

**From brutality to elegance in combating terrorism,  
a past, present and future perspective on the  
threat to democracy**

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## **Preface**

During the past semester this thesis has become increasingly personal to me. At times it has been my best friend, but also my greatest source of anger and frustration. For me the most important aspect of studying law is that, by knowing it well, I can use it in a good way. Strangely enough, my law studies began as nothing more than a coincidence.

By writing this thesis I have been able to present my views on a worldwide issue and my suggestions for progress in this respect. It begins here. We will see what comes of it. I sincerely hope I manage to stay true to my ideology.

Although grateful for the technological advantages in my time, I have experienced certain mistakes occurring when delivering my thesis electronically. I hope this does not lead to misunderstandings.

“All animals are equal-but some animals are more equal than others”. (George Orwell)

*In memory of my father*

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# 1 Introduction

## 1.1 The subject of the thesis

Terror is a public enemy that possibly can be characterized as greater than the phenomenon of war itself as it targets innocent victims indiscriminately, with lethal force more often than not and thereby shockingly destabilizes the very foundation of human life.<sup>1</sup>

Terrorism flourishes in poverty, suppression, despair, extremism and human rights abuse. The goal of a terrorist will often be to create chaos in order to achieve a certain vision.<sup>2</sup> When innocent civilians live in constant fear, under the harassment and uncertainty of where and when the next attack will turn into tragic reality, they find themselves in the pocket of a person without limitations as to methods and costs in a pursuit of his or her objective.

One may ask what sort of response can defeat such a threat to democracy. In an introduction it seems reasonable to divide between violent and non-violent responses. For the matter of this thesis I will focus on the non-violent approach. If the one can exist completely without the other is a question that certainly deserves attention, but will not be thoroughly commented on in this thesis.

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<sup>1</sup> War is meant in the traditional sense of the word, namely combat between the armed forces of two or more States, that is governed by international *humanitarian* law setting certain standards for warfare and absolutely prohibits attack on civilian population. See for instance the statutes of the ICC (International Criminal Court), which to a certain extent codify international customary law in this respect. For a complete overview one may in addition look to The Hague and Geneva conventions regulating war crimes, genocide, crimes against humanity, treatment of enemy combatants etc.

<sup>2</sup> Formulated carefully as there currently, despite international dispute on this subject, seems to be no general consensus on a conclusive written definition of terrorism. However, this particular aspect seems mostly to be agreed upon and certain judicial authors argue that the general notion of terrorism is not in question. The dispute concerns the exceptions, for instance groups referred to as “freedom fighters.” See Antonio Cassese, *International Criminal Law* pages 120-125.

However, the violent reaction is clearly exemplified by the American “war on terror” after the infamous 9/11 incident, which by no means, contrary to what one might believe by reading the tabloids, is the first terror attack our modern world has witnessed.

Within the UN concerns have been expressed in relation to violent approaches. Such responses can convincingly be argued as incompatible with the general paradox that arises when a democratic state is fighting terrorism; the measures taken to defeat terrorism may not undermine the human rights they seek to protect.

The possibilities of combating terrorism, while duly respecting human rights, open to democratic legal systems will, therefore, be the subject matter of this thesis.

## **1.2 The content of the thesis**

In discussing the above-mentioned subject I will focus on international human rights law as its objective is to regulate what a state can do to its citizens.

This will be elaborated on through certain provisions of the European Convention on Human Rights and by bringing in relevant judgements from the European Court of Human Rights.<sup>3</sup> To gain a wider perspective international statements and guidelines, the UN being a key role-player, will be taken into consideration.

By presenting a look-back in section 2 on how some terror incidents have been dealt with in the past, I will point out the relevant facts of a number of cases and compare these to the living instrument of international human rights law.

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<sup>3</sup> Hereafter referred to respectively as the Convention and the Court.

In this Past Perspective, by analyzing the groundbreaking case of *McCann and others vs. UK*,<sup>4</sup> most questions will arise with regards to Article 2 of the Convention and the absolutely necessary use of force. In my opinion the case of *McCann and others vs. UK* is important because it sets a standard as to how Article 2 should be understood. Its importance is underlined by the fact that the Court was sitting as a Grand Chamber when giving this judgement. Supplementing this part of the thesis will be other early judgements regarding terrorism that cast light over different Articles of the Convention.

The goal in this perspective is to assess how States were capable of dealing with the threat posed by terrorism pre 9/11.

In section 3, the Present Perspective, I find it imperative to consider how the international community is handling terrorism today. This includes a discussion on which measures have been taken in order to defeat terrorism in present time and how questions evolve in relation to several Articles of the Convention, namely Articles 2, 3, 5, 8, and to a certain degree Articles 6, 9 and 10.

I will try to shed light on different approaches taken, both the violent and non-violent. Although the former will not be a comprehensive part of this thesis it must be mentioned in order to provide a sufficient overview of the current situation. Such an overview demands that the recent international developments are considered. To achieve this I will rely on international guidelines and statements.

The UN Global Counter-Terrorism Strategy will also be commented on, even if this crosses a blurry line into the future perspective of my thesis. If it is possible with regards to where the world stands today on this problem, some conclusions will be drawn.

Section 4 of my thesis, the Future Perspective, will concentrate on prospects for the time to come. I will attempt to sufficiently define terrorism to what may be accepted at an international level.

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<sup>4</sup> *McCann and others vs. UK*, Series A324-1898/91, judgement of 27 September 1995.

Since my aim is to partly focus on the reactive nature of law, the law by its nature responds to an act that has already taken place, the legal possibilities to prevent terrorist attacks will be focused on and held up against the Articles mentioned above. However, the mission of drawing a concrete line in this respect belongs to the Court. Giving a presentation of forward-looking strategies is rather difficult compared to assessing the developments until now. This brings up the point that terrorism does not confine itself to be only a legal question, but also one of respect and tolerance between cultures.

One must in addition consider how terrorism may develop, if it will stay in its current form and shape, or mutate both in respect of building networks and methods used.

This raises important questions as to how a democratic State can prevent and defeat terrorism in the future, without violating the established human rights law that is laid down by the international community.

Finally, in section 5, I will present the conclusions I have drawn during the writing of this thesis.

The above-mentioned entails firstly, although expressions such as “war on terror” may cause confusion, that international *humanitarian* law is not the main focus in this paper. It will be briefly commented on in relation to certain aspects of the recent developments. Secondly, the problem I have chosen to discuss does not leave room for issues that surface after a terror attack has happened. Therefore, aspects related to this issue will not be discussed in this thesis.



## 2 Past Perspective

### 2.1. The case of *McCann and others vs. UK*

#### 2.1.1 Introduction

The objective of the Court, seated as a Grand Chamber, in the case of *McCann vs. UK* was to decide whether the United Kingdom breached their obligations under Article 2 of the Convention, regarding the *right to life* and use of force, in dealing with an alleged terror attack supposed to take place on Gibraltar.<sup>5</sup> Article 2 of the Convention reads as follows:

- "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.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article (art. 2) when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence 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."

#### 2.1.2 The facts of the case

In order to provide a correct impression of the events in *McCann and others vs. UK* the following is based on the Court's assessment of the facts.<sup>6</sup>

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<sup>5</sup> *McCann and others vs. UK*, Series A324-1898/91, judgement of 27 September 1995.

<sup>6</sup> See para 12 and following of the judgement, "As to the facts/Particular circumstances of the case".

English, Spanish and Gibraltar authorities had for a certain period of time been aware of a terror attack being planned by the Irish Republican Army (IRA) against Gibraltar. It was considered highly probable that the intentions were to strike during a ceremonial changing of guard at the First Battalion of the Royal Anglian Regiment. There were also clear suspicions as to which day and by which means the attack would be carried out. The option considered most likely was use of explosives, probably in the form of a car bomb.

Soldiers from the SAS were briefed on the situation and sent to Gibraltar to “assist the Gibraltar police to arrest the IRA active service unit ("ASU") should the police”; led by the Commissioner, “request such military intervention”.<sup>7</sup> Information obtained through surveillance concluded that the “ASU” would consist of Daniel McCann, Sean Savage and a woman as a third member, later identified as Mairead Farrell. This group was presumed to be armed, dangerous and highly educated in the use of explosives. The original intention of the counter-operation was therefore,<sup>8</sup>

- (a) to protect life;
- (b) to foil the attempt;
- (c) to arrest the offenders;
- (d) the securing and safe custody of the prisoners.

Soldier F (senior military advisor and officer of the SAS) was provided with “Rules of engagement for the Military Commander in Operation Flavius”, stating as follows regarding use of force in pursuit of the suspected terrorists:<sup>9</sup>

"Use of force

4. You and your men will not use force unless requested to do so by the senior police officer(s) designated by the Gibraltar Police Commissioner; or unless it is necessary to do so in order to protect life. You and your men are not then to use more force than is necessary in order to protect life.

Opening fire

5. You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this.

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<sup>7</sup> SAS is short for Special Air Service, which is a specially trained unit of the British armed forces. See para 15 of the judgement.

<sup>8</sup> See para 17.

<sup>9</sup> See para 16.

#### Firing without warning

6. You and your men may fire without warning if the giving of a warning or any delay in firing could lead to death or injury to you or them or any other person, or if the giving of a warning is clearly impracticable.

#### Warning before firing

7. If the circumstances in paragraph 6 do not apply, a warning is necessary before firing. The warning is to be as clear as possible and is to include a direction to surrender and a clear warning that fire will be opened if the direction is not obeyed."

The three suspects were sighted in Malaga in Spain on the 4<sup>th</sup> of March 1988. Due to uncertainty of when they would approach Gibraltar the group was put under surveillance on the Commissioner's order.

At this point the participants in the anti-terror operation were divided in three distinct groups, namely the military group, the police group and the surveillance/security group. Each group had their own specific routines for and means of communication. The Commissioner conducted a briefing attended by representatives from each group during the night between March 5<sup>th</sup> and 6<sup>th</sup> 1988 and stressed the importance of gathering evidence for subsequent trial of the suspects. In addition, views on different methods of detonation were discussed. A remote-control device was under the circumstances found to be most likely. The military branch of the operation, consisting of the SAS soldiers, was given the impression by their SAS attack commander (soldier E) that this attack would be a "button job".<sup>10</sup> This assessment entailed, as was discussed in light of the very short time factor a "button job" involves, a likelier chance of shooting to kill.

Soldier E confirmed the ruthlessness of these terrorists and explicitly told his men that they would resort to whatever weapons or "button jobs" they carried in the case of a confrontation. Finally, he emphasized to his group the strong likelihood of at least one of the suspected terrorists carrying such a "button job".

On the 6<sup>th</sup> of March 1988 members of the surveillance team and the police group were patrolling the streets of Gibraltar. Soldiers A, B, C and D from the military branch, were dressed in civilian clothing and armed. They were working in pairs and connected both to

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<sup>10</sup> See para 26 of the judgement.

the tactical net and the surveillance net respectively through radio communication.

A separate surveillance team was placed at the border, in addition to an arrest group nearby. Soldier E (attack commander) and F (senior military advisor) expressed that the preferred military option would be to intercept and apprehend the suspects in the border area, but this was not pursued since positive identification at that time seemed too difficult. The preferred approach was therefore to arrest and disarm the suspects on foot in the assembly area close to their target, and to defuse the bomb.

An arrest policy of four key indicators was formulated:<sup>11</sup>

1. if a car was driven into Gibraltar and parked in the assembly area by an identified member of the active service unit;
2. if a car was driven into the assembly area by an ASU member without prior warning;
3. the presence in Gibraltar of the other members of the ASU;
4. if there was clear indication that terrorists having parked their car bomb intended to leave Gibraltar, that is to say, they were heading for the border.

Not to raise suspicion and loosing useful evidence in court, the plan was to make an arrest once all three suspects were present and identified.

Sean Savage was spotted at about 14.00 hours and quickly positively identified as the man who two hours earlier parked a car in the assembly area taking “the time to get out and fiddled with something between the seats”.<sup>12</sup>

At 14.50 hours Savage was spotted meeting up with the two other suspects. They spent considerable time staring at a specific car parked in the assembly area “as if, . . . , they were studying it to make sure it was absolutely right for the effect of the bomb”.<sup>13</sup>

Soldier G (bomb-disposal advisor) conducted an exterior examination of the car in question after the suspects had left the assembly area. Being in the area for less than two minutes he detected nothing awkward inside the car, neither anything visibly out of place nor was there something that seemed to be concealed. Even so, when reporting to the

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<sup>11</sup> See para 37 of the judgement.

<sup>12</sup> See para 38.

<sup>13</sup> See para 45.

Commissioner he regarded the car as a so-called suspect car bomb.<sup>14</sup>

Soldier G, later claiming neither to be a radio- nor an explosives expert, based this on his discovery of “an old aerial situated centrally on a relatively new car”. This information was passed on to all operatives on the ground. Soldier A later stated that he was convinced of the existence of a bomb in the area. Soldier C recalled this confirmation of a bomb in the area given by Soldier E and also that it was likely to be detonated by Savage as he had been seen “fiddling” with something earlier. Soldier D stated that Soldier E had also confirmed to him that there was a bomb there.

Later Soldier D said that the possibility that none of the suspects were carrying a remote-control device, or even the possibility that there was no bomb at all, had never been mentioned. At 15.40 hours the Commissioner, deciding to arrest the three suspects on suspicion of conspiracy to murder since they were leaving the area, requested the military to intercept and apprehend the three suspected terrorists. Soldier F instructed to intervene and the soldiers on the ground were informed about the passing of control to arrest by soldier E.<sup>15</sup>

The soldiers had received training in making appropriate apprehensions.<sup>16</sup>

In the following turn of events ending with the shooting of all three suspects, soldiers A and B resumed pursuing and closed up on McCann and Farrell. Ms. Farrell was in possession of a large handbag. McCann spotted soldier A when the latter was about ten metres behind and appeared to recognize that he was a threat. At this moment soldier A drew his gun with the intention of shouting out the rehearsed warning, but stated later that he was not sure if the words actually came out.

According to the facts established before the Court, McCann made a sudden and aggressive move across the front of his body. In the belief that he was reaching for the button that would detonate the bomb soldier A opened fire, shooting McCann in his back from a distance of three metres. In the same instance he spotted a movement from Farrell

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<sup>14</sup> See para 48 of the judgement.

<sup>15</sup> See para 54.

<sup>16</sup> See para 55.

going for her handbag. Soldier A being under the impression that she was reaching for the button as well, shot Farrell in the back too.

Furthermore, all in all firing five shots, soldier A turned back to McCann discharging once at his body and twice at his head.

During these events soldier A did not realize that soldier B opened fire as well.

Since soldier B could not see Farrell's hands while she was making a sharp movement he feared Farrell was reaching for the button and opened fire at her, while recognizing a shout and shots fired from soldier A. McCann's hands were also out of sight for soldier B, who judged McCann to be in a threatening position and therefore switched fire to his direction. Discharging a total of seven shots, soldier B switched yet again towards Farrell and did not cease-fire until he was certain that she no longer posed any threat.<sup>17</sup>

Soldiers A and B denied that the suspects made any attempt to surrender or that they continued firing when the suspects already were down.<sup>18</sup> Although there were witnesses who confirmed the soldiers' version, this story is contrary to evidence given by three other witnesses. A member of the surveillance team stated that McCann and Farrell were still fired at "when they were almost on the ground, but not on the ground".<sup>19</sup>

Soldiers C and D were in pursuit of the last suspect, Sean Savage. At the time of the shootings by soldier A and B, soldier D was three metres away from Savage. He wanted to get even closer in order to commence the arrest procedure, when the shots were fired at McCann and Farrell. Savage turned around with his arm moving down to the right hip area.

A lady standing in the line of fire was pushed away by soldier D who believed that Savage was reaching for the detonator, and therefore rapidly discharged nine rounds at the suspect. The last two were aimed at his head.<sup>20</sup>

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<sup>17</sup> See para 61, 62 of the judgement.

<sup>18</sup> See para 63.

<sup>19</sup> See para 74.

<sup>20</sup> See para 78.

Soldier C recalled in his statement that he shouted “stop” and then drawing his gun. He spotted Savage’s movement to his right hip area along with something bulky in Savage’s right hand pocket, which he feared would be the detonator. At a distance of about five or six feet away from Savage soldier C fired six rounds at the suspect’s body, two bullets hitting the neck and head as a result of Savage falling down. The two soldiers C and D later stated that “once it became necessary to open fire they would continue shooting until the person was no longer a threat”.<sup>21</sup> However, also these two soldiers denied shooting Savage while he was on the ground.

Soldier E (attack commander) stated that the intention in such a situation was to kill, as this was “the only way to remove the threat”, adding that this was the standard to follow by any soldier in the army opening fire.<sup>22</sup>

At approximately 16.00 hours soldier F returned control to the Commissioner. Soldier G commenced clearance of the “suspect car-bomb”. Searching the bodies of McCann, Savage, and Farrell along with her handbag resulted in discovering that the suspects had been unarmed and were not carrying any detonating devices.<sup>23</sup>

Only at the scene where the Savage shootings had taken place some cartridge positions were marked. Except for an outline made of Savage’s position indicating the position of five bullets, there were made no markings or police photographs of the bodies.<sup>24</sup> The assembly area was declared safe between 19.00 and 20.00 hours, no bombs or explosive devices were found in the car.<sup>25</sup>

After several indications leading to a car parked in a car-park in Marbella, the Malaga bomb-disposal team found altogether 64 kg semtex explosives. This car was found rented in the name of one of the suspect’s aliases.<sup>26</sup>

To comment shortly on the forensic and pathological evidence of the shootings it was found that the distance of firing could not have been more than six feet. In Ms. Farrell’s

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<sup>21</sup> See para 80 of the judgement.

<sup>22</sup> See para 80.

<sup>23</sup> See para 93.

<sup>24</sup> See para 94, 95.

<sup>25</sup> See para 96.

<sup>26</sup> See para 99.

case it was considered reasonable that she received her shots to the face while facing the shooter, causing her to fall away and receive the shots to the back. Altogether shot eight times, it was agreed that she was going or was already down at some point receiving them.<sup>27</sup>

Concerning McCann, evidence suggested that the chest wounds came before the head wound and that “he was down or very far down when it was inflicted”.<sup>28</sup>

In the case of Savage, who was hit by sixteen bullets, it was uttered from professor Watson that he was “riddled with bullets” and that it looked like “a frenzied attack”. Professor Watson and Pounder agreed that the wounds inflicted on Savage indicated that he was shot in the head while lying down.<sup>29</sup>

### **2.1.3 Proceedings before the Court**

The Applicants, Ms Margaret McCann, Mr Daniel Farrell and Mr John Savage alleged that the killings committed by the SAS soldiers breached Article 2 of the Convention.<sup>30</sup> In addressing this issue, the Court underlined the importance of the Convention being an instrument of protection for individual human rights, stating that Article 2 ranks as one of the most fundamental provisions that are not to be derogated from in peacetime. The Court pointed out that the term “absolutely necessary” in Article 2 indicates a stricter test of necessity compared to the phrase “necessary in a democratic society” found in Articles 8 – 11 of the Convention.<sup>31</sup>

The Court acknowledged that the training, instruction and operational control of State agents, in this context, rose issues under Article 2.2. It decided not to assess the criminal responsibility of those directly or indirectly involved.<sup>32</sup>

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<sup>27</sup> See para 108 judgement.

<sup>28</sup> See para 109.

<sup>29</sup> See para 110.

<sup>30</sup> See para 1.

<sup>31</sup> See para 149.

<sup>32</sup> See para 173.



The Court rejected the Applicants' claim that the alleged shortcomings in the inquest proceedings not mentioned above constituted a violation of Article 2.1 alone. The difference between the standards of the Convention and the relevant domestic law was not sufficiently great in this regard. The Commission and the Court agreed that the requirements were "satisfied if the substance of the Convention right was protected".<sup>33</sup>

Evidence produced in this case did not convince the Court to believe that the killing of the three suspects was premeditated or tacitly encouraged, rejecting the Applicants' claim of a violation of Article 2 on this ground.<sup>34</sup>

The Court, after scrutinizing the circumstances surrounding the action of the soldiers, came to the conclusion that the soldiers honestly believed it was necessary to open fire in order to protect lives. It stated that when based on an honest belief perceived for good reasons and in pursuit of the aims listed in Article 2.2 of the Convention, use of force might be justified even if the honest belief subsequently turns out to be mistaken. Not to admit a State such a margin would be an unrealistic burden on law-enforcement personnel in executing their duty. The actions of the SAS soldiers did therefore not by themselves constitute a breach of Article 2.2.<sup>35</sup>

However, the Court rather seriously questioned the control and organization of the operation with regards to, amongst other incidents, why the suspects were not arrested at an earlier stage and ruling out the possibility of this being a reconnaissance mission. The Court also said that the true nature of these "button-jobs" had been over-simplified. It was found to be "disquieting" that the "suspect car-bomb" assessment made by soldier G was communicated as a "definite identification" to the other soldiers, let alone that several other "working hypotheses" were passed on as certainties "making use of lethal force almost unavoidable".<sup>36</sup>

Bearing in mind the discussion of an increased chance that it would be necessary to shoot to kill, the Court found that "...the authorities were bound by their obligation to respect the right to life of the suspects to exercise the greatest of care in evaluating the information at

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<sup>33</sup> See para 152-155, 162-164 of the judgement.

<sup>34</sup> See para 179-184.

<sup>35</sup> See para 200.

<sup>36</sup> See para 210.

their disposal before transmitting the it to soldiers whose use of firearms automatically involved shooting to kill”.<sup>37</sup>

Furthermore, the Court stated that the soldiers’ “reflex action...lacks the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects...” It stood in “marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasized the legal responsibilities of the individual officer...”<sup>38</sup>

In the Court’s opinion this suggested “a lack of appropriate care in the control and organization of the arrest operation”. When taking these factors, and more, into consideration the Court was “not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary....within the meaning of Article 2.2(a)....”<sup>39</sup>

For that reason the Court concluded that there had been a violation of Article 2 of the Convention.

#### **2.1.4 Analysis**

When viewing the judgement of *McCann and others vs. UK* in its context it is worthy of note that the British authorities did not appreciate it at this time. The decision was characterized as a victory for the IRA and it was put forward that Europe was playing havoc with the struggle against terrorism, hereby leaving it less efficient. In a heated public discussion Prime Minister John Major stated that the finding was “irresponsible and defying common sense”. Adding to this vice-premier Michael Hesselstine announced, “not to take the slightest notion of this ludicrous decision”.<sup>40</sup>

In my view the verdict of the Court in this case must be considered as brave, forward-

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<sup>37</sup> See para 211 of the judgement.

<sup>38</sup> See para 212.

<sup>39</sup> See para 212-213.

<sup>40</sup> See “Van Lawless naar een Rechtmatige bestrijding van terrorisme”, by Prof. Dr. Martin Kuijer.

looking, therefore highly important and setting the standards for the lawful combating of terrorism. The decision was brave because the Court probably was well aware of the subsequent criticism, forward-looking because it foresaw the need for protecting human rights and highly important because it took firm action in this regard. Protecting human rights while defeating terrorism is a view that gains acceptance internationally.

The actions of British authorities in the aftermath of the *McCann and others vs. UK* verdict leave a savage impression of their mentality regarding the struggle against terrorism. When considering the facts established before the Court, strikingly the “fire vs. fire” attitude becomes apparent through the rather inconsiderate decision-making by commanding officers at crucial stages of the operation.

Evidently, the three suspects’ *right to life* was not of great significance to neither the British SAS soldiers nor to those criticizing the Court’s verdict.

This case shows that authorities were in need of developing a more sophisticated and forward-looking policy in combating terrorism

Without prejudice to the individual soldier for his actions, the manner of bringing the suspects down is open, as is shown by the Court, to severe criticism.

Looking at this case with eyes coloured by the reactive nature of law, irreversible damage was done. The rule of law was not given a chance to interfere with the events, resulting in no possibility to ensure an objectively fair outcome securing the values of all parties involved. Instead, it became necessary to afterwards establish this outcome that per se never could achieve the same value. Since three of those involved were dead, the damage was already done.

Against those who favour a less intelligent and forward-looking approach to the delicate issue of protecting human rights while combating terrorism, or have less faith in the rule of law when dealing with it, the legal system has little opportunity to defend its rationality.

In conclusion I suggest that the events in particular, but also the later political atmosphere, of the *McCann and others vs. UK* case put the democratic world’s endeavours against

terrorism back in a severe manner. In my opinion it was a chance for democracy, represented by the British authorities, to embrace the problem of human rights and terrorism at an early stage. Consequently I hold the view that, if so had been the case, democracy at present would have been better positioned in preventing and combating terrorism.

## 2.2 Some other Cases

### 2.2.1 Article 3

The case of *Ireland vs. UK* concerns Article 3 of the Convention and the *prohibition of torture*.<sup>41</sup> Article 3 is formulated as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

The background for this case was the long-term crisis in Northern Ireland and the authorities’ response to the “longest and most violent terrorist campaign witnessed in ... Ireland”.<sup>42</sup> Numerous people were arrested and taken into custody by security forces that acted in pursuance of emergency powers. Allegations of ill-treatment were made by Ireland that presented written evidence concerning 228 cases.<sup>43</sup> The arrested persons were detained at five different detention centres. At one centre the detainees were subjected to an “interrogation in depth” which involved wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink.<sup>44</sup>

Four judges voted that such treatment amounted to torture. Detainees made allegations of severe beatings and otherwise physical ill-treatment from another detention centre, also claiming the treatment to be “applied in a sort of scheme to make them talk”.<sup>45</sup> The Court established these two practices as inhuman treatment within the meaning of Article 3. It could not be ascertained whether the practices at the three remaining detention centres amounted to violation of this Article.

An interesting decision was made by the European Commission of Human Rights in the Application of *Ensslin, Baader and Raspe vs. Germany* with regards to in particular

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<sup>41</sup> Case of Ireland vs. UK, Application 5310/71, judgement 18 January 1978.

<sup>42</sup> See para 11 of the judgement.

<sup>43</sup> See para 92-93.

<sup>44</sup> See para 96.

<sup>45</sup> See para 110.

isolation and its relations to Article 3 of the Convention.<sup>46</sup> Three terrorists were kept in complete isolation from other detainees for a period of three years until they committed suicide. The rationale behind this segregation was a fear of their terrorist group, Rote Arme Fraktion, engaging in armed attacks. However, they had access to radio, TV and the possibility to exercise in fresh air. In addition they were allowed to see each other and to have visits.

The Commission pointed out that total isolation might violate the *prohibition of torture*. Under these particular circumstances, taking into consideration that medical reports showed no specific health damage resulting from being isolated, the Commission found no breach of Article 3.<sup>47</sup>

Security measures during isolation such as covered windows, continuous camera surveillance and lights always being on were under scrutiny in the case of *Kröcher and Möller vs. Switzerland*.<sup>48</sup> After a month of imprisonment the heavy security measures were lifted and the Commission also here concluded, despite dissenting opinions, with no violation of Article 3 of the Convention.<sup>49</sup>

### 2.2.2 Article 5

With regards to Article 5 of the Convention protecting the *right to liberty and security of person*, an interesting decision was made in the *Lawless vs. Ireland* case.<sup>50</sup>

Mr. Lawless, a terrorist suspect, alleged that the Government had violated the Convention by detaining him without trial between 13<sup>th</sup> of July and 11<sup>th</sup> of December 1957. The Court narrowed the question of whether the detention was violating Article 5 down to interpreting paragraph 1(c) and 3 as it found the other parts of the Article inapplicable. These provisions are worded as follows:

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<sup>46</sup> Application 7572/76, declared inadmissible as “manifestly ill-founded” on 8 July 1978. The Commission had the task of reviewing applications before they were submitted to the Court. It does, after the reform entering into force 1 November 1998, no longer exist. See Erik Møse; *Menneskerettigheter*, page 109.

<sup>47</sup> See Erik Møse, *Menneskerettigheter*, page 220.

<sup>48</sup> *Kröcher and Möller vs. Switzerland*, 8463/78 DR34 (1982).

<sup>49</sup> See Erik Møse, *Menneskerettigheter*, pages 220-221.

<sup>50</sup> *Lawless vs. Ireland* (No.3), Application 332/57, judgement of 1 July 1961.

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:”

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (Art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

In finding that Section 4 of the Irish 1940 Act, which provided the national legislation for detaining Mr. Lawless was contrary to the provisions of Article 5, the Court had to examine if the case under these particular circumstances could be justified on other legal grounds.

In conclusion the Court found that “the Irish Government were justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation and were hence entitled, applying the provisions of Article 15, paragraph 1 (art. 15-1), of the Convention for the purposes for which those provisions were made, to take measures derogating from their obligations under the Convention”.<sup>51</sup>

### 2.2.3 Article 8

The case of *Klass and others vs. Germany* concerned surveillance on communications as a counter-terrorism measure.<sup>52</sup> The Court weighed the interest of society and the individual against each other, this time in relation to Article 8 of the Convention that guards the *right to respect for private and family life*. Article 8 has the wording as follows:

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<sup>51</sup> See para 48 of the judgement.

<sup>52</sup> *Klass and others vs. Germany*, Application No. 5029/71, judgement of 6 September 1978.

“1. Everyone has the right to respect for his private and family life, his home and correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest 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.”

Neither were German authorities obligated to inform persons under surveillance when the measures ended, nor was there any judicial control with the procedure. The Court established that this constituted an interference with the rights protected by Article 8.

However, the Court acknowledged that the process was in accordance with domestic law, restricted by rules of procedure and in pursuit of a legitimate aim, namely national security and prevention of disorder or crime. The matter in question was therefore if the interference was “necessary in a democratic society”. In the Court’s opinion authorities must have a certain, but not unlimited, margin of appreciation in such cases.

After a concrete assessment of the particular circumstances in the case, weighing the safeguards against abuse alongside with the nature of the interference, the Court concluded with no violation.<sup>53</sup>

## 2.3 Final Comments

Significant change has taken place since the Court delivered its verdict in *McCann and others vs. UK*.

Strict measures to prevent terrorism may, as shown by the selection of cases above, be taken with the Court’s approval provided that adequate care is ensured. States are given a margin of appreciation in dealing with terrorist cases, however, the *McCann and others vs. UK* case shows that this is only to a certain limit. Throughout this perspective it is proven by the Court that the world has moved further in its cause against terrorists and their

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<sup>53</sup> See Erik Møse, *Menneskerettigheter*, pages 407-408.



objectives. When reviewing the later judgements by the Court it seems that peace is established after the horrific turn of events that took place on Gibraltar during spring 1988.

My opinion is that a necessary legal foundation for the future defeat of terrorism has been laid.

## 3 Present Perspective

### 3.1 Views on the present situation

#### 3.1.1 Use of force and root causes

In the aftermath of 9/11 the commitment to fight terrorism has largely become tantamount to the American “war on terror” and expressions as “the axis of evil”. The world has witnessed an invasion of Afghanistan as well as the subsequent invasion of Iraq in the pursuit of terrorists and terrorist regimes.<sup>54</sup> It is fair to characterize the American “war on terror” as an outsized part of the terror situation in the world today.

Choosing military force as a response has led to embarrassing and humiliating incidents over the last period of years that violate both international human rights law and international humanitarian law. The measures taken have to a certain degree corroded the values they seek to protect.<sup>55</sup>

As I briefly commented on in the introduction, valid concerns have been expressed within the UN General Assembly on this matter:<sup>56</sup>

“Throughout the Panel’s regional consultations, it heard concerns from Governments and civil society organizations that the current “war on terrorism” has in some instances corroded the very values that terrorists target: human rights and the rule of law.

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<sup>54</sup> The political wisdom of such military tactics is not the subject of this thesis. However, I find it relevant in relation to the situation today.

<sup>55</sup> For instance scenes shown from the Abu Ghraib prison, obtainable at this website: [www.antiwar.com/news/?articleid=2444](http://www.antiwar.com/news/?articleid=2444) in addition to reports of detention and interrogation procedures from Guantanamo Bay.

<sup>56</sup> See Section B/No. 1/para 147 of the UN reform-suggestion by following this link: <http://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm>

Most of those who expressed such concerns did not question the seriousness of the terrorist threat and acknowledged that the right to life is the most fundamental of human rights. They did, however, express fears that approaches to terror focusing wholly on military, police and intelligence measures risk undermining efforts to promote good governance and human rights, alienate large parts of the world's population and thereby weaken the potential for collective action against terrorism".

In support of these concerns I also find an American intelligence report released late September 2006 stating:<sup>57</sup>

"Al-Qa'ida, now merged with Abu Mus'ab al-Zarqawi's network, is exploiting the situation in Iraq to attract new recruits and donors and to maintain its leadership role".

This could possibly be interpreted as an indication of the military tactics at this time being only partly successful, if successful at all. It may follow from using merely military force to suppress terrorism that terrorists adapt by using other methods or surface in another place. Such an outcome is likely when not dealing with the root causes of terrorism, resulting in fueling a burning fire.

Presently international organizations, especially the UN and Council of Europe recognize the importance of promoting tolerance and cultural understanding in this respect.

The Secretary General of the UN, Kofi Annan, has stated in fear of conflicts spreading:<sup>58</sup>

"Our global community is experiencing a period of sharply increasing intolerance, extremism and violence. Recent developments in the Middle East have only fueled this trend. Relations between adherents of major world religions have been particularly affected".

The UN has announced that it is "imperative to develop a global strategy of fighting terrorism that addresses root causes and strengthens responsible States and the rule of law and fundamental human rights".<sup>59</sup>

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<sup>57</sup> This report was accessible through [www.cnn.com](http://www.cnn.com).

<sup>58</sup> See the article of Paul Alexander "Annan Calls for Religious Tolerance" by following this link: <http://abcnews.go.com/International/wireStory?id=2475707>

Mr. Annan is resigning as the UN Secretary General on 1 January 2007 and will be replaced by Ban Ki-moon.

<sup>59</sup> See Section B/para 148 of the UN document by following this link:

<http://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm>

Currently, the latest objective in the “war on terror” is to establish a functional democracy in Iraq. The goal in itself is admirable. However, I would like to put forward that we are interfering with lives of people who, even though some are extremists, are not familiar with democracy and consequently have little idea of whether a democracy is better for them or not. If the only impression they have of representatives of democracy is the western forces, their reluctance is understandable.<sup>60</sup>

### **3.1.2 Lack of definition**

In this complex situation the international community led by the UN is struggling. A clear sign of this is the lack of an internationally accepted definition of terrorism.

The above-mentioned UN document, which according to my research is the latest development on this topic, states the following:<sup>61</sup>

“The United Nations must achieve the same degree of normative strength concerning the non-State use of force as it has concerning State use of force. Lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image. Achieving a comprehensive convention on terrorism, including a clear definition, is a political imperative”.

Evidently, the UN is not content as to where it stands today.

In contrast to this I acknowledge that certain scholars argue that a definition of terrorism indeed has developed through several UN conventions, putting forward a view of the delimitating of the notion as a main obstacle. Antonio Cassesse emphasizes in this respect the definition given in the UN “International Convention for the Suppression on the Financing of Terrorism”,<sup>62</sup>

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In this regard I point out the importance of the UNESCO “Declaration of Principles on Tolerance” (1995) and the resolution adopted by the General Assembly on 21<sup>st</sup> of November 2001 “Global Agenda for Dialogue among Civilizations”.

<sup>60</sup> Democracy cannot successfully be forced upon those who do not wish it for themselves.

<sup>61</sup> See Section B/No. 4/para 157 and 159 of the UN document in question by following this link:

<http://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm>

<sup>62</sup> UNGA resolution 54/109 of 9 December 1999.

*“any...act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing an act.”*

In its *Suresh* judgement the Supreme Court of Canada held this description to “catch the essence of what the world understands with terrorism”.<sup>63</sup>

Presently there seems to be an understanding within the field of law that the following three main elements are required before an act constitutes the crime of international terrorism:<sup>64</sup>

Firstly, it is required that the act constitutes a criminal offence under most legal systems. Secondly, the aim must be to spread terror, i.e. fear and intimidation, by violent methods or threat thereof directed against a State, the public or particular groups of people. Thirdly, the act must be politically, religiously or otherwise ideologically motivated. A striking feature of terrorism is, as indicated above, the depersonalization of the victim.

Although there is a consensus on the characteristics of terrorism, I hold the view that terrorism is insufficiently defined until there exists a comprehensive UN convention that includes a definition.

## **3.2 International documents released after 9/11 on the fight against terrorism**

### **3.2.1 The basis**

The basis for UN counter-terrorism efforts is the Security Council’s resolution 1373

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<sup>63</sup> Suresh, Canada, Supreme Court, judgement of 11 January 2002.

See Antonio Cassese, *International Criminal Law*, pages 121-122. Lack of definition will be further discussed in the Future Perspective, Section 4.1 and 4.2.

<sup>64</sup> See Antonio Cassese, *International Criminal Law*, page 124.

adopted on 28 September 2001, which among its provisions obliges all States to criminalize assistance for terrorist activities, to deny financial support and safe havens and to share information about groups planning terrorist attacks. It was also underlined that all measures must comply with international human rights. I will in the following present a brief overview of international documents released after 9/11 on the fight against terrorism, leading towards the present situation.

### **3.2.2 Reports from the Commission on Human Rights**

The Commission on Human Rights emphasized in its review of 17 July 2002 that the UN reacted swiftly to the events of 9/11 as both the General Assembly and the Security Council adopted resolutions on 12 September 2001. These strongly condemn acts of terrorism and urgently call upon international co-operation. The report mentions the progress in drafting a comprehensive convention on terrorism, “although it came close to reaching agreement on the draft comprehensive convention, it could not finalize the few remaining articles involving political sensitive matters”.<sup>65</sup>

The next report from the Commission on Human Rights is dated 25 June 2004 and titled “Specific human rights issues: new priorities, in particular terrorism and counter-terrorism”.<sup>66</sup> Again the complexity of issue of terrorism and human rights is emphasized along with underlining that dealing with root causes of terrorism is “not only a necessary component to understanding terrorism fully, but also to fashioning effective counter-terrorism measures and policies”.

Problems relating to achieving a precise and generally accepted definition were underlined. So were the “...unintended consequences to human rights, and the risk of damage to the cause of justice and rule of law...” entailed by the global war on terror and the increased “rhetorical use of the expression war on terrorism..., while at the same time providing no positive results in combating actual terrorism”.

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<sup>65</sup> Document: E/CN.4/Sub.2/2002/35 obtainable at this website: <http://www.ohchr.org/english/issues/terrorism/rapporteur/> See para 23, 25, 26, 27 and 33.

<sup>66</sup> Document: E/CN.4/Sub.2/2004/40 obtainable at this website: <http://www.ohchr.org/english/issues/terrorism/rapporteur/> See para 3, 10, 14, 15, 67, 69, 70, 71, 72 and 74.

Addressing the problem of defining the notion, particular attention was given to the “freedom fighters issue” whereas the UN Special Rapporteur distinguished between international human rights law and international humanitarian law. The agenda has “unfortunately become a political rather than a legal and, thus, continue to stand squarely in the middle of political controversies...”<sup>67</sup>

Continuing attention to the “barriers to the effective implementation of extradition provisions” was suggested, more specifically with regards to the issue of impunity both for State and non-State actors. In addition to the afore-mentioned, the Special Rapporteur recommended mechanisms “for periodic review of national counter-terrorism measures...” and that States, “refrain from generating undue fear of terrorism”. Special attention was recommended to the problem of including criminal acts related neither directly nor indirectly to terrorism in national counter-terrorism legislation, hereby not making the public safer from terrorist risks.<sup>68</sup>

Particularly interesting is the report from the Commission on Human Rights dated 11 August 2004.<sup>69</sup> The UN Special Rapporteur for consideration on possible future actions prepared “A preliminary framework draft of principles and guidelines concerning human rights and terrorism”. Among other principles and guidelines the following were pointed out:<sup>70</sup>

“All international, regional and national action concerning terrorism should be guided by the United Nations Charter, all general principles of law, all norms of human rights..., and all norms of treaty-based and customary humanitarian law...”

“International action to combat terrorism should, to the degree possible, focus on the development and implementation of forward-looking strategies rather than being responsive or reflective of individual acts or series of acts of terrorism...”

Furthermore it was emphasized that:<sup>71</sup>

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<sup>67</sup> The “freedom fighters issue” is still a major obstacle in achieving a generally accepted definition of terrorism.

<sup>68</sup> For further information, see in particular para 74.

<sup>69</sup> Document E/CN.4/Sub.2/2004/47 obtainable at this website:

<http://www.ohchr.org/english/issues/terrorism/rapporteur/>

<sup>70</sup> See Document E/CN.4/Sub.2004/47 Section II/A/1 and 3.

<sup>71</sup> See Document E/CN.4/Sub.2004/47 Section II/B and Section II/C/No. 8 obtainable at this website: <http://www.ohchr.org/english/issues/terrorism/rapporteur/>

“All States have a duty to promote and protect human rights... everywhere... All States have a duty to protect and promote the safety and security of their people at all times. All terrorist acts result in violation of human rights, whether committed by States themselves, or sub-State actors. All States have a duty to promote and carry out national and international policies and practices to eliminate the causes of terrorism and to prevent the occurrence of terrorist acts”. All counter-terrorism measures should comply fully with all rules of international law, including human rights... law...”

These quotations catch the essence of my thesis. Moreover, the statement that “all States have a duty to protect and promote the safety and security of their people at all times”, provides an interesting parallel to the “Osman-doctrine” established by the Court sitting as a Grand Chamber in its *Osman vs. UK* judgement.<sup>72</sup> According to the “Osman-doctrine”, which relates to Article 2 of the Convention, it must be established “that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers, which judged reasonably, might have been expected to avoid that risk”.<sup>73</sup>

### 3.2.3 Other UN-documents

Following up the considerations by the UN Special Rapporteur the Security Council adopted resolution 1566 on 8 October 2004. This resolution is largely based on many of the recommendations quoted above in addition to:<sup>74</sup>

“establish a working group consisting of all members of the Security Council to consider and submit recommendations to the Council on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee, including more effective procedures considered appropriate for bringing them to justice...”

Once again enhanced international co-operation is called upon along with the prevention of movement of terrorists and the freezing of their financial assets. Furthermore, the UN expressed that it will not tolerate acts of terrorism by outlining five pillars, the so-called

<sup>72</sup> *Osman vs. UK*, 87/1997/871/1083, 28 October 1998.

<sup>73</sup> *Osman vs. UK*, 87/1997/871/1083, 28 October 1998, see para 116 of the judgement.

<sup>74</sup> See S/RES/1566 (2004) Section 3 No. 9



five D's, of a counter-terrorism strategy. UN Secretary General Kofi Annan hereby underlined the importance of:<sup>75</sup>

“dissuading people from resorting to terrorism or supporting it, denying terrorists the means to carry out an attack, deterring States from supporting terrorism, developing State capacity to defeat terrorism and defending human rights”.

He addressed the need for clarity and that the international community speaks with one voice, and added:<sup>76</sup>

“Our goal should be to reduce the appeal of terrorism by reclaiming the sanctity of the civilian and according to justice, dignity and compassion to victims”.

More recently, on 8 September 2006, the UN General Assembly adopted the Global Counter-Terrorism Strategy including a plan of action.<sup>77</sup> The plan of action represents a summary of where the UN stands today.

Terrorism is to be considered as one of the most serious threats to international peace and security resulting in that the Member States resolve: “to consistently, unequivocally and strongly condemn terrorism... and to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism”.<sup>78</sup>

In the same document the UN asked for Member States to “implement all General Assembly resolutions...” and “Security Council resolutions related to terrorism...” while recognizing “that international cooperation and any measures we undertake to prevent and combat terrorism must comply with our obligations under... in particular human rights law...”.<sup>79</sup> The Member States “must develop and maintain an effective and rule of law-based national criminal justice system... with due respect for human rights and fundamental freedoms...” establishing terrorist acts as “...serious criminal offences in domestic laws...”<sup>80</sup>

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<sup>75</sup> See United Nations A/60/825 General Assembly, 06-33088 (E) 010506, “Uniting against terrorism”, Report of the Secretary General, Introduction para 1.

<sup>76</sup> See United Nations A/60/825 General Assembly, 06-33088 (E) 010506, Section II/A/ para 13.

<sup>77</sup> Obtainable at this website: <http://www.un.org/terrorism/strategy/>

<sup>78</sup> See the Annex, Plan of Action, No. 1 and 2 a by following this link: <http://www.un.org/terrorism/strategy/>

<sup>79</sup> See the Annex, Plan of Action, No. 2 b, c and 3.

<sup>80</sup> See the Annex, Plan of Action, Section IV, No. 4.

In other words, the UN Global Counter-Terrorism Strategy defines a platform which all Member States must derive their counter-terrorism efforts from and that “defending human runs like a scarlet thread through” such measures.<sup>81</sup>

### **3.2.4 Other international documents related to preventing and combating terrorism**

In accordance with the views presented by the UN is the “Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism” dated 11 July 2002. Here the same condemnation of “all acts, methods and practices of terrorism” is stated and that “it is not only possible, but absolutely necessary, to fight terrorism while respecting human rights...”<sup>82</sup>

Along with the lines drawn by the Court in the afore-mentioned *Osman vs. UK* judgement this document restates every States’ obligation to take appropriate measures to “protect the fundamental rights of everyone within their jurisdiction..., especially the right to life”.<sup>83</sup>

Such measures must “respect human rights and the principle of rule of law, while excluding any form of arbitrariness... and be subjected to “appropriate supervision”. The lawfulness of appropriate measures is absolutely imperative.<sup>84</sup> These guidelines also reaffirm the importance of Article 3 of the Convention by unconditionally prohibiting “the use of torture or of inhuman or degrading treatment or punishment..., in all circumstances...”<sup>85</sup>

Article 8 of the Convention is also duly respected by restricting competent authorities in the field of State security, demanding that efforts made by such authorities are provided for by law and subject to supervision by an external independent authority.<sup>86</sup>

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<sup>81</sup> Quoted from the UN Secretary General’s statement, obtainable at <http://www.un.org/unitingagainstterrorism/sgstatement.html>

<sup>82</sup> See b and c of the Preamble.

<sup>83</sup> See “Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism”, para I.

<sup>84</sup> See para II, III.

<sup>85</sup> See para IV.

<sup>86</sup> See para VI, No. 1.

Furthermore, the guidelines present a view consistent with the Court's case law on Articles 5 and 6 of the Convention, respectively the *right to liberty and security* and *right to a fair trial*, hereby including pre-trial detention, legal proceedings and the incurring of penalties.<sup>87</sup>

The final guideline I would like to point out here is in relation to extradition, which is “an essential procedure for effective international co-operation in the fight against terrorism.”<sup>88</sup>

Of relevance is also, in my opinion, the “Declaration on freedom of expression and information in the media in the context of the fight against terrorism” adopted by the Committee of Ministers of the Council of Europe on 2 March 2005. In this regard they called on the Member States “not to introduce any new restrictions on freedom of expression... unless strictly necessary and proportionate in a democratic society and...” if the “existing laws or other measures are not already sufficient”.

Moreover, public authorities must “refrain from adopting measures equating media reporting on terrorism with support for terrorism” and “ensure that access by journalists to information regularly updated, in particular by appointing spokespersons and organizing press conferences”.

A highly important aspect in the same document is that Member States must “provide appropriate information to the media with due respect for the principle of the presumption of innocence and the right to respect for private life”. With due respect for Articles 6 and 8 of the Convention public authorities must also “guarantee the right of the media to know the charges brought by the judicial authorities, against persons who are the subject of anti-terrorist judicial proceedings, as well as the right to follow these proceedings and to report on them”.<sup>89</sup>

In this document the Committee of Ministers agreed “to monitor... the initiatives taken by governments... in particular in the legal field, to fight terrorism as far as they could affect the freedom of the media”. In the context of protecting the right to a fair trial it seems that

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<sup>87</sup> See para VIII, IX, and X of the Guidelines.

<sup>88</sup> See para XIII, No. 1.

<sup>89</sup> See page 4 of the document.

the idea of separate trial systems for terrorist suspects and other criminal suspects is abandoned internationally.<sup>90</sup> Turkey, for instance, had until recently a dual-procedure system that was abolished after proven less effective than anticipated on top of the Convention-related problems. An increased tendency in Member States to adopt administrative measures was noted, from which the possibility that the aim is to circumvent the high procedural guarantees of criminal proceedings cannot be totally excluded. Therefore, the afore-mentioned document stated: “the standards laid down in the Guidelines should be applicable in all sorts of proceedings in which a person is designated as a terrorist suspect”.

In this document it is also suggested that “the use of intelligence materials in criminal trials will be made possible by way of adopting the system used for anonymous witnesses”.

### 3.3 Analysis

The above-mentioned initiatives are to be welcomed as intelligent adaptations to a world dealing with ruthless terrorists in a time of massive cultural misunderstandings. Even so, I find it tempting to compare the present international situation to the case of *McCann and others vs. UK* that is analyzed in the Past Perspective of this thesis.<sup>91</sup>

The excessive use of force committed by armed forces today is strikingly similar to that of the British SAS soldiers in 1988.<sup>92</sup>

In both cases use of force comes as a result of insufficiently verified information passed on from a higher level.<sup>93</sup> This “lacks the degree of caution in the use of firearms to be expected from law-enforcement personnel in a democratic society, even when dealing with

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<sup>90</sup> See “Workshop 2 sheet” courtesy of Prof. dr. Martin Kuijer, Dutch Ministry of Justice.

<sup>91</sup> *McCann and others vs. UK*, Series A324 18984/91, judgement of 27 September 1995.

<sup>92</sup> The armed forces are largely employed by USA.

<sup>93</sup> With regards to Osama Bin Laden’s whereabouts in Afghanistan and the “weapons of mass destruction” issue in Iraq. The difficulty of verifying such information is not questioned. See *McCann and others vs. UK*, Past Perspective, Section 2.1.3.

dangerous terrorist suspects”, and also suggests “a lack of appropriate care in the control and organization of the arrest operation”, as announced by the Court in its *McCann and others vs. UK* judgement.

The former quote addresses the use of force today while the latter symbolizes the lack of international co-operation. Since a comprehensive convention including a generally accepted definition of terrorism, which is the goal of the UN, is currently not achieved, one may say that there still are significant steps to be taken.

During the writing of my thesis, the actuality of the matter has been refuelled through the passing of an anti-terror law in USA. It has been severely criticized for not fulfilling the obligations previously referred to in the fight against terrorism.<sup>94</sup>

In conclusion, this leaves at present an impression of the international community as not duly capable of dealing effectively and unequivocally with the threat posed by terrorism.

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<sup>94</sup> This law allows detention of persons indefinitely without opportunity to challenge the lawfulness of it in court. A person on trial may be convicted and put to death on the basis of coerced testimony. See the following link: <http://edition.cnn.com/2006/POLITICS/10/17/bush.terrorism.ap/index.html>.

## 3.4 The practicability of international principles and guidelines

### 3.4.1 National implementations

The last Norwegian report to the Counter-Terrorism Committee (CTC) on implementation of UN resolution 1373 shows that there has been taken considerable action to establish and strengthen legislative measures against acts of terrorism. The main relevant provision is §147 (a) of the Norwegian Penal Code, which also contains a quite similar description of acts of terrorism as given in the above-mentioned *Suresh* judgement.

The Norwegian Penal Code has a broad range of provisions that target participation in terrorist activities. For instance, according to its § 104 (a) it is prohibited to form, take part in, recruit members to, or support terrorist groups or private organizations of military character.

An important aspect of terrorism is the matter of financing in which several techniques are used to avoid detection by the authorities. Most countries have taken significant steps to suppress the most common offence in this regard, that is to say the crime of money laundering. A person financing a terrorist act is under Norwegian law in principle considered to be an accomplice to the act itself. Furthermore there is also criminal liability attached to making funds, financial assets or other financial services available to terrorists. Freezing of any property belonging to any person or entity is the main preventive tool given under domestic legislation in this aspect of combating terrorism. €272,128,66 were frozen in the Netherlands in 2005.<sup>95</sup>

In Norway both financial and non-financial institutions, the former also has a duty to establish adequate control routines, are obliged to look into and report suspicious transactions to the National Authority for Investigation and Prosecution of Economic and Environmental Crime (ØKOKRIM). This authority may then, if considered necessary, deny the institution to carry out the transaction.

The Netherlands have chosen another method by establishing an independent

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<sup>95</sup> See United Nations S/2005/425 30 June 2005, Question 1.2.

administrative body within the organizational structure of the Ministry of Justice, the Unusual Transactions Reporting Centre, which focuses both on money laundering and other ways of financing terrorism.<sup>96</sup>

In France there is no punishment connected to omission of reporting suspicious transaction per se, while in Norway a financial institution shall of its own motion and without notifying the client or a third party report information suggesting that a transaction may be linked with terrorist activities.<sup>97</sup> The main responsibility of reporting money transfers into and out of the country lies on the Central Bank of Norway. In order to be able to follow up and deal effectively with such reports a new pattern of co-operation has been established between ØKOKRIM, the National Bureau of Crime Investigation (KRIPOS) and the Norwegian Police Security Service (PST), hereby combining expert knowledge from different fields. Close co-operation and regular sharing of information has proven invaluable.

Severe problems for monitoring the movement of money are posed by informal banking systems such as “Hawala” despite the fact that they are considered unlawful in most countries.<sup>98</sup> These systems may facilitate the channelling of money for terrorist purposes. Investigations have led to a number of people in Norway being charged with money laundering and by regulations governing accountancy, currency transfer or taxation.<sup>99</sup>

A big public safety issue is to prevent that neither illicit nor legitimate weapons fall into the wrong hands. In Norway a licence is required for all trade in weapons and military equipment, in addition acquiring and possessing a firearm requires permission from the police. Privately owned firearms must in some cases be kept in approved gun lockers, while the police must receive notification when firearms are lost or stolen.<sup>100</sup>

Closely related to terrorist issues are the immigration policies.

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<sup>96</sup> See United Nations S/2005/425 30 June 2005 Question 1.1.

<sup>97</sup> See United Nations S/2002/791 19 July 2002 Section A - sub-paragraph 1 (c).

<sup>98</sup> Hawala is a type of Informal Value Transfer System that is not criminal per se. A hawaladar is responsible for the sending and payment, while intermediaries handle the settlement process. See “Global Organized Crime...”, pages 149-158.

<sup>99</sup> See United Nations S/2002/791 19 July 2002, Section B - paragraph 4.

<sup>100</sup> See United Nations S/2002/791 19 July 2002, Section B - sub-paragraph 2 (a).

Firstly, foreign nationals are rejected, expelled or refused permit under the Immigration Act given that there are serious suspicions of this person having violated certain provisions of the Penal Code.<sup>101</sup> This is in accordance with the exclusion clause of the Refugee Convention and is practised as a general rule by the Member States. However, such persons cannot be sent to areas where they may fear persecution.

Secondly, border control becomes in this regard important for denying terrorists' entrance or residency in a country. This has resulted in enhanced control routines in several countries aimed at harmonizing customs procedures. Especially in Eastern Europe increasing efforts are being made to detect counterfeit travel documents. There is a growing tendency of mutual assistance between Member States for instance in investigative training and electronic equipment. Finally, intelligence information is exchanged in order to deny terrorists safe havens.

Thirdly, the issue of extradition is in Norway regulated by international agreements. Norway must be obliged to extradite under the agreement and the offence in question has to be of certain gravity. The latter limitation will not materialize in relation to terrorist offences.

In addition to regular imprisonment Norwegian courts may impose a detention not confined to a limited amount of time when the former is considered inadequate to protect society from the perpetrator. This form of indefinite deprivation of liberty requires that the perpetrator has committed a serious crime and hereby endangered the life, health or freedom of others. The likelihood of re-offending is an important consideration. Given the strong intent to cause harm and the gravity in general related to terrorist offences, it is likely that Norway will make use of this alternative detention when dealing with acts of terrorism.<sup>102</sup>

Terrorist entities are proven to have relations with organized crime.<sup>103</sup> By taking measures to combat organized crime one may for that reason be able to uncover certain aspects of terrorism as well.

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<sup>101</sup> Norwegian Penal Code, see §147 (a) and (b).

<sup>102</sup> See United Nations S/2002/791 19 July 2002, Section B - sub-paragraph 2 (e).

<sup>103</sup> For further discussion see Future Perspective, Section 4.4.



In this respect Norway has introduced several practical measures involving co-operation between different authorities aimed at preventing transnational organized crime.

According to Norway's report this has led directly to better infiltration of the underworld. Concerns and views relating to combating organized crime have been presented internationally, both within the Schengen co-operation and other bodies.<sup>104</sup>

Besides agreements on crime prevention and mutual assistance in criminal matter with other Nordic countries, Russia and the European Union, Norway and the Organization of African Unity have agreed on a support programme for implementing UN resolution 1373.

France replies to the UN in its report concerning the implementation of UN resolution 1373, on the importance of protection programmes available to those who are dealing with terrorist cases. For instance judges, law-enforcement personnel, witnesses and persons willing to provide information. These may enjoy different forms of protection or can also make use of borrowed identities, whereas disclosure of the latter is subject to severe punishment.<sup>105</sup>

As a summary, important steps have been taken on national level in the time after 9/11. The Counter-Terrorism Committee has figured as a co-ordinator.

### **3.4.2 Recent judgements on terrorism**

#### 3.4.2.1 Article 3

In *Sevtap Veznedaroglu vs. Turkey* the protection given by Article 3 was in question.<sup>106</sup> Sevtap Veznedaroglu, married to a lawyer and a former "president" of a local human rights organization, alleged that she had been subjected to torture in custody of Turkish police. Under suspicion of taking part in activities related to the PKK, she was arrested by the police, and later blindfolded and interrogated by fifteen police officers. During the

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<sup>104</sup> See United Nations S/2002/791 19 July 2002, Section B - sub-paragraph 2 (g).

<sup>105</sup> See United Nations S/2004/226 29 March 2004, para 1.8

<sup>106</sup> *Sevtap Veznedaroglu vs. Turkey*, Application No. 32357/96, judgment of 11 April 2000. See Section 2.2.1 of this thesis for the text of Article 3.

interrogation she was undressed, hung up after her arms and given electrical shocks to her mouth and genitals. Furthermore, in the first two days of detention she was denied food. The woman was also forced, under threats of being raped and killed, to sign papers stating that her bruises resulted from a fall.<sup>107</sup>

The Court stated that Article 3 protects one of the Convention's most fundamental values and may not be derogated from, even in exceptional situations where the life of a nation is threatened.<sup>108</sup> This case concerned difficult evidential questions as the wounds inflicted were not followed up by Turkish authorities. The Court's opinion was that Turkish authorities should have undertaken investigations in order to uncover whether Sevtap Veznedaroglu was subjected to torture or not. Particularly, the Court pointed out that the Turkish State Security Court concluded that torture had taken place, but did not follow up on the case.

Article 3 was violated as a result of insufficient scrutiny by Turkish authorities when presented with a case of well-founded allegations of torture.<sup>109</sup>

#### 3.4.2.2 Article 5

Pre-trial detention was the subject in the case of *O'Hara vs. UK*.<sup>110</sup> British authorities acting under the 1984 Prevention of Terrorism Act arrested Gerard O'Hara, a terrorist suspect and an important member of Sinn Fein. In the Court's opinion the suspicion was reasonable under the circumstances of the case and found that domestic law sufficiently safeguarded the citizens against arbitrary detention.<sup>111</sup>

The Court concluded with violation of Article 5(3), protecting *liberty and security of person*, as O'Hara was held in pre-trial detention for six days and thirteen hours.<sup>112</sup> Even in difficult cases involving terrorism, the Court had previously found that six days of detention without judicial review was in breach of the Convention. O'Hara was not "brought promptly before a judge" or had his "trial within a reasonable time".

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<sup>107</sup> See para 12-13 of the judgement.

<sup>108</sup> See para 28.

<sup>109</sup> See para 33-35.

<sup>110</sup> *O'Hara vs. UK*, Application No. 37555/97, judgement of 16 October 2001.

<sup>111</sup> See para 42, 44 of the judgement. See Section 2.2.2 of this thesis for the text of Article 5.

<sup>112</sup> See para 46.

### 3.4.2.3 Article 8

In the case of *Segerstedt-Wiberg and others vs. Sweden* question arose whether partly denial of access to personal records in the archive of Swedish security police constituted a breach of Articles 8, 10, 11 and 13 of the Convention.<sup>113</sup>

The Court recognized the need for intelligence services in a democratic society, but reaffirmed the duty to confine the use thereof to a level of strictly necessary. It acknowledged that the keeping and the denial of full access to such intelligence records in principle amounted to an interference with the right to private life under Article 8.

Article 8 was not breached in the case of *Segerstedt-Wiberg* concerning the keeping of such records, as the Court concluded that the interference with her privacy was not disproportionate with the aim to protect society against terrorism. Conversely, the interference was not proportionate concerning the others, as it did not meet the criteria “necessary in a democratic society” due to lack of concrete evidence.<sup>114</sup> As all States have a certain margin of appreciation in dealing with the terrorist threat, the Court did not question Sweden’s decision to deny full access to personal records and concluded with no breach of Article 8 on this matter.<sup>115</sup>

## 3.5 Final comments

Holding together the present international situation, the effort made on national level and recent judgements from the Court draws a picture of a forward-moving world in its fight against terrorism. Important human rights issues have been dealt with while seeking to achieve sufficient preventive measures. The Court has given a limited margin of

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<sup>113</sup> *Segerstedt-Wiberg and others vs. Sweden*, Application No. 62332/00, judgement of 6 June 2006. The main focus is on Article 8. See Section 2.2.3 of this thesis for the text of this Article.

<sup>114</sup> See para 92 of the judgement.

<sup>115</sup> See para 104.

appreciation to States in handling the terrorist threat. A strict rule in this regard is based on the belief that human rights must be protected when facing not only terrorism, but crime in general.

It is, in my view, important to remember that terrorism is nothing else than a criminal act, however serious it may be. Elevating the value of a terrorist act brings more difficulty to the efforts of combating this phenomenon. A distinction between terrorism and declarations or acts of war is crucial. Terrorism is a criminal offence that national authorities must learn to cope with. Due to the enormous potential destruction connected to war one should save any link to terms of such hostilities to the true situations of armed conflict. It is therefore imperative that legislators, judicial authorities, law-enforcement agencies and the democratic society in general keep its cool, so to speak. The threat posed by terrorism cannot justify violation of human rights based on the mere fact that we consider it to be a more serious crime than others. If so, we have reached the end of the scope of our fundamental principles already, which leaves them with a severely reduced value.

Intelligence services, when restricted to the lowest possible level, have been accepted by the Court as necessary in a democratic society.<sup>116</sup> Evidently, this is a preventive measure of crucial importance in relation to terrorism of which we have not yet seen the full scope. At present the Court has set a frame for what is an acceptable level of interference with the above-mentioned human rights, however, an exact dimension is unlikely to be achieved due to the living nature of the Convention. The goal must therefore be to narrow this frame down sufficiently to create clearer lines and standards for behaviour in fighting terrorism. By its nature this can only be achieved by a certain trying and failing period corrected by institutions such as the Court. It is apparent that this cannot go on indefinitely, hereby realizing that at present we are neither at the beginning of this process nor close to the end.

In relation to this one must call attention to the fact that terrorism, as a phenomenon, does not stand still. As any other criminal willing to commit a crime, a terrorist will adapt to preventive measures taken by society. This is the fact that always will make the rule of law reactive, a nature difficult to compensate for.

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<sup>116</sup> For further discussion see Future Perspective, Section 4.3.

Comparing the image of this Present Perspective to the one of the Past Perspective, the democracies have succeeded in continuing to build on the legal framework that was previously established. Sadly, the savage mentality represented by the “fire vs. fire” policy is still apparent through the “war on terror”. The progress of developing a sufficient legal framework is stained, of which the full scope has not yet manifested itself, when a representative for democracy engages in excessive use of force against terrorists or terrorist suspects.

## 4. Future Perspective

### 4.1. The problems ahead

The reactive nature of law is a weak spot for combating terrorism. Merely prohibiting or criminalizing terrorism, or other offences for that matter, does not prevent a terror attack from taking place.

In particular with facing terror threats the odds are not good for a democratic state considering that a terrorist only needs one successful attempt, while the state ideally should have a prevention-rate of one hundred percent. Therefore, I hold the view that the legal approach to defeat terrorism is to employ adequate preventive measures through legislation.

However, I cannot strongly enough call attention to the fact that this is an area where legislators need to have a wide perspective. For legal tools to work properly, co-operation with other fields is necessary. In this regard I underline especially the need for promoting tolerance and cultural understanding and protecting freedom of expression. Although nearly all expressions are protected by the freedom of expression, the Norwegian Supreme Court judgement in the case of *Kjuus* shows that the freedom is not unlimited.<sup>117</sup> To obtain the right balance between these separate frameworks is crucial.

It is urgent that the world speaks with one voice when facing terrorism.<sup>118</sup> Condemnation by the international community is absolutely necessary, but insufficient alone. In this respect I would like to stress the imperative need for a comprehensive convention

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<sup>117</sup> See Rt. 1997/14

<sup>118</sup> Stressed more generally by the UN Secretary General Kofi Annan in dealing with the escalated nuclear situation in North Korea.

including a definition of terrorism that is internationally agreed upon. As previously recognized, scholars argue that there already exists a definition developed through UN conventions and that the problem lies in delimitating the notion.<sup>119</sup>

However, bearing in mind that the UN itself is not content with the present situation it becomes clear that there is still a step to take. According to an UN document it weakens the image of the UN not to be able to take a clear stand in addressing terrorism:<sup>120</sup>

“The United Nations ability to develop a comprehensive strategy has been constrained by the inability of Member States to agree on an anti-terrorism convention including a definition of terrorism... The search for an agreed definition usually stumbles on two issues.

The first is the argument that any definition should include States’ use of armed forces against civilians. We believe that the legal and normative framework against State violations is far stronger than in the case of non-State actors and we do not find this objection to be compelling.

The second objection is that peoples under foreign occupation have a right to resistance and a definition of terrorism should not override this right. The right to resistance is contested by some. But it is not the central point: the central point is that there is nothing in the fact of occupation that justifies the targeting and killing of civilians.

Neither of these objections is weighty enough to contradict the argument that the strong, clear normative framework of the United Nations surrounding State use of force must be complemented by a normative framework of equal authority surrounding non-State use of force.

Attacks that specifically target innocent civilians and non-combatants must be condemned clearly and unequivocally by all”.

I sincerely concur with the view just presented, as it is time to put the political differences that have surrounded the environment behind and develop a comprehensive convention by focusing on the crucial point, the attacking of civilians. In my opinion the obstacles mentioned in the quote above vanish when focusing on the protective side in forming a definition. A definition of terrorism should therefore be build upon a platform with protection of civilians and non-combatants in peacetime as the main feature.

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<sup>119</sup> See Present Perspective, Section 3.1.

<sup>120</sup> See para 156 and 160 of the UN document obtainable at this website:

<http://www.un.org/News/dh/infocus/terrorism/sg%20high-level%20panel%20report-terrorism.htm>

## 4.2 Aiming at an internationally accepted definition of terrorism

I would like to present the following as an attempt of a possible definition of terrorism that could be accepted internationally:

*Any person or entity that performs or threatens to perform an act, which under civilized legal systems constitutes an offence, directed at a State, the public or a particular group of people, hereby targeting anyone not taking part in the hostilities of national or international armed conflict, with the aim to spread actual or potential fear and intimidation in order to achieve a vision driven by political, religious or otherwise ideological motivations, is guilty of the crime of terrorism.*

The focuses of this definition lie in identifying the victim, establishing the aims of and the driving motivations for the act or threat thereof, and hereby decide whether it constitutes a terrorist offence. Accordingly, neither is it in principle necessary to take into consideration by whom the act is committed nor if the act committed is of a certain character in order to assess if the crime in question amounts to terrorism. The “freedom-fighter issue” is avoided as freedom fighters are not condemned per se, only those who make use of terrorist methods.

Moreover, this definition means that terrorism also may be committed by other than violent means, for instance by launching a computer virus breaking down the banking system as we know it, hereby throwing the world into chaos. Instead of specifying the act in any way, focus is on the following affect. By approaching terrorism in such manners one in addition leaves open the possibility of committing purely mental terror, as there is no absolute criteria of bodily injury.

To balance the scale as to which act is grave enough to constitute terrorism, consideration is to be given when assessing the created “actual or potential fear and intimidation” and if the act or threat thereof is “directed at a State, the public or particular group of people”.



Continuing to clearly distinguish terrorism from other crimes, this definition recognizes all the three main features of terrorism that are internationally agreed upon.<sup>121</sup>

The essential factors are that the act or threat is aimed at spreading fear and intimidation, ideologically motivated and targeting “anyone not taking part in the hostilities of ...armed conflict”.<sup>122</sup> Entailed by the latter is that anyone, except representatives of combating forces in armed conflict, may be a victim of terrorism as a criminal offence under international human rights law subject to judicial pursuance.

Since representatives of armed forces, along with civilians and non-combatants already are protected in armed conflict under international humanitarian law, which prohibits the use of terrorist methods, a distinction between peacetime and situations of armed conflict is permitted. Consequently, in harmonizing the relationship between international human rights and humanitarian law, attention must be given to how the latter defines the actual parties in armed conflict and ensure that persons not protected hereby enjoy protection provided by international human rights law.

The rationale behind the afore-mentioned attempt to define terrorism is highly inspired by the need for forward-looking strategies. Legislators must in the future meet the challenge of converting such strategies into hard law. However, it is vital to realize that these strategies not automatically are compatible with the standards set by the Court. Therefore, in order not to achieve the same affect by legal as by violent means, one must strike the fine balance between counter-terrorism measures and international human rights.

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<sup>121</sup> See Present Perspective, Section 3.1.

<sup>122</sup> The full scope of “armed conflict” should be scrutinized under international humanitarian law.

## **4.3 Counter-terrorism measures and international human rights**

### **4.3.1 Introduction**

As shown through this thesis the Court has repeatedly stated that even when up against dangerous terrorists, states only have a certain margin of appreciation in interfering with the human rights established by the Convention.

On the other hand, this margin of appreciation lacks an exact dimension due to in particular two factors:

Firstly, the Convention is a living instrument and must be understood to have a dynamic and developing nature.

Secondly, a decision of whether or not an action taken constitutes a breach of obligations under the Convention is always dependent on the particular circumstances of the case.

The question remains, until Court has further signaled which measures are appreciated or not, which legal and violent methods a State can employ in the interest of preventing terrorism. In the following I will present an overview of considerations largely based on the Court's Jurisprudence in relation to Article 2, 3, 5 and 8 of the Convention.

### **4.3.2 Article 2**

Article 2 of the Convention protecting the *right to life* has already been elaborated on thoroughly by the Court, resulting in relatively clear standards for which counter-terrorism measures that are acceptable.

The case of *McCann and others vs. UK* provides valuable information in this respect. Through this verdict it is clear that a State is permitted to make use of lethal force given that it is absolutely necessary. However, one must keep in mind that the latter measurement depends on the particular circumstances of the case. At the same time it is

imperative to avoid that the use of lethal force by State agents becomes an alternative manner of carrying out a death penalty. This entails that restrictions on use of lethal force are ineffective without judicial review. Respectively Protocol 6 and Protocol 13 to the Convention abolish both in peacetime and under all circumstances the death penalty.

This means that terrorists guilty of the most heinous act are neither to be subjected to the death penalty nor extradited to countries where they might face such punishment. Lethal force, due to the fact that Article 2 protects one of the most fundamental values of the Convention, should be employed with the highest level of care in combating terrorism. Intentional killing by the State is a flammable issue that easily might lead to refuelling an ongoing conflict, especially when bearing in mind the extremism involved. It would be a critical step back to repeat the mistakes experienced in the case of *McCann and others vs. UK*. In principle, lethal force should in the future be a last resort in combating terrorism considering that it does not solve the problem in hand on long terms.

### 4.3.3 Article 3

The *prohibition of torture*, inhuman and degrading treatment or punishment established through the Article 3 of the Convention is of great relevance to the issue of terrorism and international human rights. In particular the situation of interrogation is subject to intriguing questions in this respect.

The conduct of interrogators is regulated through this Article as it limits what a terrorist suspect, as all other suspects, may be subjected to during in custody of authorities. Throughout the Court's case law the content of Article 3 has evolved in both defining the terms and establishing the scope. Firstly, the prohibition against torture is absolute. Secondly, a conduct must be of a certain seriousness, of which the assessment must take into consideration all circumstances of the case hereby resulting in interpretation of the Article as a sliding scale, in order to constitute a violation of Article 3.<sup>123</sup> Thirdly, the Court has weighted the Convention as a living instrument in its interpretation of Article 3,

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<sup>123</sup> Ireland vs. UK, 18 January 1978, Series A, No. 25; (1979-80) 2EHRR25 para 162.

hereby meaning that conduct previously not classified as torture may be classified differently in the future.<sup>124</sup>

Torture was in the case of *Ireland vs. UK* defined as “deliberate inhuman treatment causing very serious and cruel suffering”.<sup>125</sup> Inhuman treatment does not necessarily have to be deliberate, but must meet a minimum level of severity. Degrading treatment has the humiliation or arousing of fear as its main feature, however, the Court has classified conduct as degrading treatment also where the humiliation was unintended.<sup>126</sup>

The Court has found, while taking into consideration the duration of the treatment along with its physical and mental effects, the sex, age and victim’s state of health, that, among other incidents, the following is to be considered in breach with Article 3: beatings, mock executions, electric shocks, covering of heads with hoods, long-time standing with limbs outstretched, subjection to intense noise, deprivation of sleep, diet of bread and water, “Palestinian hanging”, imposing death penalty after an unfair trial, and also racial discrimination.<sup>127</sup>

Methods of interrogation as mentioned above may not be employed with expectancy of approval from the Court. Interrogators and investigators must seek other manners in order to obtain the wished information from terrorist suspects. There are methods, such as for instance psychological “tricks”, which do not cause any suffering compared to the aforementioned, but where the morality of is still highly questionable.

The complications involved in obtaining information through interrogation due to its nature, while duly respecting Article 3, entail that more efforts could favourably be allocated to the aspect of investigation and gathering of hard evidence. In other words, in preventing terrorism this is likely to entail a high level of intelligence services.

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<sup>124</sup> *Selmouni vs. France* (App.25803/94), 28 July 1999, 29EHRR403, para 101.

<sup>125</sup> *Ireland vs. UK*, Application No. 5310/71, judgement of 18 January 1978, para 167.

<sup>126</sup> *Peers vs. Greece* (App.28524/95), 19 April 2001, 33EHRR1192.

<sup>127</sup> See Jacobs & White “The European Convention on Human Rights”, fourth edition, pages 74-83.

#### 4.3.4 Article 5

With regards to Article 5 protecting *liberty and security of person*, the pre-trial detention alternative instituted by Article 5(1)(c) is relevant in discussing the prevention of terrorism. The Court has already set standards for lawful pre-trial detention. For instance, which could be of relevancy to the issue of terrorism; the preventive detention of individuals considered as unwanted elements in society is a violation of Article 5(1)(c).

Moreover, the duration of pre-trial detention has been under scrutiny by the Court on several occasions and although there has not been developed an exact dimension relating to such detention, certain guidelines have been established throughout the Court's case law. Taking all particular circumstances of the case into consideration in the judgement of *Brogan and others vs. UK*, the Court ruled that a detention of four days and six hours constituted a violation of Article 5(3).<sup>128</sup>

An alternative method of depriving suspects of their liberty could be to confine their possibility of movement to wanted areas, for instance by electronic surveillance or notification systems. However, it is questionable whether this is a justifiable measure against potentially dangerous terrorist suspects who one must assume are quite likely to be able to adapt to such a situation. Once again it seems that the gathering of intelligence at an earlier stage is of crucial importance.

#### 4.3.5 Article 8

In my opinion Article 8 is therefore of specific interest in relation to the prevention of terrorism. Since gathering and keeping of intelligence information is by the Court considered as an interference with the *right to respect for private and family life*, counter-terrorism measures are likely to be scrutinized under Article 8. Obtaining personal information including recordings and photographs under anti-terrorist legislation will often be judged as necessary in the interest of preventing crime. On the other hand and as shown

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<sup>128</sup> *Brogan and others vs. UK* 29 November 1988, Series A, No.145-B;(1989) 11EHRR117. See Jacobs & White "The European Convention on Human Rights", fourth edition, pages 123-132.

above, the Court is not reluctant to classify disproportionate measures as violations of the right to respect for private life.

The assessment of whether the interference amounts to a breach of this right or not, given that the other conditions are met, is mostly based on if the measure can be considered as necessary in a democratic society. Under this heading the existence of safeguards against abuse is an important consideration.

In the case of *Klass and others vs. Germany* regarding telephone interceptions, the Court found that the German law on surveillance, which provided judicial control by an “official qualified for judicial office” and not by a judge in addition to no obligation to notify the person under surveillance after the event, because of sufficient safeguards against abuse was in conformity with Article 8.<sup>129</sup>

In *Leander vs. Sweden* the Court found no violation of Article 8 concerning the fact that the secret police kept records after a personnel control procedure applicable to Swedish navy employees.<sup>130</sup> As a result of this control procedure the applicant was found unsuitable for certain positions. The Court ruled that the interference was in accordance with a sufficiently clear and accessible law, sufficient safeguards existed, and allowed the State a wide margin of appreciation in the question of national security.

The Court assessed the use of security cameras in *Perry vs. UK* where it stated that “...the normal use of security cameras per se whether in the public street or on premises, such as shopping centres or police stations where they serve a legitimate and foreseeable purpose, do not raise issues under Article 8...”<sup>131</sup> However, it is made clear that the use of such recordings need a proper legal base, a legitimate aim and must be necessary in a democratic society in order not to constitute a breach of Article 8.<sup>132</sup>

Provided that the above-mentioned requirements are met in relation to intelligence services as counter-terrorism efforts, I would like to point the possibility of permitting further-

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<sup>129</sup> *Klass and others vs. UK*, 6 September 1978, Series A, No. 28(1979-80), 2EHRR214, para 50.

<sup>130</sup> *Leander vs. Sweden*, 26 March 1987, Series A, No. 116; (1987) 9EHRR462.

<sup>131</sup> *Perry vs. UK* (App. 63737/00), 17 July 2003; (2004) 39EHRR76, para 40.

<sup>132</sup> See Jacobs & White “The European Convention on Human Rights, fourth edition, pages 286-294.

ranging methods. Such methods might be at odds with the present interpretation of Article 8.

Firstly, I base this on the threat posed by terrorists, and that the Court previously has acknowledged a State a rather wide margin of appreciation in questions on national security.

Secondly, in order to achieve balance between measure and threat, an idea is to exclude evidence obtained by such wide-ranging methods from being used in a trial. Hereby, the chances of preventing a terror attack are increased while the interference with the privacy of a terrorist suspect is compensated for by exclusion of evidence in court. One may argue that such a system should only apply to persons suspected for very serious crimes, such as terrorism, in order to justify a further interference with the right to respect for private life. This is, in my view, an assessment that may be made under the requirement “necessary in a democratic society”.

Thirdly, when facing a sophisticated type of crime such as terrorism, preventing and combating this phenomenon can be characterized as a “battle of technologies”. Since terrorists have proven to be highly capable of adapting to counter-terrorism measures, the society must again adapt to their adaptations. Or, favourably, be more foreseeing in the struggle against terror. It lies in the nature of modern society that there is a certain need for interference with the privacy of selected citizens in order to maintain the rule of law.

The Court’s stand in relation to Article 8 would be interesting to see. To expect the approval of the Court necessitates at least sufficient safeguards against abuse and destruction of information obtained if suspicion is proven to be false. In addition one should in this regard open for the possibility for compensation after the event, and ensure independent judicial control with the measure in question.

#### 4.3.6 Articles 9 and 10

It is my opinion that Articles 9 and 10 of the Convention, for the reasons given in the illustrative case below, are closely connected in promoting tolerance and cultural understanding.

The issue of terrorism must be seen in the historical, cultural, religious and geopolitical context through which our present situation has evolved. These backgrounds define the frames for our approaches in the fight against terrorism. As previously shown, terrorism cannot be defeated without dealing with the root causes of its nature, one of them being misunderstandings or lack of understanding and tolerance between cultures. Increased understanding and tolerance between cultures is therefore a necessary aim to achieve.

Religion is currently one of the driving motivations behind terror attacks and attempts thereof. For democracy to project a stable image, continuous respect for Article 9 of the Convention that protects the *freedom of thought, conscience and religion*, is required.

Article 9 is formulated as follows:

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.”

To avoid new enemies of democracy, it is important not to exceed the limitations permitted in paragraph 2 of this Article:

“2. Freedom to manifest one’s religion or belief shall be subjected only to such limitations as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of rights and freedoms of others.”

Complicating the matter is the fact that we are facing terrorists who demand to be tolerated by the same society they have no tolerance for. Religions or other ideologies are not the problem; it is the fanatic frame of mind that entails resort to terrorist methods that must be defeated.

Article 10 of the Convention, protecting *freedom of expression* is worded as follows:



“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

The connection between these two Articles is shown by the surroundings of the renowned Mohammed caricatures.<sup>133</sup> Muslims worldwide found the drawings offensive. On 2 October 2006 a documentary concerning the printings of these caricatures in a Norwegian magazine was broadcasted on national television.<sup>134</sup> Riots in the Muslim world and an attack against the Norwegian embassy in Damascus came as a result of the article. The documentary revealed that the editor-in-chief printed the drawings while giving the ethics of the press due consideration, and under the belief that he was protected by the *freedom of expression*. After picturing a massive pressure put on the editor-in-chief, the documentary indicated that the Norwegian Prime Minister chose to partly blame the former personally for the damages that occurred subsequent to the article. Moreover, the Minister of Foreign Affairs referred to the incident as “extremism on both sides” on the Muslim TV-network “Al-Jazeera”.

Rather than seeking to defend one of the pillars of democracy, one may interpret the actions of the Norwegian Government as attempts to diminish the importance of and apologize for the article.

It may have contributed to settle the riots and anger this time, although numerous people were killed as a result of the caricatures being printed worldwide, but the core issue remains unsolved. Articles 9 and 10 of the Convention protect and embrace the different beliefs and opinions of everyone, also of those who in the end resort to violence. It is the resort to violent means that is unjustifiable. Democracy, in order to prevail against terrorism, cannot accept to be coerced into undermining the value of these Articles.

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<sup>133</sup> First printed in Denmark by Jyllands-Posten on 30 September 2005.

<sup>134</sup> The relevant magazine, however not the first to print the caricatures in Norway, was “Magazinet” with editor in chief Vebjørn Selbekk. The documentary was titled “Document 2: truet til tausket” (threatened to silence).

## **4.4 Mutations and adaptations of terrorism in the future**

### **4.4.1 Introduction**

This thesis has previously had its eye on the ideologically motivated terrorism. Terrorism may, however, take various shapes and forms. The following is based on the CTC theory.<sup>135</sup>

### **4.4.2 The CTC theory**

Research by criminologists has proven the existence of a nexus between terrorism and organized crime that displays in several manners. One criminologist has pointed out that this relationship can be presented in a “crime-terror continuum” (CTC). The CTC theory takes into consideration the past, present and future development of organized crime and terrorism. In addition it considers the possibility of one single group changing character in accordance with its environment.

Firstly, one has the forming of one-off, short-term or long-term alliances between the organized crime syndicates and terrorist groups. Such alliances may be formed for several reasons, for instance the seeking of operational support or expert knowledge. An example is the fact that in 1993 the Medellin cartel hired the ELN to plant car bombs<sup>136</sup>. This tactic, however, seems currently to be less favoured.

Secondly, researchers have observed that the two criminal groups restructure themselves and hereby become capable of employing both features of organized crime and terrorism. For instance, in the 1990’s, the Italian Mafia engaged in bombing tourist attractions as a

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<sup>135</sup> See “Global Organized Crime...”, pages 159-173.

<sup>136</sup> Pablo Escobar founded the Colombian Medellin cartel. The ELN (Ejército de Liberación Nacional) was a Colombian guerrilla group.

response to the Government's counter-mafia measures. Terrorist groups have most commonly been involved in drug trafficking in addition to fraud and human smuggling.

Thirdly, these initially different ends converge at a point where the organization can exhibit features of both groups at the same time. The basis of this situation is that criminal networks present political motivations, while terrorist organizations use their political aims as a façade for criminal activities.

It is my understanding that society is then left with a highly powerful phenomenon with the capability to adapt to a wide spectre of counter-measures. As long as such co-operation and restructuring proves beneficial it seems difficult to assume otherwise than that such a pattern will continue in the future. For this reason it is likely that combating terrorism in the future will involve counter-measures against organized crime.

## 5 Conclusion

An imperative in the struggle against terrorism is to embrace the issue as part of our existence, and deny the hateful and degraded feelings of revenge to let us suppress the phenomenon. Dealing with its root causes is the only way of defeating the threat to democracy.

Through this thesis I have wished to point out that the world has been moving in the right direction in its cause against terrorism, since the verdict in *McCann and others vs. UK*. However, one may rightfully criticize the time it has taken to achieve certain goals. The most striking feature of the democratic societies' response to terrorism is the lack of international agreement on a comprehensive anti-terror convention including a definition. Kofi Annan has on the behalf the UN addressed the need for the international community to speak with one voice. The political excuses surrounding this topic are, as I see it, no longer justifiable.

The Court has in relation to Article 2, 3 and 5 of the Convention, already set “non-negotiable” standards in particular with regards to the *right to life* and the *prohibition of torture*. These do not leave much margin of appreciation for the State in its actions against terrorists. The Court has demanded a high level of care taken in cases where the use of lethal force may be a likely outcome. When measuring counter-terror efforts up against Article 2 of the Convention, holding a strict interpretation of Article 2 avoids that it becomes possible to carry out “death penalties” by use of lethal force. In my opinion the Court has clearly signalled that lethal force is to be a last resort when combating terrorism.

Looking to Article 3 of the Convention, there is not much room left for “speculative” means of interrogation. I do not hereby disregard the likely existence and development of interrogation methods that prove efficient and do not violate this prohibition. Violation of Article 3 would mean a severe set back in defeating terrorism.

It is presumable that the future fight against terrorism will be about technology and surveillance techniques. Article 8 represents therefore the main challenge for legislators. Legislators must face the threat of terrorism without violating the *right to respect for private and family life* in a technological society. It seems unlikely that the “battle of technologies” can be stopped or put on hold. Being a step ahead of the terrorist requires either to foresee the persons move on a general basis, or to interfere particularly with his or her privacy in order to confirm or refute a suspicion of involvement in terrorist activities.

Both approaches raise issues under Article 8. An interference with the rights under this provision does not per se constitute a breach, given that it is justified. A comprehensive part of the test of justification is whether sufficient safeguards are provided and if the interference has the character of a proportionate measure. If legislators, judicial authorities, law-enforcement personnel and others involved can meet the challenge of striking this balance, another large step is taken in the correct direction.

Sadly, however salubrious such an achievement is, it is insufficient alone. Since the “fire vs. fire” strategy pulls in the opposite direction, the effect of the legal approaches is limited. Consequently, the “fire vs. fire” mentality must be banned for several reasons.

Firstly, it merely forces terrorism to adapt and reappear in a stronger form. One terrorist killed, fortunately, does not result in one terrorist less.

Secondly, it does not deal with the root causes of terrorism. On the contrary, it refuels those that are already there. Criminologists have researched well on the root causes of “ordinary” crimes. Terrorism represents the same issues in enlarged version.

Thirdly, a “fire vs. fire” strategy mirrors the very image of democracy that terrorists seek to project.

Furthermore, I hold the view that in particular the expression “war on terror” is a horrific simplification. Without any legal foundation proper, it causes severe confusion with regards to the necessity of clear lines in the struggle against terrorism. It is an unfortunate example of lack of a cool head and a clear mind. With its lucid reference to war as a

phenomenon it poses a central legal question, namely which rules are to govern the actions taken.

Firstly, a war strategy has no connection with the judicial body of a democracy. They represent two profoundly different machineries whereas the war machinery should be saved for the situations of armed conflict in accordance with international humanitarian law.

Secondly, terrorism should exclusively be dealt with as a criminal offence and punished by judicial authorities. Hereby democracy can project an image of being stable against threats and remain being so, denying terrorists the destabilization they seek.

However, violent counter-terrorist methods have proven necessary. The involvement of anti-terror squads or military force does not necessarily pose a problem in this respect as long as whom they work for is well defined. To achieve maximum effect of legal efforts it must be absolutely unambiguous whether such forces are employed by Justitia as law-enforcement personnel, or by the phenomenon of war.

Legal efforts gain worth in co-operation with promotion of cultural tolerance, understanding and the circulation of information. Bearing this in mind, to protect democracy it is therefore imperative to protect the freedom of expression.

The strategy of the five D's presented by UN Secretary General Kofi Annan encapsulates the means and aspects necessary to combat the phenomenon of terrorism. It is possible for democracy to prevail while protecting human rights, in fact I argue that democracy cannot prevail without. Protecting human rights is necessary in order to present democracy as a stable institution even in shocking and horrifying moments. Neglecting this gives birth to new terrorists. Terrorists are not deterred by violence, but they fear our human rights protection.<sup>137</sup>

I believe that the possibilities of combating terrorism open to democratic legal systems, while duly respecting all human rights, lie in further elaboration of Article 8 of the

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<sup>137</sup> See "Protecting Human Rights while fighting Terrorism", Section IV.

Convention. Indeed that would be to move from brutality to elegance in combating terrorism.

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