africa's withdrawal from International Criminal Court" 22 Oct. 2016. Available at <http://www.gov.za/speeches/south-african-human-rights-commission-22-oct-2016-0000> (accessed 29 Oct. 2016).

¹⁰⁰² OIC (2016a), § 77, 78.

¹⁰⁰³ Nahimana, Vestine (2016), "Why Burundi Has Withdrawn from the Rome Treaty". Available at <http://www.burundi.gov.bi/spip.php?article1609> (accessed 29 Oct. 2016).

¹⁰⁰⁴ Law No. 1/14 of 18 Oct. 2016 on the withdrawal of the Republic of Burundi from the Rome Statute of the International Criminal Court in Rome on July 17, 1998.

Burundi accuses the Court of being "an instrument of political pressure on poor countries and their governments with the intent to control then dominate or destabilize them" by starting investigations against African leaders under pressure from major powers.¹⁰⁰⁵ Vestine Nahimana, Ambassador of Burundi in The Hague, substantiates the decision as follows: "Unfortunately some world powers, the project initiators of the creation of this Court who instigated others, mainly African countries to ratify the Rome Statute to the extent of using pressure, refused to ratify the Statute with the intention of protecting their potential criminals".¹⁰⁰⁶

The government of Burundi complicated things by calling the perpetrators of the events of April-May 2015 "radical opposition activists", "terrorist elements", and finally "criminals". It seems a clumsy attempt to misuse terrorism, and to use the Court to persecute political opponents. Nahimana stated that the "violent demonstrations" which occurred in April 2015 "turned into acts of terrorism", and that the "insurrection" ended with the coup attempt.¹⁰⁰⁷ It is not possible to equate political dissidents, activists, demonstrators and insurgents with terrorists or criminals.

Burundi suffers from the lack of attention from Western powers and international organizations: the Security Council did not intervene promptly in the 1993 mass killing of Tutsis, which the UN later called genocide.¹⁰⁰⁸ One month before the ICC withdrawal, in September 2016, the UN independent investigation on Burundi (UNIIB) accused the government of Bujumbura of GHRV by denouncing reports of murder, torture and rape.¹⁰⁰⁹

The Gambia joined South Africa and Burundi, and declared that the ICC ignores war crimes by Western nations. The withdrawal from the ICC was announced by Gambia's information minister, Sheriff Bojang on state television on 25 October 2016.¹⁰¹⁰ African states have long complained that the tribunal is biased, and that it prosecutes some Africans while ignores others. The Gambian information minister renamed the ICC "the International Caucasian Court".¹⁰¹¹ Other African countries perceive the ICC as an instrument of colonial justice that

¹⁰⁰⁵ Nahimana.

¹⁰⁰⁶ Ibid.

¹⁰⁰⁷ Ibid.

¹⁰⁰⁸ UNHRC, *Report of the Commission of Inquiry on Burundi*, 11 Aug. 2017, A/HRC/36/54, § 75.

¹⁰⁰⁹ UNHRC, *Report of the United Nations Independent Investigation on Burundi (UNIIB) established pursuant to Human Rights Council resolution S-24/1*, 20 Sept. 2016, A/HRC/33/37.

¹⁰¹⁰ Bavier, Joe (2016), "Gambia announces withdrawal from International Criminal Court", Reuters, 26 Oct. 2016. Available at <http://www.reuters.com/article/us-gambia-icc-idUSKCN12P335?il=0> (accessed 29 Oct. 2016).

¹⁰¹¹ Ibid.

unfairly targets the continent. This difference of opinion is one of the problems that prevents the international community from reaching a common definition of terrorism.

Gambia has a history of not respecting human rights, and rulings of regional interstate judicial organs that directly violate such right. The UN special rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez, finds Gambia liable for practicing, with impunity, acts that violate human rights, including torture, which is "prevalent and routine", in particular during the initial stages of detention.¹⁰¹² The judiciary lacks independence to uphold procedural safeguards that are required by international law.¹⁰¹³ Gambia has refused to implement three binding decisions by the Economic Community of West African States (ECOWAS) Court of Justice, which has competence to hear individual complaints of alleged human rights violations, regarding the torture, murder and disappearance of journalists.¹⁰¹⁴ Bull is, therefore, right when stating that order is an important good,¹⁰¹⁵ but it is distinct from justice, and the preservation of world order may be neither necessary nor sufficient for achieving justice.¹⁰¹⁶ The political manipulation of international justice is destroying its effectiveness and credibility.

The international society as described in 1977 by Bull¹⁰¹⁷ is seemingly at an end. States do not share common interests or values, do not regard themselves as bound by common rules, which provide standards of conduct, and do not cooperate in making common institutions operate properly. Hence, it appears that states do not care of justice, only order. International law is trampled upon, along with fundamental human rights, as evidenced by the cases noted above.

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¹⁰¹² UNHRC, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Mission to The Gambia*, 16 Mar. 2015, A/HRC/28/68/Add.4, § 97 et seq.

¹⁰¹³ A/HRC/28/68/Add.4, § 99.

¹⁰¹⁴ See: *Etim Moses Essien v. The Gambia and University of The Gambia*, AHRLR 131 (ECOWAS 2007), Case No. ECW/CCJ/APP/05/05, 14 Mar. 2007; *Musa Saïdykhan v. The Gambia*, Case No. ECW/CCJ/APP/11/07, judgment No. ECW/CCJ/JUD/08/10 of 16 Dec. 2010; "*Chief*" *Ebrimah Manneh v. The Gambia*, AHRLR 171 (ECOWAS 2008), Case No. ECW/CCJ/APP/04/07, judgment No. ECW/CCJ/JUD/03/08 of 5 June 2008; *Deyda Hydara Jr., Ismaila Hydra and International Federation of Journalists-Africa v. The Gambia*, Case No. ECW/CCJ/APP/30/11, judgment of 10 June 2014.

¹⁰¹⁵ Bull (1977).

¹⁰¹⁶ Bull, Hedley (1971), "Order versus Justice in International Society", *Political Studies*, Vol. 19, No. 3 (Sept.), p. 269–283. DOI: 10.1111/j.1467-9248.1971.tb00674.x.

¹⁰¹⁷ Bull (1977), p. 13.

In his annual report 2014, the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, poses some "urgent and imperative" questions to address, including the legitimacy of non-consensual entering on the territory of another state to conduct a CT operation against a non-state armed group without the state's consent.¹⁰¹⁸

One wonders, how should such a strike be considered in a hybrid conflict, as it is often presented as an act of self-defense to give it an aura of legitimacy before the international community. Do these operations respect international law, and IHL? This is an interesting question, in particular for the War on Terror, and for all conflicts that, in some way, are connected to it, such as the Syrian conflict.

Dos Reis Peron finds that the employment of drones in targeted killing operations is an in-discriminant and disproportionate use of force that violates the state sovereignty.¹⁰¹⁹ These operations are conducted mostly in Afghanistan, Pakistan, Somalia and Yemen. Both the CIA and the U.S. army's elite special forces ran covert operations in Iraq, Syria, Afghanistan and Pakistan.¹⁰²⁰ To conduct operations on foreign soil, the U.S. must obtain consent from the host country. The U.S. operation carried out in Abbottabad on 2 May 2011, which resulted in the death of Osama bin Laden was conducted without such consent, and is a violation of Pakistani sovereignty, as well as constituting a violation of fundamental human rights.

In December 2013, the National Assembly of Pakistan passed the first resolution that strongly condemns the drone attacks by the Allied Forces as a violation of the principles of the UN Charter, of international laws, and of IHL.¹⁰²¹ The Parliament calls the U.S. government to immediately end the drone attacks in Pakistan, as they ran against international law.¹⁰²²The

¹⁰¹⁸ A/HRC/25/59, § 71(a)(b). For a discussion of the issues, see: A/68/389, § 55, 56; A/68/382, § 88-92.

¹⁰¹⁹ dos Reis Peron, Alcides Eduardo (2014), "The 'Surgical' Legitimacy of Drone Strikes? Issues of Sovereignty and Human Rights in the Use of Unmanned Aerial Systems in Pakistan", JSS, Vol. 7, No. 4, pp. 81-93. DOI: <http://dx.doi.org/10.5038/1944-0472.7.4.6>.

¹⁰²⁰ Clark, J. Ransom (2015), *American Covert Operations: A Guide to the Issues*, Santa Barbara, ABC-CLIO, pp. 186-188. See also: Durham, Robert B (2014), *False Flags, Covert Operations, and Propaganda*, Raleigh, Lulu.com, pp. 247-250.

¹⁰²¹ National Assembly of Pakistan (2013), Resolution No. 25 of 10 Dec., 2013 [The House strongly condemns the Drone Attacks by the Allied Forces on the Territory of Pakistan]. Available at http://www.na.gov.pk/en/resolution_detail.php?id=140 (accessed 20 June 2016).

¹⁰²² National Assembly of Pakistan (2013), Resolution No. 30 of 20 Dec. 2013, [N.A. appreciates the efforts of the Government of Pakistan, culminating in the adoption by the United Nations General Assembly of a resolution

Pakistani executive condemned such attacks as a violation of its sovereignty. One example was the drone strike of 21 May 2016, in which the Taliban leader, Mullah Akhtar Mohammad Mansour, was killed.¹⁰²³ State secretary John Kerry confirms that the U.S. conducted a precision airstrike that targeted Mansour in a remote area of the Afghanistan-Pakistan border region.¹⁰²⁴ According to the Afghan Taliban, their leader was killed in the border area between Kandahar's Registan and Baluchistan's Nushki.¹⁰²⁵ The killing of Mansour, beyond being a violation of the Pakistani sovereignty, can be classified as a SHRV. Interestingly, while the Taliban are not blacklisted as terrorists, Mullah Mansour was designated as a terrorist by the UN.¹⁰²⁶ Airstrikes are part of the tactics adopted by governments to combat terrorism abroad. The U.S., Israel and the UK are alleged to have carried out 30 strikes in Afghanistan, Pakistan, Yemen, Somalia and Gaza between 2006 and 2013.¹⁰²⁷

Responding to terrorist attacks with punitive airstrikes is a consolidated policy of Western governments that is prohibited under international law. The International Committee of the Red Cross (ICRC) customary law study describes a belligerent reprisal as: "an action that would otherwise be unlawful but that in exceptional cases is considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary".¹⁰²⁸ Many scholars describe a reprisal a serious violation of IHL.¹⁰²⁹ Art. 46 of Geneva Convention (I) categorically prohibits reprisals against protected persons and objects in situations of international armed conflict. Zimmermann argues that, in the context of armed

against the use of drone strikes]. Available at http://www.na.gov.pk/en/resolution_detail.php?id=142 (accessed 20 June 2016).

¹⁰²³ MOFA of Pakistan (2016), "Pakistan expressed concern over drone strike", 23 May 2016. Available at <http://www.mofa.gov.pk/pr-details.php?mm=Mzc0OA> (accessed 11 June 2016).

¹⁰²⁴ Kerry, John (2016e), "Joint Press Availability With Burmese Foreign Minister Daw Aung San Suu Kyi", Department of State, 22 May 2016. Available at <http://www.state.gov/secretary/remarks/2016/05/257583.htm> (accessed 11 June 2016).

¹⁰²⁵ The Islamic Emirate of Afghanistan's Leadership Council (2016), "Statement by the Leadership Council of Islamic Emirate regarding the martyrdom of Amir ul Mumineen Mullah Akhtar Muhammad Mansour and the election of the new leader", Al Emarah, 25 May 2016. Available at <http://alemarah-english.com/?p=52> (accessed 15 Aug. 2016).

¹⁰²⁶ Nicholson, John W., Jr. (2017), "Press Briefing with General Nicholson in Brussels, Belgium", DoD Press Operations, 10 Nov. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1369768/press-briefing-with-general-nicholson-in-brussels-belgium> (accessed 11 Nov. 2017).

¹⁰²⁷ A/HRC/25/59, § 33.

¹⁰²⁸ Henckaerts and Doswald-Beck, p. 513.

¹⁰²⁹ Id. p. 515. See also: Greenwood, Christopher J. (1989), "The Twilight of the Law of Belligerent Reprisals", *Netherlands Yearbook of International Law*, Vol. 20, p. 35; Kalshoven, Frits (2005), *Belligerent reprisals*, Leiden, Martinus Nijhoff (2nd edition), pp. 321-322.

conflict, reprisals are as a rule unlawful, except those carried out in particular circumstances, such as in response to a breach committed by the adversary.¹⁰³⁰

Although reprisal is not strictly prohibited during armed conflict, its use is severely restricted under international law.¹⁰³¹ Articles 54(4), 55(2), and 56(4) of Additional Protocol I, which applies only in international conflict, and the *Conventional Weapons Convention*¹⁰³² prohibit targeting objects indispensable to the survival of the civilian population, even where they are military objectives. Pictet argues that reprisals have to be considered absolutely and permanently prohibited in non-international conflicts under the acts referred to under items (a) to (d) of Common Article 3,¹⁰³³ as incompatible with the humane treatment.¹⁰³⁴ Reprisal would fall, then, among the grave breaches of the Conventions that are considered war crimes.

In the aftermath of the terror attacks that occurred in Paris in November 2015, the French president, François Hollande, characterized the bombings as "an act of war".¹⁰³⁵ Hollande claimed that France was "at war" against *jihadi* terrorism.¹⁰³⁶ As revenge for the attack suffered, France sent fighter jets to bomb ISIS sites in Syria.¹⁰³⁷ French Prime minister Valls invoked the right to self-defense, as provided for by Art. 51 of the UN Charter.¹⁰³⁸ Right after, Russia¹⁰³⁹ and the UK¹⁰⁴⁰ began bombing Syria, too. Art. 2(4) of the *Charter of the United*

¹⁰³⁰ Zimmermann, Bruno (1987), "Part V: Execution of the Conventions and of this Protocol, Section II-Repression of Breaches of the Conventions and of this Protocol", in Yvez Sandoz et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August of 1949*, Geneva, Martinus Nijhoff Publishers, p. 982.

¹⁰³¹ Art. 52 of Additional Protocol I stresses that civilian objects may not be the object of attack or reprisals.

¹⁰³² *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, done at Geneva, on 10 Oct. 1980, UNTS, Vol. 1342, No. 22495 (1983), p. 137; *Amendment to the Conventional Weapons Convention*, done at Geneva, on 21 Dec. 2001, CCW/CONF/II/2, UNTS, Vol. 2260, No. 22495 (1983), p. 82.

¹⁰³³ (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

¹⁰³⁴ Pictet (1952), p. 54-55.

¹⁰³⁵ Hollande, François (2016), "Speech by the President of the Republic before Parliament in joint Congress", Élysée, 16 Nov. 2016. Available at <http://www.elysee.fr/declarations/article/discours-du-president-de-la-republique-devant-le-parlement-reuni-en-congres-3> (accessed 12 Mar. 2016).

¹⁰³⁶ Ibid.

¹⁰³⁷ Valls, Manuel (2015), "Syria: 'France is at war against terrorism, jihadism and radical Islam. It will be a long process but we shall prevail'", *Gouvernement.fr*, 17 Sept. 2015. Available at <http://www.gouvernement.fr/en/syria-france-is-at-war-against-terrorism-jihadism-and-radical-islam-it-will-be-a-long-process-but> (accessed 12 Mar. 2016).

¹⁰³⁸ Valls.

¹⁰³⁹ The Kremlin (2015), "Meeting on Russia's Armed Forces actions in Syria", 17 Nov. 2015. Available at <http://en.kremlin.ru/events/president/news/50714> (accessed 12 Mar. 2016).

*Nations*¹⁰⁴¹ prohibits the "threat or use of force against the territorial integrity or political independence of any state" except if authorized by the Security Council or where it is in self-defense. According to the UN Charter, member states are allowed to use force only for self-defense purposes (Art. 51) or by UNSC authorization to restore international peace and security (Art. 43-48).

In a speech delivered in September 2015 at the UN General Assembly, the Russian president, Vladimir Putin, addresses the issue of counter-terrorism in the framework of international law.¹⁰⁴² Putin finds that any assistance to sovereign nations, such as Syria, should comply with the UN Charter, and that the UN should support only measures taken in accordance with international law, and should reject any actions which are in breach of its charter. Accordingly, a comprehensive assistance can be provided only to the legitimate government of Syria, headed by Bashar al-Assad.¹⁰⁴³

The Syrian National Coalition (SNC) achieved many recognitions as "the (sole) legitimate representative of the Syrian people", even by the EU and the Arab League,¹⁰⁴⁴ but none as a government in exile. These recognitions do not strip the regime of Assad from its role within the international community; Damascus still holds the UN seat, and SNC is granted only some foreign mission and the appointment of political representatives, which are other than an embassy or an ambassador. This is one of the several inconsistencies of the U.S. and of its allies.

Counter-terrorism is a pretext to intervene in a sovereign country. Several governments justify their military intervention in Syria with the fight against terrorism. Turkey motivates its interventions in Syria and Iraq to fight terrorist organizations Daesh, PYD, YPG, PKK, and to

¹⁰⁴⁰ Fallon, Michael (2015), "RAF conduct first air strikes in Syria", Gov.UK, 23 Dec. 2015. Available at <https://www.gov.uk/government/news/raf-conduct-first-air-strikes-in-syria> (accessed 12 Mar. 2016).

¹⁰⁴¹ The *Charter of the United Nations* was signed on 26 June 1945, in San Francisco, at the conclusion of the UN Conference on International Organisation, and came into force on 24 Oct. 1945. The Statute of the ICJ is an integral part of the Charter. Amendments to Art. 23, 27 and 61 of the Charter were adopted by the General Assembly on 17 Dec. 1963 and came into force on 31 Aug. 1965. A further amendment to Art. 61 was adopted by the General Assembly on 20 Dec. 1971, and came into force on 24 Sept. 1973. An amendment to Art. 109, adopted by the General Assembly on 20 Dec. 1965, came into force on 12 June 1968.

¹⁰⁴² Putin, Vladimir (2015), "Vladimir Putin took part in the plenary meeting of the 70th session of the UN General Assembly in New York", The Kremlin, 28 Sept. 2015. Available at <http://en.kremlin.ru/events/president/news/copy/50385> (accessed 9 Nov. 2015).

¹⁰⁴³ Ibid.

¹⁰⁴⁴ National Coalition of Syrian Revolution and Opposition Forces (2017). Available at <http://en.etilaf.org> (accessed 12 Apr. 2017).

secure the "terror corridor" along its southern border.¹⁰⁴⁵ When, in August 2016, after a wave of bombings in Turkey, Ankara launches the Operation Euphrates Shield and invades Syria, claims that it is an operation against terrorist organizations, such as Daesh and the Democratic Union Party (PYD), which constantly threaten the country from northern Syria.¹⁰⁴⁶ Ankara states that the invasion Syrian soil is motivated to carry out operations against the Kurdistan Workers' Party (PKK) terrorist organization.¹⁰⁴⁷ President Erdoğan claims that Turkish troops entered Syria "in order to end the rule of Assad who has been responsible for state led terror".¹⁰⁴⁸

The Syrian General Command of the Army and Armed Forces considers any presence of Turkish army units across the border into the country an "occupation force", does not matter if they claim to fight ISIS or whatever excuse.¹⁰⁴⁹ Behind these justifications are hidden the real reasons of the invasion of a sovereign state: the struggle for supremacy in the Muslim world; the religious clash between Shiites and Sunnis, and the crackdown of Kurdish separatists.¹⁰⁵⁰

The Russian government deems the advance of the Turkish troops into Syrian territory a threat to the sovereignty and territorial integrity of Damascus.¹⁰⁵¹ The Russian permanent mission at the UN presented a draft resolution to the members of the Security Council calling for respect of Syria's sovereignty and territorial integrity, according the UN Charter and SC Res. 2254, but no agreement was reached.¹⁰⁵² Three months later, for their respective reasons of

¹⁰⁴⁵ Erdoğan, Recep Tayyip (2016), "We Won't Be a Spectator to Developments That Concern Our Security", Presidency of the Republic of Turkey, 22 Oct. 2016. Available at <http://www.tccb.gov.tr/en/news/542/55722/we-wont-be-a-spectator-to-developments-that-concern-our-security.html> (accessed 23 Oct. 2016)

¹⁰⁴⁶ Erdoğan, Recep Tayyip (2016), "Turkey will never give consent to a fait accompli in Syria", Presidency of the Republic of Turkey, 24 Aug. 2016. Available at <https://www.tccb.gov.tr/en/news/542/51060/turkiye-suriyede-sahneye-konulmaya-calisan-oyuna-asla-riza-gostermeyecek.html> (accessed 25 Aug. 2016).

¹⁰⁴⁷ Erdoğan, Recep Tayyip (2016), "We Are Assuming an Active Role to Foil the Plots Aimed at a Sectarian War in Mosul", Presidency of the Republic of Turkey, 22 Oct. 2016. Available at <http://www.tccb.gov.tr/en/news/542/55716/we-are-assuming-an-active-role-to-foil-the-plots-aimed-at-a-sectarian-war-in-mosul.html> (accessed 23 Oct. 2016).

¹⁰⁴⁸ Erdoğan, Recep Tayyip (2016), "Palestinian Issue Serves as a Litmus Test for the UN Security Council", Presidency of the Republic of Turkey, 29 Nov. 2016. Available at <https://www.tccb.gov.tr/en/news/542/61163/palestinian-issue-serves-as-a-litmus-test-for-the-un-security-council.html> (accessed 30 Nov. 2016).

¹⁰⁴⁹ Said, H. (2016), "Army Command: Any Turkish military presence inside Syria will be dealt with as an 'occupation force'", SANA, 22 Oct. 2016. Available at <http://sana.sy/en/?p=91290> (accessed 31 Oct. 2016).

¹⁰⁵⁰ Marsili, Marco (2016b), "The Islamic State: A Clash within the Muslim Civilization for the New Caliphate", *Studies in Conflict and Terrorism*, Vol. 39, No. 2. DOI: 10.1080/1057610X.2015.1100010.

¹⁰⁵¹ MFA of the Russian Federation (2016b), "Foreign Ministry statement on Turkey's military operation in Syria", 7 Sept. 2016. Available at http://www.mid.ru/en/press_service/spokesman/official_statement/-/asset_publisher/t2GCdmD8RNIr/content/id/2424916 (accessed 18 Sept. 2016).

¹⁰⁵² UNSC, The situation in the Middle East, agenda of the 7785th meeting, Journal of the United Nations, No. 2016/196 of 11 Oct. 2016, p. 21.

foreign policy, Russia and Turkey change their mind, and draft jointly the text of a draft resolution which is unanimously adopted by the SC.¹⁰⁵³

The first violation of the Syrian soil by Turkish troops takes place in February 2015 in the Operation Shah Euphrates, aimed to protect the Tomb of Suleyman Shah.¹⁰⁵⁴ According to Art. 9 of the *Treaty of Ankara* of 1921,¹⁰⁵⁵ and to Art. 3 of the *Treaty of Lausanne* of 1923,¹⁰⁵⁶ the tomb is the property of Turkey. The Lausanne treaty delimits Turkish boundaries, ceding all Turkish claims, among the others, on Syria and Iraq (Art. 3). Along with the *Treaty of Ankara*, signed by France and Turkey in 1921, and the *Treaty between Great Britain, Iraq, and Turkey*,¹⁰⁵⁷ the *Treaty of Lausanne* settles the boundaries of Syria and Iraq. The fight against terrorism is a pretext to reconsider borders: "[t]he Lausanne Treaty is not an indisputable text", concludes Turkish president Erdoğan,¹⁰⁵⁸ and outlines the Turkish strategy which aims with the excuse of fighting terrorism, to invade another country, occupy part of its territory and annex it.¹⁰⁵⁹

Finally, in January 2018, at the end of this military and political escalation, Turkey launches the Operation Olive Branch against the Kurds in Northern Syria, part of the Operation Euphrates Shield, with the well-known purpose to fight and eliminate the “terrorist organizations” SDF, PKK, PYD, and YPG.¹⁰⁶⁰ Once again, President Erdoğan blames the U.S. and the EU collaboration with PKK, which is proscribed in both jurisdictions.¹⁰⁶¹ The authorities

¹⁰⁵³ UNSC, Resolution 2336 (2016).

¹⁰⁵⁴ Kalin, Ibrahim (2015), "The Presidency's Spokesperson Kalin: 'The Decision of Operation Shah Euphrates Completely Belongs to Turkey and It Launched the Operation with its own Capabilities'", Presidency of the Republic of Turkey, 23 Feb. 2015. Available at <https://www.tccb.gov.tr/en/news/542/3473/the-presidencys-spokesperson-kalin-the-decision-of-operation-shah-euphrates-completely-belongs-to-turkey-and-it-launched-the-operation-with-its-own-capabilities.html> (accessed 13 Oct. 2016).

¹⁰⁵⁵ *Franco-Turkish Agreement*, signed at Ankara, on 20 Oct. 1921, LNTS, Vol. 54, pp. 178-193.

¹⁰⁵⁶ *Treaty of Peace with Turkey*, signed at Lausanne, on 24 July 1923, in *The Treaties of Peace 1919-1923, Vol. II* (1924), New York, Carnegie Endowment for International Peace.

¹⁰⁵⁷ *Treaty between Great Britain, Iraq, and Turkey delimited the final boundary*, signed at Ankara, on 5 June 1926, UNTS, No. 18 (1927).

¹⁰⁵⁸ Erdoğan, Recep Tayyip (2016), “Nothing Can Stop a Nation That Does Not Fear Death”, Presidency of the Republic of Turkey, 22 Jan. 2016. Available at <http://www.tccb.gov.tr/en/news/542/61094/nothing-can-stop-a-nation-that-does-not-fear-death.html> (accessed 23 Nov. 2016).

¹⁰⁵⁹ Marsili (2016b), p. 87.

¹⁰⁶⁰ Erdoğan, Recep Tayyip (2018), “The Afrin Operation Has Begun in the Field”, Presidency of the Republic of Turkey, 20 Jan. 2018. Available at <https://www.tccb.gov.tr/en/news/542/89144/the-afrin-operation-has-begun-in-the-field.html> (accessed 22 Jan. 2018).

¹⁰⁶¹ Ibid.

of Ankara justify the intervention on the grounds of national security and to protect the Syrian population.¹⁰⁶²

Turkey also invades northern Iraq, an area with Kurdish majority. After having trained some Sunni groups near Bashiqa, Iraq,¹⁰⁶³ in December 2015 the Turkish forces enter the neighboring country.¹⁰⁶⁴ The Iraqi Ministry of Foreign Affairs calls on Turkey to withdraw immediately from the Iraqi territory, affirming that the presence of Turkish troops constitutes a gross violation of the sovereignty of Baghdad.¹⁰⁶⁵ Iraq's Parliament adopts a resolution denouncing the extension of Turkish troops' presence, asking the government to consider them as "occupation forces". Baghdad requests an emergency UN Security Council session over the presence of Turkish troops.¹⁰⁶⁶

The U.S. Department of Defense clarifies that the Turkish forces stationing in Iraq are not part of the Combined Joint Task Force-Operation Inherent Resolve (CJTF-OIR), but on their own. The CJTF-OIR, the largest military coalition in history – 79 members, 74 nations plus NATO, Interpol, the European Union, the Arab League and the Community of Sahel-Saharan States (CEN-SAD)¹⁰⁶⁷ – was established to defeat ISIS in Iraq and Syria.¹⁰⁶⁸ The Pentagon adds that the coalition position is that every force should be in Iraq with the coordination or and with the permission of the government, and emphasizes that Turkish troops are not there under the auspices of the coalition presence.¹⁰⁶⁹ The Trump administration upholds this stance.¹⁰⁷⁰ This

¹⁰⁶² Ibid.

¹⁰⁶³ Townsend, Stephen (2016), "Department of Defense Press Briefing by Lt. Gen. Townsend via teleconference from Baghdad, Iraq", DoD Press Operations, 14 Dec. 2016. Available at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/1030405/departement-of-defense-press-briefing-by-lt-gen-townsend-via-teleconference-from> (accessed 15 Dec. 2016).

¹⁰⁶⁴ PM of Iraq (2015), "Prime Minister's Media Office: The Iraqi government calls on Turkey to respect good neighbourly relations and to withdraw immediately from the Iraqi territory", 5 Dec. 2015. Available at <http://www.pmo.iq/pme/press2015en/5-12-20151en.htm> (accessed 3 Nov. 2016).

¹⁰⁶⁵ Jamal, Ahmed (2016a), "MOFA Spokesperson: MOFA Expresses Rejection for Mr Erdoğan's Repetitious Statements, Concerning the Mosul Liberation Operation, Constituting a Gross Interference in Iraq's Internal Affairs", Iraqi MOFA, 2 Oct. 2016. Available at <http://www.mofa.gov.iq/en/news.php?articleid=1158> (accessed 23 Nov. 2016).

¹⁰⁶⁶ Jamal, Ahmed (2016b), "MOFA Spokesperson: MOFA Submittes a Request to the Security Council to Convene an Urgent Meeting on the Turkish Breach for the Iraqi Territories", Iraqi MOFA, 5 Oct. 2016. Available at <http://www.mofa.gov.iq/en/news.php?articleid=1163> (accessed 13 Oct. 2016).

¹⁰⁶⁷ The Global Coalition against Daesh (2017), "Partners". Available at <http://theglobalcoalition.org/en/partners> (accessed 25 May 2017).

¹⁰⁶⁸ CJTF-OIR (2017a), "Our Mission". Available at <http://www.inherentresolve.mil/Portals/1/Documents/Mission/Mission.pdf?ver=2016-03-23-091705-717> (accessed 22 Dec. 2017).

¹⁰⁶⁹ Dorrian, John L. (2016), "Department of Defense Press Briefing by Col. Dorrian via teleconference from Baghdad, Iraq", DoD Press Operations, 12 Oct. 2016. Available at

is an interesting side-note as Washington congratulated Ankara for the successes in Operation Euphrates Shield that the U.S. calls Operation Noble Lance,¹⁰⁷¹ and for the critical role played in the counter-ISIS campaign in Syria and Iraq.¹⁰⁷² The U.S. considers Turkey an important part of the coalition's activities against ISIS,¹⁰⁷³ and works extensively with the Turkish military in Syria,¹⁰⁷⁴ in violation of international law.

In the fight against ISIS, Turkey conducted airstrikes that killed combatants of CJTF-OIR partner forces SDF and Syrian Arab Coalition in Syria, and Kurdish Peshmerga in Iraq.¹⁰⁷⁵ The Kurdistan Regional Government (KRG) accuses Ankara of targeting PKK within the Iraqi territory.¹⁰⁷⁶ Turkey hit PKK bases in the Kurdistan Region of Iraq several times.¹⁰⁷⁷ Despite the complaints from Damascus and Baghdad, and the repeated violations of international law, the chairman of the U.S. Joint Chiefs of Staff, general Joe Dunford, reached an agreement to make the coalition and Turkey working "together on the long-term plan for seizing, holding and governing Raqqa" and other sites like Mosul.¹⁰⁷⁸ Washington found a political point of balance

<http://www.defense.gov/News/Transcripts/Transcript-View/Article/971798/departement-of-defense-press-briefing-by-col-dorrian-via-teleconference-from-bag> (accessed 13 Oct. 2016).

¹⁰⁷⁰ Martin, Joseph (2017), "Department of Defense Press Briefing by General Martin via teleconference from Baghdad, Iraq", DoD Press Operations, 25 Jan. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1060252/departement-of-defense-press-briefing-by-general-martin-via-teleconference-from> (accessed 26 Jan. 2017).

¹⁰⁷¹ McGurk, Brett (2016b), "Press Conference on Counter-ISIL Efforts", Department of State, 6 Nov. 2016. Available at <http://www.state.gov/s/seci/264166.htm> (accessed 8 Nov. 2016).

¹⁰⁷² Cook, Peter (2016a), "Readout of Secretary Carter's Meetings with Turkish Leaders in Ankara", DoD, press release 375-16, 21 Oct. 2016. Available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/981549/readout-of-secretary-carters-meetings-with-turkish-leaders-in-ankara> (accessed 22 Oct. 2016).

¹⁰⁷³ Carter, Ashton (2016), "Media Availability with Secretary Carter at NATO Headquarters, Brussels, Belgium", DoD Press Operations, 26 Oct. 2016. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/987629/media-availability-with-secretary-carter-at-nato-headquarters-brussels-belgium> (accessed 15 Dec. 2017).

¹⁰⁷⁴ Ibid.

¹⁰⁷⁵ Dorrian, John L. (2017a), "Department of Defense Press Briefing by Col. Dorrian via Teleconference from Baghdad, Iraq", DoD Press Operations, 26 Apr. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1163952/departement-of-defense-press-briefing-by-col-dorrian-via-teleconference-from-bag> (accessed 27 Apr. 2017).

¹⁰⁷⁶ Ministry of Peshmerga Affairs (2017), "Five Peshmerga martyred and nine wounded as a result of Turkey's attacks on PKK positions on and around Mt. Sinjar", General Command of Peshmerga Forces of Kurdistan Region, 25 Apr. 2017. Available at <https://twitter.com/GCPFKurdistan/status/856834908894965760> (accessed 27 Apr. 2017).

¹⁰⁷⁷ KRP (2015), "KRP Issues a Statement on Turkey's Military Actions Against the PKK", 1 Aug. 2015. Available at <http://www.presidency.krd/english/articledisplay.aspx?id=SV5Wqw2zOPY=>. See also: KRP (2015), "KRP Issues a Statement of Condemnation", 1 Aug. 2015. Available at <http://presidency.krd/english/articledisplay.aspx?id=gDjyOJzCxGs=> (accessed 27 Apr. 2017).

¹⁰⁷⁸ Garamone, Jim (2016a), "Dunford, Turkish Leaders Create Long-term Plan Against ISIL in Raqqa", DoD News, Defense Media Activity, 6 Nov. 2016. Available at <http://www.defense.gov/News/Article/Article/997373/dunford-turkish-leaders-create-long-term-plan-against-isil-in-raqqa> (accessed 7 Nov. 2016).

for including the Turks in the operations in Iraq and Syria, along with the FSA and the SDF, which were originally composed primarily of Kurdish personnel, and afterwards become a more multi-ethnic, predominantly Arab and Sunni Arab force,¹⁰⁷⁹ led by their Syrian Arab Coalition (SAC). There remains the problem of the different attitude towards PYD and YPG.

It could be argued that the U.S. conducts some operations illegally in Syria. Damascus denounces the presence on Syrian soil of groups of French and German special forces, in flagrant violation of UN Charter's principles, as an "overt unjustified aggression on the sovereignty and independence" of the country.¹⁰⁸⁰ The U.S. forces are in Syria¹⁰⁸¹ and Yemen¹⁰⁸² to fight under the AUMF against Al-Qaeda and associated elements.

In October 2015 the U.S. deploys less than 50 Special Operations Forces (SOF) in Syria, to train, advice and assist local forces against ISIS.¹⁰⁸³ In September 2016 President Obama announces an additional 250 deployment, up to 300 units, "to help coordinate U.S. operations with indigenous ground forces".¹⁰⁸⁴ In December 2016, the secretary of defense, Ash Carter, announces that the United States will deploy approximately 200 additional forces, including SOF trainers and advisors, in addition to the 300 already in the country.¹⁰⁸⁵ As of January 2017, total number of U.S. Mobile Task Force (MTFs) deployed in Syria is some 495.¹⁰⁸⁶ While sending

¹⁰⁷⁹ Ibid.

¹⁰⁸⁰ Milhem, R. and Ghossoun (2016), "Syria condemns presence of French and German special forces in Ain al-Arab and Manbij", SANA, 15 June 2016. Available at <http://sana.sy/en/?p=80201> (accessed 31 Oct. 2016).

¹⁰⁸¹ Mattis, James (2018), "Media Availability with Secretary Mattis at the Pentagon", DoD Press Operations, 30 Apr. 2018. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1507795/media-availability-with-secretary-mattis-at-the-pentagon> (accessed 2 May 2018).

¹⁰⁸² White, Dana W. (2018a), "Department of Defense Press Briefing by Pentagon Chief Spokesperson Dana W. White", DoD Press Operations, 1 Mar. 2018. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1455355/department-of-defense-press-briefing-by-pentagon-chief-spokesperson-dana-w-white> (accessed 2 Mar. 2018).

¹⁰⁸³ Earnest, Josh (2015b), "Daily Press Briefing", Office of the Press Secretary of The White House, 30 Oct. 2015. Available at <https://www.whitehouse.gov/the-press-office/2015/10/30/daily-press-briefing-press-secretary-josh-earnest-103015> (accessed 18 Sept. 2016).

¹⁰⁸⁴ Obama, Barack (2016b), "Letter From The President - War Powers Resolution", text of a letter from the President to the Speaker of the House of Representatives and the President pro tempore of the Senate, Office of the Press Secretary of The White House, 13 June 2016. Available at <https://www.whitehouse.gov/the-press-office/2016/06/13/letter-president-war-powers-resolution> (accessed 18 Sept. 2016).

¹⁰⁸⁵ Carter, Ashton (2016), "Remarks by Secretary of Carter at the 2016 IISS Manama Dialogue, Manama, Bahrain", DoD Press Operations, 10 Dec. 2016. Available at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/1026655/remarks-by-secretary-of-carter-at-the-2016-iiss-manama-dialogue-manama-bahrain> (accessed 12 Dec. 2016).

¹⁰⁸⁶ Dorrian, John L. (2017b), "Department of Defense Press Briefing by Col. Dorrian via teleconference from Baghdad, Iraq", DoD Press Operations, 17 Jan. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1051735/department-of-defense-press-briefing-by-col-dorrian-via-teleconference-from-bag> (accessed 19 Jan. 2017).

more soldiers in Syria, Obama acknowledges that because the Assad regime does not directly threaten the United States, any deployment of troops is a violation of the international law.¹⁰⁸⁷

The U.S. trained 3,000 Syrian Arab Corps (or Syrian Arab Coalition), part of the SDF, and provided to them equipment, including weapons and training.¹⁰⁸⁸ The Department of Defense acknowledges the key role of SOF in Iraq and Syria.¹⁰⁸⁹ In November 2016 the U.S.-led coalition CJTF-OIR carries out airstrikes supporting SDF forces in counter-ISIS campaign.¹⁰⁹⁰ In September 2017 the U.S. and CJTF-OIR military forces announce more strikes against ISIS in Syria,¹⁰⁹¹ in violation of the sovereignty of Damascus and international law.

It is questionable whether U.S. support to SDF forces and to the SAC component can be considered a violation of the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, which the United States have never ratified, as well as China, France, India, Japan, Russia, the UK. Clearly, it depends on the assessment of these forces: patriots, rebels, or terrorists, which again balances on the inability of international actors to define critical terms (see: chapter 1 and 2). It is a question of political assessment based on national interest. Marsavelski concludes that the control of a foreign state over paramilitary operations turns the armed conflict from a non-international into an international one, namely if one or more states is involved by backing a revolutionary group.¹⁰⁹²

In a military escalation, in February 2018, the U.S.-led coalition conducts the first intentional attack against Syrian "pro-regime forces".¹⁰⁹³ The Pentagon presents the strike as an

¹⁰⁸⁷ Garamone, Jim (2016b), "Obama Responds to Questions Posed by Service Members, Families", DoD News, Defense Media Activity, 29 Sept. 2016. Available at <http://www.defense.gov/News/Article/Article/959338/obama-responds-to-questions-posed-by-service-members-families> (accessed 30 Sept. 2016).

¹⁰⁸⁸ Townsend.

¹⁰⁸⁹ Parrish, Karen (2016), "Carter Praises Special Operations, Criticizes Continuing Resolution", DoD News, Defense Media Activity, 18 Nov. 2016. Available at <http://www.defense.gov/News/Article/Article/1008218/carter-praises-special-operations-criticizes-continuing-resolution> (accessed 19 Nov. 2016).

¹⁰⁹⁰ Cook, Peter (2016b), "Department of Defense Press Briefing by Pentagon Press Secretary Peter Cook in the Pentagon Briefing Room", DoD Press Operations, 7 Nov. 2016. Available at <http://www.defense.gov/News/Transcripts/Transcript-View/Article/998599/department-of-defense-press-briefing-by-pentagon-press-secretary-peter-cook-in> (accessed 8 Nov. 2016).

¹⁰⁹¹ CENTCOM (2017), "September 11: Military airstrikes continue against ISIS terrorists in Syria and Iraq", press release 17-357, 11 Sept. 2017. Available at <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1305818/september-11-military-airstrikes-continue-against-isis-terrorists-in-syria-and> (accessed 12 Sept. 2017).

¹⁰⁹² Marsavelski, p. 392-293.

¹⁰⁹³ White, Dana W. (2018b), "Department of Defense Press Briefing by Pentagon Chief Spokesperson Dana W. White in the Pentagon Briefing Room", DoD Press Operations, 8 Feb. 2018. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1436566/department-of-defense-press-briefing-by-pentagon-chief-spokesperson-dana-w-whit> (accessed 9 Feb. 2018).

act of self-defense against aggression to SDF partners engaged in against ISIS.¹⁰⁹⁴ Damascus claims that the Syrian popular forces were engaged against ISIS and characterizes the attack against the sovereignty of the country as a war crime and a crime against humanity.¹⁰⁹⁵ Lt.Gen. Jeffrey Harrigan, commander of the U.S. Central Command (CENTCOM), admitted they did not know who exactly they struck in a three-hour attack that involved B-52s.¹⁰⁹⁶ The implications of an attack of this kind, conducted with the consent of the Russians, are evident: it constitutes a dangerous precedent. *Homo homini lupus*.¹⁰⁹⁷

The first intentional attack against Syrian forces took place in April 2017, when the United States fired 59 Tomahawk missiles against the Shayrat Airfield, in Homs governorate, in retaliation for the regime of Bashar Assad using nerve agents in Khan Sheikhoun.¹⁰⁹⁸ The Pentagon defined the strike “a proportional response to Assad's heinous act”. According to the secretary of defense, Jim Mattis, the strikes took out 20% of the Syrian Air Force operational aircraft.¹⁰⁹⁹

Turkey called the attack “a positive response to the Assad regime’s war crimes”.¹¹⁰⁰ NATO Secretary General, Jens Stoltenberg, attributed to the Syrian regime the full responsibility for the airstrikes.¹¹⁰¹ Russian foreign minister, Sergey Lavrov, deemed the attack “illegal”,¹¹⁰²

¹⁰⁹⁴ Ibid.

¹⁰⁹⁵ Manar and Mazen (2018a), "Damascus: The international coalition aggression on Deir Ezzor affirms US low intentions against Syria", SANA, 18 Feb. 2018. Available at <https://sana.sy/en/?p=126718> (accessed 9 Feb. 2018).

¹⁰⁹⁶ Harrigan, Jeffrey (2018), "Department Of Defense Press Briefing by Lieutenant General Harrigan via teleconference from Al Udeid Airbase, Qatar", DoD Press Operations, 13 Feb. 2018. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1441080/departement-of-defense-press-briefing-by-lieutenant-general-harrigan-via-teleco> (accessed 15 Feb. 2018).

¹⁰⁹⁷ Latin proverb meaning "Man is wolf to man", quoted by Hobbes in the "Epistola Dedicatoria" to William Cavendish – 3rd Earl of Devonshire, in the preface to the *De Cive* (First published 1642), Howard Warrender (ed.) (1983), *De Cive: The Latin Version Entitled in the First Edition Elementorum Philosophiae Sectio Tertia de Cive, and in Later Editions Elementa Philosophica de Cive*, Oxford, Clarendon Press, p. 73.

¹⁰⁹⁸ Davis, Jeff Davis (2017), “Statement from Pentagon Spokesman Capt. Jeff Davis on U.S. strike in Syria”, DoD Press Operations, 6 Apr. 2017. Available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1144598/statement-from-pentagon-spokesman-capt-jeff-davis-on-us-strike-in-syria> (accessed 7 Apr. 2017).

¹⁰⁹⁹ Mattis, James N. (2017a), "Press Conference by Secretary Mattis and Gen. Votel in the Pentagon Briefing Room", DoD Press Operations, 11 Apr. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1148604/press-conference-by-secretary-mattis-and-gen-votel-in-the-pentagon-briefing-room> (accessed 12 Apr. 2017).

¹¹⁰⁰ Kalin, Ibrahim (2017), “Presidential Spokesperson Kalin: “A Positive Response to the Assad Regime’s War Crimes”, Presidency of the Republic of Turkey, 7 Apr. 2017. Available at <https://www.tccb.gov.tr/en/news/542/74644/cumhurbaskanligi-sozcusu-kalin-esed-rejiminin-savas-suclarina-karsi-verilmis-olumlu-bir-cevap.html> (accessed 7 Apr. 2017).

¹¹⁰¹ Stoltenberg, Jens (2017), “Statement by NATO Secretary General Jens Stoltenberg on US strikes in Syria”, NATO, 7 Apr. 2017. Available at http://www.nato.int/cps/en/natohq/news_143082.htm (accessed 7 Apr. 2017).

and Russian president, Vladimir Putin, defined it “an act of aggression against a sovereign state delivered in violation of international law under a far-fetched pretext”.¹¹⁰³

State secretary, Rex W. Tillerson, justified the attack arguing that those weapons could fall into the hands of those who would bring them to the U.S. shores to harm American citizens.¹¹⁰⁴ Attending the G-7 Foreign Ministers’ Meeting at Lucca, Italy, Tillerson added that, for this reason, the attack was undertaken “in the national interest”.¹¹⁰⁵ Nevertheless, the Russian president recalled that all the Syrian chemical weapons were destroyed under control of the OPCW. Pursuant to Resolution 2118 (2013), in August 2013 the UNSC established the one year Organisation for the Prohibition of Chemical Weapons (OPCW)-UN Joint Mission on the elimination of Syrian chemical weapons,¹¹⁰⁶ and two years later established the Mechanism to Identify Perpetrators Using Chemical Weapons in Syria by Resolution 2235.¹¹⁰⁷ The OPCW-UN JIM did not visit the scenes of the incidents,¹¹⁰⁸ but concludes that the Assad regime is responsible for the use of sarin in Khan Shaykhun on 4 April 2017.¹¹⁰⁹ The U.S. Administration never proved the liability of the Syrian regime for the use of chemical weapons, such as in Eastern Ghouta.¹¹¹⁰

When on 14 April 2018, the United States, supported by the UK and France, launched an airstrike against military and civilian targets in Syria, as punishment for an alleged chemical attack carried out one week before by Assad’s regime in Douma, a Damascus suburb,¹¹¹¹ Syria

¹¹⁰² Lavrov, Sergey (2017), “Secretary’s Remarks: Remarks With Russian Foreign Minister Sergey Lavrov Before Their Meeting”, Department of State, 12 Apr. 2017. Available at <https://www.state.gov/secretary/remarks/2017/04/270124.htm> (accessed 13 Apr. 2017).

¹¹⁰³ The Kremlin (2017), “Comment from the Press Service of the President of Russia”, 7 Apr. 2017. Available at <http://en.kremlin.ru/events/president/news/54241> (accessed 7 Apr. 2017).

¹¹⁰⁴ Tillerson, Rex W. (2017c), “Remarks With National Security Advisor H.R. McMaster”, Department of State, 6 Apr. 2017. Available at <https://www.state.gov/secretary/remarks/2017/04/269543.htm> (accessed 7 Apr. 2017).

¹¹⁰⁵ Tillerson, Rex W. (2017d), “Arms Control and International Security: Remarks at a Press Availability”, Department of State, 11 Apr. 2017. Available at <https://www.state.gov/secretary/remarks/2017/04/269693.htm> (accessed 12 Apr. 2017).

¹¹⁰⁶ OPCW-UN Joint Mission (2017), “OPCW-UN Joint Mission”. Available at <http://opcw.unmissions.org> (accessed 6 Apr. 2017).

¹¹⁰⁷ UNSC (2015), “Security Council Unanimously Adopts Resolution 2235 (2015), Establishing Mechanism to Identify Perpetrators Using Chemical Weapons in Syria”, SC/12001, 7 Aug. 2015. Available at <http://www.un.org/press/en/2015/sc12001.doc.htm> (accessed 6 Apr. 2017).

¹¹⁰⁸ OPCW-UN JIM, *Seventh report of the Organisation for the Prohibition of Chemical Weapons-United Nations Joint Investigative Mechanism*, letter from the Leadership Panel of the OPCW submitting the 7th report of the JIM, 26 Oct. 2017, S/2017/904, § 14.

¹¹⁰⁹ *Id.*, § 46 and Annex II, § 93.

¹¹¹⁰ White (2018a).

¹¹¹¹ U.S. Department of Defense (2018), “International Response to Assad Chemical Weapons”. Available at <https://www.defense.gov/News/Special-Reports/Syria> (accessed 15 Apr. 2018).

condemned the act as a flagrant violation of the international law and the principals of the UN charter.¹¹¹² The Russian President Vladimir Putin called it an act of aggression against a sovereign country without a mandate from the UN Security Council and in violation of the UN Charter and norms and principles of international law.¹¹¹³ The same remarks have been delivered by the China¹¹¹⁴ and other governments. The Security Council rejected Russian request to condemn airstrikes in Syria as "an act of aggression".¹¹¹⁵

In the opening remarks, Putin recalled the attack to the Shayrat Airbase, and said that Russian military experts did not find any traces of chlorine or any other toxic agent, and that not even a single local resident was able to confirm that a chemical attack had actually occurred.¹¹¹⁶ Nevertheless a group of Western countries decided to take military action without waiting for the results of the investigation carried out by the OPCW. The strike was directed to Syria on the day that the OPCW fact-finding mission was scheduled to start work to check whether a chemical attack actually occurred in Douma.¹¹¹⁷

Still in January 2019 the CJTF-OIR airstrikes within the Syrian territory continue, and civilian casualties are reported. The Syrian government accused the U.S.-led coalition to commit massacres against civilians, included children, fleeing from areas controlled by Daesh.¹¹¹⁸ Damascus claims that the coalition operates illegally, without any UNSC mandate, and in violation of the sovereignty and territorial integrity of the Syrian Arab Republic.¹¹¹⁹ In the same

¹¹¹² Zain, H. and Mazen (2018), "Syria condemns the US, British and French aggression on the country", SANA, 14 Apr. 2018. Available at <https://sana.sy/en/?p=134232> (accessed 14 Apr. 2018).

¹¹¹³ Putin, Vladimir (2018), "Statement by President of Russia Vladimir Putin", The Kremlin, 14 Apr. 2018. Available at <http://en.kremlin.ru/events/president/news/57257> (accessed 14 Apr. 2018).

¹¹¹⁴ Chunying, Hua (2018), "Foreign Ministry Spokesperson Hua Chunying's Remarks", Ministry of Foreign Affairs, the People's Republic of China, 14 Apr. 2018. Available at http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2535_665405/t1551073.shtml (accessed 14 Apr. 2018).

¹¹¹⁵ UN News (2018), "Security Council rejects Russian request to condemn airstrikes in Syria", UN, 14 Apr. 2018. Available at <https://news.un.org/en/story/2018/04/1007341> (accessed 15 Apr. 2018).

¹¹¹⁶ Putin (14 Apr. 2018).

¹¹¹⁷ Manar and Mazen (2018b), "Al-Jaafari: Damascus will facilitate access of OPCW team to any point they want to reach in Douma", SANA, 12 Apr. 2018. Available at <https://sana.sy/en/?p=134045> (accessed 14 Apr. 2018).

¹¹¹⁸ Hassoun, Gh. A. (2019a), "20 civilians, kids included, martyred in US-led coalition airstrikes", 18 Jan. 2019, available at <https://sana.sy/en/?p=155960> (accessed 23 Jan. 2018); Hassoun, Gh. A. (2019b), "Syria condemns US-led coalition repeated crimes against civilians, demands punishing perpetrators of such war crimes", SANA, 19 Jan. 2019, available at <https://sana.sy/en/?p=156020> (accessed 23 Jan. 2018); al-Jazaeri, Ruaa (2019), "US-led coalition commits massacre against civilians fleeing from Daesh in Deir Ezzor countryside", SANA, 23 Jan. 2019, available at <https://sana.sy/en/?p=156313> (accessed 23 Jan. 2018).

¹¹¹⁹ Ibid.

days, the Israel Defense Forces (IDF) attacked Iranian military targets in Syria.¹¹²⁰ They all do it this way.

¹¹²⁰ Netanyahu, Benjamin (2019), "PM Netanyahu observes IDF exercise at Shizafon base", 23 Jan. 2019. Available at <https://mfa.gov.il/MFA/PressRoom/2019/Pages/PM-Netanyahu-observes-IDF-exercise-23-January-2019.aspx> (accessed 23 Jan. 2019).

4 FUNDAMENTAL HUMAN RIGHTS AND COUNTER-TERRORISM

In the War on Terror, standardized terms and concepts show their limits. New lexical inventions are introduced: enemy combatant; foreign fighter; extraordinary rendition; reinforced interrogation; trans-regional strike; targeting. It is questionable whether these new legal concepts and associated practices are lawful and consistent with fundamental human rights. Addressing the U.S. extraordinary rendition flights on the European soil, the Parliamentary Assembly of the Council of Europe finds that to face the threat of terrorism the U.S. introduced new legal concepts, such as "enemy combatant" and "rendition", which were previously unheard of in international law and stand contrary to the basic legal principles.¹¹²¹

A report of the PACE Committee on Legal Affairs and Human Rights emphasizes that, whatever one calls them, secret prisons, abductions (or extraordinary renditions), and torture (or "reinforced interrogation techniques"), negate justice and the rule of law.¹¹²² The CoE Parliamentary Assembly argues that the U.S. "finds that neither the classic instruments of criminal law and procedure nor the framework of the laws of war (including, *inter alia*, respect for the Geneva Conventions) have been apt to address the terrorist threat".¹¹²³

The International Committee of the Red Cross stresses the importance of respect for international law in the repression of war crimes, crimes against humanity and genocide.¹¹²⁴ The ICRC emphasizes the need for securing judicial guarantees and safeguards, including the right to a fair trial and protection from being unlawfully or arbitrarily deprived of fundamental rights.¹¹²⁵

The *Vienna Declaration*, adopted by the World Conference on Human Rights on 25 June 1993, states that the protection of human rights is a matter of priority for the international community, while terrorism is aimed at the destruction of these rights and fundamental freedoms.¹¹²⁶ The VDPA, recalling principles contained in the UN Charter, the UDHR, the ICCPR, and the Fourth Geneva Convention, recognizes that the human person is the central

¹¹²¹ PACE (2006), *Alleged secret detentions in Council of Europe member states. Information Memorandum II*, AS/Jur (2006) 03 rev of 22 Jan. 2006, rapporteur Dick Marty, § 4.

¹¹²² PACE, Doc. 12276, § 51.

¹¹²³ PACE, AS/Jur (2006) 03, § 4.

¹¹²⁴ ICRC (2014), "Judicial guarantees and safeguards". Available at <https://www.icrc.org/eng/assets/files/2014/judicial-garantee-icrc-eng.pdf> (accessed 11 May 2017).

¹¹²⁵ *Ibid.*

¹¹²⁶ VDPA, part I, chap. III.

subject of human rights and fundamental freedoms, and calls on governments to respect obligations arising from treaties and other sources of international law.

The World Conference on Human Rights complains about violations of universal human rights affecting the civilian population during armed conflicts, and calls upon states and all parties in armed conflicts to strictly observe IHL, as set forth in the Geneva Conventions of 1949 and in international conventions, and to comply with rules and principles of international law.¹¹²⁷ HRV include: torture and cruel; inhuman and degrading treatment or punishment; summary and arbitrary executions; disappearances; arbitrary detentions; foreign occupation and alien domination; terrorism; lack of the rule of law.¹¹²⁸

The UN urges member states, while countering terrorism, to comply with their obligations under IHL,¹¹²⁹ and calls upon states to ensure accountability for those responsible for HRV that amount to crimes under national or international law. The UN emphasizes the ban on illegal deprivation of liberty, torture and other cruel, inhumane or degrading treatment or punishment, and the prohibition of unlawful detention of individuals suspected of terrorist activities, and calls for fundamental judicial guarantees. By applying domestic law to prosecute alleged terrorists, states are free to make their national interest.

The first resolution adopted by the General Assembly after the 9/11 attacks does not mention the obligation of member states to take counter-terrorism measures in accordance with the relevant provisions of international law, including IHL.¹¹³⁰ Following UN resolutions stress the duty of states to comply with their human rights obligations when treating alleged terrorists.¹¹³¹ In January 1994, the UN General Assembly created the position of High Commissioner for Human Rights, with the rank of Under-Secretary-General,¹¹³² to ensure

¹¹²⁷ *Id.*, § 29. See also: § 77, 93, 96.

¹¹²⁸ *Id.*, § 30.

¹¹²⁹ UNGA, Resolutions: A/RES/58/187, A/RES/64/168, A/RES/64/297, A/RES/65/221, A/RES/68/178; HRC Resolutions: A/HRC/RES/13/26, A/HRC/RES/19/19, A/HRC/RES/25/7, A/HRC/RES/25/22.

¹¹³⁰ UNGA, Resolution A/RES/56/1 [Condemnation of terrorist attacks in the United States of America], adopted on 12 Sept. 2001.

¹¹³¹ UNCHR, Resolutions: 2003/68 of 25 Apr. 2003; 2003/37 of 23 Apr. 2003; 2004/87 of 21 Apr. 2004; 2005/80 of 21 Apr. 2005. UNHRC, Resolutions: A/HRC/RES/2/112 of 27 Nov. 2006; A/HRC/RES/7/7 of 27 Mar. 2008; A/HRC/RES/10/15 of 26 Mar. 2009; A/HRC/RES/6/28 of 14 Dec. 2007; A/HRC/RES/22/8 of 21 Mar. 2013.

¹¹³² UNGA, Resolution A/RES/48/141, adopted on 7 Jan. 1994.

respect of IHL. The UN human rights body is seriously concerned about violations of human rights and fundamental freedoms committed by member states while countering terrorism.¹¹³³

Among the 68 resolutions adopted by the General Assembly to counter terrorism,¹¹³⁴ 40 are characterized as "measures to eliminate international terrorism", and 19 are listed as resolutions on human rights.¹¹³⁵ Among the resolutions on human rights, eight are labeled as "human rights and terrorism" – the first GA resolution under this name is No. 48/122 of 14 February 1994 and the last is No. 59/195 of 22 March 2005 – while the term "protection of human rights and fundamental freedoms through countering terrorism" appears only in 2003.¹¹³⁶ The header change of UN resolutions on human rights and terrorism coincides with the establishment of the Human Rights Council, which replaced the Commission on Human Rights.¹¹³⁷

The *Report of the Policy Working Group on the UN and Terrorism* underlines that security cannot be achieved by sacrificing human rights.¹¹³⁸ SC Resolution 1456 (2003) calls on member states to comply with all their obligations under international law, in particular IHL, in taking measures to combat terrorism.¹¹³⁹

The need to respect fundamental human rights is reaffirmed in the Report of the Special Committee on the UN Charter, adopted by the UN General Assembly on 15 January 2010, which

¹¹³³ UNHRC, Resolution A/HRC/RES/25/22 [Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law], adopted on 28 Mar. 2014.

¹¹³⁴ A/RES/48/122 of 14 Feb. 1994; A/RES/49/60 of 17 Feb. 1995; A/RES/49/185 of 6 Mar. 1995; A/RES/50/53 of 29 Jan. 1996; A/RES/50/186 of 6 Mar. 1996; A/RES/51/210 of 16 Jan. 1997; A/RES/52/133 of 27 Feb. 1998; A/RES/52/165 of 19 Jan. 1998; A/RES/53/108 of 26 Jan. 1999; A/RES/54/110 of 2 Feb. 2000; A/RES/54/164 of 24 Feb. 2000; A/RES/55/158 of 30 Jan. 2001; A/RES/56/88 of 24 Jan. 2002; A/RES/56/160 of 13 Feb. 2002; A/RES/57/27 of 15 Jan. 2003; A/RES/57/219 of 27 Feb. 2003; A/RES/58/81 of 8 Jan. 2004; A/RES/58/174 of 10 Mar. 2004; A/RES/58/187 of 22 Mar. 2004; A/RES/59/46 of 16 Dec. 2004; A/RES/59/191 of 10 Mar. 2005; A/RES/59/195 of 22 Mar. 2005; A/RES/60/43 of 6 Jan. 2006; A/RES/60/158 of 28 Feb. 2006; A/RES/60/288 of 20 Sept. 2006; A/RES/61/40 of 18 Dec. 2006; A/RES/61/171 of 1 Mar. 2007; A/RES/62/71 of 8 Jan. 2008; A/RES/62/159 of 11 Mar. 2008; A/RES/62/272 of 15 Sept. 2008; A/RES/63/129 of 15 Jan. 2009; A/RES/63/185 of 3 Mar. 2009; A/RES/64/118 of 15 Jan. 2010; A/RES/64/297 of 8 Sept. 2010; A/RES/65/34 of 6 Dec. 2010; A/RES/66/171 of 19 Dec. 2011; A/RES/66/105 of 9 Dec. 2011; A/RES/66/282 of 29 June 2012; A/RES/67/99 of 14 Dec. 2012; A/RES/68/119 of 16 Dec. 2013; A/RES/68/178 of 18 Dec. 2013; A/RES/68/187 of 18 Dec. 2013.

¹¹³⁵ UN (2016), "United Nations Action To Counter Terrorism. Resolutions". Available at <http://www.un.org/en/terrorism/resolutions.shtml> (accessed 11 Apr. 2016).

¹¹³⁶ UNGA, Resolution A/RES/57/219 of 27 Feb. 2003 is classified under the header: "Protecting human rights and fundamental freedoms while countering terrorism". Following GA resolutions since A/RES/58/187 of 22 Mar. 2004 bear the reference: "Protection of human rights and fundamental freedoms while countering terrorism".

¹¹³⁷ The HRC held its first meeting on 19 June 2006. See: OHCHR (2017c), "Human Rights Bodies". Available at <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx> (accessed 26 Dec. 2017).

¹¹³⁸ Recommendation 7(d).

¹¹³⁹ UNSC, Resolution 1456 (2003) on combating terrorism, adopted on 20 Jan. 2003, S/RES/1456 (2003), Annex, § 6.

calls on the Security Council to introduce sanctions taking into account the rules of international law, in particular all of those related to human rights and fundamental freedoms (Annex, § 8).¹¹⁴⁰

ASSASSINATION AND TARGETED KILLING

Governments include assassination among terrorist tactics, while they consider targeting their enemy, even if a civilian, a legitimate practice. Assassinations of heads of state, heads of government and ministers, killed during attempted coups d'état or revolutions in contemporary era, were characterized in different ways: political acts; simple crimes; acts of terrorism. Rapoport argues that political assassination, previously an instrument of political struggle motivated by ideology or religion, is now a terrorist tactic.¹¹⁴¹ The U.S. National Counterterrorism Center encompasses among the tactics used by terrorists: “the targeted killing of a country’s public officials or individuals who represent the political, economic, military, security, social, religious, media, or cultural establishments”.¹¹⁴² The NCTC specifies that killings can be motivated by ideology, religion, politics, or nationalism.¹¹⁴³

According to the NCTC, over the past 100 years in the United States occurred 26 incidents of terrorism-related assassination attempts, the latest of which was in 1990.¹¹⁴⁴ The 1950 attempt on President Truman by Puerto Rican nationalists is the only one that strictly qualifies as a terrorism-related attempted assassinations of a highly protected public figure.¹¹⁴⁵ The assassination of the presidential candidate, senator Robert F. Kennedy, on 6 June 1968, whose killer claimed an international nexus due to Kennedy's support for Israel, is on the chart.¹¹⁴⁶

¹¹⁴⁰ See: "Introduction and implementation of sanctions imposed by the United Nations" Annex to UNGA Resolution A/RES/64/115 [Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization], adopted on 15 Jan. 2010.

¹¹⁴¹ Rapoport, pp. 51-52.

¹¹⁴² NCTC (2017b), “Methods and Tactics. Assassination as a terrorist tactic”. Available at <https://www.dni.gov/nctc/methods.html> (accessed 22 Dec. 2017).

¹¹⁴³ Ibid.

¹¹⁴⁴ NCTC (2015), *Counterterrorism Calendar 2016*, Washington, D.C., NCTC, p. 140.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Id., p. 141.

As the U.S. Congress excludes three discrete categories of law enforcement and national security records from the requirements of the Freedom of Information Act (FOIA),¹¹⁴⁷ it is not possible to know if certain acts have been qualified as “terrorism” or “sabotage”, or as ordinary criminal assassination cases, and the reasons for these classifications. These cases include the assassinations of four U.S. presidents: Abraham Lincoln (Washington, 18 Apr. 1865); James A. Garfield (Elberon, 18 Sept. 1881); William McKinley (Buffalo, 14 Sept. 1901);¹¹⁴⁸ John Fitzgerald Kennedy (Dallas, 22 Nov. 1963). Other cases of political assassination include the murder of Malcolm X, born Malcolm Little, in New York, on 21 Feb. 1965, and the homicide of Martin Luther King, Jr. in Memphis, on 4 Apr. 1968.

Political assassination was also employed during the colonial war in Africa (1961-1974) by Portugal,¹¹⁴⁹ a NATO founding member, against nationalist leaders who were labeled “terrorists” by the government of Lisbon.¹¹⁵⁰ An “extrajudicial killing” or an “extrajudicial execution” is the deliberate assassination¹¹⁵¹ outside the country's territory of a person by governmental authorities without the sanction of any judicial proceeding or legal process. The criminal responsibility must be proven in a court of law where the defendant enjoys the guarantees of due process. In international law punishment without due legal process is an SHRV, whatever the accusation is.

Marsavelski argues that criminalization of terrorism requires a fair trial for the accused.¹¹⁵² Schwartz asserts that, under natural justice, fair procedure and due process must be granted.¹¹⁵³ Pictet, referring to Common Article 3, which prohibits 'summary justice', writes: “[t]here is nothing in it to prevent a person presumed to be guilty from being arrested and so placed in a position where one can do no further harm; and it leaves intact the right of the [s]tate to prosecute, sentence and punish according to the law”.¹¹⁵⁴ McMahan admits that it is

¹¹⁴⁷ The Freedom of Information Act (FOIA) generally provides that any person has the right to request access to federal agency records or information except to the extent the records are protected from disclosure by any of nine exemptions contained in the law or by one of three special law enforcement record exclusions. See: 5 U.S.C. § 552(c) (2006 and Supp. IV 2010).

¹¹⁴⁸ President McKinley was shot by anarchist Leon Czolgosz.

¹¹⁴⁹ Mateus, Dalila Cabrita (2004), *A PIDE/DGS na Guerra Colonial 1961-1974*, Lisbon, Terramar. See also: Somerville, Keith (1986), *Angola. Politics, Economics and Society*, London, Frances Pinter.

¹¹⁵⁰ MFA of Portugal (1970), pp. 118 et seqq., namely p. 232.

¹¹⁵¹ PACE, Doc. 12276, § 26.

¹¹⁵² Marsavelski, p. 246.

¹¹⁵³ Schwartz, Bernard (1953), "Administrative Procedure and Natural Law", *Notre Dame Lawyer*, Vol. 28, No. 2 (Winter), p. 169.

¹¹⁵⁴ Pictet (1952), p. 54.

impossible for one country, or even an international body, to provide fair trials for all the members of an army, and deduces that the winner will declare its war just and seek revenge against defeated soldiers in the form of a punishment (the so called "victor's justice").¹¹⁵⁵

These are the two constituents of a fair trial which are the rules against bias (*nemo iudex in causa sua* or "no man a judge in his own cause"), and the right to a fair hearing (*audi alteram partem*, or "hear the other side").¹¹⁵⁶ The right to a fair trial is granted by Art. 10 of the UDHR, which enshrines some fair hearing rights, such as the presumption of innocence until the accused is proven guilty (Art. 6, 7, 8 and 11). Fair trial rights are guaranteed also under Art. 6(1) of the ECHR and Art. 14 and 16 of the ICCPR. Some regional instruments provide for the right to a fair trial: Art. 7 and 25 of the ACHP; Art. 20 of the AHRD; Art. 5 of the *Universal Islamic declaration of human rights*, adopted by the Islamic Council in Paris on 19 September 1981,¹¹⁵⁷ which can be considered the Islamic version of the 1958 UDHR.

The UN special rapporteur on human rights while countering terrorism, Ben Emmerson, questions if IHL permits the targeting of persons directly participating in hostilities who are located in a non-belligerent state and, if so, in what circumstances.¹¹⁵⁸ Methods used include: firing a missile from an attack helicopter or a drone; detonating a cell phone bomb; a long-range sniper shooting.¹¹⁵⁹ The Pentagon refers to extrajudicial killings abroad also as "trans-regional strikes" which target al-Qaida leaders in Syria, Yemen, and Afghanistan.¹¹⁶⁰

Some governments, such as the U.S. and Israel,¹¹⁶¹ target and kill enemy combatants, not because they are guilty, but because they are potentially lethal agents of a hostile party.¹¹⁶² So,

¹¹⁵⁵ McMahan (2006), p. 39.

¹¹⁵⁶ Jones, David Phillip and Anne S. de Villars (2009), "Natural Justice and the Duty to be Fair", *Principles of Administrative Law*, Toronto, Carswell (5th edition), p. 209.

¹¹⁵⁷ *Universal Islamic declaration of human rights*, adopted by the Islamic Council in Paris, on 19 Sept. 1981, *The International Journal of Human Rights*, Vol. 2 (1998), No. 3. DOI: <http://dx.doi.org/10.1080/13642989808406750>.

¹¹⁵⁸ A/HRC/25/59, § 71(d). See: A/68/389, § 62-65; A/68/382, § 64-66.

¹¹⁵⁹ Solis, Gary D. (2010), *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge, Cambridge University Press, p. 542.

¹¹⁶⁰ Pellerin, Cheryl (2016b), "Transregional Strikes Hit al Qaida Leaders in Syria, Yemen, Afghanistan", DoD News, Defense Media Activity, 2 Nov. 2016. Available at <http://www.defense.gov/News/Article/Article/994180/transregional-strikes-hit-al-qaida-leaders-in-syria-yemen-afghanistan> (accessed 3 Nov. 2016).

¹¹⁶¹ Gazit, Nir and Robert J. Brym (2011), "State-directed political assassination in Israel: A political hypothesis", *International Sociology*, Vol. 26, No. 6 (Nov.), p. 862-877. DOI: 10.1177/0268580910394006. See also: Melzer, Nils (2008), *Targeted Killing in International Law*, Oxford, Oxford University Press, p. 29; Gross, Michael (2003), "Fighting by Other Means in the Mid-East: a Critical Analysis of Israel's Assassination Policy", *Political Studies*, Vol. 51, p. 350-368.

¹¹⁶² Blum, Gabriella and Philip Heymann (2010), "Law and Policy of Targeted Killing", *National Security Journal*, Vol. 1 (June), p. 146.

the disclaimer contained in the *Counterterrorism 2016 Calendar* published by the NCTC sounds contradictory; it recalls that all individuals included in the release “are entitled to a presumption of innocence in the U.S. court system, unless and until such time as they are deemed guilty through the judicial process”.

Besides Washington, Jerusalem is also widely reported to extra judicially eliminate members of groups such as Hamas, al-Qassam Brigades, and Hezbollah.¹¹⁶³ In a decision by the High Court of Justice on the legality of preventative strikes that cause the death of terrorists and civilians, the Supreme Court of Israel finds that targeted killing is neither absolutely prohibited nor always permitted by customary international law, but requires a case-by-case assessment to determine the “legality” of each act.¹¹⁶⁴ Meisels upholds that the values at stake should come to balance, case by case.¹¹⁶⁵

Rapoport,¹¹⁶⁶ Mearsheimer and Walt¹¹⁶⁷ claim that the members of Irgun (AKA Etzel) and Lehi (AKA Stern Gang) used terrorism when they were trying to drive the British out of Palestine and establish the State of Israel. The government of Jerusalem has a long tradition in this area. Herberts Cukurs, a Latvian aviator, accused of alleged involvement in the killing of Latvian Jews during the Holocaust,¹¹⁶⁸ was assassinated by operatives of the Israeli intelligence service Mossad in Uruguay in 1965.¹¹⁶⁹ Charged with war crimes,¹¹⁷⁰ Cukurs never stood trial. This is a case of state murder, or extrajudicial killing, as it is called now. When, in February 2017, the Israeli Military Court sentences a young soldier, Elor Azaria, to 18 months in prison for manslaughter, the Israeli minister of education, Naftali Bennett, asks for his immediate

¹¹⁶³ Solis.

¹¹⁶⁴ *Public Committee Against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. Israel*, Case No. HCJ 769/02 (Supreme Court of Israel sitting as High Court of Justice, 13 Dec. 2006).

¹¹⁶⁵ Meisels, p. 60.

¹¹⁶⁶ Rapoport, p. 54.

¹¹⁶⁷ Mearsheimer and Walt, p. 62.

¹¹⁶⁸ Ezergailis, Andrew (1996), *The Holocaust in Latvia, 1941–1944: The Missing Center*, Riga, Historical Institute of Latvia in association with the United States Holocaust Memorial Museum. See also: Kaufmann, Max (2010), *Churbn Letland: The Destruction of the Jews of Latvia*, Konstanz, Hartung-Gorre (1st edition), p. 61, trans. Laimdota Mazzarins; Press, Bernard (2000), *The Murder of the Jews in Latvia*, Evanston, Northwestern University Press, p. 46.

¹¹⁶⁹ Kuenzle, Anton and Gad Shimron (2004), *The Execution of the Hangman of Riga: The Only Execution of a Nazi War Criminal by the Mossad*, London, Vallentine Mitchell.

¹¹⁷⁰ Pabriks, Artis (2004), "Latvia's Minister of Foreign Affairs, Artis Pabriks, condemns the issuance of postal envelopes dedicated to Herberts Cukurs", MFA of the Republic of Latvia, 30 Sept. 2004. Available at <http://www.mfa.gov.lv/en/news/latest-news/5339-latvia-s-minister-of-foreign-affairs-artis-pabriks-condemns-the-issuance-of-postal-envelopes-dedicated-to-herberts-cukurs> (accessed 16 Oct. 2016).

pardon and release.¹¹⁷¹ In 2016, Azaria killed Abdul Fatah al-Sharif, a Palestinian attacker who was lying wounded on the ground, in southern West Bank.¹¹⁷²

Meisels argues that the targets of Israel's assassinations and U.S. "non-conventional enemies" are justified by governments on the basis that they are guilty of a breach of "morally significant conventions".¹¹⁷³ According to the Israeli political theorist, there's a moral rationale behind the decision of reserving special treatment for unlawful combatants. The topic of the 'just cause' returns.

Some CT measures, such as targeted killing, instead of eradicating terrorism, contribute to its diffusion. The PACE Committee on Legal Affairs and Human Rights finds that repression and brutal force "transform the criminals into fighters and give them the legitimacy to oppose states which resort to illegal methods",¹¹⁷⁴ while "institutions which combat terrorism by the same means as the terrorists are only creating and fuelling a groundswell in their favor".¹¹⁷⁵ In a report on legal remedies for HRV, the CoE Parliamentary Assembly argues that "[t]he state cannot pitch itself on the same level as criminals and terrorists and it cannot and must not deploy the same means",¹¹⁷⁶ like outright executing terrorists.¹¹⁷⁷

In a 2010 report addressing the situation in the North-Caucasus Region, the Committee on Legal Affairs and Human Rights stresses that the strategy followed by Russia against Muslim extremism has not yielded the expected outcomes.¹¹⁷⁸ The rapporteur, Dick Marty, believes that repression alone "will never resolve anything and will only serve to create further radicalization".¹¹⁷⁹ According to the PACE, the implementation of "anti-terrorist measures 'even more brutally' is to play along with the criminals and fuel the spiral of atrocities".¹¹⁸⁰ The Committee on Legal Affairs and Human Rights calls countries to overcome terrorism without

¹¹⁷¹ Bader, Mohammed (2017), "Ministry Of Foreign Affairs: The Disgraceful Trial of Martyr Sharif's Assassination Encourages Israeli Soldiers to Kill Palestinians", MOFA of the Palestinian, 22 Feb. 2017. Available at <http://www.mofa.pna.ps/en/2017/02/22/ministry-of-foreign-affairs-the-disgraceful-trial-of-martyr-sharifs-assassination-encourages-israeli-soldiers-to-kill-palestinians> (accessed 22 Feb. 2017).

¹¹⁷² Ibid.

¹¹⁷³ Meisels, p. 60.

¹¹⁷⁴ PACE (2010), Doc. 12276 of 4 June 2010, § 11.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Ibid.

¹¹⁷⁷ Id., § 26.

¹¹⁷⁸ Id., § 7.

¹¹⁷⁹ Ibid.

¹¹⁸⁰ Id., § 47.

renouncing their values and principles as a law-based states, and in strict compliance with the rule of law.¹¹⁸¹

Extra-judiciary killings and extraordinary renditions cause a "hydra effect",¹¹⁸² giving rise, to those who, until then, had no operative role, to a feeling of hate and revenge against the West. Thus, instead of reducing the number of active opponents, bad practices increase it. The Report of the Iraq Inquiry, published in July 2016, unveils that British PM Tony Blair had been warned that military action would increase the threat from al-Qaeda to the UK and to UK interests, and that an invasion might lead to Iraq's weapons and capabilities being transferred into the hands of terrorists.¹¹⁸³ The Iraq Inquiry concludes that the invasion and subsequent instability in Iraq had, by July 2009, resulted in the deaths of at least one hundred and fifty thousand Iraqis, most of them civilians, displaced people and caused great suffering.¹¹⁸⁴

There exists a debate whether killing in counter-terrorism justified and/or lawful? The dispute is about the ethical and legal status of killings by unmanned systems that are remotely controlled, i.e. armed drones. Bradley considers that the drone warfare policy violates human rights protected under the ICCPR: the right to life; the right to a fair trial; the freedom of association; the right to protection of the family; the right to highest attainable health standards; the right to education; the right of freedom from hunger.¹¹⁸⁵

Targeted killing is an essential part of the U.S. counter-terrorism strategy¹¹⁸⁶ based on the AUMF, a joint resolution passed by the Congress one week after 11 September 2001, which authorizes the use of all "necessary and appropriate force" against those responsible for the 9/11 attacks, and provides authorization for the use of force against other terrorist groups.

The decision to strike a high-value target, that would take more risk with regard to civilian casualties, is an important political dimension.¹¹⁸⁷ The final decision on using lethal

¹¹⁸¹ Ibid.

¹¹⁸² Sloan, Stephen (1986), *Beating International Terrorism. An Action Strategy for Preemption and Punishment*, Maxwell Air Force Base, Air University Press.

¹¹⁸³ Chilcot, p. 6.

¹¹⁸⁴ Id., p. 9.

¹¹⁸⁵ Bradley, Martha (2013), "Drones and the Chicago Convention: An Examination of the Concepts of Aerial Sovereignty, The War on Terror and the Notion of Self Defense in Relation to the Chicago Convention", Pretoria, University of Pretoria.

¹¹⁸⁶ Blum and Heymann, 146. See also: Garzit and Brym.

¹¹⁸⁷ Isler, Matthew (2017a), "Department of Defense Press Briefing by Brig. Gen. Matthew Isler on Central Command's Targeting and Civilian Casualty Investigation Processes", DoD, 25 Oct. 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1354094/departments-of-defense-press-briefing-by-brig-gen-matthew-isler-on-central-command> (accessed 25 Oct. 2017).

force in overseas operations lies in the hands of the U.S. president, which is at the helm of the process, reserving the final say on approving targeted killing operations, and must sign off every strike abroad. Without prejudice to the presumption of innocence, which is assumed to be such in absence of a sentence passed by a court, these strikes may kill civilians. The 'legal architecture' set up by the White House does not avoid innocent victims in anti-terrorism operations.¹¹⁸⁸ In a speech on counter-terrorism delivered in May 2013 at the National Defense University, President Obama acknowledges that U.S. strikes resulted in civilian casualties,¹¹⁸⁹ and that the decision to use lethal force by combat drones is his prerogative as commander-in-chief.

In comparison, in the 1970s, after allegations of possible U.S. intelligence involvement in assassination plots against certain foreign leaders,¹¹⁹⁰ U.S. presidents prohibited any employee by or acting on behalf of the government to engage in, or conspire to engage in, assassination.¹¹⁹¹ Political assassinations were condemned and rejected as an instrument of U.S. policy, and even through indirect involvement.¹¹⁹² This orders have been later amended by President G. W. Bush to strengthen the role of intelligence in countering international terrorism.¹¹⁹³

The AUMF does not expressly revoke the assassination prohibition set forth in the executive orders issued by Ford, Carter, and Reagan.¹¹⁹⁴ Bazan concludes that, as the AUMF does not make explicit reference to the assassination ban, the president is authorized to make extensive use of force.¹¹⁹⁵ Further, as the term "assassination" is not defined in the presidential executive orders, the interpretation of the ban is open to different readings, including the broadest, for which it refers only to the assassination of foreign leaders in peacetime, with the

¹¹⁸⁸ The White House (2013), "U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities", 23 May 2013. Available at https://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf (accessed 14 Feb. 2016).

¹¹⁸⁹ Obama, Barack (2015b), "Remarks by the President at the National Defense University, Office of the Press Secretary of the White House, 23 May 2015. Available at <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (accessed 14 Feb. 2016).

¹¹⁹⁰ 94th U.S. Congress (Church Committee) (20 Nov. 1975), *Alleged Assassination Plots Involving Foreign Leaders. An Interim Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities*, U.S. Senate Report No. 94-465, pp. 281-84.

¹¹⁹¹ Executive Order 11905 signed on 18 Feb. 1976 by President Gerald R. Ford; Executive Order 12036 signed on 24 Jan. 1978 by President James Earl Carter, Jr.; Executive Order 12333 signed on 4 Dec. 1981 by President Ronald Reagan.

¹¹⁹² Bazan, Elizabeth B. (2002), *Assassination Ban and E.O. 12333: A Brief Summary*, CRS Report for Congress RS21037, Washington, D.C., CRS, p. 1 and 2.

¹¹⁹³ Executive Order 13355 signed on 27 Aug. 2004 and Executive Order 13470 signed on 30 July 2008 by President George W. Bush, amending Executive Order 12333 [to strength the Intelligence].

¹¹⁹⁴ A bill "To nullify the effect of certain provisions of various Executive orders" [H.R. 19], was introduced in the House of Representatives on 3 Jan. 2001, 107th Congress (2001-2002), 1st Session, but never passed.

¹¹⁹⁵ Bazan, p. 6.

exclusion of the use of military force in response to a foreign terrorist attack on U.S. soil or against U.S. nationals, according to Art. 51 of the UN Charter on the right of self-defense (which results in a preventive strike).¹¹⁹⁶ Marsavelski goes further and argues that the doctrine of self-defense would justify the assassination of the Syrian president, Bashar al-Assad.¹¹⁹⁷ Walzer claims that political assassinations, even if justified by their cause, cannot enjoy the protection granted by the laws of war, as well as secret agents of a conventional army involved in acts of sabotage and espionage.¹¹⁹⁸

Article 3 of the UDHR states that everyone has the right to life, liberty and security of person; many nations' policies derive from here the justification for a broad interpretation of their 'self-defense'. While not a treaty itself, the UDHR, which is widely regarded as forming part of customary international law,¹¹⁹⁹ and therefore constitutes an obligation for the members of the international community, served as the foundation for the International Covenant on Civil and Political Rights. The International Court of Justice observes that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Art. 4 of the ICCPR.¹²⁰⁰

Measures and practices adopted by states in addressing terrorism pose grave threats to human rights. In the commentary to the Geneva Conventions, Pictet writes that summary justice "adds too many innocent victims to the conflict".¹²⁰¹ For this reason the Conventions have rightly proclaimed that it is essential to do this even in time of war.¹²⁰² Sentences and executions without a proper trial, which are fairly general in wartime, are prohibited under Common Article 3(d)(1), which provides for humane treatment of civilians and others who are *hors de combat*. No sort of immunity is given to anyone under this provision.¹²⁰³

Pictet considers that, in order to protect civilians, the law of war requires combatants to conduct military operations in a manner designed to minimize civilian casualties and to limit the

¹¹⁹⁶ *Id.*, pp. 2, 3.

¹¹⁹⁷ *Id.*, p. 286.

¹¹⁹⁸ Walzer (1977), p. 183-184.

¹¹⁹⁹ OHCHR (2009), "Digital record of the UDHR", published: Feb. 2009. Available at <http://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx> (accessed 15 Feb. 2016).

¹²⁰⁰ ICJ (2004), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, advisory opinion of 9 July 2004, International Court of Justice Reports of Judgments, Advisory, Opinions and Orders 2004, p. 136, § 106. The Court quotes this passage in "Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo v. Uganda*)", judgment of 19 Dec. 2005, in ICJ Reports 2005, § 216.

¹²⁰¹ Pictet (1952), p. 54.

¹²⁰² *Ibid.*

¹²⁰³ *Ibid.*

amount of damage and suffering to that which can be justified by military necessity.¹²⁰⁴ The basic rule embodied in Art. 48 of Additional Protocol I prohibit the killings of civilians in a war zone.¹²⁰⁵ The law of armed conflict determines that only the military can be lawfully targeted.¹²⁰⁶ Article 52(2) of Additional Protocol I specify that: "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage".¹²⁰⁷ The prohibition of attacks against civilian objects, the civilian population and civilians is repeated in other treaty, such as Additional Protocol II.¹²⁰⁸

Article 8(2)(b)(iv) of the Rome Statute includes, among serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, the act of "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

Strikes in the territory of a country against which one is not at war, conducted without the permission of the local government, that result in civilian or non-combatants casualties, sometimes in violation of the principles of precaution, necessity and proportionality, do not constitute only the infringement of the legal principles of the UN Charter, but also the most serious breach of the Geneva Conventions. The extrajudicial killing of enemy combatants and civilians falls under these circumstances, and can be classified as a war crime.

McMahan recognizes that just combatants may act wrongly in fighting "by force or violence that is unnecessary, excessive, disproportionate, or indiscriminate",¹²⁰⁹ but argues that the requirement of proportionality, in its application to unjust combatants, is merely a device that

¹²⁰⁴ Pictet, (1975), p. 31.

¹²⁰⁵ Art. 48 (Basic rule) of Protocol I: "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". Protocol II to the Conventional Weapons Convention, on the use of mines, booby traps and other devices, prohibition of attacks against civilian objects, the civilian population and civilians.

¹²⁰⁶ Art. 52(2) of Additional Protocol I specifies that: "military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage".

¹²⁰⁷ Additional Protocol I.

¹²⁰⁸ Protocol II as amended on 3 May 1996, CCW/CONF.I/16 (Part I), UNTS, Vol. 2048, No. 22495 (2001), p. 93.

¹²⁰⁹ McMahan (2006), p. 28.

serves the moral purpose of limiting the violence.¹²¹⁰ Mavrodes considers that the distinction between combatant and non-combatants is intended to reduce the cycle of violence by limiting the parties' capacity to fight.¹²¹¹ Krisch¹²¹² thinks that if terrorism is presented as an absolute threat, then counter-terrorism measures must also be unlimited.

The law of war makes lawful killing, which would normally be considered a crime of murder and punished under the civil law. Gill and van Sliedregt infer that the acts of regular combatants, which would normally qualify as serious crimes, such as murder, are lawful because they are covered by privilege.¹²¹³ War provides opportunity for a different moral compass: in an armed conflict and in conformity with the laws of war, international law confers immunity from culpability under peacetime law.¹²¹⁴ The use of lethal force, which should be a last resort means, it's part of the comprehensive CT strategy implemented by Western governments. These actions are characterized as acts of self-defense under Art. 51 of the UN Charter.

The U.S. government deems legal the targeting of an American citizen suspected of planning terrorist attacks; it is considered a legitimate act of self-defense, consistent with the law of war. Kamal Derwish, also known as Ahmed Hijazi, is the first publicly confirmed U.S. target, and the first American citizen killed in an overseas operation. In November 2002 Derwish was driving with five others suspected al-Qaida operatives in Yemen, when a Predator missile destroyed the vehicle.¹²¹⁵ The CIA didn't know who else was in the car besides the target of the covert mission was Abu Ali al-Harethi.¹²¹⁶

In 2011 Anwar al-Awlaki becomes the first U.S. citizen to be deliberately targeted and killed in a U.S. drone strike.¹²¹⁷ Alleged to be a leader, recruiter, and trainer for AQAP, al-

¹²¹⁰ Id., p. 29.

¹²¹¹ Mavrodes, George I. (1975), "Conventions and the Morality of War", *Philosophy and Public Affairs*, Vol. 4, No. 2 (Winter), p. 117-131.

¹²¹² Krisch, Nico, (2004), "Hegemony and the Law on the Use of Force", paper presented at ESIL Conference, 13-15 May 2004, Florence.

¹²¹³ Gill and van Sliedregt, p. 31. See also: Dörmann, Knut (2003), "The Legal Situation of Unlawful/Unprivileged Combatants", *International Review of the Red Cross*, Vol. 85 (Mar.), p. 45; Ipsen pp. 66-67; Fisher, Horst (1995), "Protection of Prisoners of War" in Dieter Fleck (ed.) op. cit., pp. 326-27; Dinstein, Yoram (1989), "The Distinction between Unlawful Combatants and War Criminals" in Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Berlin, Springer, pp. 103-106.

¹²¹⁴ See: Art. 43(2) of Additional Protocol (I).

¹²¹⁵ Temple-Raston, Dina (2007), *The Jihad Next Door: The Lackawanna Six and Rough Justice in the Age of Terror*, New York, PublicAffairs.

¹²¹⁶ Yoo, John (2012), "Assassination or Targeted Killings After 9/11", *New York Law School Law Review*, Vol. 56, p. 58.

¹²¹⁷ Obama, Barack (2011a), "Remarks by the President at the 'Change of Office' Chairman of the Joint Chiefs of Staff Ceremony", Office of the Press Secretary of The White House, 30 Sept. 2011. Available at

Awlaki was qualified as a "specially designated global terrorist", and placed on the UNSC 1267 Sanctions List of individuals associated with al-Qaeda.¹²¹⁸ A U.S. citizen born in Saudi Arabia, Samir ibn Zafar Khan, thought to be the editor and publisher of al-Qaeda's English-language Web magazine *Inspire*, is killed in the action. President Obama issued an order, approved by the National Security Council (NSC), that Al-Awlaki's normal legal rights as a civilian should be suspended and his death should be imposed, as that Awalki was a threat to the United States. According to U.S. attorney general, Eric Holder, the decision to target Anwar al-Aulaqi was lawful, considered, and just.¹²¹⁹ Al-Awlaki's 16-year-old son, Abdulrahman, is killed by mistake by another U.S. drone strike two weeks later, together with nine other people, including his 17-year-old cousin.

Al-Awlaki's role in al-Qaeda, and U.S. government accusations against him, remain unverified and lacking in evidence; al-Awlaki, family, tribe, and supporters reject accusations of association with al-Qaeda.¹²²⁰ In defense and support of Awlaki intervene also the leader of AQAP, Nasser al Wuhaishi, who states that the inclusion of Awlaki's name in the most wanted list was "based upon lies, errors and fabrications".¹²²¹ Al Wuhaishi stresses that all these people have been assassinated without them being charged with anything and without evidence.¹²²²

The UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, wonders under what circumstances, in the context of non-international armed conflict, the IHL imposes an obligation to capture rather than kill a legitimate military target where this is feasible.¹²²³ Beyond the legal framework of a hybrid conflict such as the War on Terror, an execution without due process is GHRV.

<https://www.whitehouse.gov/the-press-office/2011/09/30/remarks-president-change-office-chairman-joint-chiefs-staff-ceremony> (accessed 17 Feb. 2016).

¹²¹⁸ U.S. Department of Justice (2015), "Four Men Charged with Providing Material Support to Al Qaeda in the Arabian Peninsula", 5 Dec. 2015. Available at <http://www.justice.gov/opa/pr/four-men-charged-providing-material-support-al-qaeda-arabian-peninsula> (accessed 17 Feb. 2016).

¹²¹⁹ Holder, Eric H., J. (2013), Letter to the U.S. Senate judiciary committee chairman Patrick J. Leahy, 22 May 2013. Available at <http://www.justice.gov/slideshow/AG-letter-5-22-13.pdf> (accessed 16 Feb. 2016).

¹²²⁰ Sperry, Paul E. (2005), *Infiltration: how Muslim spies and subversives have penetrated Washington*, Nashville, Thomas Nelson Inc.

¹²²¹ al Wuhayshi, Abu Baseer Nasir (2010), "In Defence and Support of Shaikh Anwar Awlaki", Global Islamic Media Front transcript of Al-Malahim's audio release, June 2010. Available at https://archive.org/details/Nusrah_yemen (accessed 25 Feb. 2016).

¹²²² Ibid.

¹²²³ A/HRC/25/59, § 71(h).

I wonder how to consider the killing of Osama bin Laden. Bin Laden was incapable to defend (*hors de combat*); this killing was a violation of Common Article 3 and of Additional Protocol I or II, depending whether the WoT to be an international or a non-international armed conflict. One wonders why the United States did not capture bin Laden, who was unarmed, to bring him before a court, and preferred to eliminate him along with other four people, considering that no fire-fight took place during the operation. A trial for war crimes and crimes against humanity is possible also *in absentia* – Martin Bormann, Hitler's private secretary and head of the Nazi Party Chancellery, was convicted and sentenced to death by hanging at the Nuremberg Trials.¹²²⁴

The U.S. government does not characterize the killing of bin Laden an assassination, which is prohibited in 1981 E.O. 12333, because considers it an act of self-defense under the AUMF. Marsavelski argues that President Obama perceived the execution of the head of al-Qaeda as “justice”; an act of retaliation for the 9/11 victims.¹²²⁵ The behavior of the U.S. administration is confirmed by a statement released to an Iraqi TV by the special presidential envoy for the Global Coalition against Daesh, Brett McGurk, about the head of the Islamic State: "will find Abu Bakr al-Baghdadi and kill him".¹²²⁶

Sometimes targeted killings are intentional, sometimes they are the outcome of errors. In January 2015, a U.S. CT operation located in the border region of Afghanistan and Pakistan kills two innocent hostages held by al-Qaeda: Warren Weinstein, an American kidnapped in 2011; Giovanni Lo Porto, an Italian national captured in 2012.¹²²⁷ According to the White House, the operation results in the accidental killing of both hostages due to high confidence intelligence analysis.¹²²⁸ The operation targeted an al-Qaeda-associated compound, where the U.S. had no

¹²²⁴ International Military Tribunal for the Trial of German Major War Criminals (1946), judgment of 1 Oct. 1946.

¹²²⁵ Marsavelski, p. 263.

¹²²⁶ McGurk, Brett (2016c), "Interview With NRT TV", Department of State, 1 Dec. 2016. Available at <http://www.state.gov/s/seci/264867.htm> (accessed 12 Dec. 2016).

¹²²⁷ Obama, Barack (2015c), "The President Addresses the Nation on a U.S. Counterterrorism Operation in January", The White House Press Secretary, 23 Apr. 2015. Available at <https://www.whitehouse.gov/blog/2015/04/23/president-addresses-nation-us-counterterrorism-operation-january> (accessed 23 Apr. 2015).

¹²²⁸ Ibid.

reason to believe either hostage was present.¹²²⁹ The law of armed conflict requires taking all "feasible measures" in planning, deciding or conducting an attack in order to spare civilians.¹²³⁰

Two more American citizens are killed by mistake in the same drone strike: Adam Yahye Gadahn, born Adam Pearlman, a senior operative, cultural interpreter, spokesman and media advisor for al-Qaeda, indicted in the Central District of California for treason;¹²³¹ Ahmed Farouq, alleged to be al-Qaeda's head of preaching and media department in Pakistan, and deputy leader of AQIS.

The U.S. has been reported having paid 1.2 million USD as a donation to the family of Giovanni Lo Porto.¹²³² The choice of the wording "donation", instead of "compensation", does not imply any acknowledgment of U.S. responsibility in the death of the drone strike victim. The agreement signed between the U.S. embassy to Italy and the family of the Italian aid worker, confirms that Lo Porto was killed in Pakistan, and provides that the stipulation does not imply neither the consent by the U.S. to the exercise of the jurisdiction of the Italian courts in disputes, if any, directly or indirectly connected, nor a waiver to the sovereign or personal immunity.¹²³³ This wording has been drafted to avoid U.S. officials to be kept responsible and from being prosecuted for the killing of Lo Porto.

While calling the dead of innocents "a tragic, unintended consequence",¹²³⁴ the White House admits that is not able to provide specific numbers on other people killed in these strikes, either local civilians or militants.¹²³⁵ The lack of information generates more than some suspicion about the accuracy of intelligence reports that support targeting operations. The targets do not seem to be so 'targeted', and information in support of terrorism charges seem weak and based on assumptions, often drawn by the Internet, rather than on solid evidence.

¹²²⁹ Ibid.

¹²³⁰ Art. 57(2), of Additional Protocol I. The precise meaning of "feasible precautions" is defined in Art. 3(10), of Protocol II to the Conventional Weapons Convention, and includes "humanitarian and military considerations".

¹²³¹ NCTC (2015), "Adam Yahye Gadahn", *Counterterrorism Calendar 2015*, p. 22.

¹²³² Kirchgassner, Stephanie (2016), "US to pay €1m to family of Italian aid worker killed in drone strike", *The Guardian*, 16 Sept. 2016. Available at <https://www.theguardian.com/us-news/2016/sep/16/us-to-pay-1m-euros-family-italian-giovanni-lo-porto-drone-strike> (accessed 16 Sept. 2016).

¹²³³ Ibid.

¹²³⁴ Earnest, Josh (2015c), "Press Briefing by Press Secretary Josh Earnest, 24 March 2015", 24 Mar. 2015. The White House Press Secretary. Available at <https://www.whitehouse.gov/the-press-office/2015/04/24/press-briefing-press-secretary-josh-earnest-4242015> (accessed 17 Feb. 2016).

¹²³⁵ Earnest, Josh (2015d), "Press Briefing by Press Secretary Josh Earnest, 23 March 2015", The White House Press Secretary, 23 Mar. 2015. Available at <https://www.whitehouse.gov/the-press-office/2015/04/23/press-briefing-press-secretary-josh-earnest-4232015> (accessed 17 Feb. 2016).

Launching a missile against an individual, or into a car, does not respect the principle of proportionality, nor that of humanity, and even that of necessity provided in the law of armed conflict, as declared by U.S. government.¹²³⁶ Can terrorism be considered the act of killing of alleged terrorists far from the battlefield. Or the killing of civilians, children, and non-combatants. Is it lawful and just the deliberate bombing of a human being with a missile fired from an unmanned aerial vehicle? Considering such targeting a lawful and just tactic, hence, one should consider terrorism a tactical weapon to those who do not have advanced weapons, such as drones and aircraft.

The killing of Giovanni Lo Porto is not the first Italian accidental victim of a lethal action by the U.S. government or by its agents. In September 1997 Fabio di Celmo, an Italian entrepreneur, was murdered in a bombing in the lobby of the Hotel Copacabana, in Havana. The bombing was orchestrated by Luis Posada Carriles, a former CIA asset. Posada admitted his involvement, showing no remorse¹²³⁷ with respect to his participation in terrorist plots and attacks on tourists sites in Cuba.¹²³⁸ The U.S. Department of Justice characterized Posada as an "unrepentant criminal".¹²³⁹

Posada was accused of having committed serious non-political crimes outside the United States,¹²⁴⁰ including a plot to kill Cuban president, Fidel Castro, and the bombing of a flight of Cubana de Aviación airline in 1976, which resulted in 73 deaths.¹²⁴¹ Posada was imprisoned for several years in Panama for his involvement in an alleged plot in November 2000 to kill the Cuban *lider*.¹²⁴² Posada was convicted on weapons charges in the case, and sentenced to eight years in prison, but ultimately was pardoned by outgoing Panamanian president, Mireya Moscoso, in August 2004.¹²⁴³

¹²³⁶ Holder.

¹²³⁷ *Luis Posada-Carriles v. Alfredo Campos, et al.*, Case EP-06-CA-0130-PRM, Repondents' objections to the magistrate judge's 11 Sept., 2006 Report and Recommendation, 5 Oct. 2006, U.S. District Court for the Western District of Texas, El Paso Division, judge Norbert J. Garney, p. 4.

¹²³⁸ *Id.*, p. 5.

¹²³⁹ *Id.*, p. 1

¹²⁴⁰ *Id.*, p. 3.

¹²⁴¹ Office of the Coordinator for Counterterrorism (2007), State Sponsors of Terrorism Overview, *Country Reports on Terrorism 2006*, Department of State, 30 Apr. 2007. Available at <http://www.state.gov/j/ct/rls/crt/2006/82736.htm> (accessed 18 Feb. 2016).

¹²⁴² Sullivan, Mark P. (2010), *Venezuela: Issues in the 111th Congress*, CRS Report for Congress RL40938, Washington, D.C., CRS, p. 41.

¹²⁴³ *Ibid.*

Although both Venezuela and Cuba denounced Posada's release, affirming that Posada was a terrorist, and addressing an issue at a UN Security Council meeting on the anti-terrorism strategy, Posada kept on living in Miami until his death, with the U.S. State Department ignoring extradition requests.¹²⁴⁴ In 2007 the Italian Senate proposed a resolution, upheld by the executive, engaging the latter to work solicitously for the extradition request of Posada Carriles in Italy.¹²⁴⁵ In the text of the resolution, adopted by the Italian government, Posada was characterized as a terrorist who served the United States for 40 years.¹²⁴⁶ Eventually, Posada Carriles died in May 2018 in Florida without being tried for murder or terrorism.

The *Immigration and Nationality Act* (INA) provides that, if there are serious reasons for believing that the alien has committed a “serious non-political crime” outside the United States, the alien is barred from receiving asylum.¹²⁴⁷ Therefore, it might be inferred that Posada's crimes are considered 'political crimes'. This remark opens the door to the consideration that actions deemed "terrorist act", but having political objectives, may be considered political crime, i.e. criminal acts with political purposes.

The attitude of Washington towards terrorists was always ambiguous and dependent on national interest. In the past, the United States supported some 'terrorist' organizations, including the Nicaraguan *Contras* and the UNITA guerrillas in Angola.¹²⁴⁸ In *Nicaragua v. United States*, the International Court of Justice holds the U.S. responsible of violations of international law by supporting the right-wing *Contras* against the government.¹²⁴⁹ U.S. presidents welcomed the White House many former terrorists, including PLO chairman, Yasser Arafat, and Israeli prime ministers Menachem Begin and Yitzhak Shamir, who played key roles in the main Zionist terrorist organizations at the time they were trying to establish the State of Israel.¹²⁵⁰ The

¹²⁴⁴ *Id.*, p. 42.

¹²⁴⁵ Palermi, Manuela et al. (2017), Motion No. G100 to Bill No. 1663, Italian Senate, 21 June 2007. Available at <http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Emend&leg=15&id=279398&idoggetto=387277> (accessed 18 Feb. 2016).

¹²⁴⁶ *Ibid.*

¹²⁴⁷ The bars to asylum are listed at INA § 208(b)(2)(A)(i)-(vi), 8 U.S.C. § 1158(b)(2)(A)(i)-(vi). See also: INA § 101(a)(42), 8 U.S.C. § 1101(a)(42), excluding persecutors from refugee definition. Once evidence indicates the applicability of a bar to asylum, the alien bears the burden of proving its inapplicability by a preponderance of the evidence, under 8 C.F.R. § 1240.8(d).

¹²⁴⁸ Mearsheimer and Walt, p. 62.

¹²⁴⁹ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States Of America), Merits, Judgment*, ICJ Reports 1986, p. 14.

¹²⁵⁰ *Ibid.*

rationale behind the decisions of governments is not the respect for international law and human rights, but the national interest.

When a U.S. drone strike kills Mohammed Emwazi, better known as 'Jihadi John', the notorious British ISIL executioner responsible for the videotaped beheadings,¹²⁵¹ UK prime minister, David Cameron, comments that the strike is "an act of self-defense".¹²⁵² There is much to debate on the ability of individuals to carry out complex attacks on targets thousands of miles away from their location, and the threat¹²⁵³ to the security of a country such as Great Britain or the United States, such as to justify the use of lethal force.

Emwazi is not the first British citizen killed in a drone strike. Reyaad Khan, a 21-year-old from Cardiff, was killed in Syria – a country with which the UK was not at war – in August 2015 by a Hellfire missile fired from an RAF Reaper drone. The UK government claimed that the action against Daesh, in which was killed another Briton, Ruhul Amin, "was a necessary and proportionate exercise of the individual right of self-defense of the United Kingdom".¹²⁵⁴ British pm Cameron characterized as an "act of self-defense" the targeting of UK citizens outside a formal conflict.¹²⁵⁵ Junaid Hussain, another 21-year-old Birmingham-born ISIL cyber-operative, was killed in a U.S. airstrike in August 2015.¹²⁵⁶ The head of the Crown Prosecution Service concludes: "The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement".¹²⁵⁷ It is clear: the War on Terror is nothing but a police action on a global scale, and, as such, civil laws and protections provided by IHL apply to it.

¹²⁵¹ Cook, Peter (2015), "Strikes Target ISIL Executioner, Other Terrorists in Syria, Iraq", DoD, 13 Nov. 2015. Available at <http://www.defense.gov/News-Article-View/Article/628831/strikes-target-isil-executioner-other-terrorists-in-syria-iraq> (accessed 4 Mar. 2016).

¹²⁵² Cameron, David (2015), "PM statement: United States air strike in Syria", PM Office, 10 Downing Street, 13 Nov. 2015. Available at <https://www.gov.uk/government/speeches/pm-statement-united-states-air-strike-in-syria> (accessed 4 Mar. 2016).

¹²⁵³ *Zambrano Vélez and Others v. Ecuador*, Inter-American Court of Human Rights, 4 July 2007, § 85.

¹²⁵⁴ Davis, David (2015), "Debate. Armed drones", House of Commons, Column 52WH, 1 Dec. 2015. Available at <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm151201/halltext/151201h0001.htm> (accessed 10 Mar. 2016).

¹²⁵⁵ Cameron, David (2015), "Oral Answers to Questions. Syria: Refugees and Counter-terrorism", House of Commons, Column 65, 7 Sept. 2015. Available at <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0002.htm> (accessed 10 Mar. 2016).

¹²⁵⁶ Cronk, Terri Moon (2015), "Iraq Progresses in ISIL Fight, Key Extremist Confirmed Dead", DoD News, Defense Media Activity, 28 Aug. 2015. Available at <http://www.defense.gov/News-Article-View/Article/615305/iraq-progresses-in-isil-fight-key-extremist-confirmed-dead> (accessed 10 Mar. 2016).

¹²⁵⁷ Cortright, p. 254.

Targeting by airstrike is part of the strategy adopted by the U.S. and CJTF-OIR members to defeat ISIS in Syria and Iraq.¹²⁵⁸ Coalition partners which have conducted strikes in Syria include: the United States, Australia, Bahrain, Canada, Denmark, France, Jordan, the Netherlands, Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom.¹²⁵⁹ Many airstrikes, especially those conducted by drones, recorded innocent victims among the civilian population.

CENTCOM officials determined that 24 U.S. airstrikes targeting ISIS, and occurred between November 2015 and September 2016, may have killed as many as 64 civilians and injured eight others in Iraq and Syria.¹²⁶⁰ According to CJTF-OIR, at least 188 civilians were killed by coalition strikes in Iraq and Syria since the start of Operation Inherent Resolve until the end of 2016.¹²⁶¹ U.S. airstrikes in Syria targeted also Al-Qaida leaders.¹²⁶²

In September 2016, a U.S. airstrike "mistakenly struck" a Syrian military position with the loss of lives.¹²⁶³ According to the U.S. Air Force Central Command (USAFCENT), the air component of CENTCOM, CJTF-OIR airstrikes attacked what they believed to be ISIS fighting positions in Dayr Az Zawr, but mistakenly hit Syrian military forces due to intelligence assessment failure.¹²⁶⁴ Gen. Richard "Tex" Coe, who headed the investigation, stated that the targets were struck in accordance with the law of armed conflict and applicable rules of

¹²⁵⁸CJTF-OIR (2017b), "History", APO AE 09306, updated: July 2017. Available at http://www.inherentresolve.mil/Portals/14/Documents/Mission/HISTORY_17OCT2014-JUL2017.pdf?ver=2017-07-22-095806-793 (accessed 22 Dec. 2017). See also: CJTF-OIR, "Strike Releases". Available at <http://www.inherentresolve.mil/News/StrikeReleases> (accessed 12 Aug. 2016).

¹²⁵⁹ CJTF-OIR (2016a), "Counter-ISIL Strikes Target Terrorists in Syria, Iraq", DoD, 12 Sept. 2016. Available at <http://www.defense.gov/News/Article/Article/940586/counter-isil-strikes-target-terrorists-in-syria-iraq> (accessed 20 Sept. 2016).

¹²⁶⁰ CENTCOM (2016), "Centcom Officials Release Iraq, Syria Civilian Casualty Assessments", DoD, 9 Nov. 2016. Available at <http://www.defense.gov/News/Article/Article/1000962/centcom-officials-release-iraq-syria-civilian-casualty-assessments> (accessed 10 Nov. 2016).

¹²⁶¹ CJTF-OIR (2017c), "CJTF-OIR Announces Civilian Casualty Assessment for November", DoD, 2 Jan. 2017. Available at <https://www.defense.gov/News/Article/Article/1040266/cjtf-oir-announces-civilian-casualty-assessment-for-november> (accessed 3 Jan. 2017).

¹²⁶² Cook, Peter (2016c), "Statement by Pentagon Press Secretary Peter Cook on Strike against Al-Qaeda Leader", press release NR-347-16, DoD Press Operations, 3 Oct. 2016. Available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/962767/statement-by-pentagon-press-secretary-peter-cook-on-strike-against-al-qaeda-lea> (accessed 5 Oct. 2016).

¹²⁶³ Cook, Peter (2016d), "Statement by Pentagon Press Secretary Peter Cook on Coalition Airstrike in Syria", press release NR-329-16 DoD Press Operations, 17 Sept. 2016). Available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/962767/statement-by-pentagon-press-secretary-peter-cook-on-strike-against-al-qaeda-lea> (accessed 5 Oct. 2016).

¹²⁶⁴ Pellerin Cheryl (2016c), "U.S. Air Forces Central Command Completes Dayr Az Zawr Investigation", DoD News, Defense Media Activity, 29 Nov. 2016. Available at <http://www.defense.gov/News/Article/Article/1015010/us-air-forces-central-command-completes-dayr-az-zawr-investigation> (accessed 30 Nov. 2016).

engagement for all nations involved.¹²⁶⁵ The CJTF-OIR claims that the Coalition takes action against ISIS in accordance with the law of armed conflict.¹²⁶⁶

Two weeks later the Dayr Az Zawr 'incident', during a UNSC meeting the U.S., UK and France accused Russia and Syria of committing war crimes in Aleppo bombardment.¹²⁶⁷ The UN Secretary-General called on the Security Council "to take decisive steps to end such obvious war crimes and hold the perpetrators accountable".¹²⁶⁸ Damascus, in turn, claimed that the violations and massacres committed by the Turkish regime in the Syrian territories constitute a crime of aggression and crimes against humanity.¹²⁶⁹

While it strikes civilians, more or less involuntarily, the U.S. calls the Assad regime and its allies to comply with the laws of war and IHL.¹²⁷⁰ The laws of war, as well as humanitarian principles, should be respected and applied by all, especially by those who invoke them. U.S. state secretary, John Kerry, distinguishes between "accidents of war" or "collateral damage", caused by the U.S. or its coalition partners, and indiscriminate slaughter, due to Syrian or Russian troops.¹²⁷¹

In December 2016, during operations to liberate Mosul, Iraq, a CJTF-OIR airstrike hits a van, that is believed carrying ISIS fighters.¹²⁷² It will be later determined that the van was a hospital compound parking lot, and that the strike would have resulted in civilian casualties.¹²⁷³ In justifying the action, the CJTF-OIR claims that the Coalition forces comply with the law of armed conflict, during the planning and execution of airstrikes, to reduce the risk of harm to civilians.¹²⁷⁴ The same justification is given in May 2017 when a U.S. aircraft kills 101 civilians

¹²⁶⁵ Ibid.

¹²⁶⁶ CJTF-OIR (2017d), "Coalition Statement on ISIS Convoy", 30 Aug. 2017. Available at <http://www.inherentresolve.mil/News/Article/1295831/coalition-statement-on-isis-convoy> (accessed 31 Aug. 2017).

¹²⁶⁷ UNSC, The situation in the Middle East, 25 Sept. 2016, S/PV.7777.

¹²⁶⁸ Ki-moon, Ban (2016), "Ban calls on UN Security Council for decisive steps to end attacks on hospitals, medical staff", UN, 28 Sept. 2016. Available at <http://www.un.org/apps/news/story.asp?NewsID=55149#.V-xq1FfJqfs> (accessed 29 Sept. 2016).

¹²⁶⁹ Qabas and Mazen (2016), "Foreign Ministry: Violations and massacres committed by Turkish regime are condemned aggressions", SANA, 29 Aug. 2016. Available at <http://sana.sy/en/?p=86741> (accessed 31 Oct. 2016).

¹²⁷⁰ Kerry, John (2016f), "Remarks on Syria", Department of State, 15 Dec. 2016. Available at <http://www.state.gov/secretary/remarks/2016/12/265696.htm> (accessed 16 Dec. 2016).

¹²⁷¹ Ibid.

¹²⁷² CJTF-OIR (2016b), "Coalition Strike Results in Possible Civilian Casualties", DoD, 29 Dec. 2016. Available at <https://www.defense.gov/News/Article/Article/1039581/coalition-strike-results-in-possible-civilian-casualties> (accessed 30 Dec. 2016)

¹²⁷³ Ibid.

¹²⁷⁴ Ibid.

in the attack on two ISIS snipers.¹²⁷⁵ As to Operation Olive Branch in Afrin, the U.S. calls upon Turkey to "minimize the casualties to civilians".¹²⁷⁶

Civilian casualties were registered also in Yemen. The U.S. Central Command admitted that civilian non-combatants, including children, were killed by an aerial gunfire against AQAP members during an SOF raid occurred on 29 January 2017.¹²⁷⁷ The U.S. characterized its attacks in Yemen as acts of self-defense.¹²⁷⁸ In December 2017, according to the UN, the Saudi-led Coalition airstrikes in Yemen in killed 100 civilians.¹²⁷⁹ The UN Humanitarian Coordinator for Yemen, Jamie McGoldrick, called to comply with the IHL obligations to spare civilians and civilian infrastructure and to distinguish between civilian and military objects.

IHL in Yemen was violated also by the Saud-led coalition supported by the United States and the United Kingdom. In 2015 the UN Humanitarian Coordinator for Yemen denounced the indiscriminate bombing of populated areas by the coalition.¹²⁸⁰ HRW argues that Saudi-backed coalition airstrikes, with no evident military target, failed to distinguish civilians from military objectives, and apparently constitute violation of the laws of war. The UN and HRW find that, since the military campaign began in March 2015, the Saudi-led coalition committed war crimes (see: HRW country report 2016¹²⁸¹ and 2017¹²⁸²). A UN panel of experts says in a report for the UN Security Council that the Saudi-led coalition violated the principles of distinction,

¹²⁷⁵ Isler, Matthew (2017b), "Department of Defense News Briefing on the Findings of an Investigation into a March 17 Coalition Air Strike in West Mosul", DoD Press Operations, 25 May 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1194694/departement-of-defense-news-briefing-on-the-findings-of-an-investigation-into-a> (accessed 27 May 2017).

¹²⁷⁶ Tillerson, Rex W. (2018), "Secretary's Remarks: Press Availability With Turkish Foreign Minister Mevlut Cavusoglu", U.S. Department of State, 16 Feb. 2018. Available at <https://www.state.gov/secretary/remarks/2018/02/278410.htm> (accessed 17 Feb. 2018).

¹²⁷⁷ CENTCOM (2017), "Centcom: Civilians Likely Killed in Yemen Firefight", DoD News, Defense Media Activity, 2 Feb. 2017. Available at <https://www.defense.gov/News/Article/Article/1068219/centcom-civilians-likely-killed-in-yemen-firefight> (accessed 3 Feb. 2017).

¹²⁷⁸ Carter, Ashton (2016), "Statement by Pentagon Press Secretary Peter Cook on U.S. Military Strikes Against Radar Sites in Yemen", DoD Press Operations, press release NR-365-16, 12 Oct. 2016. Available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/972169/statement-by-pentagon-press-secretary-peter-cook-on-us-military-strikes-against> (accessed 13 Oct. 2016).

¹²⁷⁹ OHCHR (2017d), "Yemen: Amid spike in casualties, UN relief official says civilians bearing brunt of 'absurd war'", 28 Dec. 2017. Available at <http://www.un.org/apps/news/story.asp?NewsID=58454-.WmXabyPOUqI> (accessed 28 Dec. 2017).

¹²⁸⁰ van Der Klaauw, Johannes (2015), "Statement by the Humanitarian Coordinator for Yemen, Johannes Van Der Klaauw", UN Office for the Humanitarian Coordinator for Yemen, 9 May 2015. Available at [https://reliefweb.int/sites/reliefweb.int/files/resources/HC Statement on Yemen 9 May 2015.pdf](https://reliefweb.int/sites/reliefweb.int/files/resources/HC%20Statement%20on%20Yemen%209%20May%202015.pdf) (accessed 16 Feb. 2018).

¹²⁸¹ HRW (2017a), "Yemen Country Summary 2016". Available at https://www.hrw.org/sites/default/files/yemen_1.pdf (accessed 16 Feb. 2018).

¹²⁸² HRW (2018), "Yemen Country Summary 2017". Available at https://www.hrw.org/sites/default/files/yemen_2.pdf (accessed 16 Feb. 2018).

proportionality and precaution, including through their use of heavy explosive weapons in, on and around residential areas and civilian objects, in contravention of IHL.¹²⁸³ The UN experts on Yemen conclude that "the use of such attacks in a widespread or systematic manner has the potential to meet the legal criteria for a finding of a crime against humanity".¹²⁸⁴ Finally, in March 2019, the U.S. Senate approved a joint resolution to end support for the Saudi-led coalition fighting in Yemen and to stop bombings after gross and repeated violations of human rights.¹²⁸⁵

The CJTF-OIR underlines that, while it takes extraordinary efforts to protect civilians and strike appropriate military targets in accordance with the law of armed conflict, ISIS uses facilities such as mosques, hospitals and schools – which are all protected under the rules of international law – as weapons storage facilities, fighting positions and bases for its operations.¹²⁸⁶ The U.S. complains that ISIS continues to ignore the law of armed conflict, while Coalition forces comply with it.¹²⁸⁷

In a joint compilation report, the UN special rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, and the UN special rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, stress that states, their law enforcement agencies, and their officials are obligated to comply with international standards and with the normative framework governing the use of force, especially potentially lethal force, which includes the principles of legality, precaution, necessity, proportionality and accountability.¹²⁸⁸

¹²⁸³ UNSC (2016), "Letter dated 22 January 2016 from the Panel of Experts on Yemen established pursuant to Security Council resolution 2140 (2014) addressed to the President of the Security Council" (S/2016/73), § 124.

¹²⁸⁴ Ibid.

¹²⁸⁵ 116th U.S. Congress, Cong. Rec. Vol. 165, No. 45 of 13 Mar. 2019, pp. S1829–36.

¹²⁸⁶ CJTF-OIR (2017e), "ISIL Using Protected Sites to Attack Iraqi Forces", DoD, 1 Jan. 2017. Available at <https://www.defense.gov/News/Article/Article/1040217/isil-using-protected-sites-to-attack-iraqi-forces> (accessed 2 Jan. 2017).

¹²⁸⁷ CJTF-OIR (2017f), "Coalition Forces Strike Five-Story Facility in Mosul", DoD, 18 Feb. 2017. Available at <https://www.defense.gov/News/Article/Article/1088185/coalition-forces-strike-five-story-facility-in-mosul> (accessed 19 Feb. 2017).

¹²⁸⁸ UNHRC, *Joint report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on practical recommendations for the proper management of assemblies*, 4 Feb. 2016, A/HRC/31/66, § 50, 51. See also: UNHRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, 1 Apr. 2014, A/HRC/26/36, § 56.

According to Mr Heyns, the use of force, including the use of deadly or potentially deadly force by agents of the state, is a central human rights concern¹²⁸⁹ which may infringe upon human rights standards.¹²⁹⁰ The UN special rapporteur claims that the state has the burden to prove that the use of deadly force by its agents was justified.¹²⁹¹ In a case on the extrajudicial killing of three Ecuadorians by Ecuador's Armed Forces during the 1992-1993 emergency regime, the Inter-American Court of Human Rights rules that "[s]tate agents may use deadly force only against persons who constitute an immediate, deadly threat and must ensure that others are not killed in the process".¹²⁹²

According to the basic principles on the use of force adopted by the UN, where force is necessary, graduated force should as far as possible be used,¹²⁹³ and even if it is lead to death, the force used must still be the minimum required by the circumstances of each case.¹²⁹⁴ Precautionary measures protection of the right to life should be taken in the use advanced technology and sophisticated weapons, such as drones.¹²⁹⁵

The use of unmanned remote-controlled aerial vehicles impacts on human rights, in particular the right to life. The Human Rights Council (UNHRC) expresses serious concern for violations of fundamental human rights in the use of armed drones to counter terrorism.¹²⁹⁶

The UN special rapporteur on extrajudicial, summary or arbitrary executions argues that, even if can not be considered inherently unlawful or lawful *per se*,¹²⁹⁷ there are serious concerns about the use remote-controlled weapons systems in the military context, which challenge a range of human rights, in particular, the right to life (and bodily integrity in general) and the right to human dignity.¹²⁹⁸

Mr Heyns recommends to the international community to adopt a coherent approach in armed conflict and in law enforcement, which covers both the IHL and the human rights

¹²⁸⁹ A/69/265, § 65.

¹²⁹⁰ *Id.*, § 66.

¹²⁹¹ UNHRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, 6 Aug. 2014, A/69/265, § 37.

¹²⁹² *Zambrano Vélez and Others v. Ecuador*, § 85.

¹²⁹³ Principles 2, 4 and 5 of the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug.-7 Sept. 1990. See also: A/HRC/26/36, § 59, 69, 102, 139; A/61/311, § 33-45; A/HRC/14/24, § 33-37; A/68/382 and Corr.1, § 33-37.

¹²⁹⁴ A/69/265, § 72.

¹²⁹⁵ *Id.*, § 74, 75. See also: A/HRC/26/36, § 63, 64.

¹²⁹⁶ A/HRC/RES/25/22.

¹²⁹⁷ A/69/265, § 77, 86.

¹²⁹⁸ *Id.*, § 84, 85.

dimensions, and their use of lethal and less lethal weapons.¹²⁹⁹ The UNHRC concludes that states must ensure that any measures, including CT domestic laws, comply with their obligations under international law, in particular IHL.¹³⁰⁰ France, UK and the U.S. are among the six members of the UNHRC which voted against the resolution to ensure the use of armed drones comply with international law.¹³⁰¹

The UN Deputy High Commissioner for Human Rights, Flavia Pansieri, affirms that states have the duty to protect individuals from terrorist acts, but any measures taken must be consistent with IHL.¹³⁰² Miss Pansieri stresses that under the human right to life, the intentional use of lethal force is lawful only in a law enforcement context, when an individual poses an imminent threat to the life of another, where the use of lethal force is strictly unavoidable to protect life, and where other, less lethal, measures – including restraint, capture, and the graduated use of force – cannot be employed.

The UN Policy Working Group on Terrorism concludes that the targeting of unarmed civilians and the disproportionate use of force is wrong in all circumstances and violates the IHL.¹³⁰³ The Working Group recalls that military force must be used only in strict adherence with the principles of the UN Charter and in accordance with the laws of war.¹³⁰⁴

In his annual report 2014, the UN special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, addresses the legal frame to the use armed drones in extraterritorial lethal CT operations. The UN special rapporteur calls the HRC to take effective steps, by means of an appropriate resolution aimed at urging all member states to comply with their obligations under international law, including IHL,

¹²⁹⁹ *Id.*, § 89.

¹³⁰⁰ UNHRC, Resolution 7/7 [Protection of human rights and fundamental freedoms while countering terrorism], adopted on 27 Mar. 2008, § 1. See also: the list of principles concerning the compatibility of anti-terrorism measures with Art. 9 and 10 of the UDHR and Art. 9 and 14 of the ICCPR, in A/HRC/10/21, § 50-55. These principles include that: the detention of persons suspected of terrorist activities shall be accompanied by concrete charges, and in the development of judgments against them, the persons accused shall have a right to the guarantees of a fair trial and the right to appeal.

¹³⁰¹ UNHRC, Resolution 7/7, § 1.

¹³⁰² Pansieri, Flavia (2014), "Remarks by Ms. Flavia Pansieri, United Nations Deputy High Commissioner for Human Rights on the Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law", OHCHR, 22 Sept. 2014. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15113&LangID=E> (accessed 26 Mar. 2016).

¹³⁰³ Policy Working Group on the UN and Terrorism, Recommendation 7.

¹³⁰⁴ *Ibid.*

in particular the principles of precaution, distinction and proportionality.¹³⁰⁵ The report complains about a disproportionate number of civilian casualties,¹³⁰⁶ and suggests to fix, according to the applicable legal principles, some practices and interpretations that "appear to challenge established legal norms".¹³⁰⁷ Nevertheless, the secretary of defense, Jim Mattis, thinks that a more lethal force is needed in military practices.¹³⁰⁸

According to Mr Emmerson, legal uncertainty in relation to the interpretation and application of the core principles of international law governing the use of deadly force in CT operations, leaves dangerous wideness for differences of practice by states, running counter to the obligation identified in § 6(s) of UN General Assembly Resolution 68/178.¹³⁰⁹ The UN special rapporteur complains that this uncertainty "fails to provide adequate protection for the right to life, poses a threat to the international legal order, and runs the risk of undermining international peace and security".¹³¹⁰

By any name, targeting is assassination, murder; a 'justifiable homicide' standing on the dividing line between an excuse, a justification, and an exculpation. It is the attempt by governments to find an ethical justification for the use of terrorist means.

The U.S. condemns serious HRV, including extrajudicial killings,¹³¹¹ committed by other governments, but does not proceed with the extradition of criminals such as Posada Carriles; Washington avoids its agents to be extradited for offences related to terrorism. Among serious HRV committed by states while countering terrorism, there are extraordinary renditions, the government-sponsored abductions and extrajudicial transfers of a person, often never charged with any crime, from one country to another. An extraordinary rendition is the secret transfer of a suspected criminal from one country to another, often a country known to violate human rights and due process of law, without legal protection such as extradition laws and treaties.

¹³⁰⁵ A/HRC/25/59, § 73.

¹³⁰⁶ *Id.*, § 21.

¹³⁰⁷ *Id.*, § 70.

¹³⁰⁸ Pellerin, Cheryl (2017b), "Mattis: DoD Lines of Effort Include Building a More Lethal Force", DoD News, Defense Media Activity, 20 Sept. 2017. Available at <https://www.defense.gov/News/Article/Article/1318291/mattis-dod-lines-of-effort-include-building-a-more-lethal-force> (accessed 21 Sept. 2017).

¹³⁰⁹ UNGA, A/RES/68/178 [Resolution on the protection of human rights and fundamental freedoms while countering terrorism], adopted on 28 Jan. 2014.

¹³¹⁰ A/HRC/25/59, § 71.

¹³¹¹ Rubin, James P. (2000), "U.S. Response to Human Rights Commission Resolution on Chechnya", Office of the Spokesman of the Department of State, 26 Apr. 2000. Available at <http://www.state.gov/1997-2001-NOPDFS/briefings/statements/2000/ps000426.html> (accessed 11 Jan. 2015).

EXTRAORDINARY RENDITIONS

In the eighties, after years of ineffective counter-terrorism operations, the U.S. government is eager to strike back. In 1984 and 1986, during a wave of terrorist attacks, the Congress passes laws which turn into federal crimes air piracy and attacks on Americans abroad. The first case of extraordinary rendition is Operation Goldenrod, put in place by FBI and CIA in September 1987. Fawaz Younis, a Lebanese who was wanted in the U.S. courts for his role in the hijacking of a Jordanian airliner that had American citizens onboard, is abducted in Italy and brought to the U.S. for trial.¹³¹²

This tactic is best known for the kidnapping of Nazi criminal Adolf Eichmann by Israeli secret service in 1960. Eichmann, a former Schutzstaffel (SS) Obersturmbannführer (lieutenant colonel) was captured in Buenos Aires, Argentina, by Mossad agents, and smuggled to Israel.¹³¹³ Eichmann was charged of facilitating and managing the logistics of mass deportation of Jews to ghettos and extermination camps in German-occupied Eastern Europe during World War II.¹³¹⁴ Following a trial in Jerusalem, Eichmann was found guilty of war crimes and hanged in 1962.¹³¹⁵ Unlike Cukurs, Eichmann was at least granted a trial.

In February 2003, Osama Mustafa Hassan Nasr (AKA Abu Omar), an Egyptian cleric and alleged member of al-Gama'a al-Islamiyya (the Islamic Group) who left Egypt due to that group's prosecution as a terrorist organization by the Egyptian government,¹³¹⁶ is seized and transferred to Egypt, held *incommunicado* and tortured.¹³¹⁷ Abu Omar spends four years in detention before his imprisonment is declared unfounded.¹³¹⁸ Omar was granted political asylum in Italy in 2001, and held an Italian asylum passport.¹³¹⁹

¹³¹² FBI (2017a), "Fawaz Younis/Operation Goldenrod". Available at <https://www.fbi.gov/history/famous-cases/fawaz-younis> (accessed 17 Mar. 2017).

¹³¹³ Pearlman, Moshe (1961), *The Capture of Adolf Eichmann*, London, Weidenfeld and Nicolson, p. 113 et seq. See also: Harel, Isser and Shlomo J. Shpiro (1997) (eds.), *The House on Garibaldi Street*, London, Routledge (2nd edition).

¹³¹⁴ *The Trial of Adolf Eichmann* (1998), Record of Proceedings in the District Court of Jerusalem, Case No. 40/61, Jerusalem, Rubin Mass. See also: U.S. Holocaust Memorial Museum (2016), "Adolf Eichmann", *Holocaust Encyclopedia*, Washington, D.C., United States Holocaust Memorial Museum. Available at <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007412> (accessed 16 Oct. 2016).

¹³¹⁵ *Ibid.* See also: Aharoni, Zvi (1997), *Operation Eichmann: The Truth about the Pursuit, Capture and Trial*, Hoboken, Wiley.

¹³¹⁶ *Nasr and Ghali v. Italy*, App. No. 44883/09, ECtHR, Fourth Section, 23 Feb. 2016, § 3, 19, 33.

¹³¹⁷ *Nasr and Ghali v. Italy*, § 8.

¹³¹⁸ A6-0020/2007, § 50.

¹³¹⁹ *Ibid.*

The Abu Omar case is one of the better-documented cases of extraordinary rendition carried out in a joint operation by the CIA and the Italian Military Intelligence and Security Service (SISMI) in the context of the Global War on Terror.¹³²⁰ Twenty-two CIA operatives and high-ranking officials, and one U.S. Army officer, were convicted *in absentia* of Abu Omar's abduction, and were sentenced to serve between six and nine years imprisonment.¹³²¹ Even if the Italian minister of justice refused to forward to Washington the demand for extradition of the CIA agents requested by the Italian prosecutors, European arrest warrants were issued for all the indicted persons.¹³²² The Italian government classified the files related to the Abu Omar case invoking the state secret, which granted impunity of those responsible.¹³²³

In December 2015, the Italian head of state, Sergio Mattarella, to avoid their imprisonment, pardons the CIA agents convicted of the kidnapping of Abu Omar.¹³²⁴ The decision taken by Mattarella follows that of his predecessor, Giorgio Napolitano, who in April 2013 pardoned the U.S. Air Force lieutenant colonel Joseph L. Romano III,¹³²⁵ at the time of kidnapping the U.S. security officer of the 31st Security Forces Squadron (SFS) of the U.S. Air Force (USAF) based at the NATO Aviano airport – Abu Omar was smuggled in an aircraft that made a stop at Aviano, before continuing to Ramstein, Germany, and from there to Egypt. The act of clemency of the Italian president mention the adoption of "drastic measures" by the U.S. after the 9/11 attacks, and the need to overcome the problem in terms of bilateral relations with a friendly country. The mandate of Napolitano would have expired two weeks later. Two weeks before signing the decree of clemency, Napolitano meets the U.S. vice president, Joe Biden, on

¹³²⁰ See: *Prosecutor v. President of the Council of Ministers*, Case No. 007C1212, action before the Constitutional Court for conflict of attribution between state powers (state secret) of the public prosecutor of Milan against the President of the Council of Ministers of the Italian Republic, 5 Dec. 2006, GU, 1st Special Serie - Constitutional Court, No. 42 of 31 Oct. 2007.

¹³²¹ *Nasr and Ghali v. Italy*, § 122-123, 136.

¹³²² *Id.*, § 48, 50.

¹³²³ A6-0020/2007, § 60. See also: *Nasr and Ghali v. Italy*.

¹³²⁴ Presidency of the Italian Republic (2015), "President Mattarella signed three decrees granting pardon", 23 Dec. 2015. Available at <http://www.quirinale.it/elementi/Continua.aspx?tipo=Comunicato&key=1263> (accessed 18 Feb. 2016).

¹³²⁵ Presidency of the Italian Republic (2013a), "Pardon of President Napolitano Under Article 87 clause 11 of the Constitution", 5 Apr. 2013. Available at <http://presidenti.quirinale.it/elementi/Continua.aspx?tipo=Comunicato&key=14800> (accessed 18 Feb. 2016).

state visit in Italy.¹³²⁶ It is not difficult to imagine that these pardons are grounded on the national interest, and not on the principle of justice.

While for worldwide extradition is required the authorization from the minister of justice, the European arrest warrant may be issued administratively by prosecutors, without government approval. Sabrina De Sousa has been the only U.S. agent involved in the abduction of Abu Omar to be detained. De Sousa was arrested at the airport of Lisbon, Portugal, on a European arrest warrant, appealed her extradition to Italy, and lost all her petitions against deportation. De Sousa was eventually pardoned by the Italian president of the Republic in February 2017, on the grounds that the U.S. had stopped the practice of extraordinary renditions, and the need to re-balance the penalty compared to that of others convicted of the same crime.¹³²⁷

In the Abu Omar case, the European Court of Human Rights unanimously condemns Italy for the violation of the ECHR: Art. 3 (prohibition of torture and inhuman or degrading treatment); Art. 5 (right to liberty and security); Art. 8 (right to respect for private and family life); Art. 13 (right to an effective remedy). In previous cases, the ECtHR finds that the treatment of "high-value detainees" for the purposes of CIA's extraordinary renditions program was to be qualified as torture within the meaning of Art. 3 of the Convention: *El-Masri v. "The former Yugoslav Republic of Macedonia"*,¹³²⁸ *Al Nashiri v. Poland*,¹³²⁹ *Husayn (Abu Zubaydah) v. Poland*.¹³³⁰

More histories of extraordinary rendition are documented by the European Parliament (EP), which reveals that the CIA operated 1,245 flights¹³³¹ with the knowledge or cooperation of member states.¹³³² The EP strongly condemns the U.S. extraordinary rendition program for HRV and for the breaching of an imperative norm of international law (*jus cogens*) from which no derogation is possible, and to which all states are obliged (*erga omnes*).¹³³³ The EP finds that the

¹³²⁶ Presidency of the Italian Republic (2013b), "President Napolitano received the Vice President of the United States, Biden", 18 Mar. 2013. Available at <http://presidenti.quirinale.it/elementi/Continua.aspx?tipo=Comunicato&key=14730> (accessed 18 Feb. 2016).

¹³²⁷ Presidency of the Italian Republic (2017), "President Mattarella granted the partial pardon of one year imprisonment to Sabrina De Sousa", 28 Feb. 2017. Available at <http://www.quirinale.it/elementi/Continua.aspx?tipo=Comunicato&key=2579> (accessed 28 Feb. 2017).

¹³²⁸ *El-Masri v. "The former Yugoslav Republic of Macedonia"*, App. No. 39630/09, ECtHR, Grand Chamber, 13 Dec. 2012.

¹³²⁹ *Al Nashiri v. Poland*, App. No. 28761/11, ECtHR, Fourth Section, 24 July 2014.

¹³³⁰ *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, ECtHR, Fourth Section, 24 July 2014.

¹³³¹ A6-0020/2007, § 42.

¹³³² *Id.*, § 39, 43.

¹³³³ *Id.*, letter G of the premises.

U.S. program violates in particular the right to liberty and security, the freedom from torture and cruel, inhuman or degrading treatment, the right to an effective remedy, and, in extreme cases, the right to life.¹³³⁴ The Council of Europe estimates that 100 people have been unlawfully kidnapped by the CIA on EU territory, with the cooperation of CoE members,¹³³⁵ and rendered to other countries notorious for their use of torture.¹³³⁶

The CoE Parliamentary Assembly considers that secret detentions and unlawful inter-state transfers occurred without any democratic legitimacy, and without any legal protections.¹³³⁷ The PACE concludes that these abductions deprived hundreds of suspects of their basic rights, including the right to a fair trial, often to be handed over to states who customarily resort to torture.¹³³⁸

According to the CoE, whose members abolished death penalty,¹³³⁹ the U.S. has tainted its reputation as a stronghold of the defense of civil liberties and human rights through the systematic exclusion of all forms of judicial protection and by depriving hundreds of suspects of their basic rights, including the right to a fair trial.¹³⁴⁰ The PACE gathers that the United States has paid a high price in terms of loss of international credibility for actions taken in detention camps like Abu Ghraib, Guantánamo, and more generally in Iraq.¹³⁴¹

The World Conference on Human Rights emphasizes that one of the most atrocious HRV is the act of torture,¹³⁴² and reaffirms that under human rights law and IHL, freedom from torture is a right which must be protected under all circumstances, including in times of internal or international disturbance or armed conflicts.¹³⁴³ The World Conference urges states to prevent,

¹³³⁴ *Id.*, A6-0020/2007, letter F of the premises.

¹³³⁵ PACE (2006), Resolution 1507 (2006), *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, adopted on 26 June 2006, § 8, 9, 10.

¹³³⁶ *Id.*, § 7.

¹³³⁷ *Id.*, § 4, 6, 8.

¹³³⁸ *Ibid.*

¹³³⁹ The Russian Federation has not abolished the death penalty in law but the penalty has not been applied since 1999, following the decision of the Constitutional Court to impose a moratorium. The last person to be executed in Russia was a serial killer named Sergey Golovkin, who was shot on 2 Aug. 1996.

¹³⁴⁰ PACE, Resolution 1507 (2006), § 8.

¹³⁴¹ PACE (2007), Resolution 1539 (2007), PACE, Resolution 1539 (2007) [The United States of America and international law], adopted on 16 Mar. 2007, rapporteur Tony Lloyd, § 3.4.

¹³⁴² VDPA, § 55.

¹³⁴³ *Id.*, § 56. See also: § 96.

terminate and punish acts of enforced disappearance¹³⁴⁴ and to prosecute responsible for grave violations of human rights such as torture.¹³⁴⁵

It should be noted that the reason why the United States have not removed Posada Carriles from the American soil, pursuant to Art. 3 of the UN Convention against Torture and according to Federal law,¹³⁴⁶ is for the possibility of torture in Venezuela or in Cuba.¹³⁴⁷

While promoting operations to overthrow dictatorships and regimes suspected of HRV, the United States remains an ally of the Sunni monarchies of the Gulf and of several other governments, from Israel to Russia, through Egypt, which are known for failure to comply with human rights. The fight against terrorism can be a convenient excuse to violate laws, invoking the state of necessity, emergency, war. The most affected are fundamental human rights.

OBLIGATIONS AND DEROGATIONS TO HUMAN RIGHTS

I believe that measures taken by states in time of public emergency, which threatens the life of the nation, even if derogating from their obligations, should not be inconsistent with their other obligations under international law. In *Lawless v. Ireland* the European Court of Human Rights rules that invoking a state of war allows a government to take measures derogating from its obligations under the ECHR, providing that such measures do not conflict with other obligations under international law.¹³⁴⁸ The derogation from certain rights under the ECHR does not exempt signatory states from compliance with the mandatory principles. The UN High Commissioner for Human Rights finds that the suspension of constitutional rights adopted in the state of emergency, violates human rights and fundamental freedoms, not only with regard to the fundamental law of some states but also in relation to international conventions.¹³⁴⁹

¹³⁴⁴ *Id.*, § 61.

¹³⁴⁵ *Id.*, § 60. See also: § 91.

¹³⁴⁶ See, e.g., *Foreign Affairs Reform and Restructuring Act of 1998* (FARRA), Pub. L. 105-277, 112 Stat. 2681 (8 U.S.C.A. § 1231 note), div. G, § 2242(a).

¹³⁴⁷ *Cfr. Posada-Carriles v. Campos*, p. 3: "Posada was ordered removed from the United States on September 27, 2005, but granted deferral of removal under the Convention Against Torture to Cuba and Venezuela - a temporary form of relief which does not preclude the Government from removing him to other destinations, and which, on a proper showing, may be terminated even as to Cuba and Venezuela".

¹³⁴⁸ *Lawless v. Ireland (No. 3)*, Case No. 332/57 (A/3), ECtHR, 1 July 1961 [law part], §22.

¹³⁴⁹ OHCHR (2008), "Human Rights, Terrorism and Counter-terrorism", fact sheet No. 32. Available at <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf> (accessed 15 Dec. 2017). See also: Warbick,

Art. 15 of the ECHR enables states to derogate from some of their obligations in certain exceptional circumstances,¹³⁵⁰ without prejudice to: the prohibition of inhuman and degrading treatment or torture (Art. 3); the prohibition of slavery and servitude (Art. 4(1)); the principle of no punishment without law (Art. 7); the right to life (Art. 2), except in respect to deaths resulting from lawful acts of war.¹³⁵¹ Other rights which any derogation is prohibited by the ECHR are: Art. 1 of Protocol No. 6 to the Convention (abolishing the death penalty in peacetime); Art. 1 of Protocol No. 13 (abolishing the death penalty in all circumstances); Art. 4 of Protocol No. 7 (the right not to be tried or punished twice). The derogation set forth in Art. 15 has been used by some states in the fight against terrorism.¹³⁵² Following the November 2015 Paris attacks, France suspended some rights guaranteed by the ECHR.¹³⁵³ Until then only eight states had waived due to public emergency threatening the life of the nation: Albania, Armenia, Georgia, Greece, Ireland, Turkey, Ukraine and the UK. Derogations by France, Ireland, UK, Turkey are motivated due to the national security threat from terrorists organizations.¹³⁵⁴

The European Court of Human Rights has dealt with the violation of ECHR in the fight against terrorism in several cases. The first judgment given by the Court is due to the derogation by Ireland of certain rights enshrined in the ECHR. The pilot judgment for violation of Art. 5, 6 and 7 of the ECHR, providing rights to liberty and security, fair trial and the principle of 'no punishment without law', is filed by Gerard Richard Lawless,¹³⁵⁵ who was an IRA member, and was detained between July and December 1957 under the special powers of indefinite detention without trial under the *Offences against the State (Amendment) Act 1940*.¹³⁵⁶ Lawless admitted membership of the IRA, a terrorist group which had been declared by statute to be an unlawful organization, and could have obtained his release by undertaking to observe the law and refrain from such activities, but was detained by the Irish government without charge or trial. The

Colin (2004), "The European Response to Terrorism in an Age of Human Rights", *EJIL*, Vol. 15, No. 5. DOI: 10.1093/ejil/chh506.

¹³⁵⁰ Art. 15 ECHR: "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 the Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law".

¹³⁵¹ ECtHR Press Unit (2017a), "Derogation in time of emergency", factsheet, updated: Nov. 2017. Available at http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf (accessed 22 Dec. 2017).

¹³⁵² Ibid.

¹³⁵³ CoE Secretary General (2015), "France informs Secretary General of Article 15 Derogation of the European Convention on Human Rights", 25 Nov. 2015. Available at <https://go.coe.int/T9hFs> (accessed 8 Apr. 2016).

¹³⁵⁴ ECtHR Press Unit (2017a).

¹³⁵⁵ *Lawless v. Ireland (No. 3)*, § 22.

¹³⁵⁶ *Offences against the State (Amendment) Act 1940*, No. 2 of 1940.

European judges rules that is not be possible to justify the detention under the exceptions in § 5(b) or § 5(c), according to Art. 15 of the ECHR; persons detained must be brought before the court in all cases to which Art. 5(1)(c) refers. The same scheme of indefinite detention without trial is employed by the U.S. in Guantánamo.

The European Court of Human Rights compiled a list of cases in which addressed derogations from obligations resulting from the application of the Convention.¹³⁵⁷ Apart from cases concerning Northern Ireland and Britain, related to the IRA, in 1961, 1978, 1988, 1990, 1993, 1994, 1995, and those related to the fight of Turkey against the PKK (1996, 2005, 2006, 2008, 2009 and after), the statistics show a surge of cases brought before the ECtHR for alleged violations of human rights by CoE member states. This escalation begins in the mid-2000s, following the wave of terrorist attacks by al-Qaeda in the Old Continent (Madrid, 11 March 2004; London, 7 July 2005).

As of March 2016 the European Court defined 29 cases under Art. 3 (conditions of detention and treatment in case of deportation/extradition, including "secret 'rendition' operations"); two more judgments were pending by that date. The ECtHR addressed 13 issues under Art. 5 (right to liberty and security): existence of reasonable suspicion; indefinite detention; right to be brought promptly before a judge or other officer authorized by law to exercise judicial power; right to be tried within reasonable time; right to take proceedings to challenge lawfulness of detention; right to have lawfulness of detention decided speedily by a court. The ECtHR judged four cases under Art. 6 (right to a fair trial) – two more applications pending by that date – and one case under Art. 7 (no punishment without law). Five applications were addressed under Art. 8 (right to respect for private family and life).

The European Court of Human Rights ruled also on 41 cases – one more pending by that date – related to the state obligation to take measures needed to protect the fundamental rights within their jurisdiction against terrorist acts, according to Art. 2 (right to life) and Art. 6 of the Convention. Applications related the right to life concerned four cases, two pending at that date, and regarded use of the force to resolve terrorist attacks by Russian and British authorities.

Ruling on CT measures, the ECtHR recalls that remedies to prevent terrorism must respect human rights, excluding any form of arbitrariness, and that the Convention justifies the

¹³⁵⁷ ECtHR Press Unit (2017b), "Terrorism and the European Convention on Human Rights", factsheet, updated: Dec. 2017. Available at http://echr.coe.int/Documents/FS_Terrorism_ENG.pdf (accessed 23 Feb. 2016).

use of force in self-defense only if it is necessary,¹³⁵⁸ according to the *Guidelines on human rights and the fight against terrorism*.¹³⁵⁹

Among the issues addressed by the ECtHR, there are cases concerning: the right to life and use of force by the state in self-defense or defense to another (Art. 2); interferences with the exercise of the right to respect for private and family life, home and correspondence (Art. 8); interference with freedom of religion (Art. 9). More specifically, the Strasbourg court ruled also on: one case of applicants' complaint under Art. 9 of the ECHR (freedom of religion); twenty-one cases under Art. 10 (freedom of expression); six cases under Art. 11 (freedom of assembly); two cases under Art. 3 (right to free elections).

National courts have recognized terrorists' rights under the Convention. In April 2016, judge Helen Andenaes Sekulic of the Oslo district court, rules that the prison conditions under which is held domestic terrorist Anders Behring Breivik, who killed 77 people in 2011 attacks, violate Art. 8 and 3 of the ECHR.¹³⁶⁰

In addition to the ECHR, multiple international covenants ensure the obligation to respect fundamental human rights. According to Art. 4 of the ICCPR, states have the obligation to respect in any circumstances certain non-derogable rights;¹³⁶¹ derogations must be exceptional and temporary. The ICCPR inspired part of the *American Convention on Human Rights* ("Pact of San José"),¹³⁶² that has been adopted by many countries in the Western Hemisphere, excluding the U.S.,¹³⁶³ which have signed but have never ratified it. The preamble to the Convention calls for the "respect for the essential rights of man"; chapter II gives lists individual civil and political

¹³⁵⁸ Id., p. 18.

¹³⁵⁹ CoE (2005), "Human rights and the fight against terrorism. The Council of Europe Guidelines", Strasbourg, CoE Publishing. Available at <http://www.echr.coe.int/LibraryDocs/DG2/ISBN/COE-2005-EN-9287156948.pdf> (accessed 6 Apr. 2016).

¹³⁶⁰ *Anders Behring Breivik v. Ministry of Justice and Public Security (The State)*, Case No. 15-107496TVt-OTtR/02, Oslo District Court, judgment of 20 Apr. 2016 by Justice Helen Andenæs Sekulic. See also: Oslo District Court (2016), "Verdict: Lawsuit regarding prison regime and claimed violation of human rights (ECHR)", 20 Apr. 2016. Available at <https://www.domstol.no/en/Enkelt-domstol/Oslo-District-Court/Nyheter/verdict-lawsuit-regarding-prison-regime-and-claimed-violation-of-human-rights-echr> (accessed 20 Apr. 2016).

¹³⁶¹ Under provision of Art. 4 of the ICCPR, no derogation may be made from: Art. 6 (right to life); Art. 7 (ban on torture or to cruel, inhuman or degrading treatment or punishment); Art. 8 (ban on slavery and servitude); Art. 11 (prohibition of imprisonment for inability to fulfill a contractual obligation); Art. 15 (prohibition of retroactivity of law); Art. 16 (right to be tried before a court); Art. 18 (right to recognition as a person before the law).

¹³⁶² *American Convention on Human Rights* (Pact of San José), adopted at San José, on 22 Nov. 1969, entered into force 18 July 1978, UN Registration 27 Aug. 1979, No. 17955, OAS Treaty Series No. 36; UNTS Vol. 1144 (1987), p. 123.

¹³⁶³ OAS (2016), "American Convention on Human Rights. Signatories and Ratifications". Available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (accessed 8 Mar. 2016).

rights due to all persons, including: the right to life; the right to humane treatment; the right to a fair trial; the right to privacy; the right to freedom of conscience; the right of freedom of assembly; the right of freedom of movement. The right to life in war and peace is also protected by Art. 2 of the ECHR.

Chapter IV of the *Pact of San José* describes the circumstances in which certain rights can be temporarily suspended, such as during state of emergency, and details the formalities to be followed for such suspension to be valid. However, the *American Convention on Human Rights* does not authorize any suspension of Art. 3 (right to juridical personality), Art. 4 (right to life), Art. 5 (right to humane treatment), Art. 6 (freedom from slavery), and Art. 9 (freedom from *ex post facto* laws). Many provisions are enshrined in the earlier *American Declaration of the Rights and Duties of Man* (Bogotá Declaration),¹³⁶⁴ the world's first international human rights instrument, which, while not a treaty itself, constitutes an obligation for those states that have not ratified the American Convention, such as Cuba and the United States: a bizarre situation which permits the existence of the Guantánamo detention facility.

This chapter shed some light on the problems that arise from lack of understanding, or complete disregard for the rules of engagement in the War on Terror. It can, rightly, be claimed that at least part of the problem arises due to the inconsistent application of definitions and terms in respect to the nature of combatants in this war. As demonstrated, nations use these inconsistencies to push legislation that allows them to breach international law in an effort to pursue those they see as enemies of the state. Without a clear definition of terrorism, and in extension of terrorist, it is impossible to curtail the breach of human rights in this conflict. Moreover, counter-terrorism measures cannot be neither unlawful nor unlimited. Some CT measures violate the fundamental human rights protected under international law. Governments cannot invoke the state of emergency or national security as a motivation to suspend or limit fundamental human rights. Compliance with the rules is important, especially by those who claim to be on the 'right side'. Fundamental human rights must be respected, even in times of conflict or war; security concerns should not lead to disproportionate restrictions. Western civilization runs the greatest danger if renounces to its liberties and rights; this is a danger much

¹³⁶⁴ *American Declaration of the Rights and Duties of Man* ("Bogotá Declaration"), adopted by the Ninth International Conference of American States, Bogotá, 1948.

5 COUNTER-TERRORISM LAW AND POLICIES IN THE U.S. AND THE EU

As evidenced in chapter 4, the U.S. and its allies use methods that do not conform to international law when dealing with terrorist threats. In this chapter, the onus is placed on the U.S. counter-terrorism policy, which was enacted immediately after the events of 9/11. The onus is placed on the U.S., because, as it will be shown, most of the dogmatic elements found in the U.S. strategy can also be found in the EU strategy, which was passed in 2002. The differences between the purported methods for attaining strategic goals are relevant, but not so different as to warrant a complete comparative analysis. There is significant overlap between the two, with major differences emerging in the models of execution of the policy. The EU, unlike the U.S. bases its security policy on soft power, whereas the U.S. bases its policy on power and military might.

What is important is that this chapter analyzes the security policy in an effort to locate those segments that can be used to interpret the specific legal and judicial oversights identified in the previous chapter. While the U.S. generally strives to secure its internal borders by external action, the EU does the opposite, and focuses on external only insofar as it directly threatens the internal, while otherwise remains interested in its internal security above all other considerations. Both strategies include provisions that pertain to the apprehension and seizure of assets of terrorists, suspected terrorists, suspected terrorist aids, and organizations. There is no mention, in either strategy, of anything that could define or defend the actions of the U.S. and its allies in Afghanistan, Iraq, Syria, and elsewhere, since the onus is on terrorism as a non-state actor, whereas military operations are always directed against individual states. Moreover, the non-recognition of ISIS as a state, which is a moot point, removes any objective grounds for persecution of individuals for war crimes that could have been committed on its territory, simply by the virtue of fighting against non-state actors, which is not a clearly defined position in international law.

THE UNITED STATES V. THE LAW

During World War I, the U.S. government determined, without benefit of a hearing, that Alexander Gilroy, a U.S. citizen, was an alien enemy. The U.S. District Court for the Southern District of New York (S.D.N.Y.) agreed with the government that the court did not have jurisdiction to review the executive's determination, but did not agree that the court had no jurisdiction to inquire into the application of the statute.¹³⁶⁵ The S.D.N.Y. ruled that a U.S. citizen could not be an alien enemy as defined in the statute, and therefore the government was not at liberty to detain him without a hearing based on the executive's determination.¹³⁶⁶ Such hearing to determine whether aliens should be interned or released was probably not full and fair.¹³⁶⁷ After 9/11, President George W. Bush retraced the path of his predecessor Woodrow Wilson,¹³⁶⁸ and attempted to place Guantánamo detainees outside of the jurisdiction of *habeas corpus*, but the Supreme Court overturned this action. Bush challenged not only domestic law, but also international law.

The War on Terror, a transnational, hybrid, and unconventional conflict, challenges international law. Controversy arises over the U.S. designation of irregular opponents as "unlawful enemy combatants" or "unprivileged belligerents", especially in the SCOTUS judgments over the Guantánamo Bay detainees: *Hamdi v. Rumsfeld*;¹³⁶⁹ *Hamdan v. Rumsfeld*;¹³⁷⁰ *Rasul v. Bush*; *Boumediene v. Bush*.¹³⁷¹

After the September 11 attacks, President George W. Bush claims power, as commander-in-chief of the Armed Forces, to determine that any person, including an American citizen who is suspected of being a member, agent or associate of al-Qaeda, the Taliban, or possibly any other terrorist organization, is a "unlawful enemy combatant" who could be detained in U.S. military custody until hostilities end, pursuant to the international law of war.¹³⁷² Detainees are held in the Guantánamo Bay Naval Base (GTMO), where the U.S. administration interrogates and prosecutes them for war crimes.¹³⁷³ In February 2002 the White House determines that Taliban

¹³⁶⁵ *Ex parte Gilroy*, 257 F. 110, 112–13 (S.D.N.Y. 1919).

¹³⁶⁶ *Ibid.*

¹³⁶⁷ Commission on Wartime Relocation and Internment of Civilians (CWRIC) (1982), *Personal Justice Denied: Report of the CWRIC*, Washington, D.C., U.S. GPO, p. 285.

¹³⁶⁸ Woodrow Wilson served as the 28th President of the United States, during the World War I.

¹³⁶⁹ *Hamdi v. Rumsfeld* (03-6696), 542 U.S. 507 (2004), decided on 28 June 2004.

¹³⁷⁰ *Hamdan v. Rumsfeld* (05-184), 548 U.S. 557 (2006), decided on 29 June 2006.

¹³⁷¹ *Boumediene v. Bush* (06-1195); 553 U.S. 723; 128 S. Ct. 2229; 2008 WL 2369628; 2008 U.S. LEXIS 4887.

¹³⁷² Elsea.

¹³⁷³ U.S. Department of Defense (2002), "DoD News Briefing - Secretary Rumsfeld and Gen. Pace", DoD, 22 Jan. 2002. Available at <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=2254> (accessed 4 July 2016).

detainees are covered under the Geneva Conventions while al-Qaeda terrorists are not, but that none of the detainees qualified for the status of prisoner of war under Art. 4 of the Third Geneva Convention.¹³⁷⁴

The authority to detain individuals, argues the U.S. government, relies on 10 U.S.C. § 956(5), which authorizes the use of funds for "expenses incident to the maintenance, pay, and allowance of prisoners of war" as well as "other persons in the custody of the Army, Navy, or Air Force whose status is determined by the secretary concerned to be similar to prisoners of war".¹³⁷⁵ The U.S. administration interprets the phrase "similar to prisoners of war" to include "enemy combatants" who are not accorded POW status.¹³⁷⁶

The AUMF does not define the term "enemy combatant" until 7 July 2004, when then deputy secretary of defense, Paul Wolfowitz, issues the Order on creating the Combatant Status Review Tribunals (CSRTs) for confirming whether captives held in extrajudicial detention at GTMO have been correctly designated as enemy combatants.¹³⁷⁷ The definition of enemy combatant provided by the secretary of defense 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", including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces".¹³⁷⁸ The use of the term "armed forces" as usually indicates the regular armed forces of a state, also in IHL.

According to the DoD Dictionary an enemy combatant is "[i]n general, a person engaged in hostilities against the United States or its coalition partners during an armed conflict".¹³⁷⁹ The current U.S. definition of unprivileged belligerent is "an individual who is not entitled to the distinct privileges of combatant status (e.g. combatant immunity), but who by engaging in hostilities has incurred the corresponding liabilities of combatant status".¹³⁸⁰ The term

¹³⁷⁴ Fleischer.

¹³⁷⁵ Elsea, p. 47.

¹³⁷⁶ Ibid.

¹³⁷⁷ U.S. Department of Defense (2006), "Combatant Status Review Tribunals", CSRT Info 26Sep06, v3F. of 26 Sept. 2006. Available at <http://archive.defense.gov/news/Oct2006/d20061017CSRT.pdf> (accessed 28 Jan. 2016).

¹³⁷⁸ *In re Guantánamo Detainees Cases*.

¹³⁷⁹ JCS (2010) (ed.), *Department of Defense Dictionary of Military and Associated Terms*, JP 1-02, as amended through 15 Feb. 2016, Washington, D.C., DoD. For another definition of the term, see also: *Detention of Enemy Combatants Act*; this bill was introduced in several sessions of the U.S. Congress (H.R. 5684, 107th; H.R. 1029, 108th; H.R. 1076, 109th), but was never enacted.

¹³⁸⁰ Work, Robert O. (2014), "Department of Defense Directive Number 2310.01E of 19 August 2014 on Department of Defense Detainee Program", p. 14. Available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf> (accessed 10 Dec. 2017).

"unprivileged belligerent" is synonymous with the term "unlawful enemy combatant".¹³⁸¹ Examples of unprivileged belligerents are individuals who have forfeited the protections of civilian status by joining or substantially supporting a non-state enemy armed group in the conduct of hostilities; combatants who have forfeited the privileges of combatant status by engaging in spying, sabotage or other similar acts behind enemy lines.¹³⁸² According to the Geneva Convention (III) only spies and mercenaries do not have the right to be treated as combatants or prisoners of war.

The issue of military jurisdiction over enemy spies has been addressed in some cases,¹³⁸³ but the U.S. Congress, which made spying punishable by court-martial or military commission, but not technically a crime, rejected the idea of subjecting citizens to military jurisdiction after being accused of associating with the enemy to commit hostile acts.¹³⁸⁴

In World War II eight German saboteurs caught on U.S. soil while wearing civilian clothes were deemed to be unlawful combatants and thus not entitled to POW status. Six of them were executed by electric chair as spies.¹³⁸⁵ In its seminal decision on the German saboteurs, the U.S. Supreme Court rules:

The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.¹³⁸⁶

In the 1942 SCOTUS decision *Ex Parte Quirin*, the Court uses the terms with their historical meanings under international law within the definition in the Hague Convention to distinguish

¹³⁸¹ Ibid.

¹³⁸² Ibid.

¹³⁸³ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), 120–21, 18 L.Ed. 281 (1866); *United States ex rel. Wessels v. McDonald*, 265 F. 754 (E.D.N.Y. 1920); *Ex parte Gilroy*.

¹³⁸⁴ Elsea, pp. 14-16.

¹³⁸⁵ FBI (2017d), "Nazi Saboteurs and George Dasch". Available at <https://www.fbi.gov/history/famous-cases/nazi-saboteurs-and-george-dasch> (accessed 21 Dec. 2017).

¹³⁸⁶ *Ex parte Quirin*, 317 U.S. 1 (1942), § 31.

between unlawful and lawful combatants: "Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful".

The German saboteurs' case, as well as other similar cases, did not result in any military determinations that those charged were enemy combatants based on their association with the enemy or their hostile acts.¹³⁸⁷ It is therefore not clear what kind of ties with other enemy saboteurs would have authorized the military to detain them without trial as enemy combatants under the law of war.¹³⁸⁸

In a 2014 directive on the Detainee Program,¹³⁸⁹ which reissues a previous directive passed by the Bush administration in 2006, the U.S. Department of Defense (DoD) updates the established policy to ensure compliance with the laws of the United States and the laws of war, including the Geneva Conventions. The revised directive does not reflect any substantive changes. Some more notable ones relate to expanded humane treatment provisions; the general process for handling detainees from point of capture or assumption of custody until final transfer, repatriation, or release and policies related to the transfer, repatriation, or release of detainees, including applicable humane treatment and security assurances.

The DoD 2014 directive, valid for 10 years, says that treatment of all detainees should be consistent with the laws of war and with the standards established in Common Article 3, the principles in Art. 4, 5 and 6 of Additional Protocol II during non-international armed conflict, and the principles in Art. 75 of Additional Protocol I during international armed conflict and occupation.

The law of war is defined in the DoD Directive as "the part of international law that regulates the conduct of hostilities and the protection of victims of armed conflict in both international and non-international armed conflict and occupation, and that prescribes the rights and duties of neutral, non-belligerent, and belligerent states". The Directive recalls that it is often referred to as the "law of armed conflict" or "international humanitarian law," and that it is "specifically intended to address the circumstances of armed conflict". According to the Directive, the law of war "encompasses all international law applicable to the conduct of military operations in armed conflicts that is binding on the United States or its individual citizens,

¹³⁸⁷ Elsea, p. 26.

¹³⁸⁸ Ibid.

¹³⁸⁹ Work.

including treaties and international agreements to which the United States is a party [e.g. the Geneva Conventions of 1949], and applicable customary international law".

The operative provisions set up in § 3(f) of the Directive refer to three categories of military detainees in an armed conflict: prisoners of war, unprivileged belligerents and civilian internees. The glossary at the end of the directive in turn offers definitions for each of these three terms. A detainee is defined as any individual captured by or transferred to the custody or control of DoD personnel pursuant to the law of war, excluding persons being held solely for law enforcement purposes, except where the United States is the occupying power.

The Directive calls for human treatment and respect for the dignity of all detainees in accordance with applicable U.S. law and policy and the law of war and during all military operations, however they are characterized, but authorizes segregation for security reasons or to conduct law enforcement investigations. It states that access to detainees "will be permitted in limited circumstances". Humane treatment includes the prohibition of torture and cruel, inhuman or degrading treatment or punishment.

In 2002, when President Bush determines that detainees at Guantánamo Bay detention camp would "not be treated legally as prisoners of war" under the Geneva Convention (III), the government guarantees that they will be treated well under the same principles, as the United States usually does, and not because they are given legal POW status.¹³⁹⁰ According to the Department of Justice, individuals held in the Guantánamo prison are detained under the AUMF "as informed by the law of war, and consistent with applicable domestic and international law for such detentions".¹³⁹¹ In Guantánamo occurred serious HRV.

The Geneva Conventions prohibit torture and provide that those who are out of action, such as surrendering combatants, the wounded, sick, prisoners of war and other captives and detainees, must be identified as such and treated humanely.¹³⁹² Alleged terrorists were interrogated at GTMO using cruel, inhumane treatment considered illegal under the U.S.

¹³⁹⁰ Fleischer.

¹³⁹¹ U.S. Attorney General (2014), "Report Pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014", appendix to the "Plan for Closing the Guantanamo Bay Detention Facility" transmitted on 14 May 2014, Washington, D.C., U.S. Department of Justice, p. 1. Available at http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf (accessed 24 Feb. 2016).

¹³⁹² ICRS (2002), p. 14.

Constitution.¹³⁹³ In a memorandum drafted for the Inspector General of Department of the Navy, General Counsel Alberto J. Mora deems the detainees' treatment to be unlawful.¹³⁹⁴ The International Committee of the Red Cross has consistently expressed its grave concern over the humanitarian consequences and legal implications of the practice by the U.S. authorities of holding persons in undisclosed detention in the context of the fight against terrorism.¹³⁹⁵

In a strictly confidential *Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody*, the ICRC argues that these detainees, who were transferred from the CIA detention program to the custody of the Department of Defense in the Guantánamo facility after President Bush's decision in 2006, were subjected to systematic physical and/or psychological ill-treatment and that transfers to places of detention in unknown locations and continuous solitary confinement and incommunicado detention was itself a form of ill-treatment.

The International Committee of the Red Cross denounces these measures as an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law, and believes that the U.S. can achieve its security objectives while respecting its obligations and historical commitment to abide by international law.¹³⁹⁶ According to the ICRC, this detention regime, which "was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering.....resulting in exhaustion, depersonalization and dehumanization", constitutes torture and cruel, inhuman or degrading treatment.¹³⁹⁷

The ICRC report finds also that the interrogation process and the infliction of ill-treatment constitutes a gross breach of medical ethics and, in some cases, has amounted to participation in torture and/or cruel, inhuman or degrading treatment.¹³⁹⁸ The Red Cross calls on the U.S. authorities, which have failed to respond to two previous ICRC reports on undisclosed detention issued in 2004 and 2006, to treat persons deprived of liberty in the context of the fight

¹³⁹³ McColgin, David L. (2011) "The Theotorture of Guantánamo", in Nathan C. Walker and Edwin J. Greenlee (eds.), *Whose God Rules? Is the United States a Secular Nation or a Theolegal Democracy?*, New York, Palgrave MacMillan, p. 202-203.

¹³⁹⁴ Mora, Alberto J. (2005), *Memorandum for Inspector General, Department of the Navy. Statement for the record: Office of General Counsel involvement in interrogation issues*, Navy Pentagon, Department of the Navy, 7 July 2005. Available at <http://www.newyorker.com/images/pdfs/moramemo.pdf> (accessed 5 July 2016).

¹³⁹⁵ ICRC (2007), *ICRC Report on the Treatment of Fourteen 'High Value Detainees' in CIA Custody*, WAS 07/76, Washington, D.C., ICRC Regional Delegation for United States and Canada, 14 Feb. 2007, p. 3. Available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (accessed 5 July 2016).

¹³⁹⁶ *Id.*, p. 4 and 26.

¹³⁹⁷ *Id.*, p. 26.

¹³⁹⁸ *Id.*, p. 26-27.

against terrorism in accordance with the provisions of international law and internationally recognized standards, and to put an end to abuses.¹³⁹⁹

In a report on the *Human Rights Situation of Detainees in Guantánamo* issued in November 2015,¹⁴⁰⁰ the OSCE Office for Democratic Institutions and Human Rights (ODIHR) identifies a number of serious violations in the operation of the facility and the treatment of detainees, including torture and other cruel, inhuman or degrading treatment of prisoners, and calls the U.S., which is an OSCE participating state, for the prosecution of those responsible.

On the 15th anniversary of the opening of the GTMO, ODIHR director Michael Georg Link, reiterating the need for the United States to close the facility without further delay, affirms that "[i]ndefinite detention without charge or trial and a lack of accountability for abuses, including acts of torture and other ill-treatment at the Guantánamo detention facility and as part of the CIA rendition program, run directly counter to the United States commitments as an OSCE participating state and to other international human rights obligations".¹⁴⁰¹ Link adds that "[d]etention without effective recourse to justice and protection against abuse has no place in a democratic society based on the rule of law, human rights and fundamental freedoms".

Prisoners died of torture in 'black sites' – Asadabad, Bagram and Gardez in Afghanistan and Abu Ghraib, Camp Whitehorse, Basra, Mosul, Tikrit, Bucca and an unidentified facility in Iraq – where the U.S. government must abide by the Geneva Convention (IV).¹⁴⁰² Several DoD practices helped to obstruct medical evaluation of these deaths.¹⁴⁰³ Eight men died in the GTMO prison camp waiting for a trial. Six of them were suicides, while others unsuccessfully attempted suicide. The military claimed that the suicides were a conspiracy as part of "asymmetrical warfare" against the United States,¹⁴⁰⁴ but the report of the Naval Criminal Investigative Service (NCIS) said the government's conclusion of suicide by hanging in their cells was not proven.¹⁴⁰⁵

¹³⁹⁹ Id., pp. 3, 27-28.

¹⁴⁰⁰ OSCE/ODIHR (2015), *Report on the Human Rights Situation of Detainees at Guantánamo*, Warsaw, OSCE. Available at <http://www.osce.org/odihr/198721?download=true> (accessed 11 Jan. 2017).

¹⁴⁰¹ OSCE/ODIHR Public Affairs Unit (2017), "OSCE/ODIHR Director reiterates need for swift closure of Guantanamo Bay detention facility", 11 Jan. 2017. Available at <http://www.osce.org/odihr/293381> (accessed 11 Jan. 2017).

¹⁴⁰² Miles, Steven H. (2005), "Medical Investigations of Homicides of Prisoners of War in Iraq and Afghanistan", *Medscape General Medicine*, Vol. 7, No. 3, p. 4.

¹⁴⁰³ Ibid.

¹⁴⁰⁴ Denbeaux, Mark (2009), *Death in Camp Delta*, Newark, Center for Policy and research of the Stetson Hall University School of Law, pp. 3, 9, 37.

¹⁴⁰⁵ Denbeaux, pp. 41-44.

The NCIS mission is to investigate and defeat criminal, terrorist and foreign intelligence threats to the U.S. Navy and Marine Corps-ashore, afloat, and in cyberspace.¹⁴⁰⁶

Suspected terrorists were held in black sites that are secret prisons operated by the CIA, generally outside U.S. territory and legal jurisdiction that were used by the U.S. government in its War on Terror to detain alleged unlawful enemy combatants.¹⁴⁰⁷ Prisoners have been reported to have been tortured at such CIA-controlled facilities.¹⁴⁰⁸ Black sites were part of the U.S. extraordinary renditions program¹⁴⁰⁹ where detainees were likely to be tortured¹⁴¹⁰ in violation of Art. 3 of the UN *Convention Against Torture and Other Forms of Cruel and Inhuman or Degrading Treatment or Punishment*.¹⁴¹¹ The Convention Against Torture, which prohibits parties from engaging in torture, and also requires them to take measures to end "cruel, unusual, and inhuman treatment or punishment" within territories under their jurisdiction, was ratified by the U.S. in 1994.¹⁴¹²

Accordingly to a memorandum of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (PACE) on alleged detention in CoE member states, about 100 persons have been kidnapped by the CIA on European soil and subsequently taken to countries where they may have been tortured.¹⁴¹³ This number of 100 persons does not include the 100 U.S.-detained ghost detainees.¹⁴¹⁴

In Resolution 1539 (2007) on human rights violations committed by the United States and its allies in countering terrorism, the PACE argues that "the American Administration has inappropriately and unilaterally disregarded certain key human rights and humanitarian legal norms" in pursuit of its so-called War on Terror.¹⁴¹⁵ PACE accuses Washington of holding

¹⁴⁰⁶ NCIS (2016), "NCIS Mission". Available at <http://www.ncis.navy.mil/Pages/publicdefault.aspx> (accessed 5 July 2016).

¹⁴⁰⁷ ICRC (2007).

¹⁴⁰⁸ Ibid.

¹⁴⁰⁹ EP (2007), *Report of the European Parliament on the Alleged Use of European Countries by the CIA for the Transport and the Illegal Detention of Prisoners* (2006/2200(INI)), Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, rapporteur Giovanni Claudio Fava, Final A6-0020/2007, RR\382246EN.doc, PE 382.246v02-00, § 178, 232.

¹⁴¹⁰ ICRC (2007).

¹⁴¹¹ UNGA, Resolution 39/46 [Convention against torture and other cruel, inhuman or degrading treatment or punishment], adopted on 10 Dec. 1984, 39 UN GAOR, Supp. No. 51; A/39/51 (1984); UNTS, Vol. 1465, 1-24841, p. 113.

¹⁴¹² Id., Art. 1-3, and 16.

¹⁴¹³ PACE Resolution 1539 (2006).

¹⁴¹⁴ Ibid.

¹⁴¹⁵ PACE, Resolution 1539 (2007). See also: PACE (2007), *Report of the Committee on Legal Affairs and Human Rights*, Doc. 11181 of 8 Feb. 2007, rapporteur Tony Lloyd.

detainees unlawfully "in flagrant breach of its international obligations", in particular under the ICCPR, the Convention against Torture and the Geneva Conventions, as well as other rules of international humanitarian law on the treatment of persons captured or detained in an international armed conflict.¹⁴¹⁶ It denounces U.S. secret detention centers and unlawful interstate transfer routes, often in collaboration with countries notorious for their use of torture.¹⁴¹⁷

The *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* report compiled by the U.S. Senate Select Committee on Intelligence (SSCI) addresses the use of various forms of torture – "enhanced interrogation techniques", in U.S. government communiques – on detainees between 2001 and 2006.¹⁴¹⁸ The report was approved on 13 December 2012, updated for release on 3 April 2014, and then published after declassification revisions on following 3 December.¹⁴¹⁹ The PACE Committee on Legal Affairs and Human Rights argues that "reinforced interrogation techniques" is a euphemism for torture.¹⁴²⁰

When President George Bush declares the War on Terror in 2001, his administration does not apply IHL, such as the Geneva Conventions, to U.S. interrogators overseas. Human rights violations against detainees in U.S. overseas detention centers, including Iraq – in 2003, during this war, the United States' role was that of an occupying power –, Afghanistan, and Guantánamo Bay, seem to be 'made lawful' by president's Executive Order.¹⁴²¹ Guantánamo became the symbol of the violation of human rights in the War on Terror. At Guantánamo detainees were deprived of their fundamental rights, and IHL was trampled. The U.S. Supreme Court reinstalled some of these rights.

In *Hamdi v. Rumsfeld* (2004) the SCOTUS recognizes the power of the U.S. government to detain enemy combatants, including U.S. citizens, but rules that detainees who are U.S. citizens have the right to due process and the ability to challenge their enemy combatant status before an impartial authority. The Court also rejects the U.S. government request to hold an

¹⁴¹⁶ *Id.*, § 3.1.

¹⁴¹⁷ *Id.*, § 3.2.

¹⁴¹⁸ U.S. Senate Select Committee on Intelligence (2014), *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, approved 13 Dec. 2012; updated for release 3 Apr. 2014; declassification revisions 3 Dec. 2014. Available at <http://www.intelligence.senate.gov/press/committee-releases-study-cias-detention-and-interrogation-program> (accessed 5 July 2016).

¹⁴¹⁹ *Ibid.*

¹⁴²⁰ PACE, Doc. 12276, § 51.

¹⁴²¹ FBI (2004), "Message MSG014 of 22 May 2004, Memo 4940-4941, Detainees 1640-1641", 22 May 2004. Available at https://www.aclu.org/sites/default/files/torturefoia/released/FBI.121504.4940_4941.pdf (accessed 28 June 2016).

individual in indefinite detention for the purpose of interrogation. The Department of Defense considered that AUMF provides authority to detain those individuals within the United States until the end of hostilities.¹⁴²² Elsea argues that it is difficult to imagine that Congress would have meant to give the president authority to detain indefinitely similarly situated U.S. citizens, without trial, as 'enemy combatants'.¹⁴²³

In *Rasul v. Bush* (2004) the Supreme Court decides that the U.S. court system has the authority to decide whether foreign nationals (non-U.S. citizens) held in Guantánamo Bay are wrongfully imprisoned. The Sixth Amendment to the U.S. Constitution, part of the *Bill of Rights*,¹⁴²⁴ states the right to a fair trial. *In re Winship*¹⁴²⁵ the U.S. Supreme Court upholds that the presumption of innocence shall apply already in the adjudicatory stage, and that delinquent status should be proved beyond a reasonable doubt.

As a result of the SCOTUS decision in *Rasul*, eleven detainees held as enemy combatants at GTMO pursuant to the AUMF, and accused of ties with al-Qaeda or other terrorist organizations, call the D.D.C. complaining that their detention and its conditions at Guantánamo Bay violate, among others, the Fifth Amendment to the U.S. Constitution (the right not to be deprived of liberty without due process of law), and the Third and Fourth Geneva Conventions.¹⁴²⁶ Some of the detainees, who had been taken into custody in distant locations including Afghanistan, Gambia, Zambia, Bosnia-Herzegovina and Thailand, have been detained *incommunicado* for as long as three years without the opportunity to challenge their "enemy combatant" status.¹⁴²⁷

The D.D.C. decides that the special nature of the base at Guantánamo Bay justifies that it be treated as the equivalent of sovereign U.S. territory and recognizes the detainees' fundamental constitutional rights under the Due Process Clause of the Fifth Amendment, even if inmates are not U.S. citizens. The D.D.C. also finds that the procedures provided by CSRTs fail to satisfy constitutional due process guarantees. The court rules that GTMO prisoners have the right to challenge the basis of their detention, and the government needs to distinguish between POWs,

¹⁴²² *Plan for Closing the Guantanamo Bay Detention Facility*, p. 6.

¹⁴²³ Elsea, p. 46.

¹⁴²⁴ *The Bill of Rights*, joint resolution passed by the U.S. Congress on 25 Sept. 1789, proposing 12-not 10-amendments to the Constitution.

¹⁴²⁵ *In re Winship*, 397 U.S. 358 (1970). See also *In re Gault*, 387 U. S. 1, 387 U. S. 13 (1967).

¹⁴²⁶ *In re Guantánamo Detainees Cases*.

¹⁴²⁷ *Ibid*.

civilians, and enemy combatants. Detainees cannot be tried by military commissions until has been determined if they are enemy combatants.¹⁴²⁸

In December 2005, via amendments the U.S. Congress passes the *Detainee Treatment Act* (DTA), as part of the *Department of Defense Appropriations Act of 2006*,¹⁴²⁹ which prohibits the "cruel, inhuman, or degrading treatment or punishment of persons under the detention, custody, or control" of the U.S. government, and provides for "uniform standards" for interrogation.

The Act regulates U.S. treatment of enemy combatants and terrorist suspects detained in the custody or control of the U.S. government, regardless of their nationality or physical location. The DTA requires the DoD and intelligence and law enforcement to comply with U.S. statutes and treaties such as the Fifth, Eighth, and Fourteenth Amendments to the Constitution, the UN Convention against Torture and the Geneva Conventions. While the Constitution applies to U.S. citizens abroad, and non-citizens in the United States,¹⁴³⁰ the *Detainee Treatment Act* grants broad protection to detainees regardless of their geographic location or nationality, including terrorist suspects or enemy combatants abroad.

Garcia argues that "[i]t is not clear that these and similar treatments may never be deemed constitutionally impermissible outside the criminal context, including when such treatments are used upon enemy combatants or terrorist suspects who have not been charged with a criminal offence".¹⁴³¹ Further, these provisions do not appear to prohibit U.S. agencies from transferring persons to other countries where those persons would face cruel, inhuman or degrading treatment or punishment.¹⁴³² These transfers are prohibited by domestic statutes and treaties ratified by the U.S., as provided for in the DTA.

The DTA contains provisions that require Department of Defense personnel to employ the U.S. *Army Field Manual on Intelligence Interrogation* (FM 34-52) guidelines.¹⁴³³ After the

¹⁴²⁸ 10 U.S.C. 950, current through the *Veterans Entrepreneurship Act of 2015*, Pub. L. 114-38, 129 Stat. 437, provides crimes triable by military commission.

¹⁴²⁹ *Department of Defense Appropriations Act of 2006*, Pub. L. 109-148, 119 Stat. 2680, and *National Defense Authorization Act for Fiscal Year 2006*, Pub. L. 109-163, 119 Stat. 3136.

¹⁴³⁰ See, e.g., *Verdugo-Urquidez v. United States*, 494 U.S. 259, 270-71 (1990). See also: *Rasul v. Bush*.

¹⁴³¹ Garcia, Michael John (2006), *Interrogation of Detainees: Overview of the McCain Amendment*, CRS Report for Congress RL33655, Washington, D.C., CRS, p. 6.

¹⁴³² Garcia (2006), p. 3.

¹⁴³³ DTA § 1002; Pub. L. 109-163 § 1402.

Hamdan ruling, the *Army Field Manual* was updated.¹⁴³⁴ The requirement to adhere to the Geneva Conventions were already included in the previous 1992 version of the *Field Manual*. The updated 2006 version requires all detainees to be treated in a manner consistent with the Geneva Conventions and prohibits the use of torture or cruel, inhuman or degrading treatment in any circumstance.

Garcia notes that an exception to this general requirement is made for individuals being held pursuant to U.S. criminal or immigration laws.¹⁴³⁵ The *Detainee Treatment Act* does not require non-DoD agencies, such as non-military intelligence and law enforcement agencies, to follow the *Field Manual* guidelines while interrogating detainees.¹⁴³⁶

The DTA also removes the federal courts' jurisdiction over detainees wishing to challenge the legality of their detention, stating that no court, justice or judge shall have jurisdiction to hear or consider applications on behalf of Guantánamo detainees, and gives the D.C. Court of Appeals exclusive jurisdiction to review CSRTs decisions.¹⁴³⁷ In *Hamdan v. Rumsfeld* the SCOTUS overruled Congress's attempt to deprive the Court of jurisdiction to decide the issue by passing the *Detainee Treatment Act*.

In the *In re Guantánamo Detainee Cases*, judge Joyce Hens Green, who was coordinating the many *habeas corpus* cases, states that it seemed that the government would be indefinitely holding the detainees, possibly for life, without charging them of a crime, solely because of their contacts with individuals or organizations tied to terrorism and not because of any terrorist activity that the detainees aided, abetted or undertook themselves.¹⁴³⁸ Justice Green recalls that the U.S. president does not have the authority to detain individuals indefinitely.¹⁴³⁹ In her memorandum opinion,¹⁴⁴⁰ justice Green highlights that Murad Kurnaz,¹⁴⁴¹ a Turkish citizen who was arrested by Pakistani police and turned over to the U.S., was held in extrajudicial detention in the military base in Kandahar, Afghanistan, and at Guantánamo from 2001 until 2006, without any evidence whatsoever that Kurnaz had any ties to terrorism. Judge Joyce

¹⁴³⁴ U.S. Department of the Army (2006) (ed.), *Human Intelligence Collector Operations*, Field Manual No. 2-22.3 (FM 34-52), Washington, D.C., Department of the Army. Available at <http://www.state.gov/documents/organization/150085.pdf> (accessed 19 Dec. 2016).

¹⁴³⁵ Garcia, (2006), p. 2.

¹⁴³⁶ Ibid.

¹⁴³⁷ See: DTA § 1005(e) which amended 28 U.S.C. § 2241.

¹⁴³⁸ *In re Guantánamo Detainees Cases*.

¹⁴³⁹ *Rasul v. Bush*, at 2641, cited in *In re Guantánamo Detainees Cases*, p. 60.

¹⁴⁴⁰ *In re Guantánamo Detainees Cases*.

¹⁴⁴¹ *Kurnaz v. Bush*, Case No. 04-1135, 2005 WL 839542.

determines that the petitioners do enjoy constitutional rights, as well as rights resulting from international treaties cognizable in a U.S. court, and that the Geneva Conventions – in particular with respect to Art. 4 and Art. 5 of the Third Convention – are selfexecuting.¹⁴⁴²

Several subsequent SCOTUS decisions, including the *Hamdan* ruling, overturn the Bush administration policy, and rule that Geneva Conventions apply to all detainees in the War on Terror. In *Hamdan v. Rumsfeld* the Supreme Court rules that the CSRTs violate domestic and international law, and do not provide for protection under Geneva Conventions. Hamdan was not a member of the U.S. military, and would be tried before a military "commission", which is not a court-martial. The CSRTs were established in 2004, after the *Rasul* ruling, which states that GTMO prisoners have the right to challenge the basis of their detention, and that the government needs to distinguish between POWs, civilians, and enemy combatants.¹⁴⁴³

The SCOTUS argues that CSRTs do not qualify as "competent tribunals" under the provision of Art. 5 of the Third Geneva Convention., does not meet the requirements of Art. 21 of the *Uniform Code of Military Justice* (UCMJ)¹⁴⁴⁴ or of Art. 102 or Convention (III), and therefore violates the laws of war. CSRTs are deemed unconstitutional because they do not comply with the UCMJ which permits the creation of military commissions that comply with the laws of war. The Supreme Court holds that President Bush did not have authority to set up the war crimes tribunals and finds the special military commissions illegal under both military justice law and the Geneva Conventions. The SCOTUS concludes that the president cannot unilaterally establish such tribunals, and that Congress needs to authorize a means by which detainees could confront their accusers and challenge their detention.

The SCOTUS accepts the Administration's argument – it sounds a bit bizarre for a government claiming to be in a "global war on terror" – that the U.S. is engaged in a "non-international armed conflict with al-Qaeda". The Court finds that Common Article 3 of the 1949 Geneva Conventions covers even that purported conflict, but does not deem that the U.S. was in a worldwide-armed conflict with al-Qaeda.¹⁴⁴⁵ After the *Hamdan* ruling, the U.S. government

¹⁴⁴² *In re Guantánamo Detainees Cases*. See also: *Hamdan v. Rumsfeld*, D.D.C., Case No. 04-1519 (JR), 8 Nov. 2004.

¹⁴⁴³ *In re Guantánamo Detainees Cases*.

¹⁴⁴⁴ *Uniform Code of Military Justice* (UCMJ), 64 Stat. 109, 10 U.S.C. §§ 801–946.

¹⁴⁴⁵ *Hamdi v Rumsfeld*, 521.

was forced to review its position, apply Common Article 3, and grant the right to defense¹⁴⁴⁶ to GTMO detainees.

The *Military Commissions Act of 2006* (MCA),¹⁴⁴⁷ drafted after the *Hamdan* decision, sets up procedures governing the use of military commissions established by the president to try unlawful alien enemy combatants engaged in hostilities against the United States for violations of the law of war and other offences. The MCA (§ 948b(g)) determines that no unlawful alien enemy combatant subject to trial by military commission may invoke the Geneva Conventions as a source of rights.

The MCA amends provisions of the *War Crimes Act of 1996* (18 U.S.C. § 2441),¹⁴⁴⁸ which makes it a criminal offence to commit any violation of Common Article 3, so that only specified violations would be punishable. Garcia deduces that the MCA criminalizes torture and certain less severe forms of cruel treatment against persons protected by Common Article 3,¹⁴⁴⁹ but it does not criminalize all conduct that violates the DTA provisions (i.e. cruel, inhuman or degrading treatment of the kind prohibited under the Fifth, Eighth, and Fourteenth Amendments).¹⁴⁵⁰ Garcia argues that under treaty obligations, U.S. personnel cannot commit any violation of Common Article 3, even though the *Military Commissions Act* amends the *War Crimes Act* so that U.S. personnel would only be guilty of severe violations of Common Article 3, as constituting a grave breach.¹⁴⁵¹

The MCA, drafted with the stated purpose "to authorize trial by military commission for violations of the law of war", can be considered an amnesty law for crimes committed in the War on Terror by retroactively rewriting the *War Crimes Act*, as a military commission under this act shall have jurisdiction to try any offence made punishable by "the law of war when committed by an unlawful alien enemy combatant before, on, or after September 11, 2001", including the death penalty, but shall not have jurisdiction over lawful enemy combatants. Indeed, Art. 6(1c) of Additional Protocol II states that "no one shall be held guilty of any criminal offence on

¹⁴⁴⁶ Art. 3(1)(c) reads: "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples".

¹⁴⁴⁷ *Military Commissions Act of 2006*, Pub. L. 109-366, 120 Stat. 2006.

¹⁴⁴⁸ *War Crimes Act of 1996*, Pub. L. 104-192, 110 Stat. 2104.

¹⁴⁴⁹ Garcia (2006), p. 9. See also: Garcia, Michael John (2009a), *UN Convention Against Torture (CAT): Overview and Application to Interrogation Techniques*, CRS Report RL32438, Washington, D.C., CRS, pp. 2, 17-18.

¹⁴⁵⁰ Garcia, Michael John (2009b), *The War Crimes Act: Current Issues*, CRS Report for Congress RL33662, Washington, D.C., CRS.

¹⁴⁵¹ Garcia (2006), p. 9.

account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed".

According to the *War Crimes Act*, a grave breach of the Geneva Conventions constitutes a war crime. The definitions of "grave breach" in some Geneva Conventions extend additional protections, but all the Conventions share the following text in common: "committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health". The provisions of the *War Crimes Act* apply if either the victim or the perpetrator is a national of the United States or a member of the U.S. Armed Forces. The penalty may be life imprisonment or death. The death penalty is only invoked if the conduct resulted in the death of one or more victims.

The *Military Commissions Act* prohibits detainees who had been classified as unlawful enemy combatants or are awaiting hearings on their status from using *habeas corpus* to petition federal courts in challenges to their detention, effectively making it impossible for inmates to challenge crimes committed against them. This norm is in violation with the provisions of Art. 6 of Additional Protocol II. Elsea gathers that the detention of POWs and civilians deemed "enemy aliens" under the *Enemy Alien Act*, which applies only to U.S. residents, is administrative rather than punitive, and thus no criminal trial is required.¹⁴⁵²

In *Boumediene v. Bush* the SCOTUS rules that GTMO detainees, and other foreign nationals, do have the constitutional right to direct access to federal courts to challenge their detentions, and that the MCA is an unconstitutional suspension of that right. In its decision, the Supreme Court recalls the Suspension Clause of the Constitution (Clause 2), located in Art. 1 § 9, which provides that "[t]he 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". Justice Anthony Kennedy writes in the majority opinion that "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times". The Court adds that, even if *habeas corpus* is suspended, an adequate and effective substitute should be provided. Already in *Ex parte Milligan* (1866) the SCOTUS had asserted that the "[s]uspension of the privilege of the writ of habeas corpus does not suspend the writ itself".

¹⁴⁵² Elsea, p. 6.

During the Civil War the U.S. Congress authorized President Lincoln to suspend the privilege of the writ of *habeas corpus* and provided for the release of political prisoners.¹⁴⁵³ The *Habeas Corpus Suspension Act of 1863* authorizes to "hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, [...] or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, [...] or for any other offence against the military or naval service". This emergency law was challenged before the Supreme Court that sanctioned as unconstitutional the suspension of certain fundamental rights in wartime.

In *Ex parte Milligan* the SCOTUS rules that a dangerous civilian – the petitioner was deemed to be an unlawful belligerent because was alleged to be a member of a paramilitary organization associated with the Confederate Army – cannot constitutionally be held as a prisoner of war and tried by a military commission, nor can one be detained without trial. According to the Supreme Court, "[t]he usages of war could not, under the Constitution, afford any sanction for the trial there of a citizen in civil life not connected with the military or naval service, by a military tribunal, for any offence whatever".¹⁴⁵⁴ In *Ex parte Milligan* the SCOTUS decides that "[a] citizen not connected with the military service and a resident in a state where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted, or sentenced otherwise than by the ordinary courts of law".

The Supreme Court denied the request of the government hold a prisoner of war, a belligerent taken in action with arms in his hands, until the end of the conflict and excluded from the privileges of the POW status requiring courts to free individuals detained without charge, then handed over by the military to civilian authorities, to be tried for his crimes.¹⁴⁵⁵ The Bush administration argued that enemies engaged in the War on Terror were to be treated as combatants without rights.

Meisels believes that the Bush administration invoked the term "terrorism" to give the accused the unprotected status of "lawless combatant" and to associate the term with a list of prosecutable crimes attributed to the status of irregular combatants, based on the assumption that they are not entitled either to the law of war immunities or the rights granted by the criminal

¹⁴⁵³ *Habeas Corpus Suspension Act of 1863*, 12 Stat. 755.

¹⁴⁵⁴ *Ex parte Milligan*.

¹⁴⁵⁵ Cited in Elsea, p. 8-9.

code.¹⁴⁵⁶ Meisels argues that the lawless status of terrorists as unprotected "unlawful combatants", renders them subject to summary trial for the crime of "terrorism". These individuals are denied due process of law and they are tried with fewer procedural guarantees. Gill and van Sliedregt conclude that the Bush administration considered the Geneva Conventions and U.S. constitutional safeguards to be obstacles in the War on Terror.¹⁴⁵⁷

In 2010, Colonel Lawrence Wilkerson, a former aide to U.S. secretary of state, Colin Powell, stated in an affidavit that top U.S. officials, including President George W. Bush, vice president Dick Cheney, and secretary of defense Donald Rumsfeld, had known that the majority of the prisoners initially sent to Guantánamo were innocent, but that the detainees had been kept there for reasons of political expedience.¹⁴⁵⁸

As widely invoked in SCOTUS rulings on the Guantánamo detainees, the judiciary's role is to prevent abuse of power by the executive and legislative, that are the 'political branches'. In his 2012 opinion, chief U.S. district judge Royce C. Lamberth concludes that the government has no right to deny counsel access to detainees, and that the federal government confuses "the roles of the jailer and the judiciary" in the constitutional separation-of-powers scheme.¹⁴⁵⁹ Lamberth writes: "If the separation-of-powers means anything, it is that this country is not one ruled by Executive fiat".¹⁴⁶⁰

In the plurality opinion representing the Court's judgment in *Hamdi*, justice Sandra Day O'Connor writes that the judicial branch plays "a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions". Further, O'Connor states that "safeguarding essential liberties [...] remain vibrant even in times of security concerns".

In *Boumediene*, justice Anthony Kennedy, who wrote the majority opinion, quotes Alexander Hamilton in the *Federalist*: "The practice of arbitrary imprisonments has been, in all

¹⁴⁵⁶ Meisels, p. 53-54.

¹⁴⁵⁷ Gill and van Sliedregt, p. 54.

¹⁴⁵⁸ Wilkerson, Lawrence B. (2010), Declaration of Colonel Lawrence B. Wilkerson (Ret.), 24 Mar. 2010, *Hamad v. Bush*, CV 05-1009 JDB in D.D.C.

¹⁴⁵⁹ *In re: Guantanamo Detainee Continued access to counsel*, D.D.C., miscellaneous No. 12-398 (RCL), Case Nos. 04-1254 (RCL), 05-1638 (CKK) 05-2185 (RCL), 05-2186 (ESH) 05-2380 (CKK), memorandum opinion of 6 Sept. 2012 of chief judge Royce C. Lamberth, § 5.

¹⁴⁶⁰ *Ibid.*

ages, the favorite and most formidable instrument of tyranny".¹⁴⁶¹ The quote in full is a sentence from *Ex Parte Milligan* on the suspension of *habeas corpus* during wartime:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

In 2009, following the SCOTUS decision in *Boumediene*, the Obama administration abandoned the definition of "enemy combatant" for Guantánamo detainees, in favor of a new policy, that relies on international laws of war, for individuals captured in armed conflicts or counter-terrorism operations.¹⁴⁶² At the same time, the U.S. claims authority to hold persons who supported al-Qaeda or the Taliban under the AUMF.¹⁴⁶³ The *Military Commissions Act of 2009* amends some provisions of the 2006 version to improve protections for defendants.¹⁴⁶⁴ The new policy on treatment of Guantánamo prisoners is drafted in the E.O. 13567 of 7 March 2011,¹⁴⁶⁵ which establishes a policy and a process to review, on a periodic basis, the continued discretionary exercise of existing detention authority over detainees held at GTMO, pursuant to the AUMF, and in § 1023 of the *National Defense Authorization Act (NDAA) for Fiscal Year*

¹⁴⁶¹ Federalist Paper No. 84 of 28 May 1788 is an essay titled "Certain General and Miscellaneous Objections to the Constitution Considered and Answered", written by Alexander Hamilton to discuss his views on adding a Bill of Rights to the U.S. Constitution.

¹⁴⁶² U.S. Department of Justice (2009), "Department of Justice Withdraws Enemy Combatant Definition for Guantanamo Detainees", press release 09-232, 13 Mar. 2009. Available at <https://www.justice.gov/opa/pr/departement-justice-withdraws-enemy-combatant-definition-guantanamo-detainees> (accessed 5 July 2016).

¹⁴⁶³ Ibid.

¹⁴⁶⁴ *National Defense Authorization Act for Fiscal Year 2010*, Pub. L. 111-84, 123 Stat. 2190.

¹⁴⁶⁵ Obama, Barack (2011b), Executive Order 13567 of 7 Mar. 2011 [Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force], 3 CFR 13567.

2012.¹⁴⁶⁶ The periodic review applies to those detainees whom the interagency review¹⁴⁶⁷ established by and E.O. 13492 of 22 January 2009 has designated for a continued law of war detention, or to those who have been referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.

A secretary of defense memorandum of 12 April 2012 establishes the Periodic Review Secretariat (PRS) and discontinuation of the Office for the Administrative Review of the Detention of Enemy Combatants.¹⁴⁶⁸ The PRS is established to develop and administer the periodic review process pursuant to E.O. 13567 and Directive-Type Memorandum (DTM) 12-005 of 9 May 2012¹⁴⁶⁹ – the Directive-Type Memorandum is a temporary DoD Issuance and will be replaced by a DoD Instruction (DoDI). Some content of the DTM and the process it outlines are superseded by later decisions; these changes are reflected in the new DoDI. Extension of DTM 12-005, expiring effective 5 November 2012, was approved on 26 October 2012.¹⁴⁷⁰

DTM 12-005 (2012) lays down the guidelines to apply to GMTO detainees consistent with applicable law, including: the *Convention Against Torture*; Common Article 3; other laws relating to the transfer, treatment, and interrogation of individuals detained in armed conflict.¹⁴⁷¹ These guidelines do not address the legality of any individual's detention under the authority of the AUMF, but rather makes discretionary determinations about whether a detainee represents a continuing significant threat to the security of the United States.¹⁴⁷² The assessment process on the continued detention of individuals was deemed to constitute a significant threat to the security of the United States is discretionary and administrative. The PRB, which can be considered the successors of the CSRTs, can recommend continued law of war detention or the transfer of a detainee, and can establish the conditions for such transfer.

The Detainee Program Directive, released in 2014 by the deputy secretary of defense, Robert O. Work, prohibits the transfer of a prisoner to the custody of another country, out of

¹⁴⁶⁶ *National Defense Authorization Act (NDAA) for Fiscal Year 2012*, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (10 U.S.C. § 801).

¹⁴⁶⁷ The interagency review is carried out by senior officials from the Departments of Defense, Homeland Security, Justice, and State, the Joint Staff, and the Office of the Director of National Intelligence.

¹⁴⁶⁸ Panetta, Leon (2012), Secretary of Defense, Memorandum, Establishment of the Periodic Review Secretariat and Discontinuation of the Office for the Administrative Review of the Detention of Enemy Combatants, 12 Apr. 2012, OSD003504-12.

¹⁴⁶⁹ Carter, Ashton (2012), Directive-Type Memorandum 12-005, 9 May 2012.

¹⁴⁷⁰ Brazis, William E. (2012), "Extension Approval for DTM 12-005", 26 Oct. 2012.

¹⁴⁷¹ DTM 12-005 of 9 May 2012, p. 2.

¹⁴⁷² *Id.*, § 4(a) of attachment 3, p. 8.

DoD custody or control, except in accordance with applicable law, regulations and policy, stressing the "significant foreign policy considerations" that might arise. Such transfers can take place when a competent authority has assessed that "it is more likely than not" that the detainee would be subjected to torture or persecuted on account of race, religion, nationality, membership in a particular social group, or the expression of a particular political opinion,¹⁴⁷³ or that a death sentence would be pronounced without fundamental guarantees of a fair trial, as provided by the Geneva Conventions.

Under the MCA the U.S. president is authorized to enact an Executive Order to interpret more restrictively the meaning and application of the Geneva Conventions' requirements, and to pass administrative regulations implementing this interpretation. Garcia argues that the president is not permitted to interpret the Conventions so as to allow grave breaches.¹⁴⁷⁴ Therefore, detainees should be treated in all circumstances in a manner consistent with DTA standards, even if the president interprets the Geneva Conventions as not requiring such treatment.¹⁴⁷⁵

President Obama's E.O. 13491 of 22 January 2009 establishes that the secretary of state shall evaluate humane treatment assurances in all cases, consistent with the recommendations of the Special Task Force on Interrogation and Transfer Policies.¹⁴⁷⁶ According to this Executive Order, transfer location for any such detainee outside of the United States shall be consistent with the national security and foreign policy interests of Washington and the commitment set forth in § 1242(a) of the *Foreign Affairs Reform and Restructuring Act of 1998 (FARRA)*.¹⁴⁷⁷

The prohibition on transferring Guantánamo detainees to countries that do not meet human rights is not mandatory; a prisoner may be transferred to countries such as Saudi Arabia¹⁴⁷⁸ or Mauritania,¹⁴⁷⁹ where torture is used in prisons. At the same time the U.S calls

¹⁴⁷³ See the principles enshrined in the ICCPR.

¹⁴⁷⁴ Garcia (2006), p. 9.

¹⁴⁷⁵ *Id.*, p. 10.

¹⁴⁷⁶ Obama, Barack (2009), Executive Order 13491 of 21 Jan. 2009 [Ensuring Lawful Interrogations], 74 FR 4893 of 27 Jan. 2009.

¹⁴⁷⁷ FARRA § 1242(a) reads: "It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States".

¹⁴⁷⁸ U.S. Department of Defense (2016a), "Detainee Transfers Announced", press release NR-135-16, 16 Apr. 2016. Available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/722845/detainee-transfers-announced> (accessed 28 June 2016).

¹⁴⁷⁹ U.S. Department of Defense (2016b), "Today, 60 detainees remain at Guantanamo Bay", press release NR-371-16, 17 Oct. 2016. Available at <http://www.defense.gov/News/News-Releases/News-Release-View/Article/975922/detainee-transfer-announced> (accessed 18 Oct. 2016).

African partners to hold accountable that individuals who fail to respect human rights in countering terrorism.¹⁴⁸⁰

In 2006, the UN Committee Against Torture recommended that the United States stop the practice of sending prisoners to countries where they are likely to be tortured.¹⁴⁸¹ The PACE stresses that detainees are unlawfully internationally transferred, often in collaboration with countries notorious for the use of torture.¹⁴⁸²

In *Elmi v. Australia*,¹⁴⁸³ the UN Committee Against Torture (CAT) rules that a state has an obligation to refrain from forcibly returning a refugee to his country or to any other country where one runs a risk of being expelled or returned to his country. Sadiq Shek Elmi, a Somali national residing in Australia, where Elmi applied for asylum and is at risk of expulsion, appealed to the CAT, claiming that his expulsion would constitute a violation of Art. 3 of the UN Convention against Torture. The Committee, considering that substantial grounds exist for believing that the claimant would be at risk of torture if returned to Somalia, holds that Australia has an obligation to refrain from forcibly returning Mr Elmi to Somalia or to any other country and is at risk of being expelled or returned to Somalia.

The U.S. government should also be bound by domestic legislation to avoid to give assistance to foreign country that commit serious HRV. Under the two "Leahy laws", one for the State Department¹⁴⁸⁴ and one for the Department of Defense,¹⁴⁸⁵ assistance is prohibited to any unit of the security forces of a foreign country if the secretary of state has credible information that the unit has committed a GHRV. The U.S. government includes torture, extrajudicial killing, enforced disappearance, and rape under color of law as GVHRs when implementing the Leahy law. DoD-appropriated funds may not be used for any training, equipment, or other assistance for a foreign security force unit if the secretary of defense has credible information that such unit has committed a GHRV. Exceptions are permitted for national security, and include the government of Riyadh, the closest ally of Washington in the Arabian Peninsula, where the U.S. government transfers some GTMO detainees.

¹⁴⁸⁰ Shannon, Thomas A., Jr. (2017), "U.S.-African Partnerships: Advancing Common Interests", Department of State, 13 Sept. 2017. Available at <https://www.state.gov/p/us/rm/2017/274073.htm> (accessed 16 Sept. 2017).

¹⁴⁸¹ UN CAT (2006), *Conclusions and Recommendations, United States of America*, 25 July 2006, CAT/C/USA/CO/2.

¹⁴⁸² PACE, Resolution 1539 (2007), § 3.2.

¹⁴⁸³ UN CAT (1998), *Sadiq Shek Elmi v. Australia*, 25 May 1999, CAT/C/22/D/120/1998.

¹⁴⁸⁴ Section 620M of *Foreign Assistance Act of 1961*, Pub. L. 87-195, 75 Stat. 424-2, 22 U.S.C. § 2151 et seq.

¹⁴⁸⁵ U.S.C. § 362.

According to the Bureau of Democracy, Human Rights, and Labor (DRL), in Saudi Arabia there is an “excessive or overbroad use of antiterrorism laws”.¹⁴⁸⁶ Five top UN human rights experts deplore Saudi Arabia’s persistent use of counter-terrorism and security-related laws, including systematic arbitrary arrests and detention, to persecute peaceful activists.¹⁴⁸⁷ A report on human rights¹⁴⁸⁸ says that Saudi Arabia suffers from important human rights problems including, among the others, abuse of detainees; overcrowding in prisons and detention centers; a lack of judicial independence and transparency that manifested itself in the denial of due process and arbitrary arrest and detention; investigating, detaining, prosecuting, and sentencing lawyers, human rights activists, and anti-government reformists; holding political prisoners; arbitrary interference with privacy, home, and correspondence and discrimination based on gender, religion, sect, race and ethnicity.

In its latest country report on Mauritania, the DRL Bureau states that the African country is responsible for human rights abuses.¹⁴⁸⁹ According to the *Country Reports on Human Rights Practices for 2013*, the central human rights problems are: the use of torture by police to extract confessions; continuing slavery and slavery-related practices; trafficking in persons; racial and ethnic discrimination. The report concludes that Mauritanian security forces commit human rights abuses, that prison conditions are harsh, and that prisoners suffer abusive treatment in detention facilities and lengthy pre-trial custody.¹⁴⁹⁰ Therefore, the U.S. administration, which is signatory to the UN Convention Against Torture, does not fulfill with the provision of domestic legislation.

When, quoting President Obama, the secretary of state John Kerry reaffirms the commitment of the U.S. to secure the release of Americans unjustly detained overseas, and to

¹⁴⁸⁶ Kozak, Michael (2017), “Ambassador Michael Kozak of the Bureau of Democracy, Human Rights, and Labor On the 2016 International Religious Freedom Annual Report”, Department of State, 15 Aug. 2017. Available at <https://www.state.gov/r/pa/prs/ps/2017/08/273457.htm> (accessed 16 Aug. 2017).

¹⁴⁸⁷ OHCHR (2018), “UN experts decry Saudi Arabia’s persistent use of anti-terror laws to persecute peaceful activists”, 2 Jan. 2017. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22570&LangID=E> (accessed 2 Jan. 2017).

¹⁴⁸⁸ Bureau of Democracy, Human Rights and Labor (2015), Saudi Arabia, *Country Reports on Human Rights Practices for 2015*, Washington, D.C., Department of State. Available at <http://www.state.gov/documents/organization/253157.pdf> (accessed 28 June 2016).

¹⁴⁸⁹ Bureau of Democracy, Human Rights and Labor (2013), Mauritania, *Country Reports on Human Rights Practices for 2013*, Washington, D.C., Department of State, p. 1. Available at <http://www.state.gov/documents/organization/220348.pdf> (accessed 18 Oct. 2016).

¹⁴⁹⁰ Ibid.

call for the release of individuals unjustly held in Yemen,¹⁴⁹¹ but does not seem neither believable nor honest. What about detainees unlawfully held at U.S. black sites or transferred to countries which do not respect fundamental human rights?

Individuals found not to be "enemy combatants" and released from GTMO would be imprisoned, persecuted or tortured in their home country or other countries of destination because of domestic political issues. This leaves former detainees, cleared for transfer or freed with no charges after having been held for years, with no destination for release. Therefore, it is not surprising if some former detainees return to the battlefield, after years of being locked up in a U.S. prison camp. They return to fighting the country responsible for serious violations of their fundamental rights.

Currently, unprivileged belligerents may 'lawfully' be detained in Guantánamo until a competent authority determines that the War on Terror has ended or that active hostilities have ceased; civilian internees may 'lawfully' be detained until the reasons that necessitated their internment no longer exist. Therefore, these individuals can be detained indefinitely, that constitutes *per se* a violation of the *Convention against Torture*. Detention pending efforts to ensure a safe and orderly release or transfer is also authorized. Dodd personnel review periodically the determination of the status of unprivileged belligerents held in long-term detention, presided over by a military judge.

Some categories of detainees held during international armed conflict or cases of occupation, such as POWs, and civilian internees included in Geneva Convention (IV), enjoy protections and privileges under the law of war beyond the minimum standards of treatment established in the DoD 2014 directive. Such detainees shall be afforded all applicable protections and privileges under the law of war until their release, repatriation or transfer.

The 2014 DoD directive provides that during international armed conflict, should any doubt arise whether a detainee belongs to any of the categories enumerated in Art. 4 of the Third Geneva Convention, and as such is entitled to the protections and privileges afforded POWs, such detainee shall enjoy treatment as POWs until a tribunal convened in accordance with Art. 5 of the Convention determines whether the detainee is entitled to such status or treatment.

¹⁴⁹¹ Kerry, John (2016g), "On the Release of a U.S. Citizen", Department of State, 6 Nov. 2016. Available at <http://www.state.gov/secretary/remarks/2016/11/264132.htm> (accessed 7 Nov. 2016).

According to the 2014 DoD directive, the criminal punishment of any detainee for any offence, including serious violations of the law of war – war crime or other criminal act resulting in death, significant injury or significant property damage or loss, etc. – shall only be conducted in accordance with a previous judgment pronounced by a regularly constituted court that affords all required judicial guarantees. A competent authority may assess the propriety of prosecuting detainees for violations of the law of war or other offences.

Providing for the release from punitive confinement of civilian internees convicted for a criminal offence, when the court-administered sentence to confinement ends, sounds bizarre for a directive issued by the Department of Defense. The Directive provides a definition of civilian internee: "who is in the custody or control of DoD during an armed conflict or case of occupation", according to Art. 4 of Geneva Convention (IV). Nevertheless the Directive, considering as "unprivileged belligerent" a civilian "substantially supporting an enemy non-state armed group in the conduct of hostilities", excludes from combatant's privilege civilians who are not directly participating in hostilities in an armed conflict, while, at the same time, considers them active participants in the conflict. It is not clear whether and under what conditions a civilian may be militarily detained during an armed conflict, and which kind of "support" might justify such detention.

The U.S. Code provides that aiding the enemy constitutes a distinct offence from providing material support to terrorists, but makes both acts punishable.¹⁴⁹² In *Holder v. Humanitarian Law Project*,¹⁴⁹³ a case regarding the *USA Patriot Act's* prohibition on providing "material support" to foreign terrorist organizations (18 U.S.C. § 2339B), the Supreme Court rules against a non-governmental organization whose purpose is to provide various forms of support for the humanitarian and political activities of the PKK and the LTTE, both of which designated as foreign terrorist organizations since 1997.¹⁴⁹⁴

According to 22 U.S.C. § 2656f, the Department of State should provide to Congress a full and complete annual report on terrorism for those countries and groups meeting the legal criteria for designation under § 219 of the INA. To be blacklisted, a foreign organization must

¹⁴⁹² See, e.g., 10 U.S.C. § 904; 10 U.S.C. § 950(25); 10 U.S.C. § 950(26); 18 U.S.C. § 2339A; 18 U.S.C. § 2339B.

¹⁴⁹³ *Holder et al. v. Humanitarian Law Project et al.*, 561 U.S. 1 (2010), 130 S.Ct. 2705; opinion of 21 June 2010 delivered by John G. Roberts, Jr.

¹⁴⁹⁴ A Belgian court said that is not possible to apply counter-terrorism laws against people and organisations supporting PKK [Cfr. *Prosecutor v. The Turkish State & Others*, Investigation Office No. 2009/0030-2008/0113-2008/0121, Federal Prosecutor App. No. FD.35.98.54/09-FD.35.98.634/06-FD.35.98.502/07, the Dutch language Court of First Instance of Brussel (Forty-first Chamber), decision of 3 Nov. 2016].

be: involved in terrorist activity, as defined in § 212 (a)(3)(B) of the INA (8 U.S.C. § 1182(a)(3)(B)); engaged in terrorism, as defined in § 140(d)(2) of the *Foreign Relations Authorization Act, Fiscal Years 1988 and 1989* (22 U.S.C. § 2656f(d)(2)); retain the capability and intent to engage in terrorist activity or terrorism. The organization's terrorist activity or terrorism must threaten the security of U.S. nationals or U.S. national security (national defense, foreign relations or the economic interests).

In *Holder v. Humanitarian Law Project*, the SCOTUS argues that assistance to such groups does fit the law's definition of material aid, e.g.: training; expert advice or assistance; service; personnel. The finding is based on the principle that any assistance could help to "legitimate" the terrorist organization and free up its resources for terrorist activities. The federal government may lawfully prohibit providing non-violent material support for terrorist organizations, including legal services and advice, without violating the free speech clause of the First Amendment.

The question is whether an "enemy combatant" meets the definition of POW ex Art. 4 of the Third Geneva Convention, and may be charged for war crimes, or a civilian that should be released if not charged with crime. POWs are immune from any personal culpability and criminal proceedings. Enemy combatants should be released at the end of hostilities, unless they are tried in the military justice system, or charged with war crimes. Civilians should be released, too. Common criminals should face trial in civilian courts. Terrorist are in a legal black hole.

The 2014 DoD directive appears to be a clumsy attempt to include among POWs civilians who do not take active part in hostilities, without granting them the protection set forth in Geneva Conventions. At the same time, the Directive strips them of the privilege of civilians, who are subject to civil and not military authority for common crimes. According to the 2014 DoD directive, a civilian who substantially supports a non-state enemy group engaged in hostilities is not privileged in doing so, and may be subject to prosecution for such support. If such support consists of direct participation in hostilities, this person is likely to be targeted.

Following the rulings of U.S. courts on detention procedures at Guantánamo, in February 2016 President Obama presented the plan to close the prison facility.¹⁴⁹⁵ The U.S. administration provides for the transfer of 91 detainees, of the 780 once held, in other countries, where they are

¹⁴⁹⁵ U.S. Department of Defense (2016c), Plan for Closing the Guantanamo Bay Detention Facility, 23 Feb. 2016, p. 1. Available at http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf (accessed 24 Feb. 2016).

likely to be tortured. The plan provides that the U.S. obtains from a receiving country assurances about humane treatment according to standard requirements.¹⁴⁹⁶ The federal law does not provide for judicial review of the United States' compliance with its *non-refoulement* obligations pursuant to the *Convention against Torture*.¹⁴⁹⁷

While ensuring that GTMO alien detainees do not return to a country where they are "more likely than not" to be tortured,¹⁴⁹⁸ in 2015 the United States transferred 35 prisoners to ten countries, most of which notorious for HRV: Afghanistan (4), Estonia (1), Georgia (3), Kazakhstan (5), Morocco (1), Oman (10), Saudi Arabia (2), Kuwait (1), Slovakia (2), and Uruguay (6). Thus far, in Fiscal Year 2016 the U.S. transferred 24 detainees from the Cuban facility to nine countries: Mauritania (2), the United Kingdom (1), the United Arab Emirates (5), Ghana (2), Kuwait (1), Saudi Arabia (1), Oman (10), Montenegro (1), and Bosnia-Herzegovina (1).¹⁴⁹⁹ Despite assurances from the U.S. government,¹⁵⁰⁰ GTMO detainees are deported to countries that do not trigger the protection of the *Convention against Torture*.

The plan also makes some considerations on the possible relocation of detainees on national soil. In a report submitted by the Department of Justice to the Congress, the attorney general stresses that the relocation of a detainee from Guantánamo Bay on national soil should be subject to assessment if such relocation could result in eligibility for: relief from removal from the United States, including pursuant to the UN Convention against Torture; any required release from immigration detention, including pursuant to the decision of the Supreme Court in *Zadvydas v. Davis*;¹⁵⁰¹ asylum or withholding of removal; any additional constitutional right.¹⁵⁰²

The report emphasizes that a Guantánamo detainee relocated to national soil enjoys constitutional rights, including criminal trial rights, and the right to maintain actions challenging

¹⁴⁹⁶ *Id.*, pp. 2-4, 6, 9.

¹⁴⁹⁷ U.S. Attorney General, p. 4-5.

¹⁴⁹⁸ *Id.*, p. 4.

¹⁴⁹⁹ *Plan for Closing the Guantanamo Bay Detention Facility*, p. 3.

¹⁵⁰⁰ U.S. Attorney General, p. 5.

¹⁵⁰¹ The SCOTUS ruled that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem", 533 U.S. 690 (2001). The Court specifically noted, however, that its decision did not preclude longer periods of detention in cases of "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security" (696). The government has implemented this aspect of *Zadvydas* through the promulgation of regulations that interpret INA § 241(a) and provide for further detention with respect to aliens who pose a threat to national security. See: 8 C.F.R. § 241.14.

¹⁵⁰² U.S. Attorney General, p. 1.

his detention through writs of *habeas corpus*, and considers that Congress could, expressly preclude those forms of relief by statute¹⁵⁰³ to avoid them to be tried in Article 3 federal courts.

Although the SCOTUS rulings have been recalled in other appeals before the Supreme Court by alien citizen detained by U.S. military forces, calling for a constitutional right to *habeas corpus* review and challenging the lawfulness of their detention,¹⁵⁰⁴ the court vacated the judgment and remanded the cases because meanwhile petitioners were transferred from the custody of the United States to the custody of other nations, and cases have become moot.

In his remarks on the plan to close GTMO, President Obama underlines that 15 years after 9/11 not a single verdict has been reached, and that the military commissions have only resulted in years of litigation without a resolution.¹⁵⁰⁵ OSCE/ODIHR highlights that since the opening of the detention facility, in January 2002, a total of 780 detainees have been held there, the vast majority without charge or trial, thus failing to comply with fundamental guarantees.¹⁵⁰⁶ Prisoners under the age of 18 were also detained at GTMO in violation of international law, which prohibit their imprisonment.

The policy undertaken by Obama to close Guantánamo was disowned by the following administration. In August 2017, the secretary of state, Rex Tillerson, and his colleague, defense secretary Jim Mattis, suggest to the Foreign Relations Committee of the Senate to consider the adoption of a new AUMF as not “time-constrained” and not “geographically restricted” due to the transnational nature of terrorist threats like ISIS.¹⁵⁰⁷ In January 2018, President Trump overturns Obamas's policy, and signs an order directing defense secretary Mattis to re-examine

¹⁵⁰³ *Id.*, p. 8-9.

¹⁵⁰⁴ *Al-Najar v. Obama*, No. 12-5401 (CADC 2013), and *Amanatullah v. Obama*, No. 12-5407 [CADC 2013]. They do not seek review of the judgments in *Al Maqaleh v. Hagel*, No. 12-5404 [CADC 2013], or *Al Bakri v. Obama*, No. 12-5399 [CADC 2013].

¹⁵⁰⁵ Obama, Barack (2016c), "Remarks by the President on Plan to Close the Prison at Guantanamo Bay", Office of the Press Secretary of The White House, 23 Feb. 2016. Available at <https://www.whitehouse.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay> (accessed 24 Feb. 2016).

¹⁵⁰⁶ Gísladóttir, Ingibjörg Sólrún (2018), "OSCE/ODIHR Director says ongoing operation of Guantanamo Bay detention facility contravenes international human rights standards, reiterates call for closure", OSCE/ODHR, 11 Jan. 2018. Available at <http://www.osce.org/odihr/366051> (accessed 14 Jan. 2018).

¹⁵⁰⁷ Tillerson, Rex W. (2017d), "Secretary's Remarks: Opening Remarks Before the Senate Foreign Relations Committee on the Authorizations for the Use of Military Force: Administration Perspective", Department of State, 30 Oct. 2017. Available at <https://www.state.gov/secretary/remarks/2017/10/275196.htm> (accessed 31 Oct. 2017). Cronk, Terri Moon (2017), "Mattis: Military Force Authorizations Remain Sound", DoD News, Defense Media Activity, 30 Oct. 2017. Available at <https://www.defense.gov/News/Article/Article/1358069/mattis-military-force-authorizations-remain-sound> (accessed 31 Oct. 2017).

the military detention policy and to keep open the Guantánamo detention facility.¹⁵⁰⁸ Trump characterizes terrorists not as merely criminals, but as unlawful enemy combatants, who "should be treated like the terrorists they are".¹⁵⁰⁹ In the War on Terror the U.S. detains people not because they are criminals, but because they are the enemy.

According to the Department of Defense as of January 2017 there were still 41 detainees held in the Guantánamo prison camp.¹⁵¹⁰ The OSCE/ODHIR stresses that these include five men who have been cleared by all relevant U.S. national security agencies for release.¹⁵¹¹ The same organization accuses the U.S. authorities to seek to hold 23 others indefinitely, in spite of the fact that they have never been charged or tried.¹⁵¹² As of January 2018, ten detainees out of 41 were under prosecution, and only three have been convicted by military commissions.¹⁵¹³ In May 2018 Defense secretary Mattis said the U.S. government was going to transfer to GTMO over 400 ISIS fighters held by the SDF.¹⁵¹⁴

The U.S. extra-territorial detentions infringe human rights, leading to long periods of imprisonment, even a decade, without trial and without usual judicial guarantees and safeguards. One must keep in mind that GHRV, termed as "grave breaches", constitute crime, and meet the legal definition of war crime. Serious breaches, such as the violations of the Third and Fourth Geneva Conventions, include: willful killing, torture or inhumane treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; compelling a protected person to serve in the armed forces of a hostile power and willfully depriving a protected person of the right to a fair trial if accused of a war crime.

Also considered grave breaches of the Fourth Geneva Conventions are the following: taking of hostages; extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly and unlawful deportation, transfer, or confinement. The U.S. government and some of its European allies can be charged with the latter

¹⁵⁰⁸ Garamone, Jim (2018b), "Trump Calls for Ending Sequester, Keeping Guantanamo Open", DoD News, Defense Media Activity, 30 Jan. 2018. Available at <https://www.defense.gov/News/Article/Article/1428370/trump-calls-for-ending-sequester-keeping-guantanamo-open> (accessed 1 Feb. 2018).

¹⁵⁰⁹ Ibid.

¹⁵¹⁰ U.S. Department of Defense (2017), "Detainee Transfers Announced", press release NR-018-17, 19 Jan. 2017. Available at <https://www.defense.gov/News/News-Releases/News-Release-View/Article/1054644/detainee-transfers-announced> (accessed 20 Jan. 2017).

¹⁵¹¹ Gísladóttir.

¹⁵¹² Ibid.

¹⁵¹³ Ibid.

¹⁵¹⁴ Mattis (2018).

crimes, not to mention non-Western countries where the violation of these rights is common practice.

THE TRUMP BAN TRAMPLES HUMAN RIGHTS

Certain restrictions against the rights of aliens or citizens deemed dangerous, may be enacted pursuant to an Executive Order. Bush and Obama have not been the only, nor the first U.S. presidents to counter terrorism through the INA provisions – INA § 212(f) clearly gives the president the authority to use his discretion to restrict or "suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants".¹⁵¹⁵

According to a report by the Congressional Research Service (CRS):¹⁵¹⁶ Obama invoked his immigration authority on 19 occasions;¹⁵¹⁷ President George W. Bush invoked it six times; Bill Clinton used it 12 times; George H.W. Bush only once; Ronald Reagan employed it five times.¹⁵¹⁸ White House documents also show that President Bill Clinton and George W. Bush issued six immigrant bans each, and President Ronald Reagan four.¹⁵¹⁹ In 1980, President Jimmy Carter banned Iranians after the seizure of U.S. embassy in Tehran.¹⁵²⁰

However, the use of this instrument is not free of criticisms, with regard to the fundamental rights and freedoms of those affected by its restrictions. When President Donald J. Trump issued his Executive Order on immigration,¹⁵²¹ temporarily banning travel from seven Muslim-majority countries (Iran, Iraq, Sudan, Syria, Libya, Somalia, and Yemen), raised a series of legal questions. This order has been called by the press and by opponents to the measure “the Muslim ban”, although only applied to some Islamic countries.

¹⁵¹⁵ 8 U.S. Code § 1182 (Inadmissible aliens).

¹⁵¹⁶ Manuel, Kate M. (2017), *Executive Authority to Exclude Aliens: In Brief*, CRS Report for Congress R44743, Washington, D.C., CRS.

¹⁵¹⁷ Among Obama’s actions: on 25 July 2011, banned those under a UN travel ban, or who broke 29 executive orders covering transactions with terrorists; on 4 Aug. 2012 banned anybody involved in war crimes, or just about any other crime including human rights violations; on 23 Apr. 2012, banned those helping Syria or Iran, or involved in human rights abuses for those governments; on 1 May 2012, blocked those helping Iran and Syria; on 3 Apr. 2014, banned anyone known to threaten South Sudan; on 6 Mar. 2014 banned entry of those claiming government authority in the Crimea region of Ukraine, presumably on behalf of Moscow.

¹⁵¹⁸ Manuel.

¹⁵¹⁹ Ibid.

¹⁵²⁰ Ibid.

¹⁵²¹ Trump, Donald J. (2017a), Executive Order 13769 [Protecting the Nation from Foreign Terrorist Entry into the United States] of 27 Jan. 2017, 82 FR 8977.

The purpose of E.O. 13.769 (82 Fed. Reg. 8977), as enshrined in § 1, was “to better detect would-be terrorists from receiving visas, these measures did not stop attacks by foreign nationals who were admitted to the United States” after the 9/11 attacks. Thus, President Trump proclaimed that the immigrant and non-immigrant entry into the United States of aliens from countries referred to in § 217(a)(12) of the INA, 8 U.S.C. 1187(a)(12), would be detrimental to the interests of the nation, and suspended their entry into the U.S. of such persons for 90 days.¹⁵²² The suspension would be terminated once concerns relating to screening practices would be addressed, as necessary “to prevent infiltration [into the United States] by foreign terrorists or criminals”¹⁵²³ The temporary suspension of the refugee program would be lifted after 120 days, once the Secretaries of State and Homeland Security, in consultation with the director of National Intelligence, have determined what additional procedures should be taken to ensure that those approved for refugee admission do not pose a threat to the security and welfare of the United States.¹⁵²⁴

The E.O. was immediately challenged in court; judge Ann M. Donnelly of Federal District Court in Brooklyn granted a nationwide emergency stay of part of Trump's immigration E.O.¹⁵²⁵ The ruling says that the E.O. violates their rights to due process and equal protection guaranteed by the U.S. Constitution. Donnelly found that Trump’s E.O. would cause detainees “irreparable injury”.

The attorney general of Washington (AGOWA), Bob Ferguson, filed a lawsuit in federal court against the Trump administration.¹⁵²⁶ Ferguson asked the U.S. District Court for the Western District of Washington (W.D. Wash.) to declare unconstitutional key provisions of Trump’s immigration E.O.,¹⁵²⁷ and to enter a nationwide temporary restraining order (TRO) barring enforcement of portions of that E.O. The AGOWA argues that the Executive Order violates the U.S. Constitution’s guarantee of equal protection and the First Amendment’s “Establishment Clause”, infringes individuals’ constitutional right to due process, and

¹⁵²² *Id.*, § 3(c).

¹⁵²³ *Ibid.*

¹⁵²⁴ *Id.*, § 5(a).

¹⁵²⁵ *Hamed Khalid Darweesh and Haider Sameer Abdulkhaleq Alshawi v. President of the U.S. Donald Trump, U.S. Department of Homeland Security and Others*, 17 Civ. 480 (AMD), E.D.N.Y., decision and order of 28 Jan. 2017, judge Ann Donnelly.

¹⁵²⁶ *State of Washington v. Trump and Others*, Case No. 2:17-cv-00141-JLR, AGOWA complaint for declaratory and injunctive relief of 30 Jan. 2017.

¹⁵²⁷ *State of Washington v. Trump and Others*, Case No. 2:17-cv-00141, AGWA motion for temporary restraining order of 30 Jan. 2017.

contravenes the INA. In the conclusions of his motion, Fergusson states that “[s]ometimes federal courts are the only entities that can immediately halt abuses by the executive branch”, such in this case, and asked the court “to play its constitutional role”.

A district senior judge, James L. Robart, found key provisions of the president’s E.O. as illegal and unconstitutional, and thus granted the temporary restricting order.¹⁵²⁸ As a result of this, the E.O. was permanently invalidated nationwide. Commenting the decision of the federal judge, Ferguson said the Constitution prevailed and added that “No one is above the law — not even the President”.¹⁵²⁹

Trump requested an emergency motion to stay. A federal appeal court in San Francisco rejected the request to immediately restore the travel ban introduced by Trump’s Executive Order.¹⁵³⁰ Trump requested a stay pending appeal of the district court’s injunctive order. Deputy solicitor general, Edwin S. Kneedler, claimed that “the President has directed a temporary suspension of entries through the refugee program and from countries that have a previously identified link to an increased risk of terrorist activity” and that “[t]he purpose of that temporary suspension is to permit an orderly review and revision of screening procedures to ensure that adequate standards are in place to protect against terrorist attacks”.¹⁵³¹

In his reply in support of emergency motion for stay, Kneedler stresses that the E.O. temporarily suspends for 90 days entry of aliens from seven countries previously identified by Congress and the executive branch as raising heightened terrorism-related concerns.¹⁵³² Kneedler recalls that Iraq and Syria were identified as being associated with a heightened risk of terrorism;¹⁵³³ Congress itself identified Iraq and Syria,¹⁵³⁴ and also incorporated countries

¹⁵²⁸ *State of Washington and Others v. Donald J. Trump and Others*, Case No. C17-0141JLR, D.C., No. 2:17-cv-00141-JLR, W.D. Wash, TRO of 3 Feb. 2017, judge James L. Robart.

¹⁵²⁹ Ferguson, Robert Watson (2017), “AG Ferguson obtains court order halting Trump immigration action”, AGOWA, 3 Feb. 2017. Available at <http://www.atg.wa.gov/news/news-releases/ag-ferguson-obtains-court-order-halting-trump-immigration-action> (accessed 4 Feb. 2017).

¹⁵³⁰ *State of Washington and Others v. Trump and Others*, Case No. 17-35105, 9th Cir., order of 4 Feb. 2017.

¹⁵³¹ *State of Washington and Others v. Donald J. Trump and Others*, Case No. 17-35105, 9th Cir., reply in support of emergency motion for stay of 6 Feb. 2017.

¹⁵³² *Id.*, § 3.

¹⁵³³ *Id.*, § 2(d)(i)

¹⁵³⁴ Bureau of Counterterrorism and Countering Violent Extremism (2016), *State Sponsors on Terrorism, Country Reports on Terrorism 2015*, Washington, D.C., Department of State, p. 301-2.

designated as state sponsors of terrorism: Iran, Sudan, and Syria, and in 2016 the executive branch added Libya, Somalia, and Yemen.¹⁵³⁵

Over fifty entities, among individuals, companies, associations, plus 18 states submitted a *amicus curiae* motion and brief to intervene as plaintiffs in this action in support of appellees.¹⁵³⁶ Pennsylvania, Massachusetts, New York, California, Connecticut, Delaware, Illinois, Iowa, Maine, Maryland, New Hampshire, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Virginia, and District of Columbia joined Washington and Minnesota as plaintiffs in the case.¹⁵³⁷

Former U.S. national security, foreign policy, and intelligence senior officials, such as Madeleine K. Albright (former secretary of state), Avril D. Haines (former CIA deputy director and deputy national security advisor), Michael V. Hayden (former NSA and CIA director), John F. Kerry (former secretary of state), John E. McLaughlin (former CIA deputy director and acting director), Lisa O. Monaco (deputy national security advisor), Michael J. Morell (former CIA acting director), Janet A. Napolitano (former secretary of homeland security), Leon E. Panetta (former CIA director and secretary of defense), and Susan E. Rice (former U.S. permanent representative to the UN and national security advisor), declared that the Order “disrupts thousands of lives”¹⁵³⁸ and predicted that it would have a “devastating humanitarian impact”.¹⁵³⁹

The Federal Appeals Court unanimously denied Trump's request to immediately reinstate his travel ban.¹⁵⁴⁰ The decision says that “government has pointed to no evidence that any alien from any of the countries named in the order has perpetrated a terrorist attack in the United States”. The three-judge panel said that Trump’s order violates the due process rights of lawful permanent residents, people holding visas and refugees. The ruling also rejected Trump’s claim that courts are powerless to review a president’s national security assessments. Judges have a crucial role to play in a constitutional democracy, the court added.

¹⁵³⁵ DHS (2016), “DHS Announces Further Travel Restrictions for the Visa Waiver Program”, 18 Feb. 2016. Available at <https://www.dhs.gov/news/2016/02/18/dhs-announces-further-travel-restrictions-visa-waiver-program> (accessed 12 May 2017).

¹⁵³⁶ U.S. Courts for the 9th District (2017), *State of Washington and State of Minnesota v. Trump*, Case No. 17-35105. Available at https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000860 (accessed 7 Feb. 2017).

¹⁵³⁷ *State of Washington and Others v. Trump and Others*, Case No. 17-35105, 9th Cir., amended motion for leave to file 20-page brief by *amici curiae* states in support of plaintiffs-appellees of 6 Feb. 2017.

¹⁵³⁸ *State of Washington and Others v. Trump and Others*, Case No. 17-35105, 9th Cir., response to emergency motion exhibit A of 6 Feb. 2017, § 3 (see also: § 5(f)).

¹⁵³⁹ *Id.*, § 5(f).

¹⁵⁴⁰ *State of Washington and State of Minnesota v. Trump and Others*, Case No. 17-35105, D.C. No. 2:17-cv-00141, 9th Cir., order denying stay of 9 Feb. 2017.

The repelled Executive Order was later substituted by a new one.¹⁵⁴¹ Like its predecessor, § 13 and § 14 of the new E.O. 13780 restrict the entry of foreign nationals from Somalia, Iran, Syria, Sudan, Libya and Yemen and suspends entrants from the U.S. refugee program for a period of 90 days.

In March 2017, a federal district court judge in Hawaii issued a new TRO against Donald Trump's second travel ban.¹⁵⁴² Federal judge Derrick K. Watson granted a temporary TRO to prevent the federal government from suspending new visas for people from proscribed countries and freezing the nation's refugee program.¹⁵⁴³ The federal judge decided to extend his order blocking President Trump's travel ban, and converted TRO to a preliminary injunction.¹⁵⁴⁴

On the same month, the District Court for the District of Maryland ruled that President Trump's revised travel ban, forbidding entry into the United States by nationals of six Muslim-majority nations for three months, was unconstitutional because its supposed national security rationale is a pretext for discrimination against Muslims.¹⁵⁴⁵ Federal judge Theodore D. Chuang issued an injunction blocking enforcement of one of the critical sections of President Trump's revised travel ban, using Trump's own comments against him in deciding that the ban was likely to run afoul of the Constitution.¹⁵⁴⁶

The following month, the Court of Appeals for the 4th Circuit based in Richmond, Virginia, upheld the Maryland ruling.¹⁵⁴⁷ The 4th Circuit Court ruled that the new ban violated constitutional protections against religious discrimination.¹⁵⁴⁸

Lastly, in June 2017, the U.S. Court of Appeals for the 9th Circuit unanimously refused to reinstate President Trump's revised travel ban.¹⁵⁴⁹ The three judges' panes ruled that the EO lacked justification and violated the INA, that prohibits discrimination based on nationality. The decision leaved in place a nationwide injunction issued by Hawaii-based district judge.

¹⁵⁴¹ Trump, Donald J. (2017b), Executive Order 13780 of 6 Mar. 2017 [Protecting The Nation From Foreign Terrorist Entry Into The United States], 82 FR 13209.

¹⁵⁴² *State of Hawaii and Ismail Elshikh v. Trump et al.*, Case No. 17-00050 DKW-KSC, U.S. District Court for the District of Hawaii, order of 15 Mar. 2017.

¹⁵⁴³ *Ibid.*

¹⁵⁴⁴ *State of Hawaii and Ismail Elshikh v. Trump et al.*, Case No. 17-00050 DKW-KSC, U.S. District Court for the District of Hawaii, order of 29 Mar. 2017.

¹⁵⁴⁵ *International Refugee Assistance Project v. Trump*, Case No. TDC-17-0361, U.S. District Court for the District of Maryland, memorandum opinion of 15 Mar. 2017.

¹⁵⁴⁶ *Ibid.*

¹⁵⁴⁷ *International Refugee Assistance Project v. Trump*, Appeal No. 17-1351, 4th Cir., opinion of 25 May 2017.

¹⁵⁴⁸ *Ibid.*

¹⁵⁴⁹ *State of Hawaii and Ismail Elshikh v. Trump et al.*, Case No. 17-15589, Civ. No. 17-00050 DKW-KSC, District Court for the District of Hawaii, opinion of 12 June 2017.

The 9th Circuit Appeals Court argued, *inter alia*, that the E.O. failed to tie the targeted nationalities to terrorist groups or “provide any link between an individual’s nationality and their propensity to commit terrorism or their inherent dangerousness”. This ruling is not based on President Trump’s discriminatory motivations. The 9th Circuit Court, following a different rationale, said it wasn’t necessary to reach the constitutional question because Trump’s order violated the INA passed by Congress. This ruling concludes that the order is invalid for the simple reason that Trump lacked statutory authorization from Congress, for his actions.

The Department of Justice filed a request for the Supreme Court to overturn the 4th Circuit’s injunction against the ban, and to put the Hawaii ruling on hold until the 9th Circuit issues its ruling. The SCOTUS reinstated much of President Donald Trump’s travel ban.¹⁵⁵⁰ The SCOTUS left the travel ban against citizens of six majority-Muslim on hold as applied to non-citizens with relationships with persons or entities in the United States.

A third version of the Trump administration's travel ban, that expands the previous temporary measures, was proclaimed in September 2017.¹⁵⁵¹ The new travel restriction continue to target foreign nationals from Somalia, Yemen, Syria, Libya and Iran, but also adds North Korea, Chad and Venezuela to the list. Sudan has been dropped from the list of countries, and Iraqi citizens are subjected to “additional scrutiny”.

In December 2017 the Supreme Court issued two orders¹⁵⁵² stopping implementation of lower court injunctions that had temporarily blocked implementation of President Donald Trump’s third travel ban order, which permanently bans entry into the United States by most citizens of six Muslim-majority nations. These orders allowed the latest travel ban to go into effect, at least until the lower courts reach final decisions on its legality.

The fear caused by terrorism pushes to adopt restrictive measures against aliens, or certain categories of them. Sometimes these measures overly compress the fundamental human rights without guaranteeing security.

¹⁵⁵⁰ *Trump v. International Refugee Assistance Project*, Cases Nos. 16–1436 (16A1190) and 16–1540 (16A1191), opinion of 26 June 2017, 582 U. S. (2017).

¹⁵⁵¹ Trump, Donald J. (2017c), Proclamation 9645 of 24 Sept. 2017 [Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats], 24 Sept. 2017, 82 FR 45161.

¹⁵⁵² *Trump et al. v. Hawaii et al.*, order in pending case 583 U.S.; *Trump v. Refugee Assistance et al.*, order in pending Case 583 U.S.

EU COUNTER-TERRORISM AND SECURITY STRATEGY

The fight against terrorism is nothing new in the EU, since this organization has stood on the forefront of anti-terrorism since its inception, predominantly due to several prominent terrorist organizations that operated out of Spain, Italy, and Ireland (ETA, IRA, and others). Despite the nominal orientation against terrorism, the EU did not have a defining doctrine against it until 2002, when the EU council intensified its fight against terrorism in response to 9/11. Moreover, the majority of nations within the EU did not have any legal norms that would pertain to the prevention and fight against terrorism, largely due to the relative security that persisted in Europe since the end of World War II.¹⁵⁵³

Great Britain was one of the few nations that did have a well developed national policy against terrorism, largely due to the decades of constant fights with Irish separatists. The *Security Service Act* from 1989¹⁵⁵⁴ saw most of budget redistributed to counter terrorism, which was entrusted to a variety of agencies but mostly to UK domestic counter-intelligence and security agency MI5.¹⁵⁵⁵ Most of the entirety of the resources allocated pertained to international counter-terrorism and Northern Ireland-related terrorism.¹⁵⁵⁶ Aware of the danger of international terrorism, the UK was among the first nations to develop a more robust national program that looked at counter terrorism. It was inspired in many ways by the U.S. program. This was passed in 2003, but was only made public in 2006, and amended in 2009 and 2011. The EU passed a similar strategy two years later, mainly due to the specifics of its legislature, which necessitated the approval of most member states.¹⁵⁵⁷

Even though the EU does not meet the same criteria of federalism and unified foreign political doctrine, it is the closest political entity to the U.S. in terms of population, economy, and common values, which makes it a good source of comparison for the two counter terrorism strategies. What is clear, however, is that there exists a great deal of internal friction among

¹⁵⁵³ CoE (2005).

¹⁵⁵⁴ The *Security Service Act 1989 (Commencement) Order* was amended by the *Security Service Act 1996*.

¹⁵⁵⁵ Baber, Mary and Helena Jeffs (1996), *Security Service Bill*, Research Paper 96/2, London, House of Commons Library; International Business Publications (2013), *UK National Intelligence Service Handbook Volume 1. Strategic Information, Activities and Regulations*, Washington, D.C., International Business Publications, p. 117; Intelligence and Security Committee of Parliament (ISC) (2016), *Annual Report 2015–2016*, HC 444, London, House of Commons.

¹⁵⁵⁶ ISC, p. 11.

¹⁵⁵⁷ MI5 Security Service (2019), "What We Do, 2015". Available at <https://www.mi5.gov.uk/what-we-do> (accessed 2 Jan. 2019).

member states on the question of foreign policy, more specifically about the treatment of and dealing with terrorist threats. Countries which have not been hit by terrorist attacks tend to be less eager to contribute funds and personnel, whereas those (UK, France, Spain, Germany) that were are naturally much more willing to push the strategy.

The codependence and intertwining of contemporary security threats and challenges that include terrorism and the proliferation of weapons of mass destruction, organized crime, and others, have long since surpassed the ability of any single state to respond. Even large, wealthy, and well organized entities such as the U.S. or the EU cannot hope to respond to all of these threats single-handedly, which is why integration of the security processes of NATO and allies became a necessity. And yet, the unwillingness of members to part with some of their sovereignty in terms of external policy persists as a critical issue in the creation of EU's counter-terrorist policies.

Much like their U.S. counterpart, the EU strode to maximize its security and defense activities immediately after the 2001 attacks in the U.S. by implementing a six point action plan:

1. Increase of police and judicial cooperation by implementing a unified, EU arrest warrants, the establishment of a common EU definition of terrorism and terrorist activity, creation of a list of known terrorist organizations, and information exchange with Interpol, Europol, and U.S. based security agencies
2. Development of international legal instruments in the fight against terrorism by expanding the existing conventions and the development of the general convention against international terrorism
3. Fight against money laundering and terrorist financing by expanding regulations within the EU, allowing the freezing of assets of suspected terrorists and organizations that provide aid to terrorists, and ratifying this agreement with the UK
4. Increased air-traffic control on the entire EU territory
5. Integrating the war on terrorism within the Common security policy of the EU
6. Prevention of regional conflicts through the Common security policy and the operationalization of EU security and safety policy.¹⁵⁵⁸

¹⁵⁵⁸ Bossong, Raphael (2008), "The action plan on combating terrorism: a flawed instrument of EU security governance", *JCMS*, Vol. 46, No. 1, pp. 27-48.

During that same session, treaty for the shaping of a proper definition of terrorism was signed, and passed unanimously. As yet, this definition is in lieu with other similar definitions passed by the U.S. and other nations, as well as the UN, and largely negates the role of states in the creation and participation in terrorist activities.

The EU security strategy of 2002 must be examined in the context of political reality of the world in the years following the end of the Cold War. Removed from power, the USSR no longer posed any threat, and the EU largely left security and military consideration to the U.S. This was in part due to the unwillingness of member states to give away their sovereignty and partly due to the already entrenched role of the U.S. as the main political and military force in the world.

THE EUROPEAN COURT JUDGMENTS

Emergency CT measures adopted in the aftermath of 9/11, on the wake of emotion, may be wrong or unlawful. UN resolutions call for member states and other supranational organizations, such as the EU, to implement adopted CT measures. These solutions are implemented within the EU through Council regulations, by which is ordered the freezing of the funds and assets of listed individuals and entities. The list is regularly reviewed by the European Commission on the basis of updating carried out by the Sanctions Committee. Derogations from the freezing may be granted by states on humanitarian grounds with the consent of the Committee. Following a specific procedure, a delisting request may be made to the Committee through the state of residence or nationality of the person concerned.

The effects of these measures are multiple. While the benefits regarding the fight against terrorism are controversial, their application, more or less in good faith, causes significant collateral damage, and comes to serve as instruments of political repression. Due to the possibility for governments, in the conduct of their international relations, to preclude the disclosure of information to other governments, it may happen that individuals or organizations are blacklisted without real evidence, but only for political reasons. The lack of effective guarantees and proceedings rights allows the arbitrary use of CT measures. The scrutiny of

legality of these measures is crucial to ensure a proper balance between the need for security and the respect for human rights. Evidence of this can be found in some judgments rendered by the General Court, which became case laws.

THE PEOPLE'S MOJAHEDIN ORGANIZATION CASE

By a common position and a decision of 2 May 2002, the EU Council updated the list of persons and entities whose funds were to be frozen as part of the fight against terrorism, including, *inter alia*, the People's Mujahidin Organization of Iran (PMOI), also known as Mujahedin-e Khalq (MEK). Since then, the European Council has adopted a number of common positions and decisions updating the list in question, always maintaining the PMOI on the list. These successive decisions freezing the funds of the PMOI have already resulted in several judgments.

The People's Mujahidin of Iran was founded in 1965, and set itself the objective of replacing the regime of the *Shah* (emperor) of Iran, then the mullahs' regime, by a democracy.¹⁵⁵⁹ In the past, the PMOI had an armed branch operating inside Iran, but has expressly renounced all military activity since June 2001.

The PMOI brought an action before the European Court of First Instance (now the General Court) seeking annulment of those common positions and decisions. The Court annulled the Council Decision 2005/930/EC which ordered the freezing of the funds and other financial assets or economic resources of the PMOI, on the grounds that it did not contain a sufficient statement of reasons, that it had been adopted in the course of a procedure during which the PMOI's rights of defense had not been observed.¹⁵⁶⁰

According to the Court, the Council decision infringes the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection. That is, the decision is unlawful because unsubstantiated, and because the PMOI must be informed of the specific information and must be afforded the opportunity to make known effectively its view on any subsequent decision to maintain a freeze on funds.

¹⁵⁵⁹ Abrahamian, Ervand (1992), *The Iranian Mojahedin*, New Haven, Yale University Press.

¹⁵⁶⁰ *Organisation des Modjahedines du peuple d'Iran v. Council of the European Union*, Case T 228/02, Court of First Instance, Second Chamber, 12 Dec. 2006, ECLI:EU:T:2006:384.

The EU Court notes, first, that the relevant legislation does not explicitly provide for any procedure for notification of the evidence adduced or for a hearing of the parties concerned, either before or concomitantly with the adoption of an initial decision to freeze their funds or, in the context of the adoption of subsequent decisions, with a view to having them removed from the list.

Next, the Court finds that at no time before the action was brought was the evidence adduced against the PMOI notified to it. Neither the initial decision to freeze its funds nor subsequent decisions to maintain that freeze even mention the specific information or material in the file showing that a decision justifying its inclusion on the disputed list was taken in respect of it by a competent national authority (the United Kingdom). Thus, the PMOI has been unable effectively to make known its views to the Council.

The European Court draws a distinction between the PMOI case and the cases concerning the freezing of funds of individuals and entities linked to Osama bin Laden, al-Qaeda and the Taliban, which were the subject-matter of the judgments in *Yusuf and Kadi* of 21 September 2005 and also the judgments in *Ayadi*¹⁵⁶¹ and *Hassan*¹⁵⁶² of 12 July 2006.

In those cases, Court of First Instance found that the Council and the Commission had merely transposed at Community level resolutions of the Security Council and decisions of its Sanctions Committee which identified the persons concerned by name, without the Community institutions having any discretionary power as to the appropriateness of those measures. By contrast, argues the Court, in the system at issue in the PMOI case, the Security Council left it to the discretion of UN members to carry out the specific identification of individuals and entities whose funds are to be frozen. That identification involves the exercise of the Community's own powers, entailing a discretionary appreciation by the Community. The Court concludes that, in those circumstances, the Council is in principle bound to observe the fundamental rights guaranteed by the Community legal order.

On 28 June 2007 the Council adopted Decision 2007/445/EC updating the fund-freezing list. The PMOI was still included in the list. On 16 July 2007 the PMOI brought again the case before the Court of First Instance, asking for the annulment of the Council Decision.

¹⁵⁶¹ *Chafiq Ayadi v Council of the European Union*, Case T-253/02, Court of First Instance, Second Chamber, 12 July 2006, ECLI:EU:T:2006:200.

¹⁵⁶² *Faraj Hassan v Council of the European Union and Commission of the European Communities*, Case T-49/04, Court of First Instance, Second Chamber, 12 July 2006, ECLI:EU:T:2006:201.

On 30 November 2007 the Proscribed Organisations Appeal Commission (POAC), the appropriate UK tribunal established by § 5 of the *Terrorism Act 2000* for the purposes of § 7 of the *Human Rights Act 1998*, allowed an appeal against the home secretary's decision refusing to lift the proscription of the PMOI as an organization concerned in terrorism. Proscribed organization or groups must first write to the Home Office to ask to be removed from its list. If the Home Office decides to keep them on the list, they can appeal to the POAC, a commission independent of the government.

The POAC ordered the home secretary to remove the PMOI from the list of proscribed organizations.¹⁵⁶³ In that decision the POAC, *inter alia*, described as "perverse" and "unreasonable" the home secretary's conclusion that the applicant was still an organization concerned in terrorism. It is a strong censure of decisions adopted by the British cabinet. Subsequently, the POAC refused an application by the home secretary for permission to lodge an appeal before the Court of Appeal on the ground that none of the arguments advanced by the home secretary had a reasonable chance of succeeding.

On 20 December 2007, the European Council adopted Decision 2007/868/EC updating the list; the PMOI's name was still included. The Council took the view that the reasons for continuing to include the PMOI in the list still held good and observed that the home secretary had sought to bring an appeal against the POAC's decision. In consequence, the PMOI made a request to the Court of First Instance to be allowed to amend the form of order sought so that its application also sought annulment of this Decision.

The home secretary's application for leave to bring an appeal against the POAC's decision was definitively rejected by the Court of Appeal on 7 May 2008 and on 24 June 2008 the UK Parliament approved the home secretary's order removing the PMOI from the list of proscribed organizations under the national anti-terrorist legislation.

Nevertheless, on 15 July 2008 the Council adopted a new decision,¹⁵⁶⁴ based on two pieces of information supplied by the French government, which maintained the PMOI's name on the updated Community funds-freezing list. The Council noted in that regard that, even if the

¹⁵⁶³ Proscribed Terrorist Entities, also commonly termed 'listed' entities (2014), FATF Glossary of Terms and Acronyms: "Individuals or organisations on national or international lists of actors known to be engaged in terrorist activities".

¹⁵⁶⁴ Council Decision 2008/583/EC of 15 July 2008 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2007/868/EC, OJ 2008 L 188, p. 21.

home secretary's order was no longer in force, "new information concerning the group [had] been brought to the Council's attention" which, according to the Council, justified keeping the PMOI on the European list.¹⁵⁶⁵ The "new information" was the opening of a judicial inquiry by the anti-terrorist prosecutor's office of the *Tribunal de grande instance* of Paris and to two supplementary charges brought in March and November 2007 against persons presumed to be members of the PMOI. On 21 July 2008, the PMOI brought an action for annulment against the Council Decision 2008/583/EC (case T-284/08).

On 23 October 2008 the Court of First Instance delivered its judgment [the PMOI judgment] annulling the Decision 2007/445 on the grounds that the Council had failed to give sufficient reasons as to why it had not taken into account the judgment of a British judicial authority, the POAC, ordering the removal of the PMOI from the British list of terrorist organizations.¹⁵⁶⁶

The European Court considers that the POAC's decision is of considerable importance, inasmuch as it is the first decision of a competent judicial authority ruling on the lawfulness of the home secretary's refusal to withdraw the order on the basis of which the Council adopted both the initial decision to freeze the PMOI's funds and all the subsequent decisions. Because of the overriding necessity to verify the consequences at national level of decisions of a competent authority, having regard to all the relevant information at the date when Decision 2007/868 was adopted, and taking account of the particular circumstances of the case, the Court considers that the Council's statement of reasons (that home secretary intended to bring an appeal against the POAC's decision) is manifestly insufficient to provide legal justification for continuing to freeze the PMOI's funds.

Furthermore, the EU Court considers that, while it is true that the Council could have regard to the existence of appeals against the POAC's decision and to the home secretary's actual recourse to them, it was not sufficient for the Council merely to state that the home secretary had sought to lodge an appeal in order to be relieved of the need to take into specific consideration the findings of fact made by the POAC against which no appeal lies and the legal conclusions which it drew from those findings. Moreover, when Decision 2007/868 was adopted, the Council had been informed of the POAC's refusal to grant the home secretary leave to introduce such an

¹⁵⁶⁵ Common Position 2001/931/CFSP and Council Regulation (CE) No. 2580/2001.

¹⁵⁶⁶ *People's Mojahedin Organization of Iran v. Council of the European Union*, Case T-256/07, Court of First Instance, Seventh Chamber, 23 Oct. 2008, ECLI:EU:T:2008:461

appeal on the ground that none of the arguments put forward stood a reasonable chance of succeeding before the Court of Appeal. The European Court recalls that the Council, when adopting Community fund-freezing measures, must ensure the existence of a decision of a relevant national judicial authority, and verify any consequences of this decision.

On 4 December 2008, the Court of First Instance, using an expedited procedure, delivered its judgment for the annulment of Council Decision 2008/583/EC [PMOI II].¹⁵⁶⁷ The Court finds that the Council violated the rights of defense of the PMOI by not communicating to it the new information which, according to the Council, justified maintaining the entity on the European terrorist list. The Court considers that the contested decision violated the PMOI's rights of defense. Therefore, the Court finds that by refusing to communicate to the Court certain information about the case, the Council has equally infringed the fundamental right of the PMOI to effective judicial protection. In particular, the Council has failed to explain why the acts ascribed to the supposed members of the PMOI in France should be attributed to that organization itself.

Finally, the European Court notes that by failing to communicate to the Court certain information about the case which the French authorities refused to declassify, even though this information had been communicated to the Council and subsequently to the 26 other member states, the Council had equally infringed the fundamental right of PMOI to effective judicial protection. The Court concludes that the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a member state, if that member state is not willing to authorize its communication to the EU judiciary whose task is to review the lawfulness of that decision.

Nevertheless the previous judgments annulling the Council decisions for breaching of PMOI's fundamental rights of defense, France brought an appeal against that judgment before the Court of Justice. Along with the General Court and the Civil Service Tribunal, the Court of Justice (ECJ) is one of the three distinct courts which constitute the Court of Justice of the European Union (CJEU), that exercise the judicial functions of the European Union.¹⁵⁶⁸ The

¹⁵⁶⁷ *People's Mojahedin Organization of Iran v. Council of the European Union [People's Mojahedin Organization of Iran II]*, Case T-284/08, Court of First Instance, Seventh Chamber, 4 Dec. 2008, ECLI:EU:T:2008:550.

¹⁵⁶⁸ Art. 19 TEU: The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised court.

Court of Justice dismissed the appeal and upheld the judgment of the General Court.¹⁵⁶⁹ This was the third time that the General Court had annulled a decision of that kind.

The Court notes that, in the case of an initial decision to freeze funds, the Council is not obliged to inform the person or entity concerned beforehand of the grounds of his or its inclusion in the list not to jeopardize the effectiveness of such a measure, the surprise effect, in the case of a subsequent decision to freeze funds maintaining the person concerned in the list, that surprise effect is no longer necessary, with the result that the adoption of such a decision must, in principle, be preceded by notification of the incriminating evidence and by allowing the person or entity concerned an opportunity of being heard.

Thus, the Council was bound, imperatively, to ensure that PMOI's rights of the defense were observed, that is to say, that the incriminating evidence against it was communicated and PMOI given the opportunity to respond, before that decision was adopted. The Court emphasizes that the protection offered by this notification is fundamental and essential to the rights of defense.

Next, the Court argued that, while it is indeed true, as France has maintained, that the Council could not possibly allow a situation to continue in which the earlier decision lacked any basis following the removal of PMOI from the British list, the fact nevertheless remains, as indeed that member state accepts, that that removal had no automatic, immediate effect on the earlier decision, which remained in force by reason of the presumption that acts of the institutions of the European Union are lawful.

The People's Mujahidin of Iran have suffered the same fate in the U.S., and faced the same judicial process, without achieving the same success that had in the Community courts. The U.S. law gives the secretary of state the utmost discretion in designating an organization. The procedural guarantees, in this case, are almost null, and very little can be done by the courts, in front of the executive power.

In October 1997, the U.S. Department of State enlisted the PMOI as a foreign terrorist organization.¹⁵⁷⁰ In 1999, the PMOI filed a petition for a writ of certiorari before the SCOTUS,

¹⁵⁶⁹ *French Republic v. People's Mojahedin Organization of Iran*, Case C-27/09, General Court, Grand Chamber, 21 Dec. 2011, OJ C49/2 of 18 Feb. 2012, ECLI:EU:C:2011:853.

¹⁵⁷⁰ Albright, Madeleine K. (1997), Public Notice 2012 of 2 Oct. 1997 of the secretary of state, 62 FR 52650 of 8 Oct. 1997.

that denied the request.¹⁵⁷¹ In 2003, the MEK appealed against the secretary of state's designation, but the D.C. Circuit denied the petitions for review.¹⁵⁷² The Secretary made successive designations of the PMOI as a FTO in 1997, 1999, and 2001. The People's Mujahidin of Iran appealed against the secretary's denial for revocation of its 2003 designation, but the court remanded to the secretary for further proceedings.¹⁵⁷³ Finally, on 21 September 2012, the U.S. State Department removed MEK from its list of terrorist organizations,¹⁵⁷⁴ due to the fact that they renounced to violence.¹⁵⁷⁵ But some doubt remains about whether this was a political decision, as the People's Mujahidin of Iran make a tough opposition to Tehran's regime, which has been determined a state sponsor of terrorism by the U.S. secretary of state.

THE AL-AQSA CASE

In joint cases *Al-Aqsa v Council* and *Netherlands v Al-Aqsa*¹⁵⁷⁶ the European Court of Justice set aside the judgment of the General Court which annulled the inclusion of Stichting Al-Aqsa, a Dutch foundation which describes itself as an Islamic charity supporting humanitarian projects, in the list of persons and entities whose funds have been frozen in the fight against terrorism. In 2007 the General Court has annulled the Council decisions to include Al-Aqsa in the list on the ground of an inadequate statement of reasons,¹⁵⁷⁷ and in 2010 annulled again a new set of Council measures adopted between 2007 and 2009.¹⁵⁷⁸

¹⁵⁷¹ *People's Mujahidin Organization of Iran v. Department of State at al.*, Case No. 99-1070, SCOTUS, brief for the respondents in opposition, Mar. 2000.

¹⁵⁷² *People's Mojahedin Organization of Iran v. Department of State and Colin L. Powell, Secretary of State*, Case No. 01-1465 and 01-1476, D.C. Circuit, decision of 9 May 2003.

¹⁵⁷³ *People's Mujahidin Organization of Iran v. Department of State and Hillary Rodham Clinton, in her Capacity as Secretary of State*, Case No. 09-1059, D.C. Circuit, decision of 16 July 2010.

¹⁵⁷⁴ Rodham Clinton, Hillary Diane (2012), Public Notice 8049 of 21 Sept. 2012 of the secretary of state, 77 FR 60741 of 4 Oct. 2012.

¹⁵⁷⁵ Bureau of Counterterrorism and Countering Violent Extremism (2012), "Delisting of the Mujahedin-e Khalq", PRN: 2012/1558, Department of State, 28 Sept. 2012. Available at <https://www.state.gov/j/ct/rls/other/des/266607.htm> (accessed 2 June 2017).

¹⁵⁷⁶ *Stichting Al-Aqsa v. Council of the European Union* (C-539/10 P), *Kingdom of the Netherlands v. Stichting Al-Aqsa, Council of the European Union, European Commission* (C-550/10), joined cases C-539/10 and C-550/10, CJEU, Third Chamber, 15 Nov. 2012, ECLI:EU:C:2012:711.

¹⁵⁷⁷ *Stichting Al-Aqsa v. Council of the European Union*, Case T-327/03, Court of First Instance, Second Chamber, 11 July 2007, OJ C199/29 of 25 Aug. 2007, ECLI:EU:T:2007:211.

¹⁵⁷⁸ *Stichting Al-Aqsa v. Council of the European Union*, Case T-348/07, EGC, 9 Sept. 2010, OJ C288/32 of 23 Oct. 2010, ECLI:EU:T:2010:373.

Security Council Res. 1373 (2001) leaves to member states to determine the identification of persons and entities involved in acts of terrorism. Decisions must be based on precise information, or serious and credible evidence, or instigation of investigations or prosecution or sentence for such deeds.

On 3 April 2003, the Dutch Foreign Ministry adopted the *Sanctieregeling Terrorisme 2003* (Regulation on sanctions for the suppression of terrorism 2003), ordering, *inter alia*, the freezing of all Al-Aqsa's funds and financial assets on the ground that they were intended for organizations supporting terrorism in the Near East, in particular Hamas. An action against the regulation was rejected on 3 August 2003 by the competent national authority, following the adoption of Council decision of 27 June 2003 which has enlisted the Islamic charity institution.

In 2003 Al-Aqsa brought actions before the Court of First Instance seeking annulment of the decisions ordering its funds to be frozen. The Court annulled the Council decision. The Court finds, as it did previously in the PMOI case, that certain fundamental rights and safeguards, especially the rights of the defense and the right to effective judicial protection, were not respected by the Council in its adoption of the contested decisions of freezing funds.

Meanwhile, on 28 June 2007, the Council adopted a fresh decision updating the list and including Al-Aqsa.¹⁵⁷⁹ To justify its decision, the Council invoked the Dutch *Sanctieregeling* and the order on the application for interim measures as a decision taken by a competent national authority. Al-Aqsa brought an action before the General Court for the annulment of that decision, and extended its action also to cover the annulment of the new measures adopted up to a regulation of June 2009.¹⁵⁸⁰ On 22 December 2009, the Council adopted a new implementing regulation,¹⁵⁸¹ which did not form part of these proceedings, maintaining Al-Aqsa on the list.

The General Court annulled the contested measures, and stressed that the Council was under an obligation to eliminate the same defects or illegalities in any subsequent fund-freezing measure which has repealed and replaced the contested measures.¹⁵⁸² Nevertheless considering

¹⁵⁷⁹ Council Decision 2007/445/EC of 28 June 2007 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2006/379/EC and 2006/1008/EC, OJ 2007 L169, p. 58.

¹⁵⁸⁰ The measures concerned are: Council Decision 2007/445/EC of 28 June 2007; Council Decision 2007/868/EC of 20 Dec. 2007; Council Decision 2008/583/EC of 15 July 2008; Council Decision 2009/62/EC of 26 Jan. 2009; Council Regulation (EC) No. 501/2009 of 15 June 2009.

¹⁵⁸¹ Council Implementing Regulation (EU) No 1285/2009 of 22 Dec. 2009 implementing Article 2(3) of Regulation (EC) No. 2580/2001 and repealing Regulation (EC) No. 501/2009, OJ 2009 L346, p. 39.

¹⁵⁸² An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The member states, the European institutions and individuals may, under certain conditions,

that a decision of a relevant national authority which could, in principle, justify the adoption of a fund-freezing measure at the Community level, the Court pointed out that the Council should have held that there was no longer any "substratum" in national law justifying to a sufficient legal standard the maintenance of the Community measure.

According to the General Court, the verification of the existence of a decision of a competent national authority is an essential precondition for the adoption of an initial Community decision to freeze funds, while verification of the action taken at national level following that decision is indispensable in the context of the adoption of a subsequent Community decision to continue the freezing of funds.

It is likely that the decision to proscribe Stichting Al-Aqsa is due to the assonance with the Al-Aqsa Martyrs' Brigades, which have carried out several joint attacks with Hamas. The Al-Aqsa Brigades, that are deemed to be the military wing of al-Fatah, have been designated a terrorist organization by the EU, Israel, Canada, Japan,¹⁵⁸³ New Zealand,¹⁵⁸⁴ and the U.S.¹⁵⁸⁵ The military wing of al-Fatah have always been directly funded by Yasser Arafat.¹⁵⁸⁶

The Al-Aqsa Martyrs' Brigades must not be confused with Jund al-Aqsa (Soldiers of al-Aqsa), a former subunit within ANF now fighting against Nusairi (also known as Alawites or Ansari), an Islamic Shia sect with syncretist elements. Jund al-Aqsa (JAA), later known as Liwa al-Aqsa after 7 February 2017, has been identified as a SDGT entity by the U.S. Department of State on 20 September 2016 under E.O. 13224.¹⁵⁸⁷

While Hamas – which runs also its own official satellite television station Al-Aqsa TV, broadcasting from the Gaza Strip – has been designated, though not uniformly, as a terrorist organization, Fatah has always been considered a privileged interlocutor of Western governments, especially of the U.S. and Europe.

Fatah is generally deemed to have had a strong involvement in terrorism in the past. Unlike its antagonist Islamist faction Hamas, Fatah is no longer considered a terrorist

bring an action for annulment before the CJEU or the EGC. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

¹⁵⁸³ MOFA of Japan (2005), p. 138.

¹⁵⁸⁴ New Zealand Police.

¹⁵⁸⁵ Bureau of Counterterrorism, *Foreign Terrorist Organizations*.

¹⁵⁸⁶ Pina, Aaron D. (2005), *Palestinian Factions*, CRS Report for Congress RS21235, Washington, D.C., CRS, p. 4.

¹⁵⁸⁷ U.S. Department of State (2016c), "State Department Terrorist Designation of Jund al-Aqsa", 20 Sept. 2016. Available at <http://www.state.gov/r/pa/prs/ps/2016/09/262158.htm> (accessed 21 Sept. 2016).

organization by any government. Until 1988, when renounced terrorism,¹⁵⁸⁸ Fatah was designated a terrorist organization by the State of Israel and was proscribed by the Department of State and the U.S. Congress.

Fatah is a dominating faction within the Palestine Liberation Organization. The PLO was designated a terrorist organization by the United States in 1987,¹⁵⁸⁹ and was considered such as, along with Israel, until 1991.¹⁵⁹⁰ Fatah was not designated a terrorist entity by any Arab government. In 1993, when the PLO recognized Israel's right to exist in peace, accepted UN Security Council Resolution 242 (1967) and 338 (1973), and rejected violence and terrorism, it was officially recognized by the government of Jerusalem as the representative of the Palestinian people.¹⁵⁹¹

Nonetheless, Israel accuses the Palestinian National Authority (PNA) and its chairman Mahmoud Abbas, also known by the teknonymy Abu Mazen, to use "inflammatory Islamic rhetoric to spread false and malicious claims against Israel"¹⁵⁹² and to glorify terrorism.¹⁵⁹³ Abbas, who is co-founder of Fatah, is the incumbent president of the State of Palestine and its National Authority, and the chairman of PLO.¹⁵⁹⁴

The PLO has enjoyed observer status at the UN since 1974.¹⁵⁹⁵ After the proclamation of the State of Palestine by the Palestine National Council on 15 November 1988, the UN General Assembly decided that the designation "Palestine" should be used in place of the designation "Palestine Liberation Organization" in the UN system,¹⁵⁹⁶ and the representation was later upgraded to "non-member observer state" status.¹⁵⁹⁷ Following the application of Palestine for

¹⁵⁸⁸ Kushner, Harvey W. (2003), *Encyclopedia of Terrorism*, Thousand Oaks, Sage Publications (illustrated ed.), pp. 13–15, 281–83.

¹⁵⁸⁹ *Anti-Terrorism Act of 1987*, Pub. L. 100–204, 101 Stat. 1406. See also: 22 U.S.C. § 5201, 5202.

¹⁵⁹⁰ Ehrenfeld.

¹⁵⁹¹ UN (2008), pp. 55-57.

¹⁵⁹² MFA of the State of Israel (2015a), "Palestinian incitement and terrorism: Truth and lies", 29 Oct. 2015. Available at <http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Palestinian-incitement-and-terrorism-Oct-2015.aspx> (accessed 21 Feb. 2017)

¹⁵⁹³ MFA of the State of Israel (2015b), "Examples of Palestinian Incitement from the Past Week", 19 Oct. 2015. Available at <http://mfa.gov.il/MFA/ForeignPolicy/Terrorism/Palestinian/Documents/PalIncitementSocialMedia191015.pdf> (accessed 21 Feb. 2017).

¹⁵⁹⁴ Embassy of the State of Palestine in Dhaka (2016), "The President Mahmoud Abbas". Available at http://palestineembassybd.com/?page_id=173 (accessed 22 Feb. 2017).

¹⁵⁹⁵ UNGA, Resolution 3210 (XXIX) [Invitation to the Palestine Liberation Organization], adopted on 14 Oct. 1974, GAOR, 29th Sess., Supp. No. 31, Volume I: Resolutions and Decisions 17 Sept.-18 Dec. 1974: A/9631 + Corr.2, p. 3.

¹⁵⁹⁶ UNGA, Resolution 43/177 [Question on Palestine], adopted on 9 Dec. 1988.

¹⁵⁹⁷ UNGA, Resolution 67/19 [Status of Palestine in the United Nations], adopted on 29 Nov. 2012.

admission to membership in the UN (S/2011/592),¹⁵⁹⁸ the Committee on the Admission of New Members, suggested that the General Assembly should adopt a resolution by which Palestine would be made an observer state.¹⁵⁹⁹ The Committee reported that questions concerning the application of Palestine for admission to membership in the UN were raised since Hamas refused to renounce terrorism and violence.¹⁶⁰⁰ Eventually, the State of Palestine became the only UN non-member state, together with the Holy See, participating as observer in the sessions and the works of the General Assembly.¹⁶⁰¹

Fatah is supported by the international community, both financially¹⁶⁰² and militarily.¹⁶⁰³ During the Fatah–Hamas conflict (2006–2007), the Quartet on the Middle East (UN, U.S., EU and Russia) imposed a freeze on all international aid to the Palestinian territories, and asked the European Union to propose a Temporary International Mechanism (TIM) to ensure direct delivery of assistance to the Palestinians,¹⁶⁰⁴ whilst avoiding distributing monies to Hamas.

None of the funds appropriated by the U.S. for International Security Assistance and Foreign Assistance may be provided to support a Palestinian state unless it is proved that the governing entity has taken appropriate measures to counter terrorism and terrorist financing in the West Bank and Gaza.¹⁶⁰⁵ Individual, entities, or educational institutions determined to be involved in or advocating terrorist activity are not provided of funds appropriated for assistance under the West Bank and Gaza Economic Program.¹⁶⁰⁶ The U.S. president may waive these limitations "if he determines that it is important to the national security interests of the United States to do so".¹⁶⁰⁷ Since 2006, Bush and Obama have both issued the waiver every year (Obama's latest waiver was issued in July 2013). The law prohibits to use this funds "for salaries

¹⁵⁹⁸ UNSC, *Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations*, 11 Nov. 2011, S/2011/705.

¹⁵⁹⁹ UNGA-UNSC, *Application of the State of Palestine for admission to membership in the United Nations*, note by the Secretary-General, 23 Sept. 2011, A/66/371–S/2011/592.

¹⁶⁰⁰ S/2011/705, § 16.

¹⁶⁰¹ Marsili (2016a), pp. 167-8.

¹⁶⁰² Sharp, Jeremy M. and Christopher M. Blanchard (2006), *U.S. Foreign Aid to the Palestinians*, CRS Report for Congress RS22370, Washington, D.C., CRS.

¹⁶⁰³ IISS (2007), *Hamas coup in Gaza*, Washington, D.C., International Institute for Strategic Studies, Vol. 13, No. 5 (May).

¹⁶⁰⁴ DEVCO (2007), "Temporary International Mechanism (TIM). Key Facts", Brussels, EU. Available at https://ec.europa.eu/europeaid/sites/devco/files/factsheet-tim-occupied-palestinian-territory-200706_en_7.pdf (accessed 10 Feb. 2016).

¹⁶⁰⁵ *Consolidated Appropriations Act, 2010*, Pub. L. 111–117, 123 Stat. 3364, § 7036.

¹⁶⁰⁶ § 7039 (b), 123 Stat. 3366.

¹⁶⁰⁷ § 7036 (E)(c), 123 Stat. 3364 and § 7040 (b), 123 Stat. 3367.

of personnel of the Palestinian Authority located in Gaza"¹⁶⁰⁸ or "for assistance to Hamas or any entity effectively controlled by Hamas or any power-sharing government of which Hamas is a member".¹⁶⁰⁹ The U.S. position is different from that of the European Union. Bizarrely, the *Consolidated Appropriations Act 2010* does not provide any limitation to the assistance to Lebanon, despite the presence of Hezbollah in the Parliament or in the cabinet.

THE SISON CASE

On the same day that delivered the Al-Aqsa judgment, the Court of First Instance ruled also on the case of Jose Maria Sison,¹⁶¹⁰ a Filipino national who resided in the Netherlands since 1987. When the government of Manila withdrew his passport in September 1988 Sison applied for refugee status and a residence permit in the Netherlands on humanitarian grounds. The state secretary for justice refused three times the application on the ground that Mr Sison was the chairman of the Communist Party of the Philippines (CPP), that the military wing of the CPP, the New People's Army (NPA), was under the Central Committee of the CPP, and that Mr Sison was, in fact, the head of the NPA, which was responsible for a large number of terrorist acts in the Philippines. The first two decisions were annulled by the Dutch Council of State, but the third was upheld by decision of 11 September 1997 of the *Rechtbank Gravenhage*, The Hague District Court. The issue of the determination of a political movement, or only of its military wing, as a terrorist organization, concerns many cases (e.g. Hamas, Hezbollah, and the Kurds).

In 2003 Mr Sison challenged the decision of the Council of 29 October 2002, which included him in the list of persons whose funds must be frozen. The Court of First Instance annulled the Council decision for the same reasons of the PMPI case, on the grounds that these decisions had been taken in breach of the rights of defense, the obligation to state reasons, and the right to effective judicial protection.

In 2007 Mr Sison submitted an application before the Court of First Instance for annulment of the decision of the Council adopted – and then confirmed on several occasions – to

¹⁶⁰⁸ § 7040 (f)(1), 123 Stat. 3368.

¹⁶⁰⁹ *Ibid.*

¹⁶¹⁰ *Jose Maria Sison v. Council of the European Union*, Case T-47/03, Court of First Instance, Second Chamber, 11 July 2007, OJ C199/27 of 25 Aug. 2007, ECLI:EU:T:2007:207.

include his name in the list of persons whose assets are frozen, based on matters contained in the Dutch judicial decision. The Court annulled the Council decision for lack of evidence: the proceedings before the Dutch courts contain no evidence of any "condemnation" of Mr Sison, nor do they constitute decisions for the "instigation of investigations or prosecution for a terrorist act".¹⁶¹¹ According to the European Court, these procedures were solely concerned with the review of the lawfulness of the administrative decision refusing to grant Mr Sison refugee status and a residence permit in the Netherlands.

THE KADI CASE

Identified as a SDGT, Yassin Abdullah Kadi, a Saudi Arabia national, was placed on a blacklist by the OFAC on 12 October 2001,¹⁶¹² pursuant to E.O. 13224.¹⁶¹³ Kadi was informed by OFAC of the asset freezing by letter dated 15 October,¹⁶¹⁴ and the notice was published on the *Federal Register* on 26 October. On 17 October Kadi was designated by the 1267 Sanctions Committee as associated with Osama bin Laden, and then enrolled in the Consolidated List. On 19 October his name was placed in the European list¹⁶¹⁵ annexed to the Community regulation¹⁶¹⁶ implementing the UN decision. His assets, as well as the funds belonging to Al Barakaat International Foundation, established in Sweden, were frozen, and a travel ban applied.

¹⁶¹¹ *Jose Maria Sison v. Council of the European Union*, Case T-341/07, Court of First Instance, Seventh Chamber, 30 Sept. 2009, OJ C282/42 of 21 Nov. 2009, ECLI:EU:T:2009:372.

¹⁶¹² OFAC (2001), "Blocked Persons, Specially Designated Nationals, Specially Designated Terrorists, Foreign Terrorist Organizations, and Specially Designated Narcotics Traffickers: Additional Designations of Terrorism-Related Blocked Persons", 16 Oct. 2001, 66 FR 54404 of 26 Oct. 2001.

¹⁶¹³ Bush, George W. (2001), Executive Order 13224 [Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism] of 23 Sept. 2001, 66 FR 49079 of 25 Sept. 2001.

¹⁶¹⁴ *Yassin Abdullah Kadi v. Timothy Geithner et Al.*, Case No. 09-0108 (JDB), D.D.C., memorandum opinion of 19 Mar. 2012, p. 24.

¹⁶¹⁵ EEAS (2015), "Consolidated List of Persons, Groups and Entities Subject to EU Financial Sanctions", updated 18.08.2015 (18:17). Available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/8442/Consolidated_list_of_sanctions (accessed 20 Dec.2017).

¹⁶¹⁶ Council Regulation (EC) No. 881/2002 of 27 May 2002 Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama bin Laden, the Al-Qaeda Network and the Taliban, and Repealing Council Regulation (EC) No. 467/2001, OJ L139 of 29 May 2002, p. 9.

Mr Kadi¹⁶¹⁷ and Al Barakaat Foundation¹⁶¹⁸ applied to the Court of First Instance arguing the Council Regulation should be annulled because it breached his fundamental rights to be heard, the respect for property, and effective judicial review. Both actions for annulment were dismissed by the Court of First Instance for lack of jurisdiction to indirectly check the lawfulness of Security Council resolutions in relation to *jus cogens* norms, as member states are obliged to comply with resolutions of the SC under the UN Charter, an international treaty which has primacy over Community law.

Kadi and Al Barakaat brought appeals before the Court of Justice against the judgment of the General Court, which annulled the regulation freezing Kadi's funds, holding that it had been adopted in breach of Kadi's fundamental rights but maintaining its effects for a period of three months in order to allow the Council to remedy the infringements found. The ECJ followed, determining that "the rights of the defense, in particular the right to be heard, and the right to effective judicial review of those rights, were patently not respected".¹⁶¹⁹ Despite this judicial decision, the European Commission adopted a new regulation¹⁶²⁰ maintaining the freeze of Kadi's funds. Emboldened by the 2008 ECJ *Kadi* judgment, national courts have likewise begun to invalidate domestic implementations (*Abdelrazik*, 2009;¹⁶²¹ *Ahmed and Others*, 2010¹⁶²²).

Kadi filled a further legal application with the General Court. In delivering its judgment, the General Court finds that "the re-examination procedure operated by the Sanctions Committee clearly fails to offer guarantees of effective judicial protection".¹⁶²³ The Court argues that the measures in question have had a marked and long-lasting effect on the fundamental rights of Kadi, all of whose funds have been indefinitely frozen for nearly ten years.¹⁶²⁴

¹⁶¹⁷ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [Kadi], Case T-315/01, Court of First Instance, Second Chamber, extended composition, 21 Sept. 2005, ECLI:EU:T:2005:332.

¹⁶¹⁸ *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Case T-306/01, Court of First Instance, Second Chamber, extended composition, 21 Sept. 2005, ECLI:EU:T:2005:331.

¹⁶¹⁹ *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, ECJ, Grand Chamber, 3 Sept. 2008, ECLI:EU:C:2008:461, § 334.

¹⁶²⁰ Commission Regulation (EC) No 1190/2008 of 28 Nov. 2008 Amending for the 101th Time Council Regulation (EC) No 881/2002, OJ L322 of 2 Dec. 2008, p. 25.

¹⁶²¹ *Abousfian Abdelrazik v. Minister of Foreign Affairs and Attorney General of Canada* [Abdelrazik], Case T-727-08, Federal Court of Canada, 4 June 2009 [2009 FC 580].

¹⁶²² *Ahmed and Others*.

¹⁶²³ *Kadi II* (2010), § 127.

¹⁶²⁴ *Id.*, § 151.

The General Court denounces that Kadi's "rights of defense have been 'observed' only in the most formal and superficial sense",¹⁶²⁵ which was clearly deficient to allow him to launch an effective challenge against the allegations. According to the Court, the procedure followed by the EC, in response to Kadi's request disclosure of information, "did not grant him even the most minimal access to the evidence against him", as such was refused access despite his express request.¹⁶²⁶ The Court considers that the allegations against Kadi and his alleged participation in terrorist activities were "imprecise".¹⁶²⁷ Hence, concludes the Court, follows that the regulation was adopted in breach of Kadi's rights of defense.¹⁶²⁸

Given the lack of any proper access to the information and evidence used against him, Kadi was unable to defend his rights with regard to that evidence in satisfactory conditions before the EU Courts, with the result that it must be held that his right to effective judicial review has also been infringed.¹⁶²⁹ The General Court argues that, given the general application and duration of the freezing measures, the regulation also constitutes an unjustified restriction of Kadi's right to property.¹⁶³⁰ Consequently, the Court annuls the EC regulation in so far as it concerns Kadi.

As a result of the SC determination, Kadi was blacklisted by national authorities, forced to challenge these proscriptions before local courts. In 2007 a Swiss court removes Kadi from the list of blocked terrorists; Kadi is exonerated on all charges and his funds in Swiss banks are unfrozen. In December 2008, the UK Treasury removes Kadi from the list of persons designated as terrorists under *Terrorism (United Nations Measures) Order 2001* (the "2001 Order"), but leaves him on a second list drafted under separate UK legislation, the *Al Qaeda and Taliban (United Nations Measures) Order 2006* (the "2006 Order"), which contains different listing criteria.¹⁶³¹ In 2010 the UK Supreme Court annuls the listing criteria and strikes down the operative part of the legislation, ruling that it must be quashed as being *ultra vires*, or beyond the powers of the government.¹⁶³² Consequently, Kadi's name is removed from the second UK list of terrorists.

¹⁶²⁵ Id., § 171.

¹⁶²⁶ Id., § 173.

¹⁶²⁷ Id., § 174.

¹⁶²⁸ Ibid.

¹⁶²⁹ Kadi II (2010), § 45, 181.

¹⁶³⁰ Id., § 183.

¹⁶³¹ *Yassin Abdullah Kadi v. Timothy Geithner et Al.*, memorandum opinion, p. 2.

¹⁶³² *Ahmed and Others.*

In 2013 the Court of Justice rules, first, that in proceedings relating to listing or maintaining the listing of the name of an individual on the list of persons suspected of being associated with terrorism, the competent EU authority must disclose to the individual concerned the evidence underpinning its decision.¹⁶³³ Accordingly, that individual must be able to obtain, at the very least, the summary of reasons provided by the Sanctions Committee to support that committee's decision to impose restrictive measures on him.¹⁶³⁴ Further, that authority must ensure that individual is placed in a position which may effectively make known their views on the grounds relied on against him and must examine, in the light of comments made by the individual concerned, whether those reasons are well founded.¹⁶³⁵ In that context, if necessary, it is the task of that authority to seek the assistance of the Sanctions Committee and, through that committee, the member of the UN which proposed the listing of the individual concerned on the Consolidated List, in order to obtain the disclosure of information or evidence, confidential or not, to enable it to undertake a careful and impartial examination of whether the reasons concerned are well founded.¹⁶³⁶ The Court argues that "if that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a basis for the contested decision to list or maintain a listing".¹⁶³⁷ In that regard, the Court acknowledges that overriding considerations to do with the security of the EU or of its member states or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned.

Finally, on 11 September 2014, the OFAC unblocked the property and interests in property of Kadi pursuant to Executive Order 13224.¹⁶³⁸ The property of Kadi has been arbitrarily frozen for 13 years, without concrete evidence. Notwithstanding the delisting,¹⁶³⁹

¹⁶³³ *Commission, Council, United Kingdom v. Yassin Abdullah Kadi* [Kadi II 2013], joined cases C-584/10, C-593/10 and C-595/10, CJEU, Grand Chamber, 18 July 2013, § 112. ECLI:EU:C:2013:518.

¹⁶³⁴ *Kadi II* (2013), § 111, 135.

¹⁶³⁵ *Id.*, § 112, 114, 135.

¹⁶³⁶ *Id.*, § 121.

¹⁶³⁷ *Id.*, § 123.

¹⁶³⁸ OFAC (2011), "Unblocking of a Specially Designated Global Terrorist Pursuant to Executive Order 13224" 26 Nov. 2001, 79 FR 72248 of 5 Dec. 2014.

¹⁶³⁹ Terrorist entity (2014), FATF Glossary of Terms and Acronyms: "refers to a terrorist and/or terrorist organisation identified as a supporter of terrorism by national or international sanctions lists, or assessed by a jurisdiction as active in terrorist activity".

sanctions have continued to be in force under U.S. Treasury's OFAC regulations and other laws.¹⁶⁴⁰

THE AYADI CASE

Just after the Kadi judgment of 2005, the Court of First Instance clarified that, under the Community legal order, individuals whose funds have been frozen in connection with the fight against terrorism are guaranteed to present a request to the Security Council to have their case reviewed.¹⁶⁴¹ The Court ruled that in the examining of such a request member states are bound to observe the fundamental rights of such persons.¹⁶⁴²

On 19 October 2001, Chafiq Ayadi, a Tunisian national resident in Dublin, Ireland, was added to the Community list of persons and entities associated with the Taliban, Osama bin Laden and the al-Qaeda network compiled by the Sanctions Committee. On 20 November 2003, Faraj Hassan, a Libyan national, held in Brixton Prison (UK), pending the outcome of extradition proceedings brought by the Italian authorities, was added to the European list. Those African nationals asked the Court of First Instance to annul those measures.

In *Ayadi*, the Court recognizes that freezing of funds constitutes a particularly drastic measure. The Court asserts that the grant of a taxi driver's license to Mr Ayadi and his hiring of a car may theoretically be the object of a derogation from the freezing of his funds. It is however for the national authorities to determine whether such a derogation may be granted on humanitarian grounds with the consent of the Sanctions Committee.

The Court points out that the member states: must ensure so far as possible that the persons concerned are put in a position to argue their point of view effectively before the competent national authorities; may not refuse to initiate the review procedure solely because the persons concerned could not provide precise and relevant information, owing to their having been unable to ascertain the precise reasons for which they were included in the list in question, on account of the confidential nature of those reasons; and are bound to act promptly in order to

¹⁶⁴⁰ Senior Administration Officials.

¹⁶⁴¹ *Chafiq Ayadi v. Council of the European Union and Faraj Hassan v. Council of the European Union and Commission of the European Communities*.

¹⁶⁴² *Ibid.*

ensure that such persons' cases are presented without delay and fairly and impartially to the Sanctions Committee, if that appears to be justified in the light of the relevant information supplied.

The Court of First Instance dismissed the cases because Mr Ayadi and Mr Hassan should seek for judicial remedy offered by domestic law bring an action for judicial review before the national courts against any wrongful refusal by the competent national authority (Ireland and United Kingdom) to submit their cases to the Sanctions Committee for re-examination.

THE LTTE CASE

In 2006, the Council places the Liberation Tigers of Tamil Eelam on the EU list of terrorist organizations, and maintained them on that list ever since, referring to, *inter alia*, decisions of Indian authorities. The Tamil Tigers claim that their confrontation with the government of Sri-Lanka is an "armed conflict" within the meaning of international law, subject only to international humanitarian law and not to anti-terrorist legislation.

The General Court rules that European CT law also applies in "armed conflicts" within the meaning of international law, and that an authority of a state outside the Community (India) may be a "competent authority" within the meaning of Common Position 2001/931.¹⁶⁴³ The Court adds that the Council must carefully verify at the outset that the legislation of the third state ensures protection of the rights of defense and of the right to effective judicial protection equivalent to that guaranteed at European level. The General Court finds that the Council did not carry out such a thorough examination in the present case. The Court finds that the contested measures were based not on acts examined and confirmed in decisions of competent authorities,¹⁶⁴⁴ but on factual imputations derived from the press and the Internet. Therefore the Court annulled the contested measures, on fundamental procedural grounds, not implying any substantive assessment of the question of the classification of the LTTE as a terrorist group,

¹⁶⁴³ *Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union, Kingdom of the Netherlands, United Kingdom of Great Britain and Northern Ireland, European Commission*, joined cases T-208/11 and T-508/11, EGC, Sixth Chamber, extended composition, 16 Oct. 2014, ECLI:EU:T:2014:885.

¹⁶⁴⁴ See: Article 1(4) of Common Position 2001/931 and case-law *Al-Aqsa v Council* (C-539/10), *Netherlands v. Al-Aqsa* (C-550/10).

while maintaining temporarily the effects of the last of those measures in order to ensure the effectiveness of any possible future freezing of funds.

THE NADA CASE

The Old Continent experimented with the system of blacklisting, not just the EU countries. In the Nada case (2007)¹⁶⁴⁵ the Swiss Supreme Court acknowledges the listing procedures were affected by lack of judicial remedies. Mr Youssef Moustafa Nada, an Italian and Egyptian national living in the Italian enclave of Campione in Switzerland, was banned from entering or transiting through Switzerland, as a result of the addition of his name to the list annexed to the Federal Taliban Ordinance.

On 2 October 2000, the Swiss Federal Council adopted an ordinance “instituting measures against the Taliban” (the “Taliban Ordinance”).¹⁶⁴⁶ According to this ordinance, all assets of individuals or entities listed in the ordinance were frozen, and these individuals and entities were banned from entry into or journey through Switzerland. On 9 November 2001, Mr Nada, and various organizations connected with him, were included in the list issued by the sanctions committee. On 10 September 2002, Switzerland became a UN member state.

On 22 September 2005, Mr Nada submitted a request to the Swiss Federal Council to remove his name and the names of the organizations connected with him from the ordinance. Nada contended that after criminal proceedings against him had been closed on 31 May 2005, there was no reason to uphold the sanctions against him. The Swiss State Secretariat for Economic Affairs dismissed his request. Mr Nada lodged an administrative appeal against this decision, which was dismissed by the Federal Department of Economic Affairs (FDEA) on 15 June 2006. The FDEA maintained that, for the purpose of striking a name from the Ordinance, it was necessary to be delisted by the Sanctions Committee. On 6 July 2006 Mr Nada appealed to the Federal Council against the FEDA decision.

¹⁶⁴⁵ *Youssef Nada v. State Secretariat for Economic Affairs and Federal Department of Economic Affairs* [Nada], Case 1A 45/2007, Federal Supreme Court of Switzerland, First Public Law Chamber, 14 Nov. 2007, ILDC 461 (CH 2007), BGE 133 II 450.

¹⁶⁴⁶ *Swiss Treaty Series* 946.203.

On 29 October 2007, Switzerland denied the applicant's request to have his name removed from the Sanctions Committee's list set up pursuant to Resolution 1730 (2006), and on 2 November 2007 also rejected a request for information concerning the country that had designated him for listing and the reasons for that designation, invoking the confidentiality of the process.

According to the Federal Supreme Court, the civil rights of Mr Nada were clearly affected under Art. 6(1) of the EHCR. The Court stresses that the Security Council itself was bound by the UN Charter and had to act in accordance with the purposes and principles of Art. 24(2), including respect for human rights and fundamental freedoms (Article 1(3)). The Swiss Court recalls that decisions of the Security Council are binding for all UN member states, which are not entitled to evade their obligations under the UN Charter by declaring that a SC resolution is not in conformity with the Charter. The Swiss Federal Supreme Court argues that the introduction of a delisting procedure and the improvements adopted in December 2006 by Resolutions 1730 and 1735 had led to considerable progress, even if the system is still affected with grave deficiencies. The Court suggests that the UN has the task to introduce an effective control mechanism on the blacklisting. The Court accepts that the obligation to implement the SC decisions was limited by norms of *jus cogens*. Lastly, the Swiss Federal Supreme Court concludes that delisting procedure was not in conformity with the standards of judicial control granted by Art. 29(a) of the Constitution of 1874 (Switzerland), Art. 6(1) of the ECHR, and Art. 14(1) of the ICCPR.

In February 2008 Mr Nada asked the Swiss government to apply the Sanctions Committee for delisting, but the authorities refused to provide an attestation confirming that the criminal proceedings against him had been dismissed. On 5 July 2008 the Italian government submitted to the Committee a request for delisting, but the Committee denied that request. Eventually, according to the procedure provided by Resolution 1730 (2006), Mr Nada submitted a request for the delisting, which was effective on 23 September 2009. On 19 February 2008, Mr Nada filed an application before the ECtHR, complaining about the violation of his fundamental rights and freedoms. The Court unanimously held that there had been violations of Art. 8 and Art. 13 of the EHRC.¹⁶⁴⁷

¹⁶⁴⁷ *Nada v. Switzerland*, App. No. 10593/08, ECtHR, Grand Chamber, 12 Sept. 2012.

THE ABDELRAZIK CASE

The sanction list system applies globally and affects indiscriminately citizens of any nationality wherever they are. Aousfian Abdelrazik, a Sudanese-born Canadian dual citizen, after arriving in 1990 in Canada as a political refugee, in 2006 was blacklisted as a terrorist,¹⁶⁴⁸ labeled a national-security risk, and kept in forced exile for years. After being imprisoned by the Sudanese, spent the year of forced exile living in the lobby of the Canadian embassy in Khartoum, without a passport or the permission to travel anywhere.

On 23 July 2006, the U.S. Department of the Treasury designated Mr Abdelrazik as a supporter the Taliban and Al-Qaida, but was subsequently cleared in multiple investigations by the Sudanese government, the Canadian Security Intelligence Service (CSIS), and the Royal Canadian Mounted Police (RCMP).¹⁶⁴⁹ Following the imprisonment of Mr Abdelrazik in Sudan, the Canadian government would not grant travel papers and otherwise blocked Abdelrazik's return to Canada.

On 4 June 2009, the Canadian Federal Court ruled that Mr Abdelrazik's citizenship rights under the Canadian Charter of Rights and Freedoms, which guarantees Canadian citizens the right to enter Canada, had been violated. The Court said Canadian CSIS agents were complicit in his imprisonment abroad, and ordered the Canadian government to facilitate his return, but the government still refused to pay for his return, leaving ordinary citizens to buy the airline ticket. Canadian authorities had barred his return to Canada because Abdelrazik was listed on a U.S. no fly list, but a listing on a U.S. list should have been insufficient to bar him from returning to Canada, and yet due to this listing, Abdelrazik was stuck in Sudan for a further five years.

The federal judge Zinn wrote that Mr Abdelrazik "is as much a victim of international terrorism as the innocent persons whose lives have been taken by recent barbaric acts of terrorists". In a toughly worded 107-page ruling, justice Zinn pilloried the government's claims of trying to help Mr Abdelrazik, concluded that Canadian anti-terrorism agents were implicated in his imprisonment in Sudan, denounced the UN terrorist blacklist as an affront to justice and

¹⁶⁴⁸ UNSC (2006), "Security Council Committee Adds One Individual in Al-Qaida Section of Consolidated List, Approves Changes of Information Regarding 25 Individuals", press release SC/8798, 2 Aug. 2006. Available at <http://www.un.org/press/en/2006/sc8798.doc.htm> (accessed 5 June 2017).

¹⁶⁴⁹ *Abdelrazik v. Canada*.

basic human rights and slammed foreign minister, Lawrence Cannon, for high-handedly ignoring due process of law.

The Canadian government attempted to wash its hands of the entire listing and delisting process, and argued that “it is not as a consequence of any of Canada’s actions that Mr. Abdelrazik has been prevented from entering Canada; rather it is as a consequence of his listing by the 1267 Committee as an associate of Al-Qaida”.¹⁶⁵⁰ In a submission to the delisting process, Canada chose not to back Mr Abdelrazik’s request, despite written assurances previously that it would do so. Instead, it said it was remaining neutral. Mr Abdelrazik was removed from the UN Security Council blacklist on 30 November 2011.

¹⁶⁵⁰ Genser, Jared and Kate Barth (2010), “The Need for Reform of the U.N.S.C.’s 1267 Sanctions Regime”, *Boston College International and Comparative Law Review*, Vol. 33, No. 1 (Winter), p. 20.

6 A GEOPOLITICAL ISSUE

THE SULTANS OF COUNTER-TERRORISM AND THE CRACKDOWN ON POLITICAL DISSENT

Turkey represents the challenge to the values of Western civilization, and pillories all the contradictions and the limits of the latter in terms of defending fundamental human rights while countering terrorism. Turkey, a crossroads between Asia and Europe, can be used as a benchmark to assess the narrowing of human rights and civil liberties in the fight against terrorism.

The government and the judiciary, which can be said to be anything but totally independent from political power,¹⁶⁵¹ keep Turkey under an iron fist by large-scale imposition of special and repressive laws. The European Commission finds that already prior to the 2016 coup attempt, several key pieces of Turkish legislation regarding the rule of law and fundamental rights were not in line with the European standard.¹⁶⁵² In the *Turkey 2016 Report*, the Commission expressed its concern about serious allegations of human rights violations and disproportionate use of force by the Turkish security forces, including violation of procedural rights and of the prohibition of torture and ill-treatment. The report emphasized that many elected representatives and municipal executives were suspended, dismissed or arrested on terrorism-related charges, some of them on the basis of decrees under the state of emergency following the coup attempt. The EC underlines that a large number of organizations were shut down, their assets seized or transferred to public institutions as part of the post-coup measures taken by the government. Many people were arrested and detained over alleged links to the Gülen movement and involvement in the attempted putsch, including judges, prosecutors, policemen, gendarmerie, military, civil servants, local authorities, academia, teachers, lawyers, the media and the business community and human rights defenders, whose assets were frozen or confiscated.¹⁶⁵³

¹⁶⁵¹ International Commission of Jurists (2016), *Turkey: the Judicial System in Peril*, Geneva, International Commission of Jurists. Available at <https://www.icj.org/wp-content/uploads/2016/07/Turkey-Judiciary-in-Peril-Publications-Reports-Fact-Findings-Mission-Reports-2016-ENG.pdf> (accessed 20 Oct. 2016).

¹⁶⁵² EC (2016), *Turkey 2016 Report* [SWD(2016) 366 final], Doc. ID 1156617, Bruxelles, EC.

¹⁶⁵³ Ibid.

The International Commission of Jurists argues that repressive measures, enforced through the courts, apparently for the purposes of political control and suppression of dissenting or unwelcome opinions, are closely linked to attempts by the executive to gain greater control over the justice system.¹⁶⁵⁴

In recent years (2015-2017) the Turkish Constitutional Court, which has jurisdiction over violations of the ECHR, has repeatedly annulled rulings for infringement of fundamental rights and freedoms, such as: the rights to liberty, freedom of expression and freedom of the media; the principle of no punishment without law; the right to a fair trial; the right to trial in a reasonable time; the right to access to court; the right to liberty and security of person; the right to freedom of assembly; the right to freedom of communication; the right to form trade unions; the right to life; the lengthy detention beyond reasonable period.¹⁶⁵⁵ The lower courts, that seem to be 'sensitive' to the will of the executive, refuse to implement the Court decision of 11 January 2018, which ruled to release from pre-trial detention some journalists held in prison since July 2016, saying that their detention is disproportionate and infringing upon their rights to liberty, freedom of expression and freedom of the media.¹⁶⁵⁶ The lower courts denied the release of the journalist, on the ground that the Constitutional Court had exceeded its authority.¹⁶⁵⁷

On the one hand, the Turkish government has to deal with the Kurdish independence fighters and on the other is handling strong domestic opposition to the authoritarian and religious turn by the AKP, the Justice and Development Party of President Erdoğan. The coup attempt of 15 July 2016 provided a justification for tough repression in the country, involving arrests and purges in all areas of the public administration under emergency measures.

In the case-law No. 132, *Gözel and Özer v. Turkey*,¹⁶⁵⁸ the European Court of Human Rights found that the "automatic" conviction of journalists, based on Anti-Terrorism Law, without taking into account the objectives of journalists or the public's right to information,

¹⁶⁵⁴ International Commission of Jurists, p. 3.

¹⁶⁵⁵ See: Constitutional Court of Turkey (2016 and 2017), *Annual Report 2015* and *Annual Report 2016*, Ankara, Constitutional Court. See also: "Leading Judgments. Individual Application". Available at <http://www.constitutionalcourt.gov.tr/inlinepages/leadingjudgements/IndividualApplication.html> (accessed 17 Jan. 2018).

¹⁶⁵⁶ OSCE RFoM (2018a), "Life sentences for Turkish journalists are an unprecedented, unacceptable attack on freedom of expression, say UN and OSCE representatives", 16 Feb. 2018. Available at <http://www.osce.org/representative-on-freedom-of-media/372571> (accessed 16 Feb. 2018).

¹⁶⁵⁷ Ibid.

¹⁶⁵⁸ *Gözel and Özer v. Turkey*, App. No. 43453/04 and 31098/05, ECtHR, Second Section, 6 July 2010.

violated Art. 10 of the ECHR and Art. 19 of the ICCPR. The court argued that the law allowed for arbitrary prosecution of journalists based on the mere coverage of terrorist activities.

In *Belek and Velioglu v. Turkey*¹⁶⁵⁹ the ECtHR unanimously held that there had been a violation of Art. 10 (freedom of expression) of the ECHR. The case concerned the conviction of Ahmet Sami Belek and Savaş Velioglu by a Turkish State Security Court. The two men were convicted because of an article published in the daily newspaper *Günlük Evrensel* containing a statement by members of KADEK (Kurdistan Freedom and Democracy Congress), an illegal armed organization, who were in prison at the time. The Court found in particular that the text, taken as a whole, did not contain any calls for violence, armed resistance or insurrection and did not amount to hate speech, which was the main factor to be taken into consideration. The detainees called for a democratic solution to the Kurdish question and stressed the importance of and need for an amnesty law. The article also criticized the prison conditions of Abdullah Öcalan, the chief of KADEK, and the law on remorse.

The public prosecutor at the Turkish State Security Court indicted statements published from an illegal armed organization contrary to Art. 6 § 2 and § 4 of CT Law No. 3713, and requested the application of Art. 2 § 1 of the Law No. 5680 on the press.

In its verdict, the Turkish State Security Court held that the article contained a statement from terrorist organizations KADEK and PJA (*Partiya Jina Azad*, Party of Free Women), both branches of the PKK. Established in 1978, PKK changed its name to KADEK in April 2002.¹⁶⁶⁰

The Turkish government equates PKK, Daesh and DHKP-C (the Revolutionary People's Liberation Party/Front), a Marxist–Leninist party, along with Fethullah Gülen's organization,¹⁶⁶¹ even though it acknowledges, "There is no clear-cut, comprehensive definition of terrorism".¹⁶⁶²

The lack of clear definition of each can be a reason to muddy the waters, and label political opponents as terrorists. On 19 December 2014, the Public Prosecutor of Ankara requested the arrest of *Imam* Fethullah Gülen who, according to the indictment, was the leader of

¹⁶⁵⁹ *Belek and Velioglu v. Turkey*, App. No. 44227/04, ECtHR, Second Section, 15 Sept. 2015.

¹⁶⁶⁰ MFA of Turkey (2015a), "PKK/KONGRA-GEL". Available at http://www.mfa.gov.tr/pkk_kongra-gel.en.mfa (accessed 17 Oct. 2015).

¹⁶⁶¹ Erdoğan (16 Aug. 2016).

¹⁶⁶² MFO of Turkey (2015b), "What is terrorism? The problem of definition". Available at http://www.mfa.gov.tr/what-is-terrorism---the-problem-of-definition_en.mfa (accessed 1 Nov. 2015).

a terrorist network that planned "dirty plots" against the Turkish government.¹⁶⁶³ Days ahead of the elections of 1 November 2015, Turkey put Gülen – an influential Muslim scholar and preacher¹⁶⁶⁴ in self-imposed exile who has been living in Pennsylvania since 1998 – on the most wanted terrorist list, along with ISIS and PKK. Other names on the list included Cemil Bayik, the founder of PKK, acting leader Murat Karayilan and senior figure Duran Kalkan.¹⁶⁶⁵ Gülen, who heads the Hizmet movement, an international Islamic network of schools, businesses, media outlets, and charity organizations, also known as the Fethullah Gülen movement,¹⁶⁶⁶ is the arch-enemy of Turkish president Erdoğan.

The *imam* has long been under attack, since well before entering the crosshairs of the Turkish authorities. On his website, Gülen released some examples of Turkish court decisions favorable to him.¹⁶⁶⁷ Subsequently, an alliance with Erdoğan and the AKP party guaranteed Gülen a long period of peace, until the fracture occurred in December 2013,¹⁶⁶⁸ and the subsequent persecution and accusations of terrorism for seeking to seize power in Turkey by forming a "parallel state" and infiltrating state institutions.¹⁶⁶⁹ The Turkish cabinet accuses Gülen of plotting to establish a parallel state to seize power unlawfully.¹⁶⁷⁰

Hizmet ("Service") rejects the claims of dominating Turkey's judiciary and bureaucracy and the accusations of plotting to overthrow the government.¹⁶⁷¹ The Turkish authorities characterize Hizmet as the "Fethullah Gülen Terrorist Organization" (FETÖ), even if Gülen has always rejected a violent approach to conflict resolution, calling for peaceful, non-violent

¹⁶⁶³ Mert, Ali Osman (2016) (ed.), *15 July Coup Attempt and the Parallel State Structure 2016*, Ankara, Publications of the Presidency of the Republic of Turkey (2nd edition), p. 10. Available at <http://www.tccb.gov.tr/assets/dosya/2016-09-22-15temmuz-en2.pdf> (accessed 1 Nov. 2016).

¹⁶⁶⁴ Fethullah Gülen's Official Web Site (2015a), "Introducing Fethullah Gülen". Available at <http://en.fgulen.com/about-fethullah-gulen/introducing-fethullah-gulen> (accessed 1 Nov. 2015).

¹⁶⁶⁵ MFO of the Republic of Turkey (2015a).

¹⁶⁶⁶ Park, Bill (2008), "The Fethullah Gülen Movement as a Transnational Phenomenon", *Middle East Review of International Affairs Journal*, Vol. 12, No. 4 (Dec.). See also: Fethullah Gülen's Official Web Site, "Introducing Fethullah Gülen".

¹⁶⁶⁷ Fethullah Gülen's Official Web Site (2015b), "Examples of the Court Decisions", 25 Jan. 2003. Available at <https://www.fgulen.com/en/press/court-decisions/25017-examples-of-the-court-decisions> (accessed 1 Nov. 2015).

¹⁶⁶⁸ Mert, p. 14.

¹⁶⁶⁹ International Commission of Jurists, p. 3 and 10.

¹⁶⁷⁰ Davutoğlu, Başbakan Ahmet (2014), "Başbakan Davutoğlu, Makedonya ziyareti öncesi basın toplantısı düzenledi", PM of the Republic of Turkey, 22 Dec. 2014. Available at http://www.basbakanlik.gov.tr/Forms/Article/pg_Article.aspx?Id=9d052314-c923-4308-96bd-8a69b01e3bb9 (accessed 1 Nov. 2015)

¹⁶⁷¹ Hizmet Movement News Portal (2013), "GYV rejects claims that Hizmet movement dominates Turkey's judiciary", 21 Mar. 2013. Available at <http://hizmetnews.com/848/gyv-rejects-claims-that-hizmet-movement-dominates-turkeys-judiciary/#.WAow2qOh0qI> (accessed 21 Oct. 2016).

activities.¹⁶⁷² The reference to terrorism gives the government the pretext to pass emergency measures and to carry out wider purges of all those not seen as loyal to government interests.¹⁶⁷³

On 4 March 2016 the Turkish government seized control of *Zaman*, the country's largest newspaper linked to the Hizmet movement.¹⁶⁷⁴ The Istanbul 6th Criminal Court of Peace ordered Feza Gazetecilik, the media group that publishes *Zaman*, to be placed under a trustee panel upon a directive by the prosecutor's office in Istanbul.¹⁶⁷⁵ The newspaper was closed by decree law the following July.¹⁶⁷⁶ On 8 March 2018, the İstanbul 25th Heavy Penal Court sentenced to prison, with no evidence, 25 media workers accused for their alleged affiliation with FETÖ media organization.¹⁶⁷⁷ The ECHR ruled that pre-trial detentions of Turkish journalists Şahin Alpay¹⁶⁷⁸ and Mehmet Altan¹⁶⁷⁹ violated their right to liberty and security and the right to freedom of expression protected under Art. 5(1) and 10 of the Convention. Alpay was a journalist for the daily *Zaman*, considered as the main publication of the "Gülenist" network; Altan, an economics teacher and journalist, presented a political discussion program on the channel *Can Erzurum TV*.

The UN special rapporteur on freedom of expression, David Kaye, said the Turkish government's seizure of *Zaman* does not meet "the international standard that a restriction must be provided by law and necessary to protect a legitimate government interest, such as national security or public order".¹⁶⁸⁰ The Council of Europe Commissioner for Human Rights, Nils Muižnieks, denounced the "unacceptable and undue restrictions of media freedom in Turkey" and the "judicial harassment against dissenting media and journalists" in the country.¹⁶⁸¹ The

¹⁶⁷² Wright, Steve (2012), "The Work of Fethullah Gülen and the Role of Non-Violence in a Time of Terror", in Paul Weller and Ihsan Yılmaz (eds.), *European Muslims, Civility and Public Life: Perspectives on and From the Gulen Movement*, London, Continuum International Publishing Group. See also: Mert, p. 13 and 16.

¹⁶⁷³ International Commission of Jurists, 2016, p. 3-4.

¹⁶⁷⁴ OHCHR (2016), "Turkey/freedom of expression: UN expert raises alarm at government's seizure of independent media group", 8 Mar. 2016. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17172&LangID=E> (accessed 21 Oct. 2016).

¹⁶⁷⁵ Ibid.

¹⁶⁷⁶ Decree Law No. 668, Resmi Gazete 29783 of 27 July 2016.

¹⁶⁷⁷ OSCE RFoM (2018b), "OSCE representative Désir urges Turkey to release and drop charges against 25 media workers sentenced to prison, including journalists Aksoy and Taş", 9 Mar. 2018. Available at <https://www.osce.org/representative-on-freedom-of-media/374923> (accessed 9 Mar. 2018).

¹⁶⁷⁸ *Şahin Alpay v. Turkey*, App. No. 16538/17, ECtHR, Second Section, 20 Mar. 2018.

¹⁶⁷⁹ *Mehmet Hasan Altan v. Turkey*, App. No. 13237/17, ECtHR, Second Section, 20 Mar. 2018.

¹⁶⁸⁰ OHCHR (8 Mar. 2016).

¹⁶⁸¹ Nils, Muižnieks (2016), "Commissioner Muižnieks deplores new case of judicial harassment against media in Turkey", CoE, 4 Mar. 2016. Available at <http://www.coe.int/en/web/commissioner/-/commissioner-muiznieks-deplores-new-case-of-judicial-harassment-against-media-in->

International Commission of Jurists argues that the judiciary's decision against Gülenists is politically driven by the executive.¹⁶⁸² According to the Consultative Council of European Judges (CCJE),¹⁶⁸³ an advisory body of the Council of Europe, the Venice Commission,¹⁶⁸⁴ and UN special rapporteur on the independence of judges and lawyers,¹⁶⁸⁵ the erosion of judicial independence by politicization in Turkey failed to comply with international law and standards.¹⁶⁸⁶

Ultimately, responsibility for Turkey's authoritarian drift lies with the European Union. When Ankara applied for accession to the European Union, the EU demanded a reform package that would limit the power of the military, which was the guardian of the constitutional order founded by Mustafa Kemal Atatürk, Father of the Turkish nation. When in 1923 Atatürk included in the Turkish constitution the military's role as the sole "defender and protector of the constitution and of republican and honest civilian rule", and ultimately legitimized the military's intervention in politics.¹⁶⁸⁷

The reform package limiting military powers was enacted in 2003 under the AKP 'moderate' Islamic government led by then PM Erdoğan. Accession negotiations to the Union started in 2005, after the implementation of the guidelines laid down by the European Council in Lisbon on intensified cooperation and development of relations with Turkey in line with the prospect laid down in the association agreement (the "Ankara Agreement") of 1963 and the protocol of 1970.¹⁶⁸⁸ Turkey applied to join what was then the European Economic Community (EEC) in 1987, and ten year later it was declared eligible to join the EU.¹⁶⁸⁹ Without the control

[turkey?inheritRedirect=true&redirect=%2Fen%2Fweb%2Fcommissioner%2Fcountry-report%2Fturkey](#) (accessed 21 Oct. 2016).

¹⁶⁸² International Commission of Jurists, p. 4-5.

¹⁶⁸³ CCJE (2016), "Challenges for judicial independence and impartiality in the member states of the Council of Europe", CoE, 24 Mar. 2016. Available at [http://www.coe.int/t/dghl/cooperation/ccje/textes/sginf\(2016\)3rev%20challenges%20for%20judicial%20independence%20and%20impartiality.asp?#P231_17807](http://www.coe.int/t/dghl/cooperation/ccje/textes/sginf(2016)3rev%20challenges%20for%20judicial%20independence%20and%20impartiality.asp?#P231_17807) (accessed 23 Oct. 2016).

¹⁶⁸⁴ Venice Commission (2015), "Declaration on Interference with Judicial Independence in Turkey", 20 June 2015. Available at <http://venice.coe.int/files/turkish%20declaration%20June%202015.pdf> (accessed 23 Oct. 2016).

¹⁶⁸⁵ UNHRC, *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, 4 May 2012, A/HRC/20/19/Add.3.

¹⁶⁸⁶ International Commission of Jurists, p. 5 and 10.

¹⁶⁸⁷ Perlmutter, Amos (1977), *The Military and Politics in Modern Times*, New Haven; London, Yale University Press, p. 111.

¹⁶⁸⁸ EUR-Lex/EU Publications Office (2005), "Turkey's pre-accession strategy", updated: 01.06.2005. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:e40113> (accessed 27 Apr. 2017).

¹⁶⁸⁹ EC, DG Neighbourhood and Enlargement Negotiations, "Turkey" (2016), updated: 06.12.2016. Available at https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/turkey_en (accessed 27 Apr. 2017).

of the military, which acted as a counterweight against radical religious trends, Erdoğan and his party now knew no limits to their ambitions.

An ICJ 2016 report revealed that since 2014 the Turkish government had implemented a combination of legislative measures and institutional reforms which, associated with an arbitrary application of criminal and disciplinary sanctions, gave the executive and the AKP party an unprecedented degree of control of the judiciary.¹⁶⁹⁰ Also the OSCE/ODHIR states that the independence of the judiciary is not guaranteed by the legal framework.¹⁶⁹¹ Arbitrary arrests, prosecutions and disciplinary measures are justified as necessary to address the "terrorist" threat of the Gülenists.¹⁶⁹² Judges who refuse to comply with the will of the executive are removed and arrested on charges of being members of a terrorist organization or of attempting to overthrow the government.¹⁶⁹³

The legal basis for counter terrorism activities in Turkey is Counter-Terrorism Law No. 3713 of 12 April 1991. This law defines terrorism, terrorist and terror organizations. More legal measures against organized crime are included in the Turkish Penal Code No. 5237 and in the Code of Criminal Procedure No. 5271.¹⁶⁹⁴ Besides these laws, major laws related to CT are Law No. 5233 on Compensation for Terrorism and Counter-Terrorism Losses; Law No. 4959 on Reintegration into Society; Law No. 4208 on Prevention of Money Laundering and Law No. 5607 on Smuggling. In addition to these laws, a draft law on prevention of financing of terrorism has been completed and the legislative process has started in Parliament.¹⁶⁹⁵

A European Commission report finds that the Turkish CT law is not in line with the *acquis* with regard to its scope and definitions and its application raises serious concerns about fundamental rights.¹⁶⁹⁶ According to the EC both criminal and anti-terror legislation should be aligned with ECtHR case law.

Commenting on the pre-trial detention of 11 human rights activists, including the director and chair of Amnesty International Turkey, Council of Europe secretary general Thorbjørn

¹⁶⁹⁰ International Commission of Jurists, p. 10.

¹⁶⁹¹ OSCE/ODIHR (2016a), *Republic of Turkey, Early Parliamentary Elections, 1 November 2015: OSCE/ODIHR Limited Election Observation Mission Final Report*, Warsaw, OSCE/ODIHR, p. 5. Available at <http://www.osce.org/odihr/elections/turkey/219201?download=true>

¹⁶⁹² Ibid.

¹⁶⁹³ International Commission of Jurists, p. 16.

¹⁶⁹⁴ TNP (2016a), "National Legislation/Legal Framework". Available at https://www.egm.gov.tr/EN/Pages/national_legislation.aspx (accessed 24 Oct. 2016).

¹⁶⁹⁵ Ibid.

¹⁶⁹⁶ *Turkey 2016 Report* [SWD(2016) 366 final].

Jagland said deprivation of liberty is only permissible in strictly defined cases and should be a measure of last resort.¹⁶⁹⁷ The defendants were arrested in October 2017 on charges of abetting armed terrorist organization and being members of terrorist organization. Secretary general Jagland described the accusations general, abstract, and not sufficient, and called the Turkish judiciary to apply the ECHR and the principles set in the case-law of the Strasbourg Court.

On 20 May 2016 the Grand National Assembly of Turkey (GNAT) passed a temporary constitutional change to lift the parliamentary immunity of 138 MPs, the overwhelming majority of whom were from the two main opposition parties.¹⁶⁹⁸ With this law temporarily suspending the first sentence of Art. 83 of the Constitution,¹⁶⁹⁹ some pro-PKK terrorism-linked HDP deputies are about to face prosecution.

HDP (Peoples' Democratic Party) and CHP (Republican People's Party) lawmakers were the only political forces opposing the constitutional reform package submitted to Parliament by Turkey's ruling AK Party to expand the president's powers.

On the night of 4 November 2016, the Turkish police arrested 11 deputies belonging to the Halkların Demokratik Partisi (HDP), including co-chairs Selahattin Demirtas and Figen Yuksekdag and the party's parliamentary group leader Idris Baluken.¹⁷⁰⁰ Arrest warrants were issued for all 59 HDP lawmakers for failing to appear to testify as part of a counter-terrorism investigation. They were accused of spreading terrorist propaganda, among other charges, in relation to investigations on the PKK. The HDP deputies were arrested after their parliamentary immunity was lifted in May.

Summary proceedings have been filed against Kemal Kiliçdaroğlu, the leader of the Cumhuriyet Halk Partisi (CHP), on charges of insulting the Turkish president.¹⁷⁰¹ Investigations for such offence increased from 397 in 2014 to 962 in the first half of 2015. Of these, 486 were

¹⁶⁹⁷ CoE Secretary General (2017), "Telephone conversation of Secretary General Jagland with Turkish Minister of Justice Abdulhamit Gül", CoE, 18 Oct. 2017. Available at <https://www.coe.int/en/web/portal/-/telephone-conversation-of-secretary-general-jagland-with-turkish-minister-of-justice-abdulhamit-gul> (accessed 17 Nov. 2017).

¹⁶⁹⁸ EP, Resolution 2016/2761(RSP) [Decision of the Grand National Assembly of Turkey to lift the parliamentary immunity of 138 members (debate)], Verbatim Report of Proceedings of 8 June 2016, pp. 845-863.

¹⁶⁹⁹ Law Proposal on Amending the Constitution of the Republic of Turkey No. 2/1028 introduced in the GNAT by AKP Party on 12 Apr. 2016. Available at <http://www.tbmm.gov.tr/d26/2/2-1028.pdf> (accessed 4 Nov. 2016).

¹⁷⁰⁰ Anadolu Agency (2016), "Turkey MPs held in terror probe for failing to answer summons", 4 Nov. 2016. Available at <http://aa.com.tr/en/turkey/turkey-mps-held-in-terror-probe-for-failing-to-answer-summons/678391> (accessed 4 Nov. 2016).

¹⁷⁰¹ Kalin, Ibrahim (2016c), "Statement by Presidential Spokesperson Ambassador İbrahim Kalın", Presidency of the Republic of Turkey, 26 Feb. 2016. Available at <http://www.tccb.gov.tr/en/spokesperson/1696/39941/statement-by-presidential-spokesperson-ambassador-ibrahim-kalin.html> (accessed 5 Mar. 2016).

opened in the six months of 2015 alone.¹⁷⁰² The law on defamation is employed also as means of censorship against journalists who investigate on top officials.¹⁷⁰³ The PACE believes that under the abusive application of Art. 299 (Insulting the President of the Republic) there were about 2,000 cases in two years against journalists, academics and ordinary citizens.¹⁷⁰⁴

In *General Comment No. 34 to Article 19 of the ICCPR*, the Human Rights Council of the United Nations argues that "the mere fact that forms of expression are considered being insulting to a public figure is not sufficient to justify the imposition of penalties".¹⁷⁰⁵ It states that imprisonment is never an appropriate penalty for defamation (§ 47).

The Secretary General of the Inter-Parliamentary Union (IPU) expressed concern that "peaceful and legal political activities by Turkish MPs are not presented as evidence of criminal and terrorist acts".¹⁷⁰⁶ The PACE is seriously concerned about the stripping of the immunity of many parliamentarians – mostly from the opposition – numerous measures and abusive application of legal provisions restricting freedom of expression and of the media, and the lack of independence of the judiciary.¹⁷⁰⁷ The Parliamentary Assembly of the Council of Europe remains concerned about the extensive interpretation of the Anti-Terror Law,¹⁷⁰⁸ as many of the HDP deputies have been charged for their statements under this provision.¹⁷⁰⁹ PACE concludes that Turkey is jeopardizing the freedom of the media and of expression, and that the erosion of the rule of law and human rights violations related to anti-terrorism security operations constitute a threat to the functioning of democratic institutions.¹⁷¹⁰

Erdoğan claimed that the anti-terrorism measures taken by Turkey mirrored those of other European countries. So the decision of the European Parliament was debatable, when it waived the immunity of deputy Marine Le Pen for having posted on her Twitter account images

¹⁷⁰² *Turkey 2016 Report* [SWD(2016) 366 final], p. 64. See also: Venice Commission (2016), CDL-AD(2016)002-e, Opinion on articles 216, 299, 301 and 314 of the Turkish Penal Code, Venice, 11–12 Mar. 2016, p. 52.

¹⁷⁰³ OSCE RFoM (2019a), "OSCE Representative expresses alarm following court sentence against Pelin Ünker, urges Turkey not to prosecute journalist for her investigative work", 10 Jan. 2019. Available at <https://www.osce.org/representative-on-freedom-of-media/408599> (accessed 10 Jan. 2019).

¹⁷⁰⁴ EP, Resolution 2016/2761(RSP), § 22.

¹⁷⁰⁵ CCPR/C/GC/34, § 38.

¹⁷⁰⁶ Chungong, Martin (2016), "IPU stresses critical role of parliamentary immunity after Turkish vote", IPU, 24 May 2016. Available at <http://www.ipu.org/press-e/pressrelease201605241.htm> (accessed 3 Sept. 2016).

¹⁷⁰⁷ PACE (2016), *The functioning of democratic institutions in Turkey*, Doc. 14078 of 6 June 2016, co-rapporteurs Ingebjørg Godsken and Nataša Vučković. Report adopted by Resolution 2121 (2016) on 22 June 2016.

¹⁷⁰⁸ PACE, Resolution 2121 (2016), § 20

¹⁷⁰⁹ *Id.*, § 7.

¹⁷¹⁰ *Id.*, § 36.

of the murder of three hostages by the Islamic State accompanied by the comment: “This is Daesh!”¹⁷¹¹ Le Pen defended her freedom of expression.¹⁷¹²

The Office for Democratic Institutions and Human Rights stresses that freedom of expression, speech and opinion is unduly restricted by broad defamation provisions, including on insult of the president.¹⁷¹³ According to the ODIHR, “unduly broad provisions in the Anti-Terrorism Law and the Criminal Code, including on insult of the president, allow prosecution and imprisonment of journalists”.¹⁷¹⁴ Under the guise of fighting terrorism, general laws are used to silence the regime's opponents.

In the *Turkey 2016 Report*, the European Commission argues that selective and arbitrary application of the law against journalists, writers or social media users, especially the provisions on CT and national security, is having a negative impact on freedom of expression. The report highlights that many journalists have been arrested and numerous media outlets have been closed in the aftermath of the July 2016 attempted coup. According to the EU, freedom of assembly in Turkey continues to be overly restricted, in law and practice.

The OSCE Representative on Freedom of the Media (RFoM), Dunja Mijatović, argues that most of the journalists imprisoned as of 21 July 2015 were convicted under Art. 5 and Art. 7 of the Anti-Terrorism Law and Art. 314 of the Criminal Code. Article 5 of the Anti-Terrorism Law allows for the application of more severe sentences for prosecutions under CT provisions in the Criminal Code.¹⁷¹⁵ Cases include terrorism charges against media that are critical of the government.¹⁷¹⁶

In its report on the November 2015 Turkish general elections, the OSCE/ODIHR emphasized that media freedom remained an area of serious concern, and complained about criminal investigations of journalists and media outlets for alleged support of terrorism and

¹⁷¹¹ EP (2017), “Request for the waiver of the immunity of Marine Le Pen”, A8-0047/2017; PE 595.654v02-00; RR\1118682EN.docx. Report on the request for waiver of the immunity of Marine Le Pen (Procedure: 2016/2295(IMM)), adopted by the EP JURI, on 28 Feb. 2017, rapporteur Laura Ferrara.

¹⁷¹² Ibid.

¹⁷¹³ OSCE/ODIHR (2016b), *Final Report on 2015 Early Parliamentary Elections in Turkey*, Warsaw, OSCE/ODHIR, p. 1 and 2.

¹⁷¹⁴ Id., p. 14.

¹⁷¹⁵ OSCE RFoM (2015), “Table of imprisoned journalists and examples of legislative restrictions on freedom of expression and media freedom in Turkey”, updated: July 2015. Available at <http://www.osce.org/fom/173036?download=true> (accessed 27 Oct. 2016).

¹⁷¹⁶ OSCE/ODIHR, *Final Report on 2015 Early Parliamentary Elections in Turkey*, p. 14.

defamation of the president.¹⁷¹⁷ The Office for Democratic Institutions and Human Rights denounced the seizure of main media outlets, the blocking of websites and the voters' deprivation of a plurality of views and information.¹⁷¹⁸ The Election Observation Mission (EOM) report complained that the general election campaign was affected by violence and restrictions on media freedom.¹⁷¹⁹ Nevertheless even though Washington has raised concerns about the erosion of fundamental freedoms in Turkey, Ankara remains a friend of the U.S. and a NATO ally, and the two governments continue their close coordination by sharing political and security agendas.¹⁷²⁰

Terrorism has become an excuse to crack down on opponents. CoE Commissioner for Human Rights, Nils Muižnieks, expressed his concern about "the alarming scale of recourse to an overly wide notion of terrorism to punish non-violent statements and criminalization of any message that merely coincides with the perceived interests of a terrorist organization".¹⁷²¹ Mr Muižnieks argues that "respect for human rights has deteriorated at an alarming speed" in Turkey's fight against terrorism.¹⁷²² There have been reports of serious human rights violations related to CT operations by Turkish security forces.¹⁷²³

The Turkish government rejected the allegations in the Human Rights Watch report,¹⁷²⁴ which argued that anti-terrorist measures taken against Gülenists after the failed coup involved serious violations of human rights and international conventions, especially the ECHR and the ICCPR.¹⁷²⁵

¹⁷¹⁷ Id., p. 1 and 2.

¹⁷¹⁸ Ibid.

¹⁷¹⁹ Ibid.

¹⁷²⁰ Earnest, Josh (2015e) "Press Gaggle by Press Secretary Josh Earnest en route Newark, New Jersey", Office of the Press Secretary of the The White House, 2 Nov. 2015. Available at <https://www.whitehouse.gov/the-press-office/2015/11/02/press-gaggle-press-secretary-josh-earnest-en-route-newark-new-jersey> (accessed 27 Oct. 2016).

¹⁷²¹ Muižnieks, Nils (2016), "Turkey: security trumping human rights, free expression under threat", CoE, 14 Apr. 2016. Available at <http://www.coe.int/it/web/commissioner/-/turkey-security-trumping-human-rights-free-expression-under-threat> (accessed 3 Sept. 2016).

¹⁷²² Ibid.

¹⁷²³ Muižnieks, Nils (2015), "Turkey should ensure the protection of human rights in the fight against terrorism", CoE, 18 Nov. 2015. Available at <https://www.coe.int/en/web/commissioner/-/turkey-should-ensure-the-protection-of-human-rights-in-the-fight-against-terrorism> (accessed 23 Oct. 2016).

¹⁷²⁴ Turkish Ministry of Interior (2016), "Press release on the report of the Human Rights Watch, titled 'A Blank Check', 1 Nov. 2016. Available at <https://www.icisleri.gov.tr/icisleri-bakani-suleyman-soylu-goc-politikalari-kurulu-ikinci-toplantisina-katildi> (accessed 26 Apr. 2017).

¹⁷²⁵ HRW (2016), *A Blank Check: Turkey's Post-Coup Suspension of Safeguards Against Torture*, New York, HRW. Available at: <http://www.refworld.org/docid/5820ac064.html> (accessed 26 Apr. 2017).

A few days after the French National Assembly extended the state of emergency for six months in the aftermath of the Nice terrorist attack, the Turkish government also suspended the ECHR,¹⁷²⁶ and declared a state of emergency for three months to eliminate the FETÖ "terrorist organization".¹⁷²⁷ President Erdoğan recalled that Art. 120 of the Turkish Constitution authorized a declaration of state of emergency "in case of acts of violence aimed at abolishing democracy, fundamental rights and freedoms",¹⁷²⁸ and pointed out that France and Belgium suspended human rights after the terrorist attacks in Paris and Brussels.¹⁷²⁹ The Turkish Presidency claimed that a state of emergency "is not an usual method and one which Western democracies resort to in critical times", like recently in France, the U.S. and Germany in the wake of terrorist attacks or public disorder.¹⁷³⁰

Quoting the case of a U.S. citizen sentenced to 12 years in prison for attempting to join Daesh, deputy secretary general and spokesperson of the Turkish presidency complained that it was not possible "to accept being criticized for being oppressive and violating the rule of law when measures in the fight against terror are taken, while European countries are praised for taking the same measures".¹⁷³¹

Western CT laws are used by authoritarian governments to justify censorship of websites that criticize government officials or express views different from theirs, or where government critics are readily labeled as "terrorists".¹⁷³² As a matter of fact, the Turkish CT measures have resulted in a sort of self-censorship.¹⁷³³ When Tahir Elçi, a human rights lawyer, was killed in November 2015, was under criminal investigation for allegations of promoting a terrorist organization after publicly stating that PKK was not one.¹⁷³⁴ A number of lawyers have been

¹⁷²⁶ ECtHR Press Unit (2017a).

¹⁷²⁷ Erdoğan, Recep Tayyip (2016), "State of emergency is aimed at safeguarding democracy, freedoms and the law, Presidency of the Republic of Turkey, 20 July 2016. Available at <https://www.tccb.gov.tr/en/news/542/49705/state-of-emergency-is-aimed-at-safeguarding-democracy-freedoms-and-the-law.html> (accessed 30 July 2016).

¹⁷²⁸ Ibid.

¹⁷²⁹ Erdoğan, Recep Tayyip (2016), "We will protect our freedoms and state of law until the end", Presidency of the Republic of Turkey, 16 Aug. 2016. Available at <https://www.tccb.gov.tr/en/news/542/50986/we-will-protect-our-freedoms-and-state-of-law-until-the-end.html> (accessed 17 Aug.2016).

¹⁷³⁰ Mert, p. 21.

¹⁷³¹ Ibid.

¹⁷³² See: Law No. 5651 [Law on the Regulation of the Publications on Internet and the Fight against Crimes Committed Through These Publications], T.C. Resmi Gazete 26530 of 23 May 2007.

¹⁷³³ OSCE/ODIHR, *Final Report on 2015 Early Parliamentary Elections in Turkey*, p. 14

¹⁷³⁴ International Commission of Jurists, p. 4 and 20.

arrested and are facing criminal charges on suspicion of working for or belonging to a terrorist organization.¹⁷³⁵

The Peace at Home Council, a council established within a faction of the Turkish Armed Forces, which attempted to seize power on 15 July 2016, stated that its aim was "to reinstate constitutional order, human rights and freedoms, the rule of law and general security that was damaged" by the current executive.¹⁷³⁶ The plotters stated that democratic and secular rule of law had been eroded by current government and that they had acted "to preserve democratic order", so that the rule of law would remain a priority.¹⁷³⁷

In the first stages of the coup attempt, the Turkish prime minister, Binali Yıldırım, speaking on the phone to television channels, described events as an "insurrection",¹⁷³⁸ but later that night compared the attackers to members of a terrorist organization.¹⁷³⁹ and in the aftermath of the suppressed putsch, and talked again about "insurrection".¹⁷⁴⁰ None of the world leaders, who strongly condemned the attempted coup, deemed it a terrorist act.¹⁷⁴¹

A few hours after, President Erdoğan defined it a "terrorist act",¹⁷⁴² and accused FETÖ/PDY (Fethullahist Terror Organisation/Parallel State Structure) of being responsible.¹⁷⁴³ The President repeatedly accused Fetullah Gülen of being the mastermind of the coup attempt, even though the authoritative mainstream Muslim scholar immediately condemned the military intervention.¹⁷⁴⁴ Erdoğan called on the U.S. administration to repatriate the self-exiled imam to

¹⁷³⁵ Id., p. 21.

¹⁷³⁶ Karaş, Tijen (2016), "Under the gun I've read the declaration, the most difficult of my broadcast life", Turkish Radio and Television Corporation Channel 1, 15 July 2016. Available at <http://onedio.com/haber/tijen-karas-bildiriyi-silah-zoru-altinda-okudum-hayatimin-en-zor-yayiniydi--721477> (accessed 30 July 2016).

¹⁷³⁷ Ibid.

¹⁷³⁸ Turkish Presidency and Anadolu Agency (2016), *July 15 Coup Attempt in Turkey and Peoples' Victory*, Ankara, Publications of the Presidency of the Republic of Turkey (1st edition), p. 8. Available at <http://www.tccb.gov.tr/assets/dosya/2016-09-22-15temmuz-en.pdf> (accessed 1 Nov.2016).

¹⁷³⁹ Id., p. 14.

¹⁷⁴⁰ Id., p. 24.

¹⁷⁴¹ Id., pp. 28-31.

¹⁷⁴² Erdoğan, Recep Tayyip (2016), "President Erdoğan Addresses Hundreds of Thousands: 'The President and the government are on duty; let us not leave the streets'", Presidency of the Republic of Turkey, 16 July 2016. Available at <https://www.tccb.gov.tr/en/news/542/46658/cumhurbaskani-erdogan-yuz-binlere-konustu-cumhurbaskani-ve-hukmet-gorevededir-sokaklari-terk-etmeyelim.html> (accessed 30 July 2016).

¹⁷⁴³ Presidency of the Republic of Turkey (2016), "Guard of Democracy at Beştepe People's Mosque", 16 July 2016. Available at <https://www.tccb.gov.tr/en/news/542/46662/millet-camiinde-vatan-ve-demokrasi-nobetinde.html> (accessed 30 July 2016).

¹⁷⁴⁴ Gülen, Fethullah (2016), "Statement by Alliance for Shared Values on Developments in Turkey", 16 July 2016. Available at <https://www.fgulen.com/en/press/messages/50648-statement-by-alliance-for-shared-values-on-developments-in-turkey> (accessed 16 July 2016).

Turkey.¹⁷⁴⁵ Turkish foreign policy includes cooperation between states on the basis of the "extradite or prosecute" principle regarding terrorists.¹⁷⁴⁶

Turkey sent the U.S. a formal request for Gülen's extradition.¹⁷⁴⁷ Since this person was not on the U.S. international terror watch list, though the Turkish president compared him to bin Laden.¹⁷⁴⁸ The U.S. Department of State said the legal extradition process would be evidence-based, and "not driven by political motivation".¹⁷⁴⁹ Turkish justice minister, Abdülhamit Gül, said the U.S. should extradite Gülen in line with 1979 treaty, which states that extradition can proceed for any possible reason.¹⁷⁵⁰ "This means that there is no need of proof of a person's guilt", added Gül. It is strange that Turkey did not characterize the extradition request as relating to the 2016 coup attempt.¹⁷⁵¹

Germany's federal minister of justice, Heiko Maas, stated that Berlin did not extradite suspects if they would face "politically motivated" charges in Turkey without concrete evidence of criminality.¹⁷⁵² Erdoğan criticized Germany's stance on the Gülenists, and stated that Berlin took members of terrorist organizations PKK, DHKP-C and FETÖ under its wing.¹⁷⁵³ When in March 2017 the Turkish authorities detained a *Die Welt* reporter of Turkish origin on charges of affiliation with PKK, Erdoğan said that Gülen was "a German agent" hidden at the Consulate in

¹⁷⁴⁵ Erdoğan, Recep Tayyip (2016), "President Erdoğan Addresses the US: 'Mr. President, repatriate the person in Pennsylvania to Turkey!'", Presidency of the Republic of Turkey, 16 July 2016. Available at <https://www.tccb.gov.tr/en/news/542/46666/president-erdogan-addresses-the-us-mr-president-repatriate-the-person-in-pennsylvania-to-turkey.html> (accessed 30 July 2016).

¹⁷⁴⁶ MFA of Turkey (2011), "Turkey's Contributions to International Community's Efforts to Fight Terrorism". Available at <http://www.mfa.gov.tr/turkey-s-contributions-to-international-community-s-efforts-to-fight-terrorism.en.mfa> (accessed 29 Oct. 2016).

¹⁷⁴⁷ Erdoğan, Recep Tayyip (2016), "If we have an agreement on the extradition of criminals, you should extradite that person", Presidency of the Republic of Turkey, 19 July 2016. Available at <https://www.tccb.gov.tr/en/news/542/49691/abd-suclularin-iadesi-anlasmasi-geregi-guleni-vermek-durumunda.html> (accessed 30 July 2016).

¹⁷⁴⁸ Erdoğan (16 July 2016), *President Erdoğan Addresses the US: 'Mr. President, repatriate the person in Pennsylvania to Turkey!'*.

¹⁷⁴⁹ Toner, Mark C. (2016a), "Daily Press Briefing", Department of State, 19 July 2016. Available at <http://www.state.gov/r/pa/prs/dpb/2016/07/260261.htm#TURKEY> (accessed 30 July 2016)

¹⁷⁵⁰ *Daily Sabah* (2017), "Justice Minister: U.S. should extradite Gülen in line with 1979 treaty", 19 Oct. 2017. Available at <https://www.dailysabah.com/diplomacy/2017/10/20/justice-minister-us-should-extradite-gulen-in-line-with-1979-treaty> (accessed 17 Nov. 2017).

¹⁷⁵¹ Toner, Mark C. (2016b), "Daily Press Briefing", Department of State, 23 Aug. 2016. Available at <http://www.state.gov/r/pa/prs/dpb/2016/08/261220.htm#TURKEY3> (accessed 28 Aug. 2016).

¹⁷⁵² Anadolu Agency (2016), "Erdoğan slams Germany for not extraditing FETO members", 3 Nov. 2016. Available at <http://aa.com.tr/en/europe/erdogan-slams-germany-for-not-extraditing-feto-members/677993> (accessed 4 Nov. 2016).

¹⁷⁵³ Erdoğan, Recep Tayyip (2016), "The Date of July 15, 2016 is a Turning Point for Turkey", Presidency of the Republic of Turkey, 3 Nov. 2016. Available at <https://www.tccb.gov.tr/en/news/542/58866/turk-milleti-15-temmuzda-sadece-bayragina-degil-hedeflerine-de-sahip-cikti.html> (accessed 4 Nov. 2016).

Tarabya for one month.¹⁷⁵⁴ German Chancellor Angela Merkel called for the release of the reporter, but the Turkish authorities replied that they considered him a terrorist.¹⁷⁵⁵

The repression that followed the failed coup of July 2016 has the hallmark of the prosecution against dissidents through political use of the charge of terrorism. The UN High Commissioner for Human Rights accused the Turkish government of "thirst for revenge".¹⁷⁵⁶

The Organization of Islamic Cooperation is the second largest intergovernmental organization after the UN, with 57 member states, which calls itself "the collective voice of the Muslim world".¹⁷⁵⁷ Under pressure from Ankara, in October 2016 it adopted Resolution No. 47/43 PO declaring FETÖ/PDY a terrorist organization.¹⁷⁵⁸ The resolution refers to the UN CT Framework, including the UN Global CT Strategy, and calls on member states to take "necessary measures to prevent the abuse of NGO's work by terrorists and terrorist entities".¹⁷⁵⁹ As the document is included in "Resolutions on Political Affairs", it underlines the strictly political and discretionary nature of the measure.

On 21 July 2016 the Council of Ministers declared a state of emergency¹⁷⁶⁰ pursuant to Art. 121 of the Turkish Constitution and Art. 4 of Law No. 2935 of 25 October 1983.¹⁷⁶¹ Mass arrests and preventive custody on mere suspicion of links to Hizmet characterized post-coup Turkey.¹⁷⁶² A massive number of people alleged to be involved in the putsch and to have ties

¹⁷⁵⁴ Erdoğan, Recep Tayyip (2017), "Our Only Power is the Nation", Presidency of the Republic of Turkey, 3 Mar. 2017. Available at <https://www.tccb.gov.tr/en/news/542/72207/16-nisanda-milletimizin-tercihiyle-farkli-bir-donemi-baslatacagiz.html> (accessed 5 Mar. 2016).

¹⁷⁵⁵ Erdoğan, Recep Tayyip (2017), "I Believe All Citizens will Unite at 'Yes' for the Future of Turkey", Presidency of the Republic of Turkey, 5 Mar. 2017. Available at <https://www.tccb.gov.tr/en/news/542/72226/turkiyenin-istikbali-icin-tum-vatandaslarin-evette-birlesecegine-inaniyorum.html> (accessed 7 Mar. 2017).

¹⁷⁵⁶ Bilgiç, Tanju (2016), "QA-30, 13 August 2016, Statement of the Spokesman of the Ministry of Foreign Affairs, Tanju Bilgiç, in Response to a Question Regarding the Interview of Zeid Ra'ad Al Hussein, the UN High Commissioner for Human Rights, about Turkey to the Reuters", MFA of Turkey, 13 Aug. 2016. Available at http://www.mfa.gov.tr/qa_30_-13-august-2016_-statement-of-the-spokesman-of-the-ministry-of-foreign-affairs_-tanju-bilgic_-in-response-to-a-question-regarding-the-interview-of-zeid-ra_ad-al-hussein_-the-un-high-commissioner-for-human-rights_-about-turkey-to-the-reuters.en.mfa (accessed 18 Aug. 2016).

¹⁷⁵⁷ OIC (2017b), "History". Available at https://www.oic-oci.org/page/?p_id=52&p_ref=26&lan=en (accessed 22 Dec. 2017).

¹⁷⁵⁸ OIC (2016c), Resolution No 47/43-POL on the Fethullah Terrorist Organization (FETO), adopted at the 43rd Session of The Council of Foreign Ministers (Session of Education and Enlightenment-Path to Peace and Creativity), held in Tashkent (18-19 Oct. 2016), OIC/CFM-43/2016/POL/RES/FINAL, OIC Resolutions on Political Affairs, p. 46.

¹⁷⁵⁹ Ibid.

¹⁷⁶⁰ Decree Law No. 2016/9064 of 21 July 2016 [Decree on measures taken under the state of emergency], T.C. Resmi Gazete 29779 of 23 July 2016.

¹⁷⁶¹ Decree Law No. 667 [Decree on measures to be taken under state of emergency], T.C. Resmi Gazete 29779 of 23 July 2016.

¹⁷⁶² List attached to Decree Law No. 667, T.C. Resmi Gazete 29779 of 23 July 2016.

with Hizmet – not just military and government officials, but even university professors and journalists¹⁷⁶³ – were detained by the Turkish authorities.¹⁷⁶⁴ Soon, in the aftermath, 2,745 judges were arrested, including some 200 members of the Supreme Court of Appeals, Council of State and Supreme Board of Judges and Prosecutors.¹⁷⁶⁵

The Turkish authorities detained a total of 35,022 people following the failed coup d'état. Over half of them, 17,740 people, were formally arrested; 11,597 were released and 5,685 remained in custody, but apparently not formally charged.¹⁷⁶⁶ As part of the emergency measures, all these people had their passports confiscated.¹⁷⁶⁷ None of the academics were allowed to leave the country, the deans were purged¹⁷⁶⁸ and media organizations were shut down.¹⁷⁶⁹ The closure of Hizmet circles suspended freedom of association and some political rights, while the closure of schools and universities meant the suspension of the right to freedom of education. These measures recall the purges of Stalin, during his reign of terror in Russia,¹⁷⁷⁰ and those of the Khmer Rouge in Democratic Kampuchea.¹⁷⁷¹

A decree law on the state of emergency published on 1 September 2016 removed 7,669 policemen who allegedly belonged to terrorist organizations or state structures judged to operate against national security or had taken part in their formation or had regular contact with them.¹⁷⁷² The list includes 24 central governors, 323 gendarmes, and two Coast Guard officers.

Another decree issued on the same day under the state of emergency law of 1983¹⁷⁷³ fired nearly 6,000 public employees for alleged ties with the network of the Fethullah Gülen coup, including: 1,519 workers of the Presidency of Religious Affairs (*Diyanet*), the highest Islamic authority in the country; 2,018 employees of the Ministry of Health; 2,346 academics of the

¹⁷⁶³ Kirby, John (2016a), "Daily Press Briefing", Department of State, 29 July 2016. Available at <http://www.state.gov/r/pa/prs/dpb/2016/07/260680.htm#TURKEY2> (accessed 30 July 2016).

¹⁷⁶⁴ Kirby, John (2016b), "Daily Press Briefing", Department of State, 21 July 2016. Available at <http://www.state.gov/r/pa/prs/dpb/2016/07/260371.htm#TURKEY> (accessed 30 July 2016).

¹⁷⁶⁵ Turkish Presidency and Anadolu Agency, pp. 24, 25.

¹⁷⁶⁶ Trudeau, Elizabeth (2016), "Daily Press Briefing", Department of State, 11 Aug. 2016. Available at <http://www.state.gov/r/pa/prs/dpb/2016/08/260998.htm#TURKEY> (accessed 12 Aug. 2016).

¹⁷⁶⁷ Ibid.

¹⁷⁶⁸ Kirby (2016b)

¹⁷⁶⁹ Kirby (2016a).

¹⁷⁷⁰ Saul (2006a), p. 2.

¹⁷⁷¹ Democratic Kampuchea was the name of the Khmer Rouge-controlled state that, between 1975 and 1979, existed in present-day Cambodia.

¹⁷⁷² Decree Law No. 672 of 15 Aug. 2016 [Measures taken on public employees under the scope of emergency decree law], T.C. Resmi Gazete 29818 of 1 Sept. 2016.

¹⁷⁷³ Law No. 2935 of 25 Oct. 1983 [State of Emergency Law], T.C. Resmi Gazete 18204 of 27 Oct. 1983.

Council for Higher Education (*Yükseköğretim Kurulu* or YÖK), which oversees universities.¹⁷⁷⁴ There were also 28,163 employees of the Ministry of Education, mostly teachers of elementary and middle schools among the public workers laid off in the Turkish maxi-purges for suspected links with the Gülen network. More than 40,000 civil servants were dismissed under the three new state of emergency decrees published on 1 September 2016.

An emergency decree issued in January 2017 provides that any public personnel deemed to be involved in the formation or affiliated with groups or terrorist organizations considered a threat to national security should be removed from office without any compensation and without trial.¹⁷⁷⁵ No further notification is made to them. Individuals excluded from public office pursuant to this decree can no longer be directly or indirectly employed in public service. Their weapons licenses, ship ownership documents, pilot licenses, and passports are cancelled. According to the decree, these people are forbidden to be founders, partners and employees of private security companies.

Associations and educational institutions on the lists attached to the above mentioned decree, including journals, were closed, and their assets transferred to the Turkish Treasury free of charge. Scholarships assigned to students abroad included in one of the aforementioned lists were cancelled. Another decree published on the same day reformulated the powers of the judiciary and security forces,¹⁷⁷⁶ and another covered national defense and the armed forces.¹⁷⁷⁷

Under emergency measures, on 31 October 2016 the Istanbul's prosecutor's office issued arrest warrants for 13 journalists of the pro-secular opposition daily newspaper *Cumhuriyet Gazetesi*, including the editor-in-chief Murat Sabuncu, three of its columnists and former editor-in-chief Can Dündar, on accusations of supporting terrorists PKK and FETÖ/PDY.¹⁷⁷⁸ Sabuncu

¹⁷⁷⁴ Decree Law No. 673 [Some measures taken in the context of the emergency decree], T.C. Resmi Gazete 29818 of 1 Sept. 2016. See also: Decree Law No. 674 [Decree concerning certain regulations under emergency context], T.C. Resmi Gazete 29818 of 1 Sept. 2016.

¹⁷⁷⁵ Decree Law No. 679 [Some measures taken in the context of the emergency decree], T.C. Resmi Gazete 29940 of 6 Jan. 2017.

¹⁷⁷⁶ Decree Law No. 680 [Implementation of some regulations under the State of Emergency], T.C. Resmi Gazete 29940 of 6 Jan. 2017.

¹⁷⁷⁷ Decree Law No. 681 [Implementation of some regulations concerning the national defense in the context of the state of emergency], T.C. Resmi Gazete 29940 of 6 Jan. 2017.

¹⁷⁷⁸ *Cumhuriyet Gazetesi* (2016), "Cumhuriyet gazetesine operasyon", 31 Oct. 2016. Available at http://www.cumhuriyet.com.tr/haber/turkiye/623897/Cumhuriyet_gazetesine_operasyon.html (accessed 31 Oct. 2016).

spent over one year in preventive imprisonment.¹⁷⁷⁹ In February 2019, an Istanbul court upheld convictions to prison – up to ten years in jail – against dozens of journalists and executives of *Cumhuriyet*, on groundless accusations of supporting terrorism, that were tried for having dissident views or reporting on issues of public interest.¹⁷⁸⁰

Reportedly, more than 125 media outlets have been closed, and 120 journalists detained since the attempted coup in July 2016.¹⁷⁸¹ On the first anniversary of the coup attempt another 7,500 persons were included in 7 lists and proscribed.¹⁷⁸² These people were removed from public office and their passports canceled. The Turkish authorities established procedures and principles for the study of the emergency process review commission for those proscribed.¹⁷⁸³

In August 2017 another 928 employees were expelled from public administration for alleged links with terrorist organizations.¹⁷⁸⁴ Most of the new purges concern the Ministry of the Interior and related bodies (212 persons), the armed forces (205 people), and 120 academics. The same decrees also provide the closure of six associations. Since the putsch attempt, more than 50,000 people have been arrested and about 120,000 were dismissed or suspended.

Condemning Turkey for the restriction of fundamental rights and freedoms, the ECtHR argues that, even in situations involving armed conflict and in presence of terrorist threats, the use of the criminal law to restrict freedom of expression is unlawful.¹⁷⁸⁵ In a case of conviction of a journalist for having published an interview with a PKK activist, who called for a separate Kurdish state, the ECtHR concludes that Turkey has violated the right to freedom of expression.¹⁷⁸⁶ The European Court of Human Rights finds that a general prohibition of

¹⁷⁷⁹ OSCE RFoM (2018c), "OSCE Désir welcomes the release of two Cumhuriyet journalists, calls on Turkey to free Akin Atalay and drop charges against all defendants", 9 Mar. 2018. Available at <https://www.osce.org/representative-on-freedom-of-media/374947> (accessed 9 Mar. 2018).

¹⁷⁸⁰ OSCE RFoM (2019b), "Cumhuriyet trial convictions a terrible setback for Turkey, says OSCE Media Freedom Representative, calls for end to criminalization of journalism", 19 Feb. 2019. Available at <https://www.osce.org/representative-on-freedom-of-media/411830> (accessed 19 Feb. 2019).

¹⁷⁸¹ Mijatović, Dunja (2016), "OSCE Representative condemns continued arrests of journalists in Turkey, calls on authorities to restore media pluralism", OSCE, 31 Oct. 2016. Available at <http://www.osce.org/fom/278326> (accessed 31 Oct. 2016).

¹⁷⁸² Decree Law KHK/692 [Some measures adopted under the state of emergency], T.C. Resmî Gazete 30124 (Repeated) of 14 July 2017.

¹⁷⁸³ Notification of the Turkish PM, "Principles and procedures of the emergency inquiry commission", T.C. Resmî Gazete 30122 (Repeated) of 14 July 2017.

¹⁷⁸⁴ Decree Law KHK/693 [Some measures adopted under the state of emergency], T.C. Resmî Gazete 30165 of 25 Aug. 2017; Decree Law KHK/694 [Implementation of some measures under the state of emergency law], T.C. Resmî Gazete 30165 of 25 Aug. 2017.

¹⁷⁸⁵ *Incal v. Turkey*, Application No. 22678/93, ECtHR, 18 May 1998, delivered on 9 June 1998, § 54; *Şener v. Turkey*, App. No. 26680/95, ECtHR, Third Section, 18 July 2000, § 40, 42.

¹⁷⁸⁶ *Süreç And Özdemir v. Turkey*, App. Nos. 23927/94 and 24277/94, ECtHR, 8 July 1999, § 61.

glorification of violence cannot be justified under Art. 10 § 2 of the ECHR.¹⁷⁸⁷ Also a Belgian court argues that making propaganda for PKK cannot be considered terrorism.¹⁷⁸⁸

The OSCE RFoM, Dunja Mijatović, commented that CT and other legislation used to restrict media freedom “goes far beyond what may be justifiable under a state of emergency”,¹⁷⁸⁹ and concluded that “[r]eporting on a terrorist attack should not be assimilated to the justification of terrorism”.¹⁷⁹⁰ Concluding an official visit in Turkey, in June 2019, the RFoM Harlem Désir, complained that several presidential decrees, issued during the state of emergency – including the practice of detaining journalists for their work and the abuse of pre-trial detention and Internet censorship – became permanent measures that are used to restrict freedom of expression and freedom of the media, and to imprison journalists who simply express dissenting voices.¹⁷⁹¹ He also reiterated that journalism should not be equated with terrorism.¹⁷⁹²

Turkey's government used the state of emergency imposed following the failed coup of July 2016 to crack-down on all government critics. In the aftermath of the New Year's Day assault in Istanbul, the state of emergency was extended once again for three months, effective from 19 January 2017.¹⁷⁹³ The decision, taken by the Cabinet (Council of Ministers), was approved by the GNAT.

The OSCE representative on media freedom reported that six months after the failed coup more than 100 journalists were imprisoned, and about 150 were still in jail. More than 150 media outlets have been shut down, and over 10,000 media workers had lost their jobs, with thousands awaiting trial for critical tweets or other social media posts, or charged with propaganda supporting terrorism.¹⁷⁹⁴ Ms Mijatović accused the Turkish government of constantly purging critical voices.¹⁷⁹⁵ Six journalists were sentenced to life imprisonment for attempting to disrupt

¹⁷⁸⁷ *Karatas v. Turkey*, App. No. 23168/94, ECtHR, 8 July 1999.

¹⁷⁸⁸ *Prosecutor v. The Turkish State and Others*, p. 14.

¹⁷⁸⁹ Mijatović (2016).

¹⁷⁹⁰ OSCE RFoM (2019c), “OSCE Media Freedom Representative calls for dropping of criminal charges against Radio Ekho Moskvy journalist Svetlana Prokopyeva in Russia”, 11 Feb. 2019. Available at <https://www.osce.org/representative-on-freedom-of-media/411116> (accessed 11 Feb. 2019).

¹⁷⁹¹ OSCE RFoM (2019d), “Concluding official visit to Turkey, OSCE Media Freedom Representative calls on authorities to urgently reverse the course of media freedom violations”, 14 June 2019. Available at <https://www.osce.org/representative-on-freedom-of-media/423179> (accessed 14 June 2019).

¹⁷⁹² *Ibid.*

¹⁷⁹³ Cabinet of Turkey, Decision No. 1134 of 3 Jan. 2017 on the extension of the state of emergency.

¹⁷⁹⁴ Mijatović, Dunja (2017), “OSCE Representative on Freedom of the Media calls on Turkey to decriminalize journalistic work following arrest of Die Welt journalist”, OSCE, 1 Mar. 2017. Available at <http://www.osce.org/fom/302351> (accessed 1 Mar. 2017).

¹⁷⁹⁵ *Ibid.*

constitutional order over the failed coup.¹⁷⁹⁶ In January 2018, journalists and hundreds social media users were detained on terrorism charges for their social media posts about the military offensive against the Kurds launched into Afrin¹⁷⁹⁷ — according to the Turkish Interior Ministry, as many as 449 people were arrested and charged with propaganda for terrorism for their social media posts, and in many cases they were only released under specific conditions such as restrictions to travel abroad or drive a vehicle.¹⁷⁹⁸ In April 2019, the Istanbul 14th High Criminal Court sentenced to prison for terrorist propaganda thirteen journalists and writers who participated in a solidarity campaign organized by the now closed Kurdish media outlet *Özgür Gündem*.¹⁷⁹⁹

The International Commission of Jurists argues that repressive measures enforced through the courts apparently for the purpose of political control and suppression of dissenting or unwelcome opinions, are closely linked to attempts by the government to gain greater control over the justice system.¹⁸⁰⁰ It is pretty bizarre that, while enacting the after-coup repression, the Turkish Presidency called for "democracy and freedom of expression and assembly".¹⁸⁰¹ Eventually, this authoritarian path led to constitutional reform, transforming Turkey into a presidential republic.¹⁸⁰²

In a joint statement of preliminary findings and conclusions on the constitutional referendum which was held on 16 April 2017, PACE and ODIHR concluded that the legal framework was inadequate for a genuinely democratic process, and that the use of state of

¹⁷⁹⁶ OSCE RFoM (2018a),

¹⁷⁹⁷ OSCE RFoM (2018d), "Detention of hundreds in Turkey for expressing dissenting views on military operation in Afrin is unacceptable, OSCE representative warns", 7 Feb. 2018. Available at <http://www.osce.org/fom/370951> (accessed 7 Feb. 2018).

¹⁷⁹⁸ Ibid.

¹⁷⁹⁹ OSCE RFoM (2019c), "Sentencing journalists to prison greatly damages media freedom in Turkey, says OSCE Media Freedom Representative following Özgür Gündem trial", 3 Apr. 2019. Available at <https://www.osce.org/representative-on-freedom-of-media/416147> (accessed 10 Apr. 2019).

¹⁸⁰⁰ International Commission of Jurists, p. 3.

¹⁸⁰¹ Kali, Ibrahim (2016d), "Statement by Presidential Spokesperson Ambassador Ibrahim Kali on "Democracy Rally against Coup" in Cologne", Presidency of the Republic of Turkey, 31 July 2016. Available at <https://www.tccb.gov.tr/en/spokesperson/1696/49844/statement-by-presidential-spokesperson-ambassador-ibrahim-kalin-on-democracy-rally-against-coup-in-cologne.html> (accessed 12 Aug. 2016).

¹⁸⁰² Law No. 6771 of 21 Jan. 2017 [Law Amending the Constitution of the Republic of Turkey], entered into force 10 Feb. 2017, T.C. Resmi Gazete 29976 of 11 Feb. 2017

emergency powers, which limited fundamental freedoms, undermined the rule of law by further restricting freedom of assembly and expression, meaning that the campaign was biased.¹⁸⁰³

The constitutional reform consists of 18 articles, including the abolition of the office of prime minister and the strengthening of the role of the president, who will have broad powers in emergency situations. President can appoint senior public officials, ministers and the vice president, and easily dissolve Parliament. The reform also endangers fundamental rights and freedoms by reforming judicial power through changes in the composition of the Constitutional Court (*Anayasa Mahkemesi*) and the High Council of Judges and Prosecutors or HCJP (*Hâkimler ve Savcılar Yüksek Kurulu*, HSYK).

IN THE NAME OF NATIONAL INTEREST

While draconian CT measures, although inappropriate and ineffective, result in the erosion of individual liberties, on the other side excessive guaranteeism creates an easy way out for terrorists. Ibrahim el-Bakraoui, one of the Brussels attackers of March 2016, was detained and deported by the Turkish authorities in June 2015. Turkish president Erdoğan reported that Ankara had informed the Belgian Embassy of the deportation process on 14 July 2015. However, the Belgians released the attacker. "Despite our warning that this person was a foreign terrorist warrior, Belgium was unable determine his ties with terrorism", complained Erdoğan. The Turkish president added that el-Bakraoui was also deported to the Netherlands, at his own request, and that the Turkish authorities had informed the Dutch.¹⁸⁰⁴

However, Erdoğan's reasoning was meant to emphasize the ambiguous behavior of Western governments, which, despite having officially classified the PKK as a terrorist organization, support other Kurdish groups (i.e. PYD, YPG, and DHKP-C) in fighting the Islamic State in Syria. According to the Turkish authorities, the Democratic Union Party (PYD) and its armed wing YPG were set up under the control of PKK in 2003. They share the same

¹⁸⁰³ OSCE/ODIHR and PACE (2017), "Turkey, Constitutional Referendum, 16 Apr. 2017: Statement of Preliminary Findings and Conclusions", OSCE, 17 Apr. 2017. Available at <http://www.osce.org/odihr/elections/turkey/311721?download=true> (accessed 17 Apr. 2017).

¹⁸⁰⁴ Erdoğan, Recep Tayyip (2016), "The world has to redefine terrorism", Presidency of the Republic of Turkey, 23 Mar. 2016. Available at <https://www.tccb.gov.tr/en/news/542/41214/we-will-overcome-terrorism.html> (accessed 24 Mar. 2016).

leadership cadres, organizational structure, strategies and tactics, military structure, propaganda tools, financial resources and training camps.¹⁸⁰⁵ Turkey considers PYD the Syrian affiliate of PKK, and YPG its armed service.¹⁸⁰⁶

Turkey accused the Western countries of "double standards and hypocrisy" for supporting the PKK terrorist organization in Europe in the name of freedom of expression.¹⁸⁰⁷ Quoting the case of a U.S. citizen sentenced to 12 years in prison for attempting to join Daesh, the Turkish Presidency commented, "It is not possible for us to accept being criticized for being oppressive and violating the rule of law when we take measures in the fight against terror while European countries are praised for taking the same measures".¹⁸⁰⁸ Erdoğan continues to accuse European countries of helping terrorists flee Turkey for years.¹⁸⁰⁹

The relationship between crime and terrorism is thin, and is subject to political assessments, which may differ depending on the interests of governments. Turkey experienced terrorist attacks carried out by Armenian terrorist organizations ASALA (Armenian Secret Army for the Liberation of Armenia) and JCAG (Justice Commandos for the Armenian Genocide) in 1970s and 1980s.¹⁸¹⁰ When in June 2016 the Bundestag, the lower chamber of the Federal German Parliament, adopted a resolution recognizing the Armenian genocide,¹⁸¹¹ Erdoğan commented that it would seriously affect Turkish-German relations.¹⁸¹² Deputy secretary general and spokesperson of the Turkish Presidency, Ibrahim Kalin, commented that the resolution has no legal basis, is contrary to historical facts, and is "an example of political irresponsibility".¹⁸¹³

¹⁸⁰⁵ MFA of Turkey (2015a).

¹⁸⁰⁶ Kalin, Ibrahim (2016e), "Statement by Presidential Spokesperson Ambassador İbrahim Kalin", Presidency of the Republic of Turkey, 27 Jan. 2016. Available at <http://www.tccb.gov.tr/en/spokesperson/1696/38634/statement-by-presidential-spokesperson-ambassador-ibrahim-kalin.html> (accessed 5 Mar. 2016).

¹⁸⁰⁷ Kali, Ibrahim (2016a), "Presidential Spokesperson Kalin: 'Double-standards and hypocrisy should come to an end in the fight against terror'", Presidency of the Republic of Turkey, 8 June 2016. Available at <https://www.tccb.gov.tr/en/news/542/44324/cumhurbaskanligi-sozcusu-kalindan-bati-ulkelerine-cagri-terorle-mucadelede-cifte-standardin-ve-ikiyuzlulugun-son-bulmasi-gerekliyor.html> (accessed 11 June 2016).

¹⁸⁰⁸ Ibid.

¹⁸⁰⁹ Erdoğan (5 Mar. 2017), *I Believe All Citizens will Unite at 'Yes' for the Future of Turkey*.

¹⁸¹⁰ TNP (2016b), "Terrorism". Available at <https://www.egm.gov.tr/EN/Pages/terrorism.aspx> (accessed 24 Oct. 2016).

¹⁸¹¹ German Bundestag (2016), *Resolution on the Remembrance and commemoration of the genocide of the Armenians and other Christian minorities in the years 1915 and 1916*, No. 18/8613 of 31 May 2016.

¹⁸¹² Erdoğan, Recep Tayyip (2016), "Germany's 1915 Resolution: 'It will seriously affect Turkish-German relations'", Presidency of the Republic of Turkey, 2 June 2016. Available at <https://www.tccb.gov.tr/en/news/542/44240/germanys-1915-resolution-it-will-seriously-affect-turkish-german-relations.html> (accessed 11 June 2016)

¹⁸¹³ Kalin, İbrahim (2016b), "Presidential Spokesperson Kalin: 'German parliament's resolution is an example of political irresponsibility'", Presidency of the Republic of Turkey, 2 June 2016. Available at

Kalin labeled the Bundestag resolution as "genocide propaganda due to political motives", and accused Germany to be "the perpetrator of the Holocaust, the biggest genocide in modern history".¹⁸¹⁴ Similarly, President Erdoğan affirmed that "Armenian issue is being used as a convenient blackmail against Turkey", and called Germany to "first redefine the Holocaust" and "review the Namibia genocide".¹⁸¹⁵ The Turkish head of state accused Belgium in Congo, Germany in Namibia, Britain and France in other countries, to have committed very serious genocides by exploiting and pillaging resources under the claim of bringing civilization.¹⁸¹⁶ Further, Germany killed over 100 thousand Namibians and thus "is the last country to hold a vote on the so-called Armenian genocide".¹⁸¹⁷ Erdoğan also accused France of being responsible for the Rwandan genocide of 1994.¹⁸¹⁸

The denial of the Holocaust is illegal in many European nations, excluding some major countries.¹⁸¹⁹ In June 2016, the Italian Parliament passed an anti-negationism bill making spreading Holocaust denial illegal,¹⁸²⁰ according to European Union's 2008 Framework Decision calling for legislative harmonization in this respect throughout its territory.¹⁸²¹ It is a single article which provides for the penalty of imprisonment from two to six years if propaganda or instigation and incitement, committed so resulting real danger of spreading, are based in whole or in part, on the denial of the *Shoah* (the Holocaust) or crimes of genocide, crimes against humanity and war crimes as defined in Art. 6, 7 and 8 of the ICC statute. Measures such as criminalizing the Holocaust denial, come up against fundamental rights such as the freedom of

<https://www.tccb.gov.tr/en/news/542/44248/presidential-spokesperson-kalin-german-parliaments-resolution-is-an-example-of-political-irresponsibility.html> (accessed 11 June 2016).

¹⁸¹⁴ Ibid.

¹⁸¹⁵ Erdoğan, Recep Tayyip (2016), "Armenian issue is being used as a convenient blackmail against Turkey", Presidency of the Republic of Turkey, 4 June 2016. Available at <https://www.tccb.gov.tr/en/news/542/44275/armenian-issue-is-being-used-as-a-convenient-blackmail-against-turkey.html> (accessed 11 June 2016).

¹⁸¹⁶ Erdoğan, Recep Tayyip (2016), "Our history is a history of mercy and compassion", Presidency of the Republic of Turkey, 5 June 2016. Available at <https://www.tccb.gov.tr/en/news/542/44286/our-history-is-a-history-of-mercy-and-compassion.html> (accessed 11 June 2016).

¹⁸¹⁷ Ibid.

¹⁸¹⁸ Ibid.

¹⁸¹⁹ Bazylar, Michael J. (2006), "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism", Jerusalem, International Institute for Holocaust Studies Yad Vashem.

¹⁸²⁰ Law No. 115 of 8 June 2016 [Amendment to Article 3 of Law 13 Oct. 1975, No. 654, on enforcement and prosecution of crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court], GU, No. 149 of 28 June 2016.

¹⁸²¹ Council Framework Decision 2008/913/JHA of 28 Nov. 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L328/55 of 6 Dec. 2008, p. 55–58.

belief and speech. Furthermore arises the question of the legal status of genocide, which in many cases (see the Armenian genocide) is controversial.

Some of the countries that ban Holocaust denial, particularly those with a direct involvement in World War II, including Germany,¹⁸²² also ban other elements associated with Nazism, such as the expression of Nazi symbols. But each country is a case in itself, according to its own history. In Italy the Constitution prohibits the reconstruction of the Fascist party,¹⁸²³ and apology of fascism is a criminal offence.¹⁸²⁴ The Russian law on extremism considers as unlawful the propaganda and public exposure of Nazi emblems or symbols or of emblems or symbols similar to Nazi emblems (Art. 1.1).¹⁸²⁵ Holding, printing or spreading material related to the Nazi Party (*Nationalsozialistische Deutsche Arbeiterpartei* or NSPD) or to the Italian Fascist party is also banned by the same legislation (Art. 1.3). The issue of banning symbols or of emblems is disputed as restricts the freedom of belief and speech.

Nevertheless, the German Federal Constitutional Court (*Bundesverfassungsgericht* or BVerfG) rejected the bid, submitted by the Bundesrat, to ban the National Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*, NPD).¹⁸²⁶ The supreme constitutional court for the Federal Republic of German did not uphold the "deviating definition" set out in the judgment prohibiting the Communist Party of Germany (*Kommunistische Partei Deutschlands*, KPD), according to which the fact that there are, according to human standards, no prospects that the party will be able to realize its unconstitutional intention in the foreseeable future does not preclude the prohibition of the party.¹⁸²⁷ KPD was banned by the Federal Constitutional Court in 1956 for its aggressively militant opposition to the West German Constitution.¹⁸²⁸

A few months after the ruling, commenting the cancellation of Turkish ministers' meetings in Germany, Turkish president Erdoğan said that there was no difference between the incumbent government's practices and the Nazi ones,¹⁸²⁹ and that was evident that Nazism was

¹⁸²² See: German Criminal Code (*Deutsches Strafgesetzbuch*) § 86(a).

¹⁸²³ First paragraph of the 12nd transitory and final disposition of the Italian Constitution.

¹⁸²⁴ Law 20 June 1952, No. 645, Art. 1 and 4, GU No. 143 of 23 June 1952.

¹⁸²⁵ State Duma (2002), Federal Law No. 114-FZ of 25 July 2002 [On combating extremist activity].

¹⁸²⁶ *NPD Prohibition*, Case No. 2 BvB 1/13, BVerfG, 17 Jan. 2017.

¹⁸²⁷ *Id.*, § 266.

¹⁸²⁸ *KPD Prohibition*, Case No. 1 BvB 2/51, BVerfG, 17 Aug. 1956, *Entscheidungen des Bundesverfassungsgerichts–BVerfGE* (Decisions of the Federal Constitutional Court), Vol. 5, p. 85, § 143.

¹⁸²⁹ Erdoğan, Recep Tayyip (2017), "Democracy Is Unsustainable without Women and the Youth", Presidency of the Republic of Turkey, 5 Mar. 2017. Available at <https://www.tccb.gov.tr/en/news/542/72223/kadinlar-ve-genclerin-icinde-olmadigi-bir-demokrasi-surdurulemez.html> (accessed 7 Mar. 2017).

still alive in Germany.¹⁸³⁰ When, a few days after, the Netherlands denied the landing clearance for the airplane of Turkish foreign minister, Mevlüt Çavuşoğlu,¹⁸³¹ Erdoğan accused the Dutch government to harbor and feed terrorists and to be Nazi and Fascist.¹⁸³² The Turkish head of state added that the Netherlands “acted like a banana republic, not like an EU-member democratic state of law”, and accused again Europe of Islamophobia and Turkophobia.¹⁸³³

JIHAD AND TERRORISM. A COMPARATIVE ANALYSIS OF ISIS, AL-QAEDA AND THE TALIBAN

Who decides whether it is genocide, crimes against humanity or war crimes? What is the difference between dissidents, insurgent, rebels, ordinary criminals, and terrorists? Also in the War on Terror, the legal status of this topics is disputed; there is no unanimity among the members of the international community. Governments have a tendency to characterize their opponents as it suits them, according to their own convenience, as we have seen so far in this chapter and in previous chapter 5. An interesting contribution to the discussion can come from a comparative analysis of three *jihadist* movements that have come into world attention since the beginning of the 2000s.

The Financial Action Task Force acknowledges that common or ordinary criminals and terrorists are not equivalent.¹⁸³⁴ It is not viable to label as terrorists all those who commit violent acts in the name of a political or religious cause. It is necessary to distinguish between criminals, terrorists, and lawful combatants pursuing the goal to win popular support, territory, or international recognition.

Dissidents, opponents, resistance fighters, combatants, insurgent, rebels are not terrorists: they are members of a non-state organization pursuing a political goal of liberation or conquest

¹⁸³⁰ Erdoğan (5 Mar. 2017), *I Believe All Citizens will Unite at ‘Yes’ for the Future of Turkey*.

¹⁸³¹ Government of the Netherlands (2017), "Government statement on the denial of Turkish landing rights", 11 Mar. 2017. Available at <https://www.government.nl/latest/news/2017/03/11/government-statement-on-the-denial-of-turkish-landing-rights> (accessed 12 Mar. 2017).

¹⁸³² Erdoğan, Recep Tayyip (2017), "Our Citizens in the Netherlands will Foil Your Plot on April 16", Presidency of the Republic of Turkey, 11 Mar. 2017. Available at <https://www.tccb.gov.tr/en/news/542/72298/our-citizens-in-the-netherlands-will-foil-your-plot-on-april-16.html> (accessed 12 Mar. 2017).

¹⁸³³ Erdoğan, Recep Tayyip (2017), "I Call on All International Organizations to Impose Sanctions on the Netherlands", Presidency of the Republic of Turkey, 12 Mar. 2017. Available at <https://www.tccb.gov.tr/en/news/542/72304/tum-uluslararasi-kurululari-hollandaya-karsi-yaptirim-uygulamaya-davet-ediyor.html> (accessed 13 Mar. 2017)

¹⁸³⁴ FATF (2014), § 177.

of a territory, excluding actions intentionally aimed to cause death or injury of civilians. Such geopolitical objective, namely the right of peoples to self-determination and independence, is a cardinal principle in modern international law enshrined in the UN Charter and many other instruments. The claims of these groups or organizations, however, to be considered lawful, should be supported by a cultural and historical background related to ethnic, racial, or religious issues, and should be aimed to establish a state entity with new and different characteristics with respect to the existing one. Basically, The purpose of these groups is no different from that of those who organize a political revolution or a coup d'état, unlawful acts from which arises a new legal order.

Therefore, these acts do not have just the purpose to seize state authority, or to carry out violent acts outside the target territory. The political, ethnic and religious is essential, and underlies the actions of many of these organizations. In the past, several movements, originally labeled as terrorist, following the successful in the fight for independence or for the conquest of state power, got a status recognized by the international community. Among these the most notable being: the Mexican Revolution (1910-1917); the Russian Revolution (1917), the Chinese Communist Revolution (1946-1949), the Cuban Revolution (1953-1959); the Portuguese Carnation Revolution (1974); the Saur Revolution (1978); the Islamic Iranian Revolution (1978-1979); the Libyan Revolution (1969); the national liberation revolutions during the decolonization period in the 20th century.

The support of a large part of the population is necessary to distinguish between a revolution, which is therefore legitimate by popular consent, by a coup, usually masterminded by an elite (political, economic or religious), and often backed by the military (the Portuguese Revolution of 1974 is an exception).

Certain organizations, although have gained democratically state power, are still considered as terrorist by some governments or international organizations. Among the aforementioned revolutions, the Saur Revolution which took place in Kabul – a military coup d'état more than a real revolution, lacking of popular support – led to the 1979 intervention by the Soviets and the war against the *Mujahideen* until 1989.¹⁸³⁵ The revolution was led by the People's Democratic Party of Afghanistan (PDPA) against the rule of self-proclaimed Afghan

¹⁸³⁵ Arnold, Anthony (1985), *Afghanistan, the Soviet invasion in perspective*, Stanford, Hoover Press.

president, Mohammed Daoud Khan.¹⁸³⁶ The *jihad* was then established as a reaction to Soviet invasion of Afghanistan. In this political and military scenario, *Mujahideen* are characterized as partisans, resisters, opponents, rebels, insurgents. Following the withdrawal of the Soviet Army, thousands of *Mujahideen* returned to their countries and *jihad* relocalized itself to Europe.¹⁸³⁷

The year of the Iranian Revolution and the intervention of Moscow in Afghanistan stands out for the appearance of radical Islamic movements Shiite (e.g. Hezbollah in Lebanon) and Sunni (e.g. Hamas, al-Qaeda, etc.). The arrival on the scene of the United States in the funding of Afghan insurgents, through a CIA covert operation,¹⁸³⁸ marks the beginning of the support to some Islamic fundamentalist movements, which, in the following years, will become "uncomfortable", and hard to crack down. Any international coalition was established to contrast 'old school' terrorism, such as Hamas or al-Fatah, and instead was formed a broad coalition against Daesh (Sept. 2014) and against the Taliban (Oct. 2001) .

The Afghan Taliban are designated as a terrorist organization by Canada, Kazakhstan, Russia and the UAE, but not by China, France, the UK, and the U.S. The question of whether the Taliban, who still name themselves the Islamic Emirate of Afghanistan, should be considered a terrorist organization or not is disputed in the U.S.

The *Antiterrorism* publication prepared under the direction of the chairman of the Joint Chiefs of Staff (CJCS), which provides joint doctrine for planning, executing, and assessing joint antiterrorism operations, clarifies that the term terrorism is often used interchangeably with the term insurgency.¹⁸³⁹ According to the joint publication "what typically distinguishes terrorism is that while both terrorism and insurgency seek political aims, terrorism is always unlawful and specifically intended to inculcate fear to achieve its aims".¹⁸⁴⁰ This definition is incomplete, and is not sufficient to distinguish terrorism from insurgency.

The White House principal deputy press secretary and special assistant to President Obama, Eric Shultz, characterized the Taliban isn't a terrorist group, but "an armed

¹⁸³⁶ Ibid.

¹⁸³⁷ Vidino, p. 168-169.

¹⁸³⁸ Aldrich, Richard J., Christopher Moran and Simon Willmetts (2013), "Central Intelligence Agency", in Paul S. Boyer, Christopher Nichols and David Milne (eds.), *The Oxford Encyclopedia of American Military and Diplomatic History*, Oxford, Oxford University Press, p. 147.

¹⁸³⁹ *Antiterrorism*, xiv.

¹⁸⁴⁰ Ibid.

insurgency”.¹⁸⁴¹ On the contrary then senior advisor to U.S. president characterized ISIS as a terrorist group.¹⁸⁴² The White House press secretary, Jay Carney, had previously defined the Taliban as an “enemy combatant in a conflict that has been going on”.¹⁸⁴³ Intervening later at the Brussels Conference on Afghanistan, state secretary John Kerry characterized the Taliban as “armed insurgents” representing an “armed opposition”.¹⁸⁴⁴ This situation leads to paradoxes, such as attack by U.S. drones to the Taliban, under the AUMF,¹⁸⁴⁵ while they counteract the ISIS affiliates in Afghanistan.¹⁸⁴⁶

The Obama administration characterized the Afghan conflict as the “long war”.¹⁸⁴⁷ The Trump administration keeps on calling it a “war” against the Taliban,¹⁸⁴⁸ “the longest war in American history” or “a war without victory”, according to President Trump.¹⁸⁴⁹ Nevertheless, the Trump administration has not revisited the Taliban's status as a terrorist organization. U.S. defense secretary James N. Mattis bizarrely described the PKK as a terrorist group which is “conducting an active insurgency in Turkey”.¹⁸⁵⁰ Until this moment the U.S. administrations have always distinguished between terrorists and insurgents, such as the Afghan Taliban, but the Trump administration seems to have changed attitude. The boundary between insurgents and terrorists is becoming increasingly thin, and to encompass the first between the second.

¹⁸⁴¹ Schultz, Eric (2015), "Press Briefing by Principal Deputy Press Secretary Eric Schultz", The White House, 28 Jan. 2015. Available at <https://www.whitehouse.gov/photos-and-video/video/2015/01/28/press-briefing-principal-deputy-press-secretary-eric-schultz> (accessed 16 Dec. 2015).

¹⁸⁴² Ibid.

¹⁸⁴³ Carney, Jay (2014), "Press Briefing by Press Secretary Jay Carney", The White House, 2 June 2014. Available at <https://www.whitehouse.gov/the-press-office/2014/06/02/press-briefing-press-secretary-jay-carney-060214> (accessed 16 Dec. 2015).

¹⁸⁴⁴ Kerry, John (2016h), "Remarks at the Brussels Conference on Afghanistan", Department of State, 5 Oct. 2016. Available at <http://www.state.gov/secretary/remarks/2016/10/262786.htm> (accessed 6 Oct. 2016).

¹⁸⁴⁵ Brennan, John O. (2012), "The Ethics and Efficacy of the President's Counterterrorism Strategy", Wilson Center, 30 Apr. 2012. Available at <https://www.wilsoncenter.org/event/the-efficacy-and-ethics-us-counterterrorism-strategy> (accessed 13 Feb. 2016).

¹⁸⁴⁶ Shahamat (2016a), "13 Mujahideen martyred in Gomal US airstrikes", 13 Feb. 2016. Available at <http://shahamat-english.com/13-mujahideen-martyred-in-gomal-us-airstrikes> (accessed 13 Feb. 2016).

¹⁸⁴⁷ Blinken, Antony J. (2016), "Remarks at RAND Politics Aside Conference", Department of State, 12 Nov. 2016. Available at <http://www.state.gov/s/d/2016d/264291.htm> (accessed 16 Nov. 2016).

¹⁸⁴⁸ Tillerson, Rex W. (2017e), "Statement on the United States' Engagement in South Asia", Department of State, 21 Aug. 2017. Available at <https://www.state.gov/secretary/remarks/2017/08/273566.htm> (accessed 23 Aug. 2017).

¹⁸⁴⁹ Trump, Donald J. (2017d), "Remarks by President Trump on the Strategy in Afghanistan and South Asia", The White House Office of the Press Secretary, 21 Aug. 2017. Available at <https://www.whitehouse.gov/the-press-office/2017/08/21/remarks-president-trump-strategy-afghanistan-and-south-asia> (accessed 23 Aug. 2017).

¹⁸⁵⁰ Mattis, James N. (2017), "Media Availability with Secretary Mattis Enroute to Washington, D.C.", DoD Press Operations, (11 May 2017. Available at <https://www.defense.gov/News/Transcripts/Transcript-View/Article/1180340/media-availability-with-secretary-mattis-enroute-to-washington-dc> (accessed 12 May 2017).

The Turkish National Police (TNP) labels the PKK as an “ethno-nationalist separatist terrorist organization”, the DHKP/C as a “left-wing terrorist organization”, while al-Qaeda and Hezbollah – a Turkish terrorist organization and not related with Lebanese Hezbollah – are classified as “terrorist organizations exploiting religion”.¹⁸⁵¹ The groups connected to the Al-Qaida network are also listed as “international terrorist group”.¹⁸⁵² The subdivision of terrorist movements in distinctive categories, according to their orientation,¹⁸⁵³ proof that they are not just ‘criminal’ organizations, but entities pursuing political goals.

The Taliban are commonly considered a terrorist organization, as under their rule of Afghanistan (1996-2001) al-Qaeda became a virtual state within the Islamic Emirate of Afghanistan. The Taliban movement is not determined a terrorist organizations by the U.S. Department of State,¹⁸⁵⁴ but is considered a terrorist group by the National Counterterrorism Center,¹⁸⁵⁵ due to having provided during its regime a safe haven for al-Qaeda. The U.S. Treasury Department incorporates the Afghan Taliban members on its Specially Designated Nationals (SDN) list, which includes both individuals and entities whose property is blocked.¹⁸⁵⁶ The U.S. Treasury argues that there is still a *fill rouge* between senior al-Qaeda leaders in Afghanistan and the Taliban.¹⁸⁵⁷

A difference in the treatment accorded to the Taliban and the one reserved to Al-Qaida is probably due to the fact that the first attack only military targets or politicians considered stooges of the U.S. and NATO occupation troops (called “crusaders”). The Taliban, in fact, do not shoot civilians indiscriminately, and rather complain of Afghan losses due to the actions of the international coalition backing Kabul government. Pentagon spokesman, Jeff Davis, said that “Al-Qaida doesn't recognize borders when they conspire to commit terrorist attacks against the West”, and that the U.S. will continue to work with their partners and allies “to find and destroy

¹⁸⁵¹ TNP (2016c), “Terrorist Organizations in Turkey”. Available at https://www.egm.gov.tr/EN/Pages/terrorist_organizations.aspx (accessed 24 Oct. 2016).

¹⁸⁵² TNP (2016b).

¹⁸⁵³ Ibid.

¹⁸⁵⁴ Bureau of Counterterrorism, *Foreign Terrorist Organizations*.

¹⁸⁵⁵ NCTC (2017e), “Afghan Taliban”, Counterterrorism Guide. Available at https://www.dni.gov/nctc/groups/afghan_taliban.html (accessed 23 Dec. 2017).

¹⁸⁵⁶ OFAC (2017), “Specially Designated Nationals and blocked persons (SDN list)”, Department of the Treasury. Available at <https://www.treasury.gov/ofac/downloads/sdnlist.txt> (accessed 23 Dec. 2017).

¹⁸⁵⁷ U.S. Department of the Treasury (2016), “Treasury Designates Senior al-Qaida Leader in Afghanistan”, 2 Oct. 2016. Available at <https://www.treasury.gov/press-center/press-releases/Pages/jl0346.aspx> (accessed 11 Feb. 2016).

their leaders, their fighters and their cells that are planning attacks externally".¹⁸⁵⁸ This would be the reason for the Taliban are not characterized as terrorists, but are deemed to be insurgents, although using the tactic of suicide attacks, since they operate only within Afghanistan and with a declared political goal. Neither the U.S., nor other governments, have ever referred to the Taliban suicide attacks characterizing them as terrorist acts.

However, because of the previous connection with al-Qaeda, the Taliban suffer the sanctions established by the 1267 UNSC Committee, the Sanctions Committee established in 1999 in relation to Al-Qaida and the Taliban. In 2011, the 1267 Committee was divided into two distinct sanctions regimes, one for Al-Qaida and another for the Taliban, thus separating the two organizations: the Committee pursuant to resolutions 1267 (1999)¹⁸⁵⁹ and 1989 (2011) oversees sanctions concerning individuals and entities associated with Al-Qaida; the Committee pursuant to resolution 1988 (2011) oversees sanctions concerning individuals and entities associated with the Taliban, which strongly condemned the sanctions renewed by the UNSC against the Islamic Emirate of Afghanistan.¹⁸⁶⁰ The measures taken against the Afghan Taliban and their supporters look more like the typical diplomatic sanctions taken against states, rather than the usual counter-terrorism measures.

In fact, the sanctions imposed on the Taliban and associated individuals and entities prevent them from establishing political missions outside Afghanistan or appointing political representatives abroad, as did in the past the OLP and other political-military organizations. Yet, the Taliban are not classified as terrorists neither by the U.S., nor by any European government. The Afghan cabinet has even started a process of national reconciliation, which seeks to include the Taliban. Therefore it is unclear why the U.S. remove the Taliban leaders, or kill the fighters.

In June 2002, in an attempt to put an end to the civil war, the government of Kabul established the Afghan Independent Human Rights Commission (AIHRC), in order to achieve

¹⁸⁵⁸ Pellerin, Cheryl (2016b).

¹⁸⁵⁹ UNSC, Resolution 1267 (1999), adopted on 15 Oct. 1999, S/RES/1267 (1999).

¹⁸⁶⁰ Shahamat (2015a), "Statement of Islamic Emirate regarding renewal of sanctions by the United Nations Security Council", 23 Dec. 2015. Available at <http://shahamat-english.com/statement-of-islamic-emirate-regarding-renewal-of-sanctions-by-the-united-nations-security-council/> (accessed 4 Feb. 2016).

national reconciliation,¹⁸⁶¹ according to findings and recommendations included in *A Call for Justice* report of January 2005.¹⁸⁶²

The difference between the Taliban and a major terrorist organization such as the Islamic State which, according to the above enunciated criteria, can be characterized a criminal organization, is remarkable: while the former are only interested to re-establish the Islamic Emirate of Afghanistan, the latter intended to establish a worldwide caliphate,¹⁸⁶³ recruiting followers across the planet. The Taliban confirmed that they do not have military activities outside Afghanistan.¹⁸⁶⁴

The War on Terror has been characterized as an 'internationalized' armed conflict, due to the transnational nature of al-Qaeda, which has been the first organization without limited territorial claims, but aimed to attack the United States worldwide. Al-Qaeda considers the U.S. an enemy because of the its 'unnatural and blasphemous' alliance with Saudi Arabia and Israel. Washington has a close relationship with Jerusalem which is responsible for the occupation of Palestine.

The strategy of Ayman al-Zawahiri, the incumbent leader of al-Qaeda, seems to be different from that of bin Laden, and also different from the strategy of the Islamic State. Al-Qaeda seems to have abandoned the path of the attacks against civilian targets in Western countries, thus focusing its efforts on territorial claims. Al-Qaeda seems, in his own way, comply with the rules of the IHL, which oblige to distinguish between military objectives, which can be attacked, and civilians, which are protected persons.

An organization like al-Qaeda, which forsake the international terrorism strategy, which targets civilians deliberately and indiscriminately, can still be regarded as a terrorist organization, or should be considered as the Afghan Taliban or as the PLO after the Oslo agreements. The issue is not so simple, as al-Qaeda is a network with branches in Asia and Africa, where its affiliates operate with specific territorial claims. Responding to those, such as Daesh, who claim

¹⁸⁶¹ AIHRC, "Peace, Reconciliation and Justice in Afghanistan Action Plan of the Government of the Islamic Republic of Afghanistan". Available at http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/Action_Pln_Gov_Af.pdf (accessed 23 Mar. 2016).

¹⁸⁶² AIHRC, "A Call for Justice. A National Consultation on past Human Rights Violations in Afghanistan". Available at http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/rep29_1_05call4justice.pdf (accessed 23 Mar. 2016).

¹⁸⁶³ Marsili (2016b), p. 86.

¹⁸⁶⁴ Shahamat (2016b), "Islamic Emirate Wants Good Relations with the World", 6 Jan. 2016. Available at <http://shahamat-english.com/islamic-emirate-wants-good-relations-with-the-world> (accessed 6 Jan. 2016).

that Al-Qaida does not have a project of building a state, Sheikh Abu Abdullah Ash-Shaami, a senior Shareeah official in ANF, said:

In fact, the strategy of al-Qaeda [for establishing a state] is like what was clarified by the martyred Shaykh, as we reckon him, Osama bin Laden. It is based upon not establishing a state in this current phase as there are three phases: undermine the enemy, then maintaining balance of power, then establishment with consolidation. And the Shaykh clarified this in all his messages to both Yemen and to Somalia – that we do not establish a state until our Jihad reaches a point and our enemies are weakened to a level of balance with us, so that we may first be able to establish it [a state] and secondly we be able to protect it from collapsing. As for before that, then no. And if you want to know more, then refer to the leaked letters of the Shaykh to Yemen and to Somalia, or those that are known as the 'Abbottabad documents'.¹⁸⁶⁵

Until the irresistible progression of ISIS, al-Qaeda was the more 'talked' terrorist organization. The Islamic State is founded as a spin-off of al-Nusra in 2013, and clashes between the two groups begins at the end of the year. In March 2015, ISIS makes official *takfir* upon Jabhat al-Nusra, which has maintained the representation of al-Qaeda in Syria.¹⁸⁶⁶ In Islamic law *takfir*, derived from the word *kafir* (unbeliever), refers to the practice of excommunication: a Sunni Muslim who accuses another Muslim of apostasy and declares him as *kafir* (infidel).

The clash between *jihadist* groups takes place on incident planes, whose intersection is Islam as the state religion. In Spring 2016, the clash between al-Qaeda and ISIS breaks out openly on several levels: on the military,¹⁸⁶⁷ and theological-religious. The Islamic State official

¹⁸⁶⁵ Ash-Shaami, Abu Abdullah (2015), "Discussion with Sheikh Abu Baseer At Tartousi. Response to the Fatwa of Sheikh Abu Baseer prohibiting joining Jabhatun Nusra", 29 Apr. 2015. Available at <https://almuwahideenmedia.wordpress.com/2015/04/28/discussion-with-sheikh-abu-baseer-at-tartousi/comment-page-1> (accessed 22 Feb. 2016).

¹⁸⁶⁶ *Dābiq* No. 8 (Mar. 2015), "Irjā-The most dangerous bid'ah (and its accent on the Jihād in Shām)", p. 56.

¹⁸⁶⁷ Amaq Agency (2016), "Islamic State fighters kill 17 Jabhat an-Nusra combatants, as they attempt to advance on positions in Wadi az-Zamrani and Wadi Murtibah in western Qalamun", 28 Mar. 2016. Available at <https://amaqagency.wordpress.com/2016/03/28/islamic-state-fighters-kill-17-jabhat-an-nusra-combatants-as-they-attempt-to-advance-on-positions-in-wadi-az-zamrani-and-wadi-murtibah-in-western-qalamun> (accessed 14 Apr. 2016). Amaq Agency (2016), "14 Syrian Opposition Factions Attack the Town of ar-Rai in the Aleppo Countryside with U.S. and Turkish Support", 7 Apr. 2016. Available at <https://amaqagency.wordpress.com/2016/04/07/14-syrian-opposition-factions-attack-the-town-of-ar-rai-in-the-aleppo-countryside-with-u-s-and-turkish-support> (accessed 14 Apr. 2016). Amaq Agency (2016), "Islamic State fighters take control of the Juwrat ash-Sharibati

newsletter *Al-Nabā'* states that the beliefs and the methodology of al-Qaida deviate from the correct interpretation of Islam.¹⁸⁶⁸ Daesh accuses al-Qaeda of having deviated from the path of Osama bin Laden.

In April 2016, the Islamic State makes again *takfir* on al-Nusra through an attack published in its Arabic weekly newsletter *Al-Nabā'*.¹⁸⁶⁹ In its English magazine *Dābiq*, ISIS declares all branches of al-Qaeda to be apostates.¹⁸⁷⁰ ISIS considers the leader of al-Qaeda, Ayman al-Zawahiri, "the soldier of the Pakistani puppet Akhtar Mansūr",¹⁸⁷¹ that is to say submitted of the Afghan Taliban, who in turn are considered in collusion with the government of Islamabad. Eventually, in April 2016, the two major terrorist organizations come to a direct armed conflict.¹⁸⁷²

Basically, the difference between the Daesh and al-Qaeda lies in the fact that the former tries to establish a universal Islamic state, the caliphate, while the latter supports national states, that are the result of the partition of the Ottoman Empire made by the Western powers after the Great War. According to the Muslims the cause of their troubles originates by the *Sykes-Picot Agreement*, which have broken the Ottoman Empire and ended the Caliphate, creating Turkey, a secular state, as successor.¹⁸⁷³ The Sykes–Picot Agreement was a secret pact between UK and France, aimed to define their proposed spheres of influence and control in Southwestern Asia after the defeat of the Ottoman Empire in World War I. The situation was worsened by the

neighborhood and parts of the Yarmouk Camp, south of Damascus, after clashes with al-Qaeda", 7 Apr. 2016. Available at <https://amaqagency.wordpress.com/2016/04/07/islamic-state-fighters-take-control-of-the-juwrat-ash-sharibati-neighborhood-and-parts-of-the-yarmouk-camp-south-of-damascus-after-clashes-with-al-qaeda> (accessed 14 Apr. 2016). Amaq Agency (2016), "Al-Qaeda military commander and head of security of al-Jurah in Damascus both killed while Islamic State fighters attack the neighborhood", 8 Apr. 2016. Available at <https://amaqagency.wordpress.com/2016/04/08/al-qaeda-military-commander-and-head-of-security-of-al-jurah-in-damascus-both-killed-while-islamic-state-fighters-attack-the-neighborhood> (accessed 14 Apr. 2016). Amaq Agency (2016), "Islamic State Forces Advance in Damascus and 3 al-Qaeda Fighters Surrender Themselves", 9 Apr. 2016. Available at <https://amaqagency.wordpress.com/2016/04/09/islamic-state-forces-advance-in-damascus-and-3-al-qaeda-fighters-surrender-themselves> (accessed 14 Apr. 2016). Amaq Agency (2016), "Renewed advance by Islamic State forces at the expense of al-Qaeda fighters in Yarmouk Camp in Damascus, capturing new positions", 11 Apr. 2016. Available at <https://amaqagency.wordpress.com/2016/04/11/renewed-advance-by-islamic-state-forces-at-the-expense-of-al-qaeda-fighters-in-yarmouk-camp-in-damascus-capturing-new-positions> (accessed 14 Apr. 2016).

¹⁸⁶⁸ *Al-Nabā'* (22 Mar. 2016), No. 23, p. 9.

¹⁸⁶⁹ *Al-Nabā'* (12 Apr. 2016), No. 26, p. 5.

¹⁸⁷⁰ *Dābiq* No. 14 (Apr. 2016), "The Murtadd Brotherhood", p. 43.

¹⁸⁷¹ Ash-Shamālī, Abū Jarīr (2014), "Al-Qa'idah of Waziristan: A Testimony From Within", *Dābiq*, No. 6 (Dec.), p. 41.

¹⁸⁷² Amaq Agency (2016), "Development of Battles between Islamic State Forces and al-Qaeda Fighters in Southern Damascus", 14 Apr. 2016. Available at <https://amaqagency.wordpress.com/2016/04/14/development-of-battles-between-islamic-state-forces-and-al-qaeda-fighters-in-southern-damascus> (accessed 14 Apr. 2016).

¹⁸⁷³ Helmreich, Paul C. (1974), *From Paris to Sèvres: The Partition of the Ottoman Empire at the Peace Conference of 1919–1920*, Athens, Ohio University Press.

Balfour Declaration,¹⁸⁷⁴ a letter sent on 2 November 1917 from British foreign secretary, lord Arthur James Balfour, to lord Rothschild, with which the British government, after discussions within the cabinet and consultations with the Zionist Federation, decided to endorse publicly the establishment of a Jewish home in Palestine.

The term *Jihad* (Holy War) indicates a political-religious syncretic phenomenon which goes far beyond state borders traced by the victorious powers of World War I; it is the concept of the *Ummah* (community), intended as a supra-national entity, the homeland of all Muslims. The *Umma* represents the unity of all Muslims; it's the pan-Islamic concept of the Muslim nation. Westerners are still considered by some Muslims such as the crusaders against whom it is necessary to call the *Jihad*.

Daesh fights against the IEA as it deems the Taliban a nationalist movement¹⁸⁷⁵ which recognizes "the nationalist borders drawn out by the crusaders".¹⁸⁷⁶ Nevertheless, the organization founded by al-Baghdadi uses a typical Western term: "state". The Afghan *Mujahideen* mark the difference with the Islamic State, refusing to call it in this way, and naming it "Daesh",¹⁸⁷⁷ just like the most of the Western countries, including Turkey,¹⁸⁷⁸ used to do in the early days of it founding.

The Islamic State accuses the Afghan Taliban to have close relationships with the Iranian *rāfidī* (rejectors), who are considered enemies because they are Shiites.¹⁸⁷⁹ Yet, Iran has always condemned the Taliban, which the Tehran government considers a terrorist group, like Al-Qaeda and Daesh.¹⁸⁸⁰ According to the ISIS Emir of Khurāsān (Afghanistan and Pakistan), both the Taliban and al-Qaeda are "Pakistani intelligence-affiliated".¹⁸⁸¹ Saeed Khan accuses the Afghan Taliban to allow farmers and merchants to grow and sell opium, and asserts that the Taliban themselves transport opium and heroin in their personal vehicles.¹⁸⁸² The leader of the Taliban,

¹⁸⁷⁴ ICC (2010), Situation in Palestine. Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements, Office of the ICC Prosecutor, 3 May 2010, pp. 2 and 12. Available at <https://www.legal-tools.org/doc/af5abf/pdf> (accessed 30 Mar. 2016).

¹⁸⁷⁵ *Dābiq* No. 13, (Jan. 2016), "The Rāfidah, from Ibs Saba' to the Dajjāfil", p. 39.

¹⁸⁷⁶ Id., Interview With: The Wālī of Khurāsān, p. 51-52.

¹⁸⁷⁷ Shahamat (2015b), "Clarification by Islamic Emirate concerning clashes with Daesh in Zabul", 11 Nov. 2015. Available at <http://shahamat-english.com/clarification-by-islamic-emirate-concerning-clashes-with-deash-in-zabul/> (accessed 14 Dec. 2015).

¹⁸⁷⁸ Marsili (2016b), p. 91.

¹⁸⁷⁹ *Dābiq* No. 13 (Jan. 2016), pp. 39-40.

¹⁸⁸⁰ See: MFA of the Islamic Republic of Iran (2017), <http://en.mfa.ir> (accessed 26 Dec. 2017).

¹⁸⁸¹ *Interview With: The Wālī of Khurāsān*, p. 50-53.

¹⁸⁸² *Ibid.*

Akhtar Mansour, is referred to as one of the major dealers of these narcotics.¹⁸⁸³ Accusations against the Taliban, and against al-Qaeda and its Syrian branch, Jabhat al-Nusra, begin in the issue of *Dābiq* of December 2014.¹⁸⁸⁴

In March 2016, Daesh supporters come to blows with the Afghan Taliban. Amaq Agency, the Islamic State news agency, reports that Daesh fighters attacked the 'nationalist' Taliban. The clashes result in nine casualties and three Taliban members apprehended.¹⁸⁸⁵ Fighting keeps on and results in the killing of four Taliban, and the complete control by the ISIS militiamen over Nar' Awbah region in Dah Bala District, in the south of Nangarhar Province, Afghanistan, bordering on Pakistan.¹⁸⁸⁶ Curiously, Al Emarah, the official news agency of the Taliban, did not report the news.

The dispute between the leader of the Taliban, 'emir' Akhtar Muhammad Mansour, and the leader of the Islamic State, 'caliph' Abu Bakr al-Baghdadi, is like the one that took place between Trotsky and Stalin because of different political visions. Trotsky focused on the idea of a 'permanent revolution' on the world stage, while Stalin supported the idea of 'socialism in one country' to strengthen the Soviet Union.

A basic question between the two soviet leaders was: how to build socialism. According to Stalin and the Stalinists, the socialist revolution should be consolidated internally in the Union of Soviet Socialist Republics (USSR), as the country was internationally isolated by the failure of revolutionary attempts in other countries and the hostility of the capitalist world. This is the thesis of building 'socialism in one country'.

For Trotsky and the Trotskyists, the socialist revolution should be taken where capitalism was in crisis. Believed to be impossible the construction of socialism in the Soviet Union if it does not occur socialist victories in other countries, because if on the contrary, the capitalist countries would end up with the USSR. This is called the theory of 'permanent revolution', according to which socialism should be built on an international scale.

¹⁸⁸³ Ibid.

¹⁸⁸⁴ *Dābiq* No. 13 (Jan. 2016), pp. 40-55.

¹⁸⁸⁵ Amaq Agency (2016), "Islamic State Fighters Attack Taliban and Police Positions in Eastern Afghanistan", 30 Mar. 2016. Available at <https://amaqagency.wordpress.com/2016/03/30/islamic-state-fighters-attack-taliban-and-police-positions-in-eastern-afghanistan> (accessed 30 Mar. 2016).

¹⁸⁸⁶ Wilayat Khurasan Media Office/al-Battar Media Foundation (2016), "Taking control over Nar' Awbah region in (Dah Bala-Nangarhar) from Taliban nationalist movement", 22 Apr. 2016. Available at <https://justpaste.it/tior> (22 Apr. 2016)

In a letter to al-Baghdadi, *mullah* Akhtar Mohammad Mansour writes that "Afghanistan Islamic Emirates consider the defeat of the U.S. and NATO as the defeat of Crusades in all over the world",¹⁸⁸⁷ thus emphasizing the difference between the goals of the Taliban (the establishment of the Islamic Emirate only in Afghanistan) and the universalist claims of the caliphate of al-Baghdadi. The caliphate is a universal institution like the Empire and the Catholic Church. The caliphate is a syncretic concept of an entity in which the spiritual domain, that is claimed to be universal, coincides with the territorial domination.

Mansour recalls that "many times that people pretending to be Mujahideen have tried to ruin the image of the jihad and Mujahideen" and calls al-Baghdadi "to be very attentive towards such danger to avoid any other line in opposition to the exiting lines of Islamic Emirate" to avoid "hate and distance from Islamic state".¹⁸⁸⁸ The leader of the Taliban reminds that they "have already tested bad experience of jihad lines division and differences during Soviet invasion and their severe and bad implications which resulted in the waste of 14 years of jihad" and "strictly insist on the unity of jihad lines" according to the Koran, which "clearly forbid Muslims from divisions, differences and internal conflicts".¹⁸⁸⁹ These are political differences that arise from different interpretations of Islam, which is a state religion.

The invasion of Afghanistan, a sovereign state, in December 2001 due to harboring a terrorist organization (al-Qaeda), leads to the recognition of the latter as a subject of public international law.

The 'brotherly' clash between ISIS and IEA, takes place on a political level. The caliphate claims to be a global institution,¹⁸⁹⁰ under whose authority would fall also the IEA. Conceptually the emirate does not claim any moral, spiritual or economic primacy, but it's just a territorial entity which has the right to issue orders (Arabic: *amr*) within its jurisdiction; in this respect the Taliban call their leader *amir al-mu'minìn* (commander of the believers). Etymologically the emirate is the quality, dignity, office or territorial competence of any emir, on which, however, the Islamic State wishes to impose the supremacy of its global caliphate.¹⁸⁹¹

¹⁸⁸⁷ Mansoor, Akhtar Mohammad (2015), *Letter of Islamic Emirate's Leadership commission to the Distinguished Abu Bakr Al-Baghdadi*, 16 June 2015. Available at <http://justpaste.it/lscce> (accessed 18 Dec. 2015).

¹⁸⁸⁸ Ibid.

¹⁸⁸⁹ Ibid.

¹⁸⁹⁰ Marsili (2016b), p. 86.

¹⁸⁹¹ Ibid.

Contrary to the Islamic State of al-Baghdadi, the IEA was more or less successfully established in 1996, when the Taliban began their rule of Afghanistan,¹⁸⁹² and ended with their fall from power in 2001, after the U.S.-led NATO invasion of the country following the September 11 attacks. The Taliban government was recognized only by Pakistan, Saudi Arabia, and the UAE.¹⁸⁹³ Yet during the Taliban rule of Afghanistan there was no government in exile; therefore, it was the only authority, even at intergovernmental organizations.

Somehow, governments run the issue of terrorism. When, in February 2016, the major world powers reached an agreement on a nationwide cessation of hostilities in Syria, after peace talks in Munich, they excluded from the arrangement "terrorist" organizations such as ISIL or ANF, so fighting with those groups continued.¹⁸⁹⁴ The International Syria Support Group (ISSG), co-chaired by U.S. and Russia, decided to apply the ceasefire to any party engaged in military or paramilitary hostilities against any other parties other than Daesh, Jabhat al-Nusra, or other groups designated as terrorist organizations by the UN Security Council.¹⁸⁹⁵ Commenting the ceasefire, the Russian foreign minister, Sergey Lavrov, said that "terrorists are beyond the ceasefire".¹⁸⁹⁶ The terms of the ceasefire are consistent with UN Security Council Resolution 2254 and the statements of the ISSG.¹⁸⁹⁷ Consequently, military actions, including airstrikes, continue against ISIL, ANF, and other terrorist organizations designated by the SC.¹⁸⁹⁸ The classification of certain groups as terrorists, puts governments and international organizations in the impossibility to consider them interlocutors at the negotiating table, and does not facilitate the resolution of ongoing conflicts.

However, there are some inconsistencies in the behavior of the ISSG. Despite being widely designated as a terrorist organization, the ANF is allied with other groups, such as Salafists Jaysh al-Islam (Army of Islam) and Ahrar al-Sham (Harakat Ahrar ash-Sham al-

¹⁸⁹²Afghanistan (2017), *The World Factbook*, Washington, D.C., CIA. Available at <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>, updated: 18:12.2017 (accessed 27 May 2017).

¹⁸⁹³ Guelke, p. 55.

¹⁸⁹⁴ U.S. Department of State (2016d), "Statement of the International Syria Support Group", 11 Feb. 2016. Available at <http://www.state.gov/r/pa/prs/ps/2016/02/252428.htm> (accessed 12 Feb. 2016).

¹⁸⁹⁵ Ibid.

¹⁸⁹⁶ Lavrov, Sergey (2016), "Press Availability at the International Syria Support Group", Department of State, 12 Feb. 2016. Available at <http://www.state.gov/secretary/remarks/2016/02/252431.htm> (accessed 12 Feb. 2016).

¹⁸⁹⁷ U.S. Department of State (2016e), "Joint Statement of the United States and the Russian Federation, as Co-Chairs of the ISSG, on Cessation of Hostilities in Syria", 22 Feb. 2016. Available at <http://www.state.gov/r/pa/prs/ps/2016/02/253115.htm> (accessed 22 Feb. 2016).

¹⁸⁹⁸ Ibid.

Islamiyya): the first is blacklisted by Syria, Russia, Iran and Egypt, and the latter also by the UAE, both countries that are the closest allies of Washington in the region. While having joined with *jihadi* groups under the Army of Conquest operations room umbrella, Ahrar al-Sham is a major component of al-Jabhat al-Islāmiyyah (the Islamic Front), an alliance with other armed groups in northern Syria such as Jaysh al-Islam. On March 2016 Jabhat al-Nusra, Harakat Ahrar ash-Sham al-Islamiyya (Islamic Front) and Fajr al-Ummah (Army of the Ummah) announced their complete merging under the name Jaysh al-Fustat.

The U.S. said it was "gaining confidence" and working with Jaysh al-Islam and Ahrar al-Sham because "they fight a little bit against ISIL and they fight a little bit against the regime,"¹⁸⁹⁹ and because they were not designated by the UN as terrorist organizations inside Syria.¹⁹⁰⁰ Damascus accused the U.S. administration to use terrorism as "a political weapon against the Syrian government" and stressed that would be no solution to the issue of separating the moderate opposition and the terrorist organizations as long as there is a U.S. desire to hide the terrorists and cover for them by labeling them as "moderate opposition".¹⁹⁰¹

The U.S., Saudi and Qatari personnel trained in Turkey fighters who Damascus characterizes as "terrorists"¹⁹⁰² while Western governments and their allies call them "moderate opposition",¹⁹⁰³ which include Jaysh al-Islam, a group backed by Riyadh.¹⁹⁰⁴

Turkish president Erdoğan accused some countries, particularly the U.S., "to lend overt support, under various pretexts and through various word games, to terrorist organizations" in the region.¹⁹⁰⁵ Erdoğan said that Turkey, NATO, and the U.S. supports the Free Syrian Army, which

¹⁸⁹⁹ Warren, Steve (2016), "Department of Defense Press Briefing by Colonel Warren via teleconference from Baghdad, Iraq", DoD Press Operations, 11 Mar. 2016. Available at <http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/691794/departement-of-defense-press-briefing-by-colonel-warren-via-teleconference-from> (accessed 12 Mar. 2016).

¹⁹⁰⁰ Kirby, John (2016c), "Daily Press Briefing", Department of State, 12 Sept. 2016. Available at <http://www.state.gov/r/pa/prs/dpb/2016/09/261773.htm#> (accessed 14 Sept. 2016).

¹⁹⁰¹ Milhem, Rasha and Hazem Sabbagh (2016), "Al-Jaafari: The USA covering for terrorists by labeling them as 'moderate opposition'", SANA, 18 Sept. 2016. Available at <http://sana.sy/en/?p=88376> (accessed 31 Oct. 2016).

¹⁹⁰² Nassr, M. and Barry (2015), "Terrorists confess being trained in Turkey by US, Qatari and Saudi personnel", SANA, 6 July 2015. Available at <http://sana.sy/en/?p=47410> (accessed 31 Oct. 2016).

¹⁹⁰³ R.J. and Barry (2015), "U.S. sends 70 terrorists to Syria after training them in Turkey", SANA, 22 Sept. 2015. Available at <http://sana.sy/en/?p=55523> (accessed 31 Oct. 2016).

¹⁹⁰⁴ Manar, Hazem and Mazen (2015), "Foreign Ministry: Terrorism is outcome of generous support provided by countries like Turkey and Saudi Arabia to terrorist organizations", SANA, 28 Dec. 2015. Available at <http://sana.sy/en/?p=65124> (accessed 31 Oct. 2016).

¹⁹⁰⁵ Erdoğan, Recep Tayyip (2016), "The Coalition, Established against DAESH, Is Making No Contribution to Al-Bab Operation", Presidency of the Republic of Turkey, 29 Dec. 2016. Available at <https://www.tccb.gov.tr/en/news/542/69615/the-coalition-established-against-daesh-is-making-no-contribution-to-al-bab-operation.html> (accessed 3 Jan. 2017).

someone characterizes as "a terror organization".¹⁹⁰⁶ Erdoğan complained that Turkey was not receiving any bit of support for its ongoing al-Bab operation from either NATO or the "so-called allied countries that keep troops in the region".¹⁹⁰⁷ Then Erdoğan accused the Global Coalition partners to support terrorist organizations, YPG, PYD, and DAESH.¹⁹⁰⁸

While accusing Western powers to be behind Daesh,¹⁹⁰⁹ Turkey is accused to be the main source of weapons and military equipment for ISIS¹⁹¹⁰ and ANF.¹⁹¹¹ The Syrian government denounced the support provided by Turkey and Saudi Arabia to terrorist organizations as a flagrant violation of SC resolutions, mainly No. 2170, 2178, 2199 and 2253.¹⁹¹² The Security Council failed to pass draft resolution submitted by Russia demanding that all parties prevent material and financial support from reaching groups associated with Al-Qaida, Daesh or ANF.¹⁹¹³

The Russian foreign minister accused the U.S. to not separate the "moderate" Syrian opposition from terrorist groups like ANF to take cover behind other armed opposition groups with which Washington collaborates.¹⁹¹⁴ Moscow accused Washington of supporting "illegal armed groups that are hardly different from terrorists, for their own cause".¹⁹¹⁵ Erdoğan added that "[a] section of the U.S. administration insists on working jointly with the PKK/PYD-YPG terrorist organization in Syria and Iraq", while "another section tries to pursue policies that are

¹⁹⁰⁶ Ibid.

¹⁹⁰⁷ Ibid.

¹⁹⁰⁸ Erdoğan, Recep Tayyip (2016), "Coalition Powers are not Keeping Their Promises", Presidency of the Republic of Turkey, 27 Dec. 2016. Available at <https://www.tccb.gov.tr/en/news/542/69572/el-babda-kendi-gobegimiz-kendimiz-kesecegiz.html> (accessed 4 Jan. 2017).

¹⁹⁰⁹ Erdoğan, Recep Tayyip (2016), "We Should Eliminate These Bunches of Killers, Who Have No Other Skill than to Shed Muslims' Blood, from the Islamic World", Presidency of the Republic of Turkey, 17 Nov. 2016. Available at <https://www.tccb.gov.tr/en/news/542/61023/musulman-kani-dokmekten-baska-maharetleri-olmayan-katil-surulerini-islam-leminden-sokup-atmaliyiz.html> (accessed 19 Nov. 2016)

¹⁹¹⁰ Sabbagh, Hazem (2016), "Churkin: Turkey main source of weapons and equipment for ISIS", SANA, 1 Apr. 2016. Available at <http://sana.sy/en/?p=73456> (accessed 31 Oct. 2016).

¹⁹¹¹ Rudskoy, Sergei (2016), "Briefing by Chief of the Main Operational Directorate of the General Staff of the Russian Armed Forces Lieutenant General Sergei Rudskoy", Ministry of Defence of the Russian Federation, 11 Apr. 2016. Available at http://eng.mil.ru/en/news_page/country/more.htm?id=12082856@egNews (accessed 31 Oct. 2016).

¹⁹¹² Manar, Hazem and Mazen.

¹⁹¹³ UNSC and Russian Federation (2016), Draft Resolution S/2016/847 [on cessation of hostilities in the Syrian Arab Republic], 8 Oct. 2016.

¹⁹¹⁴ MFA of the Russian Federation (2016c), "Press release on Foreign Minister Sergey Lavrov's telephone conversation with US Secretary of State John Kerry, 30 Sept. 2016". Available at http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2481251 (accessed 1 Oct. 2016).

¹⁹¹⁵ MFA of the Russian Federation (2016a).

sympathetic" of Ankara sensitivities.¹⁹¹⁶ The inconsistencies of Washington and its allies reside in this double-cross.

On the other hand Washington accuses external actors, particularly Pakistan, Russia, and Iran, to support insurgent or terrorist groups inside Afghanistan.¹⁹¹⁷ According to the U.S. administration, Russia "has overtly lent legitimacy to the Taliban".¹⁹¹⁸

In a statement delivered a few hours before the failed military coup d'état of 15 July 2016, commenting on the terrorist attack of the previous day in Nice, Erdoğan reaffirmed that "there is no difference between Turkey and France, Iraq and Belgium, and Saudi Arabia and the United States" in the fight against terrorism.¹⁹¹⁹ According to the Turkish authorities, "the international community should not discriminate between terrorist organizations and must act with equal determination in preventing, suppressing, pursuing and prosecuting all terrorist groups, their members and activities".¹⁹²⁰ Yet, it is Ankara's government to admit that there is not a "clear-cut and comprehensive definition of terrorism".¹⁹²¹

The inconsistencies of Western governments, have been repeatedly denounced by Erdoğan, who has censured the attitude towards the PKK. The Turkish president has noted that the West "failed the test" on refugees and on distancing itself from terrorist organizations such as the PKK.¹⁹²² Turkey accuses Western countries of "double-standards and hypocrisy" for supporting the network of the PKK terrorist organization – including PYD, YPG and DHKP-C – in the name of freedom of expression.¹⁹²³

Syria's permanent representative to the UN, Bashar al-Jaafari, criticized Western countries' double-and multiple standards in dealing with the human rights issue, as those countries legitimize their violation of the human rights in other countries under the pretext of

¹⁹¹⁶ Erdoğan (1 Oct. 2016).

¹⁹¹⁷ Nicholson.

¹⁹¹⁸ Ibid.

¹⁹¹⁹ Erdoğan, Recep Tayyip (2016), "Statement by President Recep Tayyip Erdoğan on the Terror Attack in Nice, France", Presidency of the Republic of Turkey, 15 July 2016. Available at <https://www.tccb.gov.tr/en/speeches-statements/558/45654/statement-by-president-recep-tayyip-erdogan-on-the-terror-attack-in-nice-france.html> (accessed 15 July 2016).

¹⁹²⁰ MFA of Turkey (2011).

¹⁹²¹ MFA of Turkey (2015b), "What is terrorism? The problem of definition". Available at http://www.mfa.gov.tr/what-is-terrorism---the-problem-of-definition_en.mfa (accessed 1 Nov. 2015).

¹⁹²² Erdoğan, Recep Tayyip (2016), "We will overcome terrorism", Presidency of the Republic of Turkey, 21 Mar. 2016. Available at <https://www.tccb.gov.tr/en/news/542/41214/we-will-overcome-terrorism.html> (accessed 24 Mar. 2016).

¹⁹²³ Kalin (2016b).

protecting those rights.¹⁹²⁴ Al-Jaafari concluded that "terrorism as a political weapon to topple the legitimate regimes by force" under the pretext of fighting it.¹⁹²⁵

According to a Belgian criminal court, it is not sufficient to blacklist an entity to say that it is a terrorist organization, because those lists are inspired by geopolitical reasons.¹⁹²⁶

Following vetoes wielded by China and Russia, the UN Security Council failed to adopt draft resolutions on the conflict in Syria. A text, demanding a cessation of hostilities throughout the country, except where operations were ongoing against groups it deemed terrorists, failed.¹⁹²⁷ Venezuela's representative, which voted against the draft resolution, said a political solution must recognize the responsibility of the government of Syria to protect its people from terrorism, adding the conflict's humanitarian dimension had once again been politicized. While Russia and Syria were effectively fighting the terrorist threat, foreign intervention had handicapped the Syrian government's commitment to protect its people against terrorism. The representative of Syria, describing France, the UK, and the U.S. as the "three musketeers" defending terrorism, with the support of Turkey, Qatar and Saudi Arabia, asked where they had been when so-called moderate armed groups had bombed a Russian field hospital in western Aleppo. The government of Syria and its allies had upheld previous periods of calms, which terrorist groups had exploited in order to regroup and obtain more weapons and supplies so as to continue their crimes against the Syrian people.

Commenting previous SC Resolution 2178 (2014) Syria's representative at the United Nations criticized those who had supported armed groups in the country, and affirmed that "there are no good terrorists or bad terrorists".¹⁹²⁸

When the Security Council ultimately adopted Resolution 2336 (2016) supporting efforts by the Russian Federation and Turkey to end Syrian conflict, the representative of France expressed concern over which groups would be designated as terrorist groups.¹⁹²⁹ Turkish president Erdoğan added that "[t]error organizations should not be invited to the Astana

¹⁹²⁴ Zain, H. and Ghossoun (2016), "Al-Jaafari: Some countries exploit human rights issue to interfere in the other states' affairs", SANA, 14 July 2016. Available at <http://sana.sy/en/?p=82607> (accessed 31 Oct.2016).

¹⁹²⁵ R.J., R. Raslan and Ghossoun (2016), "Al-Jaafari: Terrorist war on Syria disclosed fragility of international law", SANA, 19 Sept. 2016. Available at <http://sana.sy/en/?p=88431> (accessed 31 Oct. 2016).

¹⁹²⁶ *Prosecutor v. The Turkish State and Others*, p. 11.

¹⁹²⁷ UNSC (2016), Egypt, New Zealand and Spain: Draft Resolution S/2016/1026, 5 Dec. 2016.

¹⁹²⁸ UNSC (2014), "Security Council Unanimously Adopts Resolution Condemning Violent Extremism, Underscoring Need to Prevent Travel, Support for Foreign Terrorist Fighters", SC/11580, 24 Sept. 2014. Available at <https://www.un.org/press/en/2014/sc11580.doc.htm> (accessed 20 Dec. 2017).

¹⁹²⁹ UNSC, The situation in the Middle East, 31 Dec. 2016, S/PV.7855, p. 3.

summit"¹⁹³⁰ on a political settlement established by resolution between the Syrian government and opposition representatives. Erdoğan was referring to PYD, YPG, which are considered a terrorist organization by the Turkish authorities, but not by the U.S. and NATO allies.

When in April 2017 the Security Council rejected a draft resolution that would have condemned the reported chemical weapons attack on the Syrian town of Khan Shaykhun, and expressed its determination to hold the perpetrators accountable, Syria's representative said that had sent 90 letters to OPCW about terrorist groups' involvement with chemical weapons and other arms.¹⁹³¹ Russia and China vetoed once again the resolution. The Russian representative described a previous draft resolution of February 2017,¹⁹³² intended to impose sanctions for use of chemical weapons in Syria, which was vetoed by Beijing and Moscow, as a politically motivated text.¹⁹³³

JIHAD, TERRORISM AND GOVERNMENT. THE CASE OF HEZBOLLAH AND HAMAS

After analyzing similarities and differences in 'extra-parliamentary' movements – ISIS, al-Qaeda and the Taliban – a separate reasoning must be made for *jihadist* organizations that are represented in state institutions more or less widely internationally legitimized. Hereafter we scrutinize the case of two Middle East organizations, Hezbollah ("Party of Allah" or "Party of God") and the Islamic Resistance Movement (Hamas), both backed by Iran. The first is a radical Islamic Shiite organization based in Lebanon, and the latter is a Sunni movement based in Gaza.¹⁹³⁴

Moscow, Beijing and Tehran declined to include Hezbollah and Hamas in their list of terrorist organizations. The Russian government, which strongly defends the Assad regime, supports both politically and militarily Tehran, which according to the U.S. Department of State

¹⁹³⁰ Erdoğan (27 Dec. 2016).

¹⁹³¹ UNSC (2017), "Security Council Fails to Adopt Resolution Condemning Chemical Weapons Use in Syria, Following Veto by Russian Federation", SC/12791, 12 Apr. 2017. Available at <https://www.un.org/press/en/2017/sc12791.doc.htm> (accessed 20 Dec. 2017).

¹⁹³² UNSC, Draft resolution S/2017/172 [on use of chemical weapons in the Syrian Arab Republic], 28 Feb. 2017.

¹⁹³³ UNSC, SC/12737 of 28 Feb. 2017.

¹⁹³⁴ Marsili (2016b), p. 92.

is a state sponsor of terrorism.¹⁹³⁵ Moscow has a strong alliance with Beijing, and, together with Tehran, they constitute a strong axis supporting the Syrian government.

When, in September 2016, the U.S. and Russia reached an agreement on Syria to defeat Daesh and al-Nusra, which has re-branded itself Jabhat Fateh al-Sham the previous July, Hezbollah was not included among the targets, as not blacklisted by the UN.¹⁹³⁶ As a matter of fact, this agreement only applies to a UN designated terrorist: Hezbollah is blacklisted by Washington but not by the UN. Therefore, according to the FATF Report 2014, both Hamas and Hezbollah are terrorist entities. Oddly, Hezbollah and Hamas, both blacklisted by the EU and the U.S., which are allies of Turkey within NATO, are not considered terrorist organizations by Ankara.¹⁹³⁷ This is one of the typical inconsistencies of governments, which blacklist according to their interests or their religious beliefs – is the case of Turkey with Hezbollah and Hamas – that are also political issues, as the Islamic religion does not allow a separation between faith and politics.

While participating in the Parliament of Lebanon and in the cabinet, Hezbollah (also transliterated Hizballah, Hizbollah, Hizbullah) deployed fighters in Syria to support the Damascus regime in the ongoing conflict. The Syrian-Iranian backed organization led by Hassan Nasrallah is not just a political party or a military strength: it operates a satellite television station, Al-Manar TV (the Lighthouse); a radio station, al-Nour (the Light); provides social services, educational facilities, hospitals, clinics, and supports economic and infrastructure development projects. Thus, we can define Hezbollah "a state within a state".

The classification of Hezbollah as a whole as a terrorist organization is disputed, as its status as a legitimate political party, a terrorist group, a resistance movement, or some combination thereof is a contentious issue. Some governments make a distinction between Hezbollah's political and a military wing, classifying only the latter as a terrorist organization.¹⁹³⁸ For most of the Arab and Muslim world, Hezbollah is considered an anti-Zionist resistance movement, engaged in national defense against the illegitimate State of Israel.

¹⁹³⁵ Ibid.

¹⁹³⁶ Kirby (2016c).

¹⁹³⁷ TNP (2016c).

¹⁹³⁸ The U.S., France, the GCC, Australia, Canada, the Netherlands, and Israel have classified Hezbollah as a terrorist organization. The EU, New Zealand and the UK have proscribed Hezbollah's military wing, but do not list Hezbollah as a whole as a terrorist organization.

Also the characterization of Hamas as a terrorist organization is disputed. The Islamic Resistance Movement is designated a terrorist organization by Canada, Israel, Egypt, Japan,¹⁹³⁹ the U.S., and the EU. Australia and the UK have designated only the military wing of Hamas, the Izz ad-Din al-Qassam Brigades, as a terrorist organization. Hamas is banned in Jordan, but is not regarded a terrorist organization by Iran, Russia, Norway, Switzerland, Brazil, Turkey, China, and Qatar, just to mention a few.

Section (b) of General License 4 issued pursuant to the Global Terrorism Sanctions Regulations (31 C.F.R. Part 594), the Terrorism Sanctions Regulations (31 C.F.R. Part 595), and the Foreign Terrorist Organizations Sanctions Regulations (31 C.F.R. Part 597) authorize U.S. financial institutions to reject transactions with members of the Palestinian Legislative Council (PLC) who were elected to the PLC on the party slate of Hamas.

When the Council of the European Union adopted a Common Position¹⁹⁴⁰ and a Regulation¹⁹⁴¹ to combat terrorism, the same day adopted its first decision¹⁹⁴² establishing a list of terrorist organizations, which includes Hamas and its military wing Al-Qassam Brigades.¹⁹⁴³ These measures require the freezing of the funds of individuals and entities enlisted. Hamas contested its inclusion in the list and brought the case before the General Court (EGC), which annulled the measures. The ECG argued that the measures were based not on acts examined and confirmed in decisions of competent authorities but on factual imputations derived from the press and the Internet. The Court found that the EU decision to freeze funds was based not on factual elements that the Council may have derived from the press or the Internet, but on

¹⁹³⁹ MOFA of Japan (2005), *Diplomatic Bluebook 2005*, Tokyo, MOFA of Japan, p. 138.

¹⁹⁴⁰ Council Common Position of 27 Dec. 2001 on the application of specific measures to combat terrorism, OJ 2001 L344, p. 93.

¹⁹⁴¹ Council Regulation (EC) No. 2580/2001 of 27 Dec. 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 2001 L344, p. 70.

¹⁹⁴² Council Decision of 27 Dec. 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No. 2580/2001, OJ 2011 L344, p. 83.

¹⁹⁴³ On 31 Jan. 2011, the Council adopted Decision 2011/70/CFSP updating the list of persons, groups and entities subject to Art. 2, 3 and 4 of Common Position 2001/931 on the application of specific measures to combat terrorism (OJ 2011 L28, p. 57), whereby it maintained the applicant on the list, and Implementing Regulation (EU) No. 83/2011 implementing Art. 2(3) of Regulation No. 2580/2001 and repealing Implementing Regulation No. 610/2010 (OJ 2011 L28, p. 14). On 2 Feb. 2011, the Council published in the *OJ* a Notice for the attention of the persons, groups and entities on the list provided for in Art. 2(3) of Regulation No. 2580/2001 (OJ 2011 C33, p. 14).

elements which have been concretely examined and confirmed in decisions of national competent authorities within the meaning of the Common Position.¹⁹⁴⁴

As a result the General Court annulled the contested measures while temporarily maintaining their effects for three months, or, if an appeal was brought before the Court of Justice,¹⁹⁴⁵ until this appeal was closed, in order to ensure the effectiveness of any possible future freezing of funds. The Court stressed that those annulments, on fundamental procedural grounds, do not imply any substantive assessment of the question of the classification of Hamas as a terrorist group within the meaning of the Common Position. Arises, therefore, the question of the methodology by which an organization is blacklisted, and the impact of CT financial measures. The role of the courts will prove to be increasingly essential in ensuring respect for fundamental rights, against political arbitrariness of governments and their organizations.

In the Arab and Muslim world, Hamas is considered a legitimate political actor.¹⁹⁴⁶ Khaled Meshal, who was the head of Hamas political bureau since 2004 until 2017, and a member of the Muslim Brotherhood (MB) since 1971, was welcomed in the capitals of nations supporting the activities of Hamas.¹⁹⁴⁷ Meshal met the Saudi king Salman bin Abdul-Aziz,¹⁹⁴⁸ and visited Riyadh.¹⁹⁴⁹ Russian president, Dmitry Medvedev,¹⁹⁵⁰ and Russian foreign minister, Sergey Lavrov,¹⁹⁵¹ met Meshal abroad. Turkish president Erdoğan received him twice at the presidential complex in Ankara.¹⁹⁵² Erdoğan, who had already met Meshal several times while

¹⁹⁴⁴ *Hamas v. Council of the European Union*, Case T-400/10, EGC, Second Chamber, 17 Dec. 2014, ECLI:EU:T:2014:1095.

¹⁹⁴⁵ An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

¹⁹⁴⁶ OIC (2016d), "OIC Secretary General Receives Khaled Meshal, Leader Of Hamas Political Office", 7 Jan. 2016. Available at http://www.oic-oci.org/oicv3/topic/?t_id=3179&ref=1375&lan=en (accessed 24 Oct. 2016).

¹⁹⁴⁷ Marsili (2016b), p. 96.

¹⁹⁴⁸ Browning, Noah (2015), "Hamas chief and Saudi king hold rare meeting: Hamas source", Reuters, 17 Aug. 2015. Available at <http://www.reuters.com/article/2015/07/17/us-saudi-palestinians-idUSKCN0PROJN20150717> (accessed 17 Aug. 2015).

¹⁹⁴⁹ Hamas (2015a), "Meshal: Saudi Arabia's visit a step in the right direction", 24 July 2015. Available at <http://hamas.ps/en/post/110/meshal-saudi-arabia-s-visit-a-step-in-the-right-direction> (accessed 24 July 2015).

¹⁹⁵⁰ The Kremlin (2010), "Dmitry Medvedev met with Hamas leader Khaled Meshal", 11 May 2010. Available at <http://en.kremlin.ru/events/president/news/7714> (accessed 7 Feb. 2016).

¹⁹⁵¹ MFA of the Russian Federation (2015), "Press release on Foreign Minister Sergey Lavrov's meeting with Head of HAMAS Politburo Khaled Meshal", 3 Aug. 2015. Available at http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/1629757 (accessed 7 Feb. 2016).

¹⁹⁵² Presidency of the Republic of Turkey (2015a), "President Erdoğan Receives Hamas Political Bureau Leader Meshal", 12 Aug. 2015. Available at <http://www.tccb.gov.tr/en/news/542/34084/president-erdogan-receives-hamas-political-bureau-leader-meshaal.html> (accessed 12 Aug. 2015). See also: Presidency of the Republic of Turkey (2015b), "Hamas Political Bureau Leader Meshal at the Presidential Complex", 14 Sept. 2015. Available at

serving as the prime minister of Turkey, does not mention Hamas among the terrorist organizations, while including:¹⁹⁵³ Daesh, al-Qaeda, Boko Haram, PKK, PYD, YPG, and DHKP-C.

Hamas is a legitimate ruling party since the 2006 Palestinian legislative election, when it won a majority and formed a cabinet, later dissolved and followed by a national unity government with Fatah. By changes in geopolitical circumstances, in 2015 the State of Palestine obtained recognitions from many of Western governments, including Russia.¹⁹⁵⁴ Hamas political objectives are connected with territorial claims: the creation of an Islamic state in Palestine, in place of Israel and the Palestinian Territories, and the liberation of the land occupied by Israel, on which weighs the uncertainty of recognition as legitimate state. The Palestinian territories have been suffering the Israeli occupation since 1967,¹⁹⁵⁵ even if the right of the Palestinian people to self-determination and independence has been recalled by many UN General Assembly resolutions.¹⁹⁵⁶

Just like Hezbollah, Hamas' funds are provided by Islamic charity organizations, Muslim Brotherhood, Iran, and the Gulf States. Hamas has a welfare wing providing social services to Palestinians in the Gaza Strip, including running relief programs and funding schools, orphanages, mosques, healthcare clinics, libraries, mosques, soup kitchens, sports leagues and education centers for women. It also builds nurseries and kindergartens and supervises religious schools which provide free meals to children. Hamas runs also its own official satellite television station, Al-Aqsa TV, broadcasting from the Gaza Strip.

Hamas was founded in 1987 as an offshoot of the Society of the Muslim Brothers,¹⁹⁵⁷ shortened to the Muslim Brotherhood, a transnational Sunni organization founded in Egypt. The

<http://www.tccb.gov.tr/en/news/542/34357/hamas-siyasi-buro-sefi-mesal-cumhurbaskanligi-kulliyesinde.html> (accessed 7 Feb. 2016).

¹⁹⁵³ Erdoğan, Recep Tayyip (2015), "G20 adopted a strong position in its stand against terrorism", Presidency of the Republic of Turkey, 16 Nov. 2015. Available at <http://www.tccb.gov.tr/en/news/542/36013/g20-adopted-a-strong-position-in-its-stand-against-terrorism.html> (accessed 7 Feb. 2016).

¹⁹⁵⁴ Marsili (2016a), pp. 167-8.

¹⁹⁵⁵ OHCHR (2017a).

¹⁹⁵⁶ UNGA Resolutions: A/RES/49/149, adopted on 7 Feb. 1995; A/RES/50/140, adopted on 30 Jan. 1996; A/RES/51/82, adopted on 26 Feb. 1997; A/RES/52/114, adopted on 19 Feb. 1998; A/RES/53/136 adopted on 1 Mar. 1999.

¹⁹⁵⁷ Pina, Aaron D. (2006), *Fatah and Hamas: the New Palestinian Factional Reality*, CRS Report for Congress RS22395, Washington, D.C., CRS, p. 2-3.

case of Muslim Brothers, which was addressed in a previous paper,¹⁹⁵⁸ deserves a thorough analysis.

THE MUSLIM BROTHERHOOD: FROM GOVERNMENT TO TERRORISM

The Egyptian Revolution of 2011, part of the so called ‘Arab Spring’, saw the overthrow of President Hosni Mubarak, who was imprisoned and eventually released after six years of detention, without any conviction,¹⁹⁵⁹ and the seizure of power by the Muslim Brothers. Mohamed Morsi, at that time head of the Muslim Brotherhood, sworn in as fifth and first democratically elected president of Egypt, and served from 30 June 2012 to 3 July 2013, when was ousted by defense minister and commander-in-chief of the Armed Forces, Abdel Fattah el-Sisi. In 2014 el-Sisi ran for presidential elections, that were held without the participation of most political parties, and won over his sole opponent.

Following a September 2013 ruling that banned all MB activities,¹⁹⁶⁰ the Egyptian government authorized the social solidarity minister, Ahmed Borai, to remove the organization from the list of registered NGOs.¹⁹⁶¹ All MB properties were sorted, and the Egyptian cabinet put in place measures to implement a court order to dissolve the group. In February 2014, the Cairo Court for Urgent Matters ruled that the Muslim Brotherhood is a terrorist organization.¹⁹⁶² The court motivated the decision on the basis of crimes that the MB was carrying out against the Egyptian people. Morsi and high-echelon MB leaders were accused of "terrorism and plotting with foreign militants against Egypt".¹⁹⁶³ The MB was officially declared a terrorist group in April 2014,¹⁹⁶⁴ by implementing the decision of the Court for Urgent Matters.¹⁹⁶⁵ The Egyptian

¹⁹⁵⁸ Marsili (2016b).

¹⁹⁵⁹ MENA (2017a), "Prosecution releases Mubarak", 13 Mar. 2017. Available at <https://www.mena.org/en/news/dbcall/table/textnews/id/6688461> (accessed 24 Mar. 2017).

¹⁹⁶⁰ SIS (2013), "An Egyptian Court bans all Muslim Brotherhood activities", 23 Sept. 2013. Available at <http://www.sis.gov.eg/Story/79216?lang=en-us> (accessed 29 Dec. 2016).

¹⁹⁶¹ SIS (2014a), "Cabinet to remove MB from list of NGOs", 13 Aug. 2014. Available at <http://www.sis.gov.eg/Story/79217?lang=en-us> (accessed 29 Dec. 2016).

¹⁹⁶² SIS (2014b), "Court blacklists MB as terrorist group", 13 Aug. 2014. Available at <http://www.sis.gov.eg/Story/79215?lang=en-us> (accessed 29 Dec. 2016).

¹⁹⁶³ SIS (2014c), "Government officially declares Muslim Brotherhood terrorist group", 11 Apr. 2014. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=77152#.VdJmrmAy3jI> (accessed 17 Aug. 2015).

¹⁹⁶⁴ Ibid.

cabinet implemented the court ruling which banned all the activities of the Muslim Brotherhood, its group and society,¹⁹⁶⁶ and formed an independent committee for running the MB funds and real estate that had been frozen.¹⁹⁶⁷

At the end of 2014, the Prosecutor General of Egypt filed a lawsuit against Hamas' military wing Al-Qassam Brigades, intending to declare Hamas a terrorist organization and to ban its activity. Hamas claimed that the directive to the Prosecutor General originated from Egyptian president el-Sisi¹⁹⁶⁸ The move of Egypt's Prosecutor General came after a series of terror attacks in northern Sinai. Former members of the dissolved Ansar Bait al-Maqdis, who established the Sinai Province of ISIL or Wilayat Sinai, claimed responsibility, but according to Egyptian intelligence, Hamas was actively involved the attack by smuggling explosives and fighters through Gaza's tunnels.¹⁹⁶⁹ The Islamic Resistance Movement denied connection to any attack in the Sinai Peninsula.¹⁹⁷⁰

That said, it may sound quite unusual that, in January 2017, the leaders of Hamas politbureau visited general Khaled Faozi, the minister of the Egyptian General Intelligence.¹⁹⁷¹ After the visit, deputy head of Hamas' political bureau, Ismail Haniyeh, said that the Palestinian-Egyptian relations would have experienced an "ideal shift".¹⁹⁷²

The only countries designating the MB a terrorist organization are: Russia (12 Feb. 2003), Syria (21 Oct. 2013), Egypt (25 Dec. 2013), Saudi Arabia (7 Mar. 2014) and United Arab

¹⁹⁶⁵ SIS (13 Aug. 2014), *Court blacklists MB as terrorist group*.

¹⁹⁶⁶ SIS (2014d), "Cabinet reiterates commitment to ban MB activities", 13 Aug. 2014. Available at <http://www.sis.gov.eg/Story/79218?lang=en-us> (accessed 29 Dec. 2016).

¹⁹⁶⁷ Ibid.

¹⁹⁶⁸ Menachem, Yori Ben (2014), "Egyptian President al-Sisi vs. Hamas", *Institute for Contemporary Affairs*, Vol. 14, No. 40, Jerusalem, The Jerusalem Center For Public Affairs. Available at <http://jcpa.org/article/al-sisi-vs-hamas> (accessed 10 June 2015).

¹⁹⁶⁹ SIS (2015a), "Court announces reasons behind lifetime sentence against Morsi and death sentences against 16 MB leaders", 29 June 2015. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=94137#.VdxplWYy3jI> (accessed 17 Aug. 2015). See also: SIS (2015b), "CCC sentenced to death ousted president Morsi over jail break charges during Jan. Revolution", 16 June 2015. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=94001#.Vdxqf2Ay3jI> (accessed 17 Aug. 2015).

¹⁹⁷⁰ Hamas (2015b), "Al-Qassam denies Israeli allegations of Sinai involvement", 5 July 2015. Available at <http://hamas.ps/en/post/89/al-qassam-denies-israeli-allegations-of-sinai-involvement> (accessed 17 Aug. 2015). See also: Hamas (2015c), "A press statement on PA's Foreign Minister Maliki's allegations", 5 July 2015. Available at <http://hamas.ps/en/post/88/a-press-statement-on-pa's-foreign-minister-maliki's-allegations> (accessed 17 Aug. 2015).

¹⁹⁷¹ Hamas (2017a), "Press release concerning latest visit to Egypt", 26 Jan. 2017. Available at <http://hamas.ps/en/post/499/press-release-concerning-latest-visit-to-egypt> (accessed 28 Jan. 2017).

¹⁹⁷² Hamas (2017b), "Haniyeh: Relations with Egypt will experience ideal shift", 28 Jan. 2017. Available at <http://hamas.ps/en/post/500/haniyeh-relations-with-egypt-will-experience-ideal-shift> (accessed 30 Jan. 2017).

Emirates (9 Mar. 2014). The Supreme Court of Russia banned the Muslim Brotherhood, accusing the group of supporting Islamist rebels who want to create an Islamic entity in the North Caucasus. Saudi Arabia blacklisted the Muslim Brotherhood along with two al-Qaeda-linked groups fighting in Syria: Jabhat al-Nusra, which was then al-Qaeda's official Syrian affiliate, and the Islamic State of Iraq and the Levant (ISIL), later self-renamed Islamic State, which has disowned al-Qaeda.¹⁹⁷³ In November 2015, a bill that designates the Muslim Brotherhood as a terror organization was introduced in the Congress by Rep. Mario Diaz-Balart.¹⁹⁷⁴ The legislation was not enacted by the end of the 114th Congress, and in 2017 was re-introduced by its sponsor in the House of Representatives.¹⁹⁷⁵ Ayman al-Zawahiri, who serves as current leader of al-Qaeda after Osama bin Laden's death, joined the Muslim Brotherhood.¹⁹⁷⁶

In an article published in its *Dābiq* propaganda magazine, the Islamic State accuses the MB of calling to pacifism and censuring terrorism rather than calling the Muslims to *jihad*.¹⁹⁷⁷ The Muslim Brotherhood is named “a cancer”, and is accused of “hodgepodge of deviance bequeathed by the Ottomans combined with the various tenets and rites of democracy, liberalism, pacifism, and socialism borrowed from the pagans of the West and the East”, namely of apostasy.¹⁹⁷⁸ The Islamic State accused the MB: of promoting liberal secularism or Marxist atheism through the acknowledgment of pluralism and constitutional rule within a democratic framework;¹⁹⁷⁹ of protecting and ensuring the safety of Jewish citizens of Egypt and Coptic Christians;¹⁹⁸⁰ of cooperation with Western governments and supporting Iran.¹⁹⁸¹

The assessments of the Muslim Brotherhood by the Islamic State, by the Egyptian government and its allies, and by Western governments, confirms the inconsistency with which the status of a terrorist is attributed. In fact, it is based on mere geopolitical assessments.

The nations that have blacklisted the Muslim Brotherhood are those that praised the crackdown against Islamists put in place by el-Sisi, who came to power after the military coup

¹⁹⁷³ MENA (2014a), “Saudi Arabia declares MB, three other militant groups terrorist organizations”, 7 Mar. 2014. Available at <https://www.mena.org.eg/en/news/dbcall/table/webnews/id/596104> (accessed 23 Apr. 2015).

¹⁹⁷⁴ *Muslim Brotherhood Terrorist Designation Act of 2015* (H.R. 3892).

¹⁹⁷⁵ *Muslim Brotherhood Terrorist Designation Act of 2017* (H.R. 377).

¹⁹⁷⁶ Wright, Lawrence (2006), *The Looming Tower: Al-Qaeda and the Road to 9/11*, New York, Alfred A. Knopf, p. 37.

¹⁹⁷⁷ *Dābiq* No. 14 (Apr. 2016), pp. 36-37.

¹⁹⁷⁸ *Id.*, p. 28.

¹⁹⁷⁹ *Id.*, pp. 33-35.

¹⁹⁸⁰ *Id.*, p. 31-32.

¹⁹⁸¹ *Id.*, p. 30.

d'état that deposed Morsi. The new Egyptian government urged the European Union "not to deal with illegal entities affiliated to the terrorist Muslim Brotherhood group".¹⁹⁸² The move is motivated by the fact that the EU¹⁹⁸³ and many European governments, including the UK¹⁹⁸⁴ and Germany,¹⁹⁸⁵ does not consider the MB a terrorist entity. Members of the Commonwealth of Nations, such as Australia,¹⁹⁸⁶ New Zealand¹⁹⁸⁷ and Canada,¹⁹⁸⁸ do not proscribe the MB. Among the allies of Western powers that do not deem the MB a terrorist entity, remember Japan.¹⁹⁸⁹

The Muslim Brothers are at the bottom of the pyramid by which Vidino represents a "tripartite threat from radical Islam" in Europe.¹⁹⁹⁰ At the top of the pyramid, Vidino places the violent *jihadists*; below them there are the "peaceful revolutionaries".¹⁹⁹¹ Finally, at the base of the pyramid, the largest section, are the groups that publicly support democracy and the integration of Muslims in Europe, but that actually work to radicalize them.¹⁹⁹²

The "peaceful revolutionaries" are non-violent individuals who believe that Islam is the solution to political, economic, cultural and social problems.¹⁹⁹³ Vidino finds that most of them are "highly educated young professionals who are second-generation Muslim immigrants in

¹⁹⁸² MENA (2015a), "Egypt urges EU not to deal with terrorist Brotherhood entities", 4 Feb. 2015. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=89362#.VdJnBmAy3jI> (accessed 17 Aug. 2015).

¹⁹⁸³ Council Decision (CFSP) 2015/1334 of 31 July 2015 updating and amending the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2015/521, OJ L206/61-63 of 1 Aug. 2015.

¹⁹⁸⁴ UK Home Office (2017), "Proscribed Terrorist Organisations", updated: Dec. 2017. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/670599/20171222_Proscription.pdf (accessed 23 Dec. 2017)

¹⁹⁸⁵ German Federal Ministry of the Interior (2017), *2016 Annual Report on the Protection of the Constitution: Facts and Trends*, Berlin, Federal Ministry of the Interior, p. 21.

¹⁹⁸⁶ Australian National Security (2017), "Listed terrorist organisations". Available at <https://www.nationalsecurity.gov.au/listedterroristorganisations/pages/default.aspx> (accessed 20 Dec. 2017).

¹⁹⁸⁷ New Zealand Police (2017), "Designated terrorist entities. Lists associated with Resolution 1373". Available at <http://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolution-1373> (accessed 10 Feb. 2016).

¹⁹⁸⁸ Public Safety Canada (2016), "National Security. Counter-terrorism. Listed Terrorist Entities. Currently listed entities", modified: 28.12.2016. Available at <https://www.publicsafety.gc.ca/cnt/ntnl-scrnt/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-en.aspx> (accessed 20 Dec. 2017).

¹⁹⁸⁹ MOFA of Japan (2002), "Implementation of the Measures including the Freezing of Assets against Terrorists and the Like", (5 July 2002). Available at <http://www.mofa.go.jp/announce/announce/2002/7/0705.html> (accessed 20 Dec. 2017).

¹⁹⁹⁰ Vidino, Lorenzo (2009), "Islamism and the West: Europe as a Battlefield", *Totalitarian Movements and Political Religions*, Vol. 10, No. 2 (June), p. 167. DOI: 10.1080/14690760903192081.

¹⁹⁹¹ Ibid.

¹⁹⁹² Id., p. 168.

¹⁹⁹³ Id., p. 170.

Europe".¹⁹⁹⁴ They do not openly endorse violence, primarily in order to avoid closer scrutiny and crackdowns by the authorities, and provide powerful ideological tools to radicalize Muslims through literature and speeches stating that Islam is under attack and Muslims have a duty to defend it by establishing a worldwide caliphate.¹⁹⁹⁵ So here comes the Islamophobic vision denounced by Erdoğan.

At the bottom of the pyramid, Vidino places the largest Islamic group in Europe: the Muslim Brotherhood and “participationists”.¹⁹⁹⁶ The Italian scholar distinguishes such organizations, that avoid confrontation and opted for a policy of engagement with the European establishment, from *jihadists* and “peaceful revolutionaries”. Vidino considers that groups such as the MB are likely supported by Western governments.¹⁹⁹⁷ Vidino warns about organizations which reject all forms of violence and show themselves as the moderate face of Islam: by this way, they are able to establish preferential relationships with European elites, which can consider them as partners in the struggle against radicalization.¹⁹⁹⁸ Vidino wonders if the "so-called 'moderate' Islamists, such as the Muslim Brotherhood" are "reliable partners in finding a solution to radicalism".¹⁹⁹⁹

In recent years the Muslim Brotherhood changed its strategy and has always condemned as criminal and unjustifiable any terrorist attack, rejecting and denouncing all kind of violence.²⁰⁰⁰ This position is shared by the Freedom and Justice Party (*Ḥizb Al-Ḥurriya Wal-ʿAdala*), an offshoot of the MB founded in 2011. The Freedom and Justice Party was banned and dissolved by order of the Egyptian Supreme Administrative Court on 9 August 2014, after the MB organization’s activities were banned by an Egyptian Court in September 2013,²⁰⁰¹ and afterwards prohibited by the government.²⁰⁰²

¹⁹⁹⁴ Ibid.

¹⁹⁹⁵ Ibid.

¹⁹⁹⁶ Id., p. 171.

¹⁹⁹⁷ Ibid.

¹⁹⁹⁸ Id., p. 172-174.

¹⁹⁹⁹ Id., p. 175.

²⁰⁰⁰ See: Ikhwanweb.com, the Muslim Brotherhood's Official English Web Site.

²⁰⁰¹ MENA (2014b), “An Egyptian Court bans all Muslim Brotherhood activities”, 13 Aug. 2014. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?ArtID=79216#.VdJm62Ay3jI> (accessed 17 Aug. 2015).

²⁰⁰² MENA (2014c), "Cabinet reiterates commitment to ban MB activities", 13 Aug. 2014. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticles.aspx?CatID=2885#.VdZE6mAy3jI> (accessed 17 Aug. 2015).

Russia supported el-Sisi after the coup and offered Egypt a huge military weapons deal after the United States suspended some military aid and postponed weapons delivery to Egypt.²⁰⁰³ The U.S., which has not proscribed the MB, took an ambiguous position: Washington refused to characterize el-Sisi's act as a coup d'état, but decided to frozen military supply. Many foreign governments consider el-Sisi as a bulwark against Islamic extremists in the region. Saudi Arabia, Kuwait and the United Arab Emirates gave more than 20 billion USD to support Egypt in the aftermath of Morsi's overthrow.²⁰⁰⁴

King Abdullah of Saudi Arabia has been reported to be the first head of state to send a message of congratulations to interim Egyptian president, Adly Mansour: "We strongly shake hands with the men of all the armed forces, represented by General Abdel Fattah El Sisi".²⁰⁰⁵ The minister of foreign affairs and international cooperation of the United Arab Emirates, Abdullah bin Zayed Al Nahyan, declared that his government was "satisfied" with the developments in Egypt. Al Nahyan also praised the Egyptian army as a "strong shield" and a "protector".²⁰⁰⁶

After the coup, ousted president Morsi and the majority of Brotherhood leaders have been imprisoned and referred to criminal court by prosecutors for different charges. In Egypt a wide and vaguely-defined range of terrorism-related offences not necessarily resulting in death are punishable by death.²⁰⁰⁷ The new anti-terror law adopted in August 2015²⁰⁰⁸ has been criticized

²⁰⁰³ MENA (2014d), "Putin, Sisi agree to enhance military cooperation", 12 Aug. 2014. Available at <https://www.mena.org.eg/en/news/dbcall/table/webnews/id/870813> (accessed 23 Apr. 2015).

²⁰⁰⁴ MENA (2014e), "President Sisi holds talks with Saudi King", (21 June 2014. Available at <https://www.mena.org.eg/en/news/dbcall/table/webnews/id/789301> (accessed 23 Apr. 2015).

²⁰⁰⁵ *Al Arabiya* (2013), "Saudi King Congratulates Egypt's New Interim President", 4 July 2013. Available at <http://english.alarabiya.net/en/News/middle-east/2013/07/04/Saudi-king-congratulates-Egypt-new-interim-president.html> (accessed 23 Apr. 2015).

²⁰⁰⁶ *Ibid.*

²⁰⁰⁷ Such offences include: founding an organisation that opposes the state through use of violence aimed at causing harm, terror, ecological disaster or other social disruption; cooperation with a foreign country or organisation in carrying out or attempting a terrorist act; gang attacks on the people, armed resistance to authorities or seizure of government or public facilities, or leadership of a gang that would perform such activities; usurping military authority or leading armed gangs for criminal purposes (such as plundering); or other violent actions. Under Art. 83(A) of the Penal Code, a wide range of violent, non-violent and inchoate actions—which plausibly include propagating "extremist thought" or sectarian divisions—aimed at undermining Egypt's independence, unity or territorial integrity or aimed at assisting an enemy in time of war can be construed as terrorism punishable by death. Under Art. 26 of the *Arms and Ammunition Law No. 394 of 1954*, as amended by *Law No. 165 of 1981*, possessing or acquiring arms, ammunition or explosives for the inchoate purpose of disrupting the government, public security or peace, national unity, constitutional principles or the law is punishable by death. Article 35 of new terrorism legislation adopted with *Decree Law No. 94 of 2015* provides that reporting false news this is punishable by a fine and/or suspension from the profession for one year.

²⁰⁰⁸ MFA of Egypt (2015), "Remarks on Egypt's Counter-Terrorism Law (Decree Law no. 94 for the year 2015)", 19 Aug. 2015. Available at <http://www.mfa.gov.eg/English/Ministry/News/Pages/NewsDetails.aspx?Source=6781921f-3993-444a-859e-ee26ce851de8&newsID=d4b1b0c8-0a48-4209-8512-c957a84e44fe> (accessed 19 Aug. 2015).

by a number of countries and foreign human rights organizations.²⁰⁰⁹ The Egyptian Foreign Ministry emphasizes that "[t]here is no universally agreed definition of terrorism" as "[i]t is therefore up to every domestic jurisdiction to develop its own definition" said spokesman Ahmed Abu Zeid.²⁰¹⁰ The Foreign Ministry stresses that "[l]egislators also referred to many anti-terror laws in a number of countries" such as the *Patriot Act*, the TACT 2000 and 2006, French CT laws, and the *Arab Convention* of 1998.²⁰¹¹ Many African countries such as Tunisia²⁰¹² adopted new CT laws that erode basic rights, undermining freedom of expression and speech.

In June 2015, Morsi has been sentenced lifetime imprisonment for espionage, and 16 MB leaders have been sentenced to death in a trial for jailbreak.²⁰¹³ The Cairo Criminal Court finds the Muslim Brotherhood guilty of planning "to form terrorist organizations for armed interference in Egypt" in cooperation with Hamas e Hezbollah. The Egyptian Court established a link between the leaders of the MB international organization, and Hamas, Hezbollah and Iran.²⁰¹⁴ The Court ruling underlines the association of the Lebanese group with the Iranian revolutionary guard.²⁰¹⁵

Turkey has been the only country to react strongly to the death sentence against "the democratically elected president, Mohamed Morsi",²⁰¹⁶ issued on 16 May 2015 by an Egyptian court, for the alleged role of the MB leader in the Wadi el-Natrun prison break during the 2011 revolution.²⁰¹⁷ "Egypt is returning to the old Egypt"²⁰¹⁸ commented Erdoğan. The attack was characterized as "a punishment targeting the ballot box",²⁰¹⁹ and called el-Sisi "a coup-

²⁰⁰⁹ HRW (2015a), "Egypt: Counterterrorism Law Erodes Basic Rights", 19 Aug. 2015. Available at <http://www.refworld.org/docid/55d58e414.html> (accessed 27 Aug. 2015).

²⁰¹⁰ MFA of Egypt.

²⁰¹¹ MENA (2015b), "FM: Egypt's decision on anti-terror law should be respected", 20 Aug. 2015. Available at <http://www.sis.gov.eg/En/Templates/Articles/tmpArticleNews.aspx?ArtID=95924#.VdZL-GAY3jI> (accessed 20 Aug. 2015).

²⁰¹² HRW (2015b), "Tunisia: Counterterrorism Law Endangers Rights", 31 July 2015. Available at <http://www.refworld.org/docid/55bf735c4.html> (accessed 27 Aug. 2015).

²⁰¹³ SIS (2015b).

²⁰¹⁴ Ibid.

²⁰¹⁵ Ibid.

²⁰¹⁶ Erdoğan, Recep Tayyip (2015), "President Erdoğan Attends Mass Opening Ceremony in Sultangazi", Presidency of the Republic of Turkey, 16 May 2015. Available at <http://www.tccb.gov.tr/news/397/93382/president-erdogan-attends-mab-opening-ceremony-in-sultangazi.html> (accessed 7 June 2015).

²⁰¹⁷ SIS (2015b).

²⁰¹⁸ Erdoğan (16 May 2015), *President Erdoğan Attends Mass Opening Ceremony in Sultangazi*.

²⁰¹⁹ Erdoğan, Recep Tayyip (2015), "If Morsi is sentenced to death today, it is indeed a punishment targeting the ballot box", Presidency of the Republic of Turkey, 16 May 2015. Available at <http://www.tccb.gov.tr/news/397/93395/if-morsi-is-sentenced-to-death-today-it-is-indeed-a-punishment-targeting-the-ballot-box.html> (accessed 7 June 2015).

maker".²⁰²⁰ The Turkish president criticized the silence of the West, and emphasis the “fight against terror” carried out by Morsi.²⁰²¹ Erdoğan do not accept el-Sisi as legitimate president of Egypt, recognizing still in office Morsi:²⁰²² “To me, the President of Egypt is Morsi, not Sisi”²⁰²³ declared Erdoğan.

Turkey aims to “be much more powerful in 2023”,²⁰²⁴ according to the political vision described is a list of goals released by the party of then prime minister Erdoğan, to coincide with the centenary of the Republic of Turkey,²⁰²⁵ and the loss of power of the Muslim Brotherhood in Egypt wrecks the dream of an Islamic confessional bloc able to influence the regional policy: a new caliphate.

The MB issue divides the Arab world. The Wahhabi Kingdom of Saudi Arabia and Qatar experimented strong frictions due to the attitude towards the Muslim Brotherhood, that the government of Doha supports by denouncing what the Emir, sheikh Tamim Bin Hamad Al-Thani, has called a “military coup”.²⁰²⁶ The crisis within the GCC led to the withdrawal of the ambassadors of Saudi Arabia, UAE and Bahrain from Doha, in March 2014.²⁰²⁷ Both Saudi Arabia and Qatar have been accused of financing and supporting terrorist groups through private donors and charity organizations even if no evidence were found.²⁰²⁸

²⁰²⁰ Erdoğan, Recep Tayyip (2015), “President Erdoğan in Kahramanmaraş”, Presidency of the Republic of Turkey, 22 May 2015. Available at <http://www.tccb.gov.tr/news/397/93497/president-erdogan-in-kahramanmaras.html> (accessed 7 June 2015).

²⁰²¹ Erdoğan, Recep Tayyip (2015), “President Erdoğan Addresses Citizens in Kayseri”, Presidency of the Republic of Turkey, 17 May 2015. Available at <http://www.tccb.gov.tr/news/397/93397/president-erdogan-adrebes-citizens-in-kayseri.html> (accessed 7 June 2015).

²⁰²² Erdoğan, Recep Tayyip (2015), “To me, the President of Egypt is Morsi, not Sisi”, Presidency of the Republic of Turkey, 20 May 2015. Available at <http://www.tccb.gov.tr/news/397/93448/to-me-the-president-of-egypt-is-morsi-not-sisi.html> (accessed 7 June 2015).

²⁰²³ Erdoğan (22 May 2015).

²⁰²⁴ Erdoğan, Recep Tayyip (2015), “The terrorist organization must lay down and bury its arms”, Presidency of the Republic of Turkey, 12 Aug. 2015. Available at <http://www.tccb.gov.tr/en/news/542/34079/the-terrorist-organization-must-lay-down-and-bury-its-arms.html> (accessed 12 Aug. 2015).

²⁰²⁵ AKP (2012), “Political Vision of AK Parti (Justice and Development Party) 2023 (Politics, Society and the World). Great Nation, Great Power. Target 2023”, Ankara, AKP. Available at <http://www.akparti.org.tr/upload/documents/akparti2023siyasivizyonuungilizce.pdf> (accessed 19 Aug. 2015).

²⁰²⁶ Hassan, Islam Khalid (2015), “GCC’s 2014 Crisis: Causes, Issues and Solutions”, Mecca, Al Jazeera Center for Studies, 31 Mar. 2015. Available at <http://studies.aljazeera.net/en/dossiers/2015/03/201533172623652531.html> (accessed 11 June 2015).

²⁰²⁷ Ibid.

²⁰²⁸ Prados, Alfred B. and Christopher M. Blanchard (2004), “Summary”, *Saudi Arabia: Terrorist Financing Issues*, CRS Report for Congress RL32499, Washington, D.C., CRS.

After a visit of President Trump in Saudi Arabia, in May 2017, the Gulf crisis escalated.²⁰²⁹ Saudi Arabia, the United Arab Emirates, Bahrain and Egypt severed relations with Qatar.²⁰³⁰ The Yemeni government joined these groups of nations and broke its diplomatic relations with Qatar, accusing Doha of backing extremist groups in Yemen.²⁰³¹ Such measures were justified and based on allegations of supporting multiple terrorist and sectarian groups aimed at disturbing stability in the region, including the Muslim Brotherhood, ISIS and Al-Qaeda.²⁰³² The crisis that started over the relationship of Doha with Tehran and its support of the Muslim Brotherhood.²⁰³³ The government of Qatar has also close ties with Hamas and the Afghan Taliban.

In a confidential response to a parliamentary question from left-wing party Die Linke, the German Federal Interior Ministry describes Turkey as the Middle East terrorism hub.²⁰³⁴ "The many expressions of solidarity and support actions for the Egyptian MB, Hamas and the armed Islamist opposition groups in Syria by the ruling AK Party and President Erdoğan emphasize the ideological affinity with the Muslim Brotherhood", says the part of the answer which has been classified for restricted use only. The statement is based on information provided by the *Bundesnachrichtendienst* (BND), the German Federal Intelligence Service. The confidential answer concludes that Turkey has become the central platform for action for Islamist groups in the Middle East as a result of the gradually Islamized domestic and foreign policy of Ankara since 2011.

²⁰²⁹ MOFA of Saudi Arabia (2017), "Saudi King Urges Stronger Partnership with the US to Fight Terrorism", 22 May 2017. Available at <http://www.mofa.gov.sa/sites/mofaen/ServicesAndInformation/news/MinistryNews/Pages/ArticleID201752210826919.aspx> (accessed 5 June 2017).

²⁰³⁰ MOFA of Qatar (2017), "Qatar regrets the decision by Saudi Arabia, the United Arab Emirates and Bahrain to sever relations", 4 June 2017. Available at <https://www.mofa.gov.qa/en/all-mofa-news/details/2017/06/04/qatar-regrets-the-decision-by-saudi-arabia-the-united-arab-emirates-and-bahrain-to-sever-relations> (accessed 5 June 2017).

²⁰³¹ MENA (2016), "Yemeni gov't announces cutting ties with Qatar", 5 June 2016. Available at <https://www.mena.org.eg/en/news/dbcall/table/textnews/id/6841359> (accessed 5 June 2017).

²⁰³² MENA (2017b), "Egypt, Saudi Arabia, Bahrain, UAE cut ties with Qatar", 5 June 2017. Available at <https://www.mena.org.eg/en/news/dbcall/table/textnews/id/6841268> (accessed 5 June 2017).

²⁰³³ Ibid.

²⁰³⁴ Answer of the Federal German Government No. 18/9399 of 10 Aug. 2016.

CONCLUSIONS

The meaning of terrorism has changed over time. Starting as a way to fight against authoritarian regimes, terrorism transformed into a useful tool for rebellion, and used to great extent in Nazi Germany, Soviet Union, Ireland, Spain, Italy, and elsewhere. After some years of hiatus, it flourished again in the second half of the 20th century, linked mainly to independence movements. Since the early 60s the term has often been used in a political sense to label national liberation movements in Africa and later in Latin America. It took hold as an instrument in political struggles against governments in the U.S. and Europe, and finally has been identified with the Islamic world. Now the term terrorism is commonly used to describe acts committed by non-state or subnational entities, thereby excluding acts committed by lawful governments. Everything changed on 11 September 2001; since then the fight against terrorism is a central issue in political agendas and on the front page of newspapers. The 9/11 attacks caused outrage and international solidarity which come under the critical spirit and overshadowed fundamental rights and freedoms, leaving the field open to suspicion, speculation, and sometimes at the convenience of a part.

What is worrying in the context of terrorism, and as expressed in this thesis, is the proclivity of international and national bodies to disregard the need for an all-encompassing definition of terrorism, one that is not limited in its scope as many of the definitions presented in this dissertation are, including those currently used in the U.S., the EU, and the UN. The fact that state-terrorism seems to be a separate category that is only used to justify specific actions conducted by the U.S. or its allies, and not in its entirety is problematic, to say the least, for several reasons. First, and the most obvious reason is that it allows those who determine the merit of inclusion the ultimate decision making power. In other words, the U.S. can, but it need not determine that a specific terrorist group is a state actor. There is no accountability, and no oversight of these decisions. Ultimately, the world is expected to abide by the conscious choices of individual states in respect to the identification of, and tackling state-terrorism. Implications of this are clear. Not only does the U.S. and its allies have the power to decide, they are also absolved of any responsibility in terms of possible activities that would be identified as terrorism if conducted by the other side – drone attacks serves as a blatant example. Moreover, the problem of defining terrorism has been well documented in chapter 1, and partially in chapter 2

of this dissertation, especially in respect to the issue of anti-terrorism, and state-led terrorism. Just a simple comparison of facts will show that instances of judicial and legal culpability that are not pushed against the activities of U.S., the EU, and allies, are most surely processed, condemned, and scrutinized when conducted by other nations or groups. This is not to be considered an indictment of the U.S., or the EU, but rather a call for the equalization of judicial and legal frameworks in and around terrorism. If action A is terrorism when conducted by nation A, then surely such an action is also terrorism when conducted by nation B.

Terrorism is a multifaceted phenomenon, and it must be treated as such. The limitations of this study are many but its core argument has been validated, that the currently existing definitions of terrorism are not sufficient to properly regulate the legal, judicial, and policy implications on an international stage. The different treatment of terrorists, as evidenced by chapter 4 and 5, is indicative of a defect of justice. Regardless of the crime, and terrorists are guilty of many, the provisions of the legal code and the many international agreements pertaining to conflict and treatment of combatants are completely ignored. The shipment of terrorists and suspects to black sites in Europe, for example, is not just a clear violation of the Geneva Conventions, but also a clear violation of many national and international laws. And yet, those who pursue these tactics are not persecuted, nor are their methods questioned thoroughly. One must ask the question, whether justice applies only to some, or does the rule of law dictate that every individual, regardless of their crime be given the same fundamental rights.

The sheer breadth of material that was covered in this dissertation came as a consequence of the multifaceted problem that is terrorism. It is impossible to look at terrorism as only a military, or security issue. It is at all times, a political, legal, philosophical, psychological, religious, and social issue that must be addressed. Moreover, it seems as though there are hundreds of definitions of terrorism, none of them tackle the problem of state terrorism. The example of ISIL, perhaps, validates this point the best. Although never formally a state, according to all definitions of state, the Caliphate qualifies. And yet, its combatants were not recognized as such, and were treated as terrorists. This is to say that if the international community is to pursue this format of war on terror, then it would be appropriate to develop a broader definition, one that would encompass the possibility of a pseudo-state led by terrorists, and the appropriate response in case of a conflict with such a state. As ISIS demonstrates, this is a growing possibility in the near future.

It is argued that the main problem with framing such a definition lies not in the law, but in politics. If such a definition were developed, then the questionable activities of U.S., EU, and other nations' armies would likely fall under the scope of international investigation into war crimes. Within the current status quo, no such investigations are likely to be pursued. The double standard in the determination of terrorist status, which is seemingly attributed at will and according to daily-political needs is not a coherent policy. As evidenced by the events in Syria, the road from freedom fighter to terrorist is slippery, and very short. The problem lies in the different, and oftentimes contradictory interests of nations, double standards – some nations like Turkey fight terrorism only and only when it suits their specific political needs, namely the suppression of the PKK (chapter 7 was intentionally crafted in this way to showcase how Turkey adopts the definitions of terrorism and uses them very selectively, and only in some specific instances). Most countries are only interested in terrorism when it directly endangers their borders or their citizens, whereas others take a proactive stance. All of these different approaches are politically valid, naturally, but are made possible by the inadequate definitions of the terms. The U.S. and Western countries in general tend to use double standards in their approach to terrorism. As evidenced by chapters 3 and 4, the legal and judicial practice clearly indicates that they perceive their conflicts as just, as opposed to the fight of any group that can arbitrarily be deemed terrorist. And yet, the Western countries seem to be the only ones that are proactively fighting against terrorism today.

Depending on the point of view, any violence can be terrorism, or anti-terrorism. Legitimate defense or aggressive attack are semantics that depend on the arbitrary judgment of the involved parties. This, by definition, defeats the concept of justice and legality. Terrorism is an effective method of conflict because it is limited in scope, targeted against civilians, and almost impossible to eradicate. This isolates it from the traditional military applications, and by extension, from the same legal and judicial argumentation. However, there are cases where terrorists were those who defended their land from invaders, and the invaders were the ones who marked them as terrorists. There needs to be a clear division between what is and what is not terrorism, and only then will it be possible to clearly define the terms and the scope of conflict against those who are terrorists.

This leads to the question of human rights, which are protected by a variety of international rules and agreements, most of which however are not applicable to terrorists. This

is where the problem of double standards comes to the forefront. If countries can arbitrarily decide who is and is not a terrorist, then they also automatically give, or remove from them the dignity and the protection afforded to them by the international codes such as the Geneva conventions. The best example being the torture law passed by the U.S. in the aftermath of 9/11. Essentially, this law allowed the U.S. government to torture suspected terrorists because they were not under the protection of international law. This and many other cases are indicative of the wider issue of legality and justification of conduct. It is ironic that a country such as the United States, whose contribution to the establishment of international law – especially the humanitarian one – has been crucial, have disowned, within the War on Terror, the ideals which have inspired their politics in the last century by sacrificing the liberty on the altar of national interest. The U.S. government took the opportunity followed by the emotional wave to 9/11 to get the authorization from the Congress to expand its powers to fight terrorism.

The new challenges to peace and stability – the maintenance of world order is the main concern of the international community. New instruments and new rules are applied to deal with hybrid threats and asymmetric conflicts that characterize the third millennium. Counterterrorism policies impact negatively the quality of life of many people all over the world, with prejudice to liberty, human rights and justice. Emergency measures taken in the aftermath of terror attacks are inconsistent with international and domestic laws, and violate human rights and fundamental freedoms. The fight against terrorism has become a pretext for restricting civil liberties and violate other states' sovereignty; wars are no longer declared, and the cardinal points of international law are lost. The rule of law is a ghost that wanders around the world.

The crucial point to be taken into account is that the inadequacy of the current UN conventions on terrorism, which leaves the definition of the term to the interpretation of governments, according to their convenience. Therefore the words "terrorist" and "terrorism" became fluid terms, easy to be manipulated. Today everything, from political opponents to hybrid conflicts and even organized crime, can be construed as terrorism. The very concept of terrorism has changed since the word has a political meaning.

Different assessments of terrorist organizations or groups reflect the divisions of nations on political and religious grounds. Often these divisions are between blocks of countries, and mirror much deeper divisions. The War on Terror leads to asymmetric alliances that have their origins in the Cold War era. The same transnational terrorism has its origins in geopolitical

strategies motivated by ideological divisions of that period. All this prevents the adoption of a convention defining terrorism in a clear and undisputed way.

Terrorists are determined as such by each government, according to domestic and foreign policy. Thus, it becomes difficult to distinguish 'true' terrorists from those who are political opponents or just common criminals. The anti-terror legislation has been progressively used to try to usurp the role of courts in ordinary criminal cases, hence making unclear in what terrorism, which is considered a specific criminal activity, is different from other offences. This situation has turned out to be comfortable to some governments, including permanent members of the Security Council, which do not hesitate to confuse political opponents with terrorists, or characterize common criminals as terrorists. Terrorism has become an umbrella term encompassing criminals and political opponents. It seems that the problem in labeling acts as terrorism is not what is done, but who does it. Against this background, the most serious violations of international law are consumed. Liberties are eroded by repressive legislation. Hence, authoritarian governments have joined Western democracies, justifying their actions with those of the latter, and formed alliances that better no side.

Governments, in claiming a moral justification to their actions in the name of the fight against terrorism, should, in order to be credible, apply themselves, first, the principles they invoke. The West is balancing precariously between the pursuit of security and respect for the human rights. In the letter from Birmingham jail of 16 April 1963, Martin Luther King Jr. wrote: "injustice anywhere is a threat to justice everywhere". A society without justice ultimately has no chance of survival.

If the West wants to be able to reasonably claim 'moral superiority', in the name of "the general principles of the law recognized by civilized nations", it must first respect those values and rules that presume to try to impose on rest of the world. Justice and law, to become universal values, must be applied anytime and everywhere without being bent to the interests of the strongest.

FUTURE RESEARCH DIRECTIONS

Future research directions should investigate whether and how the current international law, in particular IHL and the law of war, applies to unconventional conflicts that characterize the 21st century: hybrid, asymmetric, and transnational conflicts which involve state and non-state actors such as insurgents or terrorist organizations.

The research should check if current rules are suitable for dealing with conflicts that go beyond the rigid classifications established by international conventions and customary law, that distinguishes only between international and non-international conflict. The research should scrutinize the application of international law, in particular IHL, in case of hybrid conflict. The research should find whether new rules are required to deal with hybrid conflict, or if current rules are still valid and can be used/adapted.

Among the objectives, the research should be engaged to determine whether IHL applies in transnational armed conflict against non-state groups, and if their members cease to be targetable during a pause in their active involvement, and whether there can be a non-international armed conflict which has no finite territorial boundaries with a non-state armed group operating transnationally.

The research should also investigate the high-tech evolution of warfare. Because of the application of high-tech solutions to military activities, it is now difficult to distinguish between conventional/unconventional, traditional/non-traditional, kinetic/non-kinetic, and lethal/non-lethal. The debate does not concern only what weapons will be used in the Twenty-First century conflicts, but when and how they will be employed. The research should also investigate the emerging autonomous domain, and the tendency to give more responsibility to machines, that is the military application of artificial intelligence and machine learning under international law.

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