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TERRORISM AND INTERNATIONAL LAW

LL.M. MASTER THESIS

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ABBREVIATIONS

ACHR	American Convention on Human Rights
COE	Council of Europe
CTC	Counter Terrorism Committee
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GA	United Nations General Assembly
HRC	Human Rights Committee
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 Former Yugoslavia
IHL	International Humanitarian Law
OAS	Organization of American States
OAU	Organization of African Unity
SAARC	South Asian Association for Regional Cooperation
SC	United Nations Security Council
UN	United Nations
U.N.G.A.	United Nations General Assembly
U.N.T.S.	United Nations, Treaty Series

INTRODUCTION

The terms terror and terrorism on which there has been achieved no generally accepted definition in international area till today although its roots go back to quite early history as human being, have been on the agenda of international community particularly since September 11 attacks.

We live in a global world which affects our life in many aspects. Of course terrorism was affected by this phenomenon, too. The recent transformation of terrorism especially in the last decades proves this idea. Therefore, the fight against terrorism has to be global, too. The need to a cooperation of states in international area is felt mostly in the context of combating terrorism but in fact terrorism is one of the areas on which the least cooperation is achieved between states at international level.

Terrorism especially international terrorism was always on the agenda of international community particularly in the second half of the century. Although international community aimed to response terrorism by using international law instruments effectively, it hasn't been achieved to suppress terrorism hitherto exactly.

The dissertation deals with the problem of terrorism in the sense of international law with the questions as 'what is terrorism according to the international law and which measures can be taken in order to combat terrorism or the relationship between terrorism and different international law disciplines such as international humanitarian law and international human rights law'. It also aims to clarify the relationship between terror and international law.

The thesis is mainly divided into two chapters. It was aimed in the first chapter to facilitate understanding the phenomenon of terrorism as a preparing for the second chapter which deals with terrorism in many aspects. Therefore, the term terrorism is

examined comprehensively in the first chapter under three parts. In the first part, the historical background of terrorism and the first terrorist movements in the history are analysed in detailed. Then it is dealt with the transformation and evaluation of classical terrorism into modern age terrorism especially occurred in the last decades.

The main topic of the other part is the definitional problem of terrorism. The reasons of the situation not to achieve to a universally accepted definition of terrorism and the probable results of it at international level are examined in this division. Moreover, the most important definitions of terrorism by scholars and official institutions are given as exaxmples. In addition, it is being tried to enlighten the concept of terrorism by distinguishing it from other type of criminal acts.

The subject of the last part of the first division is the motives and new forms of terrorism. The terrorist organizations are classified as ethnic-nationalistic, revolutionary and religious based organizations. On the other hand, the new forms of terrorism emerged with the effect of globalization process in last years are examined under the title of new forms of terrorism in this chapter.

The second main chapter of the thesis studies the relation between terrorism and international law in details. This chapter is founded on four parts consisted of components of different international law disciplines.

The first part concerns with the international law mechanisms relating to fight against terrorism. The approach of the U.N to the issue, the conventions adopted by several U.N bodies and the efforts made by other several regional bodies in order to combat terrorism are the main subjects of this part. The European approach to the terrorism is discussed specifically in this chapter under the title of regional achievements on combating terrorism.

The second part focuses on humanitarian law in the context of international or non-international armed conflicts pertaining terrorist acts. The four Geneva Conventions and their two Additional Protocols are examined comprehensively in this

part within the meaning of armed conflict law. It was attempted to find a legal answer to the question of the applicability of the international armed conflict law to the terrorist acts. Especially the Common Article 3 of the four Geneva Conventions was discussed in this part in order to enlighten the situation for terrorist organizations whether they are a party to non-international armed conflict or not.

The other part deals specifically with the scope of the International Criminal Court regarding terrorist acts. It studies about the role of the ICC on prosecuting terrorist activities at international level. The jurisdiction of the Court is being studied within the context of prosecuting terrorist acts. The feature of terrorist acts are analysed whether they constitute war crimes or crimes against humanity under The Rome Statute of the International Criminal Court.

The last issue of the thesis is the approach of international human rights law to terrorism and counter terrorism measures in the context of European Convention on Human Rights. The rights are classified in this part as derogable and non-derogable rights in the light of the decisions of European Court of Human Rights.

CHAPTER I

TERRORISM IN GENERAL

Terrorism is one of the most serious common threats to the international community today. It challenges the peace and security of the world as well as democratic institutions and modern values of the international community.

The political violence is the central feature of the phenomenon of terrorism. Murders and armed robberies without political motive are not terrorism. The terrorist aims to further a political cause by using or threatening violence which is not directed merely against property. People are killed or subjected to kidnapping, hijacking, wounding or other severe ill-treatment. Or there is an attempt to coerce people by the threat of these things. The violence or the threats have to be of the kind that can strike terror into people.

In this connection, for instance the bombing of a restaurant has two aspects. If an individual, claiming to be acting for and on behalf of a group dedicated to overthrow of the government, in the state in which the act occurred, bombed the restaurant, the act is terroristic. If however, the perpetrator is the owner of the restaurant and destroys it in order to collect insurance, the act is not terroristic but a common crime.¹

Terrorist violence is indiscriminate and arbitrary in its effects. No one can be sure that they will not be the next victim. Because terrorism denies all rules and conventions of war laws and it refuses to distinguish combatants and non-combatants in its acts.

¹ M. Cherif Bassiouni, "*International Terrorism*", M. Cherif Bassiouni, (Eds.), *International Criminal Law, Volume 1, Crimes*, Transnational Publishers, 1999. p. 782.

I. CHARACTERIZATION OF TERRORISM

A. HISTORY OF TERRORISM

1. The first terrorist movements in the history

Is terrorism an invention of the modern society? Or is it impossible to find any trace of terrorism in the history of the world? It is generally accepted that, terrorism is not new. Although it is impossible to determine absolutely when it was first used, that which we today call terrorism, traces its roots back at least some 2,000 years.²

Modern terrorism had also thousand years ago several forerunners both in Europe and in Orient. This is not to say that the act of terrorism has remained static. Rather, as the difficulties involved in defining it, terrorism has evolved considerably over the years, although retaining some of the same characteristics that have historically shaped it. Moreover, today's terrorism has, in some respects come full circle, with many of its contemporary practitioners motivated by religious convictions – something which drove many of their earliest predecessors. It has also, in the generally accepted usage of the word, often possessed a political dimension.

Among the earliest such examples were the Sicari and the Zealots, Jewish groups active during the Roman occupation of the first century Middle East. The favored weapon of the Sicari was the sica (the short dagger which gave them their name, which literally means 'dagger men'), which they used these to murder those (mainly Jews) they deemed apostate and thus selected for execution. The Zealots, who generally targeted Romans and Greeks, give us the modern term Zealot, one translation of which is "a fanatical partisan." Such killings usually took place in broad daylight and in front of witnesses, with the perpetrators using such acts to send a message to the Roman authorities and those Jews who collaborated with them – a tactic that would also

² Peter Waldman, *Terrorismus, Provokation der Macht*, Gerling Akademie Verlag, 1998, p. 40.

be used by subsequent generations of what would become known as terrorists.³

Adherents of other religions also resorted to methods which might today be termed terrorism, such as the Assassins – an 11th century offshoot of a Shia Muslim sect known as the Ismailis. Like the Zealots-Sicari, the Assassins were also given to stabbing their victims (generally politicians or clerics who refused to adopt the purified version of Islam they were forcibly spreading) in broad daylight. The Assassins - whose name gave us the modern term but literally meant ‘hashish-eater’ - a reference to the ritualistic drug-taking they were (perhaps falsely) rumored to indulge in prior to undertaking missions – also used their actions to send a message. Often, the Assassins’ deeds were carried out at religious sites on holy days – a tactic intended to publicize their cause and incite others to it. Like many religiously inspired terrorists today, they also viewed their deaths on such operations as sacrificial and a guarantor that they would enter paradise.⁴

Sacrifice was also a central element of the killings carried out by the Thugees (who bequeathed us the word ‘thug’) – an Indian religious cult who ritually strangled their victims (usually travelers chosen at random) as an offering to the Hindu goddess of terror and destruction, Kali.⁵ In this case, the intent was to terrify the victim (a vital consideration in the Thugee ritual) rather than influence any external audience. Active from the seventh until the mid-19th centuries, the Thugees are reputed to be responsible for as many as 1 million murders. They were perhaps the last example of religiously-inspired terrorism until the phenomenon reemerged a little over 20 years ago. More secularized motivations for such actions did not emerge until the French Revolution, as did the first usage of the term now used to describe them.

³ David C. Rapoport, *"Fear and Trembling: Terrorism in Three Religious Traditions"*, *American Political Science Review*, Vol.78, no.3 (September 1984), p.658 –677.

⁴ *Ibid.*

⁵ *Ibid.*

2. Terrorism in Modern Era

The English word 'terrorism' comes from the *regime de la terreur* that dominated in France from 1793-1794. Originally an instrument of the state, the regime was designed to make secure and strong the power of the newly-installed revolutionary government, protecting it from elements considered 'subversive.'⁶ In contrast to its modern usage, the term terrorism had at that time a positive association. The French revolutionary leader, Maximilien Robespierre, viewed it as vital if the new French Republic was to survive its infancy, proclaiming in 1794 that: "Terror is nothing other than justice, prompt, severe, inflexible; it is therefore an emanation of virtue; it is not so much a special principle as it is a consequence of the general principle of democracy applied to our country's most urgent needs."⁷

Under such justification, some 40,000 people were executed by guillotine - a fate Robespierre and his top lieutenants would themselves suffer when later that same year, his announcement of a new list of subversives led to a counter-inquisition by some in the Revolutionary government who feared their names might be on the latest roll of 'traitors.' Before long, the Revolution devoured itself in an orgy of paranoiac bloodletting. Meanwhile, terrorism itself began taking on the negative connotations it carries today (terrorists do not generally tend to describe themselves thus), helped initially by the writings of those like the British political philosopher Edmund Burke, who popularized the term 'terrorism' in English while demonizing its French revolutionary practitioners.⁸

a. Terrorism in 19. Century

Specially starting from the middle of the nineteenth century occurred so many

⁶ Bruce Hoffman, *Terrorismus, Der unerklarte Krieg, Neue Gefahren politischer Gewalt*, Fischer Taschenbuch Verlag, 2002, p 15-16.

⁷ Cited in R. R. Palmer, *The Age of Democratic Revolution, Vol 2: The Struggle*, Princeton University Press, 1970 p. 126.

⁸ Bruce Hoffman, *Terrorismus, Der unerklarte Krieg*, p. 18.

terrorist acts occurred in Europe. These acts were carried out particularly against the leaders of the states at that time: In 1861 an attack that failed against the King of the Prussian, in 1878 two further attacks against the German Chancellor, in the same year an attempt to assassinate the Kings of the Spain and Italy, in 1881 the assassination of the Tsar Alexander II of Russia, in 1894 this time the murder of the President of France, in 1987 the Prime minister of the Spain was the victim of the terrorism and at least in 1900 the King of the Italy and 1901 President of USA were assassinated by terrorists.⁹

A Russian populist group namely Narodnaya Volya (People's Will) was at that moment the most famous and the most effective terrorist organization. It was founded in St Petersburg in the late of the 1870's in order to oppose and overthrow the Tsarist regime. The social background of the organization was very remarkable because most of the followers of the group consisted of young people (% 92 were under 30 year old). Most of them were students in various universities in St. Petersburg. The group's most famous deed, the assassination of Alexander II on March 1, 1881, also effectively sealed their fate by incurring the full wrath of the Tsarist regime. Only one year after the assassination almost all the followers of the organization were judged and executed. By the way the group could not survive anymore and in 1883 by the arrest of the executive committee of the organization it was dissolved. The effects of the organization in the world were greater than its attacks. Only four months after the assassination, all the anarchists have met at the Congress of Anarchists in London. Despite all these attempts, nothing has changed in the world order in favor of anarchists. But that was enough for the anarchists to meet each other.

One of the other striking terrorist movements occurred in the last decades of the 19. Century belonged to Armenians, living in the east of Turkey against Ottoman Empire. Another organization was in Balkans, namely the IMRO (Macedonian Revolutionary Organization), aimed to build an independent Macedonia. Both of them had terrorist strategies that were adopted from various terrorist organizations in the 20. Century.

⁹ Peter Waldman, *Terrorismus, Provokation der Macht*, p. 50.

b. Aspects of Terrorism in 20. Century

The dissolution of empires and the search for a new distribution of political power provided an opportunity for terrorism in the nineteenth and twentieth centuries. It climaxed in the assassination of Archduke Franz Ferdinand on 28 June 1914, an event that catalyzed the major powers into taking violent action, not because of the significance of the man himself but because of the suspicion of rival state involvement in the sponsorship of the killing. World War I, the convulsive systemic cataclysm that resulted, ended the first era of modern terrorism. Predominantly during the 1930s and 1940s terrorism changed its meaning. Instead of its old connotation referred to revolutionary movements and violence acts carried out against the governments, terrorism has had a new connotation as a means for the governments used against its own citizens. Especially Hitler in Germany, Mussolini in Italy and Stalin in Russia have used the terrorism as an effective weapon in order to intimidate their own nation and to destroy all the opponents.¹⁰

After Second World War, terrorism took place more often in the agenda of the world in the framework of the de-colonization process. At that moment, terrorism was used as the most important tool for the 'freedom fighters' against the colonial powers and by the way terrorism has played in the process of liberation of the third world countries a great role. Meanwhile by the anti-colonial process, a great problem occurred about interpretation of the terrorism. The people described by the west communities as 'terrorists', were freedom fighters and heroes in the views of the communist and third world countries. This position was perhaps most famously explained by the Palestine Liberation Organization (PLO) chairman, Yasser Arafat, when he addressed the United Nations General Assembly in November 1974. "The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of this land from invaders, the settlers and the colonialists, cannot possibly be called terrorist."¹¹ This

¹⁰ Bruce Hoffman, *Terrorismus, Der unerklarte Krieg*, p. 27–29.

¹¹ Yasser Arafat, "Address to the UN General Assembly (13 November 1974)" in Walter Laqueur, *The Israel-Arab Reader: A Documentary History of the Middle East Conflict* New York : Bantam, 1976, p. 18.

approach was followed several times by Arab world in official declarations, too. For instance the fifth Islamic summit meeting in Kuwait, at the beginning of 1987, stated in its resolutions that:

“The conference reiterates its absolute faith in the need to distinguish the brutal and unlawful terrorist activities perpetrated by individuals, by groups, or by states, from the legitimate struggle of oppressed and subjugated nations against foreign occupation of any kind. This struggle is sanctioned by heavenly law, by human values, and by international conventions”¹².

This position was reiterated strongly at the meeting of foreign and interior ministers of the Arab League in April 1998 in Cairo. In a document entitled “Arab Strategy in the Struggle against Terrorism,” they emphasized that belligerent activities aimed at “liberation and self determination” are not in the category of terrorism, whereas hostile activities against regimes or families of rulers will not be considered political attacks but rather criminal assaults.¹³

The former Soviet Union was the greatest supporter of the third world countries about the dilemma of the interpretation of terrorism. The President of the Soviet Union at that time, Leonid Brezhnev, made the following statement in April 1981, during the visit of the Libyan ruler, Muammar Quaddaafi:

“Imperialists have no regard either for the will of the people or the laws of history. Liberation struggles cause their indignation. They describe them as ‘terrorism’.¹⁴

Terrorism achieved an international character during the 1970s and 1980s, evolving in part as a result of technological advances and partly in reaction to the

¹² Al-Anba'a, Kuwait, January 30, 1987.

¹³ Haaretz, April 21, 1998 and ICT Internet Site (<http://www.ict.org.il/spotlight/det.cfm?id=50>), (Access: 16.03.2004).

¹⁴ Ray S. Cline and Yonah Alexander, *Terrorism as State-Sponsored Covert Warfare*, Virginia: Hero Books, 1986, p. 24.

dramatic explosion of international media influence. International links were not new, but their centrality was. Individual, scattered national causes began to develop into international organizations with links and activities increasingly across borders and among differing causes. This development was greatly facilitated by the covert sponsorship of states such as Iran, Libya, and North Korea, and of course the Soviet Union, which found the underwriting of terrorist organizations an attractive tool for accomplishing clandestine goals while avoiding potential retaliation for the terrorist attacks. The situation in 1970s and 1980s was described as 'state-sponsored terrorism'. Because of the cold war at that time there were so many states that supported the terrorist organizations for the sake of own interests. This state-sponsored terrorism mostly aimed to attack in recent years predominantly against American and other Western targets in the Middle East and especially in their own homeland. In last decade of twentieth century, a series of suicide bombings directed mostly against American diplomatic and military targets in the Middle East have demonstrated how the threat of state-sponsored terrorism has risen and affected the international community.¹⁵ All these terrorist acts have climaxed with the attacks of September 2001 and through that terrorism influences events on the international stage to a degree hitherto unachieved. As a popular saying; nothing will be steady after September 2001.

3. Basic Tendencies in Terrorism

There was always terrorism in all periods of world history but especially since the 50's of the twentieth century terrorism is the most determined phenomenon of the modern era. Some of these examples can be mentioned as follows:

- The reasons and arguments of the terrorism have reached a great diversity and all these reasons are mixed to each other containing political, social, economic and religious characters.

¹⁵ Bruce Hoffman, *Terrorismus, Der unerklärte Krieg*, p. 32.

- With many possibilities of the technological development of the twentieth century, the methods of terrorism have changed and as a result of this development; modern terrorists began to use nuclear, biological and chemical weapons instead of conventional means.

- The structures of the terrorist organizations have changed and besides the classical structured terrorist groups, there have emerged too many terror organizations difficult to compare with conventional movements such as Al-Qaeda organization.

- Terrorism has itself internationalized with many useful facilities. Today's terrorists operate not only at regional areas but they also operate all over the world. They don't limit their conflict area with their nation because of the globalization process.

- It is always rarely aimed to destroy and eliminate the enemy for the terrorists nowadays. They prefer to understand terrorism as a communication strategy and therefore they are interested in publicity not in killing. By the way of attacks they want to intimidate and terrorize the people rather than killing them and conquering the land. So they plan to change and restructure the political order in pursuit of their own political thoughts.

- Terrorism is in present times a complex strategy and it contains at the media age a media strategy. Cyber terrorism is a very useful means in order to achieve such an aim.

- It increasingly attacks the symbol targets. It has been seen in September 2001 attacks and by the way it aims to wound the values and the systems of the enemies.

- By the end of the 70's the relationship between religion and the terrorism appeared. In the history of the world in certain areas it has been always conflicts because of the religious approach but the religion was never so intensive used as a terrorist motivation before today's.

B. DEFINITION OF TERRORISM

Terrorism is in the twentieth century especially in the late of the twentieth century frequently on the agenda of the world community. Despite of this fact and many international conventions on the subject, there has been no general accepted definition of terrorism.

There are more than one hundred proposal definitions of terrorism which were mentioned and collected in a book. All these definitions were analyzed and classified according to their statistical appearance stated in explanation: Violence, force (appeared in 83.5% of the definitions); political (65%); fear, emphasis on terror (51%); threats (47%); psychological effects and anticipated reactions (41.5%); discrepancy between the targets and the victims (37.5%); intentional, planned, systematic, organized action (32%); methods of combat, strategy, tactics (30.5%).¹⁶

What is actually terrorism and how may it be defined? In order to achieve an exact answer to this question many institution and academics have tried to define and characterize the phenomenon. From these definitions the most important are as follows:

US Department of Defense

The calculated use of unlawful violence to inculcate fear, intended to coerce or to intimidate governments or societies in the pursuit of goals that are generally political, religious, or ideological.¹⁷

FBI

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

¹⁶ Alex P. Schmidt, Albert J. Jongman, **Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature**, New Brunswick: Transaction Books, 1988, p. 5–6.

¹⁷ United States Department of Defense, Office of Joint Chiefs of Staff, Joint Publication 1-02: Department of Defense Dictionary of Military and Associated Terms (Washington, DC: United States Department of Defense, 12 April 2001 – As amended through 5 June 2003), p. 531. Online at: http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf , (Access: 15.03.2004).

of political or social objectives.¹⁸

US State Department

Premeditated, politically motivated violence perpetrated against noncombatant targets by sub national groups or clandestine agents, usually intended to influence an audience.¹⁹

Walter Laquer

Constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted.²⁰

Paul Wilkinson

Political terrorism is the systematic use of murder and destruction and the threat of murder and destruction in order to terrorize individuals, groups, communities or governments into conceding to the political demands of terrorists.²¹

Brian Jenkins

The violence or threat of violence calculated to create an atmosphere of fear and alarm – in a word, to terrorize – and cause panic, disorder, and terror within an organized society, thereby bringing about some social or political change.²²

¹⁸ Counterterrorism Threat Assessment and Warning Unit, National Security Division, Federal Bureau of Investigation, *Terrorism in the United States 1999: 30 Years of Terrorism – A Special Retrospective Edition*, (Washington, DC: United States Department of Justice, 1999), Online at <http://www.fbi.gov/publications/terror/terror99.pdf>, (Access: 16.03.2004).

¹⁹ Office of the Coordinator for Counterterrorism, *Patterns of Global Terrorism 2002*, US Department of State Publication 11038 (Washington, DC: State Department, April 2003), p. 13. Online at: <http://www.state.gov/documents/organization/20177.pdf>, (Access: 16.03.2004).

²⁰ Walter Laquer, *The Age of Terrorism*, Boston, 1987, p. 72.

²¹ Paul Wilkinson, *Terrorism and The Liberal State*, London: Macmillan Press, 1977, p. 54.

²² Brian M. Jenkins, "International Terrorism: The Other World War", Charles Jr. Kegley, (Eds.), *International Terrorism: Characteristics, Causes, and Control*, New York: St. Martin's Press, 1990, p. 28.

Peter Waldman

Use of violence from underground against the political order that was scheduled prepared and shocked the community.²³

M. Cherif Bassiouni

An ideologically- motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power outcome or to propagandize a claim or grievance, irrespective of whether its perpetrators are acting for and on behalf of themselves, or on behalf of a state.²⁴

Bruce Hoffman

The deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change.²⁵

Paul Pillar

Terrorism is premeditated and planned in advance, rather than an impulsive act of rage, it is political-not criminal, like the violence that groups such as the Mafia use to get money, but designed to change the existing political order. It is aimed at civilians-not military targets or combat-ready troops and it is carried out by sub-national groups not by the army of country.²⁶

In all these definitions the general basis is obvious but there are differences of stresses on words. The official definitions reflect institutional positions. The US State

²³ Peter Waldman, *Terrorismus, Provokation der Macht*, p. 10.

²⁴ M. Cherif Bassiouni, "*International Terrorism*", M. Cherif Bassiouni, (Eds.), *International Criminal Law, Volume 1, Crimes*, p. 777-778.

²⁵ Bruce Hoffman, *Terrorismus, Der unerklärte Krieg*, p. 55-56.

²⁶ Cited in Council On Foreign Relations, 'Terrorism: An Introduction', at: [<http://www.terrorismanswers.com/introduction.html>], (Access: 15.03.2004).

Department lays stress on deliberation. The potential political motivation of sub national groups is noted. The FBI, for example, underlines compel and unlawfulness and offences against property, in furtherance of social as well political objectives. More comprehensively the US Department of Defense gives equal prominence to actual or threatened violence, cites a wider range of objectives and includes as possible targets not only governments but also whole societies.

According to Bassiouni, the following characteristics assist in understanding why one act constitutes 'terrorism' and the other does not:

1. Motivation

The motives of perpetrators are ideological rather than personal profit.

2. Resulting Harm

The resulting harm to life or property presents no personal benefit for the ideologically-motivated offender, whereas it is personally beneficial for the common criminal.

3. Target

The ideologically motivated offender's selection of the target does not necessarily bear a relationship to his ultimate goal or purpose, whereas, for the common criminal the target is either the goal is essentially linked to the goal.

4. Publicity

The ideologically motivated offender seeks publicity for the act, whereas the common criminal shuns publicity.

5. Desired Outcome

The outcome sought by the ideologically motivated offender, usually the dissemination of a particular claim, does not necessarily bear a relationship to the target, whereas for the common criminal the desired outcome and target are, more often than not, one in the same.

6. Risk Taking

The ideologically motivated offender will weigh the risks incurred in perpetration of the acts against the ultimate goal sought to be achieved, or against other ideological or political benefits to be obtained, that are not necessarily inherent in the primary target, whereas the common criminal will weigh the risks incurred against any immediate material benefits he can derive from the very act.

7. Methodology

The contemplated harm resulting from a given act will usually be less of a consideration in the decision making process of the ideologically motivated offender than that of the common criminal. As a direct result the ideologically motivated offender will usually perpetrate the act in a manner designed to ensure maximum effect in relationship to his goal, irrespective of the harm produced thereby. The common criminal will usually resort to only those means most likely to accomplish the immediate result, incurring the least possible risk of harm.²⁷

As a summarize of all these explanations on the definitional problems of terrorism, it can be assumed that this common perception of terrorism is made up of following basic elements:

- Violence or the threat of violence targeting ordinary civilians, their life, property and safety. The indiscriminate feature of the terrorist act is very distinctive factor to distinguish terrorism from other criminal acts.

²⁷ M. Cherif Bassiouni, "International Terrorism", M. Cherif Bassiouni, (Eds.), *International Criminal Law, Volume 1, Crimes*, p. 782.

- Pursuing a political objective which could not be achieved by lawful means within the scope of the established constitutional order.
- Use of violence which is systematic, deliberate and perpetual.
- Intimidating the community and coercing the government in order to establish conditions which could further their aim.

1. Problems in Defining Terrorism

In its long and varied history unfortunately it could not be achieved to a subjective and exact definition of the phenomenon of terrorism. Despite many of attempts by scholars, security experts, journalists and politicians to accomplish a comprehensive and general acceptable definition of terrorism, it was always unsuccessful for the international community to unit in such a definition. Media coverage of terrorist incidents over the years has further confused the difficulties of defining terrorism, which is variously described as the work of, among others, 'commandos,' 'extremists,' fundamentalists,' and 'guerillas'. The negative connotations associated with the word 'terrorism' have further complicated attempts to arrive at a subjective definition of the term. The other reason of this perplexity is the declarations of the governments or international subjects which are mostly affected by political or ideological meaning of the term, that containing different values. This diversity of the views of the international subjects about the definition was the most important difficulty to overcome.

The initial problem in defining 'terrorism' stems from various popular perceptions and misconceptions, which ultimately condition the political and legal meaning of the term. Legal literature reflects a shared perception as to certain types of prohibited conduct which target civilian aircraft, innocent civilians, diplomats and other internationally protected persons, civilian installations, archaeological and cultural

monuments, artifacts and records. But there is no agreement as to just who the persons deemed 'innocent civilians' or genuine diplomats are, or what constitutes purely civilian installations or legitimate targets. This confusion stems, in part, from the mass media's indiscriminate and inconsistent use and application of the term terrorism, as well as, governments pronouncements, which are influenced in turn by the political or ideological content of the term, thus reflecting differing values. It is best expressed in the maxim: what is terrorism to some is heroism to others.²⁸

It is clear that terrorism as a popular term has no positive sound. It is usually used to label the 'others' for instance the enemies or opponents with always a negative connotation. 'What is called terrorism thus seems to depend on one's point of view. Use of the term implies a moral judgment and if one party can successfully attach the label 'terrorist' to its opponent, than it has indirectly persuaded others to adopt its own moral viewpoint.'²⁹ Therefore it is almost subjective to label anyone as terrorist because the point of view is here the determined factor.

This difference of thought about the interpretation of the term has been distinctly seen in international community when 11 Israeli athletes at the 1972 Olympic Games in Munich were seized and murdered by namely the 'Black September Organization' militants. This act was perhaps until 11 September 2001 attacks on America, the most effective and greatest one that world has seen. There was a great debate and discussion at the United Nations about the feature of the act whether to call it as a terror violence or not. The world has divided into two parts; commonly, western and non-western countries. The Arab and several third world countries consisted of African, Asian and communist states claimed that the nations under invasion of other state armies have the right to use all means (including use of force) in order to defend their homeland.³⁰ By

²⁸ M. Cherif Bassiouni, "International Terrorism", M. Cherif Bassiouni, (Eds.), *International Criminal Law, Volume 1, Crimes*, p. 776.

²⁹ Brian M. Jenkins, *The Study of Terrorism: Definitional Problems*, Santa Monica, CA, Rand Corporation, December 1980, p. 10.

³⁰ Quoted by Frederick J. Hacker, *Crusaders, Criminals, Crazies: Terror and Terrorism in Our Time*, New York: W. W. Norton, 1976, p. 174.

the way, the third world countries aimed to exclude the national liberation movements and the acts of violence which were perpetrated within the scope of defending homeland against the colonial, racial and alien powers from the notion and context of terrorism. On the other hand, these same countries pursued the aim to include or to extend the notion of terrorism by describing the activities of the colonial, racist and alien regimes which were imposed forcibly on the people of third world countries as state terrorism.

In contrast to this behavior of non-western countries, all the western states were ready to carry out a strict measure plan against international terrorism. But as mentioned above because of the disagreement about the features of the acts, it could not be achieved up to now to take altogether severe measures in international community against terrorism. Just as the same situation was experienced after 11 September attacks in the world but this time there was a mixed distribution appearance in the western civilization. All western countries did not support America's war on international terrorism as in the past they did.

Is it actually necessary to agree on an international general accepted definition of terrorism?

Indeed, the definitional studies on the subject of terrorism are not the final pursued aim but also they are the means to be used in order to facilitate the understanding and thinking of the phenomenon. They are also not enough solely to solve and suppress the problem of terrorism. The UN experts who study on the definition of terrorism finally come to the result that, it is too ambitious an aim to force the parties to agree on a subjective definition of terrorism.³¹ According to Laquer, it is also neither possible to agree on a universal definition nor is it worthy to try to achieve such an aim.³²

However it has to be said that, defining terrorism is since 90's not only a theoretical subject but also an operative concern of the international community. It

³¹ UN Doc. E/CN.4/ Sub. 2/1999/27, paragraph 43.

³² Walter Laquer, *Terrorismus-eine Bilanz*, Walter Laquer, (Eds.), *Zeugnisse politischer Gewalt, Dokumente zur Geschichte des Terrorismus*, Athenaum Verlag, 1977, p.218.

seems no longer a local problem of specific countries but an issue involving a number of international aspects. Terrorist organizations may perpetrate attacks in several countries; the victims of attacks can be of different nationalities; the offices, headquarters, and training camps of terrorist organizations function in various countries; terrorist organizations receive direct and indirect assistance from different states, enlist support from different ethnic communities, and secure financial help throughout the world. Also it can be argued that, it is particularly an international pressing need to agree on the definition of terrorism at the international scale because modern terrorism has very international aspects in modern age.

2. Distinguishing Terrorism from Other Types of Criminal Acts

Terrorism is a weapon and a method that was used in the history both from states and non-state actors with mostly political reasons and intentions. It is also accepted that terrorism is the last stage of the political extremism. The aim of terrorism is always the political order. Terrorists intend to coerce or intimidate the legitimate governments in pursuit of their political or other goals. They need to create in the society a general insecurity and a great fear in order to undermine the trust to the state and its ability to safe its own people. Shock effect is not of little important of the terror violence but maybe the most important component of the act. Terrorism is primarily a communication strategy particularly nowadays and in that strategy the act of violence has only a symbolic worth that is to say a message carrier.³³ But what kind of message then is it? It is difficult to determine the truth of the message but it has to be accepted that this message is full of blood and tear since thousand years.

a. Distinguishing Terror from Terrorism

³³ Peter Waldman, „*Terrorismus als weltweites Phänomen: eine Einführung*“, Kai Hirschman and Peter Gerhard (Eds.), *Terrorismus als weltweites Phänomen*, Bundesakademie für Sicherheitspolitik, Band 18, Berlin Verlag 2000, p. 13.

In order to make the term more comprehensible, it is meaningful to differ the terms terror and terrorism from each other. At first, it is fundamentally admitted that the both terms have the relationship with the systematic spreading of fear and intimidation. It is aimed to mean under the term 'terror' generally the violence that is carried out 'from the top' in other words from the state actors or agents to the own citizens of a state. In contrast to this situation it is understood under the term 'terrorism' generally the violence 'from down' against the rulers in order to achieve a change in political order.³⁴

There are certainly conspicuous differences between these both phrases. Firstly there have been always more victims of regime terror than the revolutionary terror. When it is remembered only the Nazi regime or Stalin's dictatorship or the cultural revolution of China thought, it is seen that the numbers of victims of these regimes are incomparable with the revolutionist terrorisms.³⁵ Another diversity is the fearlessness of the state actors. They are not afraid of being captured or to be sentenced. Therefore they are fearless to crime and have more possibilities without risks to offence. However it is always dangerous for the terrorists to act under risk. Terrorists need mostly the sympathy of the nation and for that reason the playing field of the terrorists is more restricted than the state actors. The terrorists must pay attention the reaction of the people but the agents of the terror regime do not have to.

b. National and International Terrorism

It is of course more difficult to agree on a definition of international terrorism while there is no agreement even on national terrorism. Particularly with the technical developments in the last decades of the twentieth century, terrorism could renew itself easily and by the way at the international area a co-operation and integration process

³⁴ Kai Hirschman, *Terrorismus*, Europäische Verlagsanstalt, 2003, p. 7.

³⁵ Peter Waldman, *Terrorismus, Provokation der Macht*, p. 16.

occurred between so many terrorist movements. It is to say that with the globalization era terrorism has itself internationalized too.

Under these circumstances such terror acts could be described as 'international' when these acts fulfill several conditions. At the beginning there must be an international organization whose destination is further away than its own nationality. Actually these movements have no nationalities or national restrictions. They don't limit their targets and action fields with a certain area but also they are all over the world. Sometimes in the heart of America, sometimes in Africa or whole Europe. Both their aims and operations have international characters and the members of the organizations consist of many different origins, not only an exact nationality but also members from many different countries.³⁶

The threat or use of violence for political purposes is called as international terrorism when:

- such an action is intended to influence the attitude and behaviour of a target group wider than immediate victims,
- its ramifications transcend national boundaries (as the result, for example, of the nationality or foreign ties of its perpetrators, its locale, the identity of its institutional or human victims, its declared objectives or the mechanics of its resolution.³⁷

Political terrorism becomes international in the strict sense when it is; (i) directed at foreign targets; (ii) concerted by the governments or factions of more than one state; (iii) aimed at influencing the policies of a foreign government.³⁸

³⁶ Kai Hirschman, *Terrorismus*, p. 9–10.

³⁷ International Terrorism in 1977; A Research Paper (National Foreign Assessment Center, CIA, RP78–102554, August 1978), p1, footnote 1, cited in *Terrorism: A Challenge to the State*, (Eds.), Juliet Lodge, Oxford: Martin Robertson, 1981, p. 9.

³⁸ Paul Wilkinson, *Terrorism and the Liberal State*, London: Macmillan Press, 1977, p. 174.

On the other hand, the aim of political change is the most emphasized aspect by the definitions of academics. According to Bassiouni, acts of terror violence must contain an international element, be directed against an internationally protected target or violate an international norm in order to be deemed as international.

An act of terror violence contains an international element when:

1. The perpetrator and victim are citizens of different states.
2. The conduct is performed in whole or in part in more than one state.
3. The perpetrator is a citizen of one state and the act is committed in another state.

Internationally protected targets are:

1. Innocent civilians, whether protected by international legal instruments or not.
2. Duly accredited diplomats and personnel of international organizations acting in their official capacities.
3. International civil aviation and international civilian maritime navigation.
4. The mail and other means international communications.
5. Members of non-belligerent armed forces.

A power oriented outcome is; an outcome which is aimed at changing or preserving the political, social or economical structures or the policies, conduct or practices of a given state by means of coercive terror violence strategies.

Internationally proscribed conduct applicable to terror violence includes:

- Aggression
- War crimes
- Crimes against humanity
- Genocide
- Apartheid
- Unlawful human experimentation
- Torture
- Slavery and slave related practices
- Piracy and unlawful acts against the safety of maritime navigation
- Hijacking and sabotage of aircraft and acts of violence at airports
- Kidnapping of diplomats and other internationally protected persons
- Taking civilian hostages
- Serious environmental damages
- Serious violation of fundamental human rights.³⁹

c. Terrorism and Guerilla Warfare

³⁹ M. Cherif Bassiouni, "*International Terrorism*", M. Cherif Bassiouni, (Eds.), *International Criminal Law, Volume 1, Crimes*, p. 778-779.

It has been always a controversial subject to distinguish terror from the guerrilla warfare. Both of the terms contain irregular war methods. Sometimes terrorist acts can constitute the beginning of a guerilla war or the end of it. The acceptability of the use of violence in the area of national liberation movements leads to the result that the terrorists want to be described as the freedom fighters. The anxiety of the legitimacy of the organizations at the field of international area was a reason of such an approach. Finally this approach requires to differ these both phrases from each other in order to achieve a clear conclusion.

Terrorism and guerrilla warfare often serve as alternative designations of the same phenomenon. The term “terrorism,” however, has a far more negative connotation, seemingly requiring one to take a stand, whereas the term “guerrilla warfare” is perceived as neutral and carries a more positive connotation.

Guerilla warfare is a military strategy intended to disturb and gradually to surround and finally to destroy the enemies. They operate as military units and they attack against the armed forces of the enemies. The guerillas aim to conquer the territories of the land and to keep it anyway. On the other hand, terrorism is a communication strategy. This strategy contains of course violence or threat of violence but not as an unconscious extermination method but as a signal in order to expand its psychological intimidation affectivity at the community. Terrorists don't appear as a military unit at the public area or they don't aim to conquer a certain region and in this region to dominate its own rules. That is to say that; the guerilla wants to invade the area, against it the terrorist wants only the thoughts of the people.⁴⁰

The strategy of the guerilla warfare seems to be like a conventional and classical war technique. Building a classical army and conquest of the lands are the goals of the guerillas. Guerrilla war is a small war – subject to the same rules that apply to big wars, and by the way it differs from the approach of the terrorism. Another factor that differs terrorism from guerilla warfare can be argued as follows:

⁴⁰ Peter Waldman, „*Terrorismus als weltweites Phänomen: eine Einführung*“, p. 17.

“The traditional distinguishing characteristic of the terrorist was his explicit refusal to accept the conventional moral limits which defined military and guerrilla action”⁴¹

It is also acceptable that the guerillas are more respectful to the separating line as a target between the combatants and non-combatants. In contrast to the manner of the guerillas, terrorists have no limits. And they don't refrain from aiming at the civilians as a target.

“Guerrillas may fight with small numbers and often inadequate weaponry, but they can and often do fight according to conventions of war, taking and exchanging prisoners and respecting the rights of non-combatants. Terrorists place no limits on means employed and frequently resort to widespread assassination, the waging of ‘general terror’ upon the indigenous civilian population.”⁴²

3. State-sponsored Terrorism

The acts of violent perpetrated by a state against civilians are proscribed by international conventions and are obviously defined as ‘war crimes’ (in a war situation) and crimes against humanity (out of war situation). Therefore intentional acts of violence against civilians by official agencies of a state either rat times of war or in occupied territories will be considered war crimes rather than terrorism.

The above mentioned conventions have led to the international delegitimation of the use of violence against by military personnel and political leaders there is still a lack of legitimation concerning the use of violence against civilians by organizations or individuals on political grounds.

⁴¹ Alex P. Schmidt, Albert J. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*, p. 44.

⁴² Paul Wilkinson, *Political Terrorism*, London: Macmillan, 1974, p. 80.

State sponsored terrorism can be defined as follows:

“The deliberate employment of violence or the threat of use of violence by sovereign states (or sub-national groups encouraged or assisted by sovereign states) to attain strategic and political objectives by acts in violation of law. These criminal acts are intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened.”⁴³

For many years, terrorism was a two-sided battle between an organization and a sovereign state. Acts of terror violence were mostly carried out by a group of people or an organization against a legal government. But in the late of the twentieth century this approach was changed and many different states began to use terrorism as a means in international area in order to promote their own state interests. Since that time terrorism was perceived and carried out as a dangerous weapon not only by revolutionary or liberation movements but also by several kinds of states.

Some puppet terrorist organizations were established by various states especially in the cold war era in order to achieve strategic ends in circumstances where the use of conventional armed forces is deemed inappropriate, ineffective, too risky or too difficult. The high costs of conventional war methods and the unwillingness to appear as the aggressor or the indirect responsibility at the international area have altered terrorism as a useful but also dangerous weapon for many states at that time.

Ever since the nineteenth century, the great powers, as well as a large number of middle-sized powers, have financed terrorist groups, meddled in their politics, and attempted to use them to achieve some fancied advantage over their adversaries. Far more often than not, however, this alleged ‘weapon’ blows up in the sponsor’s face.⁴⁴

⁴³ Ray S. Cline and Yonah Alexander, *Terrorism as State-Sponsored Covert Warfare*, Virginia: Hero Books, 1986, p. 24.

⁴⁴ Richard E. Rubenstein, *Alchemists of Revolution, Terrorism in the Modern World*, New York: Basic Books Inc, 1990, p. 36–37.

State sponsored terrorism constitutes a particularly grave source of escalating terrorism according to Wilkinson. He points out that access to the armouries, training facilities and cash and logistic support of sponsor regimes vastly increase the fire power of the terrorist groups. Sponsor states find proxy war remarkably cheap compared to conventional military attack, while at the same time terrorism carries none of the risks of open war. It is clandestine and undeclared and therefore the sponsor state can simply disavow any involvement. The target state, especially if it is militarily weak and politically and economically unstable will find it almost impossible to prevent external aid reaching terrorist groups.⁴⁵

The sponsor states supported their beneficiary terrorist organizations politically, financially as well as military. States are involved in terrorism in a variety of ways from various levels of general assistance, to operational aid to initiating and directing a terrorist organization's activities, and up to direct attacks perpetrated by official state agencies. Such forms of involvement classify states as 'states supporting terrorism or terrorist states'.

The basic level of the state sponsored terrorism is actually the ideological based support. In the past, the terrorist organizations have been perceived as a useful instrument for exporting ideological doctrines. In such cases, the terrorist organization is supplied with political, military and ideological or religious indoctrination via agents of the supporting state or is trained by institutions of the sponsoring state.

These states provide terrorist organizations financially too, in order to maintain the operational availability of the organization. A terrorist movement requires large amount of money to sustain its presence, and it is mostly unable to meet all the required monetary needs for a terrorist organization from its own resources.

The next level of the state aids in the field of international terrorism is military aids which are operational or directional. Within this framework, the state provides the

⁴⁵ Paul Wilkinson, *Terrorism and the Liberal State*, p. 199.

organization with a broad range of weapons, or organizes training courses and supplies the militants with false documents.

The highest level of the state involvement in terrorism is 'perpetrating direct attacks by government agencies'. In these cases, the state carries out terrorist attacks against the civilians in order to further its interests, using agencies from its own intelligence services and security forces, or through people directly responsible to them. Such a state is not a participant actor to the violence anymore but the fundamental part of the unlawful act. This type of activity by a state is called state terrorism. The distinction of the state terror and terror sponsored by a state is the participation degree of the state to the terrorist act.



II. MOTIVES AND NEW FORMS OF TERRORISM

A. MOTIVES OF TERRORISM

The reasons behind terrorism are as diverse as the types of people who commit terrorist attacks. Terrorists often believe that they have exhausted all attempts at legitimate religious or political change and have no other option to bring recognition to their cause and change to the society they live in. However, terrorists intentionally target civilians in order to gain publicity. Political oppression, religious intolerance and divine revelation are a few of the most common reasons cited by terrorist as justifications for their attacks. Whether motivated by religious, political, or military beliefs there is no single reason terrorists use to justify their attacks.

To develop a framework for the analysis of likely settings for terrorism, conceptual distinctions must be established among different types of factors. Firstly, a significant difference exists between preconditions, factors that set the stage for terrorism over the long run, and precipitants, specific events that immediately precede the occurrence of terrorism. Secondly, a further classification divides preconditions into enabling or permissive factors, which provide opportunities for terrorism to happen, and situations that directly inspire and motivate terrorist campaigns.

First, modernization process produces an interrelated set of factors that is a significant permissive cause of terrorism, as increased complexity on all levels of society and economy creates opportunities and vulnerabilities. Sophisticated networks of transportation and communication offer mobility and the means of publicity for terrorists. Urbanization is part of the modern trend towards aggregation and complexity, which increases the number and accessibility of targets and methods. Cities became a significant cause and arena for terrorism with the process of modern urban renewal projects. Social facilitation is also an important permissive factor. This concept refers to social habits and historical traditions that sanction the use of violence against the government, making it morally politically justifiable, and even dictating an appropriate form, such as demonstrations, coups or terrorism. Social myths, traditions, and habits

permit the development of terrorism as an established political custom. The most salient political factor in the category of permissive causes is a government's inability or unwillingness to prevent terrorism. The absence of adequate prevention by police and intelligence services permits the spread of conspiracy.

Generally speaking, three motives for terrorist actions can be mentioned. These basic motives of terrorism can be seen especially in the last thirty years' terrorist actions. The social revolutionary, ethnic-nationalistic and religious motivations are the ground motives of today's terrorism.

1. Social revolutionary terrorism

A desire for changes in social and political structures often with an ideologically based movement as an example of the extreme left-wing terrorists of 70's is the most emphasized character of this type of motivation. Marxist-Leninist ideas stay at the core of the approach. The Red Army Faction is an appropriate example of the social revolutionary terrorism in Germany. Namely the '68 Generation' consisted of the students in German universities who have used terrorism as a useful means in order to design the social and political structures in pursuit of their own goals.

2. Ethnic-Nationalistic Terrorism

The longing of political and cultural autonomy even a separate state for the ethnic or political minorities is the aim and motive of this type of terrorism. This is the most frequently used type of terrorism particularly since the second half of the 20. Century in the world. Despite the allegations of the governments that terrorism is not an impossible and effective means in order to have the authority over the land and in the pursuit of a successful political change, it was also a victory for some ethnic-nationalistic terrorist based organizations such as EOKA in Greece and FLN in Algeria

and in the establishment of Israel for Menachem Begin. All these actors and organizations have used terrorism as a functional tool in order to achieve their own aims. The other examples are the most famous terrorist organizations namely former PLO in Palestine, IRA in Nordirland, PKK and ASALA in Turkey and finally ETA in Spain. Most of these organizations seem rhetorically as in the same way with left wing terrorism because of tactical reasons. Some of them prefer more and more religious rhetoric because of the more acceptability of such a motive in the society.

3. Religious Terrorism

The relation between religion and terrorism is absolutely not new. The first terrorist attacks were carried out more than two thousand years ago by the religious fanatics. These religious terrorists have inherited to the world their own terminology as 'Zelot' from Jews fanatics and 'assassinate' from radical Islamic sect namely 'Ismaelis' and at last the word 'thug' from Indian religious cult. The act of violence stemmed from religious character has a sacramental direction as a duty direct from God or holy texts or from the spiritual authority in the world. They have always dreamed to be a martyr in the pursuit of their religious aims and in order to achieve to this rang, they could risk everything even their own life.

Religion was also the most important and effective justification for almost all the terrorist movements till the secularization process in 19. Century. Because of the secularization process as like in nearly all levels of the life, religion has lost its motivate character for terrorists too. This approach induced a transformation of terrorism from a religious character into a non-religious and secular character. With the influence of the ethnic-nationalistic terrorism approach in the late of the 20. Century particularly after 2.World War, the religious motivated terrorism has lost its affectivity as former. Because in the Cold War Era each part of the superpowers were in need of a terrorist group in order to challenge each other. As an ethnic-nationalistic terrorism approach many of the third world countries have used terrorism in order to achieve their

independence and to challenge the western powers in pursuit of their own national interests.

In that time the religion was seen for no one as a required means for terrorist objectives until the revolution in Iran. In 1979 with a religious revolution in Iran, the religion appeared again as an effective motivation for terrorist approach. Before the revolution, there were no religious motivated terrorist organizations for example in 1968 'the beginning year of the modern international terrorism' none of the most effective 11 terrorist movements could be as religious described. But after the revolution in approximately twenty years the number of the religious terrorist movements increased itself to a certain high degree namely in the middle of the 90's amounts to nearly half of the all terrorist organizations.

It is remarkable that the number of the terrorist organizations that describe themselves as ethnic- nationalistic and seperative decrease in this period of time while the number of the religious terrorist movements spread over. Because after the Cold War Era the relations, the needs and the requirements and precedence have changed for the most terrorist organizations. They were no more active in international area. In contrast to this situation the influence of the religious motivated terrorism extended itself in last decade and with the Al-Qaeda terror organization the religious terrorism climaxed in its long history.

B. NEW FORMS OF TERRORISM

The technological possibilities have improved themselves in favour of terrorist organizations in last decades. There is also nuclear, biological and chemical terrorism besides conventional terrorism and of course cyber terrorism is at the disposal of modern terrorists.

1. Conventional Terrorism

First of all, conventional terrorism is most commonly used terrorist method for the terrorist movements. In the past, most of the terrorist organizations have carried out conventional means in order to achieve their goals. The famous conventional terrorist acts were use of fire arms and kidnapping people or bombing certain targets. The classical method is attractive for almost all terrorist movements. It seems pretentious with the technological improvements and it has climaxed with 11 September attacks in USA. The recent terrorist activities occurred against synagogues in Istanbul are also covered in this category.

This form of terrorism contains also the suicide bombings that appear especially in the Middle East. Such attacks are not so pretentious but they are preferred by terrorist movements because of not complexity and no need to hard preparation process.

2. NBC (Nuclear, Biological and Chemical) Terrorism

NBC terrorism was always a utopian thought and threat for the world community till the Tokyo subway attack with chemical weapons by a cult with apocalyptical fanaticism in 1995. But the use of chemical weapons, especially the use of nerve gas, by today's terrorists has indicated how terrorism in 20. Century itself developed and transformed. Actually, the use of mass destruction weapons, namely nuclear, biological and chemical weapons requires a complex and high technological substructure. Despite this negative aspect, it has to be said that, because of the difficulty even impossibility of the protection against these weapons, this type of terrorism is always popular and preferable for contemporary terrorists. It is also possible to kill and destroy a mass of people by NBC terrorism with little effort on the subject and within a little time than conventional terrorism.

On the other hand, it has to be accepted that, terrorists do not prefer

predominantly mass destruction weapons. They favor statistically the conventional means. Perhaps the expensiveness of the raw materials of NBC terrorism and the difficulty and risks to find or to steal it are the reasons of this behavior. Therefore modern terrorists prefer to use conventional means of terrorism with high technology equipments rather than nuclear terrorism. The 11 September attack, which was maybe the most important terrorist violence of the century, was a conventional terrorist act.

According to Falkenrath, 3 conditions must be fulfilled simultaneously by a group in order to speak about a threat of mass destruction (WMD) terrorism.

- It must be capable of acquiring and using weapons of mass destruction (including all risks)

- It must be interested in mass-murder

- It must want to use WMD to achieve it.

whereas the first category must be seen as the most crucial point.⁴⁶

It is not so simple to obtain or to produce a nuclear bomb for terrorists today. There are of course technical barriers pertaining to scientific information as well as hindrances to acquire it. It is also available to achieve the required information for nuclear bombs publicly for example via internet and to acquire the fissile materials via stealing or smuggling. But despite all these availabilities, it is actually difficult and risky to have a nuclear weapon. Some countries like Iraq have struggled for years in order to produce it but the result is unsuccessful. In summary, many arguments show that nuclear terrorism is not very likely to happen in the near future as a great threat for world community.⁴⁷ It is also simpler to produce and to use chemical and biological weapons for terrorist groups than nuclear ones. In the field of nuclear terrorism, the

⁴⁶ R.A. Falkenrath, "Confronting Nuclear, Biological and Chemical Terrorism", *Survival*, Vol.40, Autumn 1998, p. 43–65.

⁴⁷ Kai Hirschman, "Today's Terrorism, A New Challenge", Kai Hirschman and Peter Gerhard, (Eds.), *Terrorismus als weltweites Phänomen*, p. 51–52.

main threat is not the terrorist organizations but the developing states which have nuclear materials and techniques.⁴⁸

Biological and chemical weapons are often referred to as the poor man's nuclear bombs. The required materials and substances for bio-chemical weapons can be rather easily obtained than nuclear materials. Because these materials are being used in medicine and it is also very simple to obtain these materials with commercial aims. The next step, how to deal with these materials and how to produce a weapon, is publicly available for everyone.

It is very difficult to ascertain the probability of the use of the nuclear, biological and chemical weapons in the near future but as Laquer points out, the potential danger of using chemical and biological weapons seems to be higher than of nuclear terrorism. According to Laquer:

- Chemical agents are much easier to produce than nuclear weapons, but very difficult to keep safely in stable conditions, and their dispersal depends largely on climatic factors.

- Biological agents are most dangerous, but storage and dispersal is even trickier than for chemical agents. Also the risk of contamination for the people handling them is high and many of the most lethal bacteria and spores do not survive well outside the laboratory.

- Given the technical difficulties, terrorist are less likely to use nuclear devices than chemical agents, and least likely to use biological weapons.⁴⁹

⁴⁸ Karl-Heinz Kamp, „*Nuclear Terrorismus-Fakten und Fiktionen*“, Kai Hirschman and Peter Gerhard, (Eds.), *Terrorismus als weltweites Phänomen*, p. 197-198.

⁴⁹ Walter Laquer, „Postmodern Terrorism“, *Foreign Affairs*, September/October 1996, p. 24–36.

3. Cyber Terrorism

a. Introduction

The definitional problem occurs for cyber terrorism too, as in international terrorism. There has been no single universally accepted definition for the term 'cyber terrorism'. It is also problematic to find out the intent, identity or the political motivations of a computer attacker in order to label a computer attack as cyber terrorism.

Despite these difficulties, it was attempted to define the term by several related institutions and security experts. By the way, the term may be defined as 'a criminal act perpetrated through computers resulting in violence, death and destruction and creating terror for the purpose of coercing a government to change its policies.'⁵⁰ In order to speak about cyber terrorism, there must be a deliberate use of computers as a weapon for political or any other aims by terrorist organizations or any other individuals in pursuit of their own interests to coerce governments to change their policies.

Cyber terrorism is "the use of computer network tools to shut down critical national infrastructures (such as energy, transportation, government operations) or to coerce or intimidate a government or civilian population."⁵¹

The effects of the cyber attacks must be sufficiently destructive or disruptive to generate fear potentially in comparison with physical effects of an act of terror violence. Under this 'severity of effects' view, computer attacks that are perhaps limited in scope, but that lead to death, injury, airplane crashes, water contamination of major loss of confidence portions of the economy may also qualify as cyber terrorism.⁵²

⁵⁰ Ron Dick, Scott Berinato, *The Truth about Cyber Terrorism*, CIO, 2002

⁵¹ James A. Lewis, *Assessing the Risk of Cyber Terrorism, Cyber War and other Cyber Threats*, Center for Strategic and International Studies, December 2002, p. 38

⁵² Dorothy Denning, *Is Cyber War Next?*, Social Science Research Council, November 2001, available at:<http://www.sscr.org/setp11/essays/denning.htm>, (Access: 26.04.2004).

b. The Capabilities of Cyber Attacks

The whole information system of a country or only the computers of civilian may be the viable target for the international terrorist organizations. Terrorist groups use today the internet only to communicate and to collect information for the next potential target. It must be said that, according to a study, there is no officially published evidence that computers and the internet have been used directly or targeted in a terrorist attack.⁵³

A report by a terrorism study center in USA concluded that the barrier to entry for widespread and severe computer attacks is quite high and that terrorist groups currently lack the capability to mount a meaningful operation. The report also concluded that it is more likely that less severe computer attacks will be used in the future to supplement physical terrorist attacks.⁵⁴

Many security experts think that, information technology would most likely not be used to cause events of mass disruption. Terrorist organizations prefer to select their targets carefully with an attack of limited effects.⁵⁵

Members of Al-Qaeda and other terrorist groups have a record of using computer networks in planning terrorist acts. Evidence suggests that terrorists used the internet to plan their operations for September 11, 2001. Mohammed Atta, the leader of the attacks, made his air ticket reservation online, and Al-Qaeda cells reportedly were using Internet-based telephone services to communicate with other cells overseas.⁵⁶ Khalid Shaikh Mohammed, mastermind of the attacks against the World Trade Center, reportedly used internet chat software to communicate with at least two airline

⁵³ John Arquilla and David Ronfeldt, *The Advent of Netwar, Networks and Netwars: The Future of Terror, Crime and Militancy*, Rand, Santa Monica, 2001, p. 1–28.

⁵⁴ A report by the Center for the Study of Terrorism and Irregular Warfare, available at: <http://www.nps.navy.mil/ctiw/reports/>, (Access: 28.04.2004).

⁵⁵ David Tucker, *The Future of Armed Resistance: Cyber Terror? Mass Destruction?* Report on Conference held at the University Pantheon-Assas, Paris, May 15-17 2000, available at: http://www.nps.navy.mil/ctiw/files/substate_conflict_dynamics.pdf, (Access: 29.04.2004).

⁵⁶ Audrey Cronin, "Behind the Curve, Globalization and International Terrorism", *International Security*, Vol. 27, no. 3, Winter 2002/03, p. 30–58.

hijackers.⁵⁷

The threat of a cyber terrorist attack in developed regions as Europe or USA seems to be higher than in developing countries which have limited technological penetration.

The effects of a cyber attack against the basic infrastructure are disputable because cyber terrorists would need to attack multiple targets simultaneously for long periods of time to create terror, achieve strategic goals or to have any noticeable effect. Despite the vulnerabilities of some critical infrastructures, the cyber attack must be simultaneously undertaken with a physical attack.⁵⁸ This sort of simultaneous combination of physical and cyber attacks might be the only way in which cyber weapons could be attractive to terrorists. Otherwise, it is very difficult to speak about a national security problem with only a cyber terrorist attack. The results of such an attack can be only the disruption of basic services for a few hours. If such a cyber attack does not cause damage that rises above the threshold of the routine disruptions that every economy experiences, it does not pose an immediate or significant risks to national security.⁵⁹

But what can cyber terrorists actually do? How dangerous is the threat of such an attack? Possibilities for terrorist acts are not in short supply, e.g. manipulations:

- of computers in the food processing industry leading to poisoned products,
- of financial transactions that could cause serious difficulties even for national economies,
- of aviation control systems that make planes collide in the air,

⁵⁷ Robert Windrem, "9/11 Detainee: Attack Scaled Back", <http://www.msnbc.com/news/969759.asp>, (Access: 29.04.2004).

⁵⁸ James A. Lewis, *Assessing the Risk of Cyber Terrorism, Cyber War and other Cyber Threats*, Center for Strategic and International Studies, December 2002, p. 4.

⁵⁹ *Ibid.* p. 3

- of the computer controlled composition of medical products,
- of power supplies etc.⁶⁰

c. Conclusion

The possibility of a cyber terrorist attack against the critical national infrastructures is always for today and tomorrow present. It is a serious and growing threat for international community but according to the researches and studies in this field, although the fears by governments that their national infrastructures may be a target for information warfare or cyber terrorism, and although this fear may be well-founded, the evidence so far is that, sub-state groups at least use information and communication technology mainly for propaganda, secure communications, intelligence gathering and funds management, not yet for a cyber terrorist attack.⁶¹

While some futurologists warn of an electronic Pearl Harbour for the west communities, the reality is that terrorists have not yet resorted to strategic information warfare. What is apparent, however, is that warfare is shifting towards attacking civilian targets and that sub-state terrorists and other extremists are increasingly targeting civilian infrastructures.⁶²

Finally, it can be concluded that cyber weapons seem to be of limited value for terrorist organizations or individuals in a terrorist attack to intimidate citizens or to coerce the government.

⁶⁰ Kai Hirschman, "Today's Terrorism, A New Challenge", Kai Hirschman and Peter Gerhard, (Eds.), *Terrorismus als weltweites Phänomen*, p. 54.

⁶¹ Andrew Rathmel, "Cyber-Terrorism: The Shape of Future Conflict", *RUSI Journal*, London, October 1977.

⁶² Michael Whine, *Cyberspace, A new Medium for Communication, Command and Control by Extremists*, Studies in Conflict and Terrorism, RAND May 1999.

CHAPTER II

TERRORISM AND INTERNATIONAL LAW

I. INTERNATIONAL LAW AND TERRORISM

Terrorism does not need to a definition in order to exist in international law. Despite the absence of a universal definition, most of the international legal instruments describe terrorism as a crime of a grave nature.

International law prohibits terrorist acts fundamentally. That is the general accepted result of the UN Charter although it includes no explicit article relevant to the ban of terrorism. Such indiscriminate acts of violence have always been perceived contrary to fundamental rules of law; either international by means of international treaties or particularly domestic criminal law.

Modern international law has confronted with the phenomenon of terrorism actually not too late. After the sensational assassinations of King Alexander from Yugoslavian and the Foreign Minister of France 'Barthau' in 1934 by a terrorist attack, the international community had to take seriously the problem of terrorism. In 1937 the League of Nations drafted for the first time International Convention for the Prevention and Punishment of Terrorism but it never entered into force.⁶³

Just at that time, the definitional problem of terrorism came to the agenda of the drafting parties and it was concluded that it is particularly important to agree on an internationally accepted definition of the phenomenon. Finally the convention succeeded to define terrorism as 'criminal acts directed against a state or intended to create a state of terror in the minds of particular persons or a group of persons or the

⁶³ League of Nations Doc. C.546.M383.1937.V

general public.’ By the scope of this convention, each party had several duties i.e. to describe the acts of terrorist violence as a crime in their domestic law and to adopt the extradition procedure for the terrorists to the relevant state. Under the convention, the drafting parties were liable to prosecute the supporters and suppliers of the terrorists. This obligation was perceived by England as a breach of the freedom of opinion principle and therefore it couldn’t be agreed upon a generally accepted execution of counter terrorism measures at that time. Also the first international attempt against terrorism failed in the late of 30’s and it couldn’t be achieved necessary measures to combat terrorism till today.

Finally, the United Nations focused upon the theme in 1970’s with the increased events of hijackings and hostage takings and attacks directed against diplomats and civilians with the use of explosives and weapons of mass destructions. On the other hand, with the liberation movements which occurred during de-colonization process in 1970’s and the endless conflict between Israel and Arab states, especially Palestine, the international community witnessed a large number of terrorist acts against civilians. That was also the time when ‘terrorism’ in general and the international response to such events were placed on the agenda of United Nations and international governmental organizations.

In 1972, actually on the right time, the USA had proposed a general comprehensive convention on terrorism in the UN, which was based on either the punishment of terrorists by states or the acceptance of the extradition procedure of the terrorists to the other states.⁶⁴ But it was not acknowledged by the state parties and by the way it has once more failed to create an agreement about the terrorism threat to the international community. Some delegations from Third World countries insisted on the need of studying the causes of terrorism before drafting a convention on the issue. At that time, the political considerations had a great role on defining and prohibiting terrorism because of the cold war perception. It was the most popular slogan for both of sides: “One man’s terrorist is, other’s freedom fighter”. Terrorism was also used by both of superpowers as a useful and cheap foreign policy instrument in order to destroy and

⁶⁴ U.N. Doc. A/CN.6/L.850, on 25 September 1972, 27th Session of UNGA.

undermine the welfare of the 'other', the enemy.

A. UNITED NATIONS AND INTERNATIONAL TERRORISM

There is a consensus among the international community that terrorism can be solely defeated by more international co-operation between states. In order to achieve this co-operation, United Nations organization is the most useful and appropriate body for the international community.

Terrorism has been of concern to the international community since 1937 when the League of Nations elaborated the Convention for the Prevention and Punishment of Terrorism. Over 60 years ago, terrorism comes as a major problem to the agenda of international community most with the terrorist attacks or actions that affect almost the whole world order. As an example, after an aircraft hijacking incident in 1963 the UN had its first serious interest with terrorism. Subsequently the United Nations created the first multilateral convention namely Convention on Offences and Certain Other Acts Committed on Board Aircraft. The United Nations bodies and agencies have produced fourteen international conventions, six draft conventions, thirty four resolutions, forty six reports, seven studies by the Ad Hoc Committee on International Terrorism, five Notes by the Secretary General and eighteen miscellaneous documents pertaining to terrorism, totally 112 instruments and documents on the subject.⁶⁵

Over the last few decades, the United Nations has adopted a number of treaties dealing with specific aspects of terrorism. But none of them had dealt comprehensively with the phenomenon of terrorism and till 1997 none of them had a title mentioning obviously the term 'terrorism'.

The following list identifies the major terrorism conventions and protocols between 1963 and 1999 and provides a brief summary of some of the major terms of

⁶⁵ M. Cherif Bassiouni, "*International Terrorism*", M. Cherif Bassiouni, (Eds.), *International Criminal Law, Volume 1, Crimes*, p. 767.

each instrument.⁶⁶ In addition to the provisions summarized below, most of these conventions provide that parties must establish criminal jurisdiction over offenders (e.g., the state(s) where the offence takes place, or in some cases the state of nationality of the perpetrator or victim).

1. Convention on Offences and Certain Other Acts Committed On Board Aircraft ("Tokyo Convention", 1963 Safety of Aviation):

- applies to acts affecting in-flight safety;
- authorizes the aircraft commander to impose reasonable measures.

2. Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention", 1970 Aircraft Hijackings):

- makes it an offence for any person on board an aircraft in flight [to] "unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft" or to attempt to do so;

3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Montreal Convention", 1971 applies to acts of aviation sabotage such as bombings aboard aircraft in flight):

- makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of that aircraft; to place an explosive device on an aircraft; and to attempt such acts or be an accomplice of a person who performs or attempts to perform such acts;

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973 outlaws attacks on senior government officials

⁶⁶ http://www.unodc.org/unodc/terrorism_conventions.html, (Access: 09.04.2004).

and diplomats):

- defines internationally protected person as a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law;

5. International Convention against the Taking of Hostages ("Hostages Convention", 1979):

- provides that "any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention;"

6. Convention on the Physical Protection of Nuclear Material ("Nuclear Materials Convention", 1980, combats unlawful taking and use of nuclear material):

- criminalizes the unlawful possession, use, transfer, etc., of nuclear material, the theft of nuclear material, and threats to use nuclear material to cause death or serious injury to any person or substantial property damage;

7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (extends and supplements the Montreal Convention on Air Safety), (1988):

- extends the provisions of the Montreal Convention (see No. 3 above) to encompass terrorist acts at airports serving international civil aviation.

8. Convention for the Suppression of Unlawful Acts against the Safety of

Maritime Navigation, (1988, applies to terrorist activities on ships):

- establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established against international aviation;

- makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships;

9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988, applies to terrorist activities on fixed offshore platforms):

- establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation;

10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991, provides for chemical marking to facilitate detection of plastic explosives, to combat aircraft sabotage):

- designed to control and limit the used of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am 103 bombing);

parties are obligated in their respective territories to ensure effective control over "unmarked" plastic explosive, i.e., those that do not contain one of the detection agents described in the Technical Annex to the treaty;

11. International Convention for the Suppression of Terrorist Bombing (1997): (UN General Assembly Resolution)

- creates a regime of universal jurisdiction over the unlawful and intentional use

of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place;

12. International Convention for the Suppression of the Financing of Terrorism (1999):

- requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect, though groups claiming to have charitable, social or cultural goals or which also engage in such illicit activities as drug trafficking or gun running;

- commits states to hold those who finance terrorism criminally, civilly or administratively liable for such acts;

- provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis. Bank secrecy will no longer be justification for refusing to cooperate.

All these conventions, despite their diversity, share the six modalities of international cooperation in penal matters, namely: extradition, mutual assistance, transfer of criminal proceedings and prisoners, seizure and forfeiture of assets and recognition of foreign penal judgments.⁶⁷

In 1996, the General Assembly established an Ad Hoc Committee to elaborate international conventions on terrorism.⁶⁸ It is in this Ad Hoc Committee that the Convention on the Suppression of Financing Terrorism was elaborated. With this convention, it was firstly attempted seriously to define the international terrorism. This

⁶⁷ M. Cherif Bassiouni, "Policy Considerations on Inter State Co-operation in Criminal Matters", M. Cherif Bassiouni, (Eds.), *International Criminal Law 3*, Transnational Publishers, (2. edit. 1999), quoted in, M. Cherif Bassiouni, "International Terrorism", *International Criminal Law, Volume 1, Crimes*, p.770.

⁶⁸ UNGA Res. 51/210, 17 December 1996.

approach of the Convention to the international terrorism consists of two basic parts. Firstly it relies on the success of prohibiting specific action in the conventions that were brought about from 1960's to 1980's. Article 2 paragraph 1(a) of the convention simply refers to these specific conventions and declares as terrorist acts which are mentioned in these conventions.

The second part of this approach is the first abstract definition of terrorism in international law, which is contained in Art 2 paragraph 1(b) of the convention. The provision refers to:

“any other 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.”⁶⁹

Since 2000, the Ad Hoc Committee has begun to work on a comprehensive convention on international terrorism.⁷⁰ Especially after September 11 attacks, the efforts in order to adopt a comprehensive convention on terrorism have increased.

This draft convention formulated the following type of definition for international terrorism:

“any person commits an offence within the meaning of this convention if that person, by any means, unlawfully and intentionally, causes;

- Death or serious bodily injury to any person, or

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

⁶⁹ Article 2 Para. 1b of the Convention on the Suppression of Financing Terrorism.

⁷⁰ Measures to Eliminate International Terrorism, Report of the Working Group, A/C.6/56/L9, 29 October 2001.

• Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,

when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”.⁷¹

In comparison with two types of definitions given above for international terrorism, it is remarkable that, the tendency in international law is to extend the notion of terrorism to destructive violence against objects i.e. public or private properties, critical infrastructures and damages resulting major economic loss.

During the negotiations of the draft comprehensive convention on terrorism in the Ad Hoc Committee of the General Assembly, the traditional dilemma of international law about distinguishing freedom fighters and terrorists from each other and the issue of state terrorism were also discussed. The Discussion Paper on the Preamble and Article 1 of the Draft Comprehensive Convention for Discussion in the Sixth Committee at the fifty-seventh Session of the General Assembly⁷² takes up the wording of the 1994 Declaration, which reaffirms that “all acts, methods, and practices of terrorism are criminal and unjustifiable, wherever and by whomever committed. During the discussions, Member States of the Organization of the Islamic Conference has proposed a different wording about the usage of term ‘armed conflict’ than the proposal of the Committee. The offer of the Co-ordinator was as follows:

“2. The activities of armed forces during an armed conflict as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this convention.

3. The activities undertaken by the military forces of a state in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this convention.”⁷³

⁷¹ Report of the Working Group, see supra note 70.

⁷² UN Doc. A/57/37 Annex I.

⁷³ UN Doc. A/57/37 Annex IV.

On the other hand, the wording proposed by the Member States of the Organization of the Islamic Conference reads:

“2. The activities of the parties *during an armed conflict, including in situations of foreign occupation*, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this convention.

3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are *in conformity with international law*, are not governed by this convention.”⁷⁴

These two proposals differ from each other in two aspects; at first, the proposal of the Islamic Conference Organization prefers to use the wording of ‘parties to an armed conflict’ instead of using the term ‘armed forces’ proposed by the Co-ordinator of the Committee. The situation of foreign occupation was also included in the exemptions of the convention in this proposal. Secondly, according to the proposal of the Islamic Conference Organization, it is not enough for the activities of the military forces of a state only to be governed by international law, but at the same time these activities must be in conformity with international law.

It must be said that, the wording ‘parties to an armed conflict’ is more general than the wording ‘armed forces’. The intention of this difference seems to exempt the organizations like Hamas, Islamic Jihad and Hezbollah from the scope of the application of the convention.⁷⁵

In addition to these multilateral agreements, there have been also UN Security Council Resolutions as well as General Assembly Resolutions pertaining to the subject of terrorism. The first Security Council Resolution about terrorism was adopted in 1992 with the number of 731. By this resolution terrorism was described as a threatening for the peace and security of the world. By the way, absolutely without regarding its probable motives, terrorism was prosecuted and prohibited by the international

⁷⁴ UN Doc. A/57/37 Annex IV.

⁷⁵ Peter Weiss, “Terrorism, Counter Terrorism and International Law”, (Access: 06.05.2004), available at: <http://www.tni.org/archives/weiss/terrorism.htm>.

community. This resolution was a reaction against the attacks to the Pan Am air flight which crashed over Lockerbie in Scotland, as the result of a bomb on board. All 259 passengers and crew were killed, as were 11 residents of Lockerbie. As a result of this resolution, the Libyan government was forced with international air sanctions to relinquish suspects in the bombing of Pan Am flight 103. After these international pressures, the suspects were tried and it was succeeded for the first time to prosecute the international terrorists in international area.

After the above mentioned resolution, there have been several Security Council and General Assembly Resolutions in 90's because of the increased terrorist acts against civilians and states. The General Assembly and Security Council have to date adopted respectively 24 and 21 resolutions on terrorism. The following list gives some of the most significant SC and GA resolutions concerning terrorism with their title adopted in last decades.

- Security Council Resolutions

SC Resolution 731 (1992)

SC Resolution 1189 (1998)

SC Resolution 1267, 1269 (1999)

SC Resolution 1333 (2000)

SC Resolution 1368, 1373, 1377 (2001)

SC Resolution 1388, 1390, 1438, 1440, 1450, 1452 (2002)

SC Resolution 1455 (2003)

- General Assembly Resolutions

GA Resolution 3034 (1972)

GA Resolution 40/61 (1985)

GA Resolution 49/60 (1994)

GA Resolution 50/53 (1995)

GA Resolution 51/210 (1996)

GA Resolution 52/164 (1997)

GA Resolution 54/109 (1999)

GA Resolution 56/1, 56/88 (2002)

GA Resolution 56/27 (2003)

The first GA Resolution of the United Nations on suppressing terrorism was adopted in 18 December 1972 as a reaction to the murder of 11 Israeli athletes by the Black September Organization from Palestine at the 1972 Olympic Games in Germany. It has an interesting title which indicates the difference of the opinions on the subject in the international community. The resolution is entitled:

“Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.”⁷⁶

The first Ad Hoc Committee on the subject of suppressing terrorism has been established by this resolution. The Committee has issued three reports on combating

⁷⁶ U.N. Doc. Res. 3034 (27th Sess.).

terrorism.⁷⁷ The first report of the committee on international terrorism concluded that, a comprehensive definition of terrorism was unfeasible due to the diversity of member states' views.⁷⁸

The resolution qualifies the acts of colonial, racist and alien regimes as 'terrorist' and condemns these acts because this type of repressive and terrorist acts of such regimes deny and prevent the right to self-determination and other human rights and fundamental freedoms of peoples. As it can be perceived from the title of the first resolution on the subject, the de-colonization process had affected the debates on the subject of terrorism at that time.

UN General Assembly has faced the problem of distinction of terrorism and freedom fight in several times. One of the most important GA Resolutions on the subject is adopted on 9 December 1994 with a 'Declaration on Measures to Eliminate International Terrorism.'⁷⁹ In this declaration the General Assembly has not only condemned 'all acts, methods and practices of terrorism' by adding the formula 'wherever and by whomever committed' but even more specifically pointed out that '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.'⁸⁰ By the way, the resolution excludes the motives and even noble causes especially political motives as justification for terrorist acts.

With the terrorist attacks of September 11, the intention of international co-operation against international terrorism and the number of the resolutions to suppress it have remarkably increased. Especially in its resolution 1373 (2001) of 28 September

⁷⁷ First report in 1973 (U.N. GAOR, 28th Sess., Supp. No. 28, U.N. Doc. A/9028); second in 1977 (U.N. GAOR, 32nd Sess., Supp. No. 37, U.N. Doc. A/32/37); and third in 1979 (U.N. GAOR 34th Sess., Supp. No. 37, U.N. Doc. A/34/37).

⁷⁸ First report of the Committee, see supra note 70.

⁷⁹ G.A. Res. 49/60 of 17 February 1995.

⁸⁰ 3. Paragraph of the GA Resolution.

2001⁸¹, the Security Council declared that “acts, methods and practices of terrorism [were] contrary to the purposes and principles of the United Nations [and] that knowingly financing, planning and inciting terrorist acts [were] also contrary to the purposes and principles of the United Nations”⁸². In the same resolution, the Security Council decided that all Member States should “take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other states by exchange of information.”⁸³ The Council also decided to establish a Committee to monitor implementation of that resolution. Earlier, in its resolutions 1267 (1999)⁸⁴ and 1333 (2000),⁸⁵ the Security Council had decided that UN member countries would seize the assets of named terrorists or terrorist organizations.

In its resolution 1368 (2001) of 12 September 2001⁸⁶, the Council stated that it regarded “any act of international terrorism as a threat to international peace and security”. Under Article 25 of the Charter of the United Nations, “the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the ... Charter”. In paragraph 2 of its resolution 1373 (2001), the Council decided that all Member States should:

“ ...

“(c) Deny safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens;

“ ...

“(e) 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 and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;

⁸¹ SC/Res/1373 (2001), adopted by the Security Council at its 4385th meeting, on 28 September 2001.

⁸² 5. Paragraph of the SC Resolution 1373.

⁸³ Paragraph 2/b of the Resolution 1373.

⁸⁴ U.N. SCOR, 54th Sess., 4051st mtg., U.N. Doc. S/INF/55 (1999).

⁸⁵ U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/INF/56 (2000).

⁸⁶ SC/Res/1368 (2001), adopted by the Security Council at its 4370th meeting, on 12 September 2001.

“(f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

“ ...”

In elaborating means to accomplish these mandatory obligations, the Council called upon all Member States with paragraph 3 of the same resolution to:

“ ...

“(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

“(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001);

“ ...”

It has been also established by the resolution 1373 ‘the Counter-Terrorism Committee’ (known by its acronym: the CTC), made up of all 15 members of the Security Council. The CTC monitors the implementation of resolution 1373 by all States and tries to increase the capability of States to fight terrorism. Although it is not a sanctions committee and does not have a list of terrorist organizations or individuals, the CTC is an instrument to monitor the implementation of resolution 1373.

B. REGIONAL ACHIEVEMENTS ON THE ISSUE OF TERRORISM

There have been also initiatives for the suppression of international terrorism by adopting international conventions at regional levels:

• **OAS (*Organization of American States*) 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, D.C. on 2 February 1971,

• **European Convention on the Suppression of Terrorism** concluded at Strasbourg on 27 January 1977,

• **SAARC (*South Asian Association For Regional Cooperation*) Regional Convention on Suppression of Terrorism**, signed at Kathmandu on 4 November 1987,

• **Arab Convention on the Suppression of Terrorism**, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on 22 April 1998,

• **Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism**, done at Minsk on 4 June 1999,

• **Convention of the Organization of the Islamic Conference on Combating International Terrorism**, adopted at Ouagadougou on 1 July 1999,

• **OAU (*Organization of the African Unity*) Convention on the Prevention and Combating of Terrorism**, adopted at Algiers on 14 July 1999,

• **Inter-American Convention against Terrorism**, OAS (*Organization of American States*), concluded on June 2002.

1. Response to Terrorism in Europe Before 11 September Attacks

Terrorism is one of the major challenges facing our societies in the 21. Century. Europe is a continent, which has experienced increasingly terrorist attacks in last

decades. Almost all the countries in Europe have been affected directly or indirectly by such terrorist acts.

Council of Europe has made the most significant effort in the field of international terrorism by adopting the first comprehensive convention namely 'the European Convention on the Suppression of Terrorism'⁸⁷ in which a list of terrorist acts are for the first time detailed described. But it has to be accepted that, the convention does not offer a comprehensive definition of terrorism. Actually it has a procedural nature aiming prosecution of terrorist acts by contracting parties. The convention is contented with only drawing up a list of terrorist acts.

Article 1 and 2 of the convention includes several kinds of offences which are described as 'terrorist acts'. The offences mentioned in article 1 of the convention are based within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 1971) which refer to certain terrorist acts.

According to Article 1 of the European Convention on the Suppression of Terrorism:

"For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

(a) an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;

(b) an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;

⁸⁷ European Convention on the Suppression of Terrorism, signed at Strasbourg on 27 January 1977, available at: <http://www.conventions.coe.int>, (Access: 18.05.2004).

(c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;

(d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

(e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;

(f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.”

While article 1 of the convention concerns only with the security of international protected persons (involving diplomatic agents), second article of the same convention extends the applicability of the convention to other general offences such an act of violence against the life, physical integrity or liberty of persons and property.⁸⁸ Article 2 of the convention reads as follows:

“1) For the purpose of extradition between contracting states, a contracting state may decide not to regard as a political offence or as an offence connected with a political offence or as an offence inspired by political motives a serious offence involving an act of violence, other than one covered by article 1, against the life, physical integrity or liberty of a person.

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

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

The convention obliges states not to consider terrorist acts as political offences, offences connected with a political offence or as offences inspired by political motives. At that time, this approach appears similarly in several international conventions such as International Convention for the Suppression of Financing Terrorism and International Convention for the Suppression of Terrorist Bombings.

⁸⁸ Article 2 of the Convention.

As one of the most serious threats to democracy, fundamental rights and values of the modern community and free exercise of human rights, terrorism prevents also economic, social and cultural development.⁸⁹ It seems as the most significant hindrance for the international community to achieve the global peace and security in the world. On the other hand, European Union is established on the values and rights which terrorism threatens and undermines. Human dignity and solidarity, respect for human rights and fundamental freedoms are the basic fundamental rights and freedoms on which EU is founded. Therefore, all member states of the European Union have ratified the European Convention on the Suppression of Terrorism.

On the other hand, the treaty which established EU, 'Treaty on European Union', specifically refers to terrorism as one of the serious crimes to be prevented and combated at European Union level by developing common action in the fields of police and judicial co-operation in criminal matters and approximating, where necessary, rules on criminal matters in the member states.

The relevant article of the Treaty is as follows:

"Without prejudice to the European Community, the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the member states in the field of political and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.

That objective shall be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud"⁹⁰

Actually, European Union also takes the problem of terrorism to its agenda quite early with article 29 of Treaty on European Union. There are three remedies offered in the treaty as the measures to suppress and combat international terrorism threat: "Closer co-operation between police forces, customs and other competent authorities, closer co-

⁸⁹ The La Gamora Declaration Informal Council Meeting on 14 October 1995.

⁹⁰ Treaty on European Union Title VI, Provisions on Police and Judicial Cooperation in Criminal Matters Article 29, amended with Nice Treaty.

operation between judicial and other competent authorities of member states, approximation of rules on criminal matters”.

Within the scope of article 30 of the treaty, regarding police cooperation between member states, Europol has been established with the Council Decision of 3 December 1998 ⁹¹ in order to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property.

Concerning judicial co-operation within the scope of international terrorism, article 31 of the treaty points out that, common action on judicial cooperation in criminal matters shall include;

- “facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States, including, where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions ⁹²;
- facilitating extradition between Member States” ⁹³.

There are two legal instruments concerning the extradition procedures at European Union level.

- Convention on Simplified Extradition Procedure between the Member States of the European Union, (10.3.1995).
- Convention Relating to Extradition between the Member States of the European Union, (27.9.1996).

These conventions aim to facilitate the applicability of the European Convention on the Suppression of Terrorism between member states of the Union. There is also a framework decision concerning the implementation of common ‘European search and arrest warrant’ which was adopted on 12/13 June 2002. All these achievements in the

⁹¹ OJ C 26, 30.01.1999, p.22.

⁹² Article 31/a of the Treaty on EU.

⁹³ Article 31/b of the Treaty on EU.

field of combating terrorism aim to make Europe more secure and livable for all persons.

Finally regarding the approximation of rules on criminal matters, Treaty on European Union advises to adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.⁹⁴

In order to approximate the rules on criminal matters among member states, European Union has adopted a Convention⁹⁵ concerning the mutual legal assistance in criminal matters and a Protocol⁹⁶ to this convention.

On the other hand, the Council of EU has adopted the Action Plan of the Council and Commission on how best to implement the provisions of Treaty of Amsterdam on an area of freedom, security and justice.⁹⁷ It was also referred to terrorism as an enemy which must be combated, in the conclusions of the Tampere European Council on 15 and 16 October and of the Santa Maria da Feira European Council on 19 and 20 June 2000.

Finally it must be mentioned on the recommendation which was adopted by European Parliament on the role of the European Union in Combating Terrorism on 5 September 2001.

2. Response to Terrorism in Europe After 11 September Attacks

European Union has an objective to establish for its citizens a high level of safety within an area of freedom, security and justice. Actually, these objectives require

⁹⁴ Article 31/e of the Treaty on EU.

⁹⁵ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29.05.2000.

⁹⁶ Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, 12234/01, 9.10.2001.

⁹⁷ OJ C 19, 23.1.1999, p. 1.

an effective fight against terrorism at European level. The need to an effective fight against terrorism at European level has appeared especially after 11 September attacks.

In order to fight effectual against terrorism in Europe, the Council of European Union has several kinds of legal instruments at its disposal. Article 34(2) of the Treaty on European Union explains these instruments comprehensively. The Council Conclusions of 20 September 2001⁹⁸ and the Extraordinary European Council Plan of Action to combat terrorism of 21 September 2001⁹⁹ are in particular worthy to mention.

One of these instruments which the Council entitled to adopt is, the Council Framework Decisions. As mentioned in paragraph b of the article 34(2) of the TEU, the Council may;

“adopt framework decisions for the purpose of approximation of the laws and regulations of the member states. Framework decisions shall be binding upon the member states as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.”

In addition, article 31(1)(e) of the TEU regards terrorism as one of the most significant criminal acts which must be prevented and combated by adopting measures establishing minimum rules on the constitutive elements and penalties of crimes such terrorism.

The provisions emphasize the need on the approximation of rules on criminal rules relating terrorism. It was also noted at point 46 of the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, adopted by the Justice and Home Affairs Council of 3 December 1998.¹⁰⁰

The necessity of a European concept on the issue of combating terrorism appeared urgently with the results of the 11 September attacks. Therefore, the European

⁹⁸ SN 3926/6/01 REV 6.

⁹⁹ SN 140/01

¹⁰⁰ O.J. (C19) 1, 1999.

Council agreed upon a definition of terrorism at its extraordinary meeting on 21 September 2001. From that time, it has been broadly negotiated and on 13 June 2002, the Council adopted a Framework Decision on Combating Terrorism.¹⁰¹ The deadline for transposition into national law for member states was decided as 31 December 2002.

3. Framework Decision on Combating Terrorism

In order to satisfy the international obligations stemming from the S.C. Resolution 1373, the EU has adopted the Framework Decision on Combating Terrorism. The general purpose of the decision is the approximation of rules on criminal matters by providing a uniform legal arrangement for prosecuting terrorist acts between member states of the Union.

It contains a common definition of terrorist offences, rules of competence and a judicial cooperation procedure between member states for prosecuting terrorist acts. In this sense, the framework decision is the basis of the fight against terrorism at the European level.

Actually the majority of EU member states do not have a specific legislation on terrorism at the moment. Only six of fifteen (from 1 May 2004 twenty five) member states have a separate arrangement on terrorism in their criminal law. On the other hand, only four of these six member states namely; Spain, France, United Kingdom and Portugal define the term 'terrorism' in their legislation. Although German and Italian laws have a specific legislation in their criminal laws, these laws do not contain any definition of the term. Other member states which don't have any specific legislation on terrorism prosecute terrorist acts as a common crime according to their domestic law.

These legal gaps and the need to uniform or to approximate the national laws relating to criminal matters especially terrorism, required a common framework

¹⁰¹ U.N. Doc. 2002/475/JHA, 2002O.J.(L164)3-7

decision on combating terrorism. The terrorist acts committed against European Union institutions and member states or targeting third countries or other international organizations are considered within the scope of the framework decision. Terrorist acts targeting a third country or an international organization must be committed on the EU's territory by a European national/resident or for the benefit of a legal person established in the EU in order to be deemed as an offence covered by the framework decision.¹⁰²

There are three types of offences mentioned in the framework decision pertaining terrorism. Article 1 refers to terrorist offences, while article 2 explains offences relating to a terrorist group. With this provision, it has been created in international law for the first time the incrimination of a new category of terrorist activities namely 'the acts relating to a terrorist group'. Finally article 3 of the framework decision concerns with offences linked to terrorist activities.

The following offences listed in article 1 are described as terrorist offences by the framework decision.

"Article 1) Terrorist offences and fundamental rights and principles

1. "Each Member State shall take the necessary measures to ensure that the international acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organization to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization,

¹⁰² Article 9 of the Framework Decision.

shall be deemed to be terrorist offences:

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

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

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

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

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

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

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

2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union."

According to the first article of the framework decision, an offence must have several elements in order to be deemed as a terrorist offence. At first, the committed offence must be incriminated under national laws of the member states. By the way, the member states have a duty all the offences listed in article 1 of the decision to incriminate in their domestic laws.

As a second condition, an international act must seriously damage a country or an international organization. The aim of this provision is to differentiate terrorist offences from less serious offences. The seriousness and the potential damage of an act are the cornerstones of the act in describing it whether as terrorist or not.

Finally the last element of the act is relevant with the pursued aim of the offence. According to article 1, the international act must have an aim of seriously intimidating a population, or unduly compelling a government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

In article 2 of the framework decision, the offences relating to a terrorist group are examined. Article 2 defines the terrorist group comprehensively and states that the direction and participation of such a group shall be punished by national laws of the member states. According to the framework decision, terrorist group shall mean:

“a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”

In addition, article 2(2) of the Framework Decision requires that the person accused of an offence relating to a terrorist group has acted “with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.” The aim of this provision is to avoid labeling the innocent peoples as terrorists.

Consequently, the third type of offences namely ‘offences linked to terrorist activities’ are listed in article 3 of the framework decision. The article reads as follows:

“Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following acts:

- (a) aggravated theft with a view to committing one of the acts listed in Article 1(1);

(b) extortion with a view to the perpetration of one of the acts listed in Article 1(1);

(c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) to (h) and Article 2(2)(b)".

The Framework decision has provided comprehensive jurisdictional rules in order to ensure an effective prosecuting against terrorism. According to article 9 of the decision, each member state shall take the necessary measures to establish its jurisdiction over the offences mentioned in the decision where:

(a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;

(b) the offence is committed on board a vessel flying its flag or an aircraft registered there;

(c) the offender is one of its nationals or residents;

(d) the offence is committed for the benefit of a legal person established in its territory;

(e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.

This framework decision can not be regarded or interpreted as a restriction or reduction on the fundamental rights and freedoms which were recognized and guaranteed by article 6 (2) of the Treaty on European Union and in the Charter of Fundamental Rights and Freedoms of the European Union and in the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It must be stated that, this framework decision does not govern acts committed by armed forces during periods of armed conflict or acts of armed forces of a state in the exercise of official duties.

Besides the European Convention on Suppression of Terrorism and the Framework Decision of the Council on Combating Terrorism, there are also a number

of several Recommendations and Declarations pertaining terrorism at European level. Some of these instruments are as following:

4. Relevant Instruments and Documents on Terrorism Adopted by Council of Europe¹⁰³

Conventions

- European Convention on the Suppression of Terrorism and Amending Protocol
- European Convention on Extradition and first and second Additional Protocols
- European Convention on Mutual Assistance in Criminal Matters and first and second Additional Protocols
- European Convention on the Transfer of Proceedings in Criminal Matters
- European Convention on the Compensation of Victims of Violent Crimes
- Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
- Convention on Cybercrime and Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems

¹⁰³http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Fight_against_terrorism/2_Adopted_Texts/default.asp, (Access. 20.05.2004).

Committee of Ministers

- Declaration on Terrorism (1978)
- Tripartite Declaration on Terrorist Acts (1986)
- Resolution (74) 3 on International terrorism
- Recommendation R (82) 1 concerning International Co-operation in the Prosecution and Punishment of Acts of Terrorism
- Recommendation (2001) 11 concerning Guiding Principles on the Fight against Organised Crime
- Declaration on the Fight against International Terrorism (2001)
- Guidelines on Human Rights and the Fight against Terrorism (2002)

Parliamentary Assembly Recommendations and Resolutions

- Recommendation No. 684 (1972) and 703 (1973) on International Terrorism
- Recommendation No. 852 (1979) on Terrorism in Europe
- Recommendation No. 916 (1981) on the Conference on the Defence of Democracy against Terrorism in Europe - Tasks and Problems
- Recommendation No. 941 (1982) and 982 (1984) on the Defence of Democracy against Terrorism in Europe

- Recommendation No. 1024 (1986) and Resolution No. 863 (1986) on the European Response to International Terrorism

- Recommendation No. 1170 (1991) on strengthening the European Convention on the Suppression of Terrorism

- Recommendation No. 1199 (1992) on the Fight against International Terrorism in Europe

- Recommendation No. 1132 (1997) on the Organisation of a Parliamentary Conference to reinforce Democratic Systems in Europe and Co-operation in the Fight against Terrorism

- Recommendation No. 1426 (1999) and Order 555 (1999) on European Democracies facing up to Terrorism

- Recommendation No. 1534 (2001) and Resolution No. 1258 (2001) on Democracies facing Terrorism

- Recommendation No. 1550 (2002) and Resolution No. 1271 (2002) on Combating Terrorism and Respect for Human Rights

- Recommendation No. 1549 (2002) on Air Transport and Terrorism: how to enhance security

- Recommendation No. 1584 (2002) on the Need for Intensified International Co-operation to Neutralise Funds for Terrorist Purposes

- Recommendation No. 1644 (2004) on Terrorism: a threat to democracies

Congress of Local and Regional Authorities

- Recommendation 134 (2003) and Resolution 159 (2003) on Tackling Terrorism - the role and responsibilities of Local Authorities.



II. INTERNATIONAL HUMANITARIAN LAW AND TERRORISM

The terrorist attacks which have been carried out world wide and the response to them, namely war against terror, have led the international legal community to discuss mainly issues related to either the characterization of these attacks and their counterattacks or the overlap of the different legal regimes, mainly the international humanitarian law and the human rights law regimes.

International Humanitarian Law (IHL) or the Law of Armed Conflict is a special branch of international law governing situations of armed conflict. It is designed to ensure respect for general principles of humanity in situations of international armed conflict and to non-international armed conflict. It does not seek to outlaw war, but instead it aims to restrain the parties to an armed conflict from cruelty and ruthlessness, and to provide essential protection to those most directly affected by the conflict.

International humanitarian law prohibits acts of terrorism principally. The main treaties of international humanitarian law on the subject are the four Geneva Conventions of 12 August 1949 for the Protection of War Victims¹⁰⁴ supplemented by their two 1977 Additional Protocols¹⁰⁵ which prohibit terrorism explicitly.

There are two articles in these legal instruments prohibiting certain terrorist acts clearly. Article 33 of the 1949 Fourth Geneva Convention states that, 'collective penalties and likewise all measures of intimidation or of terrorism are prohibited.' Additionally, article 51(2) of the 1977 First Additional Protocol to the Geneva Conventions reads as follows:

¹⁰⁴ Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949; Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949; Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949. 190 States are party to these Conventions (at 30 June 2002).

¹⁰⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

All these rules proscribe terrorist activities if they are directed against civilians. Such kind of acts aim to spread terror among the civilian population as stated in article 51/2 of the First Protocol. But it must be stressed that threats of violence intended to spread terror among civilians are also prohibited. It is enough to intend spreading terror among civilians for an act in order to be perceived as terrorist.

International humanitarian law is the law of armed conflict. Therefore, it deals with terrorism only insofar as terrorist acts occur in the context of an armed conflict. The other legal regimes such as domestic and international criminal law and human rights law also apply, but only to a limited extent during armed conflict.

The use of violence against persons is natural in a warfare. But it is prohibited to use deadly force when such acts infringe the main rules of international humanitarian law. According to international humanitarian law, armed forces of the parties of an armed conflict have the right to use of force and commit such acts of violence to each other. Such kind of use of violence is legitimate and constitutes a privileged position for both sides. But of course their right to choose methods and means is not unlimited. Targeting civilians or use of mass destruction weapons are in this context prohibited, and the perpetrators of such unlawful acts can be prosecuted as war criminals under domestic law or international law. On the other hand, persons not taking part in the hostilities or the property of civilians and the critical infrastructure are not legitimate targets for military attacks. These must be protected under Geneva Conventions.

International humanitarian law applies to armed conflict in two aspects; international armed conflicts and non international armed conflicts.

A. NON-INTERNATIONAL ARMED CONFLICTS

It is difficult to ascertain whether there is a non-international conflict in any situation. There are also different interests of conflicting parties in a non-international armed conflict. Determining the status of conflicting party to an armed conflict in the sense of terrorism is also difficult. States tend not to declare situations of unrest, tumult and riots as an armed conflict. Because they don't want to remit the status of an armed conflict party to their enemies so easily. On the other hand, guerilla organizations as well as terrorist movements pursue to have such a status in international area in order to have a legitimate position at the international level.

In the event of a non-international conflict, Article 3¹⁰⁶ common to the conventions and Article 1¹⁰⁷ of the Second Protocol are applicable. Article 3, the text of

¹⁰⁶ Common Article 3 of the Conventions reads as follows: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 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, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(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.

2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

¹⁰⁷ AP II: Part I. Scope of Protocol

Article 1. Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

which is repeated in all four Geneva Conventions, is the only part of the conventions that applies explicitly to non-international armed conflicts. It has been called a 'treaty in miniature', and sets for the protections and standards of conduct to which the state and its armed opponents must adhere. The protections it spells out are at the core of international humanitarian law. Additional Protocol II of 1977 also covers non-international armed conflicts with Article 1, but it is less widely accepted among states than the 1949 Conventions. In such situations, humanitarian law is intended for the armed forces, whether regular or not, taking part in the conflict and protects every individual not or no longer actively involved in the hostilities.

The non-international armed conflict does not cover the type of classical terrorism. In classical terrorism, a group of people, who are called as 'terrorists' by the legitimate government of that state, carry out an attack on the territory of the state where they stem from or where they have their headquarters. Among these terrorist movements are the IRA in Northern Ireland, the ETA in Spain, the Red Faction Army in Germany and the PKK in Turkey. These acts are deemed as sporadic internal disturbances which do not require the application of the international humanitarian law. Therefore such kinds of acts fall within the domestic jurisdiction of national states rather than international law because these attacks do not amount to an armed conflict under the terms of international humanitarian law. A terrorist act is not seen to be an act of war unless it is part of a broader campaign of violence directed against the state. Where terrorist acts amount to no more than 'situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence,' the Geneva Conventions, especially Common Article 3 do not apply. Instead, peacetime domestic criminal laws and international conventions aimed at the repression of terrorism would come into play, obliging states parties to the agreements to try or to extradite those who are believed to be responsible.

Wars of national liberation were regarded as purely non-international armed conflicts within the context of Geneva Conventions and therefore such kind of conflicts fall outside the scope of application of all provisions of the Geneva Conventions except for Common Article 3. Prior to World War 2, the attention was focused almost on

conflicts between states namely on international conflicts. However with the increasing number of civil wars, it was realised that the international community has to make arrangements on the issue more comprehensively. Therefore, it was attempted to revise the Geneva Conventions in order to extend the applicability of the conventions to the non-international armed conflicts. While traditional international law had always held that internal conflicts were to be dealt with only under municipal law, it was aimed at the Diplomatic Conference in Stockholm in 1949 to bring non-international armed conflicts within the jurisdiction of the laws of war. According to the Draft Convention of the International Committee of Red Cross (ICRC):

“in all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present convention shall be obligatory on each of the adversaries. The application of the convention in these circumstances shall in no way depend on the legal status of the parties to the conflict and shall have no effect on that status.”¹⁰⁸

However, this provision met with resistance and was not admitted by all contracting parties at the Diplomatic Conference because:

“One of the main concerns of its opponents was that in spite of the express formal denial of any effect such an integral application on the legal status of the parties to the conflict, the possibility such a solution opens to rebels to appoint another state as protecting power would inexorably internationalize the conflict.”¹⁰⁹

Common Article 3 has been deemed as a milestone in the development of the law of war. This convention in miniature was the first attempt to legally regulate non-international conflicts in treaty law. It was an attempt to face the reality of the situation of the time with the prevalence of civil conflicts taking place in various parts of the

¹⁰⁸ J.S. Pictet, *Commentary of the Geneva Conventions of 12 August 1949, Vol. III, Geneva Convention Relative to the Treatment of Prisoners of War*, Geneva, ICRC, 1960, p. 31.

¹⁰⁹ Georges Abi-Saab, 'Non-international armed conflicts' in *UNESCO International Dimensions of Humanitarian Law*, Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1988, p. 217 – 240.

world. This provision seeks to apply the most basic principles enshrined in the Geneva Conventions to non-international conflicts.

Indeed, there had been many difficulties faced at the diplomatic conference when the drafting of the provision of non-international conflicts came up for discussion. The committee which was charged with the formulation of the non-international conflicts provision had to meet on 25 occasions before a consensus was reached. Various drafts were debated and dismissed before a final proposal was agreed upon.

“The limitations and defects of the final Article 3 must be seen in the light of this drafting history. Its conclusion was an achievement and its defects are the price. The anxieties and the cautioned states in negotiating this article have been more than borne out by the events which have occurred since the conventions were established. It is probably true to say that article 3 has been the object of more attention and dispute than any other provision in the conventions. Apart from the intrinsic sensitivity of the subject matter, the political events of the post-1949 period have more often than not manifested themselves in some form of internal armed conflict within a state.”¹¹⁰

It should be noted that the conditions of applicability of Common Article 3 for the dissident armed groups are very strict. Indeed, Common Article 3 which lays down rules described by the International Court of Justice as ‘general principles of humanitarian law’ refers to an armed conflict of a non-international character but does not define it, no indication is given of the intensity of the armed force necessary to make provision applicable. However, Common Article 3 is generally understood to apply to low intensity and open armed confrontations between relatively organized armed forces. Because there is no given definition and explanation of what constitutes a non-international armed conflict according to Common Article 3, we will have to apply the conditional requirements of the Protocol 2 for the Common Article 3, too. In this view, an internal conflict involves a legitimate state engaged in conflict with an armed group

¹¹⁰ Draper, G.I.A.D. “The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977” *Recueil des Cours*, Volume. 164, no. III, (1979), p. 1 – 94., quoted in Suter, Keith, *An International Law of Guerrilla Warfare: The Global Politics of Law- Making*, London: Frances Pinter (Publishers), 1984, p. 25.

that has attained international personality. Therefore, application of Common Article 3 requires the existence of large scale and generalized hostilities for both of the parts. Furthermore, it is a condition for the dissident armed groups to exercise control over parts of national territory or they must satisfy organizational requirements. Such requirements are to possess an organized military force under responsible command and to act within a determinate territory of that state. Therefore, because none of the terrorist organizations fulfill these criteria to be deemed as an armed force, none of them can be described as a party to an armed conflict under international humanitarian law. In the light of these conceptions, the activities of most famous terrorist movements such as PKK or ETA or IRA in Europe can not be covered by international humanitarian law or by armed conflict law. It is to say that domestic criminal laws shall apply to such kind of terrorist acts.

Common Article 3 was developed and supplemented by Additional Protocol II which applies by virtue of article 1(1) to non-international armed conflicts occurring in the territory of a State party between its armed forces and dissident armed forces. For the application of the Second Protocol to the terrorist organizations, the same criteria will also be valid. Although terrorists of abovementioned type may be formed according to a certain hierarchy, it is highly unlikely that they are able to carry out sustained and concerted actions. Further their attacks can not be regarded as military operations and there is no fraction of a doubt that they do not control a part of the territory. The scope of the applicability is further clarified in the second paragraph of article 1 that declares that Additional Protocol II does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature. The insurgent party must control part of the national territory for the application of the provision. Finally, terrorist movements will not have any chance to benefit from the application of armed conflict law especially of Protocol II to their activities according to international humanitarian law.

Besides these two legal instruments about non-international conflicts, the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) is also very helpful to ascertain whether there is an internal or international armed

conflict. The Appeals Chamber of the ICTY stated in the Tadic case that “an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state”.¹¹¹ It does not seem that sporadic attacks perpetrated by terrorists could constitute protracted armed violence.

The authoritative ICRC commentary also provides tools to assess what is meant by internal armed conflict in armed conflict law. According to the Commentary, there are some convenient but in no way obligatory criteria in order to define what constitutes an internal armed conflict. The following explanations clarify the situation according to the International Committee of Red Cross (ICRC) Commentary as follows:

What is meant by “armed conflict not of an international character”? It was suggested that the term “conflict” should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. Nevertheless, these different conditions, although in no way obligatory, constitute convenient criteria, and we therefore think it well to give a list of those contained in the various amendments discussed; they are as follows:

1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the de jure Government has recognized the insurgents as belligerents; or (b) that it has claimed for itself the rights of a belligerent; or (c) that it has accorded the insurgents recognition as belligerents for the purpose only of the present Convention; or (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State. (b) that the insurgent civil authority exercises de facto authority over persons within determinate territory. (c) that the armed forces act under the direction of the organized civil authority and are prepared to

¹¹¹ The Prosecutor v Tadic, Case No. IT-94-1- AR 72, Appeal on Jurisdiction, 2 October 1995, para.70.

observe the ordinary laws of war. (d) that the insurgent civil authority agrees to be bound by the provisions of the Convention.¹¹²

All these explanations show that activities of terrorist organizations acting especially in Europe such as PKK, ETA or IRA are not covered by international humanitarian law. Law of armed conflict especially Common Article 3 of Geneva Conventions and Article 1 of the II. Protocol shall not apply to these terrorist movements. Such kind of terrorist acts will be incriminated only by domestic criminal laws or by international conventions aiming at the suppression of terrorism.

¹¹² J.S. Pictet, *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of Red Cross, 1952, p. 49.

B. INTERNATIONAL ARMED CONFLICTS

International armed conflicts are conflicts between states. The four 1949 Geneva Conventions and Protocol 1 deal extensively with the humanitarian issues raised by such conflicts. The whole body of law of prisoners of war, their status and their treatment is geared to wars between states. The Fourth Convention states *inter alia* the rights and duties of an occupying power, i.e. a state whose armed forces control part of the territory of another state. Protocol 1 deals exclusively with international armed conflicts.

Under Protocol 1 of 8 June 1977, wars of national liberation must also be treated as conflicts of an international character. A war of national liberation is a conflict in which people is fighting against a colonial power, in the exercise of its right to self-determination. Whereas the concept of right to self-determination is today well accepted by international community, the conclusions to be drawn from that right for the purposes of humanitarian law and in particular, its application to specific conflict situations are still somewhat controversial. The historical background of the problem will probably contribute to understand the main points of the issue.

The relation between terrorism and international humanitarian law occurred firstly with the use of violence by national liberation movements after Second World War. By de-colonization process of 60's and 70's, terrorism has played a great role. With Additional Protocols to the Geneva Conventions in 1977, the third world countries obtained the right to defend their homeland against colonial, racist and alien regimes with all measures including use of armed force. In this view, prohibition of use of armed force by international law according to article 2 paragraph 4 of the UN Charter¹¹³ is invalid for national liberation movements. UN General Assembly adopted the Resolution of Definition of Aggression in 14 December 1974 by confirming his approach on the issue. According to the article 7 of the resolution;

¹¹³ Article reads as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

‘Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination: nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.’

The rules of humanitarian law applicable to international armed conflict are contained in the four Geneva Conventions of 1949 and their Additional Protocol 1 of 1977. The scope of the application of these rules is found in Common Article 2 (CA 2) of the conventions. Common Article 2 provides:

Article 2

“In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.”

The Commentary of International Red Cross Committee (ICRC) to CA 2 further clarifies that “ any difference arising between two states and leading to the intervention of armed forces ... is an armed conflict within the meaning of Article 2, even if one of

the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.¹¹⁴

Besides that, the approach of the First Additional Protocol to the national liberation movements was also criticized by western communities since it promotes and furthers terrorism. The relevant article¹¹⁵ of the First Protocol reads as follows:

“The situations referred to in the preceding paragraph include armed conflicts in which peoples 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 Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.”

The question whether ‘the law of war i.e. the law of international armed conflict is applicable to international terrorist acts’ constitutes the main point of the issue. It is obvious that only the subjects of international law have the right to use of force against another subject of international law. But who are the subjects of international law in this context? Without doubt states are the main subjects of international law thus the armed forces of states have the right to use of force against armed forces of the other state. On the other hand, it has been generally accepted among scholars that terrorist organizations do not have any international law status and therefore they can not be a party to the armed conflict in the context of international humanitarian law.¹¹⁶ According to these scholars, the terrorist acts of September 11 constitute a crime rather than a war.¹¹⁷

In the light of these conceptions, is it absolute impossible to apply the rules of international armed conflict to terrorist acts? May international terrorist organizations

¹¹⁴ J.S.Pictet, *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva: International Committee of Red Cross, 1952, p. 51.

¹¹⁵ Article 1 paragraph 4 of the 1 Additional Protocol of 8 June 1977.

¹¹⁶ J.A. Frowein, “Der Terrorismus als Herausforderung für das Völkerrecht”, *ZaöRV*, Vol.62, no.4, (2002), p. 893.

¹¹⁷ M.Schneider, “Der 11 September und die militärischen Reaktionen: Anwendbarkeit des Humanitären Völkerrechts?”, *HuV-I* Vol.4 (2001) p.. 222,223, Ch.Tomuschat, “Der 11 September und seine rechtlichen Konsequenzen”, *EuGRZ*, (2001), p. 535,536, Ch. Greenwood, “International Law and the War against Terrorism”, *International Law Affairs*, Vol. 78, (2002), p. 301,305.

be defined as armed forces within the context of international humanitarian law? In order to achieve a persuasive answer to these questions, it must be stated that there are two basic requirements for any armed forces to apply them international rules of armed conflict.

First of all, the use of armed force has to reach a certain level of intensity for existence of an armed conflict. This is called 'the intensity principle'. The ability to conquer a territory and to keep it or the ability to fight in a long term period, for example the guerilla warfare which continued more than 30 years in Columbia¹¹⁸, are the basic characters of the party of an armed conflict. Terrorists also use armed force. They have much deadly weapons even weapons of mass destruction. In this sense, the effects of a terrorist attack are comparable to a major military attack of sovereign state.

On the other hand, according to many scholars terrorist acts do not have an intensive use of force. Because terrorist organizations don't have a comprehensive military strategy, they don't act as regular armies, they do not operate as military units and also they hit and run. Therefore terrorist acts don't meet the condition to use an intensive force and that's why they are not a party of an armed conflict.

Such an argument is founded without assessing the new forms of terrorism. Nowadays, terrorism has a very different character; it constitutes a great threat comparable with a major military attack of a state. There is no difference in this sense regarding the results of the 11 September attacks on America and a probable military attack from any state. Even though, the 11 September attacks constituted more economic, military and human loss in America in comparison with the Pearl Harbor raid, which is the most famous defeat in the history of America. In this way, the intensity of a terrorist attack has the potential to meet the requirements for applicability of international armed conflict.

¹¹⁸ Kalshoven, F. "*Protocol II, the CDDH and Columbia*", K. Wellens, (Eds.), *International Law: Theory and Practice*, The Hague, 1998, p. 597.

In order to apply international armed conflict law to any use of armed force, a second condition must be met. As mentioned above, the use of armed force must have been carried out by the subjects of international law. Only such kind of use of armed force may be legitimized under international humanitarian law. In this sense, terrorist organizations have a typical non-state character¹¹⁹ and therefore can not be regarded as the subjects of international law.¹²⁰ This argument is without doubt broadly accepted among scholars.

But there are two exceptions stated in legal instruments for the second condition. According to article 1(4) of the Additional Protocol 1, the rules of international armed conflict will apply to the 'wars of national liberation.' National liberation movements are considered in this way as the subjects of international law. As a result of this consideration, the rules governing an international armed conflict will apply these movements. In comparison with terrorist organizations, national liberation movements have different features.¹²¹ They have their own people and territory which was conquered from the enemy. They fight in order to obtain their self-determination right. Terrorist organizations do not meet these conditions and therefore it is hard to classify terrorists as freedom fighters in this context.

The second exception for non-state actors is to be recognized as belligerents by a state. This recognition brings many rights and privileges for the armed forces. But there are also some conditions for a recognition as belligerent. One must have an area under its control as a rebellion and there must be a great magnitude of hostility between parties. As in the first condition it is also hard to fulfill these requirements for terrorist organizations.

¹¹⁹ A.Roberts, "Counter Terrorism, Armed Force and the Laws of War", *Survival*, Vol.44, (2002), p. 11.

¹²⁰ J.A. Frowein, "Der Terrorismus als Herausforderung für das Völkerrecht", *ZaöRV*, Vol.62. no.4, (2002), p. 893.

¹²¹ Ch. Greenwood, "Terrorism and Humanitarian Law, The Debate over Additional Protokol I", *Israel Yearbook on Human Rights*, (1989), p. 187-197, R.A.Friedlander, "Terrorism and National Liberation Movements: Can Rights Derive from Wrongs?", *Western Reserve Journal of International Law*, Vol.13, no.2, (1981), p. 282.

Despite the fact that most of the scholars tend to accept that international law of armed conflict can not be applied to terrorist acts, some argue that the acts of terrorist organizations are covered by international law of armed conflict. In this context, these two situations namely whether a terrorist organization will be a party to an armed conflict and whether their acts can be covered by the law of armed conflict must be differentiated from each other.

In this view, international law covers the acts of terrorist organizations although the same terrorist organization is not accepted as a party of an armed conflict and therefore a subject of international law. There is a condition which must be fulfilled in order to make this distinction. The acts of the terrorist organization must be attributable to any state. So there will be an international armed conflict between two states consisted of a victim state and the state whom the terrorist act is attributable. But even in this case, the terrorist organization is not a part of the armed conflict.

In the example of 11 September attacks, if it is accepted that these attacks constitute a certain level of intensity (the first requirement) and if the attacks of Al-Qaeda are attributable to the Afghan State as a legitimate subject of international law (second requirement), these attacks will be covered by international law of armed conflict.

Under which circumstances are the acts of a terrorist organization attributable to a state? The question has been discussed broadly after 11 September attacks. According to many scholars, the following criteria must be met in order to speak about an attributable terrorist act to a state:

Firstly, the state must have approved the terrorist act in question instead of taking measures against it¹²², and then the state must have an effective control on the

¹²² ICJ Tehran Hostages Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran), ICJ Reports 1980.

terrorist activity¹²³ and finally the state must have had an active part in organizing, coordinating or planning the action with having an overall control of the act.¹²⁴

At last, it can be concluded that the law of armed conflict is applicable to terrorist acts if the following criteria are met:

- The use of armed force has to reach a certain level of intensity
- The terrorist acts can be attributed to one or more states different from the victim state.

¹²³ ICJ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US) ICJ Reports 1986, 14, 103.

¹²⁴ ICTY, Prosecutor v Tadic Case (IT-94-), Judgement of July 1999, para. 137.

III. INTERNATIONAL TERRORISM AND INTERNATIONAL CRIMINAL COURT

International terrorism is a phenomenon on which international community needs to cooperate and to take measures strictly. Terrorism is not merely a domestic problem. The terrorist acts emerged in last years have indicated that clearly. But who has the jurisdiction over crimes of international terrorism on behalf of international community? In this context, what role might play the International Criminal Court in combating terrorism in terms of international law enforcement?

A. INTERNATIONAL CRIMINAL COURT

International Criminal Court was established with the Rome Statute which was signed on July 17, 1998. The statute entered into force after the sixtieth ratification on July 1, 2002 in accordance with Article 126(1). According to Article 1 of the Rome Statute, International Criminal Court shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern. These crimes comprise genocide (art. 6), crimes against humanity (art.7) and war crimes (art.8). After long debates the crime of aggression was also included to the jurisdiction of the Court.

Jurisdiction of the Court is based on two general principles, namely territoriality and nationality principles. Territorial jurisdiction is the exercise of the jurisdiction by a state over persons, acts or events occurring within its territory. It is the most substantial basis for a state to claim jurisdiction, because it derives from the sovereignty of each state. This principle takes place in article 12(2) of the statute as follows:

“12.(2): In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The state of which the person accused of the crime is a national.”

According to the provision, the ICC may exercise its jurisdiction over crimes in the territory of a state party without regarding the offender’s nationality. Although the state of the offender is not a party to the statute, the offender will be incriminated under the provisions of the Rome Statute.

The other main principle of jurisdiction stated in the ICC Statute is offender’s nationality. In view of this principle, the ICC will exercise its jurisdiction over individuals, who are nationals of state parties or of states which have accepted the jurisdiction of ICC. Even though the crime has been committed in the territory of a non-state party, the offenders can be tried within the jurisdiction of the ICC.

It must be stressed that the jurisdiction of the Court has only complementary character. This principle takes place in the first article of the statute as ‘it shall be complementary to national criminal jurisdiction.’ In this context, the ICC will exercise its jurisdiction only if a state party is unwilling or unable to prosecute the offender according to the 17(1)(a) of the Statute. In order to determine the unwillingness, the statute has laid down several features:

“(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

According to the provisions stated in this article, the attempt to shield the person from criminal responsibility or proceedings which are being delayed unjustifiably and seems impartial and not independent in national jurisdiction prove that the state in question is unwilling to prosecute the accused person. There may also be situations in which a state will not be able to institute proceedings against persons due to a total or substantial collapse of a state's judicial system. It is mentioned to this situation in article 17 (3) of the Statute as follows:

“In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”

In all other situations, the states remain the principal prosecutor of terrorist acts.

Article 13 of the statute explains in which cases the ICC jurisdiction is set in action. According to the article 13 (a) and Art. 14, a state party can refer a situation to the Prosecutor of the ICC, indicating the commission of crimes enumerated in Art. 5 (1) (a) – (c). The United Nations Security Council has the authority to do so by acting under chapter VII of the Charter of the United Nations pursuant to Art. 13 (b). At least, the Prosecutor himself can initiate investigations *proprio motu*, due to Art. 13 (c) and Art. 15.

B. TERRORISM AND ICC

How can international terrorism be prosecuted at international level? Does the jurisdiction of ICC encompass international terrorist acts? Which model would be the most appropriate to prosecute terrorists? It must be said that, the scholars are still debating these questions. After long debates on the issue, UN International Law

Commission concluded that the terrorist acts must be seen as crimes against peace when they are carried out, supported, encouraged or tolerated by state organs.¹²⁵

Although the terrorist acts seem to violate peace, it is not enough for terrorists to be prosecuted under ICC as the committers of crimes against peace. Because as indicated above, the jurisdiction of the International Criminal Court does not encompass such crimes against peace. Therefore these terrorist acts must constitute at the same time crimes against humanity or war crimes in order to be dealt within the scope of the ICC.

According to many scholars, terrorists could be put on trial for having committed war crimes or crimes against humanity.¹²⁶ In this context, such kind of terrorist acts must be divided into two parts comprised of acts committed in times of armed conflict and in any other situations acts committed at peace time. Terrorist acts committed in times of armed conflict will be prosecuted according to scholars as war crimes under article 8 of the Rome Statute. The article reads as follows:

Article 8

War crimes

“1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, “war crimes” means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

¹²⁵ Yearbook of the International Law Commission (1986), Vol. II, p. 41.

¹²⁶ Patrick Robinson, “The Missing Crime”, Antonio Cassese (Eds.), **The Rome Statute Of the ICC: A Commentary, Volume 1**, 2000, p. 497, Emanuel Gross, “*Trying Terrorists-Justification for Differing Trial Rules: The Balance Between Security Considerations and Human Rights*”, **International Comparative Law Review**, Vol. 1, (2002), p. 85.

- (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;
 - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;
 - (viii) Taking of hostages.
- ...

On the other hand, other part of terrorist acts committed at peace time or committed without a declared state of war may be prosecuted as crimes against humanity under 7. Article of the Rome Statute.

Article 7

Crimes against humanity

“1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above."

The concept of crimes against humanity evolved under the rules of international law and was proclaimed for the first time in the Charter of the International Military Tribunal of Nürnberg.¹²⁷ Since its acts are so abhorrant that they shock our sense of human dignity, it is deemed as one of the most serious crimes of international

¹²⁷ M.Charif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International 2. rev.ed., 1999, p. 9.

concern.¹²⁸ According to the relevant article mentioned above, murder, extermination, enslavement, deportation, torture and other acts amount to crimes against humanity, if the offence was of a widespread or systematic practice, which must at least be tolerated by a state, government or any entity holding de facto authority over a territory, be state-sponsored or else be part of a governmental policy.¹²⁹

To be widespread and systematic is the central feature of the acts to be deemed as crimes against humanity. If such acts are carried out pursuant to an explicit or implicit plan or policy, it can be talked about the existence of a systematic practice.¹³⁰ A single act, committed within the framework of a systematic or widespread attack, has the potential to demonstrate such a policy. If there is a multiplicity of acts, we can talk about a widespread attack.¹³¹ It must be said that, the perpetrator must be aware of the wider context in which his acts occur. However, he does not need to have a concret idea of the consequences of his acts.¹³²

The act of the perpetrator must build an overall widespread or systematic attack and the perpetrator must be aware of that. This connection between the single act and the widespread attack is the most significant distinction of the two crimes.¹³³ The awareness of the perpetrator of his act as a widespread and systematic attack raises the single act to one of the most serious crimes.

The concept of 'systematic' was defined by the International Criminal Tribunal for Rwanda as follows: "thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources." On the other hand, the Trial Chamber I of the International Criminal Tribunal for Rwanda in Akayesu held that "widespread criteria may be defined as massive, frequent, large scale

¹²⁸ Antonio Cassese, "Crimes against Humanity", Antonio Cassese (Eds.), *The Rome Statute Of the ICC: A Commentary, Volume 1*, 2000, p. 353,355.

¹²⁹ Prosecutor v. Dusko Tadic, Case No: IT-94-1-AR 72, para. 654

¹³⁰ I.L.C. Draft Code of Crimes Against the Peace and Scurity of Mankind, Report of International Law Commission on the Work of its 48. Session, 6 May-26 July 1996. p.30.

¹³¹ Ibid. p. 31.

¹³² Prosecutor v. Dusko Tadic, Case No: IT-94-1-AR 72, para. 657.

¹³³ Darryl Robinson, "Developments in International Criminal Law: Defining "Crimes against Humanity" at the Rome Conference", *A.J.I.L.*, Vol. 43, no. 52, (1999), p. 93.

action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”



IV. INTERNATIONAL HUMAN RIGHTS LAW AND TERRORISM

The first relationship between human rights and terrorism emerged at the World Human Rights Conference in Wien 1993¹³⁴. Before that conference, there was a general accepted traditional opinion in international community that human rights problem can only be seen within the jurisdictional scope of national states but not non-state actors at international levels. With the new human rights concept, terrorist acts committed by non-state actors are covered by the human rights law, too.

In its study about Human Rights and Terrorism, The Sub-Commission of the U.N Human Rights Committee has dealt with the problem comprehensively. According to the study terrorist acts infringe the human rights law in three aspects:

Firstly, terrorism violates the right to life and freedom of person and human dignity. These rights are recognized and protected under article 3 and 5 of the Universal Declaration of Human Rights and under article 6 and 7 of the International Covenant on Civil and Political Rights. It is clear that such kind of infringements can be made not only by states but also by non-state actors such as groups or individuals. European Court of Human Rights stated in one of its decisions that “activities of terrorist groups or individuals are in clear disregard of human rights.”¹³⁵

Secondly, terrorism has negative effects on a democratic society. Since democracy is in close relation with human rights, the attacks against democracy are as attacks against human rights. Terrorist attacks pursue to restrict the free elections and participation to elections freely. They want to military the democratic society with these attacks. The democratization and development process of the society is the target of such terrorist groups. United Nations has several times called the states’ attention to the issue with a number of U.N. Resolutions.

Finally according to the study, terrorism violates the social peace and public

¹³⁴ A/CONF.157/23

¹³⁵ Ireland v United Kingdom, ECHR A/25, para. 149.

order with its indiscriminate attacks. These attacks aim to intimidate the society to shock and panic the civilian population and to coerce the government to react against the attacks with unlawful measures. Therefore it will be even harder to believe the ability of the state to provide the safety of its citizens. The stability of the and social peace is in danger in such a society.

Human rights law seeks to establish a fair balance between legitimate national security concerns and the protection of fundamental rights and freedoms. According to human rights law states must address serious and genuine security concerns, such as terrorism. The balance takes place in the International Covenant on Civil and Political Rights (ICCPR) as well as in regional human rights treaties such as The European Convention for the Protection of Human Rights (ECHR), The American Convention on Human Rights (ACHR), and The African Charter on Human and Peoples' Rights. The Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, usefully articulate the balances in the context of European system.

The struggle against terrorism and the scrupulous protection of human rights are not conflicting priorities, but integral parts of the long-term fight for liberty and security. In one of his speeches UN Secretary General Kofi Anan stated that:

“We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long-term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism....while we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process”.¹³⁶

¹³⁶ Speech by UN Secretary General Kofi Annan to the Security Council, 18 January 2002.

Under specific conditions, terrorism may lead to a state of emergency. Human rights law notably article 4 of the ICCPR, article 15 of the ECHR and article 27 of the ACHR recognizes that some rights can be derogated from in time of public emergency. The three conventions, however, mandate that certain rights are not subject to suspension under any circumstances. The three treaties catalogue these non-derogable rights. The list of non-derogable rights contained in the ICCPR includes the right to life, freedom of thought, conscience and religion, freedom from torture and cruel, inhuman or degrading treatment or punishment, and the principles of precision and of non retroactivity of criminal law.

Derogation from other rights is only permitted in the specific areas defined in each of the three treaties. According to the ICCPR and ACHR, any such measures must be of exceptional character, strictly limited in time and to the extent required by the exigencies of the situation, subject to regular review, consistent with other obligations under international law and must not involve discrimination. ECHR requires that such measures should be limited to the extent required by the exigencies of the situation, in accordance with that such measures are not consistent with other obligations under international law.

Human rights bodies, whether at international or regional level, have for many years recognized the legitimate security concerns of states and their duty to protect their citizens from terrorist acts.

International law offers very extensive and rather complex standards for the protection of human rights, consisting of international customary law norms as well as a wide range of regulations which are laid down in global and regional treaties. The customary law norms are binding on all states and their organizations; they apply universally. Although treaties only bind those states which are parties thereto, a large majority of community of states indeed have ratified the most important human rights treaties, including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

A resolution which is focusing specifically on the need to protect human rights and fundamental freedoms while countering terrorism was adopted for the first time by the General Assembly on 18 December 2002.¹³⁷ It affirmed that states must guarantee that any measure taken to combat terrorism complies with their obligations under international law in particular international human rights, refugee and humanitarian law. The resolution requests the High Commissioner for Human Rights to take a number of actions, including examining the question of the protection of human rights and fundamental freedoms while countering terrorism, taking into account reliable information from all sources, making general recommendations concerning the obligation of states to promote and protect human rights while countering terrorism; and providing assistance to states, upon their request, on the protection of human rights and fundamental freedoms while countering terrorism. Another resolution with similar approach was adopted on 25 April 2003 by the Commission on Human Rights at its 59. Session.¹³⁸

The regulations on the protection of human rights have a twofold meaning in the fight against terrorism. In the first place, these regulations oblige states to the prevention and combating of terrorism, in particular on the ground of the right of everyone to life, liberty and security of person. Secondly, in the prevention and combating of terrorism states have to fully observe the respect for human rights. If there is a question of dilemmas in combating terrorism, these dilemmas can be phrased in terms of the application of various human rights. In this regard, the problem of the fight against terrorism is not unique. The fundamental political, economic and social problems translate themselves into the question concerning the permitted limitations of certain human rights based on the fulfilment of other human rights. The doctrine of the permitted limitations of human rights amounts to an integral part of the international law of human rights, while a significant part of the national and international case law on human rights concentrates on the application of such limitations. In other words, the international regulations concerning the protection of human rights themselves provide,

¹³⁷ A/RES/57/219

¹³⁸ E/CN.4/RES/2003/68

to a great extent, the guidelines for resolving the questions concerning the acceptable and unacceptable measures in the fight against terrorism.¹³⁹

The European Court of Human Rights has produced an effective jurisprudence regarding the balance of fighting terrorism and respecting human rights. In its practice, “the Court will take into account the special nature of terrorist crime and the exigencies of dealing with it, as far as is compatible with the applicable provisions of the Convention in the light of their particular wording and its overall object and purpose.”¹⁴⁰ In the fight against terrorism, the role of the European Court is essential in interpreting and applying the European Convention of Human Rights, as States must not destroy democracy on the grounds of defending it.¹⁴¹

According to the jurisprudence of the Court, European human rights law has established legal principles to be applied in cases pertaining terrorism, in the context of protection of absolute rights namely non-derogable rights and the rights which can be restricted in order to fight against terrorism namely derogable rights.

A. NON- DEROGABLE RIGHTS

1. Right to Life (Article 2)

Article 2 of the European Convention on Human Rights;

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.

¹³⁹ A Resolvable Conflict, Declaration of the Netherlands Helsinki Committee on the Fight Against Terrorism and the Protection of Human Rights, p. 2.

¹⁴⁰ Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, §28.

¹⁴¹ Klass v. Germany, 6 September 1978, §49.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is not more than absolutely necessary:

a) in defense of any person from unlawful violence

b) in order to effect a lawful arrest or to prevent the escape of a person lawfully
detained

c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The right to life is commonly considered the most fundamental human right. The right to life guaranteed by article 2 is a right not to be killed. Article should be interpreted as including an obligation for states to protect their citizens against terrorist acts. The scope of article goes further as it protects also the life of terrorists or suspected terrorists.

As the Court stated in the McCann¹⁴² judgment: "It must also be borne in mind that ...Article 2 (art. 2) ranks as one of the most fundamental provisions in the Convention ...together with Article 3 ... of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe".

In McCann and Others v United Kingdom, the Court dealt with the case where a number of terrorist suspects were killed in a security forces operation. They were suspected of involving in preparing a bomb explosion in Gibraltar. The British, Spanish and Gibraltar authorities knew about the terrorist plan, but decided to intervene only when the three suspects would have driven the car in Gibraltar. However, they considered the IRA members to be dangerous terrorists who would be probably armed and, if they had to encounter the security forces, would be ready to use their weapons or detonate the bomb. The suspected terrorist were killed in what amounted to a shootout. But the three IRA members were neither armed nor was there in fact a bomb in Gibraltar which they could have detonated.

¹⁴² McCann and Others v. UK, §147.

The Court observed in its decision the difficult dilemma of balancing the necessity to fight terrorism and the need to respect human rights. Here, the authorities knew about the terrorist attack and had to protect the population of Gibraltar, while having minimum resort to lethal force against the suspected terrorists. Moreover, the authorities were dealing with IRA members who had been convicted for bombing offences, as well as one explosive expert. The Court also raised the past history of the IRA and its disrespect towards human lives, even those of its members.¹⁴³

The Court concluded that a violation of paragraph two of Article 2 ECHR (ten votes to nine, the Commission had found no violation) had occurred as regard to the conduct and planning of the operation. The finding in McCann was of a violation of Article 2(2) not because of the actual killing by the special forces themselves but because of inadequate planning by the authorities. The violation was the sum of the fact that the suspects were not arrested at the border before their entry in Gibraltar (the danger to the population in not preventing the entry of the suspects outweigh the Government's argument that it might have had insufficient evidence to detain or prosecute them), the omission that the information might have been erroneous and the automatic shooting to kill recourse.¹⁴⁴ Also, even though there was a violation of the right to life under Article 2 ECHR, the Court rejected the applicants' claims for damages under Article 50 of the ECHR, because the three suspects who were killed had the intention to plant a bomb in Gibraltar.

The development of the case law in this area includes numerous cases in relation to terrorism and the procedural obligations of Article 2. In the McCann case, the Court established that Article 2 in conjunction with Article 1 required from States "by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State".¹⁴⁵ Thus, this obligation was respected in this case. Following the case of *Kaya v. Turkey*,¹⁴⁶ numerous cases in the context of the terrorism situation in Turkey have

¹⁴³ Ibid. §193.

¹⁴⁴ Ibid. §213.

¹⁴⁵ Ibid. §161.

¹⁴⁶ *Kaya v. Turkey*, 19 February 1998.

produced a series of findings of failures by the authorities to investigate allegations of wrongdoing by the security forces, both in the context of the procedural obligations under Article 2 of the Convention and the requirement for effective remedies imposed by Article 13 of the Convention.¹⁴⁷

In summarize, the right to life is the most fundamental right that must be protected under human rights law even in combating terrorism. No derogation can be justified in the context of right to life in fighting against terrorism. Infringing such kind of basic values of European culture contributes to the terrorists who aim to destroy the democratic values and destabilize the roots of democratic societies.

2. Right to Human Treatment (Article 3)

In times of peace and in the context of armed conflict, states are strictly prohibited from using torture, such as corporal punishment or prolonged solitary confinement, as a means of punishing detainees or as a method of interrogation in the context of fighting against terrorism. The Court is fully aware of the huge difficulties faced by States when fighting terrorist-related violence, but even in terrorism-related circumstances, the ECHR absolutely prohibits torture or inhumane or degrading treatment or punishment, irrespective of the victim's conduct.¹⁴⁸

Moreover, the Court adds that "Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even

¹⁴⁷ Ergi v. Turkey, Yasa v. Turkey, 2 September 1998; Çakici v. Turkey, 8 July 1999; Tanrikulu v. Turkey, 8 July 1999; Mahmut Kaya v. Turkey, 28 March 2000; Kiliç v. Turkey, 28 March 2000; Ertak v. Turkey, 9 May 2000; Timurtas v. Turkey, 13 June 2000; Tas v. Turkey, 14 November 2000; Çicek v. Turkey, 27 February 2001; Avsar v. Turkey, 10 July 2001; Ifran Bilgin v. Turkey, 17 July 2001; Semse Onen v. Turkey, 14 May 2002; Orhan v. Turkey, 18 June 2002; and concerning Article 13 of the Convention, see Aksoy v. Turkey, 18 December 1996; Aydın v. Turkey, 25 September 1997; Menten and others v. Turkey, 28 November 1997; Selçuk and Asker v. Turkey, 24 April 1998; Kurt v. Turkey, 25 May 1998; and Tekin v. Turkey, 9 June 1998.

¹⁴⁸ Chahal v. UK, §79. See also Ireland v. UK, §163; Tomasi v. France, §115; Aksoy v. Turkey, §62; Aydın v. Turkey, §81.

having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities”.¹⁴⁹

In *Dikme v. Turkey*,¹⁵⁰ the first applicant was detained under the suspicion of being a member of the terrorist organization “Devrimci Sol”. He alleged that he was subjected to blows causing both physical and mental pain or suffering, all aggravated by the fact that he was in total isolation and blindfolded. The Court stressed that “the requirements of an investigation and the undeniable difficulties inherent in the fight against terrorist crime cannot justify placing limits on the protection to be afforded in respect of the physical integrity of individuals”.¹⁵¹ Then, the Court reaffirmed that the victim’s conduct or, in the case of detainees, the nature of the offence, is irrespective to the absolute prohibition of Article 3.¹⁵²

Concerning the specific component of torture in Article 3, *Aksoy v. Turkey*¹⁵³ was the first judgment regarding terrorism in which the Court concluded that the alleged ill treatment amounted to torture. In this judgment, a man was detained for 14 days during which he was subjected to “Palestinian hanging”, following his arrest in Turkey on suspicion of terrorism. The Court once more observed that “even in the most difficult circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment”.¹⁵⁴ In the end, the Court concluded that the use of the “Palestinian hanging” could only be described as torture in violation of Article 3 ECHR.¹⁵⁵

The same problem occurs about the exportation of alleged terrorists to the countries which they act against and in which they will probably face ill treatment. In such a case *Chahal v United Kingdom*¹⁵⁶ the applicant was suspected by the government

¹⁴⁹ *Aydin v. Turkey*, §81.

¹⁵⁰ *Dikme v. Turkey*, 11 July 2000.

¹⁵¹ *Dikme v. Turkey*, §90.

¹⁵² *Ibid* §90.

¹⁵³ *Aksoy v. Turkey*, 18 December 1996.

¹⁵⁴ *Aksoy v. Turkey*, §62.

¹⁵⁵ *Ibid*, §64.

¹⁵⁶ *Chahal v United Kingdom*, 15 November 1996.

of being involved in Sikh terrorism. It was decided for the applicant to be deported in the context of fighting against terrorism. The Court recalled the right of States under international law and their treaty obligations to control the entry, residence and expulsion of aliens.¹⁵⁷ Nevertheless, the case law of the Court establishes that an expulsion may be in contradiction with Article 3 of the ECHR and engage the responsibility of the expelling State if there exists a real risk of ill treatment in the receiving State.¹⁵⁸ The Court made a statement that it is aware of the huge difficulties faced by States when fighting terrorist violence, but even in terrorism circumstances, the ECHR absolutely prohibits torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.¹⁵⁹

As a conclusion, the Court states that article 3 constitutes one of the most fundamental values of democratic societies and therefore European monitoring of the conducts of states against fighting terrorism is very essential otherwise there will be no protection of democratic values from terrorism and state terrorism. In that context, the Court has a great role in protecting democracy "even in the most difficult circumstances, such as the fight against terrorism ... the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment".¹⁶⁰

3. Freedom from Retroactive Criminal Legislation (Article 7)

The principle of freedom from retroactive criminal legislation is the basic element of rule of law and therefore there can be made no derogation from that within the scope of fight against terrorism. The counter terrorism legislation can not be applied retroactively as stated in its judgements of ECtHR. In the judgment of *Ecer and Zeyrek v. Turkey*¹⁶¹, the applicants alleged a violation of Article 7 as the Terrorism Prevention Act 1991 was applied to them for acts that occurred in 1988 and 1989. First, the Court

¹⁵⁷ *Chahal v. UK*, §73.

¹⁵⁸ *Ibid*, §74.

¹⁵⁹ *Ibid*, §79.

¹⁶⁰ *Labita v. Italy*, §119.

¹⁶¹ *Ecer and Zeyrek v. Turkey*, 27 February 2001.

recalled that no derogation is possible from Article 7 under Article 15. Then, relying on its case law, the Court recalled that Article 7 of the Convention consists of the general principle that “only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused’s detriment”.¹⁶²

B) RIGHTS THAT CAN BE RESTRICTED UNDER CONVENTION

Some of the rights guaranteed under European Convention on Human Rights can be restricted within the context of fight against terrorism. But such kind of restrictions are of course not unlimited. An established jurisdiction on the case has been achieved with article 15 of the Convention and decisions of the ECtHR. Article 15 of the Convention reads as follows:

“In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.”

In the context of Article 5, right to liberty and security of the person, the Court established required standards in its several judgements related to terrorism. According to the Court, Article 5 has an important role in a democratic society as stated in one of its decisions:

¹⁶² Ecer and Zeyrek v. Turkey, §30; see Kokkinakis v. Greece judgment of 25 May 1993, §52.

“for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the Court has repeatedly stressed in its case law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness...”¹⁶³

The arbitrariness and the duration of the detention of suspected terrorists are very important indications to assess whether there is a violation of Article 5 regarding terrorism. The case of the *Brogan and Others v. United Kingdom*¹⁶⁴ was related to detention and arrest of four individuals suspected of terrorism. None of the suspects were brought before a judge in more than 4 days nor were they charged officially. The Court emphasized the negative effects of terrorism and accepted the “need, inherent to the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual rights.”¹⁶⁵ The court also noted that “to attach too much importance to the terrorism features as a justification for such a length of detention without judicial control would be a disrespectful interpretation of the word promptly.”¹⁶⁶ The sole legitimate aim of protecting the population from terrorism is not enough for article 5 to be respected. At last, the Court found violation of the provision in the case.

In summarize, the Court takes into account the grave nature of terrorist crime when interpreting and applying Article 5 of the Convention, but not to the extend of damaging the protection guaranteed by it. The protection against arbitrary and excessive arrest and detention remains strictly supervised even in a terrorism context.

Article 6 of the ECHR namely the right to a fair trial is the central element of the rule of law and common heritage of the whole Europe culture. The fight against terrorism challenges this provision seriously within the scope of the issues of

¹⁶³ *Kurt v. Turkey*, 25 May 1998, §122.

¹⁶⁴ *Brogan and Others v. the United Kingdom*, 29 November 1988.

¹⁶⁵ *Brogan and Others v. UK*, §48.

¹⁶⁶ *Brogan and Others v. UK*, §62.

presumption of innocence, special courts, lengths of proceedings and the restrictions on the right to correspondence of the suspected and the access to his or her lawyer.

The presence of a military judge in the case of *Incal v Turkey*¹⁶⁷ was dealt by the Court and it was held that there is a violation of Article 6. On the other hand, the lengths of the proceedings were also discussed in several judgements of the Court such as *Zana v Turkey*¹⁶⁸ and *Tomasi v France*.¹⁶⁹ The Court found violation in these cases because there were no complex issues at stake for a legitimate delay in proceedings.

The right to private life and family according to the paragraph 2 of Article 8 may be restricted in order to protect the democratic society. The article reads as follows:

“There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

States interfere the private life easily when fighting terrorism especially with the counter terrorism measures such as secret surveillance in the interest of national security and crime prevention. But it must be stated that such interference is limited with the conditions taking place in the provision above.

Freedom of expression within the context of fight against terrorism is widely discussed in the judgements of the Court. The provision allows political expressions as a fundamental instrument in democracies. But it has also restrictions as stated in the case of *Zana v Turkey*. Mr Zana had defended the acts of terrorist organization namely PKK, and according to the Court, it is possible to punish simply the defence or justification of acts of terrorism if they amount to incitement to the use of violence. On the other hand, with his expressions and activities Mr Zana had incited the use of violence or terrorism. By the way, the Court found no violation of freedom of

¹⁶⁷ *Incal v. Turkey*, 9 June 1998.

¹⁶⁸ *Zana v. Turkey*, 25 November 1997.

¹⁶⁹ *Tomasi v. France*, 27 August 1992.

expression in the case. If the state interferes the freedom of expression when there is no incitement of terrorism, it will be a violation of Article 10 of the convention. According to the article 'the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

There are also some other rights such as freedom of association and assembly (Article 11), right to an effective remedy (Article 13) guaranteed under ECHR which can be restricted in times of war or public emergency, but it must be stated that such restrictions must strike a balance between universal human rights norms and national interests. The limitations of freedom of assembly and association are as follows according to the provision of the Convention:

'No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state.'

To sum up, international human rights law recognizes the bare minimum of standards necessary to protect the safety and integrity of individuals from abuses of power. It governs how states treat all people in all circumstances, even in times of war and public emergency.

CONCLUSION

The inability to define international terrorism has prevented the emergence of a coordinated, effective counter-terrorism strategy among nations of the international community. Divergent viewpoints about what constitutes terrorism and whether or not a definition is necessary or desirable has given terrorist organizations the upper hand and placed all countries in a somewhat vulnerable position. Differences in opinion, ideology, objectives, and rationale have led to infighting, bickering, and bureaucratic stagnation within international bodies such as the United Nations. Is a formal definition of international terrorism even necessary? An act of terrorism must certainly be identified, but is the definition of it definitely necessary?

In order to achieve to a concret solution about this dilemma, countries can adopt a universal standard about the main characteristics of terrorist acts. This set of standards would consist of some salient characteristics and features that all acts of terrorism share. For example violence or threat of violence must be present in order to identify an act as terrorist. Such violence or at least the threat of it must be directed against either people or property. In addition, terrorists aim to capture the attention of an audience beyond their immediate victims. Such victims serve generally as pawns for terrorists hidden targets. Furthermore terrorists also commit acts of violence in order to communicate a particular message or idea to its chosen target audience. Such messages could contain political, social, ideological or religious features. On the other hand, one of the most important common feature of terrorist acts is the aim of the intimidating and terrorizing the whole community. All of these salient characteristics constitute the common features of such terrorist acts on which international community may unite.

Such standards could serve as the starting point for a much larger process among nations involving other measures. Universal extradition treaty and enhanced intelligence capabilities and an effective information sharing among national states are the main measures that can be taken against terrorist acts in international level. These measures would have the intention of decreasing the amount of political and diplomatic

disagreement that is inherently involved in the formation of counter-terrorism strategies and increasing cooperative efforts among countries to combat international terrorism.

Although it seems that the definitional problem, namely the absence of a universally accepted definition of terrorism, prevents to combat it powerfully, there are lots of points on which international community must compromise in order to be successful in the fight against terrorism. Some significant points can be listed as follows:

The criminal legislation of states relating to terrorism must be approximated for an effectual fight against terrorism. A number of events relating to extradition and trying of suspected terrorists in last decades show that the international community needs to cooperate and constitute a universal criminal legislation in order to fight effective against terrorism. Therefore, it has been noted in several conventions that terrorism may never be justified as a political crime under domestic legislations.

International institutions such as UN must have a more effective role on resolving the economical and social problems of third world countries. The motives and origins of terrorism must be determined and the causes of terrorism must be exterminated in order to provide a better and safe world without any terrorist threat.

International community must be prepared to face with new forms of terrorism such as cyber terror or nuclear, biological and chemical terrorism. All adequate measures must be taken to combat with this new type of terrorist acts. The transformation of conventional terrorism forces the international community to take measures against the new threats of terrorism. The response to the global terror has to be global, too.

Terrorism which hurts to humankind seriously since thousand years is the most dangerous threat to the values of modern democratic societies today. The international community needs more cooperation of states and institutions among eachother for a better world without terrorist threat. The relationship between internentional law and

terrorist acts is very important to perceive the problems on the issue. International bodies aim to suppress and destroy the causes and motives of terrorism by using international law as a legitimate means. Therefore, international law is the common solution for response to terrorism in international area.

In such a context, human rights law has an important role for the fight against terrorism. The regulations on the protection of human rights according to the human rights law have a twofold meaning in the fight against terrorism. Firstly, these regulations oblige states to the prevention and the combating of terrorism, in particularly on the ground of the right of everyone to life, liberty and the security of person. Secondly, in the prevention and combating of terrorism states have to fully observe the respect for human rights.

The respect for human rights in no way excludes measures against terrorism, although it is often argued differently. The international treaties on the protection of human rights allow for a number of limitations, within certain boundaries, to the application of human rights. Most human rights are not absolute rules, but are principles that in concrete situations often come into conflict with one another. These legal conflicts should be resolved by means of striking a balance between the relevant principles.

A number of measures for the purpose of combating terrorism place limitations on civil and political rights and thereby change the balance between freedom and security in favour of more security. Such measures may indeed be in conformity with international standards. However, international treaties limit the restrictions permitted for security reasons. The legality of such security measures should therefore be thoroughly investigated and determined, especially from the point of view of the principle of proportionality and the principle that any potential misuse should be excluded.

Counter terrorism measures adopted by international community or by states have to be respectful to the fundamental human rights norms in order to maintain the

democratic values of modern age and the common heritage of humanity. The struggle against terrorism and the scrupulous protection of human rights are not conflicting priorities, but integral parts of the long-term fight for liberty and security. Terrorism clearly poses a threat to the most fundamental values of personal liberty and security. Its means are antithetical to human rights and the rule of law. As such, states have a right and obligation to ensure that those in their territory are protected from terrorist violence and that the perpetrators of such violence are brought to justice.

Finally, it seems that terrorism will continue to be on the agenda of the international community for a long time especially in the new century. Maybe, there will be more terrorist acts rather than conventional patterns of wars in the new era. In order to make the world more secure in 21. Century, international community must cooperate more effectively and take measures against terrorist organizations strictly while respecting the fundamental human rights norms. That will be the most acceptable compromise among different political views of national states in international community.

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