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LIST OF ABBREVIATIONS

ABS  –  American Behavioural Scientist
AJIL  –  American Journal of International Law
AJPH  –  Australian Journal of Politics and History
ASIPP  –  Analyses of Social Issues and Public Policy
ASR  –  American Sociological Review
BCN weapon – biological, chemical, nuclear weapon
CA  –  Court of Appeals
CBA  –  Centralne Biuro Antykorupcyjne [Central Anticorruption Bureau]
CD  –  the Act of 23 April 1964 the Civil Code (JL No. 16, item 93 as amended)
CDS  –  Cahiers de Defense Sociale
CE  –  Council of Europe
CFSP  –  Common Foreign and Security Policy
CJIL  –  Chinese Journal of International Law
CLSCh  –  Crime, Law and Social Change
CMLR  –  Common Market Law Review
CPP  –  the Act of 6 June 1997 the Code of Penal Procedure (JL No. 89, item 555)
CT  –  Constitutional Tribunal
CzPKiNP  –  Czasopismo Prawa Karnego i Nauk Penalnych [Journal of Penal Law and Penal Sciences]
DATR  –  Defence Against Terrorism Review
ECHR  –  European Court of Human Rights
ECJ  –  Court of Justice of the European Communities
EJICLJC  –  European Journal of Crime, Criminal Law and Criminal Justice
EJIL  –  European Journal of International Law
List of Abbreviations

EJLR – European Journal of Law Reform
EOKA – Ethniki Organosis Kyprion Agoniston
EP – European Parliament
EPC – the Act of 6 June 1997 the Executive Penal Code (JL No. 90, item 557 as amended)
ERRJ – Employee Responsibilities and Rights Journal
ETA – Euskadi ta Askatasuna
EU – European Union
European Convention – European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977
Europol – the European Police Office established by the Europol Convention signed in Brussels on 26 July 1995
FA – Foreign Affairs
FARC – Fuerzas Armadas Revolucionarias de Colombia
FCC – Federal Constitutional Court
FLN – Front de Libération Nationale
FLNC – Front de Libération Nationale de Corse
GA UN – General Assembly of the United Nations
GLJ – German Law Journal
GO – Government and Opposition
GS – Gazeta Sądowa [Court Journal]
GSP – Gdańskie Studia Prawnicze [Gdansk Legal Studies]
IAEA – International Atomic Energy Agency
ICAO – International Civil Aviation Organization
ICC – International Criminal Court
ICC Statute – Rome Statute of the International Criminal Court
ICLQ – International and Comparative Law Quarterly
ICTY – International Criminal Tribunal for the Former Yugoslavia
IJCL – International Journal of Constitutional Law
IJPCS – International Journal of Politics, Culture and Society
ILFDI – International Law FORUM du droit international
ILSAJICL – International Law Students Association Journal of International & Comparative Law
IMO – International Maritime Organization
IPM – Information Processing and Management
IPN – Instytut Pamięci Narodowej [Institute of National Remembrance]
IS – International Security
List of Abbreviations

JAP – Journal of Applied Philosophy
JCH – Journal of Contemporary History
JCLC – Journal of Criminal Law & Criminology
JCSL – Journal of Conflict & Security Law
JDBC – Judicial Decisions of the Bialystok Court of Appeal
JDC – Judicial Decisions of the Courts of Appeal
JDCT – Judicial Decisions of the Constitutional Tribunal
JDSC – Judicial Decisions of the Supreme Court – Civil Law Chamber
JDSCCM – Judicial Decisions of the Supreme Court – Criminal Law Chamber and Military Chamber
JE – Journal of Ethics
JHA – Justice and Home Affairs
JICJ – Journal of International Criminal Justice
JL – Journal of Laws
JPR – Journal of Peace Research
KZS – Krakowskie Zeszyty Sądowe [Krakow Judicial Journal]
LCE – the Act of 28 October 2002 on Liability of Collective Entities (JL No. 197, item 1661 as amended)
LLR – Loyola Law Review
LLRev – Liverpool Law Review
LN – League of Nations
MRTA – Movimiento Revolucionario Tupac Amaru
NBP – National Bank of Poland
NGO – Non-Governmental Organization
OIC – Organization of the Islamic Conference
OJEC – Official Journal of the European Communities
Pal. – Palestra [The Bar Magazine]
Par. – Parameters. US Army War College Quarterly
PC – the Act of 6 June 1997 the Penal Code (JL No. 88, item 553 as amended)
PC 1932 – Regulation of the President of the Republic of Poland of 11 July 1932 the Penal Code (JL No. 60, item 571)
PC 1969 – the Act of 19 April 1969 the Penal Code (JL No. 13, item 94)
PCh – Public Choice
PiP – Państwo i Prawo [State and Law]
PK – Problemy Kryminalistyki [Issues in Criminalistics]
PKK – Partiya Karkerên Kurdistan
PKom – Przegląd Komunikacyjny [Transport Review]
POW – Prisoner-of-war
List of Abbreviations

PP – Przegląd Policyjny [Police Review]
PQ – Political Quarterly
ProbPraw – Problemy Praworządności [Law and Order Issues]
ProkPr – Prokuratura i Prawo [Prosecutors and Law]
PrzS – Przegląd Sądowy [Court Review]
PrzSej – Przegląd Sejmowy [Parliamentary Review]
PS – Political Science
RCL – Review of Comparative Law
res. – resolution
RHR – Radical History Review
RIDPP – Rivista Italiana di Diritto e Procedura Penale
RIDU – Rivista Internazionale dei Diritti dell’Uomo
RP – Rivista di Polizia
RPEiS – Ruch Prawniczy, Ekonomiczny i Socjologiczny [The Juridical, Economic and Sociological Movement]
SC – Supreme Court
SCT – Studies in Conflict and Terrorism
SE – Studia Europejskie [European Studies]
SI – Studia Iuridica
SLR – Stanford Law Review
SM – Sprawy Międzynarodowe [International Affairs]
STh – Sociological Theory
SWI – Small Wars and Insurgencies
SZIER – Schweizerische Zeitschrift für internationales und europäisches Recht


The Montreal Convention (II) – Convention on the Marking of Plastic Explosives for the Purpose of Identification signed at Montreal on 1 March 1991


The Tokyo Convention – Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963
The Warsaw Convention – Council of Europe Convention on the Prevention of Terrorism, done at Warsaw on 16 May 2005
The Warsaw Convention (II) – Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, done at Warsaw on 16 May 2005
The Vienna Convention – Convention on the Physical Protection of Nuclear Material, opened for signature at Vienna and at New York on 3 March 1980
TPV – Terrorism and Political Violence
UNSC – United Nations Security Council
UNSWLJ – University of New South Wales Law Journal
VAC – Voivodeship Administrative Court
VP – Vita e Pensiero
YILC – Yearbook of the International Law Commission
ZIZ – Zeszyty Instytutu Zachodniego [Western Institute Journal]
Contemporary terrorism has taken on an unprecedented form and poses a material threat to international relations, democracy and human rights. Such an assessment follows from the observation of determination and ruthlessness of the perpetrators of terrorist acts, their use of new methods of operation, close co-operation of terrorist groups from different countries and their associations with organized crime. Spectacular acts of violence damage life, health, human freedom, violate state security and public order, and disrupt international relations.

The issue of terrorism and measures of counteracting it emerges as a formidable challenge to the dogmatics of criminal law. While there is a widespread conviction that this form of crime should be suppressed, the main problems appear when trying to offer a general definition of terrorism and determining the criteria of terrorist offences. From the viewpoint of comparative law, an inconsistent approach can be noted of penal law to the perpetrators of acts of violence aimed to terrorize the population or compel authorities to grant certain concessions; this uneven approach may result from divergent non-normative assessments, often embroiled in political dispute. The legal classification of such acts is frequently contingent upon the attitude to the activities of certain persons or groups, which are either condoned or condemned if undertaken by political opponents.

By present-day standards, the response of states to terrorism takes two main forms. The criminal justice model, prevailing across European

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countries, consists in approaching terrorism as an exceedingly grave form of crime that needs specific counter-measures, yet such measures as provided by penal law. The war (military) model, associated with the strategy of the United States, allows the qualification of major terrorist attacks as an armed aggression, which, even if it is not initiated by a hostile state, but by some non-state actors, gives the right to respond militarily.

The purpose of this study is to demonstrate and analyse the instruments of international law, European law and of Polish penal law developed to combat terrorism. The most fundamental problem that surfaces at the preliminary stage of any research on terrorism is the lack of a universally accepted definition specifying the content and scope of the notion. It is therefore justified to synthesize the views of the doctrine so as to determine what terrorism is and how to distinguish it from other types of crime, such as organized crime and piracy, or other legitimate forms of protest and opposition. A further part of the study focuses on two research problems. First, it seeks to identify the legal standards for combating terrorism under international and European law. Second, it furnishes a detailed analysis of the provisions incorporated in the Polish Penal Code in recent years. They introduce a new normative structure of an offence of a terrorist nature and specify its consequences.

The issue of terrorism has for many years enjoyed an unabated interest in the world literature. Our domestic research attaches much less attention to the phenomenon. This can be explained by the fact that Poland has so far been regarded as free from this type of crime. There is no doubt, however, that in the age of technological advancement and the lifting of barriers to mobility and communication, no community can feel free from the menace of a terrorist attack. The legislator ought to take account of such a threat and prevent it beforehand. In the laying down of new laws, the conclusions and recommendations arising from the scientific pursuits and deliberation on terrorism should prove more than effective.
Chapter I

The Notion of Terrorism

1. Terror

The concept of “terrorism” derives from the Latin word *terror*, which means “fear, a terrible thing or news.” Etymologically, the term was coined after the verb *terrēre* – “to terrify.”¹ In modern languages, the meaning of the word “terror” is twofold: “the use of force, violence and cruelty in order to intimidate and destroy the enemy;”² and also the effect of such behaviour, i.e. fear, horror, terror.³

In the late 18th century, the notion of terror was associated with the methods of exercising power by the Jacobins during the French Revolution in the years 1793-1994.⁴ The then revolutionary Reign of Terror (*régime de la terreur*) was founded on the ideology of the systematic use of violence against political opponents. Terror in the form of public executions and instances of pacification of the entire provinces was intended to serve the fight against the old order and lay the foundations for a new social order. In fact, it was a measure employed by the new elite to hold political sway and a peculiar form of government legitimacy.⁵

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³ W. Kopaliński, opt. cit. p. 423.
The Notion of Terrorism

Jacobins’ dictatorship, terror became a pejorative term of abuse with criminal implications.⁶

The experience of the late 18th century assigned terror a new meaning. The concept was increasingly identified with acts of violence used by the state (state terror).⁷ In this sense, it is used today in political science to explain the nature of the 20th-century totalitarian systems of government, in which terror was elevated to the status of as a primary and independent measure of governance. It assumed the status of a strategy aimed to impair individual and collective relationships in society and create an ambience of intimidation in order to provoke a desired behaviour.⁸

The literature has attempted to isolate different types of terror. P. Wilkinson distinguishes an epiphenomenal terror, which is accompanied by outbreaks of mass violence during wars and revolutions, which is merely their “by-product,” from a systematic terror inflicted intentionally and deliberately, and designed as “a mode of psychological warfare.”⁹

K. Karolczak distinguishes three types of terror, understood as the use of violence by state institutions with a view to achieving political goals. He defines “terror of state” as the action of a specialized apparatus of coercion (the police and special forces) against citizens (individuals, social groups and political opposition), taking the form of detention, trials, murder, and persecution. The use of force against an entity in international relations (state, international organization) or its representatives by means of the military or special forces he refers to as “state terror.” The last category is “the state-sponsored terror.” In this latter case, the violent action against another state is taken by “commissioned” non-governmental organizations.¹⁰

2. The History of Terrorism

The concept of “terrorism” goes back to the 19th century and initially was used interchangeably with the word “terror.” Later, both terms were distinguished in that “terror” became associated with the activity of the state and its structures, and “terrorism” with violence used by non-state ac-

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⁷ Indecki, K. Prawo karne wobec terroryzmu i aktu terrorystycznego, Łódź 1998, pp. 15, 42.
This new naming convention was largely attributed to the activity of the 19th-century anarchist movement defying the state and its institutions. C. Gearty notes that in the early 19th century terrorism become a “purely technical term, describing the use of violence by political subversives.” Its content was reduced to the description of the phenomenon of clandestine groups engaging in political struggle by having recourse to regular violence in order to terrorize certain groups of the population.

This comparatively late pedigree of the concept of terrorism did not prevent researchers from scouring the distant past for the occurrences of a similar behaviour. The first attacks, well-substantiated in the historical sources and performed in a manner that would nowadays be classified as terrorist, are attributed by researchers to the members of the socio-political movement of the Sicarii (a faction of the Zealots), operating in Palestine (in 66-73 AD). With the dagger as a weapon (sica), they put to death many Roman legionaries and local collaborators. They attacked suddenly, often publicly in a crowd, which amplified the psychological effect on the enemy. They were also accused of poisoning granaries, wells and water supplies. A thousand years later in Persia, a similar method of killing was used by the members of the Shiite sect of the Assassins (1090-1275), established by Hassan ibn Sabbah (“Old Man of the Mountains”). Among their victims were the European crusaders and the rulers of the neighbouring states. The assassinations of rulers, perpetrated by the fedayeen for martyrdom, were both religious acts, resulting from the imperative of faith and communicated by the leader, and political acts, designed to wreak havoc and provoke hostilities in the struggle for succession after the slain ruler.

The emergence of “systematic” terrorism can be dated back to no earlier than the time of increased activity of the revolutionary and anarchist movements in Europe, i.e. the second half of the 19th century. The main

trends in the evolution of the phenomenon in modern times are best reflected in the model proposed by D.C. Rapoport who distinguished four “waves” of terrorism.\textsuperscript{16}

The first wave (anarchist) was triggered in Russia in the 1880s and ended with the Great War. The doctrine underlying the activities of terrorist groups of the time was furnished by the ideologists of anarchism such as M. Bakunin, P. Kropotkin, N. Nechayev and J. Most. They propounded a new method of a revolutionary struggle against the state and its institutions. Due to the very ineffective campaigning consisting in urging the society orally to incite rebellion against the rulers and privileged, they advocated the need to strengthen the oral argument by employing a strategy called “propaganda by the deed.” By means of spectacular attacks against the targets symbolizing the political and economic oppression, they intended to encourage the public to take action, or rise up in rebellion against the authorities.\textsuperscript{17} Anarchists’ activities were facilitated by new technical inventions (explosives) and the progress in communications and printing. Publications such as \textit{The Revolutionary Catechism} championed the doctrinal foundations of the movement along with the new terrorist “ethos” before a wider public. Numerous booklets were practical manuals and contained instructions on the preferred tactics, as well as simple guidelines on how to engineer and plant explosives for an attack. This conduced to a peculiar “professionalization”\textsuperscript{18} of terrorist activity. The Narodnaya Volya, operating in Russia in the years 1878-1881 is thought to be the first terrorist group of that period. Their strategy was later imitated by a number of clandestine groups in Europe, North America and Asia.\textsuperscript{19}

The evolution of national liberation movements in the period from the end of the Great War to the 1960s became a major factor in the emergence of the next wave of terrorism (“anticolonial”).\textsuperscript{20} Separatist and indepen-
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dence aspirations in different parts of the world spawned organizations, which resorted to terrorist activity. In the interwar period, such groups had their say in the shaping of the new political order in the Balkans (VMRO – Internal Macedonian Revolutionary Organization, the Ustasha, the Black Hand), in Palestine (Irgun Zvai Leumi) and Ireland (IRA – Irish Republican Army). Similarly, after World War II, campaigns of violence undertaken on a large scale by the National Organization of Cypriot Fighters (EOKA) and the National Liberation Front (FLN) in Algeria made a significant military and propaganda contribution during the struggle for independence in those countries. In many cases, the terrorist strategy proved successful and compelled the authorities to yield, or even directly led to the establishment of independent states (Ireland, Israel, Cyprus and Algeria).

The third wave of terrorism occurred from the late 1960s to the early 1980s and was marked by the activity of radical leftist groups (the “New Left”). They materially drew on the doctrines of Marxism, neo-anarchism, Maoism and Trotskyism, and modified them to fit the circumstances and conditions of their struggle. Their members espoused the ideas of struggle against capitalism, neo-colonialism or “Americanisation” of the social and political life, treated as the overriding causes of pauperization, inequality and lack of freedom in the world.

In developed countries, this ideology was embraced by relatively weak and small groups, often denied a broader social support, for example: the Red Brigades (Brigate Rosse) in Italy, the Red Army Faction (Rote Armee Fraktion) in Germany, the Direct Action (Action Directe) in France and the Japanese Red Army (Nippon Sekigun). In Latin America, which struggled with genuine poverty and violations of fundamental human rights, ter-

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terrorist groups were more numerous and operated on a wider scale. Such organizations include, for example, the Shining Path (Sendero Luminoso), the Tupac Amaru Revolutionary Movement (MRTA) in Peru, the Revolutionary Armed Forces of Colombia (FARC) and the 19th of April Movement (M-19) in Colombia. These groups were capable of waging their struggle in large cities (urban guerrillas); some controlled extensive rural areas aided by the local population. The same period saw a number of separatist and national liberation movements. Besides the strongest and most determined groups acting in the name of Palestinians who claimed the right to their own state (the Black September, the Popular Front for the Liberation of Palestine), terrorist methods were implemented by the Basque ETA, the IRA, the National Liberation Front of Corsica (FLNC) and the Moluccans in the Netherlands. These movements often displayed strong dependence on left-wing ideology (the Kurdistan Workers’ Party), and were occasionally inspired by religious motives (Sikhs, the Tamil Tigers).

In the 1970s, terrorism became global in scope. This was evidenced by close links between terrorist groups originating in different countries, as well as the selection of targets and locations of attacks that would involve foreigners and the authorities of territories of foreign states. In addition, some states (USSR, Libya and Cuba) began supporting terrorism financially and logistically, which had been very uncommon before.

The last period, which also overlaps with contemporary times, brought the fourth wave of terror and that is religious terrorism. Researchers point to two events of 1979 that sparked the fourth wave: the Islamic Revolution in Iran and the Soviet invasion of Afghanistan. The Iranian Revolution helped constitute a state ruled according to Islamic religious law. In 1980 its political and spiritual leader, Ayatollah Khomeini, launched a campaign of “exporting the revolution” which aimed to topple the secular government and establish one Islamic state. This political and religious doctrine was primarily targeted at the United States and any “Western” influence, recognized as a main obstacle to the unity of the Arab world. Terrorist attacks were but one of many components of the process of cleansing the world of any iniquity, the source of which purportedly was the “Ameri-

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25 Rapoport, D. C. The Four Waves of Modern Terrorism, p. 61.
canization” of life. At the same time, terrorism was sanctioned by spiritual leaders and was given a religious dimension.

During the war in Afghanistan (1979-1989), conscription groups were formed for Islamic militants along with the elaborate contact networks between the combatants and Islamic communities worldwide offering their unrelenting support. These contacts were used for the establishment in 1988 of al-Qaeda, today’s most dangerous terrorist organization.27

The groups owing their inspiration for terrorist activity to the religious imperative are considered particularly dangerous. They are unpredictable and irrational in their endeavours, and their members persevere and are prepared to sacrifice.28 Rationalization of violence by invoking religion leads to the rejection of any limitations to act, be it pragmatic or resulting from political gain versus loss calculation, or ultimately fear for life, and justifies even the most destructive acts. The specific character of faith-driven terrorist attacks is that they are considered sacred acts.29 They are elevated to an unearthly level through the support of the spiritual leaders and religious authorities, and often owing to a lengthy process of indoctrination that underpins the motivation to sacrifice in the name of eradicating the enemy, collectively referred to as “infidels,” “children of Satan” or “the guilty ones.”30

Contemporary Islamic terrorist organizations are able to exploit the latest technologies, mobility, flow of information and financial resources thanks to globalization. They happen to operate legally under the guise of social, cultural and religious institutions. Hardly possible to detect are the so-called “sleeping” cells of an organization dispersed across Western countries, whose members lead a regular life, run a business or

30 Hoffman, B. Religious Extremism, p. 221. It should be noted that John Paul II repeatedly opposed the instrumental use of religion to justify political violence and resisted the idea that the ideology legitimizing acts of terrorism be identified with Islam, cf. Wiak, K. “John Paul II about Terrorism and Counterterrorism Measures,” Review of Comparative Law 14-15 (2009-2010).
integrate with the local community so as not to invite suspicion.\textsuperscript{31} A new method of operation, adopted on a large scale by Islamic terrorists, have become suicide bombings, so engineered as to claim the greatest possible number of victims and inflict extensive damage. The resolve of the perpetrators is reinforced by the belief that such acts are “deeds of martyrdom.”\textsuperscript{32}

\section*{3. The Typology of Terrorism}

A closer look at the historical manifestations of terrorism shows that the phenomenon is manifold. It is conditional upon complex historical, social, ideological or religious factors, which steer and enhance motivation of the perpetrators and their long and short-term goals.

Speaking of the criterion of the entity engaged in a terrorist activity, the following can be distinguished: state terrorism and anti-state terrorism.\textsuperscript{33} The former covers different forms of state involvement in a terrorist activity, both through direct participation in attacks and the offering of shelter and financial backing to terrorist groups. On the other hand, anti-state terrorism is the realm of movements, groups or even individuals, seeking to destabilize the state structures and social order.

Judging by the terrorists’ motivations, terrorism is said to be either political and non-political. In the first case, when causing a state of terror, the perpetrators are impelled by broader political reasons, including the religious or ideological grounds. In the other case, two categories are isolated, namely criminal terrorism, involving ordinary offences committed by resorting to terrorist methods, but in order to make a profit, and pathological terrorism, or terrorist acts perpetrated by mentally disturbed individuals, whose motives cannot be determined unambiguously, or who are driven by frustration or hatred of certain persons, groups

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or institutions. Acts of pathological terrorism are committed with a view to occurring in the public eye or harassing for pleasure or amusement. Non-political terrorism can also include instances of imitating the terrorist modus operandi and of the use of political slogans in order to conceal the actual backdrop to criminal activity. The proposed typology is convenient, since it systematizes the research on terrorism, yet broadly defines its subject. Some authors take issue with this approach and subscribe to the opinion that there is no other terrorism but politically motivated.

As regards political terrorism, P. Wilkinson lists:

1. Repressive terrorism – used primarily by the state and its enforcement agencies for the curbing and subduing of certain groups and individuals;

2. Sub-revolutionary terrorism – ideologically-motivated activities of small groups or individuals who use violence for different purposes, e.g. intimidation, punishment or revenge, but are not in a position to bring about any fundamental revolutionary change;

3. Revolutionary terrorism – its aim is a revolution with the objective of bringing about political transformation in a state; it is always a group phenomenon but under clear leadership and inspired by an ideology or political programme.

P. Wilkinson sees these categories as part of systematic terrorism, as opposed to epiphenomenal terrorism, which has no clearly defined aims and is an unintended consequence of the desolation caused by warfare and mass violence.

This list is further broadened by some authors to include single-issue terrorism; it covers the acts of violence motivated by environmental pro-

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39 P. Wilkinson, Terrorism, p. 57.
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tection (e.g. the Earth Liberation Front in the United States) or defence of animal rights (the Animal Liberation Front in the UK).\(^{40}\)

The diverse territorial and personal range of the phenomenon imposes a dichotomous division of terrorism into international and internal or domestic.\(^{41}\) When separating the two concepts, B.M. Jenkins suggested that the first category include acts of “clear international consequences,” when terrorists go abroad to strike their targets, selecting victims or targets because of their connections to a foreign state (diplomats); also, they attack airliners in international flights, or force them to fly to another country. This does not include acts targeted against a local government or citizens of the perpetrators’ own country having no foreign affiliation;\(^{42}\) Jenkins classified such acts as domestic terrorism. In the Final Document of the Conference on Terrorism and Political Crime, held in Syracuse, Italy, on 4-16 June 1973, the following acts were categorized as international terrorism:

1) “Containing an international element,” when the perpetrator and victim are of different states or when the conduct is performed in whole or in part in more than one state,

2) “Directed against internationally protected targets”: innocent civilians, diplomats and personnel of international organizations, international civil aviation, the mail and other means of international communication, or members of nonbelligerent armed forces.\(^{43}\)


Defining Terrorism

There is yet another category of terrorism and that is transnational. This form of terror is typical of terrorist organizations whose primary goal is a global revolution or the establishment of a transnational world order.\footnote{Cf. Wilkinson, P. *Terrorism*, p. 182.} In this approach, transnational terrorism should be deemed the most dangerous, aggravated form of international terrorism.

4. Defining Terrorism

4.1. The Main Contentious Issues

Many years of research on the phenomenon of terrorism and the legislative work undertaken by various national and international bodies aimed to implement measures to combat it encountered some insuperable obstacles right from the beginning. They were primarily caused by the lack of consensus in determining both the constitutive elements of the concept of terrorism, as well as the criteria defining the terrorist nature of a single prohibited act.

The term “terrorism” is widely recognized as emotive,\footnote{Claridge, D. „State Terrorism? Applying a Definitional Model,” *TPV* 8 (1996), p. 48, Saul, B. *Defining*, p. 1.} extremely pejorative in meaning\footnote{Holyst, B. *Terroryzm*, vol. I, p. 72, Jenkins, B. M. *International Terrorism*, p. 14, Quénivet, N. “The World after September 11: Has It Really Changed?” *EJIL* 3 (2005), p. 562, Saul, B. *Defining*, p. 3, Sorel, J. M. “Some Questions About the Definition of Terrorism and the Fight Against Its Financing,” *EJIL* 2 (2003), p. 366.} and revealing political tinge.\footnote{Cf. Saul, B. *Defining*, p. 3.} Still, there is no agreement as to whether it should be used to describe the behaviour, phenomenon, methods of operation, strategy or a specific ideology. As a matter of fact, the term encompasses various categories of offences involving the use of violence or a threat to use it; it may well accommodate racial cleansing, the activity of gangs or even home argument.\footnote{Cf. Ch. L. Ruby, *The Definition*, p. 10.} Currently, there is a visible trend to extend the concept, as reflected in some linguistic neologisms, such as “eco-terrorism,” “bio-terrorism,” “drug-terrorism,” “cyber-terrorism,” or even to trace some attributes of terrorism in cultural (“cultural terrorism”) or fashion influences (“fashion terrorism”).\footnote{Gearson, J. „The Nature of Modern Terrorism,” *PQ* (2002), p. 9.}
The main concern seems to be the imposing of different content on the concept of terrorism based on political assessment. Over thirty years ago, B.M. Jenkins made the following observation: “Some governments are prone to label as terrorism all violent acts committed by their political opponents, while anti-government extremists frequently claim to be the victims of government terror. What is called terrorism thus seems to depend on point of view.”\(^{50}\) This popular statement is a good illustration of that: “One man’s terrorist is another’s freedom fighter.”\(^{51}\) The concept of terrorism happens, as proven here, to be narrowed by the use of terms that instil a positive attitude in the listener, such as revolutionary, militant or guerrilla. It may as well be unduly inflated and used instrumentally to condemn some disapproved forms of political activity\(^{52}\) that in fact fall within the universal standards of human rights.

In connection with the problems outlined above, opinions are ventured that terrorism is intrinsically “indefinable” and the term itself is hollow and devoid of content.\(^{53}\) Consequently, some are dubious about the effort made to propose a universal definition of terrorism and gain a widespread acceptance for it within the international community.\(^{54}\) At the same time, there are voices urging for such a definition. If accepted, it may prevent the abuse of criminal law for eliminating political opponents and as a justification for the violations of human rights.

It is no doubt indispensable to endeavour to create a universal definition of terrorism of an international reach in order to help harmonize national laws; this will improve the cooperation between law enforcement agencies and the judiciary in different countries. A uniform legal evaluation of terrorist acts could prevent the impunity of their perpetrators and facilitate procedures, such as requesting extradition, or granting asylum or refugee status.

\(^{50}\) Jenkins, B. M. *International Terrorism*, p. 14.


Defining Terrorism

The effect of provisions criminalizing all forms of terrorism and having the character of positive general prevention should also be noted here. The assessment of their effectiveness in preventing this type of crime is rather unbalanced in the literature. Nevertheless, there are views that the very use of terms like “terrorism,” “terrorist” or “terrorist offence” implies a negative attitude and has a “stigmatizing” effect. In order for such a preventive action of criminal law to meet its expected goals, the legislator should be able to rely on a precise definition of terrorism, thus countering abuse that may entail the devaluation of the concept.

4.2. Academic Definitions

Among the various definitions of terrorism, many have been proposed by academics based on the results of their research. In this vast group, some are of inclusive and broad in character and, in fact, constitute a comprehensive description of the phenomenon, while others are concise, often one-sentence statements indicating the most essential features of the concept.

Concisely, terrorism is defined as, for example, “the intentional use or threat of violence to instil fear and/or submissive behaviour of the victim and/or the audience,” or “intentional generation of massive fear by human beings for the purpose of securing or maintaining control over other human beings.” A representative of the Polish doctrine of penal law, R. Lemkin, wrote back in 1935 that terrorism in its broadest sense means, “to intimidate the population by means of violent acts.” P. Wilkinson pointed to similar constituent elements of the concept when submitting his synthetic formula of the systematic use of coercive intimidation. The usefulness of the above definitions for the analysis of the phenomenon and its adaptation to some legal framework is still limited, since they highlight only the most essential – in the opinion of the definition-makers – characteristics of terrorism. They fail to fix the exact boundaries of the concept, leaving some issues unresolved, e.g. state terrorism, criminal terrorism, or the need to substantiate the existence of a political motivation of the perpetrator.

56 Stohl, M. National Interests, p. 38.
A definition widely acknowledged by researchers, and at the same time descriptive and inclusive, is submitted by A. P. Schmid, which reads: “Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-)clandestine individual, group, or state actors, for idiosyncratic, criminal, or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat and violence based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.”

A.P. Schmid advanced his thesis after a thorough examination of 109 definitions submitted beforehand by both the scientific community and national legislatures. Among the most common definition components testifying to what the substance of terrorism is the following factors were indicated: the use of violence and force (83.5%), the political nature (65%) and fear and terror (51%). Some other components include threat; psychological effects and anticipated reactions; differentiation between victim and target; purposive, planned, premeditated, systematic and organized action; method of combat, strategy, and tactics.

M. Cherif Bassiouni defines terrorism as a strategy of violence designed to inspire terror within a particular segment of a given society. He adds that terrorism is usually associated with acts committed by ideologically and politically motivated individuals in order to achieve power, but also by individuals who are not motivated and by individuals acting on behalf of states in time of war and peace.

In recent years, much attention in the literature has been given to the definition by B. Hoffman, who sees terrorism as “the deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change. All terrorist acts involve violence or the threat of violence. Terrorism is specifically designed to have far-reaching psychological effects beyond the immediate victim(s) or object of the terrorist

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61 Cf. ibidem, pp. 5-6.
Defining Terrorism

attack. It is meant to instil fear within, and thereby intimidate, a wider “target audience” that might include a rival ethnic or religious group, an entire country, a national government or political party, or public opinion in general. Terrorism is designed to create power where there is none or to consolidate power where there is very little. Through the publicity generated by their violence, terrorists seek to obtain the leverage, influence and power they otherwise lack to effect political change on either a local or an international scale.”

Interestingly, the author underlines the existence of a particular motivation of the perpetrators (“the pursuit of political change”) and therefore curtails his analysis to political terrorism and omits to include other forms of crime from his consideration. The literature recognises the “transparency” of Hoffman’s choice of words to define the research problem and his ability to clearly mark the boundary of terrorism. In addition, the “relevance” and “universal character” of the description help transpose it to international terrorism.

4.3. Legal Definitions

In addition to academic definitions based on research, and thus of more or less private nature, there is a distinctive set of legal definitions contained in legislation and applied by various national and international institutions. They provide an authentic interpretation of the term “terrorism” along with its derivative expressions, such as “terrorist offence” or “terrorist group”.

The annual U.S. State Department report submitted to the Congress (Country Reports on Terrorism), defines terrorism as premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents. The “non-combatant targets” are not only civilians but also military personnel (whether or not armed or on duty) who are not deployed in a war zone or a war-like setting but also military personnel, regardless of whether they are armed and on duty outside the zone of hostilities.

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64 Malik, O. Enough, pp. 3-4.
Another legal technique was adopted in the British Terrorism Act 2000,\textsuperscript{68} which offers a two-stage approach. First, it determines the subjective scope of such a criminal behaviour. A terrorist act falls within this scope if it involves serious violence against a person, involves serious damage to property, endangers a person’s life, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously disrupt an electronic system (Article 1(2)). Second, it is mandatory to prove that such an act is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public for the purpose of advancing a political, religious, racial or ideological cause (Article 1(1) (b-c)).

Introduced in recent years in various states, the laws regulating the suppression of terrorism in a holistic manner often contain legal definitions of selected terms. The Russian Federal Law of 6 March 2006 on Counteracting Terrorism\textsuperscript{69} elucidates not only the concept of “terrorism,” but also some derivative terms, such as “terrorist activity,” “terrorist act” and even “countering terrorism” and “antiterrorist operation.” According to its provisions, terrorism is defined as “the ideology of violence and the practice of influencing the adoption of a decision by public authorities, local self-government bodies or international organizations connected with frightening the population and (or) other forms of unlawful violent actions.” (Article 3(1)) The vague wording of this law is particularly conspicuous (“ideology,” “practice,” “other forms”), thus leaving the state authorities a broad and discretionary power in its interpretation. This definition can to a lesser extent serve as a guarantee; in particular, it contains no safeguards against the use of counter-terrorism legislation to stifle political opposition or quash demonstrations, strikes, etc. It also resembles a rather general description of the phenomenon than an authentic interpretation of the term used in the law.

The examples provided demonstrate that it is rather challenging to grasp and describe the most essential features of terrorism in an abstract and synthetic formula; moreover, it is no less difficult to obtain approval for it in the scientific community or at the level of interstate cooperation. It transpires that any endeavour to propose a definition that will comprehend the concept in the most definitive manner possible should occur


in two stages. First, some elements must be identified that constitute the essence of the phenomenon. This includes such features of criminal behaviour that contain genuine “terrorist” attributes. Next, the boundaries must be unambiguously defined that distinguish terrorism from other forms of crime and lawful conduct, for example, manifestations of political opposition in the country.

5. The Components of the Definition of Terrorism

5.1. Violence and Its Consequence

Among the constitutive elements embraced in the content of the notion of terrorism, priority is given to violence and the threat of its use. Violence can take different forms, yet it is necessary that it is “capable” of inflicting a state of terror. Speaking of violence, numerous definitions require that it reach a specific, excessive level. As regards the measures used and the possible consequences, it should be “serious,” and threatening to cause death or serious bodily injuries. Still, it should be noted that presently there is an explicit trend to widen the scope of the concept to include attacks against objects, e.g. public buildings, transportation systems and infrastructure facilities. Typically, there is an additional requirement for the occurrence of a sufficiently high degree of menace for such legal interests. The legal definitions also attach a condition for acts of violence to be directed against property or public safety, and be “likely to endanger human life” or cause “major economic loss.” Such a gradation of the concept of violence allows for the exclusion from the scope of terrorism of acts that do not constitute a serious infringement of human rights.

A more controversial component of the definition of terrorism is the requirement to use violence in a manner that is systematic and repeatable. Isolated cases of recourse to violence, even if capable of instilling a state of great terror in the population, are not conventionally referred to in the

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72 Article 1(1)(d) of the framework decision.
literature as terrorism. Yet, nothing prevents them from being seen as “acts of a terrorist nature,” “acts of violence” and “acts of terror.”

B.M. Jenkins notes that terrorism is often described as “mindless,” “senseless” and “irrational” violence, which may suggest that its use is the exclusive and ultimate objective of the perpetrators. Similarly, S. Newman explains the suicide attacks in the United States on 11 September 2001 by writing about their “deliberate meaninglessness” and nihilism underpinning the recourse to violence to instil “pure terror” without any specific political objectives. Such assessments are related in particular to situations where there is an obvious disproportion between the measures used and pursued goals, or when violence is used “blindly,” or affects people whose death is to no direct benefit to terrorists. Nevertheless, B.M. Jenkins is critical of the views focused on the violence itself and its, apparently, tragic absurdity. In assessing the attacks from the terrorists’ perspective, he discerns some logic in their actions. It is manifested in that violence is never an end in itself but a means to achieve specific objectives, even if they are not consistent and precisely named.

5.2. Objectives and Motivation

The perpetrators of terrorist acts reveal complex motivational processes. The voluntative attitude determining their activity occurs on two levels. One is related to a committed prohibited act and the other to the activity of an organization aiming to pursue a specific political agenda. Hence, two types of goals can be distinguished: main (primary) and instrumental (direct, marginal). The instrumental goal is accomplished by the attacks on the legal interests through committed terrorist acts, such as murder or kidnapping, and constitutes a “technical means of pursuing the main objective.” The above-cited relationship between them is mirrored in the framework underlying the definition of terrorism by A.P. Schmid. Accord-

74 Cf. T. J. Badey, Defining, pp. 93-95.
77 Cf. Jenkins, B. M. International Terrorism, p. 15.
79 K. Indecki, Prawo karne, p. 28.
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...ing to this concept, terrorist activity, directed against the instrumental goal – the immediate victims of violence, serves as a “message generator” and a means to manipulate the audience, that is, the main target.\(^8^0\)

An unequivocal identification of the goals for which violence is used is not always straightforward. Anything we learn about this is largely based on the analysis of the terrorists’ declarations provided as demands, manifestos or proclamations published in the mass media. They tend to be inconsistent, illogical, and often utopian and impossible to meet in reality. It happens that ideological declarations of a political nature are intended to camouflage criminal activities that primarily seek to obtain financial gain.\(^8^1\)

Among the common terrorists’ objectives, B.M. Jenkins lists:
- wringing specific concessions, such as the payment of ransom, the release of prisoners or the publication of a terrorist message;
- gaining publicity, attracting attention to a “cause,” attracting attention to the terrorist group as a force to be reckoned with;
- causing widespread disorder, demoralizing society, and breaking down the existing social order;
- provoking repression and retaliatory action, which in turn may lead to the collapse of an unpopular government;
- enforcing obedience, loyalty and collaboration;
- punishment of those victims of the attacks who were considered “guilty” of something or symbolize enemy institutions.\(^8^2\)

This list is supplemented by A.M. Dershowitz by “less rational” objectives, such as the killing of infidels under a religious imperative, the fuelling of violence to accelerate the coming of the Apocalypse or the seeking of revenge or destruction of different ethnic communities.\(^8^3\) There are also views that contemporary terrorism, particularly based on religious grounds, has no rational purpose and that the attacks can only be understood at the transcendental level invoked by terrorists.\(^8^4\)

In the definitions of terrorism, especially those of a normative nature, the authors avoid the enumeration of objectives based on a casuistic approach and determined through the monitoring of terrorist activity. In general, they are provided in a synthetic form that validates the common

\(^{80}\) Cf. Badey, T. J. Defining, p. 91.
\(^{81}\) Cf. Malik, O. Enough, p. 53.
\(^{82}\) Cf. Jenkins, B. M. International Terrorism, pp. 16-18.
\(^{83}\) Cf. Dershowitz, A. M. Terrorismo, p. 93.
belief that terrorism seeks to achieve “political” objectives.85 This distinguishing factor of the concept of terrorism is perceived very broadly. It is referred to not only strictly political pursuits from the sphere of governance, public order in the country, etc., but also those of religious, ideological or even philosophical origin.86 Having taken into account the indicated characteristics, some forms of crime can be excluded from the definition of terrorism, such as those guided by a desire for material gain, or committed by mentally disturbed individuals.

Besides the traditional purpose of intimidating a population or part of it,87 many definitions include the desire of destroying public order or the fundamental constitutional structures,88 as well as compelling a government or an international organization to do or abstain from doing any act.89 Recently, the opinion has been voiced that the terrorist nature of an offence may be determined by the intention to destabilize or cause damage on a large scale when the fundamental political, economic and social structures of a state are threatened.90

Some definitions also stress the need to demonstrate a link between the intention of the perpetrators and the desire to advance a particular political, religious or ideological agenda.91 Yet, this solution may raise doubts,
since the study of such links and investigation into distant, strategic objectives leads to the analysis of the underlying rationale of terrorism and motivations that guide terrorists. Consequently, terrorist acts may be legitimized, especially those justified by noble ideals or a “just cause.” In the present-day literature on the subject, there is a noticeable tendency to abandon such a requirement; it results from the conviction that referring to the motive is not mandatory for explaining the phenomenon of terrorism.\footnote{Cf. Indecki, K. Prawo karne, p. 29, Walter, Ch. „Defining Terrorism in National and International Law,” in: Terrorism as a Challenge for National and International Law: Security versus Liberty? Walter, C., Vöneky, S., Röben, V., Schorkopf, F., eds., Springer 2004, pp. 29-30.}

The requirement of political motivation also brings up significant questions when assessing the actions of social movements and organizations, such as trade unions or anti-globalist groups. Their activity, essentially aimed at influencing the authorities, may be treated as “terrorist,” though intended as the exercise of the fundamental human rights in society: the right to protest and demonstrate one’s views. The issued outlined above may be circumvented by “de-politicizing” the definition of terrorism through such a description of its characteristic objectives that there is no need to test the motives and political agenda of the people resorting to violence.

5.3. “The Innocent” as Victims of Attacks

It is relatively frequently that definitions specify the subject of terrorist attack, which is the target of violence or a threat of violence, by narrowing it to the legal interests of persons referred to as “innocent people,” “innocent victims,” “innocent civilians” or succinctly, “the innocent.”\footnote{Cf. e.g. Beinin, J. „Is Terrorism a Useful Term in Understanding the Middle East and the Palestinian-Israeli Conflict?” RHR 85 (2003), p. 12, Coady, C. A. J. “Terrorism and Innocence,” JE 8 (2004), p. 39, Gilbert, P. Terrorism, Security and Nationality, London-New York 1994, p. 11, Holyst, B. Terroryzm, vol. I, p. 56.}

The advantage of such an approach is the possibility to pin down the objective element testifying to a high degree of social harm of terrorist acts, which justifies the adoption of separate measures of combating this type of crime. Introducing the concept of “innocent victims,” however, has an important
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disadvantage; namely, it may suggest that there is also a category of the “guilty” ones who, when affected by the use of violence, will not be considered as suffering from a terrorist act in a strict sense, or, when directed against them, such an act can even be considered justified. There is also no agreement as to who in fact should be counted as “innocent.” The prevailing conviction is that these are the individuals who neither are involved in the conflict underlying the source of terror nor express their negative attitude towards a particular ideology or viewpoint.94

Perpetrators support a somewhat different interpretation of the terms “guilty” and “innocent” than lawmakers. By their standards, even those appearing accidentally at the place of attack can be regarded as a legitimate target. The intrinsic component of such a rationalization is a reference to the principles of collective responsibility and purported links between the victims and the principal enemy (target) of the terrorists. Actually, such a link may be chimerical or may even never exist.95

There are frequent situations when terrorist acts are deliberately directed against uninvolved civilians, without any attempt to justify that they are chimerical guilty. Such a choice of targets is intended to draw more attention of the media and public opinion. Studies prove that the most appalling and well-publicized acts of violence committed in democratic states resound through the society and are extremely effective means of influencing the decisions of authorities.96

5.4. Strategy and Tactics

The analysis of the objectives achieved through violence is closely connected with the tactics and strategies of terrorism. In this literature on the


95 A much-saying example of such interpretations are the statements of the leaders of the Popular Front for the Liberation of Palestine when justifying the attack at the Lod airport in 1972, which claimed the lives of Puerto Rican pilgrims. According to their explanation, the victims were „guilty” because they had arrived in Israel on Israeli visas, thereby had tacitly recognized the state that was the declared enemy of the Palestinians, and because they had entered what was in effect a war zone. One of the terrorists concluded that „There are no innocent tourists in Israel;” quoted after Jenkins, B.M. International Terrorism, p. 18

subject, in simple terms, short-term goals are referred to as tactical, and the strategy of terrorism is connected to the pursuit of long-term goals.\textsuperscript{97}

Specific methods of the use of violence usually follow from the rational assessment of the existing objective conditions, such as the human, financial and operational resources of a group and a political, social and military background. Terrorist tactics primarily take account of the imbalance of power between the involved parties, which signifies the existence of a so-called asymmetric conflict. Terrorism is in fact used as a weapon of “the weak” against “the strong.”\textsuperscript{98} The modus operandi of the perpetrators is therefore rested on avoiding an immediate military exposure to the enemy. Instead, they use a tactics of sudden hit-and-run attacks.\textsuperscript{99} Among the characteristics of such action, G. Bouthoul lists the secretive nature of the preparations within a small, clandestine group, and an element of imitation in the techniques employed.\textsuperscript{100}

It is also important to produce a kind of dramatic effect surrounding the attack, so that the event will become a scoop for the mass media. By capturing the attention of the press, radio and television, terrorists try to influence the content of the communicated message with a view to having some impact on political decision-makers pressed by the public opinion. Making use of the media gives the perpetrators of terrorist acts the opportunity to achieve many detailed objectives, as listed by M. Cherif Bassiouni: the publication of demands, dissemination of information about the ideology, undermining confidence in the authorities, presenting the perpetrators as heroes, providing the grounds justifying and defending the committed act and arousing sympathy for the ideology or group.\textsuperscript{101}

The phrase “terrorism is theatre” used by B.M. Jenkins for the drama of abducted hostages unfolding before the viewers\textsuperscript{102} reflects the desire of the perpetrators to use the mass media as part of their tactics. Terrorist attacks are often carefully choreographed to attract the attention of the media of the broadest range of influence. The literature on the subject furnishes examples of dexterous terrorists capable of manipulating the mass media and

\textsuperscript{100} Cf. Cherif Bassiouni, M. \textit{Terrorism}, p. 32.
\textsuperscript{101} Cf. Cherif Bassiouni, M. \textit{Terrorism}, p. 32.
\textsuperscript{102} B. M. Jenkins, \textit{International Terrorism}, p. 16.
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exploiting them to satisfy their own needs.\textsuperscript{103} This task is much simplified, since the relationships between terrorism and the media are close to symbiosis.\textsuperscript{104} The perpetrators of terrorist acts need the press, radio, television and the Internet to make an impact on a wider audience, but this relationship is bidirectional: terrorism delivers engrossing and front-page news. This media attitude toward terrorism may lead to devastating consequences of the media’s approach to terrorist attacks as media events, broadcast as some lurid happenings.\textsuperscript{105} Another danger is a strong psychological impact of the media coverage on the audience, which may fuel a desire to imitate. The literature is not unanimous about the actual media’s impact on stimulating a perpetrator to commit a terrorist offence, however, many authors subscribe to the opinion that they have a “contagious effect.”\textsuperscript{106} According to the proponents of this view, an appropriately targeted media message may become a factor in sparking a terrorist activity.

Detailed tactics of terrorist activity is subordinated to the adopted strategy, designed to achieve long-term objectives. D. Fromkin argued that the strategy of terrorism is uniform and is tantamount to provocation. It is based on the assumption that terrorism achieves its goals not because of committed illegal acts, but only through the response to them. It seeks to produce a psychological effect that is not limited to instilling a state of fear, but is to force specific entities to take action.\textsuperscript{107} An advocate of such a strategy was C. Marighella who, in his 1969 \textit{Mini-Manual of the Urban Guerilla}, advised to strive to produce such a state in which, “The people refuse to collaborate with the authorities, and the general sentiment is that the government is unjust, incapable of solving problems, and that it resorts purely and simply to the physical liquidation of its opponents.”\textsuperscript{108}

In the literature, however, there is a prevailing opinion that there is no single “terrorist” strategy, but, depending on the setting of a conflict which involves the use of violence, there may be many of them. Among the most commonly employed, besides provocation, there is the strategy of intimidation, often implemented due to a lack of social support for the political

\textsuperscript{103} Cf. Hoffman, B. \textit{Oblicza terroryzmu}, p. 129.
\textsuperscript{104} Cf. Cherif Bassiouni, M. \textit{Terrorism}, p. 32, Wardlaw, G. \textit{Political Terrorism}, p. 76.
\textsuperscript{108} Full text available at: www.latinamericanstudies.org/marighella.htm.
agenda and terrorists’ activity. Violence in the form of symbolic acts of “punishment” meted out on unruly individuals seeks to inspire a general state of fear and demonstrate the terrorists’ strength, and at the same time the weakness of the authorities unable to counter it.109

Creating an atmosphere of uncertainty and danger, illustrative of the strategy of chaos, is meant to undermine confidence in the state whose bodies are unable to ensure order and security. A public response to this may be a conviction of the need to replace the “weak” government by a “strong regime.”110

The principles of this strategy – its very essence, is reflected in the expression “propaganda by the deed” – were outlined by the theorists of anarchism in the second half of the 19th century. Those concepts explain that terrorist acts should trigger a struggle with an existing political, economic and social order. The activities of even few and weak terrorist organizations were to foment a social rebellion and lead to a massive revolutionary movement.111

Long-lasting, titanic and calamitous struggle, causing serious enemy losses, embodies the essence of the attrition strategy.112 Its objective is to demonstrate the high costs resulting from failure to comply with terrorists’ demands. Depending on whether the perpetrators strike economic or military targets, Ch. C. Harmon distinguishes two extra substrategies: those rendering economic and military damage.113

In many cases, the conditions of a conflict determine the choice of a specific and inclusive stratagem. A. H. Kydd and B. F. Walter provide examples of terrorist acts committed in order to break the ongoing peace talks between the parties (strategy of spoiling), and also to demonstrate a dedication greater than that of other groups to clash with the enemy (strategy of outbidding).114 There is also a known strategy of international effects, that is, to publicize the cause, which involves violence, as an issue of paramount importance with transnational or even global significance.115

112 Kydd, A. H., Walter, B. F. The Strategies, pp. 51, 59-66
114 Kydd, A. H., Walter, B. F. The Strategies, pp. 51, 72-78
6. Terrorism and National Liberation Struggle

The need to establish a relationship between terrorism and the struggle for national liberation arises from their very different legal assessment. As opposed to terrorism, any activity combined with an armed campaign orchestrated to liberate a nation from occupation or colonial dependence, and to establish a separate state is considered lawful and is validated by the internationally acknowledged right of self-determination.116

When distinguishing terrorism from national liberation struggle, a number of their characteristic features and dependencies need to be highlighted. As regards similarities, A. O’Day points to the aspirations for advancing a specific political agenda.117 B. Hoffman points out that “guerrillas and insurgents often employ the same tactics (assassination, kidnapping, hit-and-run attack, bombings of public gathering places, hostage-taking, etc.) for the same purposes (to intimidate or coerce, thereby affecting behaviour through the arousal of fear) as terrorists.”118 There are certain regularities in the evolution of the two methods of struggle. Terrorist methods usually recede into the background with the development of the national liberation movement, or – by contrast – they turn to dominant tactics of action if the social support for the fighters is weakened or eroded. On the other hand, terrorism may be the only available method of struggle where insurgents are few and without wider support. In this sense, terrorism can be recognised as a “form of primitive warfare” typical of the initial period of struggle for freedom.119

The differences between the two forms of struggle lie in the size of combatant groups. As a rule, national liberation fighters are more numerous.120 Such groups are better organized:121 they have commanders and

116 This is guaranteed by many documents of international law, including the Declaration of Principles of International Law, adopted by the UN GA on 24 October 1970, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.
118 B. Hoffman, *Inside Terrorism*, p. 35.
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are modelled on military units. Terrorist groups are usually small, with units of 40-50 people being rare.\(^\text{122}\) In principle, these findings are generally approved, still, there are exceptions. The size of some groups in Latin America, such as the Autodefensas Unidas de Colombia, is estimated at between a few thousand and several dozens of thousands of members. Their members are subject to discipline, are uniformed, and even receive a regular monthly pay.\(^\text{123}\)

The most substantial differences concern the pursued strategy. Freedom fighters intend to capture a specific territory and establish control over it. The liberated area is a shelter and base for further action. It also helps consolidate the local community around a common goal of fighting the enemy. Terrorist groups generally do not seek to seize the area in which they operate. Irrespective of the geographical and territorial considerations, their strategy in the first place involves the psychological impact on the population.\(^\text{124}\) As helpful in drawing the dividing line between the two forms of struggle, the literature on the subject recognises the deep historical, political, cultural and ethnic background of the national liberation and the support from the international community.\(^\text{125}\) Of significance may also be the following particularities: permanence and regularity of action, broad social support for the group, and even battling with regular military troops.\(^\text{126}\)

The means and ways of struggle for national liberation are subject to restrictions under international law. In order for the belligerents’ activity to be lawful, the Hague Laws and Customs of War on Land\(^\text{127}\) require that the irregular forces (militia, volunteer corps) fulfil the following conditions: a) to be commanded by a person responsible for his subordinates; b) to have a fixed distinctive emblem recognizable at a distance; c) to carry


\(^{127}\) Regulations concerning the Laws and Customs of War on Land, annex to the Hague Convention respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.
arms openly; and d) to conduct their operations in accordance with the laws and customs of war. Instances of violation of the laws of war by the freedom fighters may be, for example, violence to the life and physical integrity of persons who are not directly involved in warfare, the taking of hostages, and attacking and intimidating the civilian population as prohibited by humanitarian law.\footnote{Cf. Article 3(1) of the Convention relative to the Protection of Civilian Persons in Time of War, passed at Geneva on 12 August 1949 and Articles 51 of the Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted at Geneva on 8 June 1977.} Such acts may be regarded as conventional manifestations of terrorist activity.

Consequently, the approach of the belligerents to the rules and customs of warfare, and especially to the rules respecting the rights of persons under special protection, such as civilians and the wounded, should be regarded as the conclusive criterion for discriminating between the struggle for national liberation and terrorism.\footnote{Cf. Groffier, E. „Aspects Juridiques,” in: Atala, Ch., Groffier, E. Terrorisme et guerilla. La révolte armée devant les nations, Ottawa 1973, p. 61, Malik, O. Enough, p. 16, Neuman, G. L. “Humanitarian Law and Counterterrorist Force,” EJIL 2 (2003), p. 289, Wilkinson, P. Terrorism, p. 54.} The actions undertaken by the guerrillas are directed against military facilities and are designed to debilitate the enemy’s forces. By contrast, terrorism does not distinguish between the civilian and military targets, and even wilfully strikes those taking no part in the struggle.\footnote{Toman, J. Terrorism, p. 145.}

The ultimate assessment of individual cases often departs from the established criteria when political factors are involved. This assessment may especially be hinged on the international endorsement or condemnation of a particular movement, which is oftentimes determined by some ties developed with the fighters or other particular interests of individual states. Hindrances to the reaching of a consistent judgement of terrorist activities linked to the national liberation struggle become known in the international forum, where two opposite standpoints have come to the fore. The Western states (mainly Europe and North America) support the view that no terrorist acts, regardless of their conditions and circumstances, may be justified and legitimized under international law. The other group, dominated by Islamic states, recognizes the pursuit of the right of self-determination as the criterion distinguishing “freedom fighters” from “terrorists.”\footnote{Cf. Von Schorlemer, S. „Human Rights: Substantive and Institutional Implications of the War Against Terrorism,” EJIL 2 (2003), pp. 271-272, Subedi, S. P. “The UN Response to Inter-}
A clearly defined dividing line between terrorism and national liberation struggle is conducive to determining the status of actors involved in a conflict. In the literature on the subject, there is a prevalent opinion that a person named terrorist due to the non-compliance with the laws and customs of war is refused the veteran and consequently the POW status. However, such an individual is entitled to protection as a civilian during an armed conflict, as follows from international humanitarian law. These standards, however, do not exempt them from liability for terrorist offences.132

7. Terrorism and Organized Crime

Both terrorism and organized crime are particularly dangerous forms of the so-called group crime.133 They share many common features and develop numerous links. According to the definition of 1990 proposed by the German law enforcement agencies and judiciary, organized crime is the planned commission of criminal offences, motivated by profit or power, which, individually or as a whole, are of a considerable gravity and involve more than two perpetrators. Additionally, it is required that the perpetrators collaborate for a prolonged or indefinite period of time, each with their own appointed tasks: by using commercial or “business-like” structures, or by using violence or other means suitable for intimidation, or by exerting influence on politics, the media, public administration, judicial authorities or the economy.134

The most important instrument of international law concerning this type of crime is the UN Convention against Transnational Organized Crime, adopted in Palermo in 2000.135 One of its terms, “organized criminal
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A "structured group" is a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure (Article 2(c)). Such a definition of an organized criminal group is consistent with the concepts of EU law: “criminal organization” and “terrorist group.”

The basic difference between the two forms of crime is mirrored in their dissimilar main (strategic) objectives. K. Indecki states that terrorism is usually intended to attain political goals, while organized crime is primarily its profit-making character. Consequently, he stresses “a different aetiology” of these phenomena and sees any resemblance between them as “purely coincidental.” The criterion of objective does not always permit an unambiguous classification of certain “hybrid” groups (criminal and terrorist) of vaguely defined purpose of action, or concealing their real objectives (a desire for profit) under the disguise of political motivation. This dividing line remains blurred after making a closer examination of the instrumental goals pursued in conjunction with the committed prohibited acts. Both forms of crime may involve assassination, kidnapping, arms trafficking, or forgery of documents and currency.

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138 Cf. Article 2(1) of the framework decision.
140 Cf. Indecki, K. Prawo karne, p. 44.
141 Cf. Saul, B. Defining, pp. 41-42.
An additional distinguishing feature of terrorism seems to be striving to bring about some fundamental changes in the legal order. On the other hand, organized crime, even if it aspires to gain influence over the authorities, it basically rules out the goal of dismantling the system and initiating a broad socio-political transformation. Such an influence can facilitate the corrupting or blackmailing of politicians, law enforcement officers and the judiciary. However, it is not aimed at generating any profound changes in the state structures, since the existing political, legal and social order expedites the engineering of long-term and profitable illegal activities.\(^{142}\)

The differences also lie in the manner of resorting to violence. As aptly put by O. Malik: “Criminals use violence to enable them to acquire resources, whereas terrorists acquire resources to enable them to practise violence. Terrorists generally intend to kill people. Criminals generally kill only when obstructed.”\(^ {143}\) Terrorism resorts to a higher level of violence. Even a single terrorist act may be so choreographed as to garner broad publicity through claiming the highest possible number of victims and extensive damage. As far as organized crime is concerned, such effects are rare.\(^ {144}\) Another distinctive factor is the attitude to the mass media. The rule is that terrorists seek to give the greatest possible publicity to their activity, demands and political agenda, while those involved in organized crime keep out of the limelight; otherwise, it could cause agitation in the society, and thus intensifying the police action and jeopardizing illegal interests.

Nowadays, extensive links and relationships exist between terrorism and organized crime, leading to a specific “reapproachment”\(^ {145}\) between these two phenomena of group crime. There is evidence of liaison between the Colombian drug cartels and the Revolutionary Armed Forces of Colombia (FARC). As a consideration, the group afforded protection to drug producers and traffickers.\(^ {146}\) Drug smuggling is also high on the agenda of al-Qaeda; the proceeds are used for terrorist activity.\(^ {147}\)

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\(^ {142}\) Cf. Michalska-Warias, A. Przestępczość zorganizowana, p. 58, Pływaczewski, E. Przestępczość zorganizowana, p. 29.

\(^ {143}\) Malik, O. Enough, p. 54.

\(^ {144}\) Cf. Malik, O. Enough, p. 54.


The concept of “political crime” is vague, although it has been used in international and national laws for a number of years, not to mention judicial decisions and the literature. The problem with an explicit legal assessment of this category of offences arises from their “dual nature,” which contains criminal and political components. The literature offers three theories aimed to expound its content. Proponents of the objective concept (concerning the deed), based on objective criteria, saw the essence of political crime in the character of the legal interest threatened by the perpetrator’s act; this interest is the state and its most vital bodies. Such thinking was reflected as early as in the findings of the 6th International Conference on the Unification of Penal Law, held in Copenhagen in 1935. The delegates recognised that political crime was an act against the organization and functioning of the state and against the rights of citizens. The subjective concept (concerning the doer) is based on the analysis of the aspect of the offence as to the doer, i.e. it examines the political purpose, motive or reasons for action. This is reiterated by P. Gilbert, who requires that the perpetrator commit the offence for political reasons or as an expression of political beliefs. The mixed (complex) theory combines the two criteria – regarding the doer and the deed. According to its supporters, a political crime is an act of harming the state and its political interest, but also committed with a view to achieving a political purpose, for political reasons or motives.

The legislator most often hands over the issue of the content and scope of political crime to the doctrine and case law. M. Cherif Bassiouni dis-
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tinguished two categories of political offence: “purely political offence” and “relative political offence.” The first group lists acts directed against the authorities and their structure: treason, rebellion, espionage, as well as presenting the views and opinions unfavourable to those holding power (but without inciting to violence). The other group includes acts that violate other legal interests, besides those of the government, and take the form of murder, damage to property and unlawful imprisonment which are committed for political reasons.

Practical problems of pointing to the dividing line between political crime and terrorist offence occur in the case of acts ranked among relative political offences. The literature on the subject proposes to rest such a distinction on the content analysis of the perpetrated act in terms of criminal and political elements to determine the “dominant factor.” It is recommended that the balancing of the two elements be based on an overall assessment of the act, its circumstances and conditions of commission. The prevalence of the political component is not only determined by the political motives or objectives, but also by the general circumstances in which the perpetrator operates and commits the act. The judicial bodies in Western Europe, when deciding on matters concerning the admissibility of extradition, used to exclude the acts displaying a high degree of violence from the scope of political crime; the same applied to those acts in which violence was too remote, or disproportionate to the alleged political purpose. Much importance was attached at the same time to determine whether the perpetrator’s behaviour occurred during rebellion, insurrection or other political unrest, and whether it was closely associated with them.

Over the centuries, the legal assessment of political offence, and thus the attitude to its perpetrator, has undergone a significant evolution. In the former penal law, the offences of high treason (perduellio) and lese-majesty defined, in whole or in part, by political motives (Article 8); cf. Fiandaca, G., Giarda, A. „Codice penale. Codice di procedura penale. Leggi complementari,” IPSOA (2001), p. 80, Panagia, S. II delitto politico nel sistema penale italiano, Padova 1980, pp. 8-9.


155 See ibidem, pp. 404-412.


157 Kubiak, R. Geneza, p.11.


The Notion of Terrorism

(crimen laesae maiestatis) were ranked among the gravest crimes and were capitalized.\textsuperscript{160} Under the influence of the Enlightenment ideology, legislators began noticing the loftiness of perpetrators’ motivation along with their non-egotist position, which later justified their privileged legal status. In the first half of the 19th century in Western Europe, a custom developed of offering safe haven and immunity to the perpetrators accused in their own countries of having committed political crimes.

The trend of liberal treatment of political offenders was soon brought to a close by the objective restrictions placed on the prohibition of extradition. The so-called assassination clause (Belgian clause), first included in the French-Belgian agreement of 1856, provided that when this attack takes the form of either murder, assassination or poisoning, it would not be considered a political crime or an act connected with such a crime when it would be an attack upon the person of the head of a foreign government or of the members of his family.\textsuperscript{161} Today, there is a discernible trend to “depoliticize”\textsuperscript{162} all terrorist crimes and handle them as common offences. A common approach has been to exclude such acts from the scope of the norm prohibiting the extradition of political offenders, as is the case in many international conventions.\textsuperscript{163} The ban on regarding terrorist offences as political offences has been incorporated in several constitutions, e.g. in Article 9 of the Constitution of the Republic of Chile and Article 13(3) of the Spanish Constitution. Article 33(3) of the Constitution of Portugal uses a formula that allows the extradition of own nationals if terrorism or transnational organized crimes come into play.


The introduction by the legislator of the definition of terrorism or laying down the criteria of terrorist crimes is invariably an axiological choice; such a choice must take account of the demand to balance the scope and intensity of protecting the legal interest at risk of violence (the protective function of criminal law) and the exigency of ensuring legal security for every individual (the guarantee function of criminal law). Both functions should be implemented while respecting the fundamental and inalienable human rights that mark out the impassable limits for the legislator. These limits are increasingly vital in the face of a global trend (especially after the 11 September attacks in the USA) to legitimize human rights violations under the disguise of combating terrorism.\textsuperscript{164} The use of generic and imprecise definitions of terrorism, which violates the principle of \textit{nullum crimen sine lege}, is particularly conducive to such abuse.

Such practices validate the need to expressly exclude from the scope of the definition of terrorism any acts that are regarded as manifestations of the exercise of the individual and collective human rights. One way of achieving this objective is a clear indication of the interpretation context; such a context should be factored in when interpreting the rules and regulations fundamental for the legal classification of terrorist offences. This direction is set by the solution adopted in the preamble of the Council Framework Decision of 13 June 2002 on combating terrorism. Its opening declaration reads that “Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.” The deficiency of such a construction results from unresolved disputes about the legal nature and significance of the preamble. Concerns raised pertain to whether its wording allows the in-

troduction of independent standards or if it is only intended as a specific reference to human rights.\textsuperscript{165}

Another solution is an unequivocal decision of the legislator taking the form of a provision that \textit{expressis verbis} omits to include strikes and protests in the concept of terrorism, even if accompanied by the acts perpetrated against public order and property. The normatively designated legal scope of such an activity is usually curtailed. The Canadian Criminal Code provides that such committed acts must not be intended to cause death or injury to persons or to cause a major threat to public health, safety or human life.\textsuperscript{166} A similar model was adopted in Australia, New Zealand and South Africa.\textsuperscript{167}

It is more problematic to provide an explicit classification of acts of a higher degree of social harm, which cause extensive damage to property, including public facilities, and even cause bodily injury to intervening personnel. Examples of such behaviour are the protests organized by anti-globalist movements in Gothenburg and Genoa in 2001 and the riots in the suburbs of Paris and other French cities in 2005. One can venture the opinion that even some cases of wreaking extensive devastation, although meeting the criteria of prohibited acts, do not exceed the limits of freedom of expression and do not fall within the concept of terrorist offences. This conviction was upheld in 2008 by the European Economic and Social Committee in the opinion prepared for the European Commission.\textsuperscript{168} In order to convey the criminal aspect, it is enough to classify such acts as intended against the public order, property or even human life or health, without the necessity of transferring the assessment to the level of combating of terrorism. Yet, such an argument can be imputed to relativism in the treatment of parallel methods of the perpetrator’s action depending on their political and social context. Its critics argue that the crimes considered terrorist due to the nature of the act, and in particular threatening human life and health, should not be justified, even if committed for equitable and humanitarian purposes.\textsuperscript{169}


\textsuperscript{166} Article 83. 01 (1) (b) (ii) (E) \textit{in fine} of the Canadian Criminal Code (\textit{Criminal Code}, R.S., 1985, c. C-46).


\textsuperscript{169} Cf. Tiefenbrun, S. \textit{A Semiotic}, p. 375.
To identify the borderline separating, the various forms of protests and demonstrations from the acts considered terrorist requires that conflicts be resolved between important values, each of which being rooted in human rights. Indispensable for proper decision-making appears to be the adoption of certain restrictions concerning both the manifestations of one’s views and safeguarding against the arbitrary application of criminal legislation by state authorities. Judicial decisions taken in individual cases should make allowances for the proportions between the measures employed by the protesters and their intended objectives, and should strive to determine whether the ways of dispute resolution without violence available in a democratic state have been used in the first place.
CHAPTER II

TERRORISM IN INTERNATIONAL LAW

1. The Beginning of International Cooperation

The need for close collaboration between states aimed to combat certain forms of terrorism, such as attempts on the lives of heads of state or members of their families, was acknowledged already in the second half of the 19th century. The provisions of the then treaties on extradition, especially the so-called assassination clause (Belgian clause), were intended to let no perpetrator go unpunished. The mentioned clause denied the assassin to be recognised as a political offender, hence depriving him of a privileged legal position connected with the possibility of obtaining a safe refuge (asylum), and cleared the path for the transfer of the suspect to the state that intended to submit him to criminal liability. The literature indicates that in this way the first form of terrorist activity was defined in a normative manner and surrendered to international control.¹

In the period between the wars, the legal framework for international cooperation in suppressing terrorism was set by building on the findings of scientific conferences and original ideas and projects submitted by scholars and researchers. The problem in question was often raised during conferences on the unification of penal law, which were held under the auspices of the International Association of Penal Law. The term “terrorism” was first used during the proceedings of the third such conference held in Brussels on 26-30 June 1930. Article 2 of the final document

read: “It shall be a punishable offence to make deliberate use of means of producing a common danger, which shall constitute an act of terrorism chargeable against any person employing crimes against the life, liberty or physical integrity of persons or against governmental or private property for the purpose of propounding or putting into practice political or social ideas.” 2 This formula highlights, as indicated in the closing part of the sentence, that motivation should by all means fall within the definition of terrorism. The conference participants also found it appropriate to extend the scope of such criminal behaviours to the participation in an association formed for the purpose of committing violence against persons or property and to the formation of and cooperation in the formation of such an association, knowing the purpose for which it was formed (Article 3).

The text on terrorism adopted by the participants of the fourth conference in Paris on 27-30 December 1931 3 contained a description of the criteria of the offence whereby the offender “with a view to terrorizing the population, against persons or property makes use of bombs, mines, explosives or incendiary devices or products, fire-arms or any other lethal or destructive devices, or who causes or attempts to cause, propagates or attempts to propagate any epidemic, animal disease or other calamity, or who interrupts or attempts to interrupt any governmental or public utility service” (Article 1). Apparently, motivation was omitted as one of the vital components in the concept of terrorism. As regards the motive and purpose, the perpetrator was not required to support any particular political agenda; the only fact to determine was whether there was the purpose of terrorizing the population. The criminal liability was extended to include such forms of aiding and abetting as: willful manufacture, possession, introduction or transport of the objects mentioned in Article 1 (preparation sui generis  – Article 2) and inciting to commit an offence referred to in Article 1, or defending the acts constituting the said offence or the persons committing it, provided that it is done during public utterances, or takes the form of writings or drawings circulated among the public or publicly displayed (instigation sui generis  – Article 3). Among the instances of criminalized conduct, there was also the offence of participation in an association formed or combination established with a view to the commission any

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of the offences specified above (Article 4). In addition, first ideas emerged on the need to introduce solutions resembling the institution of active repentance, which would shatter the solidarity within a group engaged in a terrorist activity. In order to take advantage of the benefit of avoiding punishment, the co-perpetrator was required to deliver to the public authorities information that led to the arrest of the other offenders (Article 5).

During the fifth conference in Madrid (14-20 October 1934), terrorism was isolated from other offences of causing public danger. According to the proposal contained in the final document, the person to assume criminal liability was anyone who “with a view to destroying any social organization, employs means calculated to terrorize the population” (Article 1).

Compared with the draft adopted at the Paris conference, the description of the criteria of terrorist offence was less case-based and, as indicated in the literature, was effectively reduced to an “anarchist crime.”

The delegates of the last, sixth conference (Copenhagen, 31 August – 3 September 1935) returned to the thesis of the relationship between terrorist activity and acts representing public danger. The resolution adopted at the conclusion of the conference contained a set of model provisions on suppressing terrorism recommended being incorporated into penal codes or special laws as a separate chapter entitled “Outrages Endangering the Community or Creating a State of Terror.” The model provisions prioritized two types of offences covering the main manifestations of terrorist activity. The provision of Article 1 criminalized conducts directed against the life, physical integrity, health or freedom of a head of state or his or her spouse, a person exercising the prerogatives of a head of state, crown princes, members of governments, persons possessing diplomatic immunity or members of constitutional, legislative or judiciary bodies, provided that the perpetrator at the same time endangered the community or created a state of terror calculated to cause change in or impediment to the operation of the public authorities or to disturb to international relations. A similar structure was reflected in Article 2 of the resolution whose provision separated two components. The offence specified therein was committed by a person who perpetrated one of the mentioned acts (including the destruction of facilities or public buildings, the use of explosives in

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5 Quoted after: An Historical Introduction, pp. 470-471.
6 Saul, B. Defining, p. 170; Zlataric, B. History, p. 481.
a public place), and at the same time endangered the community or created a state of terror.7

The League of Nations was yet another forum of exchanging views and collaborating on seeking legal solutions designed to extinguish terrorism. The question was first addressed as early as during the LN assembly in 1926, when the representative of Romania proposed to draw up a convention on making terrorism punishable. However, this initiative was discontinued.8 It was recommenced only as a result of upheaval caused by the assassination of King Alexander I of Yugoslavia and French Foreign Minister L. Barthou in Marseilles on 9 October 1934. In consequence, two draft conventions were drawn up, one on the prevention and suppression of terrorism, and the other establishing a permanent international court competent for trying persons committing acts of international terrorism. The final versions of the two conventions were adopted on 16 November 1937, during the intergovernmental conference convened in Geneva.9

The Convention for the Prevention and Punishment of Terrorism10 formulated the principle of international law stipulating that each state assumed an obligation to refrain from any act designed to encourage terrorist activities directed against another state and to prevent the acts in which such activities take shape, undertake as hereinafter provided to prevent and punish activities of this nature and to collaborate for this purpose (Article 1(1)). It also contained an agreed definition of “act of terrorism” that means: “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public” (Article 1(2)). This synthetic formula fails to include the question of perpetrators’ motivation or the political programme that they intended to implement. However, a distinguishing feature of terrorism became the motive and purpose of the crime, namely to create a state of terror.

An important provision of the convention intended to facilitate the collaboration between states was the obligation of the contracting parties to criminalize selected international acts if they were deemed to constitute acts of terrorism. These were as follows:

1. Any wilful act causing death or grievous bodily harm or loss of liberty to: (a) heads of state, persons exercising the prerogatives of the head of the state, their hereditary or designated successors, (b) the wives or husbands or the above-mentioned persons, (c) persons charged with public functions or holding public positions when the act is directed against them in their public capacity.

2. Wilful destruction of, or damage to, public property or property devoted to a public purpose belonging to or subject to the authority of another state.

3. Any wilful act calculated to endanger the lives of members of the public.

4. Any attempt to commit an offence falling within the foregoing provisions.

5. The manufacture, obtaining, possession, or supplying of arms, ammunition, explosives or harmful substances with the view to the commission in any country whatsoever of any of the offences named above (Article 2).

The procedures laid out in the convention were aimed to guarantee that the perpetrators of terrorist acts be brought to justice and, to prevent their impunity if outside the territory of the state having jurisdiction over the crime. The contracting parties were further obliged to recognise the crimes listed in the convention as extradition crimes (Article 8), and if such a principle were not followed, the persons wanted were to be prosecuted and punished before their own courts (Article 9). Such a solution sought to follow the principle of aut dedere aut iudicare.

Another convention adopted on 16 November 1937 established a permanent international court for trying persons committing acts of international terrorism. The court’s jurisdiction was non-compulsory and subsidiary, and referred to it for political or other reasons there were some obstacles to the trial or hand over of an offender. Yet, the state having jurisdiction under the internal laws was given precedence in initiating the court proceedings before its own tribunal.

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2. Post-War Period

In the period after World War II, terrorism initially emerged as one of the pivotal issues during the work on establishing the definition of aggression and the principles of peaceful coexistence between states. Having adopted such a plane of discussion, the decision-makers focused primarily on the so-called state terrorism.

Prepared by the International Law Commission, the Draft Code of Offences Against the Peace and Security of Mankind of 1954 listed “crimes under international law,” namely “the undertaking or encouragement by the authorities of a state of terrorist activities in another state, or the toleration by the authorities of a state of organized activities calculated to carry out terrorist acts in another state” (Article 2(6)).

The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, Approved by the General Assembly in Resolution 2625 (XXV) of 24 October 1970 highlighted the need for refraining from the threat or use of force in international relations. The first principle of this declaration imposes on every state the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts involve a threat or use of force. Similarly, the General Assembly Resolution 3314/XXIV of 14 December 1974 did not mention terrorism directly, yet it recognised the sending by or on behalf of a state of armed bands against another state as an act of aggression (Article 3 (g)).

The heightened activity of national liberation and leftist groups at the turn of the 1960’s, associated with the emergence of the so-called third wave of terrorism, demonstrated that the operations of non-state actors may be a source of equally grave threats to international relations as acts of


aggression. Consequently, the UN proposed that the phenomenon of terrorism be examined more thoroughly. In the course of discussion, a sharp division of opinions surfaced between two blocks of states representing essentially divergent approaches to numerous key issues. The failure to reach a consensus was primarily due to exceedingly conflicting approaches to the acts of violence committed during the struggle for national liberation. On the one hand, African and Asian countries opposed the linking of this issue with terrorism; on the other, Western states did not acquiesce to a relativized assessment of attacks and their justification contingent on the motivations of attackers. This division was further fuelled by the political and ideological rivalry between East and West during the Cold War period, and a sense of affiliation with the movements and groups resorting to terrorist methods of action (e.g. approval for “the Palestinian cause” expressed by the Arab countries).

A symbol of impotence in reaching agreement was GA UN resolution 3034 (XXVII) adopted on 18 December 1972\(^{15}\) in which the General Assembly only expressed “deep concern over increasing acts of violence which endanger or take innocent human lives or jeopardize fundamental freedoms” (point 1), and furthermore reaffirmed the inalienable right to self-determination and independence of all peoples under alien domination and upheld the legitimacy of the struggle of national liberation movements (point 3). It also condemned “the continuation of repressive and terrorist acts by colonial, racist and alien regimes” (point 4). Contained in resolution 3034 (XXVII), firm statements concerning the legality of national liberation struggle and the stigmatisation of terrorism were collated with a mere “deep concern” over other acts of violence. The General Assembly maintained a similar attitude to terrorism until the early 1990s.\(^{16}\)

Under that same resolution, the Ad Hoc Committee for international terrorism was established, consisting of the representatives of 35 countries. The work of this body was carried out within three sub-committees, the first of which was to propose a definition of terrorism, the second – to determine its causes, and the third – to propose measures for its suppres-

\(^{15}\) Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those form of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in attempt to affect radical changes, UN GA Resolution 3034 (XXVII), full text available at: http://daccess-ods.un.org/TMP/7581012.html.

sion. The members of the Ad Hoc Committee were at variance with one another in such fundamental issues as the assessment of the legality of acts of terrorism committed in the struggle for national liberation, the legitimacy for the inclusion of state terrorism in the scope of the work, or even the need to agree on one definition of international terrorism. Ultimately, the final report failed to include a unanimous position and only listed discrepancies in the opinions of individual delegations. Further work of the Ad Hoc Committee and its reports of 1977 and 1979 also represented no breakthrough in reaching an agreement on the definition of terrorism and measures to combat it.  

3. Sectoral Conventions

The level of collaboration within the UN General Assembly and in the Ad Hoc Committee proved that the international community should not expect a quick definition of terrorism and identification of measures to counteract it. The lesson learned led to the focusing on the development of regulations addressing individual manifestations of terrorism, isolated based on its phenomenological analysis. Based on the modus operandi criterion, a selection was made of offences of terrorist character, and a scope of international cooperation was determined with a view to combating them. The agreement was made by excluding the most controversial issues, such as the perpetrator’s motivation and objectives, and the decision-makers focused on the objective nature of the isolated prohibited acts. This resulted in the drawing up of a number of important conventions referred to as “sectoral,” since they only referred to the specific forms of terrorism.

3.1. Air Terrorism

The first international agreements of sectoral character addressed air terrorism. The following documents were adopted under the auspices of the International Civil Aviation Organization (ICAO):


The solutions adopted in these international agreements responded to the exponential increase in the number of seizures of aircraft in the late 1960's and in the early 1970's.\(^{22}\) Their provisions defining the offences and legal measures designed to combat them were aimed at preventing any behaviour that threatened the safety of air transport, irrespective of the aims and motivation of the offenders. Their scope was broad and not limited to counteracting terrorism; it also included the cases of hijacking aircraft for ransom or with the aim of fleeing the country.\(^{23}\)

The Tokyo Convention refines the understanding of the act of “unlawful seizure of aircraft.” In accordance with Article 11(1), such an act is committed by a person on board “who has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed.”

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\(^{18}\) The convention entered into force on 4 December 1969 ratified by 183 states. Information on the ratification of the conventions adopted under the auspices of the ICAO is provided after the official website of the organization: www.icao.int/index.html.

\(^{19}\) The convention entered into force on 14 October 1971 ratified by 183 states.

\(^{20}\) The convention entered into force on 26 January 1973 ratified by 187 states.

\(^{21}\) The protocol entered into force on 6 August 1989 ratified by 165 states.

\(^{22}\) A. E. Evans gives the number of 277 of aircraft hijacking incidents in the world between 1969 and 1972. By contrast, in the years 1961-1968, only 66 similar incidents were reported; Evans, A. E., “Aircraft Hijacking: What is Being Done,” AJIL 67 (1973), p. 641.

Chapter III of the Tokyo Convention names the powers of the aircraft commander when he or she has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act mentioned in Article 1(1). The commander may use against such a person “reasonable measures including restraint” which are necessary: a) to protect the safety of the aircraft, or of persons or property therein, b) to maintain good order and discipline on board, c) to enable him to deliver such person to competent authorities or to disembark them (Article 6(1)). The aircraft commander may require or authorize the assistance of other crewmembers and may request or authorize, but not require, the assistance of passengers to restrain any person (Article 6(2) sent. 1). Other persons on board the aircraft (crewmembers or passengers) may also take “reasonable preventive measures” when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein (Article 6(2) sent. 2).

In another convention, adopted under the auspices of the ICAO and signed on 16 December 1970 in The Hague, the focus was shifted to the detailed description of one particular crime. As provided in Article 1, an offence is committed by a person who on board an aircraft in flight: a) unlawfully, by force or threat, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or b) is an accomplice of a person who performs or attempts to perform any such act. The provision of Article 2 of the Hague Convention imposes the obligation on states to recognize this offence as subject to “severe penalties,” without, however, supplying a more precise guidance as to the type of the penalty or its minimum and maximum limit.

The provision of Article 4(1) of the Hague Convention obliges the contracting parties to take measures to establish jurisdiction over the offence mentioned in Article 1 and over any other act of violence against passengers or crew. This obligation is effective for the state in which such an aircraft is registered, one on whose territory the aircraft lands with the alleged offender still on board, and one that is the principal place of business or the permanent residence of the lessee of that aircraft. In addition, Article 4(2) of the Hague Convention extends the obligation to establish the jurisdiction over the offence to the state in which the alleged offender is present if he has not been extradited to the states named in Article 4(1). The provisions concerning jurisdiction over the offences covered by the Hague Convention explicitly allow the concurrence of jurisdictions of different states that consider themselves appropriate to initiate the proceedings. This model eliminates the possible loopholes that might help
the perpetrator seek shelter in a state refraining from punishment. At the same time, however, the problem of precedence in the case of overlapping jurisdictions remains unresolved.

The crime of seizure or taking control of an aircraft was deemed to justify extradition and was included in extradition agreements concluded between the contracting parties to the convention (Article 8(1)). If extradition were conditional on the agreement existing between the parties, the Hague Convention might be considered the legal basis for such extradition (Article 8(2)). If extradition is refused, which might take place if the offence is made political, the state in the territory of which the alleged offender is found will be obliged, “without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution” (Article 7). Thus, the provisions of the Hague Convention seek to follow the principle of aut dedere aut iudicare. Due to the international circumstances of the time, this model was thought to be the optimum solution and a compromise was reached between the approach of states disinclined to reduce their sphere of sovereignty and the common interest of all states allied in combating the most serious crimes.

The subsequent ICAO convention, signed on 23 September 1971 in Montreal, restated the legal arrangements regarding jurisdiction and extradition adopted in the Hague Convention. However, it broadened the scope of criminalized acts. In accordance with Article 1(1) of the Montreal Convention, a person commits an offence if he or she unlawfully and intentionally:

a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft,

b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight,

c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight,

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d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight,

e) communicates information, which he knows to be false, thereby endangering the safety of an aircraft in flight.

The Montreal Protocol of 24 February 1988 further broadened the list of offences by prohibited acts occurring at airports. The protocol adds a new paragraph 1bis to complement the array of acts criminalized under the Montreal Convention. It reads that a person commits an offence if he unlawfully and intentionally, using any device, substance or weapon: (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death, (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport (Article II).

Additionally, the ICAO developed the Convention on the Marking of Plastic Explosives for the Purpose of Identification, signed at Montreal on 1 March 1991 (hereinafter: the Montreal Convention (II)).26 It responded to the growing concern of the international community about the use of the so-called plastic explosives, such as the American C4 or Czech Semtex, in terrorist attacks against aircraft. Unlike the previous international agreements adopted under the auspices of the ICAO, the Montreal Convention (II) does not criminalize any new behaviour of terrorist nature, but is designed as a preventive measure. The convention imposes on every state the obligation to take the necessary and effective measures to prohibit and prevent the manufacture in its territory of unmarked explosives (Article II), and to prohibit and prevent the movement into or out of its territory of unmarked explosives (Article III(1)). It also stipulates that within three years from the entry into force of this convention all stocks of unmarked explosives are destroyed, marked or rendered permanently ineffective (Article IV(2)).

3.2. Maritime Terrorism

The scale of attacks against sea navigation never attained the size comparable to air terrorism. According to the data from the RAND Terrorism

26 The convention entered into force on 21 June 1998 ratified by 139 states.
Database, for the last 30 years, the acts classified as acts against the security of maritime transport accounted for only 2% of all terrorist acts on an international scale. Only the spectacular seizure of the Italian passenger liner *Achille Lauro* (3-10 October 1985) urged that legislative measures be implemented to facilitate international cooperation in combating this form of crime.

The International Maritime Organization (IMO) proposed two international agreements:


The classification of offences provided in the Rome Convention encompasses a relatively wide spectrum of acts, whose normative structure resembles the model adopted earlier in the Montreal Convention. In accordance with Article 3(1) of the Rome Convention, a person commits an offence if unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat or any other form of intimidation, (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship, (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship, (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship, (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship, (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship, (g) injures or kills any person, in connection with the commission or the attempted commission of any of

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29 The convention entered into force on 1 March 1992 ratified by 146 states. Information on the ratification of the international agreements concluded under the auspices of IMO is provided after the website: www.imo.org/home.asp.

30 The protocol entered into force on 1 March 1992 ratified by 135 states.
the offences set forth in subparagraphs (a) to (f). The last of these offences has no equivalent in the earlier sectoral conventions on suppressing air terrorism. Its addition is associated with the murder that occurred during the seizure of Achille Lauro.31

A similar set of criminal behaviours to that listed in the Rome Convention is contained in Article 2 of the Rome Protocol. However, its subject is no more a vessel but a “fixed platform,” i.e., in the meaning of Article 1(3) of the Rome Protocol, an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes. The provisions of the Rome Convention also apply mutatis mutandis to the offences named in the Rome Protocol and pertaining to the criminal sanctions and extradition of perpetrators (Article 1(1) of the Rome Protocol).

Two protocols drawn up in the years 2002-2005 by the IMO Legal Committee introduce extensive modifications to the content of the two international agreements on the safety of navigation and fixed platforms located on the continental shelf, signed on 10 March 1988 in Rome. Their final version was agreed and adopted at the diplomatic conference, held on 10-14 October 2005 in London. These are: the Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at London on 14 October 2005 (hereinafter: the London Protocol),32 and the Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, signed at London on 14 October 2005, (hereinafter: the London Protocol (II)).33

The London Protocol introduces a number of amendments to the original wording of the treaty; specifically, it largely broadens the scope of criminalized acts. Added to the text of the Rome Convention is a new provision in Article 3bis (1)(a) which reads that a person commits an offence if unlawfully and intentionally:


33 Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the safety of fixed platforms located on the continental shelf, London 14 October 2005, IMO Doc. Leg/Conf./15/22, the full text available at the IMO’s official website: www.imo.org/
(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage,

(ii) discharges from a ship hazardous or noxious substance in such quantity or concentration that causes or is likely to cause death or serious injury or damage,

(iii) uses a ship in a manner that causes death or serious injury or damage,

(iv) threatens to commit any of the offences listed above.

An additional requirement is that the purpose of such an act, resulting from its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

No specific requirements in terms of motive and purpose (except for the intention) are provided for by the description of another offence whose criteria are set out in Article 3bis of the Rome Convention. It is committed by a person who unlawfully and intentionally transports on board a ship: a) any explosive or radioactive material, knowing that it is intended to be used to cause death, serious injury or damage, b) any BCN weapon, c) any fissionable material, or equipment especially designed for the production of such material, d) any materials or technology intended for the manufacture of a BCN weapon.

An innovative solution, testifying to an exceptionally case-law-based approach of the London Protocol originators, is the introduction of a separate offence of accessory after the fact sui generis. According to Article 3ter, this offence is committed by a person who unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence under the Rome Convention or other treaty, thus intending to assist that person to evade criminal prosecution. A novel addition is also the liability of juridical persons when a person responsible for management or control of that legal entity has committed an offence under the Rome Convention (Article 5bis).

The amendments made to the Rome Protocol by the London Protocol (II) may be likened to those listed above. The differences lay in a distinct object of the offence, that is, a “fixed platform.”

The adoption of the conventions providing measures to combat unlawful acts against the safety of air transport and sea navigation necessitated the elucidation of the relationship between terrorism and piracy.

Acts of piracy were among the first classified as delictum iuris gentium and as early as from the 17th century have been prosecuted as internation-
al crimes. In accordance with Article 15 of the Convention on the High Seas, done at Geneva on 29 April 1958, piracy is:

1. Any illegal act of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft,
   b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any state,

2. Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft,

3. Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article. The same components making up the concept of piracy feature in Article 101 of the United Nations Convention on the Law of the Sea, done at Montego Bay on 10 December 1982.

When differentiating between the acts of terrorism and piracy, first the actual (not only declared) perpetrators’ intent should be determined, as well as their ultimate goals. Piracy is widely recognised as an act of aggression for the purpose of robbery (to obtain certain proceeds), while those who seize aircraft and ships are generally inspired by political motives. This idea is corroborated in Article 15(1) of the Convention on the High Seas, which reads that piracy occurs when an act of violence, detention or depredation is committed “for private ends.” It does not necessarily need to imply a desire to obtain material benefits, but can also be motivated by revenge or hatred. Furthermore, Article 15 of the Convention on the High Seas provides that two vessels need to be involved for an act of piracy to occur. Finally, it should be noted that piracy is narrowed in terms of territory and refers to acts committed on the high seas or in locations outside the jurisdiction of any state. Such a condition is not attached to terrorism.

3.3. Attacks Against Internationally Protected Persons

The end of the 1960s and beginning of the 1970s saw a dramatic escalation in serious attacks against diplomats and other state representatives

abroad. The prevailing forms of violence were assassinations and kidnappings, as well as the taking of hostages and seizure of the premises of diplomatic missions.\footnote{In the years 1968-1980, there were 2,688 attacks reported against diplomats. Between 1973 and 1982, they were the main target in 34.9% of all acts classified as terrorism; cf. Baker, J. C. The Protection of Diplomatic Personnel, Ashgate 2006, p. 8.} In this respect, a fundamental step in the furthering of international cooperation was the adoption by the UN of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted at New York on 14 December 1973 (hereinafter: the New York Convention (I)).\footnote{The convention entered into force on 20 January 1977 ratified by 171 states. Information on the ratification of the conventions adopted under the auspices of the UNO is provided after the official website of the organization: http://treaties.un.org/Pages/ParticipationStatus.aspx.} The provisions of the New York Convention (I) apply to acts against a particular category of internationally protected persons, such as: (a) a head of state, including any member of a collegial body performing the functions of a head of state under the constitution of the state concerned, a head of government or a minister for foreign affairs, whenever any such person is in a foreign state, as well as members of his family who accompany him, (b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household (Article 1(1)).

A key provision of the New York Convention (I) is the obligation of Article 2(1) for the signatories to make punishable the intentional commission of: (a) a murder, kidnapping or other attack upon the person or liberty of an internationally protected person, (b) a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty, (c) an attempt to commit any such attack, and (d) an act constituting participation as an accomplice in any such attack.

In addition to the commitment to establish jurisdiction known from former sectoral conventions (Article 3), and to extradite the perpetrator or submit the case to the competent authorities for the purpose of prosecution (Article 7-8), the New York Convention (I) requires cooperation between states in the prevention of crimes specified therein. Such cooperation should consist in preventing preparations in the signatory state's
territory for the commission of crimes against internationally protected persons, and in exchanging information and coordinating other measures (Article 4). During criminal proceedings, the parties to the convention should afford one another “the greatest measure of assistance,” including the supply of gathered evidence (Article 10).

The standards of international protection established in the New York Convention (I) were subsequently accommodated to the persons involved in the UN operations under the Convention on the Safety of United Nations and Associated Personnel, adopted at New York on 9 December 1994 (hereinafter: the New York Convention (III)).

3.4. Hostage-Taking

For centuries, hostage-taking was a permissible practice in international relations, at times even sanctioned by customary law. The contemporary rules of international humanitarian law prohibit the capturing of hostages, which stems from the principle of refraining from the use of force against civilians.

In its preamble, the International Convention against the Taking of Hostages, done at New York on 17 December 1979 (hereinafter: the New York Convention II), sees all acts of hostage taking as “manifestations of international terrorism.” This offence is committed by any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (the “hostage”) in order to compel a third party, namely, a state, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage, and attempts to commit an act of hostage-taking or participates as an accomplice (Article 1).

Like the former sectoral conventions, the New York Convention (II) includes the obligation to establish jurisdiction (Article 5), extradite the offender or submit him to criminal proceedings (Article 8) and to cooperate in the prevention of hostage-taking (Article 4). In addition, the state in the territory of which the hostage is held is obliged to take all measures it

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38 The convention entered into force on 15 January 1999 ratified by 85 states.
39 In ancient times, captives secured peaceful relations between states and their fulfilment of taken commitments. It was also very common to capture wealthy individuals who were released after the ransom was delivered; cf. Allen, J. Hostage-taking in the Roman Empire, Cambridge 2006, p. 9, Kushner, H. W. Encyclopaedia of terrorism, Thousand Oaks 2003, p. 174.
40 The convention entered into force on 3 June 1983 ratified by 166 states.
considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate his departure (Article 3(1)). The New York Convention (II) does not quell the controversy related to the admissibility, or even an obligation to pay a ransom, or to satisfy other demands (e.g. release of some prisoners) of the offenders. It only provides that any object which the offender has obtained as a result of the taking of hostages, and which subsequently comes into the custody of a state, should be returned as soon as possible to the hostage, to the third party or to the appropriate authorities (Article 3(2)).

3.5. The Protection of Nuclear Material and Nuclear Facilities

The menace arising from the possibility of obtaining and using by terrorist organizations of nuclear material triggered the development of an international agreement laying down the policy for handling such material during its use, storage and transport. The Convention on the Physical Protection of Nuclear Material, opened for signature at Vienna and at New York on 3 March 1980, (hereinafter: the Vienna Convention)\(^41\) was drawn up under the auspices of the International Atomic Energy Agency (IAEA). Besides the provisions enforcing the standards of transport of nuclear material or cooperation in case of the loss of control of them, the convention required the state parties to recognise in their domestic legislation the following offences as punishable: fraudulent obtaining, theft and embezzlement of nuclear material, demand for nuclear material by threat or use of force and a threat of its use (Article 7).

During the 4-8 July 2005 Vienna Diplomatic Conference, its content was amended. Its title was modified: the Convention on the Physical Protection of Nuclear Material and Nuclear Facilities.\(^42\) An extensive and detailed record of acts that should be criminalized is given in Article 7(1) of the Vienna Convention, supplemented by the 2005 amendment. It covers the intentional commission of:

(a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material

\(^{41}\) The convention was ratified by 137 states. Information on the ratification of the conventions is provided after the official website of the IAEA: www.iaea.org/Publications/Documents/Conventions/cppnm.html

\(^{42}\) Cf. Amendment to the Convention on the Physical Protection of Nuclear Material (GOV/INF/2005/10-GC(49)/INF/6).
and which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment;

(b) a theft or robbery of nuclear material;

(c) an embezzlement or fraudulent obtaining of nuclear material;

(d) an act which constitutes the carrying, sending, or moving of nuclear material into or out of a state without lawful authority;

(e) an act directed against a nuclear facility, or an act interfering with the operation of a nuclear facility, where the offender intentionally causes, or where he knows that the act is likely to cause, death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances, unless the act is undertaken in conformity with the national law of the state in the territory of which the nuclear facility is situated;

(f) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

(g) a threat:

(i) to use nuclear material to cause death or serious injury to any person or substantial damage to property or to the environment or to commit the offence described in sub-paragraph (e);

(ii) to commit an offence described in sub-paragraphs (b) and (e) in order to compel a natural or legal person, international organization or state to do or to refrain from doing any act;

(h) an attempt to commit any offence described in sub-paragraphs (a) to (e);

(i) an act which constitutes participation in any offence described in sub-paragraphs (a) to (h);

(j) an act of any person who organizes or directs others to commit an offence described in sub-paragraphs (a) to (h);

(k) an act, which contributes to the commission of any offence, described in sub-paragraphs (a) to (h) by a group of persons acting with a common purpose; such act shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence described in sub-paragraphs (a) to (g); or

(ii) be made in the knowledge of the intention of the group to commit an offence described in sub-paragraphs (a) to (g).

Each state was also obliged to make the listed offences punishable by taking into account their grave nature (Article 7(2) of the Vienna Convention).
3.6. The Significance of Sectoral Conventions

When assessing the solutions for the suppression of terrorism contained in the sectoral conventions, it must be borne in mind that their development was marked by political and ideological rivalry between three blocks of states: “Western,” “Eastern” and “developing” ones. A serious dissent was registered when discussing many issues, such as the problem of state terrorism and the obligation to extradite the offender; yet, of key importance was diverse interpretation of acts of violence committed during the struggle for national liberation.

The inability to develop a consensus, especially in that last issue, shifted the focus to the proposal of typifying prohibited acts regarded as terrorist methods of pursuing criminal conduct, and thus bypassing the motivation aspect typifying any perpetrator. Consequently, no offence criteria were identified that would represent the essence of terrorism *per se*. Therefore, the delineated area of international cooperation also covered crimes having no connection with political activities, but carried out for material gain or out of revenge. The only restriction was the requirement to identify a foreign (international) component in the perpetrator’s deed.

Among the legal standards laid down in the sectoral conventions, priority is given to the obligation to criminalize the relevant offences in domestic legislations. They were not, however, classified as crimes under international law, such as crimes against humanity or war crimes. Their defining provisions are not self-executing[^43] but require corresponding amendments to be made in the domestic penal law. Still, due to the large number of ratifications, they embodied universal attributes and exert a material influence over the development of common practice in international law.[^44]

The literature on the subject points out that the provisions implementing the principle *aut dedere aut iudicare*[^45] assume a key role among the counter-terrorism measures agreed in the sectoral conventions. However, they do not impose the obligation to extradite the offender, although they


embrace a number of provisions expediting the effective handling of such a procedure.

4. The New UN Strategy of Combating Terrorism

Since the early 1990s, there has been a manifest progress in the position of the United Nations on the problem of terrorism. It arose from the greater acceptance by the member states of the conviction that international terrorism may not be legitimized in any way and found expression in the endeavours to comprehensively regulate the entire body of the concept of terrorism and measures to combat it and to “depoliticize” the very concept of terrorist offence.46 This fundamental evolution of the position towards acceding to the solutions proposed by the “Western” countries was the upshot of the political transformation ensuing from the end of the Cold War and the dissolution of the Eastern Block. The resistance of Asian and African countries was further crumbled by the escalation of attacks at the end of the 20th century, which stimulated a prevailing sense of danger. The attacks on 11 September 2001 in the USA were a catalyst for the activities of UN bodies. Affected by this experience, the international community embarked on the development of a global strategy of suppressing terrorism.

4.1. Activities of the General Assembly of the United Nations

New trends in the UN were reflected in resolution A/RES/49/60, adopted without a vote on 9 December 199447 it is considered in the literature as a watershed in the struggle against terrorism.48 It contains the attached Declaration on Measures to Eliminate International Terrorism, which condemns “all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever committed” (para. 1). An unequivocal and firm message of the Declaration was not undermined by the endorse-

47 Measures to eliminate international terrorism, Res. A/RES/49/60; full text of mentioned GA UN resolutions are available at: http://www.un.org/terrorism/resolutions.shtml
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ment of the exercise of the right of self-determination and national liberation struggle. The document also contains a framework agreement on the attributes of terrorism as “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes” (para. 3). The changed position of the international community on terrorism was upheld by a number of the subsequent GA UN resolutions adopted in the following years.49

A distinctive feature of many UN documents of recent years is the handling of the problem of terrorism and its suppression in close connection with human rights. The resolutions of the General Assembly draw attention to the aftermath of terrorist groups’ activity, that is, a violation of fundamental human rights and freedoms; this creates an obligation of the state to ensure their effective protection.50 GA UN resolution 58/174 stresses that “every person, regardless of nationality, race, sex, religion or any other distinction, has a right to protection from terrorism and terrorist acts.”51 On the other hand, there is a strong emphasis on the need to respect human rights when fighting against terrorism. The measures adopted to combat terrorism should comply with the standards of international human rights, in particular they must not violate the guarantees given to any person in all circumstances, and therefore also to those suspected of terrorist activity.52

On 8 September 2006, the GA UN adopted the Global Counter-Terrorism Strategy53 which systematized and institutionalized the existing measures of international cooperation and pointed to the need for further action, specifically of a preventive nature. First, the Strategy proposed


51 GA UN resolution A/RES/58/174, 22 December 2003.


a universal implementation within the national laws of all the conventions and protocols, as well as resolutions of the UN General Assembly and Security Council on suppressing terrorism. The Strategy obligations relevant to criminal law are as follows:

a) to refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that state territories are not used for such an activity (Section II(1)),

b) to cooperate fully with other states, in accordance with the obligations under international law (the aut dedere aut iudicare principle), in order to bring to justice any person who participates in the perpetration of terrorist acts (Section II(2)),

c) to determine whether an applicant for asylum was not involved in terrorist activities, and whether a person with refugee status do not use it for supporting terrorism (Section II(7)),

d) to combat crimes that might be connected with terrorism, including drug trafficking in all its aspects, illicit arms trade, money laundering and smuggling of nuclear, chemical, biological, and radiological materials (Section II(5)),

e) to prohibit by law incitement to commit a terrorist act (Section I(4)),

f) to use the Internet as a tool for countering the spread of terrorism (Section II(12)),

g) to improve border and customs controls in order to prevent the movement of terrorists and detect the materials that may be used in terrorist attacks (Section II(13)),

h) to improve the security on manufacturing and issuing of identity documents to prevent their alteration or fraudulent use (Section II(16)),

i) to ensure that any measures taken to combat terrorism comply with the human rights law (Section IV (2 and 4)).

In addition to the solutions worked out under the sectoral conventions and meant to prevent impunity of the perpetrators of terrorist offences, the Strategy lists a collection of measures of a preventive nature intended to prevent acts that furnish favourable conditions for terrorist activities and facilitate the commission of a terrorist offence.

4.2. The Work of the Ad Hoc Committee on Terrorism

The Ad Hoc Committee was established in 1996 in GA UN resolution 51/210 in order to elaborate two draft international conventions: a con-
vention for the suppression of terrorist bombings and a convention for the suppression of acts of nuclear terrorism. The committee mandate was extended two years later in GA UN resolution 53/108, which envisaged further projects: a convention for the suppression of the financing of terrorism and a comprehensive convention on combating terrorism.

4.2.1. Suppression of Terrorist Bombings

The International Convention for the Suppression of Terrorist Bombings was adopted by the General Assembly of the United Nations in New York on 15 December 1997 (hereinafter: the New York Convention (IV)). It requires the criminalization under national criminal law of the act of any person who unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility:

a) with the intent to cause death or serious bodily injury, or

b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss (Article 2(1) of the New York Convention (IV)).

It was the first time when an international agreement on suppressing terrorism made an unambiguous declaration that the criminal acts under its scope are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, “in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons” (Article 5 of the New York Convention (IV)). This wording reveals a clear reference to the text of the Convention for the Prevention and Punishment of Terrorism of 1937, in which a distinguishing feature of terrorism was the subjective intention of the perpetrator to inflict terror, rather than striving to advance a specific political agenda.

4.2.2. Combating the Financing of Terrorism

In the 1990s, the interest to the UN bodies responsible for preparing and implementing strategies to suppress terrorism was framed by the is-
sues of border protection, trade in arms and explosives, forgery of documents, or incitement to violence. From among this broad spectrum of emerging problems, most attention was attached to the financial support of terrorism. This particular concern with the issue comes from a patently obvious conclusion that the number and gravity of acts of international terrorism depend on the funds at the disposal of terrorists.\textsuperscript{56} Suppression of the transfer of funds to terrorist groups is thus seen as preventing their activity, or at least limiting their operational capabilities.

Initially, to stamp out the sponsoring of terrorism some existing legal measures were invoked laying down the principles of international cooperation developed as a response to money laundering, or the legalization of proceeds from criminal activities. Today, despite the obvious connections between these two phenomena, they are commonly regarded as distinct and that they should be separated under criminal law.\textsuperscript{57} In both cases, the source of funds may be criminal activity, such as kidnapping for ransom, robbery, extortion, murder “by contract,” the smuggling of people across the border, drug trafficking and arms trade. However, the financing of terrorism also takes lawful forms, and thus cannot be qualified as typical money laundering. These forms include support from the state, donations and contributions from followers (the so-called revolutionary tax), profits from business, charitable, or cultural activity, etc.\textsuperscript{58}

In addition to raising funds, an equally important element of the financing of terrorism is how to secure their transfer to the recipients. To do this, the following measures are used: regular cash turnover, financial institutions (banks, investment funds, insurance companies), and the so-called alternative systems of money transfer (\textit{hawala/hundi}), employed


within a single community and based on tradition and complete trust in the intermediaries, and thus hardly traceable.\textsuperscript{59}

The UN’s work on an international agreement tackling specifically the financial support for terrorism was initiated in 1998 by France. The ultimate text of the International Convention for the Suppression of the Financing of Terrorism (hereinafter: the New York Convention (V))\textsuperscript{60} was adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

Among the legal measures aimed at facilitating international cooperation, a noteworthy provision is on the conduct that comprises the financing of terrorism. In accordance with Article 2(1) of the New York Convention (V), any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. Also, an attempt to commit an offence, participation as an accomplice, organization or directing others to commit an offence were criminalized (Article 2 (4-5)).

Of importance was the final agreement on the description of the act whose commission is facilitated by the available or collected funds, i.e. the “proper” terrorist offence. Besides unquestionable references to the offences named in the sectoral conventions, a general indication in the Article 2(1)(b) of the New York Convention (V) of other conduct is a novelty; this conduct is based on three characteristics: 1) interest protected by law (human life and health), 2) the subject of the attack (civilian or any other person not taking an active part in the hostilities), 3) purpose (to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act). This provision is rightly


\textsuperscript{60} The convention entered into force on 10 April 2002 ratified by 167 states.
seen as introducing, although indirectly, the first definition of terrorism in international law.\textsuperscript{61}

The New York Convention (V) recommends that each state party take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence of financing terrorism. Such liability may be criminal, civil or administrative (Article 5). States should also adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature (Article 6). None of such offences will be regarded as a fiscal offence (Article 13) or as a political offence or as an offence connected with a political offence or as an offence inspired by political motives (Article 14). The invoking by the perpetrator of the above conditions cannot therefore underlie the refusal of a request for extradition or for legal assistance.

The catalogue of measures under criminal law aimed to allow the punishment of the perpetrator of the financing of terrorism lists the state obligations known from former international agreements: to establish jurisdiction (Article 7), to submit the case to competent authorities for the purpose of prosecution or to extradite the perpetrator (Articles 10, 11), to afford mutual legal assistance in connection with criminal investigations, including the non-refusal of a request for legal assistance on the ground of bank secrecy (Article 12) and to cooperate in the prevention of such offences (Article 18).

\textbf{4.2.3. Prevention of Nuclear Terrorism}

In 1998, the Russian Federation proposed the draft Convention for the Suppression of Acts of Nuclear Terrorism.\textsuperscript{62} When working on its content, the Ad Hoc Committee stressed the extraordinary risks associated with the potential commission of an act of nuclear terrorism or even a threat to commit such an act, although its probability was considered relatively


The ultimate text of the Convention for the Suppression of Acts of Nuclear Terrorism (hereinafter: the New York Convention (VI)) was adopted by the GA UN in resolution 59/290 of 13 April 2005.

The most pivotal is the provision of Article 2(1) of the New York Convention (VI), which is regarded in the literature as the actual definition of nuclear terrorism. In accordance with the article, a person commits an offence if unlawfully and intentionally:

(a) possesses radioactive material or makes or possesses a device with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property or the environment;

(b) uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property or the environment, or with the intent to compel a natural or legal person, an international organization or a state to do or refrain from doing an act.

Separate provisions of the New York Convention (VI) criminalize conduct related to the above mentioned offence, that is, a threat to use radioactive material or a device, or using or damaging a nuclear facility in a manner which releases or risks the release of radioactive material with the intent to cause death or serious bodily injury, or with the intent to cause substantial damage to property or the environment, or with the intent to compel a natural or legal person, an international organization or a state to do or refrain from doing an act.

The construction of the New York Convention (VI) as regards the legal measures governing international cooperation in combating terrorism draws on the model adopted in preceding legislation agreed upon by the UN in the 1990s. It frequently reiterates the solutions designed to combat terrorist

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bombings agreed in the New York Convention (IV). States were obliged to adopt appropriate measures, including adapting of domestic legislation, to ensure that criminal acts within the scope of the New York Convention (VI) are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature (Article 6). As in previous international agreements, the suppression of nuclear terrorism is to be facilitated by the commitment to: prevent and counter preparations for the commission of acts of nuclear terrorism and through the exchange of information (Article 7), establish jurisdiction (Article 9), submit the case to competent authorities for the purpose of prosecution or extradite the perpetrator (Article 11), afford mutual legal assistance (Article 14), deem the acts of nuclear terrorism extraditable offences (Article 13) and regard none of such offences as political (Article 15). Many similarities to the solutions adopted in previous conventions testify to the contemporary establishment of uniform UN standards designating the scope of international cooperation in suppressing various manifestations of terrorism.

4.2.4. The Draft Comprehensive Convention on International Terrorism

Under the new UN strategy against terrorism, the pre-WW2 idea was revived of developing a comprehensive convention on combating international terrorism. Algeria (1994) and India (1996) were first to propose the commencement of such a project. A comprehensive solution was needed primarily for the sake of shifting the approach to combating terrorism from “fragmentary” and focused on some of its aspects to an all-embracing and consistent one. Another cogent argument was the urgency to seal the gaps resulting from the sectoral conventions omitting to include various other forms of terrorism, such as murder involving firearms or the so-called cyberterrorism. On 28 August 2000, India submitted a draft comprehensive convention on international terrorism, which was formally put forward to the Ad Hoc Committee. In the following years, most of the provisions were agreed upon; still many important issues remain unresolved.

Noteworthy are the measures taken to reach an agreement on the elementary problem of the definition of terrorist offence. The draft conven-

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Section of 2002 contains a provision in Article 2(1) stipulating that any person commits an offence if that person, by using any means, unlawfully and intentionally, causes: (a) death or serious bodily injury to any person, (b) serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment, (c) damage to property, places, facilities, or systems referred to in paragraph (b), resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

The edition of further provisions of Article 2(2-4) of the draft is modelled on the solutions adopted earlier in the New York Convention (IV) and the New York Convention (VI). A “credible and serious” threat is considered an offence (Article 2(2) of the draft), as well as an attempt (Article 2(3) of the draft) and the broadening of responsibility to fall on the accomplice, organizer, director, and also the person who otherwise contributes to the commission (Article 2(4) of the draft).

The comprehensive convention would apply to various acts against human life and health and against property, regardless of the means used and other specific circumstances in which they were committed. At the same time, the requirement of targeted action of the offender eliminates criminal acts involving death, serious injury or major damage of public or private property, however not taken for the purpose of intimidating a population, or compelling a government or an international organization to do or abstain from doing any act.

The project may not be concluded due to some disagreement on several contentious issues. They pertain to the introduction of a clause offering a clear distinction between terrorism and struggle for national liberation, as well as recognition as criminalized conduct of the so-called state terrorism. Limited endorsement was given to a clause proposed by the delegation from Malaysia, also backed by Islamic countries, to exclude


from the convention the struggle of peoples against foreign occupation, aggression, colonialism and dependency and aimed at liberation and self-determination. The opposing states preclude the possibility of relativizing the assessment of a terrorist act, depending on the context of its commission. They also underline that the sole existence of the right to self-determination does not legitimize all the measures to assert it.\(^70\)

There is no agreement as to Article 18 of the draft which lists the limitations in the application of the comprehensive convention. According to the proposal of the Organization of Islamic Conference, the convention should not govern “the activities of the parties during an armed conflict, including in situations of foreign occupation” (paragraph 2), as well as “the activities undertaken by the military forces of a state in the exercise of their official duties, inasmuch as they are in conformity with international law” (paragraph 3).\(^71\) Delegations opposing these proposals argue that their adoption could, in certain cases, be conductive to the legitimization of terrorism.\(^72\)

### 4.3. The Role of the UN Security Council

Speaking about the suppression of terrorism, the broad powers conferred to the Security Council by the UN Charter concerning the maintenance of international peace and security were initially dramatically underused. The major impediments to the greater activity of the UNSC were ideological and political divisions among its members, so idiosyncratic in the period of the Cold War.\(^73\) The activities of this body did not go beyond the issuing of political declarations condemning terrorism and the urging of states to put in place relevant measures to combat it. In the 1990s,

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the UNSC engaged in the adoption of several resolutions in which, under Chapter VII of the UN Charter, it imposed sanctions on countries engaged in terrorist activities.74

However, the attacks of 11 September 2001 in the USA brought about a dramatic change. In the aftermath of the New York events, the UNSC exercised its right to issue decisions legally binding on all the UN member states and introduced several new measures against terrorism, aimed at expediting international cooperation and correspondence of domestic laws. Among the most noteworthy documents, there is resolution 1373 (2001) adopted on 28 September 2001, which lays heavy emphasis on countering the financing of terrorism. Under the resolution, all states were obliged to, among others, prevent and suppress the financing of terrorist acts, freeze funds of persons who participate in terrorist activity, prohibit the making of such funds available to such persons, suppress the recruitment of members of terrorist groups, deny safe haven to those who finance, plan, support, or commit terrorist acts, prevent the movement of terrorists by effective border controls and controls on issuance of identity papers and travel documents.

Several provisions of the resolution require the UN member states to thoroughly review internal legislation and take legislative action to implement them into national law. In two cases, there are explicit requirements related to criminal law. In paragraph 1(b), UNSC resolution 1373 (2001) makes all states criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts. What follows, the ordinary legislator is compelled to introduce into its penal code or a special act a new type of offence. Therefore, it is not sufficient to regard such a conduct as a preparation or a form of collaboration in the commission of a prohibited act under the regulations relating to money laundering.75

The need to adjust criminal law to the standards set out in UNSC resolution 1373 (2001) also arises from the obligation contained in paragraph 2(e), namely to ensure that the acts of participating, financing, planning,


preparation or perpetration of terrorist acts or in supporting terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

The special nature of UNSC resolution 1373 (2001) is also worth noting. First, the measures it introduces are not limited in time or by territory, but apply to the phenomenon of international terrorism at large. Second, it is the first instance of the UN states being encumbered, based on Chapter VII of the UN Charter, with such broad responsibilities of adjusting domestic laws to the requirements of a resolution.76 The exercise by the UNSC of such powers was possible through the assumption that any act of international terrorism constitutes a “threat to international peace and security,” and thus extraordinary measures are sought in such extreme circumstances. Third, the UNSC resorted to quasi-legislative means77 that supplanted the conventional process of sovereign assumption of obligations by the states through international agreements. In point of fact, this results in the effective reduction of the number of negotiators of the legal text binding on the entire international community to 15 members of the UNSC. While the literature on the subject voices major reservations about this practice, it also underlines its general acceptance by the UN member states.78

Of a similarly “law-making” character is UNSC resolution 1540 (2004) of 18 April 2004, which obliges states to take preventive action against proliferation of weapons of mass destruction.79 Pursuant to paragraph 2 of the resolution, all states should adopt and enforce appropriate effective laws which prohibit any non-state actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them.

76 Ogonowski, P. „Rezolucja 1373 Rady Bezpieczeństwa ONZ w sprawie zwalczania terrorystysocko międzynarodowego i jej wykonanie,” PiP 3 (2003), p. 73.
UNSC resolution 1624 (2005) adopted on 14 September 2005 attends to the issue of freedom of expression in the case of incitement and encouragement to carry out a terrorist act. It requires states to prohibit by law the incitement to commit a terrorist act or acts (paragraph 1(a)), to prevent such conduct and deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct (paragraph 1(b-c)). Furthermore, in this resolution the UNSC pointed to the necessity to include in its implementation process the obligations imposed by international law and standards of human rights, which, it seems, should be understood as a confirmation of the existing boundary impenetrable for the ordinary legislator and intended to frustrate an excessive and unjustified muzzling of freedom of expression.

5. The Problem of Jurisdiction of the International Criminal Court

In recent years, much discussed has been the proposal of recognizing at least some acts of terrorism as crimes against humanity, and thus falling under the jurisdiction of the International Criminal Court. Before further elaborating on the issue, it must be remembered that the draft ICC Statute allowed for two categories of crimes. The first were the gravest crimes of international importance (core crimes), such as genocide, crimes against humanity and war crimes. The other category, known as crimes pursuant to treaties, covered, for example, terrorist offences. The final decision made during the Diplomatic Conference in Rome in 1998 restricted the competence of the ICC only to the category of core crimes. Among the arguments mounted against the incorporation of “crimes of terrorism” into the ICC Statute, the most noteworthy were the lack of an unequivocal definition of the concept of terrorism and concern about the excessive politicization of the ICC. Moreover, there was a deeply held conviction that not all terrorist acts are sufficiently weighty to be dealt with by an international tribunal.

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80 International Criminal Court was established under the Rome Statute of the International Criminal Court, adopted on 17 July 1998 at the UN Diplomatic Conference in Rome. The Statute of the ICC entered into force on 1 July 2002.


The decision made at the Rome conference is not, for many representatives of the doctrine, tantamount to the absolute exclusion of all acts committed as terrorist activity of the jurisdiction of the ICC. Based on a linguistic interpretation, they argue that certain manifestations of terrorism may constitute crimes against humanity that meet the criteria indicated in Article 7 of the ICC Statute. In order to adopt such a classification, it must be proven that there has been murder, extermination, torture, or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health committed as part of a widespread or systematic attack directed against any civilian population (Article 7(1) of the ICC Statute). Additionally, the provision of Article 7(2) of the ICC Statute requires “multiple commission of acts referred to in paragraph 1” that should be undertaken “pursuant to or in furtherance of a state or organizational policy to commit such attack.” The modern doctrine of international law and case law of international tribunals do not require, however, for such acts to be committed during an armed conflict.

To demonstrate that terrorist acts can fit such criteria, references are usually made to the casus of the attacks on the World Trade Center and Pentagon on 11 September 2001. It goes without saying that, given the large number of casualties and serious material damage, those attacks were large-scale and deliberate acts of aggression against civilians. They were not merely individual, isolated acts of violence, but successive attacks of Al-Qaeda against U.S.-based targets, which supports the assumption that they were a means of implementing the “organizational policy” of a terrorist organization. Thus, it can be presumed that when displaying


85 Cf. Cassese, A. „The Multifaceted Criminal Notion of Terrorism in International Law,” JICJ 4 (2006), pp. 948-950, Von Schorlemer, S. Human Rights, p. 274. In justifying their decision in the case of Prosecutor v. Tadic, the bench of the ICTY referred to the prosecutor’s view, who held that crimes against humanity may be committed not only by persons acting on behalf of
the defined features, “aggravated” forms\textsuperscript{86} of terrorism will meet the necessary criteria for being regarded as crimes against humanity.

The arguments given may not be refuted by the objections based on the functional interpretation of the provisions of the ICC Statute; its proponents refer to the unambiguous will of the signatories of the treaty who wished to exclude terrorism from its scope. Moreover, they prove that there is no point in encumbering the ICC with new tasks when judicial decisions of national courts in such matters deserve a positive appraisal.\textsuperscript{87} In order to challenge these doubts, it should be pointed out that the consent to regard some terrorist acts as crimes against humanity does not entail going beyond national jurisdictions. Not only do they continue to be eligible, but are given precedence in initiating criminal proceedings on such crimes on the grounds of internal rules of jurisdiction. In accordance with Article 1 of the ICC Statute, this body is in fact complementary to national criminal jurisdictions.

6. Evolution of the Category of Terrorism \textit{per se} as a Crime under Customary International Law

Discussions on the admissibility of the qualification of acts of terrorism as crimes against humanity bring up a further question of whether there is consensus in international law as regards the essential criteria that typify this form of crime. Such criteria defined might constitute a valid argument for the isolation of terrorism \textit{per se} as a separate category of international crime, without having to advert to the provisions of the ICC Statute and international humanitarian law. This would create an opportunity to regard individual terrorist acts not only as “conventional offences” outlawed in the sectoral conventions, but as “international crimes.”\textsuperscript{88}

\textsuperscript{86} Cf. Cassese, A. \textit{The Multifaceted}, p. 950.


In answering the question posed above, it must be underlined that in no international agreement has terrorism *per se* been formally recognized as a crime of international concern, or even definitively defined. The literature on the subject promises no compromise as for the prospective introduction of such a standard under customary international law. There are two opposing positions. Those challenging the possibility of formulating the definition of terrorism in such a way stress the existing substantial differences of opinion, e.g. the attitude to national liberation movements and the need to establish the motivation of perpetrators. Consequently, they assume that relying on the standard so introduced would violate the rule of *nullum crimen sine lege*. This stance was corroborated in the discussion during the groundwork for the establishment of the ICC and by the final omission of this issue in the ICC Statute.

Recently, there have been more and more opinions voiced in the doctrine that attach greater importance to the possible consensus on the “core” of the definition, rather than to the problems emerging in connection with several contentious, yet secondary issues. These opinions prove that it is possible to acknowledge the existence of a customary rule pertaining to terrorism by demonstrating the two required components: the requisite practice of states (*usus*) and a conviction concerning the obligation to initiate specific legal procedures, with the *erga omnes* effect (*opinio juris sive necessitatis*). It lies in the commonly accepted ratification of the conventions on combating terrorism and the acceptance of the UN GA and the UNSC resolutions by the international community, as well as in the examination of increasingly convergent legal solutions within national and regional legal systems and judgements by national courts. These findings help assemble a list of acts constituting acts of terrorism, including in the first place those against civilians and committed with intent to cause death or serious bodily injury or to take hostages. In addition, there is little doubt as to the definition of the characteristic aspects of the offence regarding the doer. Based on the evaluation of documents issued by the UN, regional organizations and national legislation, the determining factor seems to be the purpose of the perpetrators, which manifests itself in intimidating

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Evolution of the Category of Terrorism

a population or compelling a government or international organization to do or abstain from doing any act. Similarly, the perception of acts of terrorism as serious offences is not at all the subject of controversy, whether in national laws or in international law. It can therefore be postulated that the lack of agreement no longer follows from the dispute over the nature of terrorism, but rather from the exigency to determine the precise scope of the concept and to distinguish it from other forms of crime.

Recent innovations in the assessment of terrorism by international law do not yet allow, it seems, for a firm endorsement of instituting such a crime of international rank with all its consequences, including its prosecution according to the principle of universal repression. Nevertheless, the evolution of the views of the international community outlined in this chapter, along with the trends in the doctrine, seem to be corroborating existing tendencies for the establishment of such a standard.

93 See ibidem, pp. 938-939.
Chapter III

The Approach of the Council of Europe and the European Union to Terrorism

1. International Cooperation through Regional Organizations

In addition to the universal conventions developed under the auspices of the UN, of great significance for the combined effort to suppress terrorism are international agreements and documents such as resolutions and recommendations produced by regional organizations. They are drawn up by smaller groups of countries that are brought together not only by their geographical proximity, but also political, social, cultural and even religious ties. Moreover, a uniform attitude of a group of countries to terrorism is determined by the existing sense of threat and joint historical experiences related to the activity of terrorist organizations. All these factors facilitate the alignment of opinions and an easier agreement on legal matters.

The cooperation of European countries in criminal matters materially goes beyond the fundamental standards developed in universal international law. The solutions adopted in tackling terrorism are not limited to the criminalization of certain acts and establishing extradition procedures, but address an increasing number of matters, thus becoming a vital component of a process known as the Europeanization of penal law.


2. Regulations of the Council of Europe

2.1. Evolution of the Cooperation Model Based on the Obligation to Extradite the Perpetrator of a Terrorist Offence

The Council of Europe’s interest in the issue of terrorism goes back to the late 1960s and early 1970s. That period revealed serious gaps in the international cooperation in criminal matters among the Western European states. The absence of consistent procedures hindered extradition proceedings to such an extent that, in extreme cases, they terminated with the refusal of extradition of persons involved in terrorist activities. Consequently, even most serious offenders happened to escape punishment. That negative experience clearly demonstrated the need for harmonization of legal solutions adopted by European countries and development of a compatible system of intra-European cooperation.

The first step in the building of a model aimed to defeat terrorism by the CE was to agree on the legal mechanisms governing the effective passing of judgements, based on the principle of aut dedere aut iudicare, but with a distinct preference in favour of extradition. The European Convention on the Suppression of Terrorism, done at Strasbourg on 27 January 1977 (hereinafter: the European Convention), originated from the conviction (stated explicitly in the preamble) that extradition is a particularly effective measure ensuring that perpetrators of terrorist acts do not escape prosecution and punishment. Its Article 1 listed offences that will not be regarded as a political offence, as an offence connected with a political offence, or as an offence inspired by political motives. Included in this list, the offences can be defined as terrorist, although the European Convention itself abstained from using this term. The listed crimes were at that time recognized as the most common and most typical, whether it was hostage taking or the use of letter or parcel bombs. The consequence of the “depoliticization” of the offences mentioned in Article 1 of the European Convention was the option to refuse the handing over of a perpetrator to the state requesting extradition. This model, however, was not based on the full obligation to extradite the perpetrator of a terrorist offence. It was

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dramatically curtailed by the non-discrimination clause (Article 5) and by reserving the right by any state to refuse extradition in respect of any offence mentioned in Article 1, which it considers to be a political offence, an offence connected with a political offence or an offence inspired by political motives (Article 13(1)). While the first of these restrictions is not objectionable and is underpinned by human rights standards, the possibility to voice reservations under Article 13(1) of the European Convention seemed to impair the coherence of the adopted solutions. A cursory analysis of this provision may indeed indicate its conflict with the elementary assumptions of the European Convention. To obtain a better and fuller picture of both obligations, it must be remembered that even subsequent to expressing such a reservation when assessing the nature of a crime, a state should weigh up and take account of “particularly serious aspects of the offence.” First and foremost, it should take into due consideration that the offence created a collective danger to the life, physical integrity or liberty of persons; that it affected persons foreign to the motives behind it; or that cruel or vicious means have been used in the commission of the offence.

2.2. Human Rights Standards as Limiting Factors in Combating Terrorism

The activities of the CE bodies show a particular concern about the legal measures intended for international cooperation in combating terrorism and national counter-terrorism legislation observing the principles of democracy and human rights standards. This commitment ensues from the axiological assumptions that see terrorism as a threat to the fundamental rights of the individual, which calls for a commensurate response from the international community and individual states. Therefore, in many of the CE’s documents, effective action for the protection of the society is regarded as the state authorities’ obligation. It is simultaneously accom-

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6 The Committee of Ministers, in the Guidelines on Human Rights and the fight against terrorism, adopted on 11 July 2002, pointed to „the obligation to take the measures needed to protect the fundamental rights of everyone... especially the right to life.” (Article I); see: Guidelines on Human Rights and the Fight against Terrorism, Adopted by the Committee of Ministers on 11 July 2002
panied by confidence that there are inviolable values associated with the human being that, no matter the circumstances, restrict the freedom of those holding power. Consequently, even in the circumstances of acute danger, the fight against terrorism can allow only such methods that respect the fundamental rights of individuals and society. What is more, it is a fully acknowledged thesis that even those involved in terrorist acts are not deprived of such guarantees. This is aimed to eliminate the threat of abuse in the form of overly repressive action which, though designed to defend democracy and human rights, in fact, leads to the undermining of those values.\footnote{Cf. De Salvia, M. „Il terrorismo e la Convenzione Europea dei diritti dell’uomo,” RIDU 1 (1989), p. 22.}

Hence, the adoption of specific methods of eradicating terrorism requires a prior statement of their compliance with international human rights standards, in the first place, with those named in the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (hereinafter: the European Convention on Human Rights). The case law of the European Court of Human Rights in Strasbourg is of no small consequence in the assessment of this compliance. This body has repeatedly dealt with complaints concerning the allegations of infringement of various rights and freedoms during anti-terrorist operations. According to the ECHR, the suppression of terrorism may under no circumstances justify the violation of fundamental human rights, such as the right to life (Article 2 of the European Convention on Human Rights),\footnote{Cf. judicial decisions in McCann and Others v. The United Kingdom of 27 September 1995, Application no. 18984/91, A324. Under Article 2 of the ECHR, the state was assigned responsibility for the so-called disappearances of persons previously detained by state officials in the course of an “anti-terrorist operation” (see judgements in the cases: Khamila Isayeva v. Russia of 15 November 2007, Application no. 6846/02, paras. 120-124, Takhayeva and Others v. Russia of 18 September 2008, Application no. 23286/04, paras. 85-96, Akhmadova and Akhmadov v. Russia of 25 September 2008, Application no. 20755/04, paras. 72-82).} prohibition of torture or inhuman or degrading treatment or punishment (Article 3 of the European Convention on Human Rights).\footnote{at the 80th Meeting of the Ministers’ Deputies, Directorate General of Human Rights, Strasbourg 2002, p. 8. This obligation has been confirmed in the Preamble to the Guidelines on the Protection of Victims of Terrorist Acts (paragraph f); see: “Guidelines of the Committee of Ministers of the Council of Europe on the protection of victims of terrorism acts, adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies,” in: Human Rights and the Fight Against Terrorism. The Council of Europe Guidelines, Strasbourg 2005, p. 41; cf. Warbrick, C. “The European Response to Terrorism in an Age of Human Rights,” EJIL 5 (2004), pp. 994-995.}
Even in the direst circumstances and regardless of the behaviour of a person, the European Convention on Human Rights bans such practices. Some guidelines ensuing from the ECHR case law may help fix the precise boundary of securing the right to a fair trial (Article 6(1) of the European Convention on Human Rights) and the right to defence (Article 6(3) of the European Convention on Human Rights). They also facilitate defining the extent of permissible interference of state bodies in the rights and freedoms of individuals in connection with the deprivation of liberty, or the tapping and monitoring of telecommunications links.

The rules formulated in the ECHR case law designed to sustain the balance between the obligation to protect society against terrorism and the imperative of respect for human rights seem to be permanent and not subject to change. These standards were not challenged even in the aftermath of terrorist attacks in New York and Washington, D.C. (11 September

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9 The ECHR has recognized the application of the so-called sensory deprivation as inhumane treatment of persons held suspect of terrorist activity. These five investigative techniques included: wall-standing, hooding, subjection to noise, deprivation of sleep, deprivation of food and drink (the judicial decision in Ireland v. The United Kingdom of 18 January 1978, Application no. 5310/71 paras. 96, 196), cf. the decisions in: Tomasi v. France of 27 August 1992, Application no. 12850/87, paras. 112-115, Aksoy v. Turkey of 18 December 1996, Application no. 21987/93, paras. 62-64, Labita v. Italy of 6 April 2000, Application no. 26772/95, paras. 29, 119-122, Chitayev and Chitayev v. Russia of 18 January 2007, Application no. 59334/00, paras. 148-159.

10 Cf. the judicial decision in: A. and Others v. The United Kingdom of 19 February 2009, Application no. 3455/05, para. 126.


Based on the ECHR judgements, there have been attempts recently to elaborate some constraints binding the state as regards the measures to combat terrorism. The standards outlined by the ECHR were collated during the meeting of the Council of Europe as the Guidelines on Human Rights and the Fight against Terrorism, adopted on 11 July 2002 by the Committee of Ministers. The specific recommendations contained therein, substantiated by the ECHR case law, are preceded by a clause reading that all measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision (Article II). Of similar character are the Guidelines on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers on 2 March 2005.

### 2.3. A Comprehensive Strategy for Combating and Preventing Terrorist Offences

A new phase of heightened activity of the CE was initiated following the terrorist attacks in the U.S. in 2001. Its distinctive feature is the intent of developing a coherent and all-embracing strategy to combat terrorism, coupled with a broader action involving education, culture, promotion of tolerance, etc. As regards penal law, this approach takes the existing CE’s attainments a step further by first, enhancing the efficiency of previously adopted legislative measures and, second, giving priority to the prevention of terrorist crimes. Both trends were markedly reflected in the work of intergovernmental expert groups (GMT and CODEXTER).\(^{16}\)

Drawn up on 15 May 2003 in Strasbourg, the Protocol Amending the European Convention on the Suppression of Terrorism\(^{17}\) supplemented the list of terrorist offences, which were excluded from the category of


\(^{16}\) Multidisciplinary Group on International Action against Terrorism (GMT) was established in 2001 and the Committee of Experts on Terrorism (CODEXTER) in 2003; more about the work of both these teams in Bellelli, R. The Council of Europe, pp. 144-145, Galicki, Z. W. International Multilateral Treaties, pp. 19-23.

\(^{17}\) Protocol Amending the European Convention on the Suppression of Terrorism, European Treaty Series, No. 190.
political offences, offences connected with a political offence or as an offence inspired by political motives. It is notable that the preamble of the protocol reiterates the imperative of respecting human rights in the fight against terrorism. The impact of standards developed by the ECHR and reaffirmed in the Guidelines on Human Rights and the Fight against Terrorism of 2002 is also conspicuous in the new Article 5 of the European Convention. Pursuant to this provision, nothing in the convention will be interpreted as imposing on the requested state an obligation to extradite if the person subject of the extradition request risks being exposed to torture (paragraph 2), or the person subject of the extradition request risks being exposed to the death penalty or, where the law of the requested state does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested state is under the obligation to extradite if the requesting state gives such assurance, as the requested state considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole (paragraph 3).

During the CE Third Summit in Warsaw in 2005, three conventions were signed, two of which address the issue of struggle against terrorism. The new strategy of the Council of Europe is voiced in the Council of Europe Convention on the Prevention of Terrorism, adopted at Warsaw on 16 May 2005 (hereinafter: the Warsaw Convention (I)). Its aim is to prevent acts leading to the commission of terrorist offences both by measures under penal law and by taking pre-emptive action to eliminate social, political, religious and other tensions, often intrinsic to the emergence of such acts. When defining the guidelines of the “national prevention policies,” priority was given to all but coercive measures. The Warsaw Convention (I) in its Article 3 obliges states to: 1) take appropriate measures, particularly in the fields of education, culture, information, media and public awareness raising, while respecting human rights obligations, 2) improve and develop the cooperation among national authorities (e.g. by exchanging information, improving the physical protection of persons and facilities, enhancing training and coordination plans for civil emergencies), 3) promote tolerance by encouraging inter-religious and cross-cultural dialogue involving, where appropriate, non-governmental organisations and other elements of civil society with a view to preventing tensions, 4) promote public awareness regarding the existence of the threat posed by terrorist offences and encourage the public to provide factual, specific help to its competent authorities that may contribute to preventing terrorist offences.
The key notion contained in the Warsaw Convention (I) is that a terrorist offence is regarded as any of the offences within the scope of and as defined in one of the treaties listed in the Appendix (Article 1(1)). This compilation corresponds to the sectoral conventions listed in the 2003 Amending Protocol to the European Convention. Still, the Warsaw Convention (I) does not merely refer to international agreements containing descriptions of offences agreed based on the criterion of modus operandi of the perpetrators, and thereby focusing on the aspects of the offence as to the deed. In addition, the preamble reads that acts of terrorism, by nature or context, have the purpose to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. Hence the description of the concept of a terrorist offence appears exhaustive. First, it requires the statement of the commission of one of the offences set forth in the sectoral conventions and listed in the Appendix to the Warsaw Convention (I); second, it needs the determination of the aspects of the offence as to the doer, that is, “terrorist motivation.”

This definition reveals the influences of solutions adopted earlier in the European Union, since it corresponds to the concept of “terrorist offences” referred to in Article 1(1) of the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA). The assessment of the crimes named in the Warsaw Convention (I) is unequivocal and does not justify any relativization due to the circumstances of perpetration. The preamble firmly rejected the possibility of justifying such offences by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, regardless of who had been the offender.

Among the penal measures adopted in the Warsaw Convention (I), the most noteworthy are the provisions obliging states to criminalize three new categories of acts under the domestic law. These are:

1) public provocation to commit a terrorist offence, which means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes

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19 O.J. L 164/3, 22.06.2002.
a danger that one or more such offences may be committed (Article 5(1) of the Warsaw Convention (I)).

2) recruitment for terrorism – to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group (Article 6(1) of the Warsaw Convention (I));

3) training for terrorism, means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose (Article 7(1) of the Warsaw Convention (I)).

These offences are often referred to as “terrorist-linked.” The ratio legis of their criminalization eventuates from their serious nature, as they have the potential to lead to the emergence or aggravation of the threat to the legal interest, thus creating the danger of commission of a terrorist act. In any case, it is required that such acts are committed unlawfully and intentionally (respectively, Articles 5(2), Article 6(2) and Article (7) (2) of the Warsaw Convention (I)). Yet, it is not mandatory to prove the existence of additional aspects of the offence as to the doer in the form of terrorist motivation, indicative of terrorist offences as such. For an act to constitute an offence under Articles 5-7, there is also no need for such an offence to be actually committed (Article 8 of the Warsaw Convention (I)).

The scope of outlawed acts is supplemented by ancillary offences (accessory crimes) covering: participating as an accomplice, organising or directing others, contributing to the commission of one or more offences as set forth in Articles 5-7 by a group of persons acting with a common purpose (Article 9(1) of the Warsaw Convention (I)) and an attempt to com-

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20 The examples of conduct fulfilling the criteria of the offence under Article 1(5) of the Warsaw Convention (I) are: the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or presenting a terrorist offence as necessary and justified; cf. Explanatory Report, paras. 95, 98.


22 Cf. Explanatory Report, paras. 78, 100.
mit an offence as set forth in Articles 6 and 7 (Article 9(2) of the Warsaw Convention (I)).

The Warsaw Convention (I) obliges the state parties to establish the liability of legal entities for participation in the offences set forth therein (Article 10) and to subject such offences to “effective, proportionate and dissuasive criminal or non-criminal sanctions” (Article 11(3)). At the same time, it reiterates the existence of intransgressible bounds to the legislative freedom of authorities in democratic countries. According to the provision of Article 12 of the Warsaw Convention (I), the implementation of the obligations should be carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion (paragraph 1) and that it should be subject to the principle of proportionality (paragraph 2).

This search for an appropriate balance and the borderline between the exercise of fundamental human rights and the conduct, which is so socially harmful that it needs to be outlawed, was particularly conspicuous during the debate on the essence and scope of the criminalized “public provocation to commit a terrorist offence.” The original proposal by the expert group CODEXTER isolated two separate acts: incitement to terrorism and apologie du terrorisme. While the legal structure of incitement to commit a crime was not challenged, the notion of apologie du terrorisme, understood as “public expression of praise, support or justification of terrorists and/or terrorist acts,” was known to but a few systems of penal law. During the drafting of the convention, it was stressed that the criminalization of both acts limits the exercise of the right to freedom of expression guaranteed in Article 10(1) of the ECHR, and underpinning any democratic legal order. It should therefore be ensured that the scope of criminal acts be defined precisely in the statute, and the legislator’s intervention be deemed necessary in a democratic society for the sake of public safety and be proportionate to the pursued aim. Guided by these indications, the final text of the convention contained two-level guarantees aimed to eliminate the threat of using its provisions to reduce the freedom of expression if so undesired by the authorities. First of all, an appropriate definition was adopted for the concept of illegal public provocation to commit a terrorist offence.


offence. Moreover, it was stated that the interpretation and implementation of the provisions of the Warsaw Convention (I) should take account of the judicature of the ECHR.\textsuperscript{25}

The model for international cooperation in combating offences named in the Warsaw Convention (I) includes solutions developed earlier by the European Convention on the Suppression of Terrorism and the Amending Protocol of 2003. It contains provisions imposing obligations of: establishing jurisdiction (Article 14), conducting inquiry or investigation (Article 15), cooperation and legal assistance (Article 17), extraditing the offender or submitting the case without undue delay to competent authorities for the purpose of prosecution (Article 18). None of the offences under the Warsaw Convention (I) will be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or an offence inspired by political motives (Article 20(1)). Article 21 of the Warsaw Convention (I) contains a “discrimination clause,” corresponding to Article 5 of the European Convention. A noteworthy novelty is the obligation to implement the necessary measures to protect and support victims of terrorist offences. They may include, for example, financial assistance and compensation for victims of terrorism and their close family members (Article 13).

The second of the international agreements done at Warsaw on 16 May 2005 is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (hereinafter: the Warsaw Convention (II)). Its aim is to raise the efficiency of suppressing the financing of terrorism by employing the mechanisms formerly tested in countering money laundering. It requires the parties to adopt such measures that ensure that they are able to search, trace, identify, freeze, seize and confiscate property, of a licit or illicit origin, used or allocated to be used by any means, in whole or in part, for the financing of terrorism, or the proceeds of this offence, and to provide cooperation to this end to the widest possible extent (Article 2(2)). In defining “terrorist financing,” the provision of Article 1(h) of the Warsaw Convention (II) refers directly to Article 2 of the New York Convention (V). The Warsaw Convention (II) requires its signatories to introduce measures enabling

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“confiscation” (Article 3) and holding legal persons liable for criminal offences (Article 10); it also proposes a number of organizational and administrative solutions to facilitate international cooperation.

The two conventions done at Warsaw in 2005 build on the existing acquis of the Council of Europe and previous normative developments of the UN and the EU. Yet, in addition to this, they introduce new, original solutions, making up a coherent model of an all-embracing struggle against terrorism, whose crucial component is the criminalization of acts leading to the commission of terrorist offences. Their adopted counter-terrorism measures appear to be increasingly moulding the standards of international cooperation, as testified by their influence on the legal acts issued by the European Union.26

3. The European Union’s Position on Terrorism

3.1. Evolution of the Institutional Foundations for Combating Terrorism

The position of the European Community on the issue of terrorism has undergone a significant evolution: from a flexible and informal cooperation between the police and experts to the making of regulations effective in all member states. At the early stage, the measures under penal law directed at terrorism were considered as belonging to the exclusive jurisdictions of each member state of the Community. The mounting threat from the leftist and separatist terrorist organizations in the 1970s motivated the establishment of the first institutionalized forms of cooperation on home security. In 1975, the meeting of ministers of justice and internal affairs in Rome appointed the TREVI Group,27 gathering experts from the Community member states, whose responsibility was to collect and share information on the activity of terrorist groups, as well as offer training and experience exchange. The police in individual states formed permanent units

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maintaining direct contact with one other and allowing quick response and assistance in investigations.  

The normative grounds for the harmonization of penal law on combating terrorism were given by the Treaty on European Union done at Maastricht on 7 February 1992 (hereinafter: the MTEU). Cooperation in justice and home affairs was recognized as one of the three “pillars” of the European Union. Terrorism was ranked among the most serious crimes whose combating is one of the “matters of common interest” of the EU member states (Article K.1(9) of the MTEU). To ensure closer cooperation and coordinated action, the Maastricht Treaty granted the Council the right to adopt joint positions, adopt joint action and draw up conventions (Article K.3 of the MTEU). In practice, however, none of these three legal instruments played a part in the unification of legal solutions prevailing in individual states. They were rather seen more as a declaration of a united Europe than a platform for legislative action. A hindrance to the harmonizing of home laws was not only the diversity of legal systems and culture, but also the traditional attachment of each member state to exclusive jurisdiction in criminal matters resulting from the principle of sovereignty. It was difficult to achieve the required unanimity in the decision-making process in the Council; likewise, there were no mechanisms put in place allowing for the control of the implementation of relevant commitments made by individual states. The establishment of the European Police Office (Europol), under Article K.3 of the MTEU, should then be regarded as a success. This organization was established by a convention done at Brussels on 26 July 1995, and its main responsibility was to foster effective col-

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31 OJ C 316, 27.11.1995.
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laboration and liaison among the competent authorities of the EU member states in preventing and combating terrorism (Article 2(1)).

Important changes in the field of EU justice and home affairs were introduced by the Treaty of Amsterdam, signed on 2 October 1997. The treaty named one of the EU’s objectives as “to provide citizens with a high level of safety within an area of freedom, security and justice” (Article 29). When determining the scope of judicial cooperation in criminal matters, the treaty expressly refers to, for example, progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking (Article 31(e)). The cited provisions of the Treaty of Amsterdam created, in their respective scope of influence, a normative basis for the use of legal means binding for all the EU member states and enabling the approximation of national laws. Essential for this harmonization of penal law were framework decisions issued by the European Council.

The trend towards the gradual approximation of penal laws of the EU member states as regards the suppression of terrorism was vindicated in the Action Plan adopted at the European Council meeting in Tampere on 15-16 October 1999. Among the basic EU’s objectives called “the Tampere milestones,” the following were listed: protection of the victims of crime (paragraph 32), setting up of joint investigative teams (paragraph 43), and setting up of Eurojust (paragraph 46) – the body facilitating the coordination and support of criminal investigations in different countries.

The terrorist attacks of 11 September 2001 in the United States exerted a tremendous influence on the speeding up of terrorism-related decision-making under the third pillar of the EU. These events triggered a profound change in shifting from political and program-like declarations to tangible legislative action. In consequence, many past proposals shelved

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for years finally took the shape of purpose-made legal measures effective in all member states.

Having arrived at a political agreement, the Council issued several important framework decisions directly affecting the matter of penal law. Pivotal for this subject was Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,\textsuperscript{35} which obliges the EU member states to accept an approximated definition of terrorist offences in national laws and enforce sanctions reflecting the seriousness of such offences. Procedural measures against terrorism were introduced in Council Framework Decision 2002/465/JHA of 13 June 2002 on joint investigation teams\textsuperscript{36} and in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.\textsuperscript{37}

### 3.2. Terrorism Suppression Strategy Adopted in the European Union

The basic document governing the issue of combating terrorism and setting the relevant objectives for the member states is the EU Counter-Terrorism Strategy adopted by the European Council at its meeting on 15-16 December 2005.\textsuperscript{38} Its overarching idea is “the European Union’s strategic commitment” to “combat terrorism globally, while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice.” This objective is to be accomplished through four pillars, including:

1. preventing recruitment of terrorists,
2. protecting potential targets,
3. pursuing members of terrorist networks,
4. responding to acts of terrorism and crisis management.

The first of the listed pillars aims to tackle the factors which can lead to radicalisation and recruitment of members by terrorist groups. Close cooperation of the EU states is intended to limit the activities of those playing a role in radicalisation; prevent access to terrorist training; establish a strong legal framework to prevent incitement and recruitment; and im-

\textsuperscript{35} OJ L 164, 22.06.2002.
\textsuperscript{36} OJ L 162, 20.06.2002.
\textsuperscript{37} OJ L 190, 18.06.2002.
\textsuperscript{38} Full text available at: http://register.consilium.europa.eu/pdf/pl/05/st14/st14469-re04.pl05.pdf.
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pede terrorist recruitment through the Internet (paragraph 9). At the level of criminal law, that same objective is formulated in Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, which imposes the obligation on national legislators to criminalize instances of public provocation to commit terrorist offences, recruitment and training of terrorists.

The second pillar sets the objective of protecting citizens and infrastructure and reducing vulnerability to attack. This will be done through: the capture and exchange of passenger data, the inclusion of biometric information in identity and travel documents, increasing the effectiveness of the outer EU border control (paragraph 16) and raising standards in transport security (paragraph 17).

The third pillar mentioned in the Strategy embodies a wide spectrum of undertakings related to the prevention of terrorist groups’ activities, eliminating the commission of terrorist acts and prosecuting the perpetrators. They are: the exchange of information and intelligence (paragraph 23), mutual recognition of judicial decisions, including the key measure of the European Evidence Warrant, and improvement of the practical cooperation through Europol and Eurojust (paragraph 26), the development of new visa information systems and Schengen information system (paragraph 27), deprivation of terrorists of the means by which they mount attacks, such as weapons and explosives and false documentation (paragraph 28).

Among the priority objectives, there was an effort to enhance the efficiency of suppressing terrorist financing. To this end, specific standards were enforced through Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (referred to as the Third Directive). In addition to the obligations of states to introduce specific procedures pertaining to the functioning of credit and financial institutions, the Third Directive requires a separate criminalization of acts regarded as “terrorist financing” (Article 1(1)). The provision in Article 1(4) of the Third Directive reads that “terrorist financing” means the provision or collection of funds, by any means, directly or

indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002. This definition is modelled on Article 2(1) of the New York Convention (V). It does not refer, however, to it directly, as is the case of Article 1(h) of the Warsaw Convention (II), adopted by the Council of Europe; by contrast, its point of reference is the Council Framework Decision of 13 June 2002, comprising the original EU acquis.

The fourth pillar set in the Strategy involves the preparation to ensure crisis management of the effects of terrorist attacks and the limitation and elimination of their aftermath. Part of such activities will include assistance and compensation of the victims of terrorism and their families (paragraph 36).

It is worth noting that references to terrorism were made in the Treaty establishing a Constitution for Europe. They are present in the provisions such as: the solidarity clause (Article I-43 and III-329), the mission of Europol (Article III-276), the use of administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains (Article III-160) and the rules of undertaking missions outside the EU assisting other countries in the fight against terrorism (Article III-309).

The solutions adopted in the Treaty of Lisbon mark a new dawn in the strengthening of European cooperation. The treaty supersedes the former division of the EU’s structure rested on three pillars and transfers the areas of freedom, security and justice to the domain of shared competence between the EU and its member states (Article 4(2)(j) of the Consolidated version of the Treaty on the Functioning of the European Union). Previous framework decisions are replaced by directives adopted by the European Parliament and the Council. They have an immediate effect, which was previously reserved only for the integration within the Community (1st pillar). This is how, through judicial cooperation in criminal matters, individual EU member states are supposed to unify the regulations laying down the criteria of offences and sanctions “in the areas of particularly serious crime with a cross-border dimension resulting from the nature or

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impact of such offences or from a special need to combat them on a common basis” (Article 83(1) of the Consolidated version of the Treaty on the Functioning of the European Union). These minimum standards are applicable in the first place to the offences expressly indicated in the treaty, such as terrorism, human trafficking, drug trafficking, arms trafficking or money laundering.


4.1. The Concept of Terrorist Offence

The development of a coherent set of penal measures aimed at combating terrorism first requires the definition of the scope of offences that they will tackle. This task was assigned to Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (hereinafter: the framework decision). Unlike the conventions developed under the auspices of the UN, the framework decision is not confined to the problem of international terrorism, but goes further to cover all its manifestations, if only they meet the criteria specified therein.43

The framework decision of 13 June 2002 imposes an obligation that the definition of terrorist offences should be approximated (paragraph 6) and names its constituent parts. According to Article 1(1) of the framework decision, the EU member states should take the necessary measures to ensure that the intentional acts referred to below, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

– seriously intimidating a population,
– unduly compelling a Government or international organization to perform or abstain from performing any act,

– seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

The definition of the catalogue of prohibited acts contained in the remainder of Article 1(1) of the framework decision should be seen as a commitment to outlaw any of such acts in the national legislations of the EU member states. This catalogue includes:

a. attacks upon a person’s life which may cause death,
b. attacks upon the physical integrity of a person,
c. kidnapping or hostage-taking,
d. causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss,
e. seizure of aircraft, ships or other means of public or goods transport,
f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons,
g. release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life,
h. interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life,
i. threatening to commit any of the acts listed in (a) to (h).

The above definition of a terrorist offence highlights three constitutive elements that should occur concurrently. Two of them are of an objective nature (refer to the deed) and one of a subjective nature (refer to the doer).

The basic requirement is to establish that the offender’s conduct meets the criteria of one of the acts listed in Article 1(1)(a-i) of the framework decision. This catalogue draws heavily on the UN acquis. The literature on the subject proposes a view that this collection of offences bears the mark of the legacy of the twelve international conventions on terrorism.44 However, while the descriptions of offences contained in international agreements agreed under the auspices of the UN were associated with a given “sector” of terrorist activity, or supplemented with additional circumstances of the time, place and manner in which they were committed,

the provision of Article 1(1) of the framework decision offers a synthetic approach.

The provision of Article 1(1)(c) of the framework decision requiring the recognition of kidnapping or hostage taking as an offence corresponds to the content of the provision of Article 1 of the New York Convention (II), although it is worded more concisely. Given special circumstances, such an act may fall under other international agreements, such as the New York Convention (I), when the victim is a person under international protection, and the New York Convention (III), if the offence affects any members of the UN or associated personnel.

Referred to in Article 1(1)(d) of the framework decision, the conduct leading to extensive destruction likely to endanger human life or result in major economic loss can be likened to the description of the crime under Article 2(1) of the New York Convention (IV). It is not required, however, for this extensive destruction to eventuate from the use of explosives or other lethal devices.

The act mentioned in Article 1(1)(e) of the framework decision involving the seizure of a means of transport corresponds to the convention provisions concerning the civil aviation and maritime security. Its scope, however, is broader, since it covers attacks directed against any means of transport, including those of land transport. The content of Article 1(1) of the framework decision makes references to the prohibitions of Article 7(1) of the Vienna Convention, and Article 1(1)(g) of the framework decision to those terms and conditions of international agreements that define the offences exhibiting the characteristics of commonly hazardous. The examples of conduct listed in point f and g also fall within the acts criminalized under the New York Convention (VI) (Article 2(1)) and the Rome Convention, amended by the London Protocol (Article 3bis(1)(a)) and also in the treaties drawn up after the entry into force of the framework decision, of 13 June 2002

Acts that involve interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life (Article 1(1)(h) of the framework decision) are absent from the existing sectoral conventions. This does not mean, however, that their inclusion in the framework decision should be considered a novelty. Similar descriptions of behaviour considered to be acts of terrorism date

45 Cf. Article 1(1) of the Hague Convention, Article 7(1) of the Vienna Convention, Article 3(1) of the Rome Convention, Article 2 of the Rome Protocol, Article 2(1) of the New York Convention (IV).
back to the interwar period, and occurred, for example, in the final document of the Brussels conference on the unification of criminal law (1930).

In addition, the threatening to commit any of the acts listed in Article 1(1)(a-h) was deemed terrorist offence (Article 1(1)(i) of the framework decision). This solution is also found in other international agreements.46

The Explanatory Memorandum attached to the draft framework decision recognized the acts committed in connection with a terrorist activity as inherently ordinary offences.47 Their terrorist nature can be ascertained if they meet two additional criteria. The first one follows from the clause imposing the requirement that “given their nature or context,” the offender’s acts “may seriously damage a country or an international organisation.” The wording of this provision clearly indicates that these effects need not actually occur, and it is sufficient to establish the existence of the danger of their occurrence.

The incorporation of such a clause into the frame corresponds to the broadly accepted argument that only those acts have the terrorist nature which – whatever the motivation of the perpetrators – are potentially capable of producing a particularly adverse outcome.48 This view is conveyed by the principle of proportionality, which requires the relationship between two conflicting values be determined (“weighed”): on the one hand, the legal interest of the individual compromised by the measures taken (established penalties), on the other hand, the legal interest whose protection is the purpose of a state’s interference. This principle leads the legislator, by resorting to criminal punishment, to take into account the sufficiently high rank of the protected legal interest, and also determine whether the criminalized acts at least expose this legal interest to danger.49

A clause referring to “serious damage to a country or an international organisation” serves as a filter to allow the exemption beyond the scope of the concept of a terrorist offence of such conduct that formally meets the criteria of punishable acts listed in (a) to (i), and yet does not reveal, due to its nature and context, an appropriately high degree of threat to the...
protected legal interests, such as the proper functioning of a state or an international organization.

The last of the component of a terrorist offence provides for the assessment criterion taking into account the subjective attitude of the perpetrator. It does not, however, pertain to motivation, but is determined by the desire to accomplish one of the named goals. The failure to refer to motivation as one of the indicators of the terrorist nature of an offence results from the effort to “depoliticize” its assessment. Consequently, it helps avoid the difficulties which may arise in determining the specific political agenda pursued by the perpetrator, the ideological substratum exerting influence on his intent, or links with movements and groups resorting to violence.

The criteria related to the perpetrator’s intention were given as alternatives; therefore, it is sufficient to demonstrate that the offender committed an act in order to achieve one of the three goals listed in the provision. The first two criteria of seriously intimidating a population or unduly compelling a government or international organization to abstain from performing an act are almost a verbatim repetition of the wording used in Article 2(1)(b) of the New York Convention (V). The last criterion, which requires that the offence seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation, has not yet occurred in any international agreements on suppressing terrorism.

The construction of the aspects of the terrorist offence as to the doer leads to a significant reduction of the range of acts falling within the defined concept. The requirement of an appropriately targeted perpetrator’s conduct (taken cum dolo directo colorato) means that not all crimes identified in the sectoral conventions may be qualified as terrorist offences in the light of the provisions of the framework decision. Some of the international agreements, such as the Hague Convention, criminalize certain acts but omit to define any requirements as to the perpetrator’s goals. For this reason, the offence of aircraft hijacking (Article 1 of the Hague Convention) may be regarded as terrorist under the framework decision if the ransom was extorted from a government or international organization, or the offender at the same time sought to intimidate a population. The same act aimed at demanding ransom from the families of the people on board or from the airline is not compatible with the requirements adopted in the framework decision, although it meets the criteria of a crime as defined by the Hague Convention.50

The literature on the subject expresses certain reservations about both the style of the whole of Article 1(1) of the framework decision, as well as individual language expressions used with a view to conveying the perpetrator’s intentions. They have been reported to be complex and raising questions during interpretation.\footnote{Cf. Balzacq, Th., Bigo, D., Carrera, S., Guild, E. „The Treaty of Prüm and EC Treaty: Two Competing Models for EU Internal Security,” in: Security Versus Freedom. A Challenge for Europe’s Future, Balzacq, Th., Carrera, S., eds., Ashgate 2006, p. 122, Casale, D. “EU International and Legal Counter-terrorism Framework,” DATR 1 (2008), p. 62, Saul, B. Defining, p. 163.} For instance, they permit to deem the conduct of persons involved in various forms of political protests and demonstrations as terrorist offences because they may be imputed the aim of “unduly compelling a Government or international organisation to perform or abstain from performing any act” or “seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.”\footnote{Cf. Saul, B. Defining, pp. 164-165, Vennemann, N. Country Report, pp. 236-237.} The threat of abuse of the broad spectrum of the intention-based criteria included in the definition adopted in Article 1(1) of the framework decision to suppress the opposition by those wielding power should not be ruled out even in democratic societies. Yet, it seems that the normative safeguards preventing such misinterpretation are sufficient. For example, the provision of Article 1(2) of the framework decision reiterates the requirement to respect fundamental rights and legal principles that govern the EU when implementing the obligations contained therein.\footnote{Cf. De Cesari, P. The European Union, in: International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism, Nesi, G., ed., Ashgate 2006, p. 216, Walter, Ch. Defining Terrorism, pp. 29-30, Wouters, J., Naert, F. “Of Arrest Warrants, Terrorist Offences and Extradition Deals: An Appraisal of the EU’s Main Criminal Law Measures Against Terrorism After 11 September,” CMLR 41 (2004), p. 928.} The interpretation of Article 1(1) of the framework decision in accordance with human rights standards should assure that the exercise of fundamental rights and freedoms will not be assessed by and dovetailed with the threat arising from terrorism.

4.2. Offences Related to a Terrorist Group and Offences Related to Terrorism

Over and above the definition of terrorist offences, the Council Framework Decision of 13 June 2002 supplies descriptions of the criteria of fairly numerous, so-called terrorist-linked offences. These are:
1. offences relating to a terrorist group (Article 2 of the framework decision),
2. offences linked to terrorist activities (Article 3 of the framework decision),

The first category names acts of directing a terrorist group (Article 2(2)(a) of the framework decision) and of participating in the activities of such a group (Article 2(2)(b) of the framework decision). In order to regard a criminal structure as a “terrorist group,” it should meet the minimum requirements set out in Article 2(1) of the framework decision. In accordance with the legal definition laid down in that provision, it should be “a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences.” The individual characteristics used in this description were borrowed, with minor stylistic changes, from the definition of “criminal organization” previously proposed in Joint Action 98/733/JHA of 21 December 1998.\(^{54}\)

The notion of a terrorist group in the framework decision of 13 June 2002 was designed based on elaborate objective and subjective criteria. As regards the objective aspect, the requirements pertain to the personal composition of a group and a minimum degree of organization. Such a group of more than two persons is not randomly formed for the immediate commission of an offence but should be established over a period of time and act in concert. There is no need to formally define roles for its members, continuity of memberships or a developed structure. The definition, it seems, is fairly broad. It does not require the existence of a hierarchical structure, or stability and invariability of the personal composition; judging by this, it may cover a variety of informal groups, which seek to commit terrorist offences,\(^{55}\) including those ready to voluntarily submit to the authority of the leader.

Due to the subjective element expressed in Article 2(1) of the framework decision, it is mandatory that the group acted in concert “to commit terrorist offences,” that is, prohibited acts itemized in Article 1(1) of the framework decision. The grammatical interpretation of Article 2(1) of the framework decision supports the conclusion that the concept of a terrorist group does not allow for the personal structure united through an agreement to commit just one specific crime. The solution requiring that the intentions of the group members were not considered “exhausted” after the commission of a single crime may be justified by the conclusions following


\(^{55}\) Cf. Dumitriu, E. The E.U.’s Definition, p. 598.
from the observation of contemporary terrorism. It has been proved that the most dangerous groups are those which aspire to take up a long-term struggle for the strategic, often distant objectives. However, it should be highlighted, against the construction adopted in the framework decision that even a one-time committed terrorist offence, but with a high degree of social harm, often requires long-term and well-planned preparations within a structured criminal group and should not be excluded from the scope of the norm in Article 2(1) of the framework decision.

The provision of Article 2(2) of the framework decision isolates two forms of participation in a terrorist group:

a) directing a terrorist group,
b) participating in the activities of a terrorist group, including by supplying information or material resources or by funding its activities in any way. In both case it is required that these are intentional acts and that participation assumes the knowledge of the fact that it will contribute to the criminal activities of the terrorist group.

Another set of offences linked to terrorist activities in Article 3 of the framework decision is:

a. public provocation to commit a terrorist offence,
b. recruitment for terrorism,
c. training for terrorism,
d. aggravated theft with a view to committing one of the acts listed in Article 1(1);
e. extortion with a view to the perpetration of one of the acts listed in Article 1(1);
f. drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) to (h) and Article 2(2)(b).

The acts criminalized in this provision cover a broad spectrum of conduct that includes casuistic forms of provoking, facilitating or creating the conditions for terrorist offences. As a matter of fact, they constitute *sui generis* types of inciting, aiding and preparation, punishable regardless of whether or not the terrorist offence has been actually committed (Article 3(3) of the framework decision). The literature on the subject raises objections against such a construction of offences related to terrorist activities. It has been underlined that it is conductive to a situation in which certain conduct classified as acts under Article 3(2) of the framework decision can be simultaneously regarded as participating in the activities of a terrorist group (Article 2(2)(b) of the framework decision), or aiding and abetting or inciting to a terrorist offence (Article 4(1-2) of the framework decision).
The Approach of the Council of Europe and the European Union on how to handle the problem of such concurrence of provisions. Further objections of a political and penal character are raised by the question of legitimacy of linking such acts as aggravated theft and drawing up false documents with the intention of committing terrorist crimes within some indefinite time. Proponents of the view that at this early stage of the *iter criminis*, the legal interest protected by Article 1(1) of the framework decision is not yet threatened,\(^{56}\) reckon that it is sufficient to punish the perpetrators by employing criminal liability for offences against property or against documents.

It is worth noting that only the acts listed in (d) to (f) were contained in the original version of the framework decision, while others, named in (a) to (c), were introduced no earlier than by Council Framework Decision 2008/919/JHA of 28 November 2008.\(^{57}\) The amendment marked the completion of a long-shelved idea of isolating, as a separate category of offences, act involving the encouragement of terrorist activities and providing support to terrorist structures. This idea failed while drafting the framework decision in the years 2001-2002, but shortly its proponents were equipped with new arguments provided by the decisions of the Council of Europe. Of great importance was the final agreement on the criteria of the offences contained in Articles 5-7 of the Warsaw Convention (I), which subsequently framed the solutions introduced in the EU by the framework decision of 28 November 2008.

The criminalization of acts of public provocation to commit terrorist offences and recruitment and training for terrorism is intended to avert something that is sometimes referred to as “violent radicalisation,” that is – to quote the European Economic and Social Committee’s opinion of 22 April 2008 prepared for the European Commission – “the phenomenon of people embracing opinions, views and ideas which could lead to acts of terrorism as defined in Article 1 of the Framework Decision on Combating Terrorism of 2002.”\(^{58}\) Such acts are particularly dangerous when coupled with the use of global communication technologies, especially the Internet, that ensure a global impact of the distributed content.


The drafters of the framework decision of 28 November 2008 saw that the proposed regulation affected the sensitive substance of human behaviour and issues, which are “on the borderline between the legitimate exercise of freedoms, such as freedom of expression, association or religion, and criminal behaviour.” The final wording of this legal act provided for critical remarks, earlier reported by NGOs, demanding the introduction of effective mechanisms safeguarding against unwarranted intrusion into the sphere of fundamental rights and freedoms. In the first place, the guarantees are the legal definitions that set the exact boundaries of prohibited acts. The concept of public provocation to commit a terrorist offence is explained in Article 3(1)(a) of the amended framework decision as the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Articles 1(1)(a) to (h) of the framework decision, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. Such a prohibited act excludes the conduct consisting in “the expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism” (the preamble, recital 14, sentence 2).

In accordance with Article 3(1)(b) of the framework decision of 2008, recruitment for terrorism means soliciting another person to commit one of the offences listed in Articles 1(1)(a) to (h), or in Article 2(2) of the framework decision. Training for terrorism means providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Articles 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose (Article 3(1)(c) of the framework decision).

The misuse of the new types of offences to combat or muzzle the political opposition, peace movements or other actions that violate fundamental human rights and freedoms is to be prevented by the guidance on interpretation contained in the preamble. It reads that nothing in the framework decision of 28 November 2008 may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as freedom of expression, assembly, or of association, the right to respect for private and personal life, and the right to education.  

family life, including the right to respect of the confidentiality of correspondence (paragraph 13), or to reduce or restrict the dissemination of information for scientific, academic or reporting purposes (paragraph 14, sentence 1). The importance of these declarations, however, is sometimes challenged by those commentators who deny the legally binding attributes of the preamble.  

The scope of criminalized acts under Article 1(3) of the framework decision is supplemented by the provisions specifying the forms of instigation, aiding or abetting and attempting to commit a terrorist offence. The EU member states were obliged to adopt measures to make the following punishable:

a. aiding or abetting an offence referred to in Article 1(1), Article 2 or Article 3 (Article 4(1) of the framework decision),

b. inciting an offence referred to in Article 1(1), Articles 2 or 3(2)(d-f) (Article 4(2) of the framework decision),

c. attempting to commit an offence referred to in Article 1(1) and Article 3(2)(d-f), with the exception of offences referred to in Article 1(1)(f) and (i) (Article 4(3) of the framework decision). Besides, the document offers an option of making punishable attempting to commit offences listed in Article 3(2)(b-c) (Article 4(4) of the framework decision).

On the one hand, the idea of separate criminalization of the mentioned forms of crime needs to be regarded as a logical consequence of the intent to create a complex and loophole-free model of combating terrorism in the EU. On the other hand, this large number of crimes and crime forms named in the framework decision raises the question of the rationale behind such a far-reaching and case-based approach of the legislator to the regulated substance. These doubts are even more justified, given the trouble in determining the scope of individual acts. The literature on the subject has for long underlined the incoherence between the provisions on participation in the activities of a terrorist group, which consists in providing information, material resources, or financing of the group’s activity (Article 2(2) of the framework decision), and aiding or abetting in a terrorist offence (Article 4(1)(a) of the framework decision).  

Similar problems surfaced with the introduction of new types of offences in the framework decision of 28 November 2008. No clear dividing line was set separating public provocation to commit terrorist offences (Article 3(2)(a) of the framework decision) and recruitment for terrorism (Article 3(2)(b) of the framework decision)
from inciting to commit terrorist offences (Article 4(2) of the framework decision), and also training for terrorism (Article 3(2)(c) of the framework decision) from aiding or abetting in the commission of such offences (Article 4(1) of the framework decision).

4.3. Penal Law Consequences of Committing Crimes Defined in the Council Framework Decision of 13 June 2002

The framework decision of 13 June 2002 requires the member states to establish such criminal penalties for all offences under Article 1(4) that will be effective, proportionate and dissuasive, and will entail extradition of the perpetrators (Article 5(1)). In relation to terrorist offences in Article 1(1) of the framework decision and the manner of their commission named in Article 4 of the framework decision, they should be punished by custodial sentences heavier than those imposable for non-terrorist offences. This tightening of punishment does not apply to cases where the imposable sentences are already the maximum possible sentences under national laws (Article 5(2) of the framework decision).

The framework decision sets the upper limit of sanctions for belonging to a terrorist group. Directing such a group should be punishable by custodial sentences with a maximum sentence of not less than fifteen years. If the purpose of the group was merely threatening to commit a terrorist offence, the maximum penalty for the group leader cannot be less than eight years. The same lowest limit of eight years imprisonment was set for participating in the activities of a terrorist group (Article 5(3) of the framework decision).

The introduction of higher penalties for the offences listed in the framework decision than in the case of non-terrorist offences is by no means questionable. It is substantiated by their two special characteristics: the specifically targeted perpetrator’s intent and the threat to inflict serious damage to a country or international organization.62

The framework decision allowed for the reduction of penalties in some enumerated cases. However, this should be conditional on the occurrence of “particular circumstances” (Article 6 of the framework decision), hinged on two cumulative conditions. First of all, the offender would have to re-

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nounce terrorist activity, and provide the administrative or judicial authorities with information which they would not otherwise have been able to obtain. The first of the conditions is rather broad, but most certainly, in order to be fulfilled, the decision taken by the perpetrator must be firm and final. What comes as a surprise is the omission of the requirement that the renouncement of terrorist activity should be voluntary, although there is no doubt that the national legislator is free to establish such an additional condition on its own. To satisfy the second of the conditions for the reduction of punishment, the information provided to authorities needs to help them to prevent or mitigate the effects of the offence, identify or bring to justice the other offenders, find evidence, or prevent further offences referred to in Articles 1 to 4 of the framework decision.

An important factor in the process of standardization of laws on combating terrorism is the obligation of the EU member states to extend the liability for offences under Articles 1-4 of the framework decision to also include legal persons. The provisions of the framework decision fail to provide a coherent and exhaustive structure of such liability, but mention its basic premises. It is provided that any of the offences referred to in Articles 1 to 4 of the framework decision be committed for the benefit of a legal person by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following: a) a power of representation of the legal person; b) an authority to take decisions on behalf of the legal person; and c) an authority to exercise control within the legal person (Article 7(1) of the framework decision). Apart from the aforementioned cases, the legal person can be held liable where the lack of supervision or control by the person referred to above has made possible the commission of any of the offences referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority (Article 7(2) of the framework decision).

The provision of Article 8 of the framework decision obliges the member states to ensure that a legal person is punishable by effective, proportionate and dissuasive penalties, which include criminal or non-criminal fines. Other mentioned sanctions are exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from engaging in commercial activities, placing under judicial supervision, judicial dissolution and the temporary or permanent closure of establishments used to commit a crime.

The provisions of the framework decision of 13 June 2002 concerning legal persons have triggered a debate among experts and researchers on the admissibility of liability of the entities of international law – states and in-
ternational organizations and their bodies. The debate has been fuelled by the documented cases of states supporting and using terrorist groups and instances of undertaking terrorist activity by the secret services of certain countries. Admittedly, the provisions in question do not explicitly mention states and international organizations among the entities responsible for the offences referred to in the framework decision, but still do not clearly imply that they should not fall within the notion of legal person. Under recital 11 of the preamble, the provisions of the framework directive do not apply only to actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a state in the exercise of their official duties. This bolsters (per a contrario) the claim that in the remainder of their scope, such acts ascribable to a state or international organisation, such as the financing of terrorist groups, should be punished as falling under the framework decision. However, the legitimate view rejecting this interpretation prevails. Its supporters refer to the rules of public international law, which do not allow for some internal EU law to lead to the imposition of liability on third states for offences defined in such a law. It should be noted that both the liability and sanctions for legal persons enforced in the framework decision refer to the concept of private law and are generally not suitable for the application to entities of international law.

The establishing of jurisdiction by each member state over the offences referred to in Articles 1 to 4 of the framework is required, where:

a) the offence is committed in whole or in part in its territory;

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

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

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

e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that member state (Article 9(1) of the framework decision).

With such an extensive scope of jurisdictions of individual national systems of penal law, the overlapping of jurisdictions may naturally occur,

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for example, when the offenders and victims are the nationals of different EU countries. If this happens to be so, the framework decision obliges states to cooperate in order to determine which of them will prosecute the offenders. It also proposes some guidelines to facilitate such a decision (Article 9(2)), but does not determine any priority of jurisdictions.

In its closing part, the framework decision addresses the issue of protection of victims of offences and their persecution. In addition to the recalling of prior standards agreed upon in previous Council Framework Decision 2001/220/JHA 15 March 2001 on the standing of victims in criminal proceedings, the provision of Article 10(2) of the framework decision requires that states, if necessary, take all possible measures to ensure appropriate assistance for victims' families. This is pivotal, since the framework decision of 15 March 2001 defines “victim” only as a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a member state (Article 1(a)), and refers to the protection of victim’s family only in connection with a risk of retaliation or a threat of an intrusion of privacy (Article 8).

The last issue tackled by the framework decision is the prosecution of its offences. The rule is that the initiation and conduct of criminal proceedings are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the member state (Article 10(1)).


The evaluation of the new counter-terrorism measures adopted within the EU in the first place requires the analysis of the degree of fulfilment of obligations imposed by the framework decision of 13 June 2002 in individual national legislations. Based on the information supplied by member states, the European Commission has examined their enacted legislative solutions twice.

The first report of 8 June 2004 confirmed that most countries had revised their regulations. At the same time, it voiced many reservations about

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65 OJ L 82, 22.03.2001.
both the scope and completeness of introduced standards, as well as the
legislative technique employed. The report concluded that the process of
implementing new regulations had not been completed yet.

The second report of 6 November 2007 reviewed legislative measures
introduced in the previously monitored states and adopted by the new
EU members. The report confirmed, in principle, a material progress in
the unification of national legislations in the portion required by frame-
work decision. The most serious Commission’s concern was articulated
in connection with the incomplete implementation of the provisions on
the definition of a terrorist offence (Article 1 of the framework decision),
penalties (Article 5(3) of the framework decision) and the liability of le-
gal persons (Article 7 of the framework decision).67 The subsequent report
investigating the fulfilment of the obligation to criminalize new types of
crimes related to terrorist activity, provided for in the framework decision
of 28 November 2008, will be prepared on the basis of information that
states were compelled to supply before 9 December 2010.

From the viewpoint of European integration, the provisions of the
framework decision of 13 June 2002 should be regarded as an important
factor in the unification of legal systems of the EU countries. Among oth-
ers, of key importance is the agreement reached on the criteria of terror-
ist offences and criminal liability. Outlined in this legal act, the minimum
standards68 governing the penal law measures aimed to combat terrorism
require national legislators to initiate appropriate legislative action, which
directly affects the formation of a uniform model of cooperation in crimi-
nal matters. This is how the EU’s response to the threat of terrorism acts
upon the acceleration and consolidation of the process of “Europeaniza-
tion” of penal law.

67 Report from the Commission based on Article 11 of the Council Framework Decision of
68 Cf. Baab, F. „The Judicial Cooperation within the European Union in the Fight Against
2003, p. 59.
Chapter IV

Offence of a Terrorist Nature in Polish Penal Law

1. Terrorism against the Background of the Polish Penal Codification and Scientific Views of the 20th Century

Polish penal law of the interwar period failed to propose either a normative definition or specific regulations on terrorism; in addition, no constituent elements of a terrorist offence were identified. However, the conduct typical of terrorist activity could be regarded as a prohibited act criminalized in the Penal Code of 11 July 1932.¹ Noteworthy are the provisions classifying: crimes of state (Articles 93-95 of the PC 1932), aggravated assault on the chief or diplomatic representative of a foreign state (Article 111 of the PC 1932), offences against public law associations (Articles 114-117 of the PC 1932), offences against the authorities and offices (Articles 125, 126, 129, 130, 133 of the PC 1932), participation in an association aimed to commit an offence (Articles 166-167 of the PC 1932), causing general danger (Article 215-217 of the PC 1932), offences against life and health (Articles 225, 235-237 of the PC 1932) and offences against freedom (Articles 248, 250, 251 of the PC 1932).

In 1935, R. Lemkin presented a project for recognizing acts of terrorism as separate types of offences. He proposed introducing into the Penal Code of 1932 provisions relating to the actual state of affairs referred to as “domestic terrorism” and “international terrorism.” When it comes to

¹ Regulation of the President of the Republic of Poland of 11 July 1932 the Penal Code (JL No. 60, item 571).
the former offences mentioned in Article I, an offender was criminally liable who: “1) undertakes criminal action against life, health or freedom of another person because of his position in public life or in public affairs, or due to his membership in other social group, 2) uses generally dangerous measures against public property or the property of another person because of his position in public life or in public affairs, or due to his membership in another social group, or 3) causes a transportation disaster or flood, or spreads an epidemic” – provided that he did so “in order to cause widespread unrest or intimidation.” The last set of criteria, defining the aspects of the offence as to the doer, determined the terrorist nature of a crime. The requirement of such a targeted attitude of the perpetrator resulted from the assumption adopted by R. Lemkin that public order in the state should be regarded as protected interest that a terrorist act aims to violate.3

Classified in two separate provisions, the offence of “international terrorism” was committed by the offender who: “undertakes criminal action on the territory of his own state against life, health or freedom of the heads of states or persons exercising their rights, government officials, diplomatic representatives, members of legislative or judicial bodies belonging to another state” or “undertakes the same action on the territory of another state against any of the above-mentioned persons of any nationality” (Article II), or “1) uses generally dangerous measures against the official seats of diplomatic representatives, 2) on the territory of his own state, uses generally dangerous measures against the property of a foreign state or, when on the territory of a foreign state, against the property of any other state, 3) on the territory of a foreign state, causes a transportation disaster or flood or spreads epidemic” (Article III). Just as with domestic terrorism, the assumption made by R. Lemkin that the protected interest is international public order was reflected in the aspects of the offence as to the doer. The terrorist nature of an offence was decided by the requirement that the offender resorted to it “to cause general unrest or to damage international relations.”

After World War II, the charge of carrying out terrorist attacks was a tool of countering the political opposition and stigmatizing political opponents. In the judicature and literature of the period, “terrorist” activity was defined as a military action conducted by the Home Army and

3 See ibidem, p. 561.
other pro-independence organizations. Following this line of thought, L.T. Schmidt wrote: “As far as the right-wing camp is concerned (I mean the Home Army), they organized acts of terrorism only in revenge, or to defend their own men from extermination, which was consistent with the bourgeoisie-like tactics. This tactics precluded the use of massive military action. The Home Army troops were not involved in guerrilla warfare against the Germans, but were only focused on the organization of terrorist acts (e.g. assassinating the SS and police commander Franz Kuchera in Warsaw in February 1943, rescuing prisoners at the Arsenal in Warsaw in March 1943 and raiding a money transport from the Issuing Bank in August 1943).”

The offences listed in the Decree of 13 June 1946 on crimes particularly dangerous during the reconstruction of the state (the so-called Small Penal Code) were regarded as forms of terrorist acts and included the following: a violent attack on a Polish or allied military unit (Article 1 § 1) and violent assault on an officer of the new authority (Article 1 § 2). Criminalization of both acts was clearly influenced by Soviet law. The model provision was that in Article 58 (8) of the Criminal Code of the Russian Soviet Federative Socialist Republic of 22 November 1926, which ranked “counter-revolutionary crimes” among “terrorist acts directed against the Soviet authority, or revolutionary activists of workers’ and peasants’ organizations.”

The Penal Code of 19 April 1969 introduced a type of offence of a similar construction of constituent elements, referred to in the literature as “terrorist attack.” It was committed by a person who “with the intent hostile to the People’s Republic of Poland” committed a violent assault on the life of a public or political activist (Article 126 of the PC 1969). In addition, other regulations could be used for the classification of terrorist offences, mainly related to: sabotage, offences against life and health or against public order. In the final period of the 1969 Penal Code being in

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7 Decree of 13 June 1946 on crimes particularly dangerous during the reconstruction of the state (JL No. 30, item 192).
8 Уголовный Кодекс РСФСР редакции 1926, Москва 1950, p. 41.
effect, the measures adopted to combat organized crime were used against
the manifestations of terrorism involving membership in criminal structures. Added in the amendment of 1995,11 a new provision of Article 58a of
the PC 1969 provided for an extraordinary aggravation of punishment by
raising the upper limit of the penalty by half if the offender committed an
offence acting in an organized group or criminal association.

In the Polish legal literature of this period, there were opinions voiced
in favour of the separate regulation of the issue of terrorist acts. Based on
comparative law studies in 1988, T.R. Aleksandrowicz proposed that there
are three components that should be taken as the statutory constituent ele-
ments of a terrorist act:

1. a major violation of a legal interest which at the same time constitu-
tes a violation of national security,

2. the perpetrator’s intent to intimidate certain groups of society in or-
der to obtain certain concessions as a result of their action or failure to act,

3. the perpetrator’s political motives.12

He proposed the introduction of a new type of offence (labelled as Ar-
ticle 167(2)), under which that offender was held liable who, by force, un-
lawful threat or otherwise unlawfully, “intimidates a person or group of
persons engaged in a social or political activity with a view to compelling
these people to take or fail to take particular action in connection with
their public activity.”13 The draft proposal was supplemented by aggra-
vated forms of certain offences involving the use of violence against the es-
sential political and economic interests of the People’s Republic of Poland,
public safety, life, health and freedom, as well as public order. The modifi-
cation of the basic forms of offences involved the addition of the statutory
constituent elements reflecting the perpetrator’s aim, i.e. to intimidate the
population or part of it, the authorities or specific groups.14

Another proposal to introduce legal solutions to counter terrorist of-
fences and add further categories of such crimes was made by K. Indecki.
His first proposal goes back to 1998, the final period of the life of the 1969
Penal Code, and – in a modified form – to 2004, after the entry into force
of the new codification of penal law. The amendment to the Penal Code
took two directions: first, to isolate a terrorist act (a “proper” terrorist of-

11 Act of 12 July 1995 amending the Penal Code, Executive Penal Code and on increasing
the lower and upper level of fines and exemplary damages in penal law (JL No. 95, item 475).
12 Aleksandrowicz, T. R. „Pojęcie czynu o charakterze terrorystycznym ‘de lege lata’ i ‘de
lege ferenda’ (Wybrane zagadnienia),” ProbPraw 10 (1988), p. 27.
13 Ibidem, p. 29.
14 Ibidem, p. 29.
Terrorism against the Background of the Polish Penal Codification

fence) and to adopt a number of specific measures to combat it and, second, to broaden the scope of response under penal law to the categories of offences committed as the so-called “pre-terrorist acts.” The dogmatic construction of the provisions propounded by K. Indecki was based on a prior determination of the generic object of protection, threatened by the acts committed with a view to accomplishing terrorist objectives. The author assumed that particular acts might harm various legally protected interests, but ultimately aim to shatter social psyche, cause the state of intimidation in people’s minds, hence disrupting social life as such.

As a consequence of such an approach to the object of protection, there was a suggestion to incorporate a set of new rules in Chapter XXXVI of the 1969 Penal Code titled, “Offences Against Public Order.” Of crucial importance among them was the draft Article 283a combining a number of offences into a single, generic type of offence characterized by the targeted attitude of the offender. To recognize the existence of such an offence and, consequently, to decide on an extraordinary aggravation of punishment, the perpetrator of an attempt on life, health or property, hijacking of a means of transport, hostage-taking or coercing had to be found “intending to cause serious disturbance to public order through intimidation or terror.” The measures to combat terrorism were not restricted, however, to increasing the statutory penalty limits for prohibited acts, as the penal policy was intended to weaken the solidarity within terrorist groups, even at the cost of impunity of those renouncing them. On the basis of the draft Article 283b § 1, “active repentance” in the form of a voluntary withdrawal from an act, followed by the notification of a law enforcement agency of all relevant circumstances of its commission, or by disclosing information about persons involved if it prevented such commission, freed the repenting perpetrator from punishment for the offence under Article 283a. If active repentance proved ineffective, but the offender voluntarily sought to avoid committing this act, the court was to apply an extraordinary mitigation of penalty (draft Article 283(b) §2). A novel idea was an additional penalty of “the prohibition on staying in the Polish territory” transferred from French law (draft Article 283c) and applied only to foreigners and for a period of 1 to 15 years.

The proposed penal law response to the category of “pre-terrorist act” was implanted in the draft Article 276 § 1, which outlawed participation in

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a “terrorist association,” along with establishing, directing and providing financial or organizational assistance to such an association – the latter being subject to a more severe penalty (draft Article 276 § 3). This proposal aimed at the so-called simplified criminalization of various acts contributing to terrorist activity, yet not always contained within the framework of penalized gradual or phenomenal forms of a specific terrorist act. In addition, the commission of a crime by a person operating in a terrorist association was a circumstance affecting the aggravation of the penalty (draft Article 58a).\(^\text{17}\)

The proposal in question is worthy of consideration for a number of reasons: first of all because it was preceded by a thorough study of the problem, including a comparative legal analysis of solutions applied in other countries, as well as obligations under international law. Apparently, the author did not resort to a simple reception of foreign law, but relied on the dogmatic framework and structure of the 1969 Penal Code. The proposals by K. Indecki were meant to introduce a comprehensive modification of the provisions in both the general and specific parts of the 1969 Penal Code. Its comprehensive character was also seen in that it addressed terrorism viewed in a wider perspective. This modification was not confined to a mere determination of the rules of liability for a terrorist act (“proper”), but took into account the acts referred to as “pre-terrorist,” e.g. as taking part in a terrorist association and rendering financial or organizational assistance to such structures. Fairly enough, it also strived to ensure that the adopted standards apply to any conduct that meets the criteria outlined above, regardless of the motives driving the offender. Such standards should therefore include cases of political as well as criminal and pathological terrorism. Still, among the submitted specific proposals, there is no legal definition allowing the separation of “terrorist” and other acts at the normative level. It is considered that this function, worded in draft Article 283a, was to some extent fulfilled by the requirement that a serious disturbance of public order occurred through intimidation or terror. Abandoning the attempts to develop a comprehensive definition resulted, it seems, from the concept, which, according to its author, “without prejudging the substance of a terrorist act, would offer the option of referring science ... and would permit gradation in the assessment of terrorist conduct.”\(^\text{18}\)

\(^{17}\) Cf. Indecki, K. Prawo karne, p. 338.

The new Penal Code of 6 June 1997 originally retained the model adopted in the former codifications of classifying terrorist acts based on the generic types of offences contained in the code’s specific part. It made allowances for the obligations under international law as to the criminalization of certain new offences, such as: taking control of an aircraft or vessel (Article 166 of the PC), placing hazardous devices or substances on a vessel or aircraft (Article 167 § 1 of the PC), destroying or preventing the operation of a navigation device (Article 167 § 2 of the Penal Code), or taking a hostage (Article 252 of the Penal Code). Among the statutory constituent elements of such acts, there were no requirements as to the aim, motives or reasons directing the perpetrator that would unambiguously ascertain their terrorist nature. These provisions permitted the punishment of not only typical instances of political terrorism in air or at sea, but also conduct intended for profit or publicity. Similarly, for the criteria of the offence of hostage taking under Article 252 of the PC to be met, the perpetrator’s motives were of secondary importance. Terrorism could also be countered under the provisions imposing criminal liability for taking part in an organized group or association resolved to commit offences (Article 258 of the PC), and also the institutions of the general part of the Penal Code, introduced to combat organized crime: an extraordinary aggravation of penalty (Article 65 of the PC) and the so-called key witness in causa sua (Article 60 § 3-5 of the PC) whose aim is to undermine the solidarity inside criminal structures.

The word “terrorism” and its derivatives were absent from the original edition of the Penal Code, yet were already common in the legal language, and were gradually making their way into bills and laws. The terminology used in other legal provinces, for example, in administrative law, banking law, or regulations governing the rules of procedure of legal protection agencies, incorporated the concepts of terrorism, terrorist act, terror-

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19 Act of 6 June 1997 the Penal Code (JL No. 88, item 553 as amended).
22 Article 106(1) of the Act of 29 August 1997 the Banking Law (JL of 2002, No. 72, item 665 as amended).
ist attack,\textsuperscript{23} terrorist attempt,\textsuperscript{24} terrorist offence,\textsuperscript{25} international terrorism.\textsuperscript{26} Predominantly, the legislator used these expressions without explaining their content. An exception was the Act of 16 November 2000 on counteracting introduction into financial circulation of property values originating from illegal or undisclosed sources and on counteracting the financing of terrorism,\textsuperscript{27} where the provision of Article 2(7) contains the definition of “terrorist act.” This concept was understood as crimes against peace and humanity, as well as war crimes, crimes against public safety and others referred to in Article 134 and 136 of the PC, i.e. an attempt on the life of the President of Poland and aggravated assault or public insult of a foreign head of state or another person enjoying international protection. It was a narrow definition\textsuperscript{28} and at the same time failed to factor in the elements that would require the occurrence of a particular aim or motivation of the perpetrators, or their belonging to terrorist structures, which would link the mentioned offences to terrorist activity.

The notion of terrorism has but occasionally appeared in judicial decisions. In its decision of 26 June 2003, the Supreme Court objected to regard as “act of terrorism” the detonation of an explosive charge by an undetermined perpetrator, whose goal was not “to enforce certain behaviour on state authorities and the society, but to cause damage to the property of the insured entity.”\textsuperscript{29} In the absence of a legal definition, the SC re-


\textsuperscript{24} Article 122a of the Act of 3 July 2002 the Aviation Law (JL No. 130, item 1112 as amended) introduced by the Act of 2 July 2004 amending the Act on the protection of State border and other selected acts (JL No. 172, item 1805).

\textsuperscript{25} Article 5(1)(2)(a) of the Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency (JL No. 74, item 676 as amended).

\textsuperscript{26} Article 6(1)(5), Article 41(1)(3) of the Act of 24 May 2002 on the Internal Security Agency and Foreign Intelligence Agency (JL No. 74, item 676 as amended).

\textsuperscript{27} Act of 16 November 2000 on counteracting introduction into financial circulation of property values originating from illegal or undisclosed sources and on counteracting the financing of terrorism (JL of 2003, No. 153, item. 1505, as amended).


ferred directly to the dictionary definition of terrorism, namely differently ideologically motivated, planned and organized action of individuals or groups, resulting in the violation of existing laws, and taken to enforce certain behaviour on state authorities and the society. When alluding to “typical terrorist aims,” the court’s decision mentions causing chaos, intimidating the population, disruption of public life, disruption of public transportation as well as manufacture and services. In the SC’s opinion, the lack of such intent in, for example, anonymous callers informing about planting explosives in public buildings, or in detonating explosive charges in revenge, ruled them out as terrorist acts.\(^{30}\)

2. Implementation of Obligations Ensuing from European Union Law in Polish Penal Law

The regulations pertaining directly to the problem of combating terrorism were first introduced into Polish penal law by Act of 16 April 2004 amending the Penal Code.\(^{31}\) Among the new provisions, the definition of an offence of a terrorist nature, included in the part called “Explanation of legal expressions” (Article 115 § 20 of the PC) is of practical significance. It functions as an authentic interpretation of the key concept used in the following provisions and, in this sense, is a reference point for all the solutions adopted in this amendment. The amendments made built on the existing normative constructions in the general and specific part of the Penal Code. Modifications were made with respect to the standards relating to: the extraordinary aggravation of penalty (Article 65 of the PC), liability for offences committed abroad (Article 110 § 1 of the Penal Code) and liability for membership in an organized criminal group or association (Article 258 of the PC). The amendment did not affect too many regulations from outside the code. Changes made in the Act of 28 October 2002 on Liability of Collective Entities\(^{32}\) involved an addition of the category of terrorist of-


\(^{31}\) Act of 16 April 2004 amending the Penal Code and other selected acts (JL No. 93, item 889).

\(^{32}\) Act of 28 October 2002 on Liability of Collective Entities (JL No. 197, item 1661 as amended).
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fence to the list of offences, whose commission affects the liability of a collective entity (Article 16(1)(12)).

The drafters’ intention was to adjust Polish law to the standards imposed by various legal instruments of the European Union, adopted in the years 2001-2002 in the framework of the so-called new acquis,33 and in particular set out in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. These obligations were scheduled to be met before 1 May 2004, i.e. before Poland’s accession to the European Union, which explains the rapid pace of legislative work.

The fact that the agreed upon solutions ensue from the implementation into domestic law of the Council Framework Decision of 13 June 2002 on combating terrorism is more than instrumental in the interpretation of individual provisions incorporated in the Penal Code. Each framework decision binds member states with regard to the result to be achieved but leaves to the national authorities the choice of form and methods. The provision of Article 34(2)(b) of the MTEU clearly reads that a legal act does not have a direct effect. However, it has not been explicitly determined whether a framework decision as an instrument of intergovernmental cooperation (the third pillar) has, by analogy with the Community law (the first pillar), primacy over the domestic law of the EU member states. This interpretation was advocated by the European Court of Justice in its ruling of 16 June 2005 in Pupino (C-105/03).34 According to the ECJ, the binding character of framework decisions places on national authorities, in particular domestic courts, an obligation to interpret national law in conformity with Community law (paragraph 34). In applying the provisions of national law, courts “as far as possible” should interpret them “in the light of the wording and purpose of the framework decision” (paragraph 43). The ECJ’s decision in Pupino unequivocally affirmed the obligation of “pro-Community”35 interpretation of the national penal regulations. This should be borne in mind when analysing the solutions integrated into the amendment of 16 April 2004 to the Penal Code and the Act of 28 October 2002 on Liability of Collective Entities.

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34 Case C-105/03, Criminal proceedings against Maria Pupino, Judgement of the Court (Grand Chamber), 16 June 2005, full text available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uni=CELEX:62003J0105:EN:HTML.

3. Statutory Criteria of an Offence of a Terrorist Nature

In the new regulation, of practical significance is the statutory definition of an offence of a terrorist nature under Article 115 § 20 of the PC. According to this provision, an offence of a terrorist nature is a prohibited act subject to a penalty of deprivation of freedom whose maximum limit is at least 5 years, committed so as to:

1) seriously intimidate many people,
2) force a public authority of the Republic of Poland or of any other state or an international organization to take or refrain from certain acts,
3) cause serious disturbances in the system or economy of the Republic of Poland, of another state or an international organization, and also a threat to commit such an act.

This definition has two components. First, based on a formal criterion, Article 115 § 20 of the PC refers to the types of prohibited acts contained in the Penal Code and other penal laws. Further, a selection was made rested on the requirement that these acts were prohibited and subject to a penalty of deprivation of freedom whose maximum limit is at least 5 years.

The second component of the definition introduces a substantive criterion and further reduces the range of offences that may be of a terrorist nature to the conduct and aims indicated in Article 115 § 20 of the PC. Both these components must occur simultaneously. For this reason, the definition of an offence of a terrorist nature can be grasped only by linking the prohibited act with a specific objective of the perpetrator.

3.1. List of Prohibited Acts that Meet the Criteria for Offences of a Terrorist Nature

When making a selection of offences to be regarded as terrorist, the legislator requires in the first place that these should be punishable acts subject to a custodial penalty with a maximum limit of at least 5 years. It seems that this indication of the sanction is not merely a factor in the selection of types of offences, which can then be collated with the features of terrorist-like conduct, but it also stresses the gravity of such acts and the high degree of their social harm.

The list of offences designated in the above clause is fairly general and broad. The legislator did not apply the method of taxative enumeration of the generic types, nor did he refer to the titles of chapters within the Penal
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Code. Moreover, the requirement is missing, though often surfacing in the literature, for such acts to be connected with the use or threat of the use of violence. In the existing regulations, there is a considerable group of offences named in the specific part of the Penal Code (in 221 provisions) that fit the statutory punishability condition (in 212 provisions after deducting offences of an unintentional character). In addition, the indicated criterion corresponds to various provisions from outside the code.

Some of the punishable acts defined in the Penal Code that meet the statutory punishability criteria embrace conduct which is the most common and typical manifestation of terrorist activity. For example, Poland has implemented provisions resulting from the obligations under international law and criminalizing the following: the seizure of an aircraft or vessel (Article 166 of the PC), hostage taking (Article 252 § 1 of the PC), or causing a disaster (Article 163 § 1 of the PC). On the other hand, the punishability requirement laid down in Article 115 § 20 of the PC is also met by such types of crimes which, even in speculative terms, can hardly be considered useful for the accomplishment of terrorist aims. This category of offences includes, e.g. abuse of one’s next of kin (Article 207 § 1 of the PC), bribery (Article 228 § 1, Art. 229 § 1 of the PC), or robbing a corpse, grave or other place of burial (Article 262 § 2 of the PC). In simple terms, a point can be made that certain types of offences, although meeting the punishability requirement, are not “suitable” for pursuing terrorist objectives.

Despite the existence of the formal restriction imposed by the limit of penalty, the collection of offences that might potentially be regarded as terrorist in nature is very broad. In this regard, the provisions contained in the Penal Code are materially different from the solutions adopted in the Article 1 of the Council Framework Decision of 13 June 2002 on combating terrorism, where the list of terrorist offences is limited to 9 points. Similarly, in most EU countries such taxative selections have been made of acts that, after fulfilling certain conditions, may be considered terrorist. Hence, unlike in Poland, they have followed a legislative technique parallel to that adopted in the framework decision. Usually, this is an enumeration corresponding to the scope of acts listed in Article 1 of the framework decision. To produce such collections, the lawmakers of the EU countries use three methods. The first method involves the listing of the types of offences by

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referring to the numbers of the provisions in which they are contained (e.g. § 278c of the Austrian Penal Code, Article 108a of the Bulgarian Penal Code, Article 421-1 of the French Penal Code, Article 83 of the Dutch Penal Code, Article 3 of the Swedish Act of 24 April 2003 on criminal liability for terrorist offences). The second method consists, as it is in the wording of Article 1 of the framework decision, in the describing of conduct without expressly identifying the corresponding provisions (Article 95 of the Czech Penal Code, Article 114 of the Danish Penal Code, Article 6, Section 34a of the Finnish Penal Code). There is also a third approach (mixed) which lists individual types of offences associated with a terrorist activity (such as hostage-taking, taking control of an aircraft), and then adds further descriptions of conduct that may carry different constituent elements of punishable acts (Article 137 § 2 and 3 of the Belgian Penal Code, Article 169 of the Croatian Penal Code).

Article 135-1 of the Penal Code of Luxembourg seems to be the most similar to the Polish solutions; it provides that – after the fulfilment of additional objective requirements – an “act of terrorism” may be any crime or misdemeanour subject to a penalty of at least 3 years’ imprisonment or a more severe penalty. Similarly, a very extensive collection of offences is contained in the provision of § 94(2) of the Slovak Penal Code, which requires that they were “intentional and particularly grave crimes,” causing danger to life, health, personal freedom or property. The legislator explained that they include a group of several dozens of crimes named in § 62 and other offences subject to a custodial penalty whose maximum limit is at least 8 years (§ 41(1)).

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38 Article I D of the Act of 24 June 2004 to amend and supplement the Penal Code and some other laws in connection with terrorist crimes, Bulletin of Acts and Decrees of the Kingdom of the Netherlands 2004, no. 290.


Against the background of a wide range of normatively designated offences that meet the criteria of Article 115 § 20 of the PC, there are issues to be tackled that require a reference to the *ratio legis* of the construction adopted in the Penal Code. The main doubt focuses on the legitimacy of a rather arbitrary choice of 5 years of deprivation of freedom as the maximum limit of penalty as a dividing line between offences of a terrorist nature and others. A. Rybak-Starčzak even challenged the need to produce a list of offences based on the penalty criteria and pointed out that “the essence of terrorism is not about how severely an act should be punished, but what the actual objective of the perpetrators is. And only that objective should establish the boundaries of the concept of terrorist offence.”  

Similarly, R. Zgorzały holds a view opposing the idea of a penalty limit of 5 years of imprisonment. The *de lege ferenda* acceptance of such an approach would lead to the total abandonment of the formal criterion ensuing from Article 115 § 20 of the PC.

However, considering the current legal state of affairs, two major concerns come into view. On the one hand, there is the risk that despite the very extensive catalogue of offences, it will fail to include acts that may reveal the manifestations of a terrorist activity. On the other hand, there are doubts raised as to whether, in the light of the requirements resulting from respecting human rights and criminal policies, the scope of instances of criminalized conduct will turn out insufficient. It is then advisable to have a closer look at these questions.

Among the objections raised to the adopted solutions, the most serious one alludes to the loopholes in the provisions criminalizing different forms of terrorist activity in the Penal Code. As examples of non-compliance with international obligations that bind Poland, critiques point to the provision of Article 166 § 1 of the PC, which outlaws the seizure of an aircraft or vessel and omits to mention other means of public or goods transport listed in Article 1(1)(e) of the framework decision, and the provision of Article 171 § 1 of the PC making punishable the manufacture and trade in biological and chemical weapons, but excluding from its scope the research into, and development of such substances, as provided in Article

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1(1)(f) of the framework decision. These concerns are well founded and should be handled through specific amendments to the Penal Code.

There is another controversial issue of whether the legislator, in determining the maximum penalty limit of at least 5 years’ deprivation of freedom under Article 115 § 20 of the PC as a criterion for the recognition of an act as an offence of a terrorist nature, should extend this scope over all offences punishable in the PC, which may constitute manifestations of a terrorist activity. Rybak-Starczak underlined that exerting an impact on the public activity of a body of government administration (Article 224 § 1 of the PC) fails to be included in this category. Similar observations can be made for other types of offences in the Penal Code. Particularly unjustified is the exclusion from the category of an offence of a terrorist nature an aggravated assault committed on Polish territory on a person who belongs to the personnel of a diplomatic representation of a foreign state or on a consular officer of a foreign state (Article 136 § 2 of the PC).

Besides the size of the sanction that separates terrorist offences from others, as provided for in Article 115 § 20 of the PC, there are also other reservations made supporting the opposing views that contest the legislator’s decision to propose such a broad range of offences of a terrorist nature. As mentioned elsewhere, the concept adopted in the Penal Code eventuates in the collection of punishable acts that can be regarded as terrorist being much more numerous than that contained in Article 1(1) of the framework decision and in criminal laws of most EU countries. In the search for the rationale warranting the narrowing of the scope of such acts, two factors must be taken into account. First, the substantive component of offences considered terrorist should not be overlooked. For their common indicator is an appropriately high degree of social harm. For this reason, the literature on the subject is consistent in emphasizing that terrorist offences should only be such offences that are potentially able to induce a state of terror, or other serious consequences. Second, the limits for too broad a scope of criminalization should be sought in the obligation of balancing the effective suppression of terrorism against the protection of other important values, in particular those involving the use of human rights. Thus, the protective function of penal law, even when the combat-

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45 Cf. Rybak-Starczak, A. Środek.
ing of the most serious forms of crime comes into play, cannot undermine its guarantee function.

Both of these requirements were taken into consideration when elaborating the concept of a terrorist offence adopted in the framework decision of 13 June 2002. The element used to make the assessment of the perpetrator’s conduct when classifying an act as a terrorist offence more objective can be inferred from the wording of Article 1(1) of the framework decision; next to the list of offences, it includes a requirement that each of them “given their nature or context,” should “seriously damage a country or an international organization.” A similar substantive criterion has been included in the provisions of Article 137 § 1 of the Belgian Penal Code, Article 114 of the Danish Penal Code and Article 135-1 of the Penal Code of Luxembourg.

Meanwhile, none of the standards introduced with the amendment of 16 April 2004 allows for explicit limitations that prevent excessive interference of anti-terrorism legislation in the sphere of fundamental rights and freedoms. Considering the above said, it seems reasonable to remind that the detailed list of terrorist offences, and even specific language expressions used to identify their constituent elements and included in the draft framework decision of 13 June 2002, sparked a heated dispute between the European Union (the Commission and the Parliament) and NGOs. The proposals of the European Commission – fairly limited compared with the content of Article 115 § 20 of the PC – were countered as violating the fundamental human rights.\footnote{Cf. Wiak, K., „Przestępstwa o charakterze terrorystycznym i ich konsekwencje w świetle przepisów kodeksu karnego,” in: \textit{Zmiany w polskim prawie karnym po wejściu w życie kodeksu karnego z 1997 roku}, Bojarski, T., Nazar, K., Nowosad, A., Szwarczyk, M., eds., Lublin 2006, pp. 314-315.}

The parties compromised on the issue by drawing up a declaration aiming to prevent the broadening of the content and interpretation of the provisions of the framework decision. As a result, recital 10 was added to the preamble providing that no provision in the framework decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression.

These factors were recognized by the Polish representatives of the study of penal law and are also reflected in the jurisprudence. The interpretation of Article 115 § 20 of the PC should therefore make concessions for international standards that safeguard human rights and freedoms and for the provisions of the framework decision of 13 June 2002. Insofar as the
former proposal seems obvious and unquestionable, the latter is likely to raise doubts as it is linked to the establishing of the content of the notion of a terrorist offence in the framework of Article 1(1) of the framework decision and its requirement that punishable acts “given their nature or context,” should “seriously damage a country or an international organization.” Although such a substantive criterion has not been introduced by the Polish legislator, it must be inferred from the obligations placed on the EU states to interpret domestic laws in accordance with Community law. As previously pointed out, the decision of the ECJ in Pupino explicitly reaffirmed the obligation of such “pro-Community” interpretation of the provisions of national criminal law, which means that public authorities should interpret them “in the light of the wording and purpose of the framework decision.” Because of the effect of reducing the excessive scope of the concept of a terrorist offence against the backdrop of the solution adopted in the Penal Code, such interpretation is not objectionable in the light of the principle of nullum crimen, nulla poena sine lege anteriori. Yet, a better solution would be to introduce an unambiguous substantive criterion, as stated in Article 1 of the framework decision, into the provision under Article 115 § 20 of the PC, which should be proposed de lege ferenda. This would constitute a sufficient guarantee against the use of Article 115 § 20 of the PC for punishing the perpetrators of offences that indeed meet the required statutory criteria, but whose relatively low degree of social harm argues against linking them to terrorism.

As regards the content of an offence of a terrorist nature, it is noteworthy that besides punishable acts mentioned in the opening part of Article 115 § 20 of the PC, the legislator also refers to “a threat to commit such an act.” The notion of threat in Polish penal law is rather indisputable.48 However, due to its placement in the structure of the standard, it is not that obvious how it should be understood. It was simply appended to the end of the provision. Therefore, it permits different interpretations. It can be assumed that the expression is clarified by the final of the three aims pursued by the perpetrator, while the accomplishment of the aims set out in points 1 and 2 is somehow naturally connected with the use of a threat. Consequently, in each case of “intimidating” (point 1) or “forcing” (point 2), the legislator assumes the use of a threat, while the aim of “causing

48 K. Daszkiewicz-Paluszyńska defined a threat as a sign of the future infringement of certain interest. The perpetrator notifies the threatened person that he or she will be exposed to some type of harm; Daszkiewicz-Paluszyńska, K. Groźba w polskim prawie karnym, Warszawa 1958, p. 9.
serious disturbance” (point 3) can be also achieved by other means. The wording of this provision seems to corroborate this interpretation because the phrase, “and also a threat to commit such an act” was attached along with a dash to the set of constituent elements of the offence described in point 3, which suggests that it is its inseparable part.\(^4^9\) However, there is an even more convincing view that the final part of the provision defines a separate act constituting an offence of a terrorist nature, and not the aim shaping such a character of the act,\(^5^0\) which is consistent with the solution adopted in Article 1 of the framework decision. To eliminate the interpretation uncertainty, some modifications should be considered to Article 115 § 20 of the PC that would disconnect the final expression from the preceding elements framed in point 3 and move it to the line below. An alternative and better solution seems to be making the threat a separate category of a punishable act, before enumerating the aims that the offender intends to pursue in committing one of the other offences that meet the punishability criteria.

The acknowledgement of a threat as a separate offence, in addition to others mentioned in the initial wording of the provision, allows for the omission of the requirement that the perpetrator’s conduct corresponded to the type of offence punishable by a penalty of deprivation of freedom whose maximum limit is at least 5 years.\(^5^1\) The legislator has expressly referred this condition only to the punishable act constituting the content of the threat. Therefore, nothing prevents any conduct that meets the criteria of a punishable threat under Article 190 § 1 of the PC from being treated as an offence of a terrorist nature, although this type of offence is only subject to a fine, restriction of freedom or deprivation of freedom for 2 years. Still, in the absence of the option of adopting other classification, the legal assessment of such an act as a punishable threat gives rise to serious concerns. As rightly pointed out by J. Majewski, a threat under Article 190 § 1 of the PC is merely an announcement of the commission of an offence to the detriment of the threatened individual or his or her next of kin, 


and not just of any crime.\textsuperscript{52} This provision will therefore be of minor importance for the suppression of terrorist offences, since it rules out the announcements of doing specific harm to persons or institutions, if their targets are not the persons directly threatened or their next of kin. Grossly inadequate to the seriousness of the offence is also the manner of persecution, i.e. at the request of the wronged person (Article 190 § 2 of the PC). Hence, a thesis can be advanced that such a limitation of criminal liability of the person making a punishable threat under Article 115 § 20 of the PC follows from incomplete implementation of the obligations arising from the framework decision. It is therefore necessary to propose a separate criminalization of factual circumstances of “threatening to commit an offence of a terrorist nature.”

Besides the discussed issue of admissibility of classification of threat as an offence of a terrorist nature, the assessment of cases of creating the appearances of a threat should be highlighted, such as fake telephone bomb threats, or sending letters containing a harmless substance, suggesting exposure to anthrax. Because the aim of the perpetrators is to intimidate other people, such acts tend to be perceived as “a kind of” (alleged) terrorism.\textsuperscript{53} Such conduct being regarded as a minor offence under Article 66 of the Code of Minor Offences\textsuperscript{54} has recently faced widespread and well-deserved criticism. The doctrine has considered a number of provisions as potentially imposing criminal liability on the perpetrators of such acts, for example, the provisions on a punishable threat (Article 190 § 1 of the PC), forcing (191 § 1 of the PC), in certain situations – also exerting an impact on the public activities of a body of government administration (Article 224 of the PC) or causing danger to life and health (Article 165 § 1(5) of the PC).\textsuperscript{55} Yet, a number of proposals made in recent years have failed to introduce a new provision to the Penal Code, which was intended to directly criminalize conduct involving a false notification by another person of an existing danger.


\textsuperscript{54} Act of 20 May 1971 the Code of Minor Offences (JL of 2007, No. 109, item 756 as amended).

3.2. Aspects of the Offence of a Terrorist Nature Regarding the Perpetrator

For the establishment of an offence of a terrorist nature, the legislator requires that the offender should reveal the intention, coupled with additional mental experiences, of achieving one of the three aims listed in Article 115 § 20 of the Penal Code:

1) seriously intimidate many people,
2) force a public authority of the Republic of Poland or of any other state or an international organization to take or refrain from certain acts,
3) cause serious disturbances in the system or economy of the Republic of Poland, of another state or an international organization.

Consequently, to meet the criteria of an offence of a terrorist nature, the accomplishment of one of these aims is not mandatory, since it is not included among the aspects of the offence as to the deed. It is only defined by the content of the perpetrator’s intention.

Accepting the goal of the perpetrator’s action as determining the terrorist nature of an offence means that, as is the case of political crimes, “the offender’s point of view is taken into account, along with the way he sees the purpose of his action.”\(^{56}\) As a consequence, a terrorist crime falls within the category of “targeted offences” and so it can be committed only with a direct intent (\textit{cum dolo directo colorato}).\(^{57}\) K. Daszkiewicz described targeted offences as follows: “The goal of such crimes is said to stigmatize them; it is that element of the offence that stands out among the rest and decides on the nature of the offence. ... The substance of such an intentional offence has generally two components: the offender’s goal and a description of means by which the offender pursues that goal. By deciding to regard the offender’s action as a means to an end, the legislator emphasizes what goal is used for a targeted offence.”\(^{58}\) These features can also be traced in the offence of a terrorist nature.

The features of the goals given in Article 115 § 20 of the PC were included as alternatives in three points. Therefore, for the establishment of an offence of a terrorist nature, it is necessary to demonstrate that the offender has committed a prohibited act, which meets the statutory punishability criteria, with a view to accomplishing one of the listed goals. Such


\(^{58}\) Daszkiewicz-Paluszyńska, K. Groźba, pp. 72-73.
a targeted attitude is also required in the case of threatening to commit a prohibited act.\textsuperscript{59}

The terms and expressions used when describing the goals quite accurately reflect the content of Article 1(1) of the framework decision, and minute changes result from the need to adapt the translated wording to the concepts of Polish criminal law. T. Przesławski recognized the sequence of goals shown in Article 115 § 20 of the PC as non-accidental and arranged “according to the strength of their external effect: from psychological intimidation of people, through influencing the state authorities and organizations to take or refrain from action, to causing havoc with the state and economic system. There is also an apparent graduation of the object of the act: many people, state bodies (organizations), and a country’s political and economic system.”\textsuperscript{60} However, it seems that this \textit{in abstracto} thesis might be an oversimplification, given a multitude of diverse factual circumstances meeting the conditions laid down in Article 115 § 20 of the PC. It is hardly agreeable that causing an epidemiological threat by polluting water (Article 165 § 1(1) of the PC) in order to seriously intimidate many people (point 1) in the hierarchy of aims is ranked lower than using violence with the effect defined under Article 224 § 3 of the PC in order to compel a local self-government authority to issue a specific decision (point 2).

All the features of the offender’s goal referred to in point 1 as “seriously intimidate many people” are highly evaluative. The meaning of individual terms should first be determined by linguistic analysis. In the Polish language, “intimidation” means terrorizing someone by intimidation, threat, placing someone in a state of chronic fear, frightening someone, causing anxiety, dispiriting, etc., and weakening one’s will.\textsuperscript{61} Hence, to establish whether some action has been taken in order to intimidate, it must be proved that the offender “through the exciting of fear, was going to inhibit the victim’s freedom.”\textsuperscript{62} As a matter of fact, how and by what means he or she intended to seek to elicit such a state is of little importance for the establishment of criminal liability. The legislator does not even require that the act under Article 115 § 20 of the PC was connected with the use of violence. In order to avoid an overly broad interpretation of intimidation, there is a preventive requirement that it needs to be of a sufficiently high


\textsuperscript{60} Przesławski, T. „Cel w konstrukcji przestępstwa terrorystycznego,” \textit{ProkPr} 5 (2009), p. 18.


\textsuperscript{62} Daszkiewicz-Paluszyńska, K. \textit{Groźba}, p. 74.
degree ("serious") and is directed at "many people." In Polish, "serious" means essential, important, substantial, significant, considerable. When recognizing any intimidation as "serious," the analysis should be based on all circumstances relating to the act, whose commission was to lead to producing such an effect. In addition to the size of the act, meaning its personal and spatial extent as well as implications, the analysis cannot overlook the assessment of efforts that the offender had made to amplify the effect and attract publicity.

Another expression, "many people" contained in Article 115 § 20(1) of the PC, was used to identify the range of ultimate "recipients" of the perpetrator’s act. In the Polish literature on the subject, there is no agreement as to the meaning of "many people," and the views presented reveal two different standpoints. The supporters of the first approach insist on identifying the minimum number of "many people." Some suggest that this is no fewer than 10 people. Others maintain that "many" is 5 or more. However, the proponents of the other approach claim that this cannot be expressed in figures but each case should be seen as unique and in determining its very content all its relevant circumstances must be taken into account. This solution fully reflects the legislator’s intention of leaving more room for discretion in critical situations in assessing the perpetrator’s intention and its actual implementation. It also keeps in view the specificity of the offences of a terrorist nature. As a rule, the perpetrator of such an offence hopes for the greatest possible publicity that should expedite the achievement of the desired objectives. His conduct is directed against both the victims of the committed wrong, as well as those individuals having an impact on the audience of the whole event.

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The terrorist quality of an offence is also manifested in striving to force a public authority of the Republic of Poland or of any other state or an international organization to do or refrain from doing certain acts. The description of the aim in Article 115 § 20(2) of the PC raises no interpretation issues. The notion of “forcing,” which is a constituent element of the offence under Article 191 § 1 of the PC is rather uniform as regards its interpretation by the doctrine and means to violate another person’s will or to submit a person to the offender’s orders. This term has the same meaning in Article 115 § 20 of the PC. The means of forcing in a terrorist offence cover any prohibited act that meets the criteria named in Article 115 § 20 of the PC.

To identify the authority mentioned in Article 115 § 20(2) of the PC in the description of the goal pursued by the perpetrator requires a reference to the concepts in constitutional law and public international law. The term “public authority” includes bodies belonging to both the legislative, executive and judicial powers (Article 10 of the Constitution of the Republic of Poland), as well as local government authorities, performing all public tasks not reserved to other units of local government (Article 163 of the Constitution of the Republic of Poland). The term “public authority of any other state” denotes those authorities who, based on domestic regulations in force in that state, primarily of constitutional status, are regarded as exercising public authority.

The term “international organization” refers to an association of states or other legal persons (mostly national unions and associations), or natural persons from different countries, established to carry out the tasks defined in its statute. Under international law, international organizations are divided into “governmental,” which associate states, and “non-governmental,” whose members are legal or natural persons from different countries. Speaking of the first category, the “authority” of an international organization does not call for elucidation, since its structure is determined in an international agreement that has established it. Examples are the United Nations organs, such as the General Assembly, the Security Council, the International Court of Justice and others defined in the UN Charter. Today, NGOs such as Amnesty International, Greenpeace or Doctors without Borders have a very strong impact on international relations and state politics. At the same time, they stress their independence from governments and

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68 Peiper, L. Komentarz do kodeksu karnego, Kraków 1936, p. 510.
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supranational structures. The functioning of an NGO is governed by private law, and its representative bodies are listed in the statute.

The doctrine of public international law abounds in opinions that equate the concept of an international organization only with governmental organizations.\textsuperscript{70} This position is based on the assumption that the legal status and competence of NGOs differ materially from those bestowed on public authorities of states and on governmental bodies. Having accepted such views would result in penal law excluding the NGO bodies from protection under Article 115 § 20(2) of the PC. However, the acceptance of the above argument would not deprive NGOs of indirect protection against crimes of a terrorist nature, since any “force” used against their bodies would mean “serious intimidation of many people” (Article 115 § 20(1) of the PC). Despite doubts voiced in the science of public international law, a broad understanding of an international organization, including non-governmental organizations, should be opted for, as in the wording of Article 115 § 20(2) of the PC\textsuperscript{71} that finds further justification in the grammatical and purpose-based interpretation of the provision.

To determine the terrorist nature of a crime, it is necessary that the pressure intended by the perpetrator led to a public authority or any of the mentioned bodies to do or omit to do an act. Such a pressure (“force”) may involve the release of prisoners, payment of ransom, or refraining from a humanitarian intervention in the area affected by an armed conflict.

The selection of individual expressions describing the last of the goals mentioned in Article 115 § 20(3) of the PC provides that the perpetrator of an offence of a terrorist nature can be held criminally liable if intends to cause serious disturbance in:

– the system of the Republic of Poland,
– the economy of the Republic of Poland,
– the system of another state,
– the economy of another state,
– the system of an international organization,
– the economy of an international organization.

In Polish, “disturbance” means a violation of the established order, a course of action, disorganization.\textsuperscript{72} The meaning of this term can be re-

\textsuperscript{70} Cf. Bierzanek, R., Symonides, J. Prawo międzynarodowe, p. 277.
duced to preventing or obstructing any proper functioning. The disturbance is related to the functioning of two key domains: the system or the economy, which means that the goal of the perpetrator is a breach of the established order, i.e. the fundamental principles defining the entire political, social and economic relations in a state or international organization. The perpetrator’s intention is to cause “serious” disturbance. It need not damage the very foundations of a political and social system or economy, or to be particularly profound or extensive; it is enough that it affects the system’s smooth and efficient functioning.

The condition that the offender committed a prohibited act for the accomplishment of one of the three goals mentioned above ultimately depletes the catalogue of offences that can be considered terrorist. First and foremost, the requirement for the perpetrator to be driven by his targeted mind-set is not present in unintentional offences for obvious reasons. Thus, all unintentional types of offences (Article 126b § 2, Article 155, Article 163 § 2 and 4, Article 165 § 4, Article 173 § 2 and 4, Article 177 § 2, Article 292 § 2 of the PC) should be ruled out in the first place from the collection of offences subject to the minimum of 5 years’ imprisonment and falling within the criteria set out in Article 115 § 20 of the PC. It should be noted that this does not significantly limit the scope of offences under Article 115 § 20 of the PC if their number in the specific part of the Penal Code still exceeds 200.

In other cases, the inclusion in the description of the aspects of the offence as to the doer of the statutory criteria of the offence requiring the occurrence of a motive, reason or goal may eliminate the recognition of an act as terrorist offence. It is difficult to assume that the simultaneous occurrence of various psychological factors driving the offender to commit a prohibited act, such as compassion for the victim characteristic of euthanasia (Article 150 of the PC), and one of the goals listed in Article 115 § 20 of the PC. However, it does not at all rule out the commission of an offence of a terrorist nature in pursuing more than one of the goals. The perpetrator’s intentions, although laid out in three separate points in Article 115 § 20 of the PC, may co-occur simultaneously or in other configurations. For example, it is possible that the perpetrator who takes a hostage at the same time endeavours to achieve one of the terrorist goals and gain material benefits; or by detonating an explosive in a restaurant, the perpetrator intended to take revenge on some specific community and sought to seri-

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74 Cf. Górnio, O. Przestępstwo, p. 10.
ously intimidate many people. Still, it is debatable whether in determining the terrorist nature of an offence the goal in Article 115 § 20 of the PC should be considered principal, or whether it may only be regarded as secondary. The latter of these approaches has been advocated by O. Górniok. J. Giezek is of a different opinion and says that the aims listed in Article 115 § 20 of the PC must always come to the fore, and the intent of their implementation should be the main cause of the offender’s action. When pondering upon this problem, one has to note that the statutory provision does not provide any basis for distinguishing between primary and secondary goals, and such a gradation might complicate this already intricate interpretation. It is then sufficient to establish the perpetrator’s intention as meeting the statutory criteria of the aspects of the offence as to the doer, regardless of whether his or her action may still be focused on achieving yet other objectives.

Another important issue is the question of how to assess the offence committed in order to achieve one of the terrorist goals where the pursued action did not give much chance of success, or it was just absolutely unworkable. O. Górniok argues that the conditions laid down in Article 115 § 20 of the PC can only be met by such conduct that, in addition to the expressly formulated formal and substantive criteria, “can lead to one of the goals named in that provision in a way that is average and typical under some circumstances.” It seems that in the absence of straightforward normative grounds for such a thesis, it has been founded on the intuitive belief that terrorism cannot be associated with acts that display a relatively low level of social harm. This conclusion is corroborated in the author’s final observation that “in such circumstances it is sensible to refrain from labelling an act as terrorism.” J. Majewski articulates a divergent view in assuming that it is of little or no importance for the legal classification of an act whether the perpetrator actually accomplished the goal, and whether this goal was in concreto attainable.

Considering linguistic interpretation, the classification of an offence as terrorist is not contingent upon whether the measures adopted by the perpetrator could actually enable the successful achievement of the de-

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75 See ibidem, p. 6.
77 Cf. Górniok, O. Przestępstwo, p. 5.
78 Ibidem, p. 6.
sired goals. However, it is reasonable to propose a criterion that would exclude those acts from the norm of Article 115 § 20 of the PC that do not present a sufficiently high threat to the protected legal interest. Such a function may be provided by the previously proposed condition imposing the requirement that the offender’s acts “given their nature or context, may seriously damage a country or an international organisation.” This would allow, which is by all means right, the exclusion of such acts from the scope of offences of a terrorist nature that, due to their manner of implementation, in given circumstances are not able to further the accomplishment of one of the goals set out in Article 115 § 20 of the PC. Bearing in mind the current legal status, such a conclusion can be drawn from the “pro-Community” interpretation of penal law made in the light of the content and objectives of the Council Framework Decision of 13 June 2002 on combating terrorism. De lege ferenda, this issue should be addressed and determined by supplementing the definition of an offence of a terrorist nature with the substantive criterion, involving the objective feasibility of implementing the perpetrator’s intentions in practice.

The fact that deserves particular attention is that no references are made to motivation driving the person to commit an offence. The relevant position adopted by the Polish legislator corresponds to that adopted in European Union law and is based on the acceptance of opinions voiced in the literature on the subject that the explanation of the phenomenon of terrorism does not necessarily need to entail the reference to motivation.80 The omission of motivation in the definition helps avoid previously identified difficulties in determining whether the offender actually wished to pursue a political agenda, or whether he or she was linked to groups using violence to attain ideological ends. Its noteworthy consequence is a significant limitation of the selection of political offences that may meet the criteria named in Article 115 § 20 of the PC. Moreover, this provision will also encompass offences committed without any clear political or ideological backdrop,81 as well as action taken because of, for instance, the desire to “show off” or impress friends, if only the requirement of pursuing the goal specified by the legislator has been satisfied. In addition, the instances of the so-called criminal terrorism can be regarded as terrorist offences. Thus, even having demonstrated what motives guided the perpetrator – profit

80 Cf. Indecki, K. Prawo karne, p. 29.
81 The perpetrators of such acts have often been able to create a climate of insecurity and fear among the population, for example the “Sniper” in the U.S.A, cf. Walter, Ch. Defining Terrorism, pp. 28-29.
or political reasons – under Article 115 § 20 of the PC, it does not suffice as definitive grounds for rejecting or regarding specific conduct as an offence of a terrorist nature. This does not preclude, of course, that the offender’s motivation should be taken into account when passing the sentence.

4. The Definition of an Offence of a Terrorist Nature, the Internal Coherence of Polish Penal Law and the Harmonization of Practices in the European Union Member States

Despite the many objections raised against the dogmatic structure adopted in the Penal Code with a view to meeting the obligations arising from the Council Framework Decision of 13 June 2002 on combating terrorism, the actual introduction of the definition of an offence of a terrorist nature should be rated as more than positive. It should become a reference point for all, not just penal, counter-terrorism measures and thus ensure the internal cohesion within the national legal order. Prior to the amendment of the Penal Code of 16 April 2004, the Polish legislation showed a considerable terminological confusion, due to the occurrence of many expressions of varied scope and not always unambiguous in their substantive content, such as terrorism, terrorist act, terrorist attack, terrorist attempt or crimes of terrorism. Thereafter, the legislator was fairly consistent in using the notion of an offence of a terrorist nature when amending the Act on the Police and the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation. This concept was also used to determine the criteria of the offence of terrorism financing (Article 165a of the PC) and failure to report an offence (Article 240 of the PC). The recently observed practice of terminological standardization by the legislator has furthered the internal consistency of the solutions under Polish penal law and deserves a positive assessment.

83 Article 38(2) of the Act of 18 December 1998 on the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation amended by the Act of 18 October 2006 on the disclosure of information on documents of state security agencies from the period between 1944 and 1990 and the content of such documents (JL No. 218, item 1592).
Another problem is associated with the significant discrepancies between the Polish definition of terrorist offences and that same EU concept contained in the framework decision of 13 June 2002, whose implementation was supposed to expedite the harmonization of dissimilar counter-terrorism measures in the EU member states. The European Commission stresses that Article 1 of the framework decision “is of crucial importance ... for counter-terrorism policy in general. A common definition of terrorism constitutes the basis on which all other provisions in the framework decision are built and allows for the use of law enforcement co-operation instruments.”

In a special report assessing the implementation of these obligations, the Commission reprimanded Poland for the incomplete enforcement of the provision of Article 1 of the framework decision. Objections were raised in relation to the method adopted in the Penal Code of identifying a terrorist offence, which only came down to the diagnosis of a terrorist intention. Consequently, it seems that the EU’s preferred solution is a threefold construction in which the notion of a terrorist offence should additionally comprise a clearly itemized collection of prohibited acts and the requirement that, given their nature or context, they should seriously damage a country or an international organization.

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Chapter V

Measures of Suppressing and Preventing Offences of a Terrorist Nature in Polish Penal Law

1. The Consequences of Committing an Offence of a Terrorist Nature

1.1. Extraordinary Aggravation of the Penalty

Any comparative legal study testifies to the offences regarded as terrorist being classified as the gravest and subject to very severe penalties. In countries exacting the death penalty, it is usually imposed on the perpetrators of such crimes. The Peruvian Constitution of 1993 stipulates the introduction of such a penalty for terrorism and treason in time of war (Article 130). The death penalty is administered for terrorist crimes as defined in Articles 124, 126, 289 and 359 of the Byelorussian Penal Code. It seems a well-founded argument that the threat of terrorism has recently inhibited abolitionist tendencies in many countries. In Pakistan, the provision of Article 17 of the Prevention of Electronic Crimes Ordinance of 2007 provides for the capital punishment for the offence of “cyberterrorism” which results in a person’s death. In Liberia, the Act to Amend Chapters 14 and

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Sub-Chapter(c), Title 26 of The Liberian Code of Laws Revised, adopted on 22 July 2008, introduced that same penalty for terrorism (Article 15.34). Certainly, such examples cannot become a pattern to follow for countries that respect the inalienable human right to life; still, they confirm that terrorist offences are exposed to the most severe penalties provided for in various national legislations.

In Polish penal law, the consequences of committing a terrorist offence in the first place refer to sanctions, namely the punishment and its size. The legislator laid down that such provisions on the imposition of penalty, punitive measures and measures related to probation should apply to the offender as if he or she were a multiple recidivist (Article 65 § 1 of the PC). Hence, no new measures were developed to counter terrorism, but the existing approach to the offender referred to in Article 64 § 2 of the PC was merely extended. Prior to the amendment of 16 April 2004, such stringent liability under the Penal Code related to persons who made committing crimes into a permanent source of revenue, or who commit a crime acting in an organized group or association aimed at committing crimes. While the first of these circumstances could be applied to the perpetrator of a terrorist offence in quite exceptional cases, the commission of such an offence in an organized group should be regarded as a rule, though, of course, admitting exceptions.5

The provision of Article 64 § 2 of the PC forces the court to impose an extraordinarily stringent penalty for the attributed offence, that is, a custodial sentence of a length over the statutory minimum, and it may impose it up the maximum of the mandatory term increased by a half. The increase does not apply to a crime punishable with at least 3 years of deprivation of freedom (Article 64 § 3 of the PC). The minimum penalty provided for in the Penal Code for offences named in Article 115 § 20 of the PC, namely a custodial sentence ranging from 3 months to 5 years, was modified so that the lower threshold was increased to 4 months, and the upper one to 7 years and 6 months of imprisonment. This rule applies, for example, to the perpetrator of assault against the head of a foreign state or a diplomatic representative (Article 136 § 1 of the PC) and to the person who places on an aircraft or vessel a dangerous substance or device (Article 167 of the PC).

Against the background of the Penal Code, a possible concurrence may occur on the grounds for the extraordinary tightening of sanction, e.g. when the offender commits an offence of a terrorist nature as a recidivist,

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while acting in an organized criminal group or association (Article 64 § 2 and Article 65 § 1 of the PC). In such a case, the rule laid down in Article 57 § 1 of the PC will apply, under which in case of several independent grounds for the extraordinary tightening of sanction, the court may impose only one aggravated penalty, taking account of all the overlapping grounds for the aggravation. The multiplicity of applicable grounds can therefore argue for a higher punishment when the maximum of the statutory term has been exceeded.\(^5\)

There is a conceivable overlapping of the grounds for the extraordinary aggravation of punishment due to the terrorist nature of an offence with the extraordinary mitigation of punishment, as when the perpetrator is a juvenile (Article 60 § 1 of the PC), or he or she revealed before the prosecution and presented the relevant circumstances of an offence punishable by more than 5 years of deprivation of freedom (Article 60 § 4 of the PC). In such a case, the court may apply an extraordinary mitigation or aggravation of penalty (Article 57 § 2 of the PC). The decision on which of the competing institutions will ultimately prevail should follow the guidelines on the imposition of penalty and penal measures under Article 53 of the PC.

1.2. Admissibility of Probation

Among the further consequences of committing a terrorist offence, there is the exclusion of the possibility of conditional discontinuation of penal proceedings, since the basic requirement is not met of the offence being punishable by no more than 3 years of deprivation of freedom (Article 66 § 2 of the PC). Provided for in Article 66 § 3 of the PC, the specific basis for the application of this institution against the perpetrators who have committed an offence punishable by a custodial sentence of up to 5 years of deprivation of freedom seems to be only a theoretical possibility. This is because it is difficult to assume that the perpetrator’s guilt and damage to society of the act committed under Article 115 § 20 of the PC were “minimal,” which is an essential condition for conditional discontinuation of penal proceedings (Article 66 § 1 of the PC).\(^7\)

The application to the perpetrator of a terrorist offence of the provisions on measures relating to the submission to the perpetrator to proba-  


tion, and provided for in the case of recidivism, offers a lesser possibility of conditional suspension of the execution of the penalty. The provision of Article 69 § 3 of the PC allows for the use of this institution “unless there is an exceptional case, justified by particular circumstances.” Taking into account the results of a positive criminological prognosis (Article 69 § 1-2 of the PC), such particular circumstances should constitute contraindication to imprisonment. In the event of the court’s deciding to conditionally suspend the execution of the penalty, the period of probation ranges from 3 to 5 years (Article 70 § 2 of the PC), and placing the offender under surveillance is mandatory (Article 73 § 2 of the PC). As regards the perpetrator of an offence of a terrorist nature, there are no grounds for the conditional suspension of the execution of the penalty, provided for in Article 60 § 3-5 of the PC, associated with the desire to break the solidarity of the members of organized criminal structures. In this case, the use of this probation institution (suspension) is by no means possible (Article 69 § 3 of the PC).

The release on parole of the perpetrator of a terrorist offence, who was sentenced under Article 65 of the PC, may be granted after fulfilling the basic condition of a positive criminological prognosis (Article 77 § 1 of the PC), but only after having served three quarters of the sentence and not earlier than one year after imprisonment (Article 78 § 2 of the PC). A person sentenced to a penalty of 25 years of deprivation of freedom may be released on parole after having served 15 years, and one sentenced to life imprisonment after having served 25 years (Article 78 § 3 of the PC). It should also be noted that the court by imposing a custodial sentence, in particularly justified cases, may create more stringent restrictions on

8 K. Sienkiewicz gives examples of such „particular circumstances”: the offender’s old age, health situation and particularly difficult family situation related to the need to care for a sick family member; cf. Sienkiewicz, Z. In: Kalitowski, M., Sienkiewicz, Z., Szумski, J., Tyszkieicz, L., Wąsek, A., eds. Kodeks karny, Komentarz, t. II (art. 32 – 116), Gdańsk 2001, p. 160
granting parole than those provided for in Article 78 of the PC, which allows for a significant modification of the rules in question. The reminder of the time to be served becomes the period of probation; it may not be shorter than 3 years and longer than 5 years (Article 80 § 1-2 of the PC). As for release on parole in the case of the penalty of life sentence, the period of probation is 10 years. Should it be granted, it is mandatory to keep the convicted for an offence of a terrorist nature under the supervision of a probation officer (Article 159 of the EPC).\footnote{Act of 6 June 1997 the Executive Penal Code (JL No. 90, item 557 as amended).}

A conviction for the offence of a terrorist nature carries important implications when serving a custodial sentence. In principle, such a prisoner fulfils the criteria of being treated as the so-called dangerous inmate\footnote{Cf. Hołda, Z., Postulski, K. Kodeks karny wykonawczy. Komentarz, Gdańsk 2007, p. 365, Keller, K. „Skazani ‘niebezpieczni’ a wybrane problemy praktyki penitencjarnej,” in: Przestępczość zorganizowana, świadek koronny, terroryzm, Pływaczewski, E., ed., Kraków 2005, p. 327.} and be confined to a closed penal institution, in conditions that ensure enhanced protection of society and the security of the prison itself. This may be due the recognition of the convicted as posing a serious threat to society or a serious threat to the security of the penal institution (Article 88 § 3 of the EPC), or from the fact that he or she has committed an offence in an organized group or association aimed at committing crimes (Article 88 § 4 of the EPC).

\subsection*{1.3. Institutions of Active Repentance and a Key Witness in Causa Sua}

The Council Framework Decision of 13 June 2002 on combating terrorism does not impose an obligation, yet offers an option, of bringing in regulations allowing the alleviation of penalty in individual cases of acts of terrorism. Such legal institutions have been adopted in, for example, the United States, Germany, Italy, Spain, France, Turkey and Russia.\footnote{Cf. Indecki, K. Prawo karne, pp. 171-179, 195-197, 206, 210, Pańskiewicz, J. Instytucja świadka koronnego w ustawodawstwie amerykańskim, włoskim i niemieckim, Toruń 2006, pp. 11-54, Schmahl, S. Specific Methods, p. 99.} Poland has not yet introduced any rules governing the alleviation of penalty or exclusion of liability of the perpetrator of a terrorist offence. However, in such cases, the Penal Code offers provisions that favour those withdrawing from the accomplishment of a terrorist act, renouncing the membership in criminal groups or entering cooperation with law enforcement authorities.
The first measure inducing the offender to abandon the commission of the offence is the institution of the so-called active repentance. It helps avoid criminal liability in return for withdrawal from the offence. In this case, the perpetrator’s going unpunished is justified by political and criminal reasons manifested in the need for the safeguarding of legal interests by drawing him or her away from the path of crime.\(^{14}\) Generally, the non-liability clause may apply provided for a person resigning from an attempted offence (Article 15 § 1 of the PC), preparation of an offence (Article 17 § 1 of the PC), as well as a co-offender who prevented a prohibited act (Article 23 § 1 of the PC). Withdrawal from the performance of a prohibited act that may be regarded as the offence of a terrorist offence should be “voluntary,” as in any other case of active repentance. This condition is met when the offender realizes the possibility of continuing the activity directly conducive to the offence, but has no further intent to commit it.\(^{15}\) In other words, despite the circumstances favourable to the offence, he or she discontinues their criminal conduct.\(^{16}\)

Prevention of terrorist offences can be motivated by numerous cases of active repentance addressed in the specific part of Penal Code. These are the clauses of non-liability or extraordinary mitigation of penalty for offences against the Republic of Poland (Article 131 of the PC), offences against public safety (Article 169 of the PC), causing a disaster in land, water or air traffic (Article 176 of the PC) and hostage-taking or detention (Article 252 § 4 of the PC). Their conditions differ from those set out in the general part of the Penal Code; for example, the provisions in Article 131 of the PC additionally require the disclosure to the prosecution of all the relevant circumstances of the committed offence, and the provision in Article 252 § 4 of the PC does not require the offender, who resigned from extortion and released the hostage, to do it voluntarily. The specific means of combating terrorist groups is the option of active repentance by the member of an organized criminal group or association under Article 259 of the PC. Non-liability, but only for taking part in a group or association


referred to in Article 258 of the PC, is justified by the desire to disintegrate the solidarity within such structures. It applies to the perpetrator who has withdrawn from participation in such a group and has disclosed to the prosecution all the relevant circumstances of the perpetrated offence or has prevented the commission of the intended crime.

The perpetrator of a terrorist offence may be covered by the provisions of Article 60 § 3-5 of the PC establishing the institution of “a key witness in causa sua.” The purpose of these regulations is to frustrate the conspiracy of silence and loyalty within the criminal structures and to obtain information about committed offences and their perpetrators. Pursuant to Article 60 § 3 of the PC, the court applies the extraordinary mitigation of penalty, and may conditionally suspend its execution against the co-offender if he or she reveals to the persecution any information on individuals involved in the offence, along with the relevant circumstances of its commission. Speaking of the rationale behind this institution, in its decision of 26 November 2008, the Supreme Court ruled that the reward of Article 60 § 3 of the PC is “a kind of reward for dissolving criminal solidarity, which occurs regardless of possible retaliation. The next of kin are also exposed to the risk of threat and fear of its fulfilment.” As for the offender satisfying the criteria of Article 60 § 3 of the PC, the Penal Code introduces special grounds for the court’s refraining from punishment under Article 61 § 1 of the PC. However, additional requirements are there to be met that warrant such a far-reaching mitigation. In the wording of the regulation, the legislator points, for example, to one contributory factor. It occurs when the offender’s role in the offence was secondary, and the supplied information helped prevent the commission of another crime.

At the request of the prosecutor, the court may apply the extraordinary mitigation of penalty, or even, conditionally suspend its execution, if the perpetrator, regardless of the explanation before the court, revealed before the prosecution and presented the circumstances, relevant and not known to the judicial body, of the offence punishable by more than 5 years of deprivation of freedom (Article 60 § 4 of the PC). Such a scope fails to fit in all prohibited acts that may be of a terrorist nature having fulfilled the criteria set out in Article 115 § 20 of the PC. The provision of Article 60


§ 4 of the PC does not apply in case of the disclosure of information on the assault against the President of the Republic of Poland or the head of a foreign state (Article 135 § 1, 136 § 1 of the PC), or on placement on a water or aircraft of dangerous substances or a dangerous device (Article 167 § 1 of the PC), punishable by up to 5 years of deprivation of freedom.

The rewarding of a member of an organized criminal group or association, and also the perpetrator of an offence of a terrorist nature, both in terms of allowing their active repentance, as well as turning “key witnesses in causa sua,” may understandably raise moral doubts. K. Indecki points to the existence of a “paradox” in the punishment policy. This paradox involves the fact that, on the one hand, the terrorist nature of an offence determines the tightening of a sanction; on the other, there are rules designed allowing terrorists to avoid criminal liability in certain circumstances. Justification for such solutions should be sought in the belief that preventing terrorism requires the measures that are able to motivate a person to refrain from criminal activity and cooperate with law enforcement authorities.

However, it should be stressed that the Polish legislator has not introduced any instruments aimed to mitigate criminal liability that would only be reserved for the perpetrators of terrorist offences. The individuals taking up terrorist activities in a broad sense may have recourse to both the general institutions under penal law and those that have been established as specific measures of suppressing organized criminal structures.

1.4. The Scope of Polish Penal Law

Polish penal law under the general rule adopted in Articles 5 of the PC is applied to the offender who committed a prohibited act on the territory of Poland or on a Polish water or aircraft (principle of territory). Similarly, as regards a Polish citizen committing an offence abroad that falls under Article 115 § 20 of the PC, no exceptions are granted to the principle of personality (Article 109 of the PC).

The 16 April 2004 amendment to the Penal Code introduced a significant change in the liability for an offence of a terrorist nature committed by a foreigner abroad. Seeking to extend the Polish penal jurisdiction, the legislator ordered that the perpetrator of such an offence should be covered by the principle of objective protection. It means that, in accordance with

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Article 110 § 1 of the PC, Polish penal law must be applied not only to an alien who committed a crime abroad against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or an organizational unit without legal personality, but also to an alien who committed an offence of a terrorist nature abroad.

### 1.5. Liability of Collective Entities

Polish international obligations to combat terrorism provide for the establishment of liability of collective entities for terrorist offences and for the financing of terrorism. As regards the former of the mentioned categories of crimes, such obligations follow from the provisions of Articles 7 and 8 of the Council Framework Decision of 13 June 2002 on combating terrorism and Articles 10 and 11(3) of the Warsaw Convention (I). The establishment of liability of collective entities for the financing of terrorism is intended to carry out the recommendation of Article 39(4) of the Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (referred to as the Third Directive) and of Article 5 of the New York Convention (V).

These commitments were enforced by the legislator through the amendment of the Act of 28 October 2002 on Liability of Collective Entities.\(^2^0\) Under Article 4 of the 16 April 2004 Act, the list of offences that, when committed, may entail the liability of a collective entity, were expanded by the category of an offence of a terrorist nature. The literature on the subject rightly claimed that the implementation of European Union regulations was incomplete, since the legislator had failed to include sanctions for collective entities such as placing them under judicial supervision and a judicial order of winding-up (Article 8(c) and (d) of the framework decision).\(^2^1\) The offence of terrorism financing under Article 165a of the PC was added by Article 13 of the Act of 25 June 2009 amending the Act on counteracting introduction into financial circulation of property values originating from illegal or undisclosed sources and on counteracting the financing of terrorism, and on amending other selected acts.

The range of collective entities under the Act of 28 October 2002 is very broad. According to Article 2 of the LCE, a collective entity is: a le-

\(^{20}\) Act of 28 October 2002 on Liability of Collective Entities (JL No. 197, item 1661 as amended).

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A legal person, an organizational unit without legal personality being granted legal capacity under separate regulations, with the exception of the State Treasury, local self-government units and their associations, a commercial company of the State Treasury, local self-government units or association of such units, a limited company in organization, an entity under liquidation, an entrepreneur who is not a natural person and a foreign organizational unit.

Liability of collective entities for punishable acts is not a criminal liability in a strict sense. Its distinct and autonomous character rests upon the fact that the conduct of a collective entity does not meet the statutory criteria of an offence, but such an entity is liable for the prior prohibited act under Article 3 of the LCE, i.e. the conduct of a natural person:

1) acting on behalf or in the interest of a collective entity with the power or obligation to represent it, making decisions on its behalf or exercising an internal control, or when overstepping that power, or failing to perform that obligation,

2) authorized to act as a result of the breach of the power or failure to perform the obligations by the person referred to in paragraph 1,

3) acting on behalf or in the interest of a collective entity, with the consent or knowledge of the person referred to in paragraph 1,

– if such conduct benefited or might have benefited that collective entity, even if the benefit was non-pecuniary.

A collective entity is subject to liability if the fact of committing an offence by the person referred to in Article 3 of the LCE was decided by: a legally valid guilty sentence; a sentence of conditional discontinuation of penal proceedings or fiscal proceedings on a tax offence; a verdict to grant release for the voluntary submission to liability; a verdict to discontinue the proceedings against the person due to the circumstances excluding the punishing of the offender (Article 4 of the LCE). In addition, Article 5 of the LCE requires the acknowledgement that the offence occurred as a result of at least the absence of due diligence in selecting the natural person referred to in Article 3(2) or (3) of the LCE, or at least the lack of adequate supervision over that person by the body or representative of the collective entity.

2. Criminalization of “Pre-Terrorist” Acts

2.1. Preventing the Offences of a Terrorist Nature

The implementation of a comprehensive strategy against terrorism requires not only a well-advised response to the committed offence of a terrorist nature, but also needs measures aimed to prevent its accomplishment. This may be achieved by the criminalization of specific conduct involving the furnishing of such conditions that facilitate and provoke terrorist activity, i.e. leading up to the actual terrorist offence or, in other words, being of a pre-terrorist nature. Although in Polish penal law, the listed acts may, in principle, be classified as forms of co-offending, or punishable preparation to commit a terrorist offence, still the norms of international law sometimes go further and stipulate more detailed obligations in this regard.

For instance, the Council Framework Decision of 13 June 2002 on combating terrorism requires a separate classification in the penal laws of the EU member states of “offences relating to a terrorist group” (Article 2(2)). The obligation to criminalize terrorist financing follows from, for example, the provisions of Article 2(1) of the New York Convention (V), paragraph 1(b) of UNSC resolution 1373 (2001), Article 2(2) of the Warsaw Convention (II) and Article 1(1) of the Directive 2005/60/EC the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. Another group is made up of the offences involving provocation, incitement and facilitating the commission of a terrorist offence, dealt with in Article 3(2)(a-c) of the framework decision, Articles 5-7 of the Warsaw Convention (I), and others, referred to as “linked to terrorist activities:” theft, extortion, or drawing up false documents (Article 3(2)(d-f) of the framework decision).

2.2. Participation in an Organized Criminal Group or Association of a Terrorist Nature

The literature on the subject generally emphasizes the threat arising from the activities of structured groups of a terrorist nature; even contemporary terrorism is sometimes identified with group action. W. Filipkowsk and R. Lonca note that “the perpetrators of both traditional and suicidal
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terrorist acts make the decision to attack within a group; also, the group chooses targets and plans the attack, makes the necessary preparations and carries out the attack together, often simultaneously ... A modern terrorist is a classic example of ‘a man of organisation’ as its most crucial element.’’

The recognition of terrorism as a form of group crime calls for the criminalization of the sole membership in such structures, which is intended to avert the accomplishment of their members’ intent of committing a terrorist offence. The obligation for Poland to outlaw the acts of directing a terrorist group and participating in its activities arises from the provision of Article 2(2) of the framework decision.

The 16 April 2004 amendment to the Penal Code adjusted the liability for participating in an organized criminal group or association (Article 258 of the PC) by introducing two new types of this offence:

1. participation in an organized group or association seeking to commit a terrorist offence, punishable by deprivation of freedom from 6 months to 8 years (§ 2);
2. establishment and directing a group or an association seeking to commit a terrorist offence regarded as a crime punishable by deprivation of freedom from 3 to 15 years (§ 4).

In the Polish literature and case law, the “organized group” is assumed to be composed of at least three people who show a certain degree of organization, involving leadership and assigned roles. In its decision of 5 June 2002, the Court of Appeal in Krakow expressed the view that “the hallmarks of an organized criminal group are: certain internal organizational structure (even with a low degree of organization), its permanence, the existence of organizational ties through a joint agreement, planning of crimes, acceptance of objectives, the sustainable satisfaction of the group’s needs, the collection of tools to commit crimes, finding places for the storage of loot and its distribution, the division of roles, coordinated action and the socio-psychological relationships between the group members.”

On the other hand, the “association seeking to commit an offence” is characterized by a higher degree of organization than the “organized group.”

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The “criminal association” is a group consisting of at least three people and displaying a lasting form of organization, having its leadership, and established rules of membership and discipline.27 G. Rejman points out that “the difference between a criminal group and association is discernible in that the association forms a lasting and complex, large-scale organization, and thus more dangerous from the criminal alliance, ordinary complicity and even acting in a criminal group.”28

The concept of “participation” in an organized group means accepting the rules governing that group or association, and following orders and objectives set by the persons superior in the hierarchy; it may also involve joint criminal actions, the engineering of such actions, joint meetings, devising and agreeing on the structure, finding hideouts, using nicknames, acquisition of supplies, taking steps to prevent detection of perpetrators, as well as sharing the loot.29 Thus, the participation in a personal structure united by an agreement to commit only one specific offence of a terrorist nature overlaps with the constituent elements of the offence under Article 258 § 2 of the PC. There is no room for doubt that to be held liable the perpetrator should be aware of the group’s objective. The criminalization under Article 258 § 2 of the PC also embraces the so-called “sleeper” terrorists who do not maintain direct contacts with the organization for a long time, but remain on stand-by, waiting for instructions or an agreed signal to act. The literature on the subject indicates the existence of such dormant Islamic units in Western Europe, though their exact number remains unknown. Their members try not to arouse suspicion in their business and lifestyle and maintain a semblance of integration with the society.30

A stricter criminal liability is assumed by a person who establishes or directs a group or association seeking to commit a terrorist offence. The “founder” is considered to be the person who creates, organizes, builds, and arranges the basic structure of a group. It can be assumed that this description fits not only the originator of a group or association, but also those cooperating in its creation, co-defining the objectives and co-ap-

pointing the leadership or authoring the group’s programme. According to Z. Ćwiąkalski, the causative act of “establishing” includes searching for candidates, submitting proposals of participation, devising the structure and mode of operation, selecting the seat, agreeing on the means of communication, appointing the leaders, gathering tools, introducing security measures. Undoubtedly, the liability under Article 258 § 4 of the PC is also borne by the one who creates a new “cell” of the existing terrorist organization. The research on contemporary terrorist groups has shown that such a cell may be yet another “link” in a more sophisticated centralized structure, as well as enjoying a considerable autonomy, while “networking” with the reminder of the structure or even starting an independent activity.

The “director” is a person who is the head of a group or association and acts in a supervisory capacity. Therefore, it is vital, from the viewpoint of establishing liability, to determine whether such a person exercises effective control over the activities of the group, has the ability to give orders, and bears responsibility for fundamental decision-making. The same criteria also apply to a person who directs an isolated structure of a larger group or association, and performs short-term or even one-time duties. However, they do not apply to one who serves as a “liaison” and carries orders from the person heading the group down to the subordinates.

The provisions of Article 258 § 2 and 4 of the PC criminalize the sole participation in an organized criminal group or association. Committing an offence of a terrorist nature while being a member of a terrorist group results in the concurrence of these two offences. As regards such perpetrators, they will be subject to the punishment as meted out for multiple recidivists and having twofold legal basis: the terrorist nature of the act and participation in an organized criminal group or association (Article 65 § 1 of the PC).

2.3. Criminalization of the Financing of Terrorism

The thesis of the existence of a strong correlation between the degree of threat from terrorist groups and the financial resources at their disposal gains universal approval in the literature on the subject.\(^{35}\) It provides grounds for proposals of instituting special measures aimed to prevent the provision or collection of funds assisting in the commission of terrorist offences. To some extent, the existing legal solutions adopted to obviate money laundering could work as a model for the relevant legislative work. There is no doubt, however, that the financing of terrorism goes beyond the mentioned offence, since it often draws on funds from legitimate sources, which is not the case in standard money laundering. There is also a clearly distinct aetiology of this practice, let alone the motivation of perpetrators.

Suppressing the financing of terrorism involves both the application of norms of an administrative nature, including banking law and related fields, as well as measures under penal law. The Act of 25 June 2009 introduced a new provision contained in Article 165a. In accordance with this provision, that person is held criminally liable who collects, transfers or offers means of payment, financial instruments, securities, foreign exchange values, property rights, or other movable or immovable property in order to finance an offence of a terrorist nature. This offence is punishable by 2 to 12 years of deprivation of freedom.

The provision of Article 165a of the PC contained in Chapter XX “Offences Against Public Safety” among the generic types of bringing about a danger to life or health of people or to property of a very important value (Article 165 of the PC) and taking control of a watercraft or an aircraft (Article 166 of the PC). The legislator decided that the protected legal interest is common safety threatened by terrorism, and strictly, by the possibility of performing a prohibited act punishable by deprivation of freedom of the maximum of at least 5 years, committed to achieve one of the goals set out in Article 115 § 20 of the PC. The rationale for such a solution seems to be the conviction that criminalized conduct nears, facilitates or furnishes conditions for committing a terrorist offence, thereby causing some dan-

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...ger to the legal interest to such an extent that justifies the introduction of a separate prohibition subject to penalty.

The offence under Article 165a of the PC consists in the perpetrator taking action to finance an offence of a terrorist nature by collecting, transferring or offering means of payment, financial instruments, securities, foreign exchange values, property rights or other movable or immovable property. “Collection” means gathering, concentrating in one place, accumulating, i.e. activities that lead to the perpetrator’s obtaining or coming into possession of certain items or information. The collection of assets, as referred to in Article 165a of the PC, may take various forms, such as an income out of conducting a legitimate business, the proceeds of committed offences (e.g. armed robberies, drug trafficking) or the so-called revolutionary tax. The collector can either be a person intending to commit a terrorist offence or a member of a terrorist organization, as well as a “sympathizer” who does not belong to such structures.

“Transfer” is effected when the offender entrusts another person (hands over, forwards) with the assets listed in Article 165a of the PC. “Offer” should be understood as it is in its colloquial meaning, namely as “propose a service, submit a proposal.”

The objects of the causative act under Article 165a of the PC are means of payment, financial instruments, securities, foreign exchange values, property rights, or other movable or immovable property. That same list can be found in the description of the constituent elements of the offence of money laundering in Article 299 § 1 of the PC.

In accordance with Article 32 of the Act of 29 August 1997 on the National Bank of Poland, the legal tender (means of payment) in the Republic of Poland is the currency issued by the NBP.

Financial instruments in the meaning of Article 2(1) of the Act of 29 July 2005 on trading in financial instruments are:

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40 JL of 2005, No. 1, item 2 as amended.
41 JL No. 183, item 1538 as amended.
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1) securities;
2) not being securities:
   a) participation titles in joint investment institutions,
   b) money-market instruments,
   c) financial-future contracts and other equivalent cash-settled financial instruments, forward interest-rate contracts, share, interest rate swaps and currency swaps,
   d) options to buy or sell financial instruments, interest-rate options, currency options, options on the previously mentioned options, and other equivalent cash-settled financial instruments,
   e) property rights, the price of which depends, whether directly or indirectly, on the value of things designated as to type, on specific kinds of energy, on measures of and limits on production volumes or pollutant emissions (derivatives on commodities),
   f) other instruments, if admitted to trading on a regulated market on the territory of a Member State or are the object of application for such admission.

The term “securities” was defined in Article 3(1) of the Act of 29 July 2005 on trading in financial instruments as follows:

a) shares, subscription rights within the meaning of the Act of 15 September 2000 – the Commercial Companies Code, the right to shares, subscription warrants, depositary receipts, bonds, mortgage bonds, investment certificates and other negotiable securities, including those incorporating property rights corresponding to the rights arising from shares or incurrence of debt, issued under the relevant provisions of Polish or foreign law,

b) other transferable property rights, which emerge by emission, incorporating the right to purchase or acquire securities referred to in (a), or exercised by a cash settlement (derivatives).

“The foreign exchange” is, according to Article 2(1)(8) of the 27 July 2002 Foreign Exchange Law, foreign currency (foreign currencies and foreign exchange) and foreign exchange gold and platinum (gold and platinum in an unprocessed form and as bullion, coins minted after 1850, semi-finished products, except those used in dentistry, as well as items made of gold and platinum usually not produced of these ores).

Property rights are individual rights that are, directly or indirectly, conditioned by the economic interest of the entitled entity. These include

42 JL No. 94, item 1037 as amended.
43 JL No. 141, item 1178 as amended.
material rights, liabilities, matrimonial and property rights, rights to intangible property of a financial character, such as the right to remuneration for a literary work of art. The term “movable property” denotes an object in a physical sense that corresponds to the term “movable property or an object” (Article 115 § 9 of the PC) and “immovable property” should be understood according to Article 46 § 1 of the CD.

For the establishment of criminal liability under Article 165a of the PC, it is required that the offender’s conduct intended to finance an offence of a terrorist nature. It is therefore mandatory to demonstrate that the collection, transferring, or offering of assets served the payment, that is, covering of expenses associated with the performance of an offence satisfying the criteria of Article 115 § 20 of the PC. At the same time, a specific intent (dolus directus coloratus) is required.

2.4. Offences Related to a Terrorist Activity

Among the pre-terrorist offences there are three further groups of wrongdoing:
1. abetting and public provocation to commit a terrorist offence, recruitment and training for terrorism,
2. aggravated theft, extortion and drawing up false official documents with the intent to commit a terrorist offence,
3. punishable acts related to illegal border crossing of the Republic of Poland.

The first group covers offences whose shared feature is that they exert influence on limiting the scope of freedom of expression because of their connections to terrorism. The obligation to criminalize incitement and public provocation to commit a terrorist offence and recruitment and training for terrorism are introduced by UNSC resolution 1624 (2005), Article 3(2)(a) to (c) of the framework decision and Articles 5-7 of the Warsaw Convention (I). The serious nature of these acts is unquestionable, since they are capable of presenting or increasing the threat of legal interests, causing a risk of the occurrence of a terrorist offence. The use by the per-

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Petrators of global communication technologies, especially the Internet, is not without significance for the above assessment. These modern means are used to distribute instructions and training content as well as expediting recruitment.

When it comes to Polish penal law, such conduct as persuading another person to commit a terrorist offence or join a group in order to contribute to the commission of a terrorist offence are normally regarded as incitement (Article 18 § 2 of the PC) to a prohibited act as referred to in Article 115 § 20 of the PC, or to participate in an organized criminal group or association under Article 258 § 2 of the PC. However, aiding and abetting (Article 18 § 3 of the Penal Code) – mostly psychological – is referred to in Article 7(1) of the Warsaw Convention (I) as providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out a terrorist offence. Any conduct involving the encouraging or inciting the commission of a terrorist offence, but made “publicly,” that is targeted at a larger, unspecified number of people, may also violate the prohibition on public provocation to commit a misdemeanour (Article 255 § 1 of the PC) or crime (Article 255 § 2 of the PC). Public approval for a terrorist offence meets the criteria of a punishable act under Article 255 § 3 of the PC. Due to the previously mentioned international obligations, it seems de lege ferenda necessary to consider the introduction of new generic types of “public provocation to commit an offence of a terrorist nature” and “public approval of the commission of an offence of a terrorist nature.”

Due to the fact that the prosecution of conduct belonging to this group curtails the scope of freedom of expression, there is a well-grounded demand to ensure mechanisms safeguarding against unwarranted intrusion into the sphere of fundamental rights and freedoms. This need is filled by both constitutional and international standards on freedom of

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48 To illustrate the problems that arise on the borderline of the criminalization of such conduct and the protection of freedom of expression, see the decision of the ECHR in Leroy v. France of 2 October 2008 (Application no. 36109/03). The object of the proceedings was to evaluate a drawing published in a magazine and showing a terrorist attack captioned, “We all dreamed of that... Hamas did it;” in France, its author was fined for the approval of terrorism. The ECHR held that the sentence did not violate the right to freedom of expression, because the published work could not be regarded as a manifestation of the author’s political commitment, but as a glorification of destruction through violence and an expression of solidarity with the perpetrators of the attack.
expression and the declarations contained in Council Framework Decision 2008/919/JHA of 28 November 2008 amending Council Framework Decision 2002/475/JHA on combating terrorism.\footnote{OJ L 330, 9.12.2008.} The mentioned framework decision of 28 November 2008 imposes an obligation on national legislatures to criminalize public provocation to commit a terrorist offence, recruitment and training for terrorism; at the same time, its preamble reads that nothing in this framework decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as freedom of expression, assembly, or of association, the right to respect of private and family life, including the right to respect the confidentiality of correspondence, or to reduce or restrict the dissemination of information for scientific, academic or reporting purposes (paragraphs 13-14). These declarations should be proposed for inclusion in the “pro-Community” interpretation of the provisions of Polish penal law.

The second group isolated from offences related to a terrorist activity should include acts defined in Article 3(2)(d) to (f) of the framework decision, that is: aggravated theft, drawing up false administrative documents, if undertaken with a view to committing a terrorist offence, and, in the case of falsifying documents, also with a view to participating in a terrorist group. They constitute a \textit{sui generis} form of preparation, since, in fact, they create conditions that can later be used to commit the “proper” terrorist offence.

Under Polish penal law, the listed offences can be considered classifiable as the preparation to commit an offence of a terrorist nature. The provision of Article 16 § 1 of the PC reads that the preparation takes place when, to commit a prohibited act, the offender engages in actions which are to create conditions to fulfil an act intended directly to commit the offence. Adoption of such a legal basis for the assessment of offences relating to a terrorist activity has an important drawback: the preparation is punishable only in exceptional cases where the law so provides (Article 16 § 2 of the PC). In the existing legal conditions, the Penal Code provides for the prosecution of the preparation of violent attempts against a unit of the Polish Armed Forces (Article 140 § 3 of the PC), bringing about a disaster, public threat, taking control of an aircraft or vessel, placing a dangerous device or substance on an aircraft or vessel (Article 168 of the PC) or taking a hostage (Article 252 § 3 of the PC). Yet, the cases of punishable preparation listed in the act fail to include the preparation for the murder or assassination attempt on the president of the Republic of Poland, corresponding
to one of the aims set out in Article 115 § 20 of the PC. In addition, none of these situations provides for the aggravation of the penalty on the perpetrators of terrorist crimes, as the sanction – from 1 month to 3 years of deprivation of freedom – does not satisfy the condition specified in Article 115 § 20 of the PC. Therefore, the new provision in Article 16 § 3 of the PC should factor in the principle of punishing the preparation to commit any offence of a terrorist nature.50

The third group of terrorist-like offences are those conducive to the preparation of the “proper” offence of a terrorist nature and are related to illegal border crossing in the Republic of Poland. Amending the Penal Code, the legislator attached more attention to this issue in response to the EU regulations effective in Poland as of 1 May 2004.51 The penalty provided for helping (organizing) other persons cross the Polish state border illegally (Article 264 § 3 of the PC) was increased from 6 months to 8 years of deprivation of freedom. Also, a new type of offence was added of enabling or facilitating another person’s stay in the territory of Poland against the law in order to gain financial or personal benefit; the perpetrator of such an act is subject to deprivation of freedom from 3 months to 5 years (Article 264a § 1 of the PC). In exceptional cases, but only if the offender has not enjoyed any financial benefits, the court may apply the extraordinary mitigation of the penalty, or even refrain from the imposition of the penalty (Article 264a § 2 of the PC).

2.5. Failure to Report an Offence of a Terrorist Nature

The Act of 20 May 201052 amended the provision of Article 240 § 1 of the PC laying down a legal obligation to reporting particularly serious offences. Under the mentioned article, any person is held criminally liable and subject to a penalty of up to 3 years of deprivation of freedom who, having credible information about the preparation, attempt or commission of an offence of a terrorist nature, fails to report the offence to a law enforcement authority.

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52 JL No. 98, item 626.
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There are opinions voiced in the doctrine that the obligation of reporting holds for any information about a circumstance which has been obtained in a credible manner. The assessment of its relevance and usefulness should be made by the above said authority, not the person holding this information.\textsuperscript{53} However, this provision has been dominated by a fairly narrow interpretation. It is considered sufficient to provide general information about the prohibited act, without offering details, and even without pointing at the known perpetrator.\textsuperscript{54} Such a notification may also be submitted anonymously, since no recommendations are made as to its form.

The person who failed to report an offence is not criminally liable if he or she has sufficient grounds to assume that the law enforcement body is aware of such a prohibited act or has already prevented its commission (Article 240 § 2 of the PC). Furthermore, in accordance with the principle of \textit{nemo se ipse accusare tenetur}, any person who failed to report an offence for fear of himself or of his or her next of kin being held criminally liable is not subject to punishment (Article 240 § 3 of the PC).

3. The Circumstances Excluding Criminal Liability

3.1. Circumstances Eliminating Criminal Responsibility as a Means of Suppressing Terrorism

A threat to legal interests that occurs with the carrying out of a terrorist offence may involve a defensive action aimed to avert the danger. The lawfulness of such conduct may be assessed by applicable institutions defining characteristic circumstances excluding criminal liability. A direct and unlawful attack on a legally protected interest, as in the case of hostage taking (Article 252 § 1 of the PC), allows necessary self-defence (Article 25 § 1 of the PC) by resorting to measures directed against the attacker’s life, health or property. Moreover, the state of necessity (Article 26 of the PC) may apply to a person sacrificing someone else’s legal interest in order to avert danger to other legal interest, for example, a person


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who has fulfilled the kidnappers’ demands and paid ransom for hostage release.

The reaction to a terrorist offence can go as far as the violation of rights and freedoms, yet considered legitimate due to acting within the limits of specific powers and duties. The provision of Article 17(1) of the Act of 6 April 1990 on the Police in setting out the conditions for the use of firearms lists a number of circumstances connected with the commission of prohibited acts of a terrorist nature. The police officer has the right to use firearms, for example, to defend against a dangerous direct, violent assault against facilities and devices important for the country’s safety and defence, on the seats of principal authorities, principal and central state administration authorities or the judiciary, on facilities of economy and national culture and on diplomatic missions and consular offices of foreign countries or international organisations (Article 17(1)(4)) and in direct pursuit of a person reasonably suspected of homicide, terrorist attack, kidnapping a person for ransom or specific behaviour (Article 17(1)(6)). Acting within the limits of specific powers and duties that eliminates punishability of the breach of confidentiality of information (Article 267 of the PC) can occur in situations in which certain entities may exercise control of and record telephone conversations, as well as vetting correspondence or using the technical means to obtain information in a secret manner. This category includes action taken under the provisions of Chapter 26 of the Code of Penal Procedure “Surveillance and Recording Conversations,” Article 23 of the Act of 24 May 2002 on the Internal Security Agency and Intelligence Agency, Article 19 and 19a of the Act of 6 April 1990 on the Police and Article 14 of the Act of 9 June 2006 on the Central Anticorruption Bureau.\textsuperscript{55}

The conviction of the incomparable threat posed by terrorism leads to the designing of radical measures to combat it. These include widely discussed proposals for new legal institutions, which apparently build on necessary self-defence or the state of emergency, but impose a much wider range of restrictions on fundamental rights and freedoms.

3.2. The Question of Admissibility of the Destruction of a Civil Aircraft Used as an Implement in a Terrorist Attack

Admissibility of the decision of shooting down a civil aircraft posing a potential threat of a terrorist attack has been high on global legal agen-\textsuperscript{55} Act of 9 June 2006 on the Central Anticorruption Bureau (JL No. 104, item 708 as amended).
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due to the *modus operandi* used by the perpetrators of the 9/11 attacks in the United States. The introduction of such legal measures has been strongly countered by the uniform approach adopted in international law, whose regulations provide an enhanced protection for aircraft. The obligation to “refrain from resorting to the use of weapons against civil aircraft in flight,” and that, “in case of interception, the lives of persons on board and the safety of aircraft must not be endangered,” is clearly worded in the provision of Article 3bis of the Convention on International Civil Aviation, adopted in Chicago on 7 December 1944, with its amending Protocol, done at Montreal on 10 May 1984. The non-use of weapons against civil aircraft is also regarded as the norm of customary international law.

However, the events of 11 September 2001, in which the aircraft (including all passengers and crew on board) became the means of attack, and not, as before, the object of attack, have led to the revision of this standpoint.

In Poland, the legal regulations concerning the rules of procedure in the event of a terrorist threat caused by the use of a civil aircraft were introduced by the Act of 2 July 2004 amending the Act on the protection of the state border and other selected acts. The new provision of Article 122a of the Act of 3 July 2002 – Aviation Law stipulated the option of destroying a civil aircraft if so required by the state security considerations, and if the air defence command authority, having analysed the information provided by the state air traffic control body, concluded that the aircraft is being used to achieve unlawful objectives, in particular as a means of a terrorist attack. The decision to destroy that civil aircraft fell to the Minister of National Defence. The detailed rules of procedure in such cases are set out in the provisions of Article 18b of the Act of 12 October 1990 on the protection of the state border, in conjunction with the Regulation of the Council of Ministers of 14 December 2004 on the procedure of using air defence against alien aircraft not complying with the calls from the state air traffic management body. The originators of the introduced solutions justified them by the desire to be able to respond to the potential threat from air attacks of the size similar to those of 11 September 2001 in the United States, and directed against targets located on the territory of Poland. In

56 JL of 1959, No. 35, item 212 as amended.
57 Protocol relating to the Amendment to the Convention on International Civil Aviation, done at Montreal on 10 May 1984 (JL of 2000, No. 39, item 446).
59 JL No. 172, item 1805.
60 JL No. 279, item 2757.
the course of legislative work, there was also the argument of “lesser evil” raised, intended to legitimize the decision to take lives of those on board by highlighting the possible consequences of a successful terrorist attack.

Compatibility of Article 122a of the Aviation Law with the Polish Constitution was challenged by the First President of the Supreme Court who referred the issue to the Constitutional Court in a motion dated 27 September 2007.\(^{61}\) He alleged that in order to allow the deprivation of the lives of those on board the aircraft, the legislator referred only to a very abstract notion of “state security” without specifying the actual threat. Therefore, he permitted the sacrifice of human life to protect the legal interests of lower value. The shooting down of a civil aircraft was not combined with the existence of a direct threat to such legal interests. The president also objected to the introduction of a legal norm granting a public administrative body “very broadly defined powers to intentionally cause the death of the passengers of a civil aircraft (not being the aggressors) to protect the lives of other people.”\(^{62}\) Due to the fact that the description of the conditions of making the decision on the destruction of an aircraft was marked by a great deal of uncertainty and risk of an incorrect identification of the actual degree of danger, an objection was raised on the violation of the principle of necessity (to ensure state security) and insufficient identification under the provision of Article 122a of the Aviation Law. Some reservations were also made to the assessment of the enacted regulations in the light of the principle of proportionality, which authorizes public authorities to limit the rights or freedoms of another person exclusively to protect an interest of higher value. These criteria were not met in the case of causing death of innocent passengers and crew on board the aircraft in order to save other people’s lives. The First President of the SC objected to the valuation of human life according to the quantitative criterion or chances of survival. Finally, granting public authorities the power to shoot down a civil aircraft was construed as depriving the passengers on board of legal protection. By making the passengers “the objects of a rescue operation,” the legislator was seen as admitting the violation of human dignity, which is inalienable and inviolable (Article 30 of the Constitution of the Republic of Poland). The motion of the First President of the SC ended


\(^{62}\) Ibidem, pp. 6-7.
with a firm statement recapping on the raised objections: “In a democratic state ruled by law, whose axiological foundation lies the inviolable and inalienable human dignity, it is not acceptable to equip public authorities with the right to decide about an intentional causing of the death of innocent people in order to protect the common good, state security or even the lives of others.”

In its decision of 30 September 2008, the CT focused on the allegations concerning the compatibility of adopted regulations with the constitutional guarantees of the legal protection of human life and human dignity. Analysing the problem of a state’s obligation to ensure the legal protection of every human life, the CT referred to the standards adopted in the prior verdict dated 28 May 1997, in which the decision was rested on the following arguments:

1. a democratic state ruled by law exists only as a community of people,
2. an essential attribute of man is his life,
3. the first directive derived from the essentially democratically established law must be the respect of the value of human life,
4. the value of human life cannot be diversified,
5. the duty of the legislator is to prohibit the violation of life and establish legal measures to ensure a satisfactory compliance with this prohibition,
6. protection of life is not absolute – the legislator may provide for exceptions which allow for the sacrifice of one of the conflicting legal interests; still, he cannot entirely dispense with the protection of such legal interests, but is obliged to offer them “adequate protection.”

Based on such grounds, the CT found that the provision of Article 122a of the Aviation Law violates the constitutional standard of the legal protection of the right to life and the conditions of admissibility of its limitations. The tribunal pointed out the failure to comply with the statutory requirements governing such regulations, as well as challenging its necessity for protecting endangered legal interests, since, under the act, human life could potentially be sacrificed to save, for example, elements of the infrastructure. Also noteworthy is the tribunal’s justification for the decision, namely “it is the right of every person, including the passengers on board an aircraft in the airspace of the State, to have their lives protected by this State. The State’s claiming the right to kill them, even in defence of

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63 Ibidem, p. 10.
64 Decision of CT of 30 September 2008, K 44/07, JDCT 7A (2008), item 126.
the lives of others, is a denial of this right.” In addition, the solution adopted in Articles 122a of the Aviation Law was recognized as violating human dignity. In the CT’s opinion, if made effective, the provision in question would “depersonify” the passengers and crewmembers on board, i.e. the persons who are not aggressors and who would become no more than “the objects (subjects) of the rescue operation.”

Therefore, the Constitutional Tribunal objected to the formulation of procedural conditions authorizing the decision on the destruction of a civil aircraft, resulting in the death of innocent people on board, and to treating it as “a standard legal instrument.” At the same time, however, it confirmed that “the law may exceptionally decriminalize the consequences of such conduct, deeming the acting person not guilty.” Seeking answers to the question of admissible response to the threat of a terrorist attack undertaken with an aircraft, the CT held that its destruction was admissible if it were an *ultima ratio* measure and there were only assassins on board. The CT’s verdict clearly indicated that the elimination of the provision found to be incompatible with the Constitution of the Republic of Poland does not create a legal loophole, since there is an option of assessing the act in question as taken out of higher necessity, or – if there are only assassins on board – in necessary self-defence. It should be emphasized that the CT expressly admitted the application of both institutions of the general part of the Penal Code excluding criminal liability of “a state authority (or a person serving as that body)” by requiring such an authority to make “an individual decision allowing for all the circumstances of the particular situation and to assume responsibility for its consequences.”

The CT’s decision of 30 September 2008 should be highlighted as most desirable in that they rendered the unconstitutional provisions ineffective and provided firm arguments contained in the justification. Resting their decision on the principle of the legal protection of life and human dignity, the CT appealed to axiology underlying a democratic state ruled by law. This axiology entails some important limitations to the state’s activity that should be respected in all circumstances, including the threat of terrorism. It is unacceptable in the first place to judge the value of human life, in neither quantitative nor qualitative terms. In addition, it is pivotal to ex-

67 Ibidem, p. 31.
68 Ibidem, p. 34.
69 Ibidem, p. 35.
70 See ibidem, p. 32.
clude the *ex ante* definition of circumstances permitting state authorities to kill a citizen and consequently legitimizing such activities. The conviction contained in the verdict should also be advocated that “just as it is possible to fight organized crime, or even wage a regular war without general denial or suspension of fundamental rights and freedoms of citizens, it is also possible to combat terrorism without such a deep interference in the fundamental right of an outsider, the right to life.”

The CT’s verdict of 30 September 2008 is aligned with the case law of the ECHR, which, following the provisions of Article 2 of the Convention on Human Rights, is very strict in construing the premises of legality of deprivation of life, and this assessment is not shaken by the circumstances arising from the threat of terrorism. Its arguments clearly refer to the thesis expressed in the verdict of the German Federal Constitutional Court of 15 February 2006. This decision, like the judgement of the Polish Constitutional Tribunal, was based on the recognition of the violation of the principle of protection of human life and dignity.

### 3.3. Legalization of Torture with a View to Preventing the Threat of a Terrorist Attack

Another issue that has arisen while defining the relationship between human rights and public security against the backdrop of countering terrorism is the legitimacy of torture as an interrogation method. Even addressing this kind of question may seem stupefying, since its contemporary and uncompromising legal assessment leaves no room for ambiguity. The prohibition of torture has been expressed in numerous international agreements and is considered the *ius cogens*. The stance of the international com-

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71 Decision of CT of 30 September 2008, K 44/07, JDCT 7A (2008), item 126, p. 35.
72 *Leitsätze zum Urteil des Ersten Senats vom 15. Februar 2006, 1 BvR 357/05*, full text available at: [www.bverfg.de/entscheidungen/rs20060215_1bv305705.html](http://www.bverfg.de/entscheidungen/rs20060215_1bv305705.html).
The Circumstances Excluding Criminal Liability

munity on this issue has been often upheld in the doctrine\textsuperscript{74} and case law.\textsuperscript{75} The rejection of torture and other cruel, inhuman or degrading treatment or punishment is also reflected in Polish penal law, both substantive and procedural. In accordance with Article 171 § 5 of the CCP, it is inadmissible to influence the statement of the examined person through coercion or unlawful threat, to apply hypnosis or chemical or technical means affecting the psychological processes of the examined person or aimed at influencing unconscious reactions of his organism in connection with the examination.\textsuperscript{76} Explanations, testimony or statements obtained against these prohibitions cannot constitute proof (Article 171 § 7 of the CCP). A public functionary or a person acting on his order who, to obtain specific depositions, explanations, information or a declaration, exercises violence, an illegal threat or otherwise demonstrates physical or mental cruelty to another person is liable to a custodial sentence ranging from 1 to 10 years of deprivation of freedom (Article 246 of the PC). Any person involved in conduct constituting torture or other cruel, inhuman or degrading treatment may also be held criminally liable under the provisions that penalize the overstepping of powers (Article 231 § 1 of the PC), the use of violence or duress to exert an impact on a person subject to penal proceedings (Article 245 of the PC), or physical or mental cruelty toward a person legally deprived of liberty (Article 247 of the PC). Analysing the scope of the rights of the examined person, Article 14(3) of the Act on the Police should be referred to which requires the police officer carrying out his duties to respect human dignity and respect and protect human rights. A specific norm is derived from this provision that prohibits torture intended to obtain testimony and excludes the recognition of such practices as action undertaken in the state of necessity.\textsuperscript{77}

The literature on the subject offers a consistent assessment of the instances of torture or other inhuman or humiliating treatment by public functionaries. The so-called moderate physical pressure used by the Israeli secret service during interrogations of Palestinians, who were accused of terrorist activities, have received widespread condemnation; similarly so

\begin{itemize}
\item \textsuperscript{75} Cf. the judgement of the International Criminal Court for Former Yugoslavia in Prosecutor v. Anto Furundžija Trial Chamber II – Judgement – IT-95-17/1-T [1997] ICTY (10 December 1998), para. 146; full text of the decision is available at: www.worldlii.org/int/cases/ICTY/.
\item \textsuperscript{76} Cf. Kaczor, R. „Niedozwolone sposoby przesłuchania,” ProkPr 3 (2009), pp. 111-132.
\item \textsuperscript{77} Cf. Filar, M. In: Kodeks karny, Filar, M, ed., p. 95.
\end{itemize}
in regard to the sensory deprivation techniques employed by the U.S. officers in the Abu Ghraib and Guantanamo prisons on the suspects of collaboration with al-Qaeda. More problematic and scientifically debatable has been the case of recognizing the extraordinary circumstances of the act committed in an abnormal motivational condition of the perpetrator, which may possibly affect its milder assessment under penal law.

In Germany, such disputes were sparked in the aftermath of the kidnapping of the eleven-year-old son of a high bank official in late 2002. To save the boy’s life, the vice-president of the Frankfurt police, W. Daschner, ordered his subordinate to inflict pain on the suspect, but without causing injuries, and under medical supervision and after prior warning. Under the influence of this threat, the examined provided all the details of the event; yet, it did not save the boy’s life because he had been killed shortly after the abduction. In its decision of 20 December 2004, the Regional Court at Frankfurt ruled against the treatment of W. Daschner’s act as performed in necessary self-defence or in the state of necessity. At the same time, the tribunal put forward a number of mitigating circumstances, such as: the objective of saving a child’s life, provocative behaviour of the suspect during the interrogations, the highly charged atmosphere and great emotional pressure on the investigators resulting from overwhelming publicity. The court found the accused guilty of the offence of coercing but due to the mitigating circumstances, only fined the offender and suspended the execution. This event and the ensuing judgement provoked a heated debate in the German legal literature where two conflicting views clashed. First, based on the assumption that human dignity is inviolable, they precluded any exceptions to the use of violence to save legal interests, i.e. in a situation that may be likened to the Daschner case. The proponents of the opposing view allowed a more lenient assessment of the application of the so-called preventive torture in police interrogations as the last resort in saving the lives of innocent people. The arguments for such an assessment were sought in external circumstances that might have a material impact on the perpetrator’s psyche. It should be emphasized that the proposals made related only to the conditions justifying or excusing, but not legalizing the police officer’s action.

79 See ibidem, pp. 1063-1064.
A broader discussion among the representatives of the science of penal law was triggered by the views of an American lawyer, A. Dershowitz, who, in the face of the threat of global terrorism, considered it necessary to grant the institutions established to protect the wider public broader powers, including the use of torture during interrogation. In his argument, he invoked the much-telling and pictorial example of “ticking-bomb scenario.” He described a situation of interrogating a terrorist who refuses to share information about the place of planting an explosive charge; if obtained, such information could eliminate the risk and save lives of many people. When analysing the “profit and loss account,” Dershowitz arrived at the conclusion that it would be more advisable to make the terrorist suffer in order to prevent the assassination of innocent people. He used the utilitarian argument of “lesser evil;” this is how he derived the proposal that democratic states should fulfil their duty of protecting the rights and freedoms of citizens at the risk of sacrificing the aggressor’s interest. A novelty in this proposal is that instead of seeking justification for allowing the perpetrator to torture a person in an exceptional and unusual situation, or requiring that another action be taken, there is an idea of creating a general legal institution, similar to the state of necessity and ex ante legalizing such practices of state authorities. A. Dershowitz saw the risk that goes with it and put forth an idea of democratic control over the use of such powers by state authorities. The abuse of powers would be prevented each time by the obligation to obtain judicial approval for the use of torture (torture judicial warrant) and to determine the permissible extent and intensity of such torture.

A. Dershowitz’s proposal encountered numerous objections. Many of them aimed to refute it by alluding to the utilitarian facets. J. Zajadło pointed out that the use of the notion of “lesser evil” is affected by errors of uncertainty: “First, the ticking bomb scenario is only theoretical and does not occur in practice in its pure form or does not exist at all, or at least is extremely unlikely. Second, there is never any guarantee as to what the terrorist actually knows, or, if obtained, whether this knowledge will prevent the impending disaster. Third, a person exposed to immense pain is capable of saying just anything in order to stop the suffering; information obtained in such a way is likely to have little to do with reality. Four,

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82 See ibidem, p. 137.
83 Ibidem, p. 134.
in practice there have been cases of torturing persons having absolutely nothing in common with the ticking bomb scenario.\textsuperscript{84}

The literature also points to the risk of a snowball effect, whereby the exceptions to the prohibition of torture would grow in numbers; consequently, this would lead to the institutionalization of violence and lawlessness, and denial of the axiology of the state ruled by law.\textsuperscript{85} This thesis is corroborated by such practices as extraordinary rendition of a suspected terrorist to the secret services of the states employing prohibited methods of interrogation\textsuperscript{86} or extra-judicial executions (targeted killings) of persons suspected of terrorist offences that cannot be brought to justice for various reasons.\textsuperscript{87} All these activities were defended as a necessary choice of “lesser evil” to save innocent people at risk of terrorist acts. However, in point of fact, they serve a denial of the obligation to protect human life and dignity as a rule of law.

Any utilitarian considerations in the discussions on the issues in question can only be of secondary importance. The prohibition of torture has not been introduced because it was considered ineffective and inefficient. It stems primarily from the recognition of inalienable human rights and freedoms and respect for the inherent dignity of every human being.\textsuperscript{88} They draw fixed boundaries for state interference, even in the situation of a credible threat of terrorism. The interrogated terrorists may not be treated like an object and a “source of information.” The respect to axiology that lies at the foundation of a democratic state ruled by law requires that it recognize the dignity due to every person. Refusing these principles would in fact give way to the “axiology of terrorism” implying (or even only allowing) the use of violence to achieve desirable goals.

\textsuperscript{86} Cf. Tarnogórski, R. „Zakaz stosowania tortur a ‘wojna z terroryzmem’,” Polski Instytut Spraw Międzynarodowych, Bieuletyn 7 (111), 5 February 2003, p. 735.
The phenomenon of terrorism is in many ways differentiated and conditional upon complex historical, social, political and religious factors. This is reflected in the multitude of existing definitions, both doctrinal and normative, that highlight substantial differences in the selection of the constituent elements of the concept of terrorism and in determining its boundaries. The reconstruction of the most important elements of the concept of terrorism in this work made it possible to determine the specific constituent attributes of offences committed as part of such an activity. In the first place, the use of violence or threat of its use should be underlined, yet with the reservation that for the Polish legislator such a circumstance is not a prerequisite for regarding an act as an act of terrorism (Article 115 § 20 of the PC). Furthermore, it is required that a specific and high level of violence is reported that, by its nature, is “capable” of causing a state of terror within society or part of it. Terrorists have distinctive tactics, which involve the commission of such acts that promise publicity and cause a stir among the general public. Terrorism is also a strategy, since ordinary attacks targeted against persons staying away from any conflict (“innocent victims”) are designed to implement a specific purpose. The most important of these goals is to intimidate the population. Another feature typifying terrorism is the goal of compelling a state or international organization to do or fail to do an act, or causing a serious disturbance of the fundamental structure of a state. On the other hand, there is less and less pressure put on the requirement of a link between the intention of the perpetrators and the desire to advance a particular political, religious or ideological agenda. Such a “depoliticization” of the definition of terrorism is intended to prevent the justification of some attacks as implemented in pursuit of noble ideals or a “just cause.”
At the turn of the 19th century, the international community materially changed its attitude to terrorism and measures to suppress it. A serious dissent was registered shortly after World War II; some states adopted an extremely diverse interpretation of acts of violence committed during the struggle for national liberation. However, since the 1990s, there has been a mounting assent to the approach that under no circumstances can international terrorism be justified, and that all countries should cooperate to fight it. Among the newly adopted solutions, there are measures designed for the entire international community and aimed at suppressing the financing of terrorism and criminalizing the provocation to commit a terrorist offence.

The cooperation of European states materially goes beyond the minimum standards developed in universal international law. Pivotal for this subject is Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, which obliges the EU member states to accept an approximated definition of terrorist offences in national laws and enforce sanctions reflecting the gravity of such offences. Moreover, it implies the harmonization of penal law with regard to offences relating a terrorist group and the so-called terrorism-linked crimes.

The obligation to adjust Polish law to European standards was the immediate reason for embedding counter-terrorism measures in the Penal Code. These solutions arouse much controversy. Objections are raised to the sole legal construction of the offence of a terrorist nature (Article 115 § 20 of the PC). The list of wrongdoings that could potentially be classified as terrorist was based on the arbitrary designation of the upper limit of the penalty at 5 years of deprivation of freedom. As a result of this omission, the aforesaid list fails to include, for example, an aggravated assault on a person belonging to the diplomatic personnel of a foreign state (Article 136 § 2 of the PC) and influencing the public activity of a state body (Article 224 § 1 of the PC). There is also no criminalization of “the threat to commit an offence of a terrorist nature.” At the same time, however, the range of conduct that might be regarded as an offence of a terrorist nature is excessive. It seems reasonable to propose its reduction only to offences that are able to intimidate or cause serious harm to a state or international organization.

There are a number of difficulties in the legal classification that surface because, when describing the notion of an offence of a terrorist nature, the legislator uses highly vague and evaluative expressions. This resulted from both the objective difficulties associated with the need to convey such a complex form of crime to a normative framework, taking into account
the obligations under EU law, as well as purely technical conditions of, for instance, translating into Polish the wording used in the Council Framework Decision of 13 June 2002 on combating terrorism.

Despite the reservations mentioned in this work, it seems appropriate to adapt to the existing dogmatic structure of the Penal Code for the sake of combating terrorism. This largely concerns the response to the offence of a terrorist nature. Its perpetrators are subject to the provisions tightening the penalty concerning multiple recidivism (Article 65 of the PC). Polish regulations penalizing participation in a terrorist group (Article 258 of the PC) and the financing of terrorism (Article 165a of the PC) correspond to international standards. In relation to the offences of incitement, instigation or facilitation of the commission of a terrorist offence, they can be classified as public provocation to commit an offence (Article 255 § 1-3 of the PC), or instigating and aiding and abetting an offence (Article 18 § 2 and 3 of the PC). The rules of international law, however, go further and offer more detailed approaches. For this reason, it is becoming a matter of urgency to criminalize public provocation to commit a terrorist offence and recruitment and training for terrorism. Similarly, there should be no objections voiced as to the proposal to introduce – as a principle – the punishability of the preparation of an offence of a terrorist nature.

The analysis of the legal concept of terrorism and measures to combat it done in this work justifies the final general conclusion. It pertains to the very foundations of penal law and its approach to terrorism. There is no doubt that terrorism is one of these modern phenomena, against which the entire international community as well as national legislators need to take a stance. Yet, it must be underlined that the state’s punishing response must be subject to limitations stemming from the axiology of penal law and its guaranteed functions. In addition, there should be considerations made for the principle of proportionality, which sets boundaries to all responses that might involve the curtailing of human rights and freedoms. In developing a comprehensive strategy for combating terrorism and devising a system of legal measures as a response to terrorism, the legislator must be in conformity with a system of values that make up penal law. This system is founded on the common good also perceived through the personal good. Penal law is a human right – along with inherent human dignity and the resulting rights, both in regard to the perpetrators and their victims. When drawing up a penal law designed to counter terrorism, the legislator should adequately balance between the need to ensure security and safeguard values, which it may not exceed when developing the standards for this law.
The content of prohibited acts classified as terrorist offences should be stated strictly and clearly, so that they are not attributed, through misguided interpretation, to those who non-violently oppose the authorities. Such offences should not be numbered among political crimes or conduct being a manifestation of free expression or opposition against those holding power. Similarly, there should be no exclusions or limitations as to the application of the principle of guilt in a terrorist offence. Its perpetrators must therefore, as in any case, be attributed with guilt at the time of the act.

On the other hand, by creating a system of penalties, the guiding principle should be that the adopted measures must not lead to harming the person. Hence, sanctions should be proportional to the gravity of deeds, because only then will they embody the principle of justice. This does not mean leniency but eliminates the element of revenge from the penalty by reviewing its content and size by a just retribution determined for the purpose of punishment and punitive measures.

Terrorist offences could be combated only in regard to the fundamental principles of penal law. When verifying the international and national regulations on terrorism, including the relevant measures under penal law, an indication made by F. von Liszt should be highlighted that the principle of nullum crimen, nulla poena sine lege anteriori sets an absolute boundary for penal policy.\textsuperscript{89} Research on the counter-terrorism system, however, proves that in many cases the limits secured by the guarantee character of penal law are overstepped. There is a temptation to debilitate some of the principles of penal law specifically for the purpose of anti-terrorism measures. This work also aims to pinpoint such pitfalls. It must be emphasized that no fundamental human rights may be compromised even for the sake of the most vital aims of public safety; this is what the international community and national legislators need to bear in mind.

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