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**FAIRNESS: Implementation of the
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JUST-JACC-AG-2018

Work Package 3: Research

D 3.1 Comparative Legal Research (1)

Mapping the Legal and Policy Landscape for Upholding Criminal Procedural Rights in the Context of Counter-Terrorism

1. Introduction

The War on Terror (WoT) that was declared in the aftermath of the 9/11 terrorist attacks in 2001 has had far-reaching implications for counter-terrorism and the ways in which the risk of terror acts are considered, addressed, and tackled. The War on Terror unravelled in response to horrific acts of violence and whilst conceived as a global campaign for ridding the world of the scourge of terrorism, it has largely become associated with legally dubious practices, abuse of power, and disregard for the international legal standards which constitute the cornerstone of the post-1945 international system. Framing terrorism as an extraordinary existential threat, the War on Terror effectively justified the disproportionate use of force both domestically and internationally. In normative terms, its pinnacle has been the enactment of ‘counter-law’¹ which essentially eroded many essential elements of the conventional criminal justice system, designed to protect important human rights (e.g. due process, habeas corpus, freedom from torture and arbitrary killing etc.) and gave the executive unconstrained prerogatives divested of legal and political accountability. Ericson defines ‘counter-law’ as a range of extraordinary legal measures – passing restrictive laws and inventing new uses of already established law – that seek to weaken or eliminate traditional legal standards and procedures hindering the government from pre-empting alleged sources of harm.² As such, counter-law serves as a special type of precautionary mechanism which, once triggered, devalues existing legislative principles as an obstacle to ensuring security and allows the state to legitimately derogate from the responsibilities which it prescribes itself. In other words, ‘old’ law comes to be regarded as a source of risk and uncertainty and, so, new laws – ‘laws against law’ – need to be enacted and enforced to fill the insecurity gap. The resultant duality of law

¹ Richard Ericson, *Crime in an Insecure World*, (Cambridge: Polity, 2007).

² Richard Ericson, *Crime in an Insecure World*, (Cambridge: Polity, 2007).

therefore implies that for the social order to be preserved, the ‘old’ legal order inevitably has to be broken, which in turn authorises the government to take any action it deems expedient.³ The wide-ranging effects of the means adopted to fight the War of Terror have been extensively documented highlighting the importance of safeguarding fundamental human rights in times of crises. The present report emphasises the essential need for upholding the established principles and standards of criminal justice in the context of counter-terrorism and counter-radicalisation. In particular, the report argues that observing criminal justice requirements in radicalisation- and terror-rated cases is a key prerequisite for developing effective and sustainable counter-terrorism and counter-radicalisation trust-based strategies and approaches that enhance civil and national security. Part 2 of the report provides a thematic overview of the applicable international and EU, in order to examine how the concepts of terrorism and radicalisation are treated as legal subjects. Part 3 looks into the existing international, EU, and national legal instruments for protecting the criminal procedural rights of suspects and accused. Part 4 reviews ongoing international and national efforts that aim to safeguard criminal procedural rights in the context of counter-terrorism with a particular emphasis on the securitisation debate and its implications for the EU domestic and foreign policy.

2. Terrorism and Radicalisation in the Context of International Criminal Law

This section examines how the concepts of ‘terrorism’ and ‘radicalisation’ are addressed in the context of international criminal law. There is no universally agreed definition for the term ‘terrorism’. Instead, it is considered in terms of specific criminal acts. In basic terms, terrorism is the unlawful and intentional causing, attempt to cause or threat to cause “(a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, or systems..., resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act”⁴, as well as the participation in such offenses as an accomplice, organizer or director or the contribution in their commission.⁵ Radicalisation *per se* is not a crime but its violent manifestations can amount to terror crimes. By the same token, international counter-terrorism is primarily viewed through the prism of criminal law enforcement and the mechanisms for its effective implementation. Some commentators have even argued that terrorism-related crime should be prosecuted by the International Criminal Court (ICC).⁶ In order to develop a

³ Richard Ericson, *Crime in an Insecure World*, (Cambridge: Polity, 2007).

⁴ Article 2 of the Draft for a Comprehensive Convention against Terrorism (UN General Assembly)

⁵ See Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism, and Counter-Terrorism*, Fact Sheet No.32, 2008, available at <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

⁶ Daniel N. Clay, ‘Protecting Due Process During Terrorism Adjudications: Redefining “Crimes Against Humanity” and Eliminating the Doctrine of Complimentary Jurisdiction in Favor of the International Criminal Court’, *Arkansas Law Review*, Vol. 71:3 (2019), pp. 571 – 611, available at <https://scholarworks.uark.edu/alr/vol71/iss3/1/>.

comprehensive appreciation of the relevant legal context, international legal instruments in four thematic domains are considered:

- Acts of terrorism, protection, and public safety.
- Support to terrorism: financing, proliferation of weapons, and incitement (including online).
- Terrorism in the context of armed conflicts.
- Counter-terrorism, prevention of violent radicalisation, and victim support.

2.1 Acts of Terrorism, Protection, and Public Safety

Under international law, acts of terrorism fall within the remit of several international conventions. These include:

- **Convention on Offences and Certain Other Acts Committed on Board Aircraft**⁷ (1963): this Convention contains provisions regarding the procedures for the return of aircraft and the treatment of passengers and crew after an unlawful diversion; it also demands that States establish jurisdiction to persecute (unspecified) offences occurred on board aircraft registered in the State.
- **Convention for the Suppression of Unlawful Seizure of Aircraft**⁸ (1970): States are required to punish people who, on board, exercise unlawful control of the aircraft.
- **Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation**⁹ (1971): States are required to criminalize attacks on aircraft in service, acts of violence on people on board, and interference with air navigation facilities.
- **Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation**¹⁰ (supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation): States are required to criminalize violence which could cause death or grave injury in airports serving international civil aviation and damaging of aircraft facilities endangering safety in airports.
- **Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents**¹¹ (1973): States are required to criminalise violent attacks against Heads of State, foreign ministers and diplomatic agents

⁷ Available at <https://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf>.

⁸ Available at http://www.oas.org/juridico/mla/en/treaties/en_conve_suppre_unlaw_seiz_aircr_sig_the_hague_1970.pdf.

⁹ Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf>.

¹⁰ Available at <https://www.un.org/ruleoflaw/files/Conv7-english.pdf>.

¹¹ Available at http://legal.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf.

entitled to special protection under international law (as defined by the Vienna Convention on Diplomatic Relations of 1961), as well as their family members.

- **International Convention against the Taking of Hostages**¹² (1979): States are required to criminalize any taking of hostages for the purpose of blackmailing the State into doing or not doing something.
- **Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation**¹³ (1988): States are required to criminalize any offence against ships and passengers with the aim of killing, injuring or endangering, combining several provisions developed in the previous decades against attacks on aircraft.
- **Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf**¹⁴ (1988) (supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation): the Protocol extends the provisions of the Convention to cover offences against fixed platforms.
- **Convention on the Safety of United Nations and Associated Personnel**¹⁵ (1994): the objective of the Convention is to ensure the safety of the UN and associated personnel and it requires States parties to establish criminal offences to prevent and punish attacks against UN and associated personnel.
- **International Convention for the Suppression of Terrorist Bombings**¹⁶ (1997): States are required to establish an offence of using an explosive or somehow lethal device (bombings, weapons of mass destruction) with the purpose of provoking death, grave injuries or major economic loss.
- **International Convention for the Suppression of Acts of Nuclear Terrorism**¹⁷ (2005): the Convention defines the offence of using nuclear or radioactive material to cause death or injury to people, property, or the environment, or to force a legal or natural person, a State, or an international organization to do or not do something.

¹² Available at <https://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>.

¹³ Available at http://oceansbeyondpiracy.org/sites/default/files/SUA_Convention_and_Protocol.pdf.

¹⁴ Available at <https://www.un.org/ruleoflaw/files/3dda0fff4.pdf>.

¹⁵ Available at https://treaties.un.org/doc/Treaties/1994/12/19941215%2007-58%20AM/Ch_XVIII_8p.pdf.

¹⁶ Available at https://sherloc.unodc.org/res/cld/treaties/definitions/treaty/international_convention_for_the_suppression_of_terrorist_bombings_1997_html/Terrorist_Bombing_Convention_English.pdf.

¹⁷ Available at https://sherloc.unodc.org/res/cld/treaties/definitions/treaty/international_convention_for_the_suppression_of_acts_of_nuclear_terrorism_2005_html/Nuclear_Terrorism_Convention_English.pdf.

- **Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation**¹⁸ (2005): the Convention expands of the range of behaviours to be criminalized (e.g. offences related to the proliferation of weapons of mass destruction) and makes specific counter-terrorism provisions, e.g. provides for a legal framework that allows States to board suspected foreign ships in high sea.
- **Convention on the Suppression of Unlawful Acts Related to International Civil Aviation**¹⁹ (2010): the Convention criminalises the use of aircraft to cause death, injury or damage, the discharge BCN (biological, chemical, or nuclear) weapons or similar substances to cause death, injury, damage or to attack civil aircraft, as well as the unlawful transportation of BCN weapons and given related materials; it further criminalises cyberattacks on air navigation facilities, and credible threats to commit an offence, and/or the conspiracy to commit an offence.

Additional relevant provisions regarding terrorist activities are contained in **United Nations Security Council Resolution 2341 (2017)**²⁰ on the protection of critical infrastructure and **United Nations Security Council Resolution 2388 (2017)**²¹ which addresses the links between human trafficking and international terrorism.

The links between transnational organized criminal activities and acts of terrorism have been acknowledged in the **United Nations Convention against Transnational Organized Crime (Organized Crime Convention – 2000)** and its three protocols – the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.²² Since terrorists groups and networks employ similar methods to those used by transnational organized criminal groups, the legislative tools for combating organised transnational crime can also be applied to transnational terrorism. The Convention can be applied whenever the two basic conditions triggering it exist: 1) the transnational nature of the offence, 2) the involvement of an organised criminal group.

The European Union (EU) has taken a two-fold approach to the definition of acts of terrorism, insofar as consideration is being given both to the type of criminal offences and to the aims they pursue. The **Directive (EU) 2017/541 of the European Parliament and of the Council on**

¹⁸ Available at <https://www.refworld.org/docid/49f58c8a2.html>.

¹⁹ Available at <https://cil.nus.edu.sg/wp-content/uploads/2017/08/2010-Convention-on-the-Suppression-of-Unlawful-Acts-Relating-to-International-Civil-Aviation-1.pdf>.

²⁰ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2341%282017%29.

²¹ Available at [https://undocs.org/en/S/RES/2388\(2017\)](https://undocs.org/en/S/RES/2388(2017)).

²² Available at https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

combating terrorism which was adopted on 15 March 2017 provides a list of criminal offences that should be defined as ‘terrorist offences’ when committed for the purposes of 1) seriously intimidating a population; 2) unduly compelling a government or an international organisation to perform or abstain from performing any act; and/or 3) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. The listed criminal offences include attacks upon a person’s life, or physical integrity; kidnapping or hostage-taking; causing extensive destruction to a government or public facility, a transport system, or an infrastructure facility, including information systems; seizure of aircraft, ships or other means of public or goods transport; manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including CBRN weapons; release of dangerous substances, or causing fires, floods or explosions; interfering with or disrupting critical infrastructure; and cyber-attacks. The threat to commit any of the listed offences is also subject to criminalisation.

2.2 Support to terrorism: financing, proliferation of weapons, and incitement

Under the **International Convention for the Suppression of the Financing of Terrorism**²³ (1999), States are required to criminalise the provision or collection of funds with the purpose or knowledge that they will be used in an act constituting a terrorist offence, or in an act killing or injuring any person with the aim of intimidating a population or controlling a Government or an international organization. **United Nations Security Council Resolution 1373** (2001)²⁴ adopted shortly after the 9/11 attacks specifically calls upon all States to join the Convention and work towards its full and effective implementation. Other relevant UN Security Council Resolutions include **UNSC Resolution 2133 (2014)**,²⁵ on strengthening the provisions of UNSC Resolution 1373 on suppressing terrorism financing; **UNSC Resolution 2178 (2014)**,²⁶ on the financing of the travel of foreign terrorist fighters; **UNSC Resolution 2199 (2015)**,²⁷ on the criminalization of any direct or indirect trade involving ISIL; **UNSC Resolution 2368 (2017)**,²⁸ and **UNSC Resolution 2396 (2017)**.²⁹

In 2003, the International Monetary Fund published a manual titled *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*³⁰ which aims to facilitate the provision of legal technical assistance in countering the financing of terrorism. To assist relevant National Authorities in the process of the identification of risks of terrorist financing within their economies,

²³ Available at <https://treaties.un.org/doc/db/Terrorism/english-18-11.pdf>.

²⁴ Available at https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf.

²⁵ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2133%20%282014%29.

²⁶ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2178%20%282014%29.

²⁷ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20%282015%29.

²⁸ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2368%282017%29.

²⁹ Available at [https://undocs.org/en/S/RES/2396\(2017\)](https://undocs.org/en/S/RES/2396(2017)).

³⁰ Available at <https://www.imf.org/external/pubs/nft/2003/sfth/index.htm>.

the United Nations Organisation on Drugs and Crime has published a *Guidance Manual for Member States on Terrorist Financing Risk Assessments* (2018).³¹

Besides the financing of terrorism, the possible acquisition of weapons and weapon-related technology and means of delivery by terrorist perpetrators is another area subject to international regulatory control. The **Convention on the Physical Protection of Nuclear Material**³² (1982), contains provisions for the protection and transportation of defined materials during international nuclear transport and requires State Parties to create offences related to the unlawful handling, demand, (threat of) acquisition of nuclear material, mechanisms for international cooperation. The Convention was amended in 2006 to include the criminalization of acts directed against or interfering with a nuclear facility for terrorist purposes.³³ Under the **Convention on the Marking of Plastic Explosives for the Purpose of Detection**³⁴ (1991), States are required to take measures to control explosives which could not be detected through scanning equipment.

The need to strengthen the existing controls on the proliferation of weapons has been acknowledged by different United Nations Security Council Resolutions. **UNSC Resolution 1540 (2004)**³⁵ adopted on 28 April 2004 aims at preventing the proliferation of nuclear, chemical and biological weapons by non-State actors, defined under the same resolution as “individual[s] or entit[ies], not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution”. In order to oppose the proliferation of weapons of mass destruction, the Resolution requires States to deny support to non-State actors and adopt and enforce laws and domestic controls. This requirement has been confirmed by subsequent Resolutions. **UNSC Resolution 2220 (2015)**³⁶ on small arms contains specific provisions for strengthening the existing regulatory arrangements for countering illicit activities, including weapons trafficking.

UNSC Resolution 1624 (2005)³⁷ tackles incitement to terrorism requiring States to take measures against it, in accordance with Article 20, Paragraph 2 of the International Covenant on Civil and Political Rights, stating that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Another pertinent resolution in this regard is **UNSC Resolution 2354 (2017)**³⁸ on countering terrorist narratives. The

³¹ Available at https://www.unodc.org/documents/terrorism/Publications/CFT%20Manual/Guidance_Manual_TF_Risk_Assessments.pdf.

³² Available at <https://www-pub.iaea.org/MTCD/Publications/PDF/Pub615web.pdf>.

³³ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/38.

³⁴ Available at <https://www.un.org/ruleoflaw/files/3dd90f0c7.pdf>.

³⁵ Available at [https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1540%20\(2004\)](https://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1540%20(2004)).

³⁶ Available at <https://www.un.org/sc/ctc/news/document/sres2220-2015-small-arms-adopted-on-22-may-2015/>.

³⁷ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1624%20%282005%29.

³⁸ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2354%282017%29.

UNODC has published a guiding document titled *The Use of Internet for Terrorist Purposes* (2012)³⁹ which seeks to facilitate the prevention of online radicalization.

Directive 2017/541 of the European Parliament and of the Council on combating terrorism addresses different aspects related to suppressing the support for terrorism, including financing of terrorist activities and measures against the provocation and instigation of terror-related offences.

2.3 Terrorism in the Context of Armed Conflicts

During armed conflicts, International Humanitarian Law (IHL) applies. The primary sources of this law are the Geneva Conventions and related Protocols which contain provisions regarding the treatment of combatants and civilians in times of armed hostilities, whether between States, or within a State. Article 3 of the **Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea**⁴⁰ (1949) concerns the treatment of people not taking active part in the conflict and explicitly prohibits taking hostages. Similar provisions are also found in the **Geneva Convention Relative to the Treatment of Prisoners of War**⁴¹ (1949), the **Geneva Convention Relative to the Protection of Civilian Persons in Time of War**⁴² (1949), as well as the Additional Protocols – **Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)**⁴³ (1977) and **Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)**⁴⁴ (1977).

2.4 Counter-Terrorism, Prevention of Violent Radicalisation, and Victim Support

The commitment of the international community to combat international terrorism is reflected in the extensive body of United Nations Security Council Resolutions that have been adopted over the past two decades (Box 1).

³⁹ Available at https://www.unodc.org/documents/terrorism/Publications/Use_of_Internet_for_Terrorist_Purposes/ebook_use_of_the_internet_for_terrorist_purposes.pdf.

⁴⁰ Available at <https://www.refworld.org/docid/3ae6b37927.html>.

⁴¹ Available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.32_GC-III-EN.pdf.

⁴² Available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf.

⁴³ Available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>.

⁴⁴ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx>.

Box 1: United Nations Security Council Resolutions on International Counter-Terrorism

UNSC Resolution 1377 (2001)⁴⁵: Ministerial Declaration on the Global Effort to Combat Terrorism

UNSC Resolution 1390 (2002)⁴⁶: on the Situation in Afghanistan

UNSC Resolution 1452 (2002)⁴⁷: Threats to International Peace and Security caused by Terrorist Acts

UNSC Resolution 1455 (2003)⁴⁸: Threats to International Peace and Security caused by Terrorist Acts

UNSC Resolution 1456 (2003)⁴⁹: Declaration of the Ministers for Foreign Affairs on the Issue of Combating Terrorism

UNSC Resolution 1526 (2004)⁵⁰: Threats to International Peace and Security caused by Terrorist Acts

UNSC Resolution 1535 (2004)⁵¹: Establishment of the Executive Directorate of the Counter-Terrorism Committee (CTED)

UNSC Resolution 1566 (2004)⁵²: Establishment of a Working Group to consider measures to be imposed upon individuals, groups or entities other than those designated by all the Al-Qaida/Taliban Sanctions Committee

UNSC Resolution 1617 (2005)⁵³: Threats to International Peace and Security caused by Terrorist Acts

UNSC Resolution 1735 (2006)⁵⁴: Threats to International Peace and Security caused by Terrorist Acts

UNSC Resolution 1787 (2007)⁵⁵: Extension of Counter-Terrorism Committee Executive Directorate (CTED) mandate

UNSC Resolution 1805 (2008)⁵⁶: Mandate of Counter-Terrorism Committee Executive Directorate (CTED) extended until 31 December 2010

UNSC Resolution 1963 (2010)⁵⁷: Mandate of the Counter-Terrorism Committee Executive Directorate (CTED) extended until 31 December 2013

UNSC Resolution 2129 (2013)⁵⁸: Threats to international peace and security caused by terrorist acts

⁴⁵ Available at <http://unscr.com/en/resolutions/doc/1377>.

⁴⁶ Available at <http://unscr.com/en/resolutions/doc/1390>.

⁴⁷ Available at <http://unscr.com/en/resolutions/doc/1452>.

⁴⁸ Available at <http://unscr.com/en/resolutions/doc/1455>.

⁴⁹ Available at <http://unscr.com/en/resolutions/doc/1456>.

⁵⁰ Available at <http://unscr.com/en/resolutions/doc/1526>.

⁵¹ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1535%20%282004%29.

⁵² Available at <https://www.un.org/ruleoflaw/files/n0454282.pdf>.

⁵³ Available at [https://www.undocs.org/S/RES/1617%20\(2005\)](https://www.undocs.org/S/RES/1617%20(2005)).

⁵⁴ Available at [https://www.undocs.org/S/RES/1735%20\(2006\)](https://www.undocs.org/S/RES/1735%20(2006)).

⁵⁵ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1787%20%282007%29.

⁵⁶ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1805%20%282008%29.

⁵⁷ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1963%20%282010%29.

⁵⁸ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2129%282013%29.

UNSC Resolution 2170 (2014)⁵⁹: on Strengthening the mechanisms for bringing to justice terrorist perpetrators

UNSC Resolution 2185 (2014)⁶⁰: on Policing during peace-keeping operations

UNSC Resolution 2195 (2014)⁶¹: on Strengthening border management

UNSC Resolution 2199 (2015)⁶²: Threats to international peace and security caused by terrorist acts

UNSC Resolution 2242 (2015)⁶³: Women and peace and security

UNSC Resolution 2249 (2015)⁶⁴: Threats to international peace and security caused by terrorist acts

UNSC Resolution 2250 (2015)⁶⁵: Maintenance of international peace and security

UNSC Resolution 2253 (2015)⁶⁶: Threats to international peace and security caused by terrorist acts

UNSC Resolution 2255 (2015)⁶⁷: Threats to international peace and security caused by terrorist acts

UNSC Resolution 2309 (2016)⁶⁸: on Aviation security

UNSC Resolution 2322 (2016)⁶⁹: on International law enforcement and judicial cooperation

UNSC Resolution 2331 (2016)⁷⁰: on Trafficking in persons

UNSC Resolution 2368 (2017)⁷¹: on Combating terrorism

UNSC Resolution 2395 (2017)⁷²: Threats to international peace and security caused by terrorist acts – CTED mandate renewal

The **United Nations Global Counter-Terrorism Strategy**⁷³ that was adopted by the UN General Assembly in 2006 (General Assembly Resolution 60/288) is a manifestation of the international

⁵⁹ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2170%20%282014%29.

⁶⁰ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2185%20%282014%29.

⁶¹ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2195%20%282014%29.

⁶² Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2199%20%282015%29.

⁶³ Available at <https://www.un.org/sc/ctc/news/document/sres2242-2015-women-and-peace-and-security-adopted-on-13-october-2015/>.

⁶⁴ Available at <https://www.un.org/sc/ctc/news/document/sres2249-2015-threats-to-international-peace-and-security-cause-by-terrorist-acts-adopted-on-20-november-2015/>.

⁶⁵ Available at

https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2250%20%282015%29&referer=http://www.un.org/en/documents/index.html&Lang=E.

⁶⁶ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2253%282015%29.

⁶⁷ Available at

https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2255%282015%29&referer=/english/&Lang=E.

⁶⁸ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2309%282016%29.

⁶⁹ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2322%282016%29.

⁷⁰ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2331%282016%29.

⁷¹ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2368%282017%29.

⁷² Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2395%20%282017%29.

⁷³ Available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/60/288.

consensus on the basic elements of international counter-terrorism. The Strategy features a Plan of Action comprising four pillars:

- a) Measures to address the conditions conducive to the spread of terrorism;
- b) Measures to prevent and combat terrorism;
- c) Measures to build States' capacities to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard; and
- d) Measures to ensure respect of human rights for all and the rule of law as the fundamental basis of the fight against terrorism.

There are multiple tools and guiding documents available to assist UN Member States in the process of implementing the UN Global Counter-Terrorism Strategy. The UNODC has published ***Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments*** (2006)⁷⁴ which covers four themes: 1) Criminalized acts – offences linked to the financing of terrorism; offences based on the status of the victim: hostage-taking and crimes against internationally protected persons; offences linked to civil aviation; offences linked to ships and fixed platforms; and offences linked to dangerous materials; 2) Measures to ensure effective criminalization – penalties; prohibition the encouragement and toleration of acts of terrorism; financial matters; prohibition of making explosives; combatting organized crime. 3) Procedural law – refugee status and terrorism; jurisdiction; specific powers of aircraft commanders; fair treatment; witness protection; and mechanisms for compensating victims of terrorist acts; 4) Modalities of international cooperation in criminal matters – extradition; mutual legal assistance in criminal matters; transfer of persons being detained or serving sentences; and cooperation in combating the financing of terrorism.

The UNODC has also developed ***Legislative Guide to the Universal Legal Regime against Terrorism*** (2008).⁷⁵ The Guide covers five main topics: 1) the universal legal regime against terrorism: fundamental considerations in providing legislative advisory services; insistence that counter-terrorism measures should be based upon human rights standards; the role of the criminal justice system in preventing terrorist acts; prohibition of incitement to terrorism; steps to becoming a party to and implementing relevant international conventions and protocols; 2) criminalization and other legislative requirements of the conventions and protocols related to terrorism: common elements of the conventions and protocols; agreements relating to the safety of civil aviation; agreements relating to maritime safety; agreements relating to other protections for civilians developed at the initiative of the General Assembly; legislative requirements relating to the financing of terrorism; issues common to all conventions and protocols; forms of participation in an offence; elements of knowledge and intention; 3) jurisdiction over offences: jurisdiction based

⁷⁴ Available at

https://www.unodc.org/documents/terrorism/Publications/Guide_Legislative_Incorporation_Implementation/English.pdf.

⁷⁵ Available at

https://www.unodc.org/documents/terrorism/Publications/Legislative_Guide_Universal_Legal_Regime/English.pdf.

upon territoriality; jurisdiction based upon registration of aircraft or maritime vessels; jurisdiction based upon nationality of the offender; Jurisdiction based upon protection of nationals and national interests; jurisdiction based upon the presence of a person in the national territory; 4) obligation to extradite or prosecute: nature and consequences of the obligation; obligation to conduct an inquiry, to report findings and to advise of intent; 5) international cooperation in criminal matters: dependence of the legal regime against terrorism upon international cooperation; mutual legal assistance; extradition; dual criminality; protections for political activity, against discrimination and requiring fair treatment; and concluding human rights considerations.

Handbook on Criminal Justice Responses to Terrorism (2009)⁷⁶ is another relevant publication by the UNODC. The Handbook underscores the importance of an effective rule of law-based criminal justice response to terrorism and the need for ensuring the protection of human rights. Key aspects discussed in the Handbook include the **components of an effective criminal justice response to terrorism – role of policymakers and legislators** (Legislative incorporation of international obligations; Criminalization: relevance of the rule of law and human rights, criminalizing conspiracy and criminal associations, criminalizing the financing of terrorism, incitement to terrorism, exclusion of any justification; Procedural law: procedural and evidentiary mechanisms, police powers, procedures relating to freezing, seizure and confiscation of assets, procedural measures for the protection of witnesses and informants, anonymity of witnesses and informants, periodic review of legislation); role of law enforcement (Methods of investigation: offender profiling and group targeting, gathering intelligence, intelligence systems and sharing of information, use of criminal informants and accomplices, use of modern investigation techniques; Arrest and detention: prohibition of arbitrary arrest and detention, right to notification and communication at the time of arrest; Interrogation and interviewing of suspects; Preventing obstructions of justice; Witness protection measures and programmes: basic witness protection measures, witness protection programmes; Gathering of financial information; Community engagement; International law enforcement cooperation: challenges in law enforcement collaboration, cooperation in the confiscation of terrorism- or crime-related assets, coordination of investigations across borders, exchange of information and intelligence, international cooperation for witness protection; Extraordinary measures: shooting without warning and shooting on sight, targeted killings); role of prosecutors (Independence of the prosecution; Role of prosecutors in upholding the rule of law; Obligation to extradite or prosecute; Extradition; Mutual legal assistance; Increasing a system's capacity for international cooperation); role of defence counsel (The right to counsel; Principle of equality of arms: notice of the rights to counsel and the right to choose defence counsel; Right to legal assistance; Exceptional measures); role of the judiciary (Independence, impartiality and integrity of the judiciary; Independence and impartiality of tribunals: designation of judges or courts with special jurisdiction; Security of the courts); Issues and challenges concerning detention (Detention prior to adjudication or during investigation:

⁷⁶Available at

https://www.unodc.org/documents/terrorism/Publications/Handbook_Criminal_Justice_Responses/English.pdf.

access to legal counsel; Conditions for detention and custody; Cruel or inhuman treatment or punishment; Security and safety of prisoners: security and safety of witnesses and informants in prison; Transfer of detainees and prisoners; Preventive detention; Complaint procedures); Role of the criminal justice system in protecting the rights of victims of terrorist crimes (Victims in international law; Definition of the term “victims”; Responding to the needs of victims of terrorism; Improving the criminal justice system’s response to victims); and **criminal justice accountability and oversight mechanisms** – oversight of law enforcement (General means of accountability; Disciplinary mechanisms; Civilian oversight mechanisms); oversight of lawyers and prosecutors; oversight of the judiciary; and prison oversight and inspections.

The UNODC *Manual on International Cooperation in Criminal Matters related to Terrorism* (2009)⁷⁷ comprises four modules:

- **Module 1: Basic principles of international cooperation against terrorism:** criminalization of acts of terrorism; legal basis for international cooperation against terrorism: the instruments for cooperation, obligation as regards international cooperation against terrorism, rules for effective cooperation, competent national authorities.
- **Module 2: Mutual legal assistance in criminal matters:** goals of mutual legal assistance; types of mutual legal assistance currently in use; mutual legal assistance in the fight against the financing of terrorism: identification, detection, freezing, seizure and confiscation; request for mutual legal assistance; joint investigations.
- **Module 3: Extradition:** goals of extradition; provisional arrest for the purpose of extradition; request for extradition; applicable law: execution of the request in accordance with the law of the requested or requesting State; outcome of the request, cost of extradition, surrender of the person to be extradited.
- **Module 4: Other types of cooperation:** other types of surrender; transfer of criminal proceedings: official request for the purpose of prosecution, transfer of detained persons already convicted.

In addition, the UNODC has developed *Model Legislative Provisions Against Terrorism* (2009)⁷⁸ – a resource that is intended to assist UN Member States in the drafting of counter-terrorism legislation; administers an online database titled *Digest of Terrorist Cases* (2010);⁷⁹ and has produced an online legal training curriculum which includes *Module 3: International cooperation in criminal matters: counter-terrorism* (2011).⁸⁰ The UNODC further provides technical assistance and tools that are designed to assist UN Member States in meeting their obligations under international law. The range of services that the UNODC offers are summarized in two

⁷⁷ Available at

https://www.unodc.org/documents/terrorism/Publications/Manual_Int_Coop_Criminal_Matters/English.pdf.

⁷⁸ Available at <https://www.un.org/sc/ctc/news/document/unodc-model-legislative-provisions-against-terrorism/>.

⁷⁹ Available at https://www.unodc.org/documents/terrorism/Publications/Digest_of_Terrorist_Cases/English.pdf.

⁸⁰ Available at

https://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3/Module3_EN.pdf.

documents: *Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism* (2018)⁸¹ and *Legislative and Capacity-Building Assistance to Prevent and Combat Terrorism*.⁸²

The Biometrics Institute of the United Nations Office of Counter-Terrorism (CTED) has developed a *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter-Terrorism* (2018)⁸³ which is intended to ensure that the use of biometrics in counter-terrorism is in compliance with the established international standards and fundamental rights safeguards. Biometrics systems are aimed at recognizing people through their biological and physiological traits (e.g. fingerprints, hand vein patterns, face, DNA, etc.), called “biometric modalities”. These systems represent a powerful tool to detect terrorists and disrupt their activities worldwide. The stages of the standard operating model of a basic biometric system include: 1) acquisition and enrolment; 2) data extraction; 3) data storage; 4) data comparison; 5) data matching; and 6) output. Biometric systems use two essentially different processes: 1) verification and 2) identification. Biometric modalities commonly used for counter-terrorism purposes are: face, fingerprints, iris, and voice, each one with its vulnerabilities.

The **Council of Europe Counter-Terrorism Strategy (2018-2022)**⁸⁴ seeks to contribute to the international counter-terrorism efforts on three axes: prevention of terrorism; prosecution of terrorists; and protection of every person present on the territories of the member States.

Prevention refers to:

- Prevention of and contrast to terrorist public provocation, propaganda, radicalization, recruitment and training;
- Prevention of and contrast to terrorist public provocation, propaganda, radicalization, recruitment and training on the internet;
- A set of indicators for assessing the risk that a terrorist attack may be carried out by radicalized individuals;
- Awareness-raising on radicalization and other preventive measures among frontline practitioners, in particular in schools;
- Prevention of the financing of terrorism;

Prosecution refers to:

- Gathering of evidence from conflict zones for the purpose of criminal prosecution;
- Gathering of e-evidence in terrorism-related cases;
- The conduct of criminal trials against, and the prosecution of, foreign terrorist fighters, including returnees and relocators;

⁸¹ Available at https://www.unodc.org/documents/terrorism/Menu%20of%20Services/18-05646_Terrorism_Prev_Branch_Services_Ebook_NEW.pdf.

⁸² Available at <https://www.unodc.org/unodc/en/terrorism/technical-assistance-tools.html>.

⁸³ Available at https://www.unodc.org/pdf/terrorism/Compendium-Biometrics/Compendium-biometrics-final-version-LATEST_18_JUNE_2018_optimized.pdf.

⁸⁴ Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016808afc96.

- Mutual legal assistance in criminal matters, extradition and the use of joint investigative teams in relation to terrorism;
- Jointly working on terrorism and transnational organized crime.

Protection refers to:

- Collection of best practices with regard to de-radicalization, disengagement and social reintegration;
- Risk assessment of individuals indicted and convicted for terrorist offences;
- Victims of terrorism;
- Identification of emerging terrorist threats;
- Understanding of the roles of women and children in terrorism;
- Law enforcement and emergency services responses during and in the immediate aftermath of terrorist attacks

The Council of Europe Convention for the Prevention of Terrorism⁸⁵ (Warsaw 2005) and its **Additional Protocol**⁸⁶ (2015) have been developed to assist States Parties in the prevention of terrorism and the mitigation of its negative effects on the enjoyment of human rights.

The **EU Counter-Terrorism Strategy**⁸⁷ comprises four pillars: prevent, protect, pursue, respond (Figure 1).

⁸⁵ Available at <https://www.refworld.org/pdfid/47fdfaf0d.pdf>.

⁸⁶ Available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c358a.

⁸⁷ Available at <https://www.consilium.europa.eu/en/policies/fight-against-terrorism/eu-strategy/>.

Figure 1: EU Counter-Terrorism Strategy⁸⁸



The first **EU Internal Security Strategy⁸⁹** was endorsed by the EU Council in March 2010. In November 2010, the Commission issued its Communication entitled ‘**The EU Internal Security Strategy in Action: Five steps towards a more secure Europe**’.⁹⁰ The Communication specifically addresses the **prevention of terrorism, radicalisation, and recruitment**. The European Commission defines radicalisation as ‘the phenomenon of people embracing opinions, views and ideas which could lead to acts of terrorism’.⁹¹ The EU response to the prevention of violent radicalisation is set out in the Commission’s Communication on ‘**Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU’s Response**’ of 2014⁹² and ‘**Supporting the Prevention of Radicalisation Leading to Violent Extremism**’ of 2016.⁹³

EU Directive 2016/681 of the European Parliament and of the Council on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of

⁸⁸ Based on the European Union Counter-Terrorism Strategy, 30 November 2005, Brussels, available at <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014469%202005%20REV%204>.

⁸⁹ Available at <https://eur-lex.europa.eu/legal-content/BG/TXT/?uri=LEGISSUM:jl0050>.

⁹⁰ Available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0673:FIN:EN:PDF>.

⁹¹ European Commission, *Terrorist Recruitment: Addressing Factors Contributing to Violent Radicalisation*, COM (2005) 313, 21 September 2005, Brussels, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0313&from=EN>.

⁹² Available at [http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com\(2013\)0941/_com_com\(2013\)0941_en.pdf](http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2013)0941/_com_com(2013)0941_en.pdf).

⁹³ Available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52016DC0379>.

terrorist offences and serious crimes of 27 April 2016⁹⁴ provides for the transfer by air carriers of passenger name record (PNR) data of passengers of extra-EU flights and its processing, including its collection, use and retention by Member States and its exchange between Member States.

An important aspect covered by **EU Directive 2017/541 on combating terrorism** is the protection of the rights of the victims of terrorism. The UNODC has published two guiding documents of relevance to this issue. These include *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework* (2015)⁹⁵ and *The Criminal Justice Response to Support Victims of Acts of Terrorism* (2012).⁹⁶

3. International, EU, and National Legal Instruments for Ensuring the Protection of Fundamental Rights during Criminal Proceedings

This section examines how fundamental rights are safeguarded during criminal procedures. To this end, relevant elements of international, EU, and national legal instruments are reviewed.

3.1 International Legal Instruments

The requirements for upholding fundamental human rights during criminal proceedings are defined in the **Universal Declaration of Human Rights**⁹⁷ (Box 2).

Box 2: Elements of the Universal Declaration of Human Rights with relevance to criminal proceedings

Universal Declaration of Human Rights (1948)

- **Article 5:** prohibition of torture and other cruel, inhuman or degrading treatment or punishment.
- **Article 9:** prohibition of arbitrary arrest, detention or exile.
- **Article 10:** right to a fair and public hearing.
- **Article 11:** penal offences and presumption of innocence

⁹⁴ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0681&from=EN>.

⁹⁵ Available at https://www.unodc.org/documents/terrorism/Publications/Good%20practices%20on%20victims/good_practices_victims_E.pdf.

⁹⁶ Available at https://www.unodc.org/documents/terrorism/Publications/Support_to_victims_of_terrorism/revised_edition_21_May_2012_12-53652_Ebook.pdf.

⁹⁷ Available at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf.

Art. 17 (1) of the International Covenant on Civil and Political Rights (ICCPR) states that ‘no one should be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation’.⁹⁸ The right to be presumed innocent until proved guilty is among the basic principles that condition the treatment to which an accused person is subjected throughout the period of criminal investigations and trial proceedings, up to and including the end of the final appeal.⁹⁹ This is stipulated in **Art. 14 of the ICCPR**:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

⁹⁸ United Nations, *International Covenant on Civil and Political Rights*, 23 March 1976, available at www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

⁹⁹ United Nations, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003.

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

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

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

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

The right to liberty is guaranteed under international human rights law. **Art. 9 and 10 of the ICCPR** contain provisions concerning detention, arrest, and treatment of accused persons:

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation, and this provision is applicable to all unlawful or arbitrary arrests and detentions.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2.

(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.¹⁰⁰

The rights of juvenile offenders during criminal proceedings are further stipulated in the **Convention on the Rights of the Child**,¹⁰¹ whereby **Art. 37** contains provisions regarding the (a) prohibition of torture or other cruel, inhuman or degrading treatment or punishment against children; prohibition of death penalty or life imprisonment without possibility of release for children; (b) conditions for arrest, detention, or imprisonment of a child; (c) conditions for children deprived of liberty; (d) right of children deprived of liberty to receive legal and other assistance and to challenge the legality of the deprivation of liberty; and **Art. 40** contains provisions regarding the (a) treatment of children alleged as, accused of, or recognized as having infringed the penal law; and (b) guarantees of children alleged as or accused of having infringed the penal law (right to be informed on the charges, right to legal and other appropriate assistance, right to communicate with one's parents or guardians, right to a fair hearing according to the law, right to the assistance of an interpreter).

The right of aliens that are lawfully present in the territory of a State Party to be protected from indiscriminate expulsion is guaranteed under **Art. 13 of the ICCPR**:

Article 13

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except

¹⁰⁰ United Nations, *International Covenant on Civil and Political Rights*, 23 March 1976, available at www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

¹⁰¹ Available at <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The **Convention Relating to the Status of Refugees**¹⁰² (1951) stipulates the requirement for lawful procedures for expulsion (only on grounds of national security or public order) in **Art. 32**.

The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**¹⁰³ prohibits all forms of torture and other cruel, inhuman or degrading treatment, or punishment under any circumstances (**Art.1 and 2**). **Art. 15** of the Convention further prohibits that any statement which is established to have been made as a result of torture is invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. The international standards for the investigation of torture are defined by the **Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol)**¹⁰⁴ (1999). Torture, as well the arbitrary or unlawful deprivation of liberty are also prohibited by the **Convention on the Rights of Persons with Disabilities**¹⁰⁵ (**Art. 14 and 15**). The **International Convention on the Elimination of All Forms of Racial Discrimination**¹⁰⁶ seeks to guarantee the (a) right to equal treatment before the tribunals and all other organs administering justice and the (b) right of protection against violence or bodily harm (whether inflicted by governing officials, individuals, groups, or institutions) – **Art. 5**.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families¹⁰⁷ (1990) contains the following provisions:

- **Art. 10** – Prohibition of torture or other cruel, inhuman or degrading treatment or punishment;
- **Art. 14** – Prohibition of arbitrary or unlawful interference with privacy, family, home, correspondence or other communications, or unlawful attacks on one's honor and reputation
- **Art. 16** – Guarantees (1) the right to liberty and security; (2) protection against violence, physical injury, threats and intimidation; (3) any identity verification by law enforcement officials must be lawful; (4) the prohibition of collective, arbitrary, or unlawful arrest or

¹⁰² Available at

<https://cms.emergency.unhcr.org/documents/11982/55726/Convention+relating+to+the+Status+of+Refugees+%28signed+28+July+1951%2C+entered+into+force+22+April+1954%29+189+UNTS+150+and+Protocol+relating+to+the+Status+of+Refugees+%28signed+31+January+1967%2C+entered+into+force+4+October+1967%29+606+UNTS+267/0bf3248a-cfa8-4a60-864d-65cdfce1d47>.

¹⁰³ Available at <https://www.ohchr.org/en/ProfessionalInterest/pages/cat.aspx>.

¹⁰⁴ Available at <https://www.ohchr.org/Documents/Publications/training8Rev1en.pdf>.

¹⁰⁵ Available at <https://www.un.org/disabilities/documents/convention/convoptprot-e.pdf>.

¹⁰⁶ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>.

¹⁰⁷ Available at <https://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>.

detention; (5) the right to be informed, upon arrest, of the reasons of the arrest and of the charges in an understandable language; (6) the right to be promptly brought before a judge after arrest; (7) the right to have one's consular authorities informed of one's arrest, to communicate with them, and to be informed of this right and of the rights deriving from relevant treaties; (8) the right to take proceedings before a court when one is deprived of liberty, right to the assistance of an interpreter; (9) the right to compensation after unlawful arrest or detention.

- **Art. 17** – Guarantees the (1) right to be treated with humanity and respect during deprivation of liberty; (2) right of being kept separated from convicted people when accused, right of juveniles to be kept separated from adults; (3) right of people in a State of transit or employment for violation of provisions relating to migration to be kept separated from convicted people and people detained pending trial; (5) same rights as nationals concerning visits from relatives.
- **Art. 18** – Guarantees (1) equality with nationals before the courts and tribunals and right to a fair trial and public hearing by a competent, independent and impartial tribunal; (2) the presumption of innocence; (3) the right to be informed, promptly and in an understandable language, of the nature and cause of charges, right to sufficient time for preparing a defense and right to communicate with counsel of one's own choosing, right to be tried without undue delay, right to be tried in one's presence and with a legal assistance of one's choosing, right to have examined the witnesses, right to the assistance of an interpreter, right to be compelled to testify against oneself or to confess guilt; (4) the right of juveniles to have their age taken into account during the procedure; (5) the right to have one's conviction and sentence reviews by a higher tribunal; (7) the right not to be tried twice for the same crime.
- **Art. 22** – Prohibition of measures of collective expulsion and procedures for lawful expulsion of migrant workers and members of their family.

Besides codified norms, a body of international non-binding instruments has been developed within the framework of the United Nations. The purpose of these instruments is to provide additional guidance and assistance to Member States as the provisions of the existing binding documents are being implemented. Table 1 provides an indicative list of international non-binding instruments pertinent to the protection of fundamental rights during criminal proceedings.

Table 1: Indicative International Non-Binding Instruments

International Instrument	Key Provisions
UN Standard Minimum Rules for the Treatment of Prisoners – the Nelson Mandela Rules ¹⁰⁸ (1955, revised in 2015)	Sets out the basic principles for the treatment of prisoners.
Code of Conduct for Law Enforcement Officials ¹⁰⁹ (1979)	<p>2. Obligation of law enforcement officials to protect human dignity and human rights of all persons in the performance of their duty.</p> <p>5. Prohibition for law enforcement officials to inflict torture, not even invoking superior orders or exceptional circumstances.</p>
Principles of Medical Ethics relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (1982) ¹¹⁰	<p>1. Duty to provide prisoners and detainees with the same protection of physical and mental health afforded to all other people.</p> <p>4. Prohibition for health personnel to assist in the interrogation of prisoners and detainees in a way affecting their physical or mental health condition and to certify their fitness to any form of treatment or punishment which could affect their physical and mental health.</p> <p>6. No derogation from the previous principles, including public emergency.</p>
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ¹¹¹ (1985)	The Declaration defines basic standards for the protection of individuals who have suffered physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.
Basic Principles on the Independence of the Judiciary ¹¹² (1985)	<p>1. Independence of the judiciary.</p> <p>3. Jurisdiction of the judiciary over all issues of a judicial nature.</p> <p>4. No interference with the judicial process.</p> <p>5. Right of everyone to be tried by ordinary courts or tribunals with established legal procedures.</p> <p>6. Obligation to conduct judicial proceedings fairly in the respect of the rights of the parties.</p>

¹⁰⁸ The 1955 version of the UN Standard Minimum Rules is available at https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf; the 2015 version is available at https://www.un.org/en/events/mandeladay/mandela_rules.shtml.

¹⁰⁹ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.

¹¹⁰ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/MedicalEthics.aspx>.

¹¹¹ Available at https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.29_declaration%20victims%20crime%20and%20abuse%20of%20power.pdf.

¹¹² Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

<p>United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)¹¹³ (1985)</p>	<p>6-1. Allowance of appropriate scope for discretion at all stages of proceedings and at the different levels of juvenile justice administration.</p> <p>7-1. Guarantee of basic procedural safeguards (presumption of innocence, right to be notified of the charges, to remain silent, to counsel, to the presence of a parent or guardian, to confront and cross-examine witnesses and to appeal to a higher authority) at all stages of proceedings.</p> <p>8-1. Respect for the right to privacy.</p> <p>10-1. Immediate notification of parents or guardians upon the apprehension of a juvenile.</p> <p>13-1. Use of detention pending trial only as last resort and for the shortest possible period of time.</p> <p>13-2. Replacement of detention pending trial with other measures whenever possible.</p> <p>13-3. Respect of all rights and guarantees of the UN “Standard Minimum Rules for the Treatment of Prisoners” during detention pending trial.</p> <p>13-4. Separation from adults for juveniles under detention pending trial.</p> <p>13-5. Right of juveniles to receive all necessary care, protection, and individual assistance during custody.</p> <p>14-1. Fair and just trial.</p> <p>15-1. Right of the juvenile to be represented by a legal adviser throughout the proceedings.</p> <p>15-2. Entitlement of parents or guardians to participate in the proceedings (it can be denied by the competent authority if it is in the interest of the juvenile).</p>
<p>Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment¹¹⁴ (1988)</p>	<p>1. Humane treatment and respect for the dignity of the human person for persons under any form of detention or imprisonment</p> <p>3. No restriction upon or derogation from human rights of people under detention or imprisonment.</p> <p>6. Prohibition of torture and no justification under any circumstance</p> <p>7-1. States should prohibit by law any act contrary to this body of principles.</p> <p>8. Persons in detention must be, if possible, kept separate from imprisoned persons.</p>

¹¹³ Available at <https://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>.

¹¹⁴ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>.

	<p>10. Right to be informed, at the time of the arrest, of the reason of the arrest and of any charge.</p> <p>11-1. Detainees must be given the opportunity to be heard promptly by a judicial or other authority and they have the right to defend themselves or be assisted by counsel.</p> <p>11-2. Detained people and their counsel must receive prompt and full communication of any order of detention and the reasons therefor.</p> <p>13. At the moment of the arrest and at the commencement of detention or imprisonment, a person must be informed of their rights and how to exercise them.</p> <p>14. Right to have the information translated in a language understandable by the arrested person and to have an interpreter during the subsequent legal proceedings.</p> <p>15. Prohibition of denying the detained or imprison person communication with the outside world for more than a matter of days.</p> <p>16-1. Right to have a person of choice informed of arrest, detention, imprisonment or transfer.</p> <p>16-2. Duty to informed the detainees of their right to communicate with a consular post, national diplomatic mission, or competent international organization.</p> <p>16-3. Guarantee of notification for children or people with special needs.</p> <p>16-4. Possibility of delaying a notification if required by exceptional needs of the investigation.</p> <p>17-1. Right to legal counsel and to be informed about such right.</p> <p>18. Right to communicate and consult with one's legal counsel.</p> <p>19. Right to communicate with one's family and, to a reasonable degree, with the outside world for detained or imprisoned people.</p> <p>21-1. Prohibition of taking advantage of the situation of a detained or imprisoned person to make them confess against themselves or others.</p> <p>21-2. Prohibition to the use of violence, threats or other illicit methods during interrogation.</p> <p>36-2. Prohibition of restrictions during detention pending investigation and trial if not to prevent hindrance to investigation, the administration of justice or maintaining security and good order in the place of detention.</p>
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	<p>37. Prohibition be keep a person under detention pending investigation or trial, unless upon the written order of a judicial or other authority.</p> <p>38. Right for detained people to be tried within a reasonable time or released pending trial.</p>
<p>Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions¹¹⁵ (1989)</p>	<p>1. Prohibition of all extra-legal, arbitrary and summary execution, under any circumstances.</p> <p>4. Obligation to guarantee effective protection to people and groups in danger of extra-legal, arbitrary and summary executions.</p> <p>5. Prohibition of extradition to countries where they would be at risk of extra-legal, arbitrary and summary executions.</p> <p>6. Right to have one's relatives, lawyer and persons of confidence informed about one's custody and whereabouts.</p>
<p>Basic Principles for the Treatment of Prisoners¹¹⁶ (1990)</p>	<p>1. Respect for human dignity and value of prisoners.</p> <p>3. Respect for religious beliefs and cultural precepts of prisoners.</p> <p>5. Respect for human rights and fundamental freedoms of prisoners, except for those limitations made necessary by incarceration.</p> <p>11. Impartiality in the application of the principles.</p>
<p>Basic Principles on the Role of Lawyers¹¹⁷ (1990)</p>	<p>1. Right to call upon the assistance of a lawyer of one's choice.</p> <p>5. Ensuring the right to be immediately informed of the right to be assisted by a lawyer upon arrest or detention.</p> <p>7. Ensuring that all arrested or detained people have prompt access to a lawyer.</p> <p>8. Right to communicate with a lawyer.</p>
<p>Guidelines on the Role of Prosecutors¹¹⁸ (1990)</p>	<p>12. Prosecutors shall perform their duties respecting and protecting dignity and upholding human rights, contributing to due process and the smooth functioning of the criminal justice system.</p> <p>16. Prosecutors shall refuse to use evidence (suspect of having been) obtained through illicit methods, especially torture or other cruel, inhumane or degrading treatment.</p> <p>18. Assuring the full respect of the rights of suspects and victims giving due consideration to waiving prosecution, discontinuing proceedings, or diverting criminal cases from the formal justice system.</p>

¹¹⁵ Available at <https://www.ohchr.org/Documents/ProfessionalInterest/executions.pdf>.

¹¹⁶ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx>.

¹¹⁷ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

¹¹⁸ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx>.

	<p>19. Taking into consideration the nature and gravity of an offence, protection of society and the personality and background of a juvenile when deciding whether or not to prosecute that juvenile.</p>
<p>United Nations Rules for the Protection of Juveniles Deprived of their Liberty¹¹⁹ (1990)</p>	<p>1. Imprisonment as last resort for juveniles.</p> <p>6. Right of juveniles to have the service of an interpreter free of charge.</p> <p>11a. The age limit under which children cannot be deprived of their liberty shall be determined by law.</p> <p>17. Presumption of innocence, avoidance of detention before trial when possible, separation of untried juveniles from convicted juveniles.</p> <p>22. Parents or guardians should be immediately informed on admission, place, transfer and release.</p> <p>24. Right to receive, on admission, a copy of the rules governing the facility and of rights and obligations in an understandable language or form.</p>
<p>Basic Principles on the Use of Force and Firearms by Law Enforcement Officials¹²⁰ (1990)</p>	<p>15. Prohibition for law enforcement officials to use force against people in custody or detention, unless necessary.</p> <p>16. Prohibition for law enforcement officials of using firearms against people in custody or detention, unless necessary.</p>
<p>Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care¹²¹ (1991)</p>	<p>1-6. Right to receive legal counsel for people with mental illness.</p> <p>20-2. Right of criminal offenders with mental illness to receive the best available mental healthcare.</p>
<p>Declaration on the Protection of All Persons from Enforced Disappearance¹²² (1992)</p>	<p>Art. 2 (1): No State shall practise, permit or tolerate enforced disappearances.</p> <p>Art. 2 (2): States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.</p> <p>Art. 3: Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.</p>

¹¹⁹ Available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/JuvenilesDeprivedOfLiberty.aspx>.

¹²⁰ Available at <https://www.ohchr.org/en/professionalinterest/pages/useofforceandfirearms.aspx>.

¹²¹ Available at https://www.who.int/mental_health/policy/en/UN_Resolution_on_protection_of_persons_with_mental_illness.pdf.

¹²² Available at <https://www.ohchr.org/en/professionalinterest/pages/enforceddisappearance.aspx>.

The **European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)**¹²³ addresses the right to life (**Art. 2**), prohibition of torture (**Art. 3**), the right to liberty and security (**Art. 5**), and the right to fair trial (**Art. 6**). **Art. 5** of the Convention specifically enumerates the grounds, which can lawfully justify a deprivation of liberty in the Contracting States. This list is exhaustive and ‘must be interpreted strictly’.¹²⁴

Article 5

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:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation 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;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer 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.

¹²³ Available at https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹²⁴ United Nations, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003, available at www.ohchr.org/Documents/Publications/HRAdministrationJustice.pdf.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Art. 55 of the Convention addresses the rights of persons during an investigation underscoring the right not to incriminate one's self; the right not to be subject to coercion, threats, torture or other cruel, inhuman or degrading treatment or punishment; right to translation; the right not to be subjected to arbitrary arrest or detention; Upon arrest, the right to be informed; the right to remain silent; the right to legal assistance; and the right to be questioned in presence of counsel. Additional relevant articles include **Art. 59** (Arrest proceedings in the custodial State); **Art. 63** (Trial in the presence of the accused); **Art. 66** (Presumption of innocence); **Art. 67** (Rights of the accused), **Art. 69** on the non-admissibility of evidence obtained by means of a violation of this Statute or of internationally recognized human rights and **Art. 92** addressing provisional arrest.

Protocol No. 7 to the Convention **for the Protection of Human Rights and Fundamental Freedoms** defines procedural safeguards relating to expulsion of aliens (**Art. 1**); and underscores the right of appeal in criminal matters (**Art. 2**) and the right not to be tried or punished twice (**Art. 3**).

Other relevant international agreements that have been adopted within the framework of the Council of Europe include:

- **European Convention on Extradition**,¹²⁵
- **European Convention on the International Validity of Criminal Judgments**,¹²⁶
- **European Agreement on the Transfer of Proceedings in Criminal Matters**,¹²⁷
- **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**.¹²⁸

Other similar international legal instruments that have been adopted at regional level include:

- **American Convention on Human Rights**¹²⁹ (1969);
- **African Charter on Human and Peoples Rights**¹³⁰ (1981);

¹²⁵ Available at <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024>.

¹²⁶ Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680072d3b>.

¹²⁷ Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680072d42>.

¹²⁸ Available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007a67f>.

¹²⁹ Available at <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>.

¹³⁰ Available at <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>.

- **ASEAN Human Rights Declaration**¹³¹ (2012).

3.2 EU Regulatory Instruments

The **Charter of Fundamental Rights of the European Union**¹³² guarantees the right to human dignity (**Art. 1**), the right to life (**Art. 2**), and the freedom from torture and inhuman or degrading treatment or punishment (**Art. 4**). Chapter VI of the Charter titled *Justice* addresses criminal procedural rights in the following terms

- **Art. 47** – Right to an effective remedy and to a fair trial.
- **Art. 48** – Presumption of innocence and right of defence.
- **Art. 49** - Principles of legality and proportionality of criminal offences and penalties.
- **Art. 50** – Right not to be tried or punished twice in criminal proceedings for the same criminal offence.

The **Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings** was adopted by the Council of the European Union in 2009.¹³³ The Roadmap is also part of the *Stockholm Programme - An Open and Secure Europe Serving and Protecting the Citizens* that was adopted by the European Council shortly thereafter. The Roadmap comprises six elements:

- **Measure A:** Translation and Interpretation
- **Measure B:** Information on Rights and Information about the Charges
- **Measure C:** Legal Advice and Legal Aid
- **Measure D:** Communication with Relatives, Employers and Consular Authorities
- **Measure E:** Special Safeguards for Suspected or Accused Persons who are Vulnerable
- **Measure F:** A Green Paper on Pre-Trial Detention – *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*¹³⁴

Key EU Directives that address the procedural rights of suspects and accused in criminal proceedings include:

- **Directive (EU) 2016/343** on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;¹³⁵
- **Directive (EU) 2016/800** on procedural safeguards for children who are suspects or accused persons in criminal proceedings;¹³⁶

¹³¹ Available at https://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf.

¹³² Available at https://www.europarl.europa.eu/charter/pdf/text_en.pdf.

¹³³ Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009G1204\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009G1204(01)).

¹³⁴ Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011DC0327>.

¹³⁵ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0343>.

¹³⁶ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L0800>.

- **Directive (EU) 2016/1919** on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings;¹³⁷
- **Directive (EU) 2013/48/EU** on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.¹³⁸

Another relevant regulatory instrument is **2002/584/JHA: Council Framework Decision on the European arrest warrant and the surrender procedures between Member States** that was adopted on 13 June 2002.¹³⁹

Table 2 provides an overview of the key elements of the listed Directives and the Council Framework Decision in relation to the measures defined by the **Roadmap**.

Table 2: Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings

	Directive (EU) 2016/343	Directive (EU) 2016/800	Directive (EU) 2016/1919	Directive (EU) 2013/48/EU	2002/584/JHA Council Framework Decision
Measure A		Art. 13 (2): treatment of cases taking into consideration communication difficulties that the child may have			Art. 8 (2): duty to translate the European arrest warrant in (one of) the official language(s) of the executing Member State Art. 11 (2): right to be assisted by an interpreter
Measure B	Art. 8(2a): right to be informed of the trial and of the consequences of non-appearance Art. 8 (4): right to be informed about	Art. 4: right to be informed about the criminal proceedings and about one's rights: modes of		Art. 9: right to be informed on the possibility and conditions for waiver	Art. 5 (1): guarantee of information about the date and place of hearing as a condition for the execution of the

¹³⁷ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016L1919>.

¹³⁸ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

¹³⁹ Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002F0584>.

	the decision and the possibility to challenge it and the possibility of a new trial or other legal remedy in case of a decision taken in the absence of the suspected / accused	information, Letter of Rights			European arrest warrant Art. 11 (1): right of the requested person to be informed of the European arrest warrant and its contents and of the possibility to surrender (upon arrest) Art. 13 (2): right to express consent to surrender only voluntarily and in full awareness of the consequences
Measure C	Art. 8 (2b): right to be represented by a mandated lawyer in case of absence at the trial	Art. 6: assistance by a lawyer Art. 18: right to legal aid	Art. 1: subject matter (right to legal aid) Art. 4: legal aid in criminal proceedings Art. 5: legal aid in European arrest warrant proceedings Art. 6: decisions regarding the granting of legal aid Art. 7: quality of legal aid services and training	Art. 1: subject matter (access to a lawyer) Art. 3: right to access to a lawyer in criminal proceedings Art. 4: confidentiality Art. 10: right to access to a lawyer in European arrest warrant proceedings Art. 11: legal aid	Art. 11 (2): right to be assisted by a legal counsel Art. 13 (2): legal counsel when consenting to surrender
Measure D		Art. 5: right to have the holder of parental responsibility informed		Art. 1: subject matter (right to have a third party informed of the deprivation of liberty and to communicate with third persons and consular authorities)	

				<p>Art. 5: right to have a third person informed of the deprivation of liberty</p> <p>Art. 6: right to communicate, while deprived of liberty, with third persons</p> <p>Art. 7: right to communicate with consular authorities</p>	
Measure E		<p>Art. 1: subject matter (procedural safeguards for children)</p> <p>Art. 7 (2): right to individual assessment taking into consideration specific vulnerabilities of the child</p> <p>Art. 12 (5b): appropriate measures for the detention of children with physical, sensory or learning disabilities</p> <p>Art. 20 (1): training to communication in a language adapted to the child</p>	Art. 9: special needs of vulnerable persons	<p>Art. 5 (2) and 5 (4): right for children to have the holder of parental responsibility (2) and the authority responsible for the protection of the welfare of children (4) informed</p> <p>Art. 13: special needs of vulnerable persons</p>	
Measure F					

3.3 National Legal Instruments

This sub-section reviews how criminal procedural rights are addressed in the national legislation of countries represented in the ***FAIRNESS project: Implementation of the Stockholm's Roadmap in Cases of Terrorism and Radicalisation***, as well as two non-EU countries: New Zealand and

Thailand. The non-EU countries have been selected because of their experience with tackling violent extremism and terrorism.

Belgium

Constitution of the Kingdom of Belgium:

- **Article 12:** individual freedom, prohibition of unlawful prosecution, no arrest without a reasoned judge's order or in case of flagrant offense
- **Article 13:** no one can be separated against their will from the judge assigned to him
- **Article 14:** prohibition of unlawful punishment
- **Article 14bis:** abolition of capital punishment
- **Article 23:** right to live with human dignity, including the right to legal assistance

Law on the transposition of the Directive 2013/48/EU (Art. 2) – 28 October 2016.

Law on the European Arrest Warrant: Notifications under **Art. 6.3, 25.2** of EAW by Belgium.
Notification under **Art. 7.1.** EAW by Belgium – 19 December 2003.

Bulgaria

Constitution of the Republic of Bulgaria:

- **Article 29:** prohibition of torture and cruel, inhuman or degrading treatment and forcible assimilation
- **Article 30:** 1. Right to personal freedom and inviolability 2. Prohibition of unlawful detention or inspection or other infringements of personal inviolability 4. Right to legal counsel from the moment of detention or of being charged 5. Right to legal counsel in private and to the confidentiality of such communication
- **Article 31:** 1. Right of people charged with a crime to be brought before a court within a reasonable time 2. Right not to be forced of pleading guilty and right not to be convicted only by virtue of a confession 3. Presumption of innocence 4. Prohibition of restricting the rights of the defendant beyond what is necessary for the purpose of a fair trial 5. Prohibition of keeping prisoners in conditions contrary to fundamental human rights and their exercise 6. Prohibition of keeping prisoners in facilities different from those established by law 7. No limitation to the prosecution and execution of a sentence for crimes against peace and humanity
- **Article 121:** 1. Duty of the courts to ensure equality and mutual challenge ability of the parties to a judicial trial 2. Judicial proceedings shall ensure the establishment of the truth; 3. Hearing should be public, unless stated otherwise by a law 4. All court rulings should be motivated

Criminal Procedure Code:

- **Article 6:** 1. Administration of justice on criminal cases solely by the Courts established by the Constitution 2. Prohibition of Courts of emergency jurisdiction on criminal cases

- **Article 7:** central place of the Court procedure
- **Article 8:** participation of jury in the Court body
- **Article 9:** requirement for appointment
- **Article 10:** independence of the bodies in the penal procedure
- **Article 11:** equality of citizens in the penal procedure
- **Article 12:** equal rights of the parties
- **Article 13:** detection of the objective truth
- **Article 14:** taking decisions by inner conviction
- **Article 15:** 1. right to defence 2. right to be provided with all procedural remedies necessary for the defence of their rights 3. right to be informed on one's procedural rights and to be provided with the possibility to exercise said rights 4. right to be provided with the procedural remedies necessary for the defence of their rights
- **Article 16:** presumption of innocence
- **Article 17:** 1. Prohibition of measures of coercion, except if provided by this Code 2. Prohibition of detaining someone for more than 24 hours without permission of the Court 3. Right to have a person of choice immediately informed of the detainment 4. Right for foreigners to have the Ministry of Foreign affairs of their country immediately informed of the detainment
- **Article 18:** decisions must be made on the basis of evidencing material examined in person (exceptions provided in this Code)
- **Article 19:** oral penal procedure
- **Article 20:** publicity of Court sessions
- **Article 21:** 1. Penal procedures should be conducted in Bulgarian 2. Right of people who do not speak Bulgarian to use another language; in this case, an interpreter should be appointed
- **Article 22:** hearing and deciding the cases within a reasonable term.

Germany

Constitution of the Federal Republic of Germany:

- **Article 103 (Fair trial):** 1. Right to a hearing according to the law 2. Prohibition of punishing an act which was not a criminal offense when it was committed 3. Prohibition of punishing a person more than once for the same crime
- **Article 104 (Deprivation of liberty):** 1. Prohibition of unlawful restrictions of liberty, prohibition of mental or physical mistreatment of people in custody 2. Permissibility or continuation of any deprivation of liberty can only be ruled by a judge 3. A detained person suspected of a crime should be brought before a judge no longer than the day after the arrest 4. Right to have a person of choice notified of the deprivation of liberty.

The German Code of Criminal Procedure:

- **Section 112 (Admissibility of Remand Detention, Grounds for arrest):** 1. Possibility of remand detention only if the accused is strongly suspected of the offense and if there is a ground for arrest 3. Conditions of existence of a ground for arrest 3. Other conditions for remand detention
- **Section 112a (Further grounds for arrest):** 1. Strong suspects which can determine a ground for arrest
- **Section 113 (Restrictions Applying to remand Detention)**
- **Section 230 (Failure of the Defendant to Appear):** 1. No main hearing against a defendant who fails to appear 2. Order to bring the defendant before the Court or warrant to arrested
- **Section 231 (Defendant's Duty to be Present)**
- **Section 232 (Main Hearing Despite the Defendant's Failure to Appear)**
- **Section 285 (Securing Evidence):** no main hearing against a person who is absent. Proceedings in the absence of the person just for the purpose of securing evidence
- **Section 295 (Safe Conduct).**

Youth Courts Law:

- **Section 3 (Criminal liability)**
- **Section 18 (Duration of youth penalty):** 1. Ten years should be the maximum duration of youth penalty for serious criminal offenses
- **Section 33 (Youth courts)**
- **Section 38 (Youth courts assistance service):** 3. Involvement, at all stages of the proceedings, of the youth court assistance service
- **Section 48 (Exclusion of the public)**
- **Section 50 (Presence at the main hearing):** 1. Main hearing in the absence of the defendant only if permissible in general proceedings, if there are special reasons and with the approval of the public prosecutor 2. Obligation to summon the parent or guardian and the legal representative 3. Right to have the representative of the youth courts welfare office informed on main hearing and right of said representative to speak on request
- **Section 51 (Temporary exclusion of participants):** 1. Possibility of excluding the accused if disadvantageous to his/her education and development
- **Section 68 (Compulsory defence counsel):** conditions under which the appointment of a defence counsel is compulsory.

Italy

Constitution of the Republic of Italy:

- **Article 13:** inviolability of personal liberty, prohibition of unlawful restrictions of liberty, possibility for the police to take provisional measures in exceptional circumstances as defined by the law with obligation to refer within 48 hours to the judiciary for validation, obligation to punish any act of physical and moral violence against a person, maximum duration of preventive detention established by law.
- **Article 24:** right to bring cases before a court to protect one's rights, inviolable right to defence at every stage and instance of legal proceedings, right of poor to proper means for action or defence, conditions and forms of reparation in case of judicial errors should be defined by the law.
- **Article 25:** prohibition of removing a case from the court seized with it, prohibition of unlawful punishment, prohibition of unlawful restriction of a person's liberty.
- **Article 27:** personal nature of criminal responsibility, presumption of innocence, prohibition of inhuman punishments, prohibition of death penalty.
- **Article 111:** jurisdiction is implemented through due process established by law. Court trials are conducted with adversary proceedings and the parties have a right to equal conditions before an impartial judge. Reasonable duration of trials. Right of the alleged offender to be promptly informed of the charges and to have the time and condition to prepare a defence. Right to cross-examine the accusers and to produce evidence in favour of the defence. Right of the defendant to have an interpreter in case they do not speak the language. Prohibition of establishing the guilt of the defendant on the basis of statements of persons who have voluntarily avoided cross-examination. All judicial decisions shall include a statement of reasons. Right to appeals to the Court of Cassation against sentences affecting personal freedom.

Decree of the President of the Republic on the Approval of the Criminal Procedure Involving Juvenile Defendants:

- **Article 6:** 1. Obligation for the judicial authority to use juvenile services for the administration of justice and for assistance services of local bodies.
- **Article 7:** 1. Obligation to notify parents or guardians.
- **Article 8:** 1. Obligation for the judge to certify that the defendant is a minor 2. When there are doubt on the age, the defendant is presumed to be a minor 3. The previous two dispositions apply when the defendant is believed to be younger than 14.
- **Article 9:** 1. Acquisition of elements, by the public prosecutor and the judge, about the conditions and personal, family, social and environmental resources of the minor in order to ascertain attribution, degree of responsibility and social relevance of the act and to adopt penal and civil measures.

- **Article 12:** 1. Insurance of affective and psychological assistance to minor defendants, in every degree and instance, through the presence of parents or other people of choice of the minor and approved by the judicial authority.
- **Article 13:** prohibition of publication and diffusion of news or pictures which could make the minor identifiable.
- **Article 18:** obligation, for the judiciary police officials arresting a minor, to immediately notify the public prosecutor, the parents or guardians and the juvenile services of the administration of justice.
- **Article 23:** precautionary custody.
- **Article 26:** 1. Minors younger than 14 are non-imputable.
- **Article 28:** 1. Possibility of suspension of trial in order to judge the personality of the minor.

Portugal

Constitution of the Portuguese Republic:

- **Article 32:** 1. Right to all necessary safeguards for the defence, including the right to appeal 2. Presumption of innocence and quick trial 3. Right to choose counsel and right to be assisted in every procedural act 4. Principle of pleading and counter-pleading 8. Nullity of all evidence obtained by torture, coercion, infringement or personal physical or moral integrity or improper intromission 10. Right to be heard and to a defence.
- **Article 33:** 1. Prohibition of deporting Portuguese citizens from Portuguese territory; 2. Only a judicial authority can order the deportation of someone legally present in the national territory; 3. Extradition of Portuguese citizens from Portuguese territory, conditions: international agreement, cases of terrorism or international organized crime, guarantees of just and fair trial in the applicant state's legal system; 6. No extradition with the risk of harm to physical integrity; 7. Only a judicial authority can order extradition.

Code of Criminal Procedure:

- **Article 57:** any person formally charged acquires the status of defendant, which remains valid during all stages of proceedings.
- **Article 58:** 2. Right to be informed of one's status of defendant; 3. Obligation to report, within 10 days, the status of defendant to the judicial authority, who has 10 days to validate (or not validate); 4. Right of the defendant to be informed of the particulars of the case and of the defence counsel; 5. Breaches in formalities prevent the use of statements made by the concerned person as evidence.
- **Article 59:** 2. A person suspected of a criminal offense has the right to acquire the status of defendant at his/her request.
- **Article 60:** when a person acquires the status of the defendant, they are ensured the exercise of procedural rights and values.

- **Article 61:** 1. Rights at all stages of proceedings: right to attend procedural acts directly affecting one's self, right to be heard by the court or examining judge, right to be informed of any charges before making statements before an authority, right to remain silent, right to choose a lawyer or to have a defence counsel appointed, right to be assisted by a defence counsel and right to contact the defence counsel privately when detained, right to take part in the inquiry and examination, to propose evidence and to require necessary measures, right to be informed of one's rights by the judicial authority, right to appeal under the law against decisions 2. Communication with defence council should occur visibly for security reasons, but without being overheard by the agent.
- **Article 62:** 1. Right to choose a lawyer at any stage of proceedings.
- **Article 64:** cases in which assistance by a defence counsel is compulsory.
- **Article 66:** 1. Right of the defendant to be notified of the appointment of a defence counsel 3. The court may replace the appointed counsel at the defendant request, on reasonable grounds.

Law No. 33/2019, corresponding to **Directive (EU) 2016/800** – defines the right of minors from 16 to 18 year-old who are involved as suspects or defendants in a criminal process or object of a European Arrest Warrant to be accompanied by their parents or trusted adults (**Law No. 33/2019** of May 22).

As paragraph **g)**, **no. 1, Art. 61** states, it is the right of the minor-defendant: “To be accompanied, in case the defendant is a minor, during the procedures In which the defendant participates, by the holders of parental responsibility, their legal representative or to the person who has in fact the custody of the minor, or, when it is impossible to contact those people, or under special circumstances based on the interest of the defendant, or on the needs imposed by the process, and only for as long as those circumstances persist, by another reliable person indicated by the minor and accepted by the competent judicial authority”.

Moreover, the adults in question are entitled to receive information on the criminal process, as the following transcriptions demonstrate:

No. 7 Art. 58: Without prejudice to the pursuit of the process, the constitution of the defendant who is a minor is communicated, immediately, to the holders of parental responsibility, their legal representative or to the person who has in fact the custody of the minor.

No. 11, Art. 194: If the defendant is a minor, the provision referred to in no. 1 is communicated, immediately to the holders of parental responsibility, their legal representative or to the person who has in fact the custody of the minor.

The legislation now mandates the production of a social report regarding the procedures:

- **Para. g), no. 3 Art. 283:** The indication of the social report or social reinsertion services information, when the defendant is a minor, except when it has not yet been added and is dispensable regarding the minor's superior interest. (**Law No. 33/2019** of May 22).

- **No 2, Art. 370:** In the case of a defendant who is a minor, if the social report or social reinsertion services information has not yet been added to the processes, said addition must happen within a 30-day delay, unless its waiver is soundly justified according to the case's circumstances and as long as it is compatible to the superior interest of the minor.

On the other hand, the privacy of the minor is further protected since there are greater restrictions on the access of third parties to the minor's records of questioning:

- **No. 3 Art. 87:** In case of a process for a human trafficking crime, or a crime against the liberty and sexual self-determination, or that involves minor defendants, the procedural acts are carried, as a rule, with not publicity.
- **No. 2 Art. 90:** Interrogation and other procedural records in which the minor defendant participates are to be excluded from the previous number.

New Zealand¹⁴⁰

In New Zealand, criminal offenses are grouped into four categories, based on their level of seriousness. The most serious is category 4, which includes, among others, acts of terrorism (including conspiring to commit one, attempting, inciting or procuring or attempting to procure any person to commit one, and being an accessory after the fact to that offense) (CPA 2011, Part 1, Section 6, 2a-c). Trial for such offenses is a jury trial in the High Court (CPA 2011, Part 1, Section 4, 1r). In case of jury trial and after the transferring to the High Court, only a lawyer can conduct the proceedings against the defendant (CPA 2011, Part 1, Section 10, 3b). The defendant's case, instead, can be conducted by a lawyer or by the defendant personally (CPA 2011, Part 1, Section 11, a-b).

Defendants can enter a plea and they can plead either guilty or not guilty. When defendants are not represented by a lawyer, the court must make sure that they have been informed of their rights to legal representation, have fully understood those rights, and have had reasonable opportunity to exercise them; moreover, the substance of the charge needs to be read to the defendant (CPA 2011, Part 3, Subpart 1, Section 37). A not guilty plea to a charge for category 4 can only be entered in the High Court (CPA 2011, Part 3, Subpart 1, Section 40). If a plea of conviction is entered, the court verifies that the defendant has already been convicted for that same offense, the charge must be dismissed (CPA 2011, Part 3, Subpart 1, Section 46, 1).

A defendant found guilty in their absence may apply for an order granting a retrial of the charge (CPA 2011, Part 5, Section 125, 1).

The defendant has the right of appeal against pre-trial decisions (CPA 2011, Part 6, Sections 217-218) and against determination of first appeal court (CPA 2011, Part 6, Section 223). A person

¹⁴⁰ Sources: Criminal Procedure Act 2011 (CPA 2011), Legal Services Act 2011 (LSA 2011).

convicted of any offense can appeal to the first appeal court against the conviction (CPA 2011, Part 6, Section 229).

The provisions contained in the Criminal Procedure Act 2011 do not apply to proceedings in the Youth Court or proceedings on appeal from any decision of the Youth Court (CPA 2011, Part 1, Section 7, 3).

Legal aid must be granted in respect of criminal proceedings in the High Court (LSA 2011, Part 2, Section 6).

Defence rights during **criminal proceedings** in New Zealand:¹⁴¹

- Right to be informed, upon arrest or detention, of the reasons for one's arrest or detention, of one's right to remain silent, and of one's right to consult or instruct a lawyer without charge or delay. Also, right to have an interpreter provided if one cannot understand the language in which such information is given.
- Right to be informed, promptly and in detail, of the charges against one, in a language that one can understand.
- Right, for non-citizens, to have one's own consulate informed of one's arrest
- Right, for people under 17, to have parents or guardians informed of one's arrest. For people over 17, this right is not automatic: one has a right to have someone informed of where one is, but not necessarily to call in person.
- Right to a lawyer, right to remain silent in the absence of a lawyer, right to speak to a lawyer for free under the Police Detention Legal Assistance (PDLA) service, right to speak to the lawyer in private.
- Right to a translator/interpreter
- Right to remain silent during police interrogation
- Right to be informed of the reason for one's arrest. However, details may not be given immediately, depending on the circumstances and the seriousness of the case.
- Right to be charged promptly or released from custody: **this point is problematic**. There is no definition of what is considered "prompt" (but case law suggests that 48 hours is not- in simple cases 24 hours should usually be the limit). If charged, one will appear before the court (usually the next working day), which decides whether to release one on bail before trial (factors: links to the country, seriousness of crime, likely flight risk). If not released, one has a right to be tried without undue delay: **this point is also problematic**. There is not established limit to what an "undue delay" is. Delays in the court process are relatively common.
- Right to be provided, on request, with a list of names and telephone numbers of local PDLA lawyers by the police. Right to appoint one's own lawyer.

¹⁴¹ Leaflet "Criminal Proceedings and Defence Rights in New Zealand", Fair Trials International, February 2015, available at <https://www.fairtrials.org/wp-content/uploads/Criminal-Proceedings-and-Defence-Rights-in-New-Zealand.pdf>.

- Right to be assisted by a lawyer even if one cannot afford it: possibility to apply for legal aid.
- Right to have evidence disclosed by the prosecutor to the defendant or their lawyer sufficiently before the trial.
- Right to have one's lawyer call and cross-examine witnesses
- **No** right to have written evidence translated
- Right to have one's interpreter in court
- **No** right to have a copy of the judgment translated
- Right to appeal against a Conviction and against a Sentence (one could be required to pay one's lawyer more money for that). Also, appealing against a sentence could even result in an increased sentence, and appealing against a conviction could result in re-trial.
- For non-citizens, risk of deportation after serving one's sentence (even for owners of permanent residence visa) depending on many factors (seriousness of the crime, past convictions, character, ties to New Zealand, human rights issue with deportation).

Thailand

Criminal Procedure Code (1934, 2008):

- **Section 7/1:** right of an arrested person to notify or have notified their relatives; right to talk with a lawyer in private; right to get in touch with relatives as may be reasonable; right to be cured when ill; right to be informed of one's rights.
- **Section 8:** right to a timely, continuous, and fair trial; right to have a counsel in the preliminary examination and the trial; right to discuss privately with the lawyer; right to examine evidence.
- **Section 13:** right, in case the alleged offender does not understand Thai, to have an interpreter provided without delay (by the inquiry official, the Public Prosecutor or the Court, which must also cover the expenses for the interpreter).
- **Section 14:** right, for people who are found to be not sound in their mind or able to put up a defence after medical examination, to have the inquiry, preliminary examination or trial suspended.
- **Sections 52-53:** right of a person required to appear during an inquiry, preliminary examination, or trial, to receive a summon with the details of the appearance.
- **Section 54:** right to be given the opportunity to appear on the date and at the time fixed in the summons.
- **Section 57:** criminal warrant is required for arrest, detention, imprisonment, and search for the person or property in their private place.
- **Section 71:** if the accused person for whom the warrant of arrest or imprisonment has been required is younger than 18, a pregnant woman, a woman who has given birth less than three months before, or an ill person, the Court will not issue the mandate or will issue the release.

- **Section 78:** government or police officials must not arrest anyone without an arrest warrant, with some exceptions: flagrant offense, person representing a threat, cause to issue an arrest mandate, risk of escape or evasion.
- **Section 81:** arrest in private place is prohibited (except in executions of provisions of this Code).
- **Section 83:** right to be notified, upon arrest, of the reasons for the arrest, of the right to make a statement or not, of the fact that such saying can be used as evidence during trial, of the right to see and talk with a lawyer, right to have a third person notified of the arrest (unless it obstructs the arrest, restrains the arrested person, or causes non-safety for someone).
- **Section 85:** search and seizure of all articles of the arrested person which could be used as evidence must be conducted with due property. Only a woman can do it on another woman.
- **Section 86:** prohibition of means restraining the arrested person more than necessary to prevent escape.
- **Section 92:** prohibition of searches in private place without the search warrant or Court's order, except in these cases: if the inspector is a government official or police official, in the case of scream from help from inside the private place, in case of offense being committed in the private place, in case the person is being followed and hides in the private place.
- **Section 93:** prohibition of searches of any person in the public place, unless the search is made by the administrative or police officials when there is ground to believe that the person has the instrument to commit an offense.
- **Section 96:** inspections in the private place must be made in the daylight, unless they do not end before the night, in case of emergency or other law prescribing inspection at night, in case of permission of the Court.
- **Section 98:** a search in a private place shall be limited to the person or article to be found, except in case of a search for unspecified articles or in case the official has the power to arrest or seize any person or article in the place (provided that they are liable to arrest or seizure).
- **Section 99:** the official must avoid causing damage and disorder as much as possible during searches in a private place.
- **Section 102:** searches in private places should be made, when possible, in the presence of the alleged offender or accused.
- **Section 130:** right to have the inquiry started without delay.
- **Section 131/1:** any sample of body cells of the accused to be used as evidence must be collected with the consent of the accused, must not be dangerous for the body or health of the person, it must be made only if necessary and reasonable and cause the less pain possible.
- **Section 132:** (1) if the body of a woman accused must be examined, only another woman can be the inspector.

- **Section 134/3:** right to let the lawyer or a trusted person hear one's interrogation.
- **Section 134/4:** right to be informed, by the inquiry official, to the right to make a statement or not and of the right to let the lawyer or trusted person hear the interrogation.
- **Section 172:** Trial and taking of evidence should occur in an open Court and in the presence of the accused, unless otherwise provided.
- **Section 173:** a lawyer should always be appointed in the case of the rate of punishment of death or if the accused person is younger than 18 or in the case of the rate of imprisonment.
- **Section 192:** right not to be judged for anything not included in the charge
- **Section 193:** right to appeal against any judgment or order of a Court of First Instance, except when prohibited by law.
- **Section 216:** right to lodge an appeal against any judgment or order of the Appeal Court within one month.

4. A Delicate Balance: Human Rights, Counter-Terrorism, and Securitisation

This Section focuses on the need for safeguarding the fundamental rights of suspects and accused of terrorism- and radicalisation-related crimes as an essential condition for strengthening international, national, and societal security. Effective law enforcement that is line with the established international human rights standards should be regarded as the cornerstone of the individual and collective efforts to prevent and counter radicalisation, violent extremism, and terrorism.

4.1 Criminal Procedural Rights and Counter-Terrorism

As noted by the **Office of the United Nations High Commissioner for Human Rights**, counter-terrorism and protection of human rights are complementary and mutually reinforcing objectives of States.¹⁴² The overwhelming majority of counter-terrorism measures are adopted on the basis of ordinary legislation, which allows restrictions on the enjoyment of certain human rights just in a restricted set of exceptional national circumstances. Challenges arise in balancing counter-terrorism and human rights, but they can be solved within the framework of international law. In fact, international human rights law allows State to **limit the exercise of certain rights**. However, in order to be legitimate, such limitations must meet three criteria: prescription by law, pursuance of one or more specific legitimate purposes, and necessity and proportionality. Moreover, in a limited set of circumstances (e.g. public emergency), States may be allowed to **derogate from some human rights provisions**. Derogation can only be made if it is strictly necessary for the life of the nation, necessity must be defined in both territorial and temporal scope, and the measures

¹⁴² Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, 2008, available at <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

must always comply with other obligations under international law.¹⁴³ **Procedural guarantees** are of extreme importance as well: the Human Rights Committee has stated that the requirements for a fair trial must be respected even during a state of emergency. Also, whether or not terrorist acts or threats provide grounds for a state of emergency must be evaluated case by case.

The **Office of the United Nations High Commissioner for Human Rights** has identified the following areas of concern:

- **Challenges to the right to life.** Some States have enacted counter-terrorism measures including **deliberate or targeted killings** of individuals as an alternative to bringing them to justice, despite the statement of the Human Rights Committee that these killings should not be used as a deterrent or punishment and that the principle of proportionality should always be applied. Other measures adopted by States and constituting a challenge to the right to life are “**shoot-to-kill**” law enforcement policies. The use of lethal force can only be considered lawful if it complies with the principle of necessity (self-defence or defence of another person’s life) and the principle of proportionality, and suspects should be given the possibility to surrender.
- **Challenges to the prohibition against torture.** The prohibition against torture is absolute but, in practice, States have adopted counter-terrorism policies and methods undermining it.
- **Challenges involved in the transfer of individuals suspected of terrorist activity.** The transfer of detainees must always be implemented in a transparent way and in compliance with human rights and the rule of law. Any deprivation of liberty must be lawful, detainees must be informed of reasons and charges against them and provided with legal counsel and they must be protected against human rights abuses. Moreover, States have obligations to ensure that persons under their jurisdiction are not transferred to places where they are likely to be subjected to torture and that their territory is not used for such transfers.
- **Challenges to liberty and security of the person.** The protection against unlawful or arbitrary interference with one’s liberty is still valid during criminal proceedings. In practice, however, States have adopted counter-terrorism measures affecting the liberty of people, such as: pre-trial procedures for terrorism offenses, pre-trial detention, administrative detention, control orders, and compulsory hearings. States may lawfully detain suspects, but such a measure must always comply with international and regional human rights law (liberty and security of people), the right to recognition before the law, and the right to due process.
- **Challenges to the principle of non-discrimination.** The principle of non-discrimination is part of *ius cogens* (no derogation is admissible under any circumstances) and, in the context of counter-terrorism, the Committee on the Elimination of Racial Discrimination has stated that said principle cannot be limited. The process of profiling determines a

¹⁴³ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, 2008, available at <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

challenge to this principle: it is a permissible means of investigation but, if the profiles used are broad and reflective of unexamined generalizations, they are contrary to human rights (especially when profiling is based on someone's ethnic and national origin).

- **Challenges to the principle of due process and the right to a fair trial.** Human rights protections apply to all alleged criminals, including terrorist, and they comprise: presumption of innocence, the right to a hearing with due guarantees and within a reasonable time (by a competent, independent and impartial tribunal), the right to have a conviction and sentence reviewed by a higher tribunal satisfying the same standards., the right to a fair trial, the right to equality before the courts and tribunal. There are issues related to terrorism and human rights, such as the administration of justice through military tribunals and the listing and de-listing of individuals and groups as terrorist or associated entities. Concerning this latter practice, fair and clear procedures should be guaranteed.
- **Challenges to the principle of legality.** The existing international legal framework refers to terrorism but does not give a clear definition of it, leaving this task to the States and therefore allowing for human rights abuses and the misuse of the term. One example is the principle of legality: a vague definition may be used by States to cover peaceful acts.
- **Challenges to the freedom of expression.** Incitement to terrorism is a common strategy used by terrorist organizations and prohibiting such incitement is part of the protection of national security and public order. However, restrictions must be necessary and proportional, as freedom of expression is a fundamental value of democratic societies.
- **Challenges to the freedom of association.** Freedom of association is central in democratic societies but, often, it is limited in order to fight terrorist threats. Such restrictions must always be taken in order to preserve national security and never to oppress the population or suffocate the opposition. Again, a clear definition of terrorism is necessary. Any decision to prohibit a certain group or association should be analysed case by case and all measures of limitation must be subject to judicial oversight.
- **Challenges to the right to privacy.** "Privacy" refers to a person's identity and private life. States have been enacting several measures collecting information about people, therefore limiting their privacy. Any interference with privacy must be lawful, necessary and proportionate and, when data are collected, any unlawful or arbitrary access, disclosure or use must be prevented.
- **Challenges to economic, social and cultural rights.** Despite not being taken into appropriate consideration, the realization of economic, social and cultural rights is essential to tackle the causes that lead to the spread of terrorism. Moreover, it should be noticed that some counter-terrorism measures may have a direct impact on the enjoyment of such rights (e.g. targeted sanctions against individuals suspected of terrorism).¹⁴⁴

¹⁴⁴ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, 2008, available at <https://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>.

The European Parliament has raised similar concerns in its 2017 study titled *EU and Member States' Policies and Laws on Persons Suspected of Terrorism-Related Crimes*.¹⁴⁵ The study presents an overview of the legal and policy framework for people suspected of terrorism-related crimes in 10 EU Member States. In particular, the study has found that the fight against terrorism can conflict with different fundamental rights enshrined in the **EU Charter of Fundamental Rights**. The study draws attention to the different interpretations of the term 'terrorist suspect' highlighting the distinction between individuals who are suspected of having committed a terrorist crime *vis-à-vis* those intending to commit terrorism or terrorism-related crimes in future. This distinction has led to the emergence of different categories of suspects, such as 'persons of interest', 'suspects', and 'defendants'. The principal conclusion of the study is that **the rights granted to criminal suspects should be the same, irrespective of the category of suspects**. The study further makes recommendations regarding the: 1) exchange of views on the implementation, in national laws and practice, of the definition of terrorism; 2) the introduction of a comprehensive database including statistics on terrorism; 3) the provision of more clarity on the different categories of suspects and on the legal framework and rights applying to each category; 4) the update of the "Suspects' Right Package" to allow a broad understanding of the term "suspects"; 5) greater transparency 6) follow-up research to clarify important questions.¹⁴⁶

The countries under scrutiny for the purposes of the study include:¹⁴⁷

Belgium

In Belgium, suspects of terrorism-related crimes are identified in accordance with **ordinary Belgian criminal procedural law**. Three **definitions of a suspect** exist in the pre-trial, investigative phase: 1) individuals subject to a criminal investigation; 2) individuals formally charged at the beginning of or during an investigation; 3) individuals indicted at the end of an investigation in cases referred to the highest Belgian criminal court by the chamber of incident. Belgian authorities can use legally prescribed **investigative methods which could restrict the fundamental rights of suspects** in relation to terrorist offenses detailed in the Criminal Code. Those methods comprise: telephone tapping, proactive investigations, undercover investigative measures, observation measures. They can also use special witness protection measures.

¹⁴⁵ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *EU and Member States' Policies and Laws on Persons Suspected of Terrorism-Related Crimes*, December 2017, available at <https://op.europa.eu/en/publication-detail/-/publication/bd1d7d69-fc02-11e7-b8f5-01aa75ed71a1/language-en/format-PDF/source-71030434>.

¹⁴⁶ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *EU and Member States' Policies and Laws on Persons Suspected of Terrorism-Related Crimes*, December 2017, available at <https://op.europa.eu/en/publication-detail/-/publication/bd1d7d69-fc02-11e7-b8f5-01aa75ed71a1/language-en/format-PDF/source-71030434>.

¹⁴⁷ European Parliament, Committee on Civil Liberties, Justice and Home Affairs, *EU and Member States' Policies and Laws on Persons Suspected of Terrorism-Related Crimes*, December 2017, available at <https://op.europa.eu/en/publication-detail/-/publication/bd1d7d69-fc02-11e7-b8f5-01aa75ed71a1/language-en/format-PDF/source-71030434>.

An **amendment** introduced with the Law of 20 July 2015 is the enlargement of the list of serious crimes for which it is allowed to use invasive investigative measures. Additional relevant amendments include: the **removal of time restrictions on house searches** in terrorism-related cases, **exemptions to normal criminal procedures** to allow arrests of suspects of terrorism-related crimes at night in non-public locations, the **relaxation of provisional custody safeguards** in cases of terrorism-related crimes.

Rights of suspects of terrorism-related crimes: all rights contained in the EU Charter of Fundamental Rights and additional rights (right to access the investigative file, right to request additional investigative acts, right to clear the file of procedural errors, right to counsel for arrested people and people questioned on suspicion of having committed a crime which could lead to imprisonment), right to access to redress mechanisms and right to appeal.

Belgian **mechanism to exchange information** on terror suspects: 1) **OCAM** (Organe de Coordination et d'Analyse de la Menace (OCAM) – Belgium's Coordination Unit for Threat Analysis) including a common database and an additional dynamic database specifically related to foreign terrorist fighters (including home-grown terrorist fighters and hate preachers). Both databases are not dependent upon judicial qualification and the group covered is bigger than that of people subject to investigation. There are also measures enacted to safeguard the inclusion of people in those databases, as well as the extraction and use of data. However, individuals cannot verify their presence in such databases nor request access to information or its correction. 2) Information sharing at the level of local administrations, through **Local Integrated Security Cells** (representatives of the police, mayor, municipal social services and other relevant institutions/services) 3) On an international level, Belgium is a member of the inter-governmental Financial Action Task Force (FATF). OCAM also has a responsibility for international relations and its partner agencies use multilateral mechanisms such as information exchange by law enforcement through Europol and INTERPOL, Club de Berne and the Counter Terrorist Group of the intelligence and security services, and the possibility for public prosecutors to establish Joint Investigation Teams.

France

The Criminal Code lists ordinary offences and it specifies that they constitute terrorist acts when they are intentionally linked to an enterprise whose purpose is to disturb public order by means of intimidation or terror. The definition of terrorist offence is broad.

The legislation extending the **State of Emergency** in France increased the possibility for the national authority to: monitor communications, perform warrantless searches, exploit digital media found during such searches, detain suspects without charge for up to 96 hours.

Powers of authorities and rights of suspects: assigned residence administrative orders (typically including a night curfew of maximum 12 hours in a house, the prohibition of traveling outside a given municipal area, and the obligation to report to a police station), house searches without prior

judicial approval, further powers to process personal data (but it has been declared unconstitutional to copy data from an electronic device during house searches without prior judicial authorization), ban on public demonstrations, search on luggage and vehicles of individuals without a judicial warrant, administrative control measure on individuals returning from areas where terrorist groups operate. Police powers to conduct identity checks and searches to investigate terrorism-related offenses. Power of judicial authorities to authorize house searches at any time to investigate terrorism-related offenses. Power to have electronic metadata or people identified as a threat and anyone in their entourage analysed by the intelligence services. Extension of the period someone can be subjected to an administrative regime, ban from France of foreigners convicted for offenses related to terrorism, increase of the maximum pre-trial detention period for children aged 16 and older. Extension of the maximum period of police custody to six days. Right of terror suspects to access to a lawyer after 72 hours of detention (suspects of other crimes have it granted immediately). Possibility of holding suspects of terror in pre-trial for up to four years (normally it is two to three years): France has been condemned by the ECHR for these periods.

Exchange of information on suspects of terror: Fiche S, European Passenger Name Record Databases (currently only for flights from high-threat countries).

Germany

There is no specific definition of terror suspects in German law, therefore the same treatment for suspects of any other crime applies.

Powers of authorities and rights of suspects. No separate procedures exist to investigate suspects of terrorist offences and the only limitations to procedural rights have been existing since the times of the (Red Army Faction) RAF, therefore they are very specific and do not have any practical application anymore. Almost all provisions of the Criminal Code and the regional police laws apply identically to suspects of terrorism and any other crime and also the rights during investigation, interrogation, main hearing and appeal against ruling courts are the same. The main measures during the investigative stage are wiretapping, surveillance, undercover investigations, and search and seizure. In case of suspects of terrorist intentions, the aforementioned measures can also be applied and travel ban and deportation can also be used as preventive measures, as well as preventive detention (but the limitations on the latter are very strict). Safeguards to the rights of suspects: necessity of the approval of a judicial authority for the application of investigative measures, right of the accused to be informed about the ways information was collected and review, by judges, of all investigative measures (all types of evidence are admissible in court).

Exchange of information on suspects of terror. The federal police office exchanges data with third countries but, more often, intelligence agencies do that. Regular meetings must be held among intelligence agencies of all *Länder* to discuss the situation of persons of interest in defence centres. The Federal Constitutional Protection Act regulates the exchange of information between domestic intelligence service and the police: due to data protection concerns, this could be problematic, but usually it is not when it comes to terror threats. The law on anti-terrorism database

calls for the establishment of a sort of book specifying which agency has information about what. The right to notification depends on whether the judge confirms exceptions where notification is not allowed.

Greece

The Greek legislation does not provide a direct definition of who a suspect is, but it is generally intended to indicate a person suspected of having committed a criminal offence.

Powers of authorities and rights of suspects. The competent agencies for the prevention and suppression for terrorism are the Hellenic Police and the public prosecutor. Greek criminal provisions against terrorism are applied to terrorist actions committed within the national territory, by Greeks or foreigners, and to terrorist actions committed abroad, by Greeks or foreigners. The rights for suspects of terrorism are the same as for suspects of other crimes: right to an attorney and to private communication, right to remain silent, right to suggest the examination of a witness, right to provide evidence against the accusations, right to have access to the case-file (the latter can be denied in exceptional cases). Terrorism-related offenses allow for special investigating acts: covert police operations, the lifting of privacy, the surveillance of activities outside a residence, the use of personal data residence. The legal limit for pre-trial detention is 18 months but it can be extended in some cases, including terrorism. The lawfulness of a detention can be challenged before a Greek court and, after exhaustion of domestic appeals, before the European Court of Human Rights (ECHR).

Exchange of information on suspects of terror. Greece has signed the European Convention on Mutual Assistance in Criminal Matters and its first Additional Protocol and the European Convention on Extradition. Joint investigative teams operate in the Greek territory for the investigation of terrorist actions.

Italy

In Italian law, a person is a suspect (“indagato”) when the prosecution formally opens an investigation against them. When the prosecutor starts the prosecution of the person in the public interest, the preliminary hearing or trial phase begins, the suspect becomes a defendant. There is a second interpretation of who a suspect is (“sospettato”) but it lacks an explicit legal definition.

Powers of authorities and rights of suspects. Procedural tools typically used in terrorism-related cases undermine the minimum procedural guarantees of the suspect: confidentiality of the investigation, extension of the maximum period of investigation, use of precautionary criminal measures. Administrative measures of the Italian anti-terrorism law to prevent terrorism-related crimes include: expulsion order to foreign nationals (it can be challenged or appealed before the Civil Court or the Administrative Tribunal), special police supervision measure (it can only be used after the suspect has been given the chance to be heard and it entails many restrictions of individual fundamental rights and freedoms), financial prevention measures of freezing, seizure and confiscation of assets. Additional investigative tools are: preventive wiretapping and

communication control (it needs to be authorised by the Head of the Prosecution's Office, the authorisation is valid for a maximum of 40 days, extendable for a maximum of 20, the data collected in this way cannot be used in criminal proceedings nor in investigation reports), questioning of prison inmates by the Security and Intelligence Services for getting information useful for prevention strategies against national and international terrorism (until 31 January 2018). There is an alarming lack of adequate procedural guarantees concerning the investigative measures.

Exchange of information on suspects of terror. Five public security bodies have access to information on terror suspects: State Police, Carabinieri, Financial Police, Forest Rangers and Penitentiary Police. The Ministry of the Interior has the responsibility to coordinate all the information possessed by these bodies. Three intelligence agencies have competence to share data on suspects of crime: the Information for security Department, the information and internal security Agency, and the information and external security agency. Powers for the identification of terrorism suspects include: residence permits as a reward for providing information, telephone tapping, extension of period of keeping of telematics data, possibility of arresting suspects of preparing to commit terror acts, possibility of expelling foreigners suspected of terrorism, right to break privacy laws.

Netherlands

Anyone can be arrested for alleged crimes and they have the right to be brought before a judge within a day. In terrorism-related cases, detention for 14 days can be ordered on "reasonable suspicion", a lesser charge compared to "serious suspicion" required for other crimes. Suspects can consult an attorney of their choice prior to police questioning and attorneys must be present during police questioning of suspects when they are minors or if the alleged offense is punishable with a prison sentence of six years or more.

Powers of authorities and rights of suspects. The Minister of Security and Justice has the power to restrict the freedom of movement of people suspected of associations with terrorism (for a maximum of six months, extended indefinitely) without requirement for judicial authorization nor for charges against the individual concerned. Affected people have the right to appeal against imposed measures to an administrative court but the judicial review is only available on procedural grounds, not on substance, and only after the control measure has been applied. Furthermore, if the executive decision is based on classified information from Dutch intelligence and security services, neither the affected individual nor the counsel can access it. On the basis on government claims that they have joined a terrorist organization, people can be considered a threat to international security and be stripped of Dutch nationality and prohibited from returning to the Netherlands. The individual has a right to be notified of this stripping but, in practice, this may be problematic. Given the unequal access to information and the ineffective representation *in absentia*, the right to a fair trial can be compromised.

Exchange of information on suspects of terror. The Dutch government freely shares information on foreign terrorist fighters with Europol and INTERPOL. There is also internal collaboration through the use of a “Counter-terrorism infobox”. There is a lack of clear guidelines for a framework establishing how security services share information with other EU Member States and little transparency on collaboration and information-sharing with foreign intelligence and security agencies.

Poland

With the introduction of the new counter-terrorism legislation in 2016, the Head of the Internal Security Services got the right to start secret surveillance of suspects of terrorism-related crimes for a maximum of three months and without authorization of the Courts (if the suspect is not a Polish citizen, the guarantees are lessened). The suspect has no rights to be notified of her or his placement on the surveillance list. Also, the prosecutor oversight has been removed, therefore reducing the necessary evidence to declare someone a suspect. Counter-terrorism is addressed at three levels: strategic, operational, and tactical.

Powers of authorities and rights of suspects. The Polish domestic intelligence agency (ABW) can keep a list of suspects and no procedures exist for the control of the quality of data. The Head of ABW can order a wiretap against a non-citizen without court review, and the evidence obtained is not subject to any control. A provision contains the blocking of certain websites without prior judicial consent, limiting the freedom of expression. In case of a third or fourth degree of alarm, mass gatherings and events can be banned. The head of ABW can access all data collected in public registers and records without reviews. No procedure exists to verify the correctness of the differentiation between citizens and aliens (including EU citizens). Firearms are allowed to save victims, but the concepts of “terrorist event” and “anti-terrorist activity” are not precise.

The Head of the Internal Security Agency keeps a register of people involved in terrorist activities, wanted people involved or suspected to be involved in terrorist activities, as well as people subject to the European Arrest Warrant, people suspected of being involved in preparatory activities, people taking part in terrorist training or traveling for the purpose of committing terrorist actions. People listed in this register have no right to be informed of it and therefore no right to challenge their listing.

The definition of what constitutes an “act of terrorist nature” is broad, allowing for a limitation of the rights not only of suspects, but of people living in Poland as a whole. The suspects’ rights are further reduced with the extension of the maximum pre-trial detention from 48 hours to 14 days for “terror suspects”.

Exchange of information on suspects of terror. Due to lack of oversight mechanisms on the collection of information, the information available on the procedures of information exchange is extremely limited.

Spain

The Spanish Criminal Procedure Code distinguishes, similarly to the Italian one, between “investigated” (in the examining phase) and “accused” (during the criminal proceeding), in order to strengthen the presumption of innocence. A suspect of terrorism-related crimes is not defined specifically, but they are such when police and intelligence services possess enough information that they have committed an offence.

Powers of authorities and rights of suspects. The National Police, the *Guardia Civil* and regional police authorities are responsible for investigating and combating terrorism. They can arrest suspects without charge for a maximum of five days with the authorisation of the competent judge. Information from domestic and foreign intelligence bodies, as well as statements made by individuals, are enough to start an investigation. The authorisation of the judiciary is necessary only if special investigatory measures requiring judicial warrant are necessary, and the suspected person may never become aware of the investigation. In exceptional circumstances, the Minister of Interior and the Secretary of State of Interior can order wiretapping, which needs to be granted or denied by a competent judge. In case of terrorist suspects, the normal pre-charge police custody of a maximum of 72 hours can be extended for an additional maximum of 48 hours. If a judge gives authorisation, terror suspects can be temporarily deprived of some of their rights: the right to notify a third person, the right to receive and send correspondence and communication, the right to receive visitors, the right to choose a lawyer (a legal aid attorney is assigned to them), the right to communicate with the legal aid attorney in private. They maintain all other fundamental rights of suspects under detention.

There is the possibility of secret proceedings, meaning that the defence does not always have access to the prosecutor’s evidence at the initial stage, compromising the efficiency of the defence. If charge, pre-trial detention can amount to up to two years, extendable for a period of another two years. The investigating magistrate can secrete the information for 30 days, renewable for period of one month.

Exchange of information on suspects of terror. INTERPOL, Europol and Eurojust all provide mechanisms for the exchange of information in Spain, which is also a member of the Global Counterterrorism Forum, of the Council of Europe and the OSCE. Moreover, information sharing also happens through informal channels.

Sweden

Swedish law defines a suspect of terrorism-related crimes as someone suspect of having committed a crime with intentions outlined in the 2003 Act on Criminal Responsibility for Terrorist Offences.

Powers of authorities and rights of suspects. The protection and rights given to suspects of terrorism-related crimes are exactly the same as for suspects of other crimes. Notwithstanding, for other crimes arrest and detention can be ordered when someone is suspected on “probable cause”, whereas for suspects of terror only “reasonable cause” is required. Surveillance is allowed only if

someone is reasonably suspected of an offense punishable with imprisonment for at least four years. Several bodies are in charge of monitoring the authorities to ensure compliance with the law and with human rights guarantees.

Exchange of information on suspects of terror. If compatible with Swedish interests, personal data can be submitted to INTERPOL (or connected agencies and bodies) or Europol. Operational cooperation and the exchange of data with competent authorities with which Sweden has ratified an agreement are regulated by provisions. If data is requested by a foreign authority, Swedish law enforcement may impose conditions limiting the use of such data, in required by the rights of people. Concerning the data received from outside, their use can be limited due to agreements with other states or inter-governmental organisations. A foreign authority can be granted access to data in the Swedish register of DNA and fingerprints. The law makes provisions for the protection of personal data in police and judicial cooperation in criminal matters within the EU, but such law does not apply if national security is perceived to be at stake. Oversight mechanisms are in place regarding the use of data.

United Kingdom

Section 40 of the Terrorism Act 2000 defines who a terrorist is, and the Police and border authorities are competent to declare someone as a terror suspect. The police powers regarding suspects of terror usually require a lower standard of evidence. When the formal status of suspect of terrorism does not exist, individuals under investigation are defined as “subject of interest” and they keep all of their formal rights as individuals.

Powers of authorities and rights of suspects. The maximum period of pre-charge detention for suspects of terrorism is extended (14 days) compared to other cases. The police can stop and search a suspect without the need for a reasonable suspicion, but only in designated places where there is reasonable ground to believe that an act of terrorism could happen. The police have the power to arrest people suspected of planning a terrorist attack. Terrorism Prevention and Investigation Measures are a form of house arrest which apply to people who cannot be prosecuted or deported and they initially amount to one year, extendable. Individuals can be stopped at ports, airports and international railway stations and be held for up to six hours and DNA samples and fingerprints can be taken without reasonable suspicion. British citizens suspected of terrorist activity abroad can be prevented from re-entering the UK.

Exchange of information on suspects of terror. The available information on data exchange mechanisms in the UK is extremely limited but authorities make use of formal mechanisms through the structure of INTERPOL, Europol and The Five Eyes alliance.

For comparison, a brief summary of legal counter-terrorism frameworks of the two non-EU countries discussed in the proceeding section – New Zealand and Thailand – is provided below.

New Zealand¹⁴⁸

Terrorism Suppression Act 2002:

- **Art. 66:** non-citizens taken into custody have a right to communicate without delay with the nearest appropriate representative of the relevant State and to be visited by her/him.
- **Art. 67:** no proceedings for offenses contained in this Act can be initiated without the consent of the Attorney-General, but alleged offenders can be arrested, or a warrant for arrest can be issued and executed, and the person can be kept in custody or bail even without the approval of the Attorney-General.

Thailand

Anti-Terrorist Financing Act (2013):

- **Art. 9:** right of people whose property-related action has been suspended to remove their name from the list of designated persons, to cancel the suspension of the property-related action, and to perform any act in respect of property the action relating to which has been suspended

The Martial Law Order (1914, 1985):

- **Art. 2:** a royal decree can be issued to implement all of some of the articles of the Martial Law Order when it becomes necessary to maintain law and order and to defend against the danger of attack, being it from abroad or from within Thailand.
- **Art. 4:** in the case of outbreak of war or unrest, the local Military Commander can declare a state of Martial Law in the area under their control, reporting as soon as possible to the government.
- **Art. 6:** where Martial Law has been declared, the authority of military personnel overrules that of civilian personnel.
- **Art. 7:** those who have the power to declare a state of Martial Law can also declare that the military courts consider and pass judgments on criminal cases, as well as the power to amend or rescind such announcements. Military courts can have authority only on cases where the criminal action took place after the start of Martial Law.
- **Art. 8:** under Martial Law, military personnel have complete powers to search and inspect, to recruit whatever and whoever, to use restraint, to make confiscations, to occupy, demolish or make changes to any building, to evict people from it.
- **Art. 9:** search and inspections can concern: (1) anything recruited for use, anything banned or confiscated, any place to be occupied, anything under illegal possession, any individual in a vehicle, in a building or in any place and at any time; (2) information, letters, telegrams, boxes, packages or any other item sent or transported into the area; (3) books, printed matters, newspapers, advertisements and written materials.

¹⁴⁸ Sources: Criminal Procedure Act 2011 (CPA 2011), Legal Services Act 2011 (LSA 2011).

- **Art. 10:** power to recruit support (1) of citizens to aid any kind of military affairs; (2) of provisions from private individuals or from companies.
- **Art. 11:** power to prohibit: (1) public gatherings; (2) distribution, purchase or sale of books, printed material, newspapers, images, articles or written material; (3) advertising, entertainment, reception or dissemination of radios, radio broadcasting and televisions; (4) use of public routes for transport; (5) possession or use of communication equipment or weapons or chemical products or parts thereof or other items which pose a threat to the safety of people, animals, vegetation or goods and property; (6) people from leaving their places or going outside during curfew; (7) people from entering or staying in any place which military forces believe necessary to use in battle, in act of suppression, and in the maintenance of law and order; (8) people from committing any act prohibited by the Minister of War during the declaration of a state of Martial Law.
- **Art. 12:** power to temporarily confiscate items in order to prevent the enemy to use them or to make them to use of the military.
- **Art. 13:** the power of occupation extends to any property deemed necessary.
- **Art. 16:** prohibition of claims for Compensation against, or to charge fines to, Military Personnel.
- **Art. 17:** extension of powers of the Supreme Commander or the Deputy Commander to issue further measures.

Emergency Decree on Public Administration in Emergency Situation (2005):

- **Section 5:** the Prime Minister, upon the approval of the Council of Ministers, can declare an emergency situation, applicable to all Thailand or some parts of it. The emergency situation should not exceed three months of duration, but it can be extended.
- **Section 9:** in case of necessity, the Prime Minister has the power to prohibit: departure from any person from a dwelling place, the assembly or gathering of people, the press release, distribution or dissemination of any means of communication instigating fear among people, the use of routes or vehicles (or prescribe conditions on their use), the use of buildings or entrance or staying in any place, the entrance of any person in a given area (and the power to evacuate people from a certain area).
- **Section 11:** in a series of emergency situations, including terrorism, the Prime Minister has the power, through a Notification, to: (1) give the power to a competent official to arrest and detain people suspected of having a role in causing said situation (including instigation, propagation, support, and conceal of information), but just to the extent that is necessary to prevent that act; (2) give a competent official the power to summon any person to report or give a statement or submit evidence relating to the emergency situation; (3) give a competent official the power to seize or attach any material if there is reasonable ground to think that it is or will be used to commit or support an act causing the emergency situation; (4) give a competent official the power to issue a warrant for the search, removal, withdrawal or demolition of buildings, structures or obstructions; (5) give a competent

official the power to issue an order to inspect any means of communication, as well as cancel and suspend any contact or communication; (6) prohibit any act or instruction to perform any act (as long as it is necessary for maintaining security and safety); (7) give a competent official the power to issue an order to prohibit any person to leave Thailand for security and safety reasons; (8) to give a competent official the power to instruct an alien to leave the Kingdom if there are reasonable grounds to believe they are supporters in causing the emergency situation; (9) order that the purchase, sale, use or possession of any equipment which may be used for causing unrest or terrorism should be reported to or permitted by the competent official; (10) order the use of military force in order to assist administrative officials or police officers in securing order.

- **Section 12:** a competent official should be empowered to arrest and take suspected people into custody for a period of maximum 7 days, but these people should not be treated as convicts. The period can be extended of 7 days at a time for a maximum of 30 days.
- **Section 17:** competent officials and people with identical powers should not be subject to civil, criminal or disciplinary liability for acts performed in good faith, but this does not preclude the right of a victim to seek compensation.

4.2 Counter-Terrorism and Securitisation

Securitisation theory seeks to elucidate the processes through which issues are being framed as security concerns in high politics.¹⁴⁹ Given the illicit, violent, and random nature of terrorist acts, there are good reasons to consider terrorism as a security threat. In today's globalised world, this threat largely recognises no borders.

Terrorism is a multidimensional and timeless phenomenon, destined to remain subjective and emotional, as it is difficult to define but is easily recognised by those who experience it.¹⁵⁰ Any terrorist act, irrespective of where it is committed, or what the demands of its perpetrators may be, causes a severe social trauma and instils a long-lasting sense of fear and vulnerability into its audience, not least because of the utter disregard for the value of human life demonstrated in the fanatical readiness of its agents to pursue their objectives by means of horrific violence against randomly selected victims. Indeed,

[w]hat fundamentally distinguishes terrorism from other forms of organised violence is not simply its severity but its features of amorality and antinomianism. Terrorists either profess indifference to existing moral codes or else claim exemption from all such obligations.

¹⁴⁹ The Copenhagen School of security studies advances the securitization theory in International Relations. The Copenhagen School is a school of academic thought which has its origins in the work of the prominent international relations scholar Barry Buzan. The School seeks to further develop the constructivist argument that security is not an objective condition but an outcome of a specific kind of social process, susceptible to criticism and change. This framework of analysis represents a significant shift from the traditionalist, 'narrow' conception of security since it argues that issues can be considered matters of security even if they are not threatening to states. (Peter Hough Understanding Global Security, (London: Routledge, 2004), p.7-8; Karin Fierke, Critical Approaches to International Security, (Cambridge: Polity, 2007), p.103); see the works of Barry Buzan, Ole Waver and Jaap de Wilde).

¹⁵⁰ Charles Kegley, *International Terrorism: Characteristics, Causes, Controls* (New York: St Martin's Press Inc, 1990).

*Political terror, if it is waged consciously and deliberately, is implicitly prepared to sacrifice all moral and humanitarian considerations for the sake of some political end.*¹⁵¹

While the destruction of people, property or infrastructure is an indispensable element of terrorism, such destruction is rarely an end in itself. Rather, in the majority of cases terrorists intentionally choose to mount horrendous attacks for the sole purpose of provoking a reaction, and the more extreme the reaction, the better for them.¹⁵² True, terrorists maim and kill in vicious ways and without mercy but in doing so, their primary goal is to cause chaos and disorder which in turn might trick government authorities, especially those in democracies, into adopting a forcible response by imposing draconian measures and curtailing human rights. In short, terrorism ‘works’ as long as it succeeds in eliciting a reaction that opens the road to the triumph of anarchy so eagerly pursued by its agents.¹⁵³ For this reason, it is important how states respond to terrorism, since a failure to preserve fundamental human rights may result in handing the terrorists a victory over tolerance, the rule of law, and basic human dignity.¹⁵⁴

Terrorism breeds distrust and insecurity, insofar as it seeks to disrupt the normal functioning of society so that ordinary people can no longer rely upon the regularities of life or the competence of authorities to protect them.¹⁵⁵ As such, it is not a mere legal violation but an explicit denial of the principles of law upon which modern societies and the existing international system are built. Terrorism is ‘chaos clad in violence’¹⁵⁶ which strikes right at the heart of the post-1945 international order by embracing the unconstrained use of lethal force as a legitimate means of pursuing political ends and undermining the human rights regime by brushing aside the distinction between combatants and non-combatants and ignoring civilian immunity. Given that terrorism aims at affirming the power of the armed and the superiority of guns over laws, the impact of terrorist attacks on both the domestic and international system of law depends on the responses to such attacks as well as on the reaction to those responses.¹⁵⁷ That is why

[t]o the extent that lawlessness is met with unlawfulness, unlawfulness with impunity, the long-term implications for the rule of law, and the peace, stability and justice it serves, will be grave. Undermining the authority of law can only lay the foundation for future

¹⁵¹ Paul Wilkinson, *Political Terrorism*, (London: Macmillan, 1974).

¹⁵² Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York: Random House, 2007); Ronald Crelinsten, *Counterterrorism*, (Cambridge: Polity, 2009).

¹⁵³ Antonio Cassese, ‘Terrorism Is Also Disrupting some Crucial Legal Categories of International Law’, *European Journal of International Law*, vol.12:5 (2001), pp. 993-1001.

¹⁵⁴ Joan Fitzpatrick, ‘Speaking Law to Power: The War against Terrorism and Human Rights’, *European Journal of International Law*, vol.14:2, (2003), pp. 241-264.

¹⁵⁵ Geoffrey Hosking, ‘Terrorism and Trust’, *Critical Studies on Terrorism*, vol.2:3 (2009), pp.482-496.

¹⁵⁶ William H. Taft IV, ‘The Law of Armed Conflict after 9/11: Some Salient Features’, *Yale Journal of International Law*, vol.28 (2003), p.323.

¹⁵⁷ Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge: Cambridge University Press, 2005).

*violations, whether by terrorists or by states committing abuses in the name of counter-terrorism.*¹⁵⁸

What distinguishes the post-1945 international system from its predecessors is the fact that it is virtually all-inclusive and law-based.¹⁵⁹ Despite the numerous examples of large-scale atrocities, oppression and ethnic cleansing that have occurred over the past few decades, it should be noted that the general integrity of the international laws designed to protect human freedoms has remained intact.¹⁶⁰ One possible explanation of this trend is the fact that, besides being codified in international and national legislation, the provisions of the Universal Declaration of Human Rights are regarded by states as common normative principles that govern their behaviour both in the domestic and international arena. Hence, the true measure of the effectiveness of international law, and human rights law in particular, is not the alacrity with which it is enforced, but the extent to which it is enacted as a norm.¹⁶¹ However, once the norm underpinning a particular law has been eroded, maintaining general adherence to the law becomes extremely difficult.

The ‘war on terror’ has in many respects blurred the distinction between terror and counter-terror¹⁶² and undermined, rather than enhanced international security. Thus, perhaps the single most important lesson of the ‘war of terror’ is the essential need for ensuring that counter-terrorism strategies, approaches, and measures are in line with the established international and national legal standards and rules. This aspect needs to be taken into consideration in security policy-making within the EU, particularly as regards the efforts to counter the spread of radicalisation and violent extremism in the light of the emerging nexus between religious fundamentalism and crime and the possible influx of returning foreign fighters.¹⁶³ In particular, the UN Secretary-

¹⁵⁸ Helen Duffy, *The ‘War on Terror’ and the Framework of International Law* (Cambridge: Cambridge University Press, 2005).

¹⁵⁹ Jim Whitman, ‘Freeing Force from Legal Constraint’ in Sarah Perrigo and Jim Whitman, ed., *The Geneva Conventions under Assault* (London: Pluto Press, 2010), p.205; 201.

¹⁶⁰ Jim Whitman, ‘Freeing Force from Legal Constraint’ in Sarah Perrigo and Jim Whitman, ed., *The Geneva Conventions under Assault*, (London: Pluto Press, 2010), p.205; 201.

¹⁶¹ Jim Whitman, ‘Humanitarian Intervention in the Era of Pre-Emptive Self Defence’, *Security Dialogue*, vol.36:3, (2005), pp.259-274.

¹⁶² Mark Danner, ‘The Red Cross Torture Report: What It Means’, *The New York Review of Books*, 30 April 2009, available at <https://www.nybooks.com/articles/2009/04/30/the-red-cross-torture-report-what-it-means/>.

¹⁶³ On terrorism and crime, see Rajan Basra and Peter R. Neumann, ‘Criminal Pasts, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus’, *Perspectives on Terrorism*, vol. 10:6 (2016), pp.25-40. On the securitization of migration, see Natalia Umansky, *What Is the Effect of Terrorist Attacks on the Securitization of Migration? Case Studies from the UK and Spain*, Research Report No.31 (2016), Institut Barcelona – Estudis Internacionals, Barcelona; João Esteves, ‘Migration Crisis in the EU: Developing a Framework for Analysis of National Security and Defence Strategies’, *Comparative Migration Studies*, vol.6:28 (2018), available at <https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-018-0093-3>; Ainhoa Ruiz Benedicto and Pere Brunet, *Building Walls. Fear and Securitization in the European Union*, Report 35, Centre Delàs d’Estudis per la Pau, 2018, available at https://www.tni.org/files/publication-downloads/building_walls_-_full_report_-_english.pdf; Teresa Cierco and Jorge Tavares da Silva, ‘The European Union and the Member States: Two Different Perceptions of Border’, *Revista Brasileira de Política Internacional*, vol. 59:1 (2016), available at http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0034-73292016000100203; Didier Bigo and Elspeth Guild, ‘International Law and European Migration Policy: Where Is the Terrorism Risk?’, *Laws*, vol.8:30 (2019), available at <https://www.mdpi.com/2075-471X/8/4/30/html>; Christopher Baker-Beall, ‘The Threat of the ‘Returning Foreign

General's **2015 Plan of Action to Prevent Violent Extremism** does state that 'violent extremism encompasses a wider category of manifestations and there is a risk that a conflation of the terms ["violent extremism" and "terrorism"] may lead to the justification of an overly broad application of counter-terrorism measures, including against forms of conduct that should not qualify as terrorist acts'.¹⁶⁴ Similar concerns have also recently been voiced by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism with regard to the definition of extremism:

*The core concept of extremism is context dependent, which means that its definition can easily be challenged and manipulated, and conceptually weaker than the term terrorism, which has an identifiable core. Such laws are likely to criminalize legitimate expression, including controversial viewpoints and information of legitimate public interest, and restrict freedom of religion or belief. The number of criminal prosecutions and the use of administrative measures against civil society members are, unsurprisingly, increasing.*¹⁶⁵

Such concerns have direct implications for security, since there is a risk of 'building the incrimination from a subjective point of view, in contrast with the construction that identifies the crime not in a simple psychological attitude, even if reprehensible, but as an offence that must be prevented by law'.¹⁶⁶ The immanent need is to find a balance between the legitimacy of pursuing a criminal action by emphasising only offensive facts and the rehabilitative function of the penalty, on the one hand, and the need to suppress dangerous phenomena through the neutralization of the undesirables, on the other.

Fighter': The Securitization of EU Migration and Border Control Policy', *Security Dialogue*, vol.50:5 (2019), pp. 437-453; Helen Hintjens, 'Failed Securitisation Moves During the 2015 "Migration crisis"', *International Migration*, 2019, <https://onlinelibrary.wiley.com/doi/full/10.1111/imig.12588>; Avi Marciano, 'Reframing Biometric Surveillance: From a Means of Inspection to a Form of Control', *Ethics and Information Technology*, vol.21 (2019), pp. 127-136.

¹⁶⁴ UN General Assembly, *Plan of Action to Prevent Violent Extremism: Report of the Secretary-General*, A/A/70/674, 24 December 2015, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/674.

¹⁶⁵ UN Human Rights Council, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/40/52, 1 March 2019, available at <https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>.

¹⁶⁶ Giovanni Fiandaca and Enzo Musco, *Diritto Penale. Parte Generale*, Zanichelli: 2019.