



COMPARATIVE LEGAL RESEARCH

MAPPING THE LEGAL AND POLICY
LANDSCAPE FOR UPHOLDING CRIMINAL
PROCEDURAL RIGHTS IN THE CONTEXT
OF COUNTER-TERRORISM

COMPARATIVE LEGAL RESEARCH

**MAPPING THE LEGAL AND POLICY
LANDSCAPE FOR UPHOLDING CRIMINAL
PROCEDURAL RIGHTS IN THE CONTEXT
OF COUNTER-TERRORISM**

This 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. It has been developed within the initiative [FAIRNESS: Implementation of the Stockholm's Roadmap in Cases of Terrorism and Radicalisation](#), funded by the European Union's Justice Program (2014-2020).

Authors:

Mara Fallini, Research Associate, Center for the Study of Democracy

Dr Tatyana Novosiolova, Research Fellow, Center for the Study of Democracy

Sergio Bianchi, Senior Researcher, Agenfor

Joana Apostolo, Consultant, Innovative Prisons Systems

Pedro das Neves, CEO, Innovative Prisons Systems

Dr Irina van der Vet, Senior Project Researcher, Institute for European Studies



This report was funded by the European Union's Justice Program (2014-2020). The content of this report represents the views of its authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.



The text has been licensed under [Creative Commons Attribution-NonCommercial-No Derivatives 4.0 International License](#).

Cover photo: Pixabay

ISBN: 978-954-477-422-6

2021, Center for the Study of Democracy

www.csd.bg, csd@online.bg

TABLE OF CONTENTS

1. INTRODUCTION.....	5
2. TERRORISM AND RADICALISATION IN THE CONTEXT OF INTERNATIONAL CRIMINAL LAW.....	7
2.1. ACTS OF TERRORISM, PROTECTION, AND PUBLIC SAFETY.....	7
2.2. SUPPORT TO TERRORISM: FINANCING, PROLIFERATION OF WEAPONS, AND INCITEMENT.....	11
2.3. TERRORISM IN THE CONTEXT OF ARMED CONFLICTS.....	13
2.4. COUNTER-TERRORISM, PREVENTION OF VIOLENT RADICALISATION, AND VICTIM SUPPORT.....	14
3. INTERNATIONAL, EU, AND NATIONAL LEGAL INSTRUMENTS FOR ENSURING THE PROTECTION OF FUNDAMENTAL RIGHTS DURING CRIMINAL PROCEEDINGS.....	23
3.1. INTERNATIONAL LEGAL INSTRUMENTS.....	23
3.2. EU REGULATORY INSTRUMENTS.....	33
3.3. NATIONAL LEGAL INSTRUMENTS.....	38
4. A DELICATE BALANCE: HUMAN RIGHTS, COUNTER-TERRORISM, AND SECURITISATION.....	51
4.1. CRIMINAL PROCEDURAL RIGHTS AND COUNTER-TERRORISM.....	51
4.2. COUNTER-TERRORISM AND SECURITISATION.....	54

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 is considered, addressed, and tackled. The War on Terror unravelled in response to horrific acts of violence. It was conceived as a global campaign that sought to rid the world of the scourge of terrorism but became 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. Terrorism was framed as an extraordinary existential threat which made it possible to justify disproportionate use of force both domestically and internationally. In normative terms, the enactment of ‘counter-law’¹ threatened to undermine essential elements of the conventional criminal justice system that are designed to protect important human rights (e.g. due process, habeas corpus, freedom from torture and arbitrary killing etc.). 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 that hinder pre-emptive responses to alleged sources of harm.² Once triggered, counter-law presents existing legislative principles as an obstacle to ensuring security and effectively legitimises derogation of relevant legal instruments and the norms that underpin them. 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 therefore implies that for the social order to be preserved, the ‘old’ legal order inevitably has to be broken.³ The wide-ranging effects of the means adopted to fight the War on Terror have been extensively documented and the importance of safeguarding fundamental human rights in times of crisis has been highlighted.⁴

The present report emphasises the importance of upholding the established principles and standards of criminal justice in the context of counter-terrorism and counter-radicalisation. In particular, the report argues that compliance with the criminal justice requirements in the process of countering violent radicalisation and terrorism is a key prerequisite for developing effective and sustainable trust-based strategies and approaches that enhance both public safety and national security. Part 2 of the report examines how the concepts of terrorism and radicalisation are framed within the

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

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

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

⁴ See, for example, Helen Duffy, *The ‘War on Terror’ and the Framework of International Law*, Cambridge University Press, 2015.

1. Introduction

international and EU legal context. 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 and involvement in such acts.⁵ Radicalisation *per se* is not a crime but its violent manifestations can amount to terror crimes.

International counter-terrorism is primarily viewed through the prism of criminal law enforcement and the mechanisms for its effective implementation. For example, some commentators have argued that terror-related crime should be prosecuted by the International Criminal Court (ICC).⁶ In order to develop a comprehensive appreciation of the relevant legal context within which acts of terrorism and violent radicalisation are addressed, 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): contains provisions for the procedures for the return of aircraft and the treatment of passengers and crew after an unlawful diversion; requires

⁵ See India, *Draft for a Comprehensive Convention against Terrorism – Working Document*, A/C.6/55/1, Sixth Committee of the United Nations General Assembly, 28 August 2000; Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism, and Counter-Terrorism*, Fact Sheet No.32, 2008.

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.

⁷ [Convention on Offences and Certain Acts Committed on Board Aircraft](#), 14 September 1963.

that States establish jurisdiction to prosecute (unspecified) offences on board aircraft registered in the State.

- **Convention for the Suppression of Unlawful Seizure of Aircraft**⁸ (1970): requires that States prosecute and 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): requires that States criminalise 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 Inter-national Civil Aviation**¹⁰: requires that States criminalise violence which could cause death or grave injury in airports serving international civil aviation and damaging of aircraft facilities that may endanger safety in airports.
- **Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents**¹¹ (1973): requires that States criminalise violent attacks against Heads of State, foreign ministers and diplomatic agents 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): requires that States criminalise any taking of hostages for the purpose of blackmailing State authorities into doing or not doing something.
- **Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation**¹³ (1988): requires that States criminalise 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.

⁸ [Convention for the Suppression of Unlawful Seizure of Aircraft](#), 16 December 1970.

⁹ [Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation](#), 23 September 1971.

¹⁰ United Nations, [Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation](#), 24 February 1988.

¹¹ United Nations, [Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents](#), 14 December 1973.

¹² United Nations, [International Convention Against the Taking of Hostages](#), 17 December 1979.

¹³ IMO, [Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#), 10 March 1988.

- **Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf**¹⁴ (1988): extends the provisions of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to cover offences against fixed platforms.
- **International Convention for the Suppression of Terrorist Bombings**¹⁵ (1997): requires that States 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**¹⁶ (2005): 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 organisation to do or not do something.
- **Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation**¹⁷ (2005): expands the range of behaviours to be criminalised (e.g. offences related to the proliferation of weapons of mass destruction) and makes specific counter-terrorism provisions.
- **Convention on the Suppression of Unlawful Acts Related to International Civil Aviation**¹⁸ (2010): criminalises the use of aircraft to cause death, injury or damage, the discharge of 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 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)¹⁹ on the protection of critical infra-

¹⁴ United Nations, [Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf](#), 10 March 1988.

¹⁵ United Nations, [International Convention for the Suppression of Terrorist Bombings](#), 15 December 1997.

¹⁶ United Nations, [International Convention for the Suppression of Acts of Nuclear Terrorism](#), 13 April 2005.

¹⁷ [Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation](#), 14 October 2005.

¹⁸ [Convention on the Suppression of Unlawful Acts Related to International Civil Aviation](#), 10 September 2010.

¹⁹ [United Nations Security Council Resolution 2341](#) (2017).

structure and **United Nations Security Council Resolution 2388** (2017)²⁰ which addresses the links between human trafficking and international terrorism.

The links between transnational organised criminal activities and acts of terrorism have been acknowledged in the **United Nations Convention against Transnational Organised Crime (Organised 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.²¹ Since terrorist groups and networks employ similar methods to those used by transnational organised criminal groups, the legislative tools for combating organised transnational crime can also be applied to transnational terrorism. The Convention can be triggered whenever two basic conditions exist: 1) that the committed offence is of a transnational nature; and 2) that an organised criminal group is involved.

The European Union (EU) has taken a two-fold approach to the definition of acts of terrorism, insofar as consideration is 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 combating terrorism** (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.²² The listed criminal offences include attacks on 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 chemical, biological, radiological, and nuclear (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 criminalised.

²⁰ [United Nations Security Council Resolution 2388 \(2017\)](#).

²¹ [United Nations Convention against Transnational Organised Crime](#), 15 November 2000.

²² [Directive \(EU\) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA](#).

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 **United Nations Security Council Resolution 2133** (2014),²⁵ on strengthening the provisions of UNSC Resolution 1373 on suppressing terrorism financing; **United Nations Security Council Resolution 2178** (2014),²⁶ on the financing of the travel of foreign terrorist fighters; **United Nations Security Council Resolution 2199** (2015),²⁷ on the criminalisation of any direct or indirect trade involving the Islamic State of Iraq and the Levant; **United Nations Security Council Resolution 2368** (2017), on asset freeze.²⁸

In 2003, the International Monetary Fund published a manual titled *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*²⁹ 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, the United Nations Organisation on Drugs and Crime (UNODC) has published a *Guidance Manual for Member States on Terrorist Financing Risk Assessments* (2018).³⁰

Besides terrorism financing, the possible acquisition of weapons and weapon-related technology and their means of delivery by terrorist perpetrators is another area subject to international regulatory control. The **Convention on the Physical Protection**

²³ [International Convention for the Suppression of the Financing of Terrorism](#), 9 December 1999.

²⁴ [United Nations Security Council Resolution 1373 \(2001\)](#).

²⁵ [United Nations Security Council Resolution 2133 \(2014\)](#).

²⁶ [United Nations Security Council Resolution 2178 \(2014\)](#).

²⁷ [United Nations Security Council Resolution 2199 \(2015\)](#).

²⁸ [United Nations Security Council Resolution 2368 \(2017\)](#). On judicial cooperation to prevent terrorism financing, see [United Nations Security Council Resolution 2396 \(2017\)](#).

²⁹ International Monetary Fund, *Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting*, 4 August 2003.

³⁰ UNODC, *Guidance Manual for Member States on Terrorist Financing Risk Assessments*, 2018.

of Nuclear Material³¹ (1982) contains provisions for the protection of nuclear materials, including during transport, and requires that State Parties create offences related to the unlawful handling, demand, and acquisition or threat thereof of nuclear material. The Convention was amended in 2005 to include the criminalisation of acts directed against or interfering with a nuclear facility for terrorist purposes.³² Under the **Convention on the Marking of Plastic Explosives for the Purpose of Detection** (1991), States are required to take measures to control explosives which could not be detected through scanning equipment.³³

The need to strengthen international disarmament, non-proliferation, and arms control has been acknowledged by different United Nations Security Council Resolutions. **United Nations Security Council Resolution 1540** (2004) 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”.³⁴ In order to prevent and counter the proliferation of weapons of mass destruction (WMD), the Resolution requires that States adopt and enforce laws and domestic controls on the physical protection, import, export, and transfer of WMD and their means of delivery, including related materials. This requirement has been confirmed by subsequent Resolutions. **United Nations Security Council Resolution 2220** (2015)³⁵ on small arms contains provisions for strengthening the existing regulatory arrangements for countering illicit activities, including weapon trafficking.

United Nations Security Council Resolution 1624 (2005)³⁶ on the incitement to terrorism and **United Nations Security Council Resolution 2354** (2017)³⁷ on countering terrorist narratives require that States adopt appropriate measures for countering related activities. This is in line with Article 20, of the **International Covenant on Civil and Political Rights (ICCPR)** which states that “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”³⁸ The UNODC has published a guiding document titled

³¹ [Convention on the Physical Protection of Nuclear Material](#), 1982.

³² International Atomic Energy Agency, [Amendment to the Convention on the Physical Protection of Nuclear Material](#), 8 July 2005.

³³ [Convention on the Marking of Plastic Explosives for the Purpose of Detection](#), 1 March 1991.

³⁴ [United Nations Security Council Resolution 1540 \(2004\)](#).

³⁵ [United Nations Security Council Resolution 2220 \(2015\)](#).

³⁶ [United Nations Security Council Resolution 1624 \(2005\)](#).

³⁷ [United Nations Security Council Resolution 2354 \(2017\)](#).

³⁸ [International Covenant on Civil and Political Rights](#), 16 December 1966.

The Use of Internet for Terrorist Purposes (2012)³⁹ which seeks to facilitate the prevention of online radicalisation.

EU Directive 2017/541 on combating terrorism addresses different aspects related to suppressing the provision of support for terrorism, including financing of terrorist activities and measures against the provocation and instigation of terror-related offences.⁴⁰

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.⁴¹ IHL does not specifically address international or domestic terrorism and terrorists are not formally recognised as combatants. It suffices to mention that individuals that have joined or are joining ISIL are referred to as ‘foreign terrorist fighters’ and not as combatants. The concept of ‘foreign terrorist fighters’ does not have a legal status within the context of international law.⁴² It could be argued that the introduction of this concept implies an inclination among States to treat terrorists as criminal offenders.

³⁹ UNODC, *The Use of Internet for Terrorist Purposes*, 2012.

⁴⁰ [Directive \(EU\) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.](#)

⁴¹ [Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts \(Protocol I\), 1977; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\), 1977.](#)

⁴² [Global Counter-Terrorism Forum, “Foreign Terrorist Fighters” \(FTF\) Initiative: The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon.](#)

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).

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

[UNSC Resolution 1377 \(2001\)](#): Ministerial Declaration on the Global Effort to Combat Terrorism

[UNSC Resolution 1390 \(2002\)](#): on the Situation in Afghanistan

[UNSC Resolution 1452 \(2002\)](#): Threats to International Peace and Security caused by Terrorist Acts

[UNSC Resolution 1455 \(2003\)](#): Threats to International Peace and Security caused by Terrorist Acts

[UNSC Resolution 1456 \(2003\)](#): Declaration of the Ministers for Foreign Affairs on the Issue of Combating Terrorism

[UNSC Resolution 1526 \(2004\)](#): Threats to International Peace and Security caused by Terrorist Acts

[UNSC Resolution 1535 \(2004\)](#): Establishment of the Executive Directorate of the Counter-Terrorism Committee (CTED)

[UNSC Resolution 1566 \(2004\)](#): 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 \(2005\)](#): Threats to International Peace and Security caused by Terrorist Acts

[UNSC Resolution 1735 \(2006\)](#): Threats to International Peace and Security caused by Terrorist Acts

[UNSC Resolution 1787 \(2007\)](#): Extension of Counter-Terrorism Committee Executive Directorate (CTED) mandate

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

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

[UNSC Resolution 2129 \(2013\)](#): Threats to International Peace and Security Caused by Terrorist Acts

[UNSC Resolution 2170 \(2014\)](#): on Strengthening the Mechanisms for Bringing to Justice Terrorist Perpetrators

[UNSC Resolution 2185 \(2014\)](#): on Policing during Peace-Keeping Operations

[UNSC Resolution 2195 \(2014\)](#): on Strengthening Border Management

[UNSC Resolution 2199 \(2015\)](#): on Threats to International Peace and Security Caused by Terrorist Acts

[UNSC Resolution 2242 \(2015\)](#): on Women and Peace and Security

[UNSC Resolution 2249 \(2015\)](#): on Threats to International Peace and Security Caused by Terrorist Acts

[UNSC Resolution 2250 \(2015\)](#): on Maintenance of International Peace and Security

[UNSC Resolution 2253 \(2015\)](#): on Threats to International Peace and Security Caused by Terrorist Acts

[UNSC Resolution 2255 \(2015\)](#): on Threats to International Peace and Security Caused by Terrorist Acts

[UNSC Resolution 2309 \(2016\)](#): on Aviation Security

[UNSC Resolution 2322 \(2016\)](#): on International Law Enforcement and Judicial Cooperation

[UNSC Resolution 2331 \(2016\)](#): on Trafficking in Persons

[UNSC Resolution 2368 \(2017\)](#): on Combating Terrorism

[UNSC Resolution 2395 \(2017\)](#): on Threats to International Peace and Security Caused by Terrorist Acts – CTED Mandate Renewal

The **United Nations Global Counter-Terrorism Strategy**⁴³ that was adopted by the UN General Assembly in 2006 (General Assembly Resolution 60/288) is indicative of the international consensus on the elements that should underpin counter-terrorism approaches and measures. 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;

⁴³ [United Nations Global Counter-Terrorism Strategy](#) (2006).

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

- 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) which covers four themes:

- 1) Criminalised 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 criminalisation – penalties; prohibition the encouragement and toleration of acts of terrorism; financial matters; prohibition of making explosives; combatting organised 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.⁴⁴

The UNODC has also developed **Legislative Guide to the Universal Legal Regime against Terrorism** (2008).⁴⁵ The Guide covers five main topics:

- 1) the universal legal regime against terrorism;
- 2) criminalisation and other legislative requirements of the conventions and protocols related to terrorism;
- 3) jurisdiction over offences;
- 4) obligation to extradite or prosecute;
- 5) international cooperation in criminal matters.

⁴⁴ UNODC, *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments*, 2006.

⁴⁵ UNODC, *Legislative Guide to the Universal Legal Regime against Terrorism*, 2008.

Handbook on Criminal Justice Responses to Terrorism (2009)⁴⁶ is another relevant publication by the UNODC. The Handbook underscores the importance of the effective rule of a 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; role of law enforcement; role of prosecutors; role of defence counsel; issues and challenges concerning detention; role of the criminal justice system in protecting the rights of victims of terrorist crimes; and **criminal justice accountability and oversight mechanisms** – oversight of law enforcement; 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)⁴⁷ comprises four modules:

- **Module 1: Basic principles of international cooperation against terrorism:** criminalisation 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 administers an online database titled *Digest of Terrorist Cases* (2010);⁴⁸ and has produced an online legal training curriculum which includes

⁴⁶ UNODC, *Handbook on Criminal Justice Responses to Terrorism*, 2009.

⁴⁷ UNODC, *Manual on International Cooperation in Criminal Matters related to Terrorism*, 2009.

⁴⁸ UNODC, *Digest of Terrorist Cases*, 2010.

Module 3: International cooperation in criminal matters: counter-terrorism (2011).⁴⁹

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 summarised in two documents: **Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism** (2018)⁵⁰ and **Legislative and Capacity-Building Assistance to Prevent and Combat Terrorism**.⁵¹

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)⁵² 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 recognising 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 include: face, fingerprints, iris, and voice, each one with its own vulnerabilities.

The **Council of Europe Counter-Terrorism Strategy (2018-2022)**⁵³ 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 (Figure 1).

⁴⁹ UNODC, *Module 3: International Cooperation in Criminal Matters: Counter-Terrorism*, 2011.

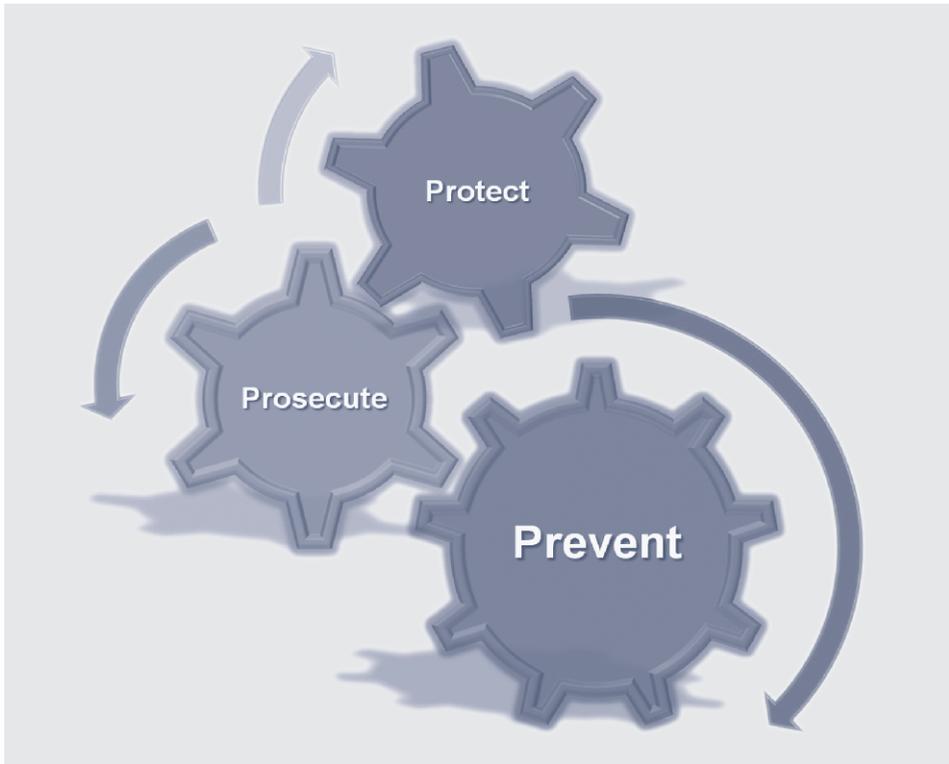
⁵⁰ UNODC, *Supporting Legal Responses and Criminal Justice Capacity to Prevent and Counter Terrorism*, 2018.

⁵¹ UNODC, *Legislative and Capacity-Building Assistance to Prevent and Combat Terrorism*.

⁵² UNODC, *United Nations Compendium of Recommended Practices for the Responsible Use and Sharing of Biometrics in Counter-Terrorism*, 2018.

⁵³ *Council of Europe Counter-Terrorism Strategy (2018-2022)*, 4 July 2018.

Figure 1: Council of Europe Counter-Terrorism Strategy



Source: Authors. The figure is based on objectives of the CoE Counter-Terrorism Strategy 2018.⁵⁴

Prevention refers to:

- Prevention of terrorist public provocation, propaganda, radicalisation, recruitment and training, including on the internet;
- Development of indicators for assessing the risk that a terrorist attack may be carried out by radicalised individuals;
- Awareness-raising on radicalisation and other preventive measures among front-line practitioners, in particular in schools;
- Prevention of the financing of terrorism.

⁵⁴ [Council of Europe Counter-Terrorism Strategy \(2018-2022\)](#), 4 July 2018.

Prosecution refers to:

- Gathering evidence from conflict zones for the purpose of criminal prosecution;
- Gathering e-evidence in terrorism-related cases;
- The conduct of criminal trials against, and the prosecution of, foreign terrorist fighters, including returnees and relocators;
- Mutual legal assistance in criminal matters, extradition and the use of joint investigative teams in relation to terrorism;
- Jointly working on terrorism and transnational organised crime.

Protection refers to:

- Collection of best practices with regard to de-radicalisation, 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 Terrorism**⁵⁵ (Warsaw 2005) and its **Additional Protocol**⁵⁶ (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**⁵⁷ comprises four pillars: prevent, protect, pursue, and respond (Figure 2).

⁵⁵ [Council of Europe Convention for the Prevention of Terrorism](#), Council of Europe Treaty Series – No. 196 (Warsaw: 2005).

⁵⁶ Council of Europe, [Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism](#), 19 May 2015.

⁵⁷ Council of the European Union, [The European Union Counter-Terrorism Strategy](#), 30 November 2005.

Figure 2: EU Counter-Terrorism Strategy



Source: Authors. The figure is based on the EU Counter-Terrorism Strategy 2005.⁵⁸

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 2014⁵⁹ and **‘Supporting the Prevention of Radicalisation Leading to Violent Extremism’** of 2016.⁶⁰

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 terrorist offences and serious crimes of 27 April 2016⁶¹ provides for the transfer of passenger name record (PNR) data of passengers of extra-

⁵⁸ Based on [The European Union Counter-Terrorism Strategy](#), 30 November 2005.

⁵⁹ [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Preventing Radicalisation to Terrorism and Violent Extremism: Strengthening the EU’s Response](#), Brussels, 15.1.2014.

⁶⁰ [Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions supporting the prevention of radicalisation leading to violent extremism](#), COM/2016/0379, Brussels, 14.6.2016.

⁶¹ [Directive \(EU\) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record \(PNR\) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime](#), Official Journal of the European Union, 4.5.2016.

EU flights by air carriers 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)⁶² and ***The Criminal Justice Response to Support Victims of Acts of Terrorism*** (2012).⁶³

⁶² UNODC, *Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework* (United Nations, October 2015).

⁶³ UNODC, *The Criminal Justice Response to Support Victims of Acts of Terrorism* (United Nations, May 2012).

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 proceedings. Relevant elements of international, EU, and national legal instruments are reviewed.

3.1 International Legal Instruments

The normative requirements for upholding fundamental human rights during criminal proceedings are defined in the **Universal Declaration of Human Rights**⁶⁴ (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.

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’.⁶⁵ 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.⁶⁶ This is stipulated in **Article 14** of the **ICCPR**. The right to liberty is guaranteed under international human rights law. **Articles 9**

⁶⁴ United Nations, [Universal Declaration of Human Rights](#), 10 December 1948.

⁶⁵ United Nations, [International Covenant on Civil and Political Rights](#), 23 March 1976.

⁶⁶ 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.

and 10 of the ICCPR contain provisions concerning detention, arrest, and treatment of accused persons.⁶⁷

The rights of juvenile offenders during criminal proceedings are further stipulated in the **Convention on the Rights of the Child**,⁶⁸ whereby **Article 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. **Article 40** contains provisions regarding the (a) treatment of children alleged as, accused of, or recognised as having infringed the penal law; and (b) right to be informed of 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, and right to assistance by 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 **Article 13** of the **ICCPR**.⁶⁹ The **Convention Relating to the Status of Refugees**⁷⁰ (1951) stipulates the requirement for lawful procedures for expulsion (only on grounds of national security or public order) in **Article 32**.

The **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**⁷¹ prohibits all forms of torture and other cruel, inhuman or degrading treatment, or punishment under any circumstances (**Articles 1 and 2**). **Article 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)**⁷² (1999). Torture, as well the arbitrary or unlawful deprivation of liberty are

⁶⁷ United Nations, [International Covenant on Civil and Political Rights](#), 23 March 1976.

⁶⁸ United Nations, [Convention on the Rights of the Child](#), 2 September 1990.

⁶⁹ United Nations, [International Covenant on Civil and Political Rights](#), 23 March 1976.

⁷⁰ UNCHR, [Convention and Protocol relating to the Status of Refugees](#), 28 July 1951.

⁷¹ United Nations, [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 26 June 1987.

⁷² United Nations, Office of the High Commissioner for Human Rights, [Istanbul Protocol](#), Professional Training Series No. 8/Rev.1, 2004.

also prohibited by the **Convention on the Rights of Persons with Disabilities**⁷³ (**Articles 14 and 15**). The **International Convention on the Elimination of All Forms of Racial Discrimination**⁷⁴ guarantees 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) – **Article 5**.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families⁷⁵ (1990) contains the following provisions:

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

⁷³ United Nations, [Convention on the Rights of Persons with Disabilities](#), 3 May 2008.

⁷⁴ United Nations, [International Convention on the Elimination of All Forms of Racial Discrimination](#), 4 January 1969.

⁷⁵ United Nations, [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families](#), 18 December 1990.

3. International, EU, and National Legal Instruments ...

tial 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 defence 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; (6) the right not to be tried twice for the same crime.

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 ⁷⁶ (1955, revised in 2015)	Sets out basic principles for the treatment of prisoners.
Code of Conduct for Law Enforcement Officials ⁷⁷ (1979)	2. Obligation of law enforcement officials to protect human dignity and human rights of all persons in the performance of their duty. 5. Prohibition for law enforcement officials to inflict torture, not even invoking superior orders or exceptional circumstances.

⁷⁶ [UN Standard Minimum Rules for the Treatment of Prisoners – the Nelson Mandela Rules, 2015](#). [UN Standard Minimum Rules for the Treatment of Prisoners, 1955](#).

⁷⁷ United Nations, [Code of Conduct for Law Enforcement Officials](#), 17 December 1979.

International Instrument	Key Provisions
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) ⁷⁸	<ol style="list-style-type: none"> 1. Duty to provide prisoners and detainees with the same protection of physical and mental health afforded to all other people. 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. 6. No derogation from the previous principles, including public emergency.
Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power ⁷⁹ (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 ⁸⁰ (1985)	<ol style="list-style-type: none"> 1. Independence of the judiciary. 2. Impartiality of the judiciary. 3. Jurisdiction of the judiciary over all issues of a judicial nature. 4. No interference with the judicial process. 5. Right of everyone to be tried by ordinary courts or tribunals with established legal procedures. 6. Obligation to conduct judicial proceedings fairly in the respect of the rights of the parties.

⁷⁸ United Nations, [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](#), 18 December 1982.

⁷⁹ United Nations, [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#), 29 November 1985.

⁸⁰ United Nations, [Basic Principles on the Independence of the Judiciary](#), 13 December 1985.

International Instrument	Key Provisions
<p>United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)⁸¹ (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 Imprisonment⁸² (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>

⁸¹ [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \(The Beijing Rules\)](#), 1985.

⁸² [United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#), 9 December 1988.

International Instrument	Key Provisions
	<p>8. Persons in detention must be, if possible, kept separate from imprisoned persons.</p> <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 imprisoned 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 inform 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>

International Instrument	Key Provisions
	<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> <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 Executions⁸³ (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 Prisoners⁸⁴ (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 Lawyers⁸⁵ (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>

⁸³ United Nations, [Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions](#), 1989.

⁸⁴ United Nations, [Basic Principles for the Treatment of Prisoners](#), 14 December 1990.

⁸⁵ United Nations, [Basic Principles on the Role of Lawyers](#), 7 September 1990.

International Instrument	Key Provisions
Guidelines on the Role of Prosecutors ⁸⁶ (1990)	<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> <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>
United Nations Rules for the Protection of Juveniles Deprived of their Liberty ⁸⁷ (1990)	<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>
Basic Principles on the Use of Force and Firearms by Law Enforcement Officials ⁸⁸ (1990)	<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>

⁸⁶ United Nations, [Guidelines on the Role of Prosecutors](#), 7 September 1990.

⁸⁷ [United Nations Rules for the Protection of Juveniles Deprived of their Liberty](#), 14 December 1990.

⁸⁸ United Nations, [Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#), 7 September 1990.

International Instrument	Key Provisions
<p>Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care⁸⁹ (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 Disappearance⁹⁰ (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>

The **European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)**⁹¹ addresses the right to life (**Article 2**), prohibition of torture (**Article 3**), the right to liberty and security (**Article 5**), and the right to fair trial (**Article 6**). **Article 5** of the Convention specifically enumerates the grounds, which can lawfully justify a deprivation of liberty in the Contracting States. This list of grounds is exhaustive and ‘must be interpreted strictly.’⁹² **Protocol No. 7** to the Convention **for the Protection of Human Rights and Fundamental Freedoms** defines procedural safeguards relating to the expulsion of aliens (**Article 1**); and underscores the right of appeal in criminal matters (**Article 2**) and the right not to be tried or punished twice (**Article 3**).⁹³

⁸⁹ United Nations, Office of the High Commissioner for Human Rights, [Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care](#), 17 December 1991.

⁹⁰ United Nations, [Declaration on the Protection of all Persons from Enforced Disappearance](#), 18 December 1992.

⁹¹ European Court of Human Rights, [European Convention on Human Rights](#), 1950.

⁹² 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.

⁹³ European Court of Human Rights, [European Convention on Human Rights](#), 1950.

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

- **European Convention on Extradition**,⁹⁴
- **European Convention on the International Validity of Criminal Judgments**,⁹⁵
- **European Convention on the Transfer of Proceedings in Criminal Matters**,⁹⁶
- **European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment**.⁹⁷

3.2. EU Regulatory Instruments

The **Charter of Fundamental Rights of the European Union**⁹⁸ guarantees the right to human dignity (**Article 1**), the right to life (**Article 2**), and the freedom from torture and inhuman or degrading treatment or punishment (**Article 4**). Chapter VI of the Charter titled *Justice* addresses criminal procedural rights in the following terms

- **Article 47** – Right to an effective remedy and to a fair trial.
- **Article 48** – Presumption of innocence and right of defence.
- **Article 49** - Principles of legality and proportionality of criminal offences and penalties.
- **Article 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 2009.⁹⁹ 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:

⁹⁴ Council of Europe, [European Convention on Extradition](#), 18 April 1960.

⁹⁵ Council of Europe, [European Convention on the International Validity of Criminal Judgments](#), 26 July 1974.

⁹⁶ Council of Europe, [European Convention on the Transfer of Proceedings in Criminal Matters](#), 30 March 1978.

⁹⁷ Council of Europe, [European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#), 1 February 1989.

⁹⁸ EUR-lex, [Charter of Fundamental Rights of the European Union](#).

⁹⁹ EUR-lex, [Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings](#).

- **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.***¹⁰⁰

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;¹⁰¹
- **Directive (EU) 2016/800** on procedural safeguards for children who are suspects or accused persons in criminal proceedings;¹⁰²
- **Directive (EU) 2016/1919** on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings;¹⁰³
- **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

¹⁰⁰ EUR-lex, [Green Paper Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention](#), 14 June 2011.

¹⁰¹ EUR-lex, [Directive \(EU\) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings](#).

¹⁰² EUR-lex, [Directive \(EU\) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings](#).

¹⁰³ EUR-lex, [Directive \(EU\) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings](#).

party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.¹⁰⁴

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 2002.¹⁰⁵

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

¹⁰⁴ EUR-lex, [Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 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.](#)

¹⁰⁵ EUR-lex, [2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision, 13 June 2002.](#)

3. International, EU, and National Legal Instruments ...

	Directive (EU) 2016/343	Directive (EU) 2016/800	Directive (EU) 2016/1919	Directive (EU) 2013/48/EU	2002/584/JHA Council Framework Decision
Measure B	<p>Art. 8(2a): right to be informed of the trial and of the consequences of non-appearance</p> <p>Art. 8 (4): right to be informed about 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</p>	<p>Art. 4: right to be informed about the criminal proceedings and about one's rights: modes of information, Letter of Rights</p>		<p>Art. 9: right to be informed on the possibility and conditions for waiver</p>	<p>Art. 5 (1): guarantee of information about the date and place of hearing as a condition for the execution of the European arrest warrant</p> <p>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)</p> <p>Art. 13 (2): right to express consent to surrender only voluntarily and in full awareness of the consequences</p>
Measure C	<p>Art. 8 (2b): right to be represented by a mandated lawyer in case of absence at the trial</p>	<p>Art. 6: assistance by a lawyer</p> <p>Art. 18: right to legal aid</p>	<p>Art. 1: subject matter (right to legal aid)</p> <p>Art. 4: legal aid in criminal proceedings</p> <p>Art. 5: legal aid in European arrest warrant proceedings</p> <p>Art. 6: decisions regarding the granting of legal aid</p> <p>Art. 7: quality of legal aid services and training</p>	<p>Art. 1: subject matter (access to a lawyer)</p> <p>Art. 3: right to access to a lawyer in criminal proceedings</p> <p>Art. 4: confidentiality</p> <p>Art. 10: right to access to a lawyer in European arrest warrant proceedings</p> <p>Art. 11: legal aid</p>	<p>Art. 11 (2): right to be assisted by a legal counsel</p> <p>Art. 13 (2): legal counsel when consenting to surrender</p>

COMPARATIVE LEGAL RESEARCH
MAPPING THE LEGAL AND POLICY LANDSCAPE
FOR UPHOLDING CRIMINAL PROCEDURAL RIGHTS IN THE CONTEXT OF COUNTER-TERRORISM

	Directive (EU) 2016/343	Directive (EU) 2016/800	Directive (EU) 2016/1919	Directive (EU) 2013/48/EU	2002/584/JHA Council Framework Decision
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) Art. 5: right to have a third person informed of the deprivation of liberty Art. 6: right to communicate, while deprived of liberty, with third persons Art. 7: right to communicate with consular authorities	
Measure E		Art. 1: subject matter (procedural safeguards for children) Art. 7 (2): right to individual assessment taking into consideration specific vulnerabilities of the child Art. 12 (5b): appropriate measures for the detention of children with physical, sensory or learning disabilities Art. 20 (1): training to communication in a language adapted to the child	Art. 9: special needs of vulnerable persons	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 Art. 13: special needs of vulnerable persons	

3.3. National Legal Instruments

This sub-section provides a summary on how criminal procedural rights are addressed at national level. The summary covers the countries represented in the *FAIRNESS* project, as well as two non-EU countries, New Zealand and Thailand.¹⁰⁶ 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 (Article 2) – 28 October 2016.

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

¹⁰⁶ The data presented in this section has been provided by project partners. The data on New Zealand and Thailand was collected through desk research.

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.¹⁰⁷

¹⁰⁷ Bulgaria, [Constitution of the Republic of Bulgaria](#) (Prom. SG No 56/13 July 1991; *amed.* SG No 100/18 December 2005).

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 of the Court body.
- **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:** revelation 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 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.¹⁰⁸

¹⁰⁸ Bulgaria, [Criminal Procedure Code](#) (Prom. SG No 86/28 Oct 2005; amended. SG No 41/18 May 2021).

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 not 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”.

New Zealand

In New Zealand, criminal offenses are grouped into four categories, based on their level of seriousness.¹⁰⁹ 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).

¹⁰⁹ Sources: Criminal Procedure Act 2011 (CPA 2011), Legal Services Act 2011 (LSA 2011).

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 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:¹¹⁰

- 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 arrested
- 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.

¹¹⁰ Leaflet "[Criminal Proceedings and Defence Rights in New Zealand](#)", Fair Trials International, February 2015.

- 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. 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.
- 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).

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.
- **Section 86:** prohibition of means restraining the arrested person more than necessary to prevent escape.
- **Section 92:** prohibition of searches in private place without a 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 in line with the established international human rights standards should be regarded as the cornerstone of 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.¹¹¹ 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 only under exceptional national circumstances. Challenges arise in balancing counter-terrorism and human rights, but these can be solved within the framework of international law. To be legitimate, any restrictions on the exercise of certain freedoms on the grounds of national security must meet three basic criteria: (1) prescription by law, (2) pursuance of one or more specific legitimate purposes, and (3) necessity and proportionality. Even if States may derogate from some human rights provisions when this is considered strictly necessary, for example in the case of public emergency, such derogation must be defined in both territorial and temporal scope, and the adopted measures must always comply with other obligations under international law.¹¹² **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. Whether or not terrorist acts or threats provide grounds for a state of emergency must be evaluated on a case-by-case basis. Specific areas of concern that the **Office of the United Nations High Commissioner for Human Rights** has identified with regard to the application of human rights standards in counterterrorism are shown in Box 3.

¹¹¹ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, 2008.

¹¹² Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, 2008.

Box 3: Areas of Concern regarding the Application of Human Rights Standards in Counter-Terrorism

Challenges to the right to life. 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. States must ensure that the full range of legal and practical safeguards to prevent torture is available, including guarantees related to the right to personal liberty and security, and to due process rights.

Challenges involved in the transfer of individuals suspected or 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. 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 this principle cannot be limited.

Challenges to the principle of due process and the right to a fair trial. Human rights protections apply to all alleged criminals, including terrorist. 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 States. When addressing terrorism, States need to consider the principle of legality which implies that the imposition of criminal liability is limited to clear and precise provisions, so as to respect the principle of certainty of the law and ensure that it is not subject to interpretation which would unduly broaden the scope of the proscribed conduct.

Challenges to the freedom of expression. Incitement to terrorism is a common strategy used by terrorist organisations 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. Any restrictions must always seek 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. 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. The realisation of economic, social and cultural rights should be regarded as essential to tackle the causes that lead to the spread of radicalisation and terrorism.

*Source: Based on the Office of the United Nations High Commissioner for Human Rights 2008.*¹¹³

The European Parliament has drawn attention to the need for strengthening human rights provisions in the context of counter-terrorism in its 2017 study titled ***EU and Member States’ Policies and Laws on Persons Suspected of Terrorism-Related Crimes***.¹¹⁴ 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

¹¹³ Office of the United Nations High Commissioner for Human Rights, *Human Rights, Terrorism and Counter-Terrorism*, Fact Sheet No. 32, 2008.

¹¹⁴ 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.

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.¹¹⁵

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.¹¹⁶ Given the illicit, violent, and random nature of terrorist acts, terrorism is considered 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.¹¹⁷ 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,

¹¹⁵ 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.

¹¹⁶ 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).

¹¹⁷ Charles Kegley, *International Terrorism: Characteristics, Causes, Controls* (New York: St Martin’s Press Inc, 1990).

“[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. 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.”¹¹⁸

While the destruction of people, property or infrastructure is an indispensable element of terrorism, such destruction is rarely an end in itself. Rather, in most cases terrorists carry out deliberate attacks, in order to provoke a reaction.¹¹⁹ The primary goal of terrorism then 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 infringing 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.¹²⁰ 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.¹²¹

Terrorism is a ‘chaos clad in violence’;¹²² it 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.¹²³ As such, it is not a mere legal violation but an explicit denial of the principles of law upon which modern societies and the international system are built. 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

¹¹⁸ Paul Wilkinson, *Political Terrorism*, (London: Macmillan, 1974).

¹¹⁹ Louise Richardson, *What Terrorists Want: Understanding the Enemy, Containing the Threat* (New York: Random House, 2007); Ronald Crelinsten, *Counterterrorism*, (Cambridge: Polity, 2009).

¹²⁰ 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.

¹²¹ 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.

¹²² 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.

¹²³ Geoffrey Hosking, “[Terrorism and Trust](#)”, *Critical Studies on Terrorism*, vol. 2:3 (2009), pp. 482-496.

law depends on the responses to such attacks, as well as on the reaction to those responses.¹²⁴ 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 violations, whether by terrorists or by states committing abuses in the name of counter-terrorism.”¹²⁵

What distinguishes the post-1945 international system from its predecessors is the fact that it is virtually all-inclusive and law-based.¹²⁶ 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 norms designed to protect human freedoms has remained intact.¹²⁷ 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 shared 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.¹²⁸ However, once the norm underpinning a particular law has been eroded, maintaining general adherence to the law becomes extremely difficult.

The single most important lesson of the War on 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.¹²⁹ 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

¹²⁴ Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005).

¹²⁵ Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005).

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ Jim Whitman, "[Humanitarian Intervention in the Era of Pre-Emptive Self-Defence](#)", *Security Dialogue*, vol.36:3, (2005), pp.259-274.

¹²⁹ Mark Danner, "[The Red Cross Torture Report: What It Means](#)", *The New York Review of Books*, 30 April 2009.

extremism.¹³⁰ In particular, the UN Secretary-General's **2015 Plan of Action to Prevent Violent Extremism** states 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'.¹³¹ 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 criminalise legitimate expression, including controversial viewpoints and information of legitimate public interest, and restrict freedom of religion or belief.¹³²

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 reprehensi-

¹³⁰ On terrorism and crime, see Rajan Basra and Peter R. Neumann, *Criminal Past, Terrorist Futures: European Jihadists and the New Crime-Terror Nexus*, ICSR, 2016. On the securitisation 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 Esteve, 'Migration Crisis in the EU: Developing a Framework for Analysis of National Security and Defence Strategies', *Comparative Migration Studies*, vol.6:28 (2018); 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; 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); Didier Bigo and Elspeth Guild, 'International Law and European Migration Policy: Where Is the Terrorism Risk?', *Laws*, vol.8:30 (2019); Christopher Baker-Beall, 'The Threat of the 'Returning Foreign 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,; 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.

¹³¹ UN General Assembly, *Plan of Action to Prevent Violent Extremism: Report of the Secretary-General*, A/A/70/674, 24 December 2015.

¹³² 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.

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

ble, but as an offence that must be prevented by law'.¹³³ The immanent need is to find a balance between the legitimacy of pursuing a criminal action, on the one hand, and the need to prevent and counter possible security risks and threats, on the other.

¹³³ Giovanni Fiandaca and Enzo Musco, *Diritto Penale. Parte Generale* (Zanichelli: 2019).

This report emphasises the essential need for upholding the established principles and standards of human rights and criminal justice in the context of counter-terrorism and counter-radicalisation. It argues that compliance with human rights and criminal justice requirements in radicalisation and terror-rated cases is an important element of the process of developing effective and sustainable counter-terrorism and counter-radicalisation trust-based strategies and approaches that enhance public safety and national security.



This report was funded by the European Union's Justice Programme (2014-2020). The content of this report represents the views of the authors only and is their sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

