Terrorists on Trial

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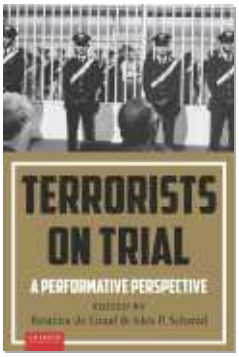

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2. Terrorism, Political Crime and Political Justice

Alex P. Schmid

> Any trial is a contest of dueling frames of reference, of alternate explanations.
>
> J. Post.[1]

2.1. Introduction

In the wake of the killing of Osama Bin Laden in Abbottabad, Pakistan, on 2 May 2011, there has been much talk on the subject of 'bringing terrorists to justice'. Yet such talk generally does not refer to bringing the alleged terrorists to a trial in court.[2] Debate over the last decade has ranged between those who favour a criminal justice approach to terrorism—based mainly on the use of the police and the judiciary—and those who favour a military warfare approach. On the whole, and certainly in the United States, the proponents of a military approach have dominated the field, even following a change of government in the United States in 2008. Attempts to try terrorists in civilian courts have often met resistance from those who would prefer military 'justice' or trial by a military commission. Underlying this debate is an uncertainty about whether terrorists should be treated as (political) criminals or as (enemy) combatants. In this chapter, I will address some conceptual issues on the subject of terrorism and justice, focusing in particular on the issue of extradition when a perpetrator is to be brought to trial from beyond national borders, and politics enters legal considerations.

The post-Cold War process of globalisation has allowed terrorists to expand the scope of their operations internationally, but justice is still largely a national prerogative. The only existing international terrorist court, the Special Tribunal for Lebanon in The Hague, still has to adhere to Lebanese national law.[3] The Lockerbie trial (2000–2001), held in the Netherlands, was conducted under Scottish national law. This illustrates that justice basically remains linked to national political communities, and is subject to national sovereignty. Terrorists, on the other hand, have traditionally breached national sovereignty and crossed international borders.

Terrorist trials are often considered 'political'. There is a widespread implicit assumption that a 'political trial' also amounts to 'political justice', i.e. that such

trials are partisan, like some trials held by victorious powers at the end of a war. In this chapter, I will examine the notions of 'terrorism' and 'crime', and what we actually mean when we call a crime or a trial 'political'. I will also explore the notion of 'justice' and its dark twin brother 'revenge'. On closer inspection, all of these terms are ambiguous.

2.2. Political Crime and the Political Offence Exception

Perhaps the least controversial of these concepts would seem to be the concept of 'crime'. Yet even the notion of what is considered a crime varies greatly across time and cultural space, as the laws that define an offence vary, and as what is and what is not considered moral and legitimate varies. Crimes are often interpreted in terms of a conflict between a 'bad' individual and a 'good' society—with the government standing between the parties as the representative of society, bringing to trial those who violate its norms.[4] The state has the prerogative to proscribe an act against persons or property it deems dangerous or merely undesirable, thereby making it a crime. Many prohibited acts are, however, 'victimless', like some traffic offences or violations of migration law; these are crimes merely because the state has declared them to be punishable offences. They are defined as 'wrong' mainly or exclusively because they are prohibited (*mala prohibita*). However, some criminal offences are so harmful and serious that they are considered wrong in all civilised societies. They are not just legally prohibited but also considered morally 'evil' (*mala in se*). In particular, this applies to 'murder'—the premeditated, unprovoked killing of a human being. In murder cases, legal systems therefore tend to consider not only the criminal act (*actus reus*), but also the guilty mindset (*mens rea*), the underlying intention of the perpetrator.[5]

National courts deal with all sorts of crimes, while international criminal courts most often deal with serious war crimes, genocide or crimes against humanity. These crime categories (and others like piracy and slavery) are acknowledged and defined in international and humanitarian law; there is widespread transnational consensus as to what these entail. But when offenders operate outside the context of inter-state war and claim to have acted for ideological or religious reasons, our ability to distinguish between political offences and criminal offences often becomes blurred.

How should we distinguish a 'common crime' from a 'political crime'? The latter can be considered either more or less serious than the former, depending partly on where the crime takes place, and who claims jurisdiction over it. Political offenders

often claim that the political nature of their deeds somehow decriminalises even violent acts. However, state officials who are on the receiving end often consider political crimes to be more serious than common crimes, even in cases where there is equivalence in terms of the victimisation resulting from a crime. The grey area between criminal and political offences is to some degree expressed in the following typology developed by Lee Ellis and Anthony Walsh.

Non-political crime:	1. Murder forcible rape, assault, kidnapping, robbery 2. Theft, burglary, fraud, vandalism, arson, shoplifting 3. Negligent manslaughter, driving while intoxicated
Quasi-political crime:	1. Violent rioting and pillaging 2. Destroying public property 3. Tax evasion, counterfeiting 4. Desertion of the armed forces, incitement to riot
Political crime:	1. Assassination political hostage-taking 2. Sabotage, desecration of national symbols 3. Advocating the violent overthrow of the government, treason

Table 2.1. Typology of crime (adapted from Lee Ellis and Anthony Walsh)[6]

This typology of crime, however, leaves no room for crimes typically performed by governments, e.g. crimes ranging from illegal police operations and gross human rights violations to ethnic cleansing and genocide.[7] Nor does it explain the difference between a murder and an assassination. The laws that outlaw these three types of offences have, at least in representative democracies, been made or confirmed by parliaments. In other words, political forces have been at the cradle of the creation of most criminal statutes.[8] In this sense, most crimes are 'political'. Yet the term 'political' can mean so many things—e.g. non-private, public, of collective interest—that it is difficult to nail down. Otto Kirchheimer's perceptive reflections help to illustrate the ambiguity of the term:

> There are no universally valid criteria for what constitutes political action as distinct from other types of social action. Something is called political if it is thought to relate

> in a particularly intensive way to the interests of the community. According to its own estimate of its needs (which does not always coincide with its 'objective' needs), each dominant group, class, or individual will develop criteria by which reprehensible acts, when grave enough, will necessitate public action. Correspondingly, infinite numbers of 'political' things might in the course of time enter, leave and re-enter the sphere of formalized public reaction.[9]

At least when it comes to domestic crimes (i.e. crimes on the territory of one state), most governments are reluctant to allow that domestic offences could be 'political' crimes. Former British Prime Minister, Margret Thatcher, for instance, abolished privileges such as wearing personal clothing for Provisional Irish Republican Army (IRA) prisoners in the 1970s, thereby portraying these militant nationalists as common criminals. This motivated IRA prisoners to engage in hunger strikes and 'blanket' protests. Thatcher's move was in fact no break with British legal tradition. When it comes to domestic crime, Anglo-American law does not recognise such crime as 'political crime' and, while it is prepared to consider the 'intent' behind a crime, it does not recognise 'motive' as bearing on guilt.[10]

Acts of lethal violence against human beings can be viewed and judged differently, depending on the frameworks used. This is most obvious when the perspective switches from a crime model to a war model. In inter-state war, most (though not all) acts of killing are viewed not as 'murder' but as legitimate acts of warfare. Those who kill in war, and do so courageously and successfully when ordered to by the state, can be rewarded with medals and promotion. However in peacetime the situation is altogether different. A decorated war veteran who comes home and continues to do to fellow citizens what he is good at—killing people—becomes a 'murderer' again, and may even receive the death penalty. Such a killing by the state, in turn, is framed differently again; what would otherwise be murder becomes a legal 'judicial execution'.

One way of exploring the notion of 'political crime' is to look at it through the lens of extradition practices between states in cases where killings and assassinations are committed by individuals against citizens or political and religious leaders.[11] If the perpetrator of such a killing is a citizen from another state and staying on the territory of a host country, a situation arises where one state might ask the other to bring him (or her) to trial or to extradite the person suspected to be the offender. However, such extradition requests are often refused for a variety of reasons when it comes to political (and some other) offenders, because:

- The suspect has dual citizenship, i.e. he/she is also national of the state from which extradition is requested;
- The crime may be a crime in one country but not in the other;
- The person sought may be unlikely to get a fair trial in the requesting country;
- The person sought may be subjected to torture in the requesting country;
- The death penalty may exist in the requesting country but not in the country from which extradition is requested.

Hesitancy to grant extradition requests for some forms of crimes makes it clear that while states are very reluctant to accept the category of 'political crime' for offences committed on their own territory, they will more readily distinguish between 'common' and 'political' crimes when it comes to foreign offenders who flee to their territory. There is greater consensus about what is a crime when it comes to war crimes and crimes against humanity. Because such crimes tend to affect also the peace and security of other states, the perpetrators can, in principle, be tried by any state—irrespective of the perpetrators' nationality or the location of the crime scene. However transnational terrorism is not yet subject to such universal jurisdiction and it is also not yet part of customary international law.[12]

Extradition is defined as 'the surrender by one State, at the request of another, of a person who is accused or has been accused of a crime committed within the jurisdiction of the requesting State'.[13] Most extradition treaties contain a 'political offence exception' and attempts to limit or abolish such exceptions have been only partly successful (for instance until quite recently, IRA terrorists sought by Great Britain were generally not extradited to Britain by the United States).[14] The Council of Europe tried to 'depoliticise' certain crimes (such as hijacking, bombing and hostage-taking) in the European Convention on the Suppression of Terrorism in 1977. However, the Council did not abolish the political offence exception itself. Nor did it define what exactly a 'political offence' is. Member states therefore still have some discretion to decide what they wish to consider a 'political offence',[15] despite the introduction of the European Arrest Warrant (2004) which recognises no political offence exception.[16] Nevertheless, even after 2004, France, for instance, continued to refuse extradition of fugitive Italian Red Brigade members.

This erratic use of the political offence exception can be better understood in the light of the historical experiences of European states. In the 1830s and in the decades thereafter, this exception was introduced by liberal democracies mainly because they felt that individuals have a right to rebel against an unjust government ruling through an undemocratic, autocratic regime.[17] There was widespread

agreement that people who had fought for a liberal democracy should not be extradited for justifiable acts of political rebellion—even when these acts could be considered criminal in other contexts. Some states wanted to maintain neutrality in political conflicts affecting neighbouring states where they considered a revolution was long overdue.[18] Rather than extradition, many political offenders were granted asylum by host countries. However the nagging question remained: where to draw the line between a 'pure'—that is largely victimless—political offence like sedition, treason or espionage, and offences which included elements of violent crime, but were perpetrated to promote a political cause. An offence like the killing of a government official during an unsuccessful insurrection, leading to the perpetrator escaping to a neighbouring country, has generally been judged differently from an offence in which the link to a political goal was less direct.[19] Offences involving the assassination of a head of state (and family members), whether the rulers were autocrats or democrats, have never been taken lightly by states considering extradition requests. The Belgian parliament in the 1850s introduced an 'attentat clause',[20] which excluded the political offence exception for such serious crimes. Attentat clauses became quite common in extradition treaties after the 1850s.[21]

In the course of the 19th and 20th centuries a number of principles were established to determine how to evaluate a crime as a 'political offence exception'.[22] The points of importance to be considered have been summarised in the Norgaard Principles,[23] (named after the former Danish president of the European Commission of Human Rights):

- The motive of the offender (whether it was personal or political);
- The circumstances in which the act is committed (whether it was committed during an uprising or not);
- The legal and factual nature of the act, including its gravity;
- The political objective of the act: at whom it was directed (against government agents, property, or ordinary citizens);
- Whether it was committed following an order from a group of which the actor was a member;
- The relationship between the offence and the political motive—specifically, the proximity of the relationship and its proportionality.[24]

Despite the guidance provided by these principles, many offenders have mixed motives. It is often difficult to draw a line between an offender who acts for private (selfish/

profit) motives and one who is a convictional criminal (who acts on the basis of altruistic motives or for ideological and political, collective ends).[25]

In recent years, there has been a clear trend towards reducing the definitional scope of political offence exceptions for violent acts in political struggles, especially when it comes to terrorist offences. However a number of regional anti-terrorism conventions still contain exception clauses for fighters engaged in armed struggles for self-determination or national liberation. Where armed struggles for national liberation are conducted in accordance with the principles of international law, and in particular international humanitarian law, this is, in theory, less problematic.[26] Nevertheless while certain types of political violence by non-state actors are sometimes permissible under the laws of war (and/or can be morally justifiable and considered by many as legitimate), certain other acts of violence carried out by members of national liberation movements are not considered legal in terms of international law.[27] An offence committed in the name of self-determination, or in the name of a religion like Islam, or for some other political cause, may constitute a (war) crime depending on context, targets, method and actors involved. References to 'freedom fighters' and 'liberation struggles' have complicated the process of international legal cooperation. For instance, attempts by the Organisation of Islamic Cooperation (OIC) to exempt Palestinians (fighting Israel) and Kashmiris (fighting India) from being subject to anti-terrorist conventions[28] have inhibited reaching a consensus on a universal Comprehensive Convention on International Terrorism in the United Nations General Assembly.

Before we turn to the issues of political trial and political justice, it is important to look at the concept of terrorism as discussed in the framework of the United Nations.

2.3. The Definition of 'Terrorism'

The Ad Hoc Committee on Terrorism, a sub-committee of the Sixth (Legal) Committee of the United Nations General Assembly, has been attempting to draft a Comprehensive Convention on International Terrorism for more than a decade. The draft Article 2 of that incomplete Convention focuses on the definition of terrorism, and characterises 'terrorism' in these terms:

> Any person commits an offence within the meaning of this [the present] Convention if that person, by any means, unlawfully and intentionally, causes:

(a) Death or serious injury to any person; or
(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or
(c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of this [the present] article, resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.[29]

This proposed draft definition of terrorism avoids the word 'political'. The drafters, representing a club of states, also make no reference to state terrorism (though this issue is indirectly discussed in draft Article 18 which, like Article 2, is also subject to continuing debate). Rather, the draft definition refers to 'any person' both as perpetrator and as potential victim (and includes some attacks on property as falling under terrorism). The 'any person' as victim could cover military personnel as well. And the 'any act' at the end of sub-paragraph (c) opens the door to even wider interpretations.

Recent developments, like the emergence of suicide bombings against civilians as a major new form of terrorism, are not reflected in this definition. The communicative and performative aspect of terrorism ('propaganda by the deed'—a concept that has been developing since it was first invented in the second half of the 19th century),[30] is not reflected in any way in this UN draft definition. This means the UN definition, if it ever passes the drafting stage, is likely to be obsolete and out of touch with reality before it ever comes into force. To understand that, we only have to compare the above draft definition to recent developments in terrorism:

– The intense and extensive use of new communication technologies;
– Weak and failed states operating as safe havens;
– The globalisation of terrorism aided by diaspora bridgeheads;
– Kamikaze-type suicide attacks;
– The expansion of targets considered licit (children, tourists, the Red Cross and other NGOs, the UN);
– Attempts to engage in catastrophic terrorism (including Weapons of Mass Destruction);
– Pronounced religious fanaticism.

None of these aspects of terrorism are in any way reflected in the UN draft definition. This definition, with its broad vagueness—'any person', 'any act'—lacks the precision, objectivity and certainty required to make laws unequivocal (if it remains unchanged in the final document presented to the General Assembly).[31]

I worked formerly for the United Nations, and before I joined the UN full-time, I acted as a consultant to the secretariat of the UN Crime Commission. Back in 1992, I was asked to look into the definition of terrorism issue. At that time I proposed cutting through the Gordian knot of the definition issue by taking an existing, generally accepted definition and extending its reach. I suggested that we take the definition of 'war crimes' and extend it to analogue crimes committed in times of peace and outside zones of conflict, so that 'acts of terrorism' could be simply defined as 'peacetime equivalents of war crimes'. When that proposal was unsuccessful with the members of the international community (only one country, India, accepted it), I turned to academia and attempted to create greater consensus at least in the world of universities. The latest result of this effort is the Revised Academic Consensus Definition of Terrorism (2011):

> Terrorism refers on the one hand to a *doctrine* about the presumed effectiveness of a special form or tactic of fear-generating, coercive political violence, and on the other hand, to a conspiratorial *practice* of calculated, demonstrative, direct violent action without legal or moral restraints, targeting mainly civilians and non-combatants, performed for its propagandistic and psychological effects on various audiences and conflict parties. Terrorism as a tactic is employed in three main contexts: (i) to enforce illegal state repression; (ii) as propagandistic agitation by non-state actors in times of peace or outside zones of conflict; (iii) as an illicit tactic of irregular warfare employed by state- and non-state actors.[32]

Unfortunately, this Academic Consensus Definition differs markedly from the draft definition produced by the Ad Hoc Committee on Terrorism. The 'academic consensus' is also aspirational rather than fully realised. A related problem is that social and political scientists still disagree on the delineation of 'terrorism' from other forms of 'political violence'. Some scholars limit political violence to violent events short of war, while others do not.[33] Some equate 'political violence' and 'political terrorism', creating more confusion. Ted Hondrich, for instance, makes no distinction between the two, including both in his definition of 'violence with a political and social intention':

> Whether or not intended to put people in general in fear, and raising a question of its moral justification—either illegal violence within a society or smaller-scale violence than war between states or societies and not according to international law.[34]

In reality, there are many other forms of political violence short of war that are quite different from terrorism as practised currently by armed civilians against defenceless civilians for the purpose of intimidating, coercing or otherwise influencing other conflict parties and audiences. To give a few examples of political violence (not all of them are also political crimes) other than terrorism:

- Hunger strike/self-burning (political suicide)
- Blockade/public property damage/sabotage
- Hate crimes/lynching
- Violent demonstrations/mob violence/rioting
- Brigandry/warlordism
- Raids, razzia, pillage /pogroms
- Torture/mutilation/mass rape
- Tyrannicide
- Extra-judicial execution/massacre
- Ethnic cleansing/mass eviction, purge
- Guerrilla warfare/partisan warfare
- Subversion, intervention
- Revolt, coup d'état rebellion, uprising, insurgency, revolution.[35]

Whether political violence is used offensively or defensively, as a means of provocation or as a weapon of last resort, whether it is used against armed opponents or against defenceless people—these are all important moral distinctions that bear on the morality, legality and criminality of the act and determine whether it is perceived as legitimate or unjustified. We should distinguish terrorism from other forms of illegitimate political violence—some, like genocide, worse than terrorism, and others, like tyrannicide, less grave—though still criminal. On the other hand, we must acknowledge that there are certain forms of violent resistance to political oppression that are legitimate; to some extent these are already acknowledged in international humanitarian law. Terrorism ought to be considered unacceptable behaviour when it takes the form of violence without legal and moral restraints—violence that does not recognise and respect the existence of protected persons like unarmed non-combatants and defenceless civilians. Such unacceptable behaviour should be criminalised whether it occurs in wartime

or peacetime, in zones of armed conflict or outside them, whether performed by state- or non-state actors and whether performed within or outside national jurisdictions.

While motive (as opposed to intent) should play no role in a legal definition of terrorism, the Academic Consensus Definition of Terrorism cited earlier includes a causal element as a driving force—the terrorists' belief in the effectiveness of their *tactic*. If terrorism did not 'work' on one level or the other, terrorists would presumably not engage in terrorism. However, since terrorists are no more rational than anyone else, they may engage in it despite the fact that, in a *strategic* sense, terrorism is more often than not counter-productive.[36] The fact that acts of terrorism often have a large impact does not mean that they are 'effective' in achieving the stated political goals (national liberation, a caliphate, etc.). An act of terrorism may satisfy the terrorists' less-than-rational desire for 'revenge'—vengeance to which they usually give the much more acceptable label of 'justice'. Revenge, in my view, is an altogether underestimated cause of terrorism and probably also of much of counter-terrorism. Let us have a closer look at it.

2.4. Revenge and Justice

When President Bush declared a Global War on Terror and pursued Al Qaeda and the Taliban in Afghanistan from late 2001, this intervention was originally named 'Operation Infinite Justice'.[37] Later, when the President was told that 'Infinite Justice' is also a description of God in a certain religion, he had the intervention rebranded as 'Operation Enduring Freedom—Afghanistan (OEF-A)'.

The 'justice' label is one which—like the 'freedom' label in 'freedom fighters'—has widespread intuitive appeal. Unsurprisingly, terrorists too are all for 'justice'. A close associate of Bin Laden, the Egyptian Saif al-Adel, carried the *nom de guerre* 'sword of justice'.[38] History books also tell us that during the terror phase of the French Revolution (1793–1794), the guillotine was labelled the 'sword of justice'. Robespierre, the father of modern state terrorism, directly equated 'terror' with 'justice', claiming that 'Terror is nothing else than justice, prompt, secure and inflexible; it is therefore an outflow of virtue.'[39] Other terrorists followed him in this understanding: Osama Bin Laden declared in October 2004 that 'We have been fighting you because we are free men who do not remain silent in the face of injustice.'[40] Shamil Basayev, the Chechen warlord, claimed in 2005 'I have always fought for justice and justice has been my only goal.'[41]

Injustice—real or imagined—is widely seen as one of the most important social causes of rebellion, whether it is a terrorist revolt by a self-appointed vanguard or a

more broadly based popular insurrection.[42] To give an example: after the attacks of 9/11, Bin Laden declared that he did not care if his life ended because his 'work was done', namely, having 'awoken Muslims around the world to the injustices imposed upon them by the West and Israel'.[43]

The justice narrative resonates strongly with people who have been wronged and crave revenge, but who label it justice because that word is more acceptable than vengeance.[44] From her study of the writings and pronouncements of terrorists, Louise Richardson contends that the revenge motive figures very prominently in the thinking of terrorists: 'The most powerful theme in any conversation with terrorists past or present, leader or follower, religious or secular, left wing or right wing, male or female, young or old, is revenge.'[45]

'Revenge' can be interpreted as 'primitive justice', an archaic form of retribution where the victim or his family or clan takes the law in their own hands and inflicts punishment on those considered guilty of having wronged, injured or killed one of its members. This desire to make someone pay for a transgression often manifests as an obsessive urge to rectify a grievance at all costs. Passionate impulses that result in revenge can be socially destructive, as a prolonged vendetta culture can break down the fabric of society.

'Revenge' has figured as a major theme in world history and literature. Cervantes' Don Quixote, for example, claimed that his mission was none other than that of helping those who cannot help themselves, avenging those who have been wronged.[46] Some terrorist groups have defined themselves as vicarious defenders of a constituency that cannot defend itself, 'adopting' a constituency and fighting on its behalf without a clear mandate from those concerned. Bin Laden, for instance, repeatedly reiterated the issue of Palestinian rights—but both Hamas and Al Fattah have rejected Al Qaeda's right to speak and act on their behalf.

Revenge can be seen as 'wild justice'; an alternative system of self-help justice, based on the archaic revenge framework. Nachman Ben-Yehuda's analysis of Jewish terrorists in the 1940s concluded that

> ... underlying vengeance is a very strong moral character, guided by a simple principle of justice that stipulates that symmetry must be restored to what is perceived to be an unbalanced situation. [...] Political assassination, as a particular rhetorical device, is invoked as a claim to explain and justify acts that the assassins want to project as a case of 'justice' in situations where they felt that they could not get a fair justice because of the opportunities for such 'justice' were felt to be blocked ...[47]

Uncomfortable as this thought may be, at least some of the violence of contemporary terrorists may be understood as a form of 'rough justice'. There are even similarities between state courts and what some terrorists do in their kangaroo courts—courts improperly constituted and illegal by the prevailing law. While an official state court, especially one with a jury, is widely seen as acting on behalf of society, the kangaroo court of the terrorist also professes to act on behalf of its constituency, for example:

- Some terrorist groups have guidelines for conducting trials within their own ranks (the 'Green Book' of the IRA) comparable to procedural codes for trials in civil society;
- Terrorist deeds are often meant to punish, e.g. 'enemies of the people';
- Terrorists seek to 'justify' their violence by referring to their ideological or religious code, while civil courts refer to a documented legal code;
- Terrorist punishment is sometimes performed in public or delivered as 'revolutionary justice' and documented on video.

The most significant difference between a legally established court and a terrorist kangaroo court is that in the latter the roles of prosecutor, judge, jury and executioner are often combined. In addition, the verdict is generally executed immediately—giving the defence not a semblance of the 'equality of arms'—a balance that would give the defendant at least the 'fighting chance' of a meaningful possibility of defence.

Terrorists have a different perception of justice, one that also includes 'might is right'. Historically, there have been a number of different bases of conceptualisations of justice. Aristoteles (384–322 BC), for instance, considered justice to be a personal virtue like prudence or fortitude. Others use a sacred text as the basis for justice (as do contemporary adherents to Sharia law). Some others equate justice simply with conformity to the current existing law. As one legal scholar has put it: 'Legal justice is justice according to law. It is not about the justice of the law.'[48] Democratic societies, however, tend to link justice to the equity principle to make the law 'fair'.

While terrorists and non-terrorists can agree that 'justice' is something positive, unfortunately no agreement can be reached on which particular conceptualisation of justice is just. 'Justice has no universally valid definition', lawyer Suri Ratnapala has observed.[49] His pronouncement is echoed in the social sciences: 'There does not appear to be universal consensus on what is considered to be just or unjust', L. Montada concludes in the *International Encyclopedia of the Social and Behavioural Sciences*.[50] When determinations of justice are based on different foundations, a clash between different notions of justices is a stark possibility. This is especially true where groups who claim

to adhere to 'divine law' oppose more secular groups adhering to man-made laws rather than the authority of religious scholars claiming to speak in the name of a supreme being.

Aristotle posed a crucial question when he asked whether it is 'more advantageous to be ruled by the best man or by the best laws'.[51] Over time, the latter option has evolved into the concept of the Rule of Law. Most interpret the changing concept of justice—from privately delivered revenge or subject to the arbitrary decisions of a power-holder, to justice carried out by representatives of the community under the Rule of Law—in terms of human progress. As the International Commission of Jurists explains it, 'The rule of law is more than the formal use of legal instruments, it is also the rule of justice and of protection for all members of society against excessive governmental power.'[52] The Rule of Law, rather than rule by the personal preference of an arbitrary ruler, or rule by brute force, generally includes these agreed principles:

- Supremacy of the law: all persons are subject to the law (including those holding state power, who are also bound by a common law or constitution);
- The principle of *habeas corpus*: arbitrary or preventive detention is prohibited;
- Separation of powers: parliament exercises legislative power; there are restrictions on the exercise of power by the executive;
- State protection for all: nobody should be above the law, nobody should be outside the protection of the law;
- The principle of proportionality: only minimum force should be used to stop law-breakers; punishment must be relative to the seriousness of the offence;
- Judicial independence: an independent and impartial judiciary, and no 'special courts'.[53]

It is the last of these core principles of the Rule of law that is often challenged in terrorist court cases. Political offenders have often been tried in 'special courts'—e.g. Diplock courts with no jury, or military tribunals. This raises another issue for discussion: whether terrorists should be tried by regular courts.

2.5. Terrorism and Fair Trial

Since in liberal democratic Western legal systems, all citizens (and in many regards also denizens) are equal before the law, people accused of terrorism should, in principle, have the same rights to a fair trial as others accused of a crime. Extensive fair trial

guarantees are provided by human rights instruments such as those found in Article 14 of the International Covenant on Civil and Political Rights, and in other UN and regional instruments. These cover, *inter alia*, these elements:

- The right to trial by a competent, independent and impartial tribunal;
- The right to defend oneself in person or through counsel;
- The right to be brought promptly before a judge or other judicial officer;
- The right to challenge the lawfulness of detention;
- The right to be tried without undue delay;
- The right to humane conditions of detention and freedom from torture;
- Exclusion of evidence elicited as a result of torture or other compulsion;
- The right to a public hearing;
- The right not to be compelled to testify or confess guilt;
- The right to call and examine witnesses;
- The right to appeal.[54]

Most of these rights are non-derogable—that is, even in armed conflict and in the face of severe peacetime attacks from terrorists, they cannot be waived.[55]

While democratic societies based on the 'one person-one vote' principle continue to manifest great social and economic inequalities, they nevertheless maintain that all persons are entitled to fair and equal treatment before the law. As a consequence, fair trial rights are in principle extended even to members of terrorist organisations who do not themselves respect the human rights of their adversaries.

Many terrorists who do not recognise the legitimacy of Western judicial systems nevertheless try to use the procedural rules of such judicial systems not just to their own advantage, but also to bring harm to others. Conversations between a defendant and the defence lawyer, for example, are considered confidential to ensure that a proper defence can be conducted, yet the instruments and safeguards of the legal system can be turned against it. There have been cases of collusion where the defence lawyers for terrorists have become de facto accomplices, smuggling messages out of prison for them, or smuggling weapons into prison—with often lethal consequences.[56] Defence lawyers have also successfully appealed to the European Court of Human Rights to overturn British court rulings against Irish terrorists who chose *not* to respect human rights. A number of problems arise in this context.

2.6. Terrorist Confrontations with the Judicial System

Terrorism has been characterised as an asymmetric mode of conflict waging. Terrorists know the location of their adversaries, while their own location is generally not known. Terrorists do not observe the humanitarian rules of warfare; their adversaries generally do. Terrorists ignore human rights but expect adversaries to adhere to them. What are the consequences when the democratic state respects the Rule of Law and the terrorist does not? If the conflict parties belong to different moral communities and play by different rules we are faced with the serious problem that there is no common ground between a judge and the accused, and that the outcome of a trial will not settle the case. Human rights lawyer Geoffrey Robertson has asked: 'How do you give fair trial to a person who does not accept your right to try him?'[57] Paradoxically, while a sentence may not be considered 'fair' by the defendant, the outcome of a trial (for example, punishment by the death penalty) may be welcomed by him or her when operating under an entirely different value system, one in which he or she may desire nothing more than to become a martyr. On a certain reading of Islam, martyrdom may offer 'a direct passport to paradise'.[58]

There may be problems even before the terrorist is brought to trial. The basic legal principle *aut dedere aut judicare* (extradite them or bring them to trial where they are) may not work for certain terrorists. A community hiding a terrorist suspect to protect him or her is unlikely to extradite the terrorist. After the attacks of 11 September 2011, the United States demanded that the Taliban, as de facto ruler of much of Afghanistan, extradite Osama Bin Laden. But Taliban rulers insisted that Osama Bin Laden could be tried only by a group of Islamic clerics committed to Sharia law.[59]

Terrorists have sought various other ways to attack the official justice systems of their adversaries. In early 2011, Greek terrorists claimed responsibility for a powerful explosion that damaged a court building in central Athens. They also threatened to target the individual judges presiding at the court over the trial of 134 suspected members of the 'Conspiracy of the Cells of Fire' organisation.[60] Other terrorists have threatened prosecutors with retaliation.[61] In November 1985 insurgents from the M-19 group in Colombia seized the Palace of Justice in Bogota, taking hostages. Over 70 people were killed in the ensuing fire and gun battle.[62] In Pakistan, courts regularly face the situation that witnesses recant earlier inculpating statements, fearing retribution by associates of the accused.[63] In Northern Ireland in the 1970s, some perverse verdicts resulted from clearly partisan juries. In other cases jurors were intimidated by defendants and their associates outside the courtroom. As a consequence, the so-called Diplock courts were established, with the jury replaced by judges.[64]

2.7. Political Trials

The court trial system is under attack not only by terrorists or—as in the case of the Stammheim trial (see case study in this volume)—by some of their defence lawyers. Under pressure from public opinion, from another state, or from the executive branch of government, attempts to bend the course of justice through unfair or illegal practices have repeatedly been made.

These practices may include the accused being denied access to a defence lawyer in a timely manner, or state prosecutors presenting unreliable or false confessions produced under intense police pressure, or forensic evidence against the accused being fabricated. In some cases, evidence exculpating those accused of a terrorist crime has been withheld from the court. Sometimes the accused have been presented to the jury in a prejudicial manner likely to influence them unduly.[65] Errors of justice based on such techniques have led to the conviction of innocent people as terrorist criminals.[66] Clive Walker has created a typology of miscarriages of justice, He explains that these occur when defendants' or suspects' human rights are breached, 'because of

1. Deficient processes or,
2. The laws which are applied to them, or
3. Because there is no factual justification for the applied treatment or punishment;
4. Whenever suspects or defendant or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others;
5. Whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers, or
6. By State law itself'.[67]

Miscarriages of justice are not confined to political trials of course, but such trials are probably more prone to them. Yet it is possible for a political trial to take place without violations of the Rule of law. It is a profound misunderstanding that a political trial will, by definition, result in political justice.[68] This perception has arisen because many political trials that stand out in collective historical memory were associated with political, i.e. partisan justice. The perception is reflected in the classical definition of a political trial elaborated half a century ago by Otto Kirchheimer, in his seminal work *Political Justice: The Use of Legal Procedures for Political Ends*. Kirchheimer distinguished three main categories of political trials:

1. The trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution;
2. The classical political trial: a regime's attempt to incriminate its foe's public behaviour with a view to evicting him from the political scene; and
3. The derivative political trial, where the weapon of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe.[69]

Kirchheimer recognised that courts are battlegrounds over legitimacy, where the loyalty of the citizens is the ultimate prize. The narrative that wins over the jury and gains public support outside the courtroom can indeed influence and sometimes even shift the political balance of power—at least in high-profile cases. However, where this battle is fought without 'equality of arms' and the defence side has no 'fighting chance', a political trial is likely to become the scene of political (partisan) justice. Typical circumstances where this is the case have been described by Kirchheimer:

> The aim of political justice is to enlarge the area of political action by enlisting the services of courts on behalf of political goals. It is characterized by the submission to court scrutiny of group and individual action. Those instrumental in such submission seek to strengthen their own position and weaken that of their political foes. […] If the foes should try to destroy the existing regime, the authority may conclude that it has no choice but to eliminate them. This necessarily involves recourse to the courts. In such circumstances the court proceedings will play a number of roles. First, they will serve as a forum for publicizing the vileness of the challengers. Second, they will conform and legitimize the power holders' proposals for disposing of their opponents. And finally, they might keep the power holders from giving in to the temptation to utilize the occasion for a wholesale elimination of all their political foes, even those unconnected with the group constituting the direct threat.[70]

The main guarantee to prevent political trials resulting in partisan political justice is the constitutional protection of the judiciary against encroachments by the executive branch of government and, to a lesser extent, by the legislative branch of government. This can be done by special provisions guaranteeing the judiciary's impartiality and independence. The importance of this guarantee was recognized in the 18th century by Charles de Montesquieu, who argued for the separation of governmental powers

between the judicial, legislative and executive arms to create a system of checks and balances to prevent abuses of power. As he put it:

> There is no liberty, if the judicial power be not separate from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would be then the legislator. Were the judicial power in a state joined to the executive power, the judge might behave with violence and oppression.[71]

Terrorists and their defence lawyers are sometimes accused of 'politicising' trials, as are governments. If both sides try to extend the process of seeking 'justice' to the court of public opinion, the question arises: who profits more from 'politicising' a trial—the prosecution or the defence? An American study (surveying hundreds of terrorist trials over nearly a quarter of a century) came to some counter-intuitive findings:

- The more politicised the prosecution strategy, the more likely the case will go to trial and the more likely it will result in acquittal or dismissal;
- Treating terrorist defendants like traditional offenders results in the highest plea and conviction rates;
- The most explicitly politicised prosecution strategies double the likelihood of acquittal and dismissal;
- Highly politicised defence strategies are associated with an increase in the likelihood of conviction[72]

If we are to believe these findings, the 'politicisation' of a trial is counterproductive for both sides. However in the study cited above, 'politicised' is defined in terms of 'tying the defendant's ideological motivation to the elements of the case'.[73] In my view, this is too narrow a definition of the performative manoeuvres engaged in by one or both sides in the 'lawfare' taking place in court in certain terrorist trials.[74]

Another American study showed that it does not pay to be seen as a 'terrorist' when it comes to sentencing since sentences for similar crimes are consistently harsher in terrorist cases, as the following table makes clear:

Average sentence for persons charged with terrorism	19.7 years
Average sentence for persons convicted of terrorism	16 years
Average sentence for persons charged with national security violations but not terrorism	10.4 years
Average sentence for persons convicted of national security violations but not terrorism	7.5 years
Average sentence for persons not charged with terrorism or national security violations	1.2 years

Table 2.2. Severity of sentences for terrorism and other charges (USA) 2001–2009[75]

Does this suggest that because terrorists are treated more harshly than others they therefore are not getting a fair trial? Not necessarily. Judges and juries not only assess the quality of the criminal deed (*actus reus* 'guilty act') itself, but also take into account the underlying intent (*mens rea* 'guilty mind'). In the case of terrorism, the tactical intent of an act of terrorism is often especially reprehensible. It can involve threatening to kill unarmed civilians to raise ransom money, provoking the repression of a sector of society in order to gain new recruits to a terrorist movement from disgruntled rebellious members of that sector of society, or instilling extreme fear in a population to induce people to leave a conflict zone (ethnic cleansing). It is this distinctive immorality which sets terrorism apart from other violent political crimes, even those with greater numbers of victims. For this reason, harsher sentences are justified although their deterrent value may not be great. However, they may go some way in placating feelings of anger among victims and survivors and the general public—thereby preventing acts of revenge.

2.8. Conclusion

When it comes to the question of how societies and governments should deal with terrorists, a crucial question is whether the criminal justice approach is the right one. Some argue that since jihadi terrorists declared 'war' on Western societies, states responding to terrorism also have to operate within a framework of war. Those taking this position are often not inclined to allow terrorists their day in court, at least not in a civilian court, and tend to prefer that captured terrorists be locked up until the war on terrorism is over (as with prisoners of war). The United States took this

approach under the Bush administration and largely continued it under the Obama administration. Yet following more than ten years of fighting a global war on terror, and spending in the process more than one trillion dollars,[76] the results of the war on terror are less than satisfactory. There are more terrorists around than before as Al Qaeda mutated from a terrorist group to a conglomerate of jihadist groups and an even broader ideological movement. Deterrence clearly has not worked and terrorism has not been eradicated. Depending on the level of the terrorist challenge, both approaches—the criminal justice approach and the military approach—may indeed be needed side by side. However, given the less than persuasive results of the military war on terrorism, a reconsideration of the merits of the criminal justice approach to terrorism is warranted. Despite some apparent weaknesses which we have highlighted above, the criminal justice approach has considerable benefits, as Ben Saul has summarised:

> Set against the vain hope of pounding terrorists into oblivion through war, the criminal law offers the promise of restraint: individual rather than collective responsibility; a presumption of innocence; no detention without charge; proof of guilt beyond reasonable doubt; due process; the right to prepare and present an adequate defence; independent adjudication; and rational and proportionate punishment.[77]

These are the qualities that set the Rule of law apart from the 'rule of the jungle', where 'might is right'. Liberal democratic states adhering to these principles will occupy a moral high ground in the fight against terrorism. Even when terrorists and their defence lawyers abuse the legal system for tactical victories they do not deserve, this is a price well worth paying in defence of freedom and justice.

Terrorist trials will almost always be 'political' because terrorism is inherently a form of political violence. That the trials of those accused of terrorism are political despite the independence and impartiality of the judiciary does not mean that they are necessarily unfair. To be sure, many terrorist trials have fallen short of the highest standards of justice—as illustrated in this volume. However, the idea that justice should apply even to terrorists who deny justice to their opponents is one that makes the criminal justice approach ultimately superior to other systems of dealing with 'political crime', including terrorism. Used with wisdom and moderation, the criminal justice approach has the potential to break the cycle of revenge actions that feed terrorism.

Notes

1 Jerrold M. Post, 'Terrorist on Trial: The Context of Political Crime', in: Harvey W. Kushner. *Essential Readings in Political Terrorism* (Lincoln: Gordon Knot Books, 2002), p. 57.

2 After the killing of Bin Laden, US President Obama said that 'justice has been done'. However critics argued that proper justice should be administered by judges in a tribunal, not by Special Forces (cf. Daniele Archibugi, 'Should bin Laden have been tried?', *Open Democracy Forum* (4 May 2011), https://www.opendemocracy.net/daniele-archibugi/should-bin-laden-have-been-tried. Retrieved 4 May 2011).

3 Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*. 2nd ed. (Cambridge: Cambridge University Press, 2010), p. 338. The authors note that '[t]errorist acts can be prosecuted in an international court at present only if they amount to war crimes or crimes against humanity'.

4 Herman Thomas Bianchi, *Politiek en Criminaliteit* (Kampen: J.H. Kok, 1992), p. 63.

5 Based on the lemma 'crime' in: A.P. Schmid (ed.), *The Routledge Handbook of Terrorism Research* (London & New York: Routledge, 2011), p. 620.

6 Lee Ellis and Anthony Walsh, *Criminology. A Global Perspective* (Boston: Allyn and Bacon, 2000), p. 10.

7 Frank E. Hagan, *Political Crime: Ideology and Criminality* (Boston: Allyn and Bacon, 1997), p. ix.

8 Ellis and Walsh, *Criminology. A Global Perspective*, p. 11.

9 Otto Kirchheimer, *Political Justice. The Use of Legal Procedures for Political Ends* (Princeton: Princeton University Press, 1961), p. 25.

10 Hagan, *Political Crime*, p. 4.

11 Cf. Colin Wilson, *The History of Murder* (Edison, N.J.: Castle Books, 2004).

12 Anthony Aust, *Handbook of International Law*. 2nd ed. (Cambridge: Cambridge University Press, 2011), pp. 264–265; Cf. Ben Saul. 'Legislating from a Radical The Hague: The UN Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', *Leiden Journal of International Law*, 24:3 (2011), pp. 677–700. See also: Ben Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2006), p. 319: where he writes, 'In national criminal legislation, almost half of States now define terrorism generically (either in simple or composite definitions) although half of States still treat terrorism as ordinary crime. The variation in national definitions precludes the identification of any international customary definition, although generic definition is increasingly common'.

13 Kimberly Prost, 'Extradition: The Practical Challenges', in: Rodrigo Yepes-Enriquez and

Lisa Tabassi (eds), *Treaty Enforcement and International Cooperation in Criminal Matters. With Special Reference to the Chemical Weapons Convention* (The Hague: T.M.C. Asser Press, 2003), p. 202.

14 Louis G. Fields, 'Bringing Terrorists to Justice—The Shifting Sands of the Political Offence Exception', in: Richard B. Lillich (ed.), *International Aspects of Criminal Law Enforcing United States Law in the World Community* (Charlotteville, VA.: Michie Co., 1981), p. 15 (Abstract); Since then, the US–UK extradition treaty has removed the political offence exception.—Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005), p. 136.

15 Fields, 'Bringing Terrorists to Justice', p. 15.

16 Since 2004, extradition for criminal offences has been effectively replaced by the European Arrest Warrant, allowing the surrender of suspected or convicted criminals from one country to another with minimum formalities.—United Nations Office on Drugs and Crime (UNODC), *Handbook on Criminal Justice Responses to Terrorism* (New York: United Nations, 2009), p. 76; Cryer (et al.), *An Introduction to International Criminal Law and Procedure*. 2nd ed., p. 96.

17 In this context, M. Cherif Bassiouni noted: 'Legitimate resistance to oppression and tyranny is an internationally recognized right as a "last resort" when political and judicial avenues of redress have been exhausted. This does not justify, however, indiscriminate, disproportionate and unlawful use of violence or terrorism .... Such matters must be adjudicated preferably by an international body taking into account all factors underlying such acts for purposes of mitigation and aggravation'. Cit. M. Cherif Bassiouni (ed.), *International Terrorism and Political Crimes* (Springfield, Ill.: Charles C. Thomas Publisher, 1975), p. xxi.

18 Matthew Lippman, 'Political Offender Exception in International Extradition Law: Terrorism Versus Human Rights', *International Journal of Comparative and Applied Criminal Justice*, 13: 2 (1989), pp. 45–59 at p. 45 (Abstract).

19 Prost, 'Extradition: The Practical Challenges', p. 209.

20 'Attentat', in German, means making an attempt on a politically important person's life; if successful resulting in 'Politischer Mord' (political murder).

21 Ethan A. Nadelman, *Cops Across Borders. The Internationalization of U.S. Criminal Law Enforcement* (University Park: The Pennsylvania State University Press, 1993), p. 420; The trigger for the 'attentat clause' was the attempt by two Frenchmen to blow up a train carrying Napoleon III in Belgium. France requested their extradition which was first refused by a Belgian court on the basis of the political offence exception. However subsequently the Belgian parliament introduced the 'attentat clause', which made possible the extradition of the two culprits. The clause held that '[t]here shall not be

considered as a political crime or as an act connected with such a crime an attack upon the person of the head of a foreign government or of a member of his family, when the attack takes the form of either murder, assassination or poisoning'; Cit. Abraham D. Sofaer, 'The Political Offence Exception and Terrorism', *Current Policy*, no. 762 (Washington, D.C.: U.S. Department of State, November 1985), p. 3.

22 Cf. James J. Kinneally, III, 'The Political Offence Exception: is the United States-United Kingdom Supplementary Extradition Treaty the Beginning of the End?', *American University Journal of International Law and Policy*, 2:1 (1987), pp. 209–211.

23 Cit. Fred Hendricks, 'Jettisoning Justice. The Case of Amnesty in South Africa', p. 102, http://www.isa-sociology.org/colmemb/national-associations/en/meetings/reports/Southern%20Africa/Chapter%207.pdf. Retrieved 11 August 2011.

24 Cf. Staff Reporter, The Norgaard Principles; cit. *Mail & Guardian* (31 March 1995) www.mg.co.za/article/1995-03-31-the-norgaard-principles. Retrieved 19 May 2015.

25 This is the division introduced by Stephen Schafer in his book *The Political Offender: The Problem of Morality and Crime* (New York: Fee Press, 1974), pp. 380–387.

26 UNODC, Unpublished Report on the Treatment of the Political Offence Exception in International Anti-Terrorism Legal Instruments [ca. 2003], pp. 17–18; For a discussion of the issue see E. Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict* (The Hague: Nijhoff, 1966). She argues that acts of terrorism during armed conflict in struggles for self-determination can be prosecuted as 'grave breaches' or terrorist war crimes. Cit. Peter van Krieken, *Terrorism and the International Legal Order* (The Hague: T.M.C. Asser Press, 2002), p. 221n.

27 Other problems of definition occur such as: who is the 'self' in 'self-determination', what is a 'nation' in 'national liberation', and indeed, who should be considered a 'people'? Does the term 'people', for instance, also apply to indigenous peoples? Neither 'nation' nor 'people' is defined in international law. In practice, self-determination in the UN context has meant freedom from white colonial overseas rule but not liberation from land-based, adjacent foreign rule as in the case of Tibet (from China) or other local non-white rulers dominating indigenous peoples (e.g. Morocco and the Sahrawi Arab Democratic Republic—Polisario—in former Spanish Western Sahara, or Indonesia in Western New Guinea—formerly Netherlands New Guinea).

28 Van Krieken, *Terrorism and the International Legal Order*, p. 221.

29 Annex II. Informal text of articles 2 and 2bis of the draft Comprehensive Convention, prepared by the Coordinator. Article 2. Reproduced from document A/C./6/56/L.9, annex I.B (emphasis in *italics* and underlined added by A.P. Schmid). This text represent the stage of consideration reached at the 2011 session of the Working Group of the Sixth Committee.—Cit. United Nations, *Report of the Ad Hoc Committee established by General*

Assembly resolution 51/210 of 17 December 1996. Sixth session (28 January–1 February 2002). General Assembly. Official Records. Supplement No. 37 (A/57/37), p. 6.

30 Typical for 'Propaganda by the Deed' is a statement by Mikhail Bakunin: 'We must spread out principles, not with words but with deeds, for this is the most popular, and the most irresistible form of propaganda'—Mikhail Bakunin, *Letters to a Frenchman on the Present Crisis* (1870), http://marxists.org/reference/archive/bakunin/works/1870/letter-frenchman.htm. Retrieved 11 August 2011.

31 These three criteria are from Saul, *Defining Terrorism in International Law*, p. 4.

32 Schmid (ed.), *The Routledge Handbook of Terrorism Research*, p. 86.

33 An example of an overly broad definition can be found in David Bloxham and Robert Gerwarth (eds), *Political Violence in Twentieth Century Europe* (Cambridge: Cambridge University Press, 2011), pp. 1–2, where the editors define 'political violence' in this way: '... it encompasses atrocities committed by the state in the form of genocide, but also of torture and extra-legal warfare; and atrocities committed by non-state actors, be they "terrorists" or paramilitary forces vying for political influence or territorial control. It includes violence in revolutionary and counter-revolutionary situations, violence within and outside conventional warfare, and violence committed in the name of ideological causes, both religious and secular. In short, the term "political violence" ... connotes all forms of violence enacted pursuant to aims of decisive socio-political control or change.'

34 Ted Honderich, *After the Terror* (Edinburgh: Edinburgh University Press, 2002), pp. 98–99. Cit. Tamara Meisels, *The Trouble with Terror. Liberty, Security, and the Response to Terrorism* (Cambridge: Cambridge University Press, 2008), p. 33.

35 Adapted from Schmid (ed.), *The Routledge Handbook of Terrorism Research*, pp. 5–6; It should be noted that some forms of political violence listed here can (also) be terroristic; there is a grey area with overlaps depending on context.

36 Max Abrahms, 'Why Terrorism Does Not Work', *International Security*, 31:2 (2006), pp. 42–78.

37 Geoffrey Robertson, 'Fair Trials for Terrorists?', in: Richard Ashby Wilson (ed.), *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005), p. 169.

38 Daniel Fischer, 'Profile: al-Qaeda's Seif al-Adel', *The Telegraph* UK (12 February 2012), http://www.telegraph.co.uk/news/worldnews/al-qaeda/9113446/Profile-al-Qaedas-Seif-al-Adel.html. Retrieved 19 May 2012.

39 Maximilien Robespierre: 'La terreur n'est autre chose que la justice prompte, severe, inflexible: elle est donc une emanation de la vertu'. Cit. Andreas Musloff, *Krieg gegen die Oeffentlichkeit. Terrorismus und politischer Sprachgebrauch* (Opladen, Westdeutscher Verlag, 1996), p. 56.

40 Osama bin Laden, speech released on 29 October 2004, *Jihad and Terrorism Studies Project. http://www.memri.org/%20bin/%20articles.cgi?Page=subjects&Area=jihad&ID=SP81104.*

Retrieved October 2010; Cit. Steve Heitkamp, *Terrorism as Ethnic Antagonism and Violence: A View from Sociology*. Quoted from MS, p. 6.

41 Cit. ABC *News Nightline* (28 July 2005); Cit. Louise Richardson, *What Terrorists Want. Understanding the Enemy, Containing the Threat* (New York, Random House, 2006), p. 87.

42 Cf. Barrington Moore, *The Social Bases of Obedience and Revolt* (London: Macmillan, 1978); Manus I. Midlarsky, *Origins of Political Extremism. Mass Violence in the Twentieth Century and Beyond* (Cambridge: Cambridge University Press, 2011), pp. 39–45.

43 Cit. Frank Gardner, 'Obituary: Osama Bin Laden', BBC *News Middle East* (2 May 2011).

44 Cf. also Jeffry R. Halverson, H.L. Goodall, Jr., and Steven R. Corman, *Master Narratives of Islamist Extremism* (New York: Palgrave Macmillan, 2011).

45 Richardson, *What Terrorists Want*, p. 88.

46 Miguel de Cervantes, *Don Quijote de la Mancha* (1605), http://www.online-literature.com/cervantes/don_quixote/23/. Retrieved 19 May 2015.

47 Nachman Ben-Yehuda, 'Political Assassination Events as a cross-cultural form of alternative justice', *International Journal of Comparative Sociology*, 38:1 (1997), pp. 4–5.

48 Suri Ratnapala, *Jurisprudence* (Cambridge: Cambridge University Press, 2009), pp. 329, 357.

49 Ratnapala, *Jurisprudence*, p. 318.

50 L. Montada, 'Justice and its Many Faces: Cultural Concerns', in: Neil J. Smelser and Paul B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences*, 12 (Amsterdam: Elsevier, 2001), p. 8037.

51 Cit. Ratnapala, *Jurisprudence*, pp. 322–323.

52 Cit. Human Security Network, *Understanding Human Rights. Manual on Human Rights Education* (Graz: Human Security Network, 2003), p. 139.

53 Adapted from: Alex P. Schmid, 'The Concept of Rule of Law', In: Alex P. Schmid and Etihne Boland (eds), *The Rule of Law in the Global Village: Issues of Sovereignty and Universality* (Milan: ISPAC, 2001), p. xi.

54 Amnesty International, *Fair Trials Manual* (London: Amnesty International Publications, 1998), pp. i–v.

55 Evelyne Schmid, 'The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights', *Goettingen Journal of International Law*, 1:1 (2009), p. 30; see also: United Nations, *Digest of jurisprudence of the United Nations and regional organizations on the protection of human rights while countering terrorism* (New York: United Nations, 2003), p. 55, where it is noted: 'Although article 14 of the Covenant is not listed as non-derogable under article 4, the Human Rights Committee (in General Comment No. 29) has concluded that certain aspects of article 14 are obligatory, even in states of emergency: [T]he category of peremptory norms extends beyond the list of non-derogable provisions as given in

article 4, paragraph 2. States parties may in no circumstances invoke article 4 of the covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by … deviating from fundamental principles of fair trial, including the presumption of innocence'.

56 C. Revon, *Terrorism and Political Defence. Deviance et Societé* (Geneva, Faculte de Droit, 1978), NCJRS Abstract.

57 Robertson, 'Fair Trials for Terrorists?', p. 178.

58 Robertson, 'Fair Trials for Terrorists?', p. 174.

59 Amartya Sen, *The Idea of Justice* (London: Penguin Books, 2009), pp. 149–150.

60 Press report, reproduced in PTSS *summary of the German George Marshall Centre* (Garmisch-Partenkirchen, 10 January 2011).

61 UNODC, *Handbook on Criminal Justice Responses to Terrorism*, p. 93.

62 National Security Archive, *State Department Cable says Colombian Army Responsible for Palace of Justice Deaths, Disappearances* (Washington, DC: NSA, 8 October 2009), p. 1.

63 Alex Rodriguez, 'Pakistani criminal justice system proves no match for terrorism cases', *Los Angeles Times* (28 October 2010).

64 Philip B. Heyman, *Terrorism and America. A Commonsense Strategy for a Democratic Society* (Cambridge, Mass.: MIT Press, 1998), p. 122.

65 Cf. Clive Walker and Keir Starmer (eds), *Justice in Error* (London: Blackstone Press, 1993).

66 Kent Roach and Gary Trotter, 'Miscarriages of Justice in the War Against Terrorism', *Penn State Law Review*, 109:4 (2005), NCJRS Abstract.

67 Clive Walker, 'Miscarriages of Justice in Principle and Practice', in: C. Walker and K. Starmer. *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999), p. 33; Cit. Roach and Trotter, 'Miscarriages of Justice in the War Against Terror', p. 1035.

68 Ron Christenson, *Political Trials. Gordian Knots in the Law* (New Brunswick: Transaction Publishers, 1989), p. 10.

69 Kirchheimer, *Political Justice*, p. 46.

70 Kirchheimer, *Political Justice*, pp. 47, 419–420.

71 Charles Montesquieu, *The Spirit of the Laws* (Hafner Classics, 1949); cit. Paavo Kotiaho, *Challenges to Fair Trial in the 'Fight against Terrorism'* (Unpublished paper, n.d.), p. 13.

72 Christopher A. Shields, Kelly R. Damphousse and Brent L. Smith, 'Their Day in Court: Assessing Guilty Plea Rates Among Terrorists', *Journal of Contemporary Criminal Justice*, 22:3 (2006), p. v.

73 Chris Shields, Kelly R. Damphousse and Brent L. Smith, *Assessment of Defence and Prosecutorial Strategies in Terrorism Trials: Implications for State and Federal Prosecutors* (Rockville, MD: NCJRS, 2008), Abstract.

74 Lawfare has been defined as 'the cynical manipulation of legal and judicial systems and human rights law, for purposes other than those for which they were originally enacted, to achieve political ends—a kind of legal equivalent to asymmetric "warfare"'. See also: Zev Krengel, '"Lawfare" is the latest weapon used against Israel', *Mail & Guardian online* (4 February 2011), http://mg.co.za/article/2011-02-04-lawfare-is-latest-weapon-used-against-israel. Retrieved 19 May 2015. The meaning of the term in this chapter and in the Israeli context is not quite the same, although there is some overlap. According to the *Lawfare Project*, an American organisation dedicated to examine this phenomenon, '"lawfare" has three goals: To silence and punish free speech about issues of national and public concern; to delegitimize the sovereignty of democratic states; and to frustrate and hinder the ability of democracies to fight against and defeat terrorism.'

75 Centre on Law and Security, *Highlights from the Terrorist Trial Report Card, 2001–2009: Lessons Learned* (New York: CLS, 2009), p. 14. Based on 828 terrorism prosecutions (235 still pending; 593 resolved indictments). Out of these 593 defendants, 523 were convicted on some charge either at trial or by plea. Conviction Rate: 88.2%. (p. 2).

76 According to figures released on 30 April 2011, the Pentagon had spent at least US$1 trillion prosecuting the wars in Iraq and Afghanistan and defending the US homeland. Cf. Tony Capaccio, 'Pentagon Crosses $1 Trillion Threshold In War On Terror Spending', *Bloomberg News* (21 June 2011).

77 Saul, *Defining Terrorism in International Law*, p. 318.