

**CHALIMBANA UNIVERSITY**

DIRECTORATE OF DISTANCE EDUCATION

PCT 3602: ORGANISED CRIME AND TERRORISM

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# 

# ASSESSMENT STRUCTURE

## Assessment

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Continuous Assessment** | |  |  | **50%** |
|  |  |
| Assignments |  |  | 25% |  |
| Tests |  |  | 25% |  |
| **Final Examination** |  |  |  | **50%** |
| **Total** |  |  |  | **100%** |

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## 

## UNIT 1 HISTORICAL BACKGROUND TO CRIME AND TERRORISM

### 1.1 Introduction

Although the term is not subject to a universally agreed definition, terrorism can be broadly understood as a method of coercion that utilizes or threatens to utilize violence in order to spread fear and thereby attain political or ideological goals. Contemporary terrorist violence is thus distinguished in law from “ordinary” violence by the classic terrorist “triangle”.

For example A attacks B, to convince or coerce C to change its position regarding some action or policy desired by A. The attack spreads fear as the violence is directed, unexpectedly, against innocent victims, which in turn puts pressure on third parties such as governments to change their policy or position. Contemporary terrorists utilize many forms of violence, and indiscriminately target civilians, military facilities and State officials among others. The challenges of countering terrorism are not new, and indeed have a long history.

The term “terrorism” was initially coined to describe the Reign of Terror, the period of the French Revolution from 5 September 1793 to 27 July 1794, during which the Revolutionary Government directed violence and harsh measures against citizens suspected of being enemies of the Revolution. In turn, popular resistance to Napoleon’s invasion of the Spanish Peninsula led to a new form of fighter—the “guerrilla”, which derives from the Spanish word guerra, meaning

“little war” (Friedlander, 1976, p. 52). As a weapon of politics and warfare, however, the use of terrorism by groups can be traced back to ancient times, and as noted by Falk, “in various forms, terrorism is as old as government and armed struggle, and as pervasive” (Falk, 1990, pp. 39, 41).

### 1.2 Objectives

At the end of the unit a student will be expected to:

* Understand the semantic and historical development of the word “terrorism”.
* Analyse the concept and underpinning legal principles of international crimes of terrorism, whether at the national or international level.
* Explain treaty-based crimes relevant for prosecuting acts of terrorism, whether at the national or international level.
* Identify and discuss some of the reasons for, and implications of, the absence of a universally accepted definition of terrorism at the global level.
* Familiarize students with interdisciplinary perspectives (e.g., victimology).

### 1.3 Introduction to different types of crimes

In most situation we face different types of crime because certain crimes are unpredicted. We have a number of crimes that are common and a number of crimes that are not common.

Common crimes include but not limited to:

* Theft
* Burglary
* Lacery
* Extortion
* Assault
* Driving without a licence
* Talking on cell phone whilst driving on non -free handset
* Smoking weed
* Pocketing

All these are common crimes which are nearly committed on a daily basis. The ones which are not common are:

* Murder
* Aggravated Robbery
* Assassination
* Treason
* Human Trafficking

### 1.4 Definition of Crime

Professor (Kulusika, S.E, 2005) defines a crime as an act (or omission or a state of affairs) which contravenes the law and which may be followed by prosecution in criminal proceedings with the attendant consequence, following conviction, of punishment. This definition reveals nothing of the characteristics of acts which are defined as criminal. Indeed the same act may give rise to both criminal and civil liability. A crime is both criminal and civil depending on the gravity of the offence.

In any case, anyone who breach the peace of another and causes any discomfort, they would have committed a crime which is criminal in nature. The breach of peace is taken to be a criminal offence because it amounts to proposing violence.

According to (Kulusika, S.E, 2005) he argues that the preceding definition of crime raises a number of legal issues regarding which acts are or should be criminalized, firstly the definition of crime appears to indicate that criminal acts are committed by reasonable persons. That crime must be intended and the intent to commit the crime has a direct link to the act. However, I do not totally agree with him on a number of issues. Whether sane or insane once a crime has been committed what determines it is the outcome of it. The mitigating factors such as insanity, may not hold. I also agree on the other side that in most cases the people who commits these crime do have an intention of committing a crime.

A crime cannot be committed when you are asleep. Thinking about committing a crime without showing any intention or talking about it would not amount to have having a guilty state of mind.

The guilty state of mind were the heat of passion becomes the driving force to commit a crime.

**1.5 Who is a criminal?**

One may classify criminals based on the crimes they have committed: murderers, rapists, burglars, robbers, thieves, etc. But there are a number of defects with this kind of classifications. For example, the classification ignores the fact that the crimes for which people are arrested, charged, prosecuted and convicted are not the same as the crimes they actually committed. Even among criminals who are said to have committed similar crimes, say of theft, there are differences among them. These differences may be in respect of (a) demographic characteristics, such as age and marital status, (b) educational status, and (c) criminal career patterns. Criminals will always have a criminal mind. They would desire to commit that crime with impunity.

Criminal have both the actus reus and malice aforethought so it is important to understand that crime is a felony.

### 1.6 Parties to a crime

Not all crimes may have an accomplice or an accessory to the crime. Some crime will only require the principal. All the parties to a crime are accomplices. For example, A decides that she wants V killed. She encourages D to perform the murder. B supplies D with a knife to perform the murder, C supplies A with information regarding V’s movements, E drives D and F to V’s home and acts as lookout, F assists D to kill V by holding him while D stabs him and G, V’s discontented butler, shouts encouragement at D and F as they attack V. All seven parties are accomplices to the murder of V but only D is the perpetrator of the offence.

When two or more persons take part in the commission of an offence, they are regarded as jointly participating in effecting the commission of the offence. They are described as parties to the offence. There may be some differences, in degree only, in the role each party played in bringing about the prohibited consequence. The concern of the criminal law, under circumstances of this sort, is to assess the role of the parties and to determine what contribution did each party played. Section 21 (Cap, 87) of the laws of Zambia creates four (4) categories of perpetrators to a crime, namely:

* Those who actually commit the offence,
* Those who enable or assist in the commission of the offence,
* Those who aid or abet the commission of the offence, and
* Those who may not be present at the place of the offence but ‘counsel’ or ‘procure’ another or others to commit an offence.

### 1.7 Abuse of office

This kind of an offence is one of a crime that is committed by those in both public and private office. It involves the office bearer to disregard the laid down procedures on how he or she ought to conduct business on behalf of government or the organization they represent. Abuse of may take different forms ranging from one awarding his relatives contracts without a declaration of interest or disclosure or getting money which was not authorised by other the relevant offices, or where you use your office to advantage yourself, like giving bursaries to all your children, nephews etc.

### 1.8 Definition of Corruption and Terrorism

What is Terrorism? According to (Parker and Sitter 2016) Terrorism is defined as

“premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience ...” according to (O’Brien, 2012) he postulate that Terrorism, then, is a tactic, a particularly violent form of political communication that depends heavily on modern means of communication, such as television and the Internet, to send a message to some audience in the hope that it will affect their emotions and change their behaviour. What do terrorists hope to achieve by their violence?

Corruption is an offence that deals so much with morality. This kind of a crime is committed when a person decided to induce another for peculiar advantage to themselves with a view of gaining a certain benefit. Corruption is committed everywhere both in public and private institutions. Chadwick, (1996) defined corruption as graft offence that is committed in a more complicated way without one noticing it. This is non-violence offence that can take place anywhere and anytime.

## SUMMARY

This unit has addressed some fundamental ideas about the nature of modern terrorism. Foremost is the definition of this violent and politically motivated activity that stresses the concept of “propaganda by deed. “Terrorism is a way to send a message through the mass media to different audiences. What are the intended purposes behind these messages and what effects did the terrorists hope to achieve by sending them

**Self-Assessment Exercise.**

Now you will be introduced to an exciting case study.

You are now an Investigator who is currently working for Amazon Globe World as Security Manager. You have received a tip from one of your workmates that few of the employees within the company have been planning to join the Jihad group as part of their social belonging. These employees have been meeting quietly with the leaders of this group within town.

You receive a docket on this case which you have been asked to investigate.

## UNIT 2 DEFINITIONS AND TERMINOLOGIES OF SPECIALISED CRIMES

### 2.0 Introduction

As far as organized crime is concerned, the EU defines it for the first time in 1998 with a Joint Action (1998/245/JHA) which states:

***a criminal organization shall mean a structured association, established over a period of time, of more than two persons, acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities.***

### 2.1 Learning Outcomes

The student is expected to explain some of the terminologies at the end of this unit. The student will be expected to:

* To expunge the concepts of organised crimes, white collar crime, embezzlement and human trafficking
* Discuss the evolution of organised crime over time.
* Explain the global crime of organised in the modern times
* Discuss how crime has grown and pose a serious threat to the global world if left unchecked

### 2.2 Organised Crime

There are numerous definitions of organised crime, which vary widely in their scope and much academic research is focused on the issue of definition. Over time organised crimes has become an ever growing problem because this type of crime takes the shapes of enterprise crimes, where people who are involved know the whole set out and been involved in illegal activities.

You may be surprised that with time, this type of crime will be the order of the day because we lack a considered effort from all the majority stakeholders around within the law enforcement agencies. These are serious curtails because they work as a group or two, three or more. They have a serious connection within the government cycles and private sector.

They do not keep money within countries that can easily question its source rather they will send this money to their offshores company were it is easier to do business.

There are numerous definitions of organised crime, which vary widely in their scope and much academic research is focused on the issue of definition. Over the past decades, academics have conceptualised ‘organised crime’ in terms of groups, networks, as well as ‘enterprise crime’. The lack of clear and accepted criteria in defining the term has led to rigorous debates in the field. On the one hand, legal rigidities and strict “black and white” criteria have left little room for nuanced studies. On the other hand, definitions, such as ‘serious crime’ developed by the UK Home Affairs Committee have narrowed the focus, leaving out a wide range of phenomena that from an analytical (social) point of view constitute ‘organised crime’. In some cases the lack of clear definition has led to the broadening of the scope of the concept by policy priorities and political agendas which have indiscriminately added many new criminal activities to its range.

A clear definition of organized crime has proven elusive so much so that The Organized Crime Control Act of 1970 itself did not define it. Among the first functional definitions of organized crime was that put forth by the United Nations Convention Against Transnational Organised

Crime1 , which defined “an organised criminal group” in Article 2(a) as “***a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain, directly or indirectly, a financial or other material benefit***.” Among the most important things to note from this definition is the idea that organized criminal groups may vary widely in terms of their size, being comprised of as few as three people. Beyond merely defining organized crime, a difficult task unto itself, scholars have developed schemas to understand various attributes of organized crime

### 2.3 Human Trafficking

Using the organized crime problem frame, scholars began to decipher between different types of organized crime groups engaging in human trafficking, but with an understanding that defining human trafficking as “organized crime” can mean different things. “Traffickers may be individual entrepreneurs, small ‘mom and pop’ operations, or sophisticated, organized rings. There is little consensus among those who have studied the problem as to the proportions of each of those types; nor with respect to their level of organization and sophisticated.

Human trafficking is an illegal movement of people by a trafficker from one destination to another for a purpose of getting a monetary reward for this work. These people who are trafficked are normally given an impression that were they are going, they will be given good jobs, earn good money, they live a luxury life etc.

1 2000

When the Trafficking Victims Protection Act (TVPA) was passed in 2000, it explicitly stated that human trafficking involves transnational organized crime: “Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide

Again you will note that this type of a crime takes a similar pattern to an organised crime because it involves groups acting together.

Finally, Albanese2 frames a typology around what he calls a “***criminal enterprise approach***.” His typology includes recruiters, transporters, and exploiters who may be organized differently and who all have different goals. Although these typologies of human trafficking groups are useful starting points, they are less helpful as empirical tools to classify organized crime groups engaged in human trafficking in the United States. This study builds on these extant typological frameworks, and proposes the “5-S” typology, which is an empirical tool to classify the groupbased characteristics of organized crime groups engaged in human trafficking.

The 5-S typology is then employed to examine the group-based characteristics of human trafficking organizations. There is minimal research to date that examines the various types of groups that are engaged in human trafficking and whether or not there are patterns regarding the organizational composition of these groups and how group-level characteristics may predict the type of trafficking in which the groups engage. This analysis uses the 5-S typology to answer questions about how human trafficking groups vary in their size, scope, structure, sophistication, and self-identification

### 2.4 White Collar Crime

According to Prof (Sutherland, H. 1983) He defines white collar crime as a crime of the community which is non-violent. When you hear someone talking about white collar crime it is not different from these high tech crimes which involves the criminal enterprise form. White collar crimes are often committed by those who are in power or the great mafias who supplier guns, or those who are into drugs, money laundering, human trafficking itself etc. The terminology white collar crime has an understanding that these crimes are committed smartly most especially by people who are well educated. These white collar crime may time to be noticed that actually something illegal was going on. In most cases of corruption, people will only discover about it when the person has retired or if they were politicians you will discover once they leave office.

2 2011

### 2.5 Embezzlement

Embezzlement ((Justin, T.P 1989) is a crime that takes the sharp or form were someone has misappropriated funds for their own benefit. It is a crime offence committed by one or more people. At times the person committing such crime will divert the use of the funds for personal gain, or he will actually convert property into his own personal gain and use.

Public funds been diverted for the intended projects for personal gains and stripe of the public benefit for that property. Money will channelled for personal gain instead of benefiting the community at large (Akbar, 1999).

The embezzlement and misappropriation or other diversion of property by a public official, which criminalizes the fraudulent conversion of public money or property or any other thing of value by a person who had a lawful possession of it. The author of the criminal conduct in this case is entrusted with authority and control over the property by virtue of his or her position as a public official and “used/converted/misappropriate” this property in violation of the terms of his or her mandate

## Conclusion

The concept of money laundering refers precisely to the act of disguising the illicit origins of money derived from crime, and corruption more specifically. The need for money laundering arises out of the desire on the part of the perpetrators of the original crime to conceal that a financial gain (in any form such as money, real estate or luxury items, etc.)— was obtained as a result of a criminal activity. The desire to ensure that such financial gain appears to have been obtained through legal means is an overriding concern. In so doing, the perpetrators are able to avoid attracting untoward attention.

## Self-Assessment Exercise

Welcome back to our case study. Now, you will be expected to put much more effort. Remember that in unit 1 we dealt with a case that was connected to computer compromise were Amazon was requested to provide investigation services.



## UNIT 3 UPRISING OF TERRORISM

### 3.0 Introduction to terrorism

When did terrorism begin? Is it a new development, something that appeared on the world stage very recently? According to many young people, the answer to the latter question is “yes.

“Terrorism began with a series of attacks staged by al Qaeda, or the followers of Osama bin Laden, against American targets in the United States and abroad, the most notorious of which were the 9/11 massacres at the World Trade Center and the Pentagon. Television news shows that suicide car bombings have become an almost daily occurrence on the streets of Baghdad and other Iraqi cities since the collapse of Saddam Hussein’s dictatorship in spring 2003.

### 3.1 Objectives

The objective of this unit is to trace the history of terrorist activities through different styles and phenomenon. Quite clear with this development, terrorists have also advanced in their quest to attack countries. These Terrorists have a different pattern of attacks.

### 3.2 EARLY HISTORY

The roots of terrorism are ancient. They are to be found in a certain tradition of Greek civilization and, perhaps more important, in the violence of several religiously inspired groups in Jewish, Muslim, Christian, and Hindu traditions.

### 3.3 The Greeks

In the case of the Greeks, the tradition is that of tyrannicide. The philosopher Aristotle and his successors understood tyranny to be the worst form of government. A tyrant is a ruler who seizes and then holds power illegally, usually on the basis of physical force. Such an individual has little concern for the public good or the interests of the community as a whole. The tyrant rules in his own interests or in the interests of his immediate family and coterie of friends (a modern example would be Saddam Hussein), becoming rich and powerful at the expense of the public. The rule of a tyrant is characterized by its extreme cruelty. Tyrants torture and kill suspected opponents (real or imagined) because it gives them pleasure and because they are intensely suspicious. Because tyrants develop an insatiable need to be flattered, after a while they tend to lose all sense of reality. They are almost literally out of control. Under these circumstances, what can be done to bring an end to tyranny and restore orderly or lawful government? According to Aristotle, tyranny invites conspiracies aimed at bringing it to an end. The conspiracy might be a small group of plotters, such as the Roman senators who killed the Roman dictator Julius Caesar in 44 B.C or Emperor Caligula in the following century. Single individuals also often seek to end tyranny by killing the tyrant

### 3.4 The Zealots

Among the oldest of such groups found in the historical record are the Sicarii, a small sect of Zealots, who were active in the Jewish struggle to end Roman rule in Palestine and whose activities were chronicled by the Roman historian Josephus. According to Josephus the Zealot movement was founded by Judah the Galilean, an early rabbi who organized a brief uprising against Roman direct rule and taxation. The Zealots believed that they were living in the End Times, a period immediately preceding the divine intervention that would put an end to human history. Before the latter could happen, the Zealots believed, the world needed to be purified and purged of its corruptions. Judah the Galilean had taught that Jews could be ruled only by God, not by secular governments like that of Rome. In practical terms, this meant bringing an end to Roman rule in Jerusalem, site of the Holy Temple, and in Judea more generally. How could this be accomplished? The Romans were the foremost military power in the world and rulers of a vast empire

### 3.5 The Assassins

Similar reasoning was at work with the Assassins. The now commonly used word assassin comes from the Arabic word for “***hashish eaters,”***a term that Christian Crusaders heard applied to this sect during the eleventh century A.D. The Assassins were a messianic sect within the larger community of Shi’ite Muslims that believed that the original vision of the prophet Mohammed had been corrupted by the largely Sunni leaders of medieval Islam. In order to restore the vision and prepare the way for the arrival of the Mahdi, the Holy Redeemer, the Muslim community (or umma) needed to be purified. The founder of the Assassins, Hassan

Sibai, or the “Old Man from the Mountain,” recognized that his followers were few but his enemies were many, and they could employ powerful military forces.

### 3.6 Hindus

Killing in order to achieve a religious purpose was not limited to the world’s three major monotheistic religions. In India, a Hindu sect known as the Thugs believed that they had to sacrifice another Hindu in order to satisfy Kali, the goddess of death. To perform this act of ritual sacrifice, members of the sect would befriend someone traveling through their region of India. At a time when the man’s trust had been won, a Thug would take out a piece of rope and strangle the person to death. The British put an end to this practice when they colonized India. Other places in Asia abounded with secret societies whose members killed strangers for a variety of secular and religious purposes

### 3.7 The French Revolution And After

The Jacobins The term terrorism entered the English language at the time of the French Revolution, the world-shaking event that brought down the French monarchy at the end of the eighteenth century. The “***Reign of Terror***,” or regime ***de la terreur***, refers to a time (1793–1794) during the revolution when the Jacobins, a radical group headed by a lawyer named Maximilien Robespierre, took control of the French government. Robespierre and the Jacobins announced that they had uncovered lists of traitors, mostly foreigners, who intended to betray the revolution to its enemies. These traitors needed to be eliminated for the revolution to succeed and for a new world based on “liberty, equality, and fraternity”to be achieved .Accordingly, the Jacobins used their control of the Committee of General Security and the Revolutionary Tribunal to arrest and execute thousands of these perceived subversives. In summer 1794, the Jacobins were toppled from power because of their excesses and Robespierre was sent to the guillotine.

### 3.8 Criminalization of Terrorist Activities

Terrorism is an act of sabotage with impunity caused by an individual or group of people who have ganged up together to control certain illegal enterprise, fight for religious recognition or war of trade. Again, the people who are involved in such acts are known as Terrorists? To terror simply means to destroy or damage. These concepts are interrelated and interconnected to each other. (Sanaz, G. 1999)

## Introduction to Terrorists Activities

These acts of sabotage started way back in the medieval time were you could see subjects wanting to overthrow the sitting king by use of terrorising his kingdom. The roots of terrorism are ancient. They are to be found in a certain tradition of Greek civilization and, perhaps more important, in the violence of several religiously inspired groups in Jewish, Muslim, Christian, and Hindu traditions.

## Definition of a Terrorist

Although the term is not subject to a universally agreed definition, terrorism can be broadly understood as a method of coercion that utilizes or threatens to utilize violence in order to spread fear and thereby attain political or ideological goals. Contemporary terrorist violence is thus distinguished in law from “ordinary” violence by the classic terrorist “triangle”

However, one could define a terrorist as an individual who with intent cause to destroy, damage, injure, massacre people, and property without any lawful excuse or justification. Why are we saying lawful excuse? Should there be lawful excuse anyway? To qualify my statement, we could say lawful in the context were a person during the time of war or state of emergency or in desperate moments, he had the blessing to destroy property or people who were causing war or problems. The lawful aspect comes with permission to do so. Remember that during war, you cannot ask for permission to protect the lives of people. The Rwanda genocide can be a good case study.

## UNIT 4 NATURE AND COMPOSITION OF TERRORIST GROUPING

### 4.0 Introduction

This section introduces students to the United Nations designation and targeted sanctions regimes against the Taliban, Al-Qaida, ISIL and affiliated individuals and groups under Security Council resolution 1267 (1999) and is aimed at promoting discussion on the strengths, weaknesses and challenges associated with the counter-terrorism approach of the United Nations under that resolution and its successive resolutions

### 4.1 Learning Outcomes

At the end of this unit, students should be able to:

1. Explain the nature and composure of terror groupings
2. Identify the two major groups
3. Discuss the terror victims
4. Explain the media platforms terrors target

### 4.2 Two Major Groups of Terrorists

There are two primary non-state groups, namely the Taliban and Al-Qaida, which have been designated “terrorist” organizations by the Security Council. In 1999, following the refusal of the Taliban to surrender Osama Bin Laden and his associates for their roles in the August 1988 attacks on United States Embassies in Kenya and the United Republic of Tanzania, under its resolution 1267 the Security Council designated as terrorist groups the Taliban and associated individuals and entities, through targeted travel and arms embargos, and financial/ assets sanctions. In 2011, under Security Council resolution 1989, the Council divided the so-called “Consolidated List” of individuals and entities associated with the Taliban and Al-Qaida into two separate lists: the “Al-Qaida, or 1988 List”, and the Taliban List, which contains those individuals and entities associated with the Taliban who are deemed to present an ongoing threat to the peace and security of Afghanistan. Finally, under Security Council resolution 2253 (2015), the Al-Qaida List was further extended to include ISIL and Al Nusrah Front (ANF).

The global Al-Qaida network has remained resilient and in several regions poses a greater threat than ISIL. Despite being under military pressure, Al-Qaida in the Arabian Peninsula (AQAP) increasingly serves as the communications hub for Al-Qaida as a whole. In North and West

Africa, Al-Qaida affiliates and groups loyal to ISIL increased their activities; while in East Africa, Al-Shabaab has sustained its dominance over ISIL groups. In South Asia, Al-Qaida affiliates and ISIL are taking advantage of the volatile security situation in Afghanistan. Although the recapture of Marawi City by the Philippine authorities was a military success, the ability of ISIL affiliates to maintain a temporary stronghold within the city was a propaganda victory with potential long-term consequences for the region.

The global flow of foreign terrorist fighters has continued to slow, with only individual cases being reported. However, the marked reduction of territorial control by ISIL in Iraq and the Syrian Arab Republic will force many foreign terrorist fighters to make a choice between joining other groups or leaving the region. With the adoption of its resolution 2396 (2017), the Security Council has taken a significant step towards meeting the challenges posed by returnees and relocators.

In implementing their obligations under the sanctions regimes established against Al-Qaida, ISIL and other affiliated groups designated by the Security Council under resolution 1267 (1999), many States have established a range of domestic mechanisms for giving effect to the United Nations lists of designated individuals, groups or entities. Often, this will involve the adoption of the lists, at a national level, or the use of nationally-based designations of individuals or entities appearing on them.

In addition, in countering the financing of terrorism, States are obliged under Security Council resolution 1373 (2001), operative para. 1(c), to freeze, without delay, funds, other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; or of entities they own, control or direct, as well as of persons and entities acting on their behalf or direction, and to prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts (operative para. 1(d)). As a result, many States have in place, at a national level, legal and institutional frameworks for the designation of individuals or groups their governments consider to be terrorists, that are on the United Nations list, or are designated for national or multilateral (e.g., European Union) purposes. The use of such designation mechanisms potentially raises a number of implementation challenges for States, and rightsbased concerns.

### 4.3 Terrorist Victimization: Victims of Terrorism

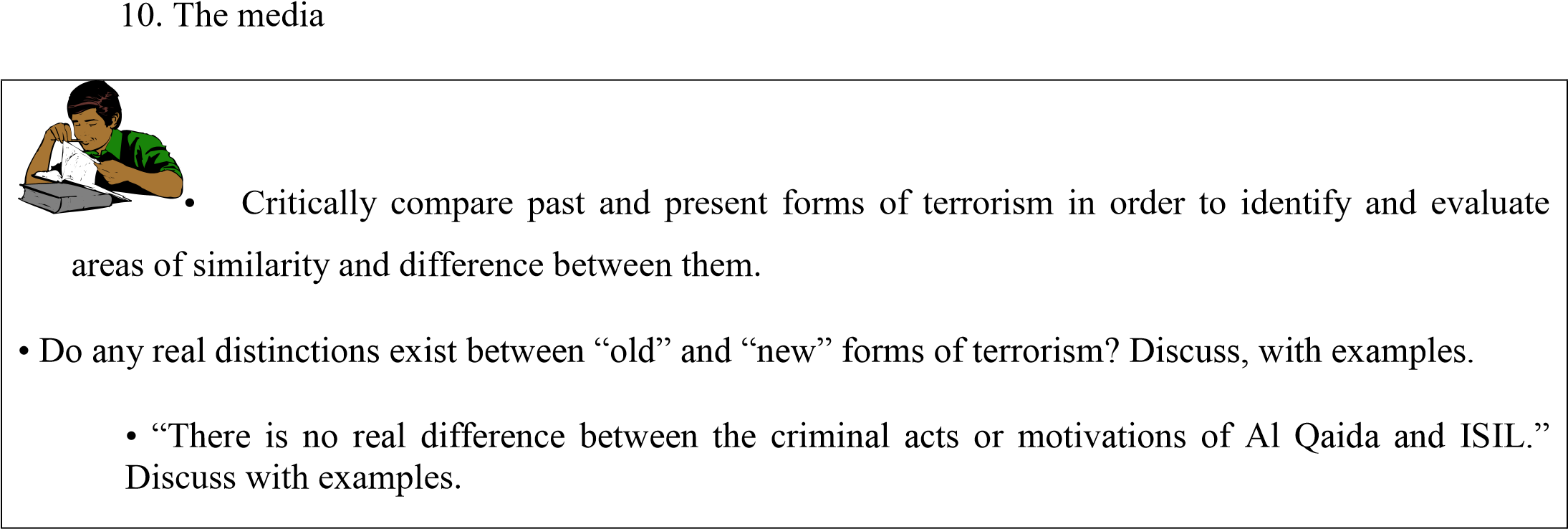
Victimization can be understood as the action of singling someone out for cruel or unjust treatment. This section explores terrorist victimization, for example, the factors that come into play when targeting the future victims of a planned terrorist attack.

Terrorist attacks can be broadly categorized into two categories: focused and indiscriminate. Historically, terrorism has largely fallen under the former category. As noted earlier, terrorist attacks were used as an instrument for politically motivated action, which targeted specific members of governments or political actors for the purposes of attaining a particular political aim (Schmid, 2006, p. 3; Turkovic´, 2006, p. 55). Such attacks involved some element of participation in the conflict, albeit indirectly, between the terrorist group and the adversary.

However, contemporary terrorism is characterized by an increasing frequency and magnitude of indiscriminate violence. Victims of terrorist attacks are not usually specifically selected on the basis of their individual characteristics, but are “chance” victims who happen to be in the wrong place at the wrong time. These victims serve as an instrument designed to influence third party actors (Šeparović, 2006, p. 20). It is partly this element of unpredictability and randomness of victim selection that gives terrorism its modern power—“a power enhanced manifold by the media’s display and replay of acts of victimization” (Schmid, 2006, p. 9). This evolution of the focus of terrorism reflects a shift from individual terror to a dimension of mass murder and psychological warfare (Schmid, 2006, p. 9). In this sense, terrorism attempts to coerce a population and or its leadership by inciting fear of being hurt (Šeparović, 2006, p. 21)

## Ten Terrorist Audiences

1. The adversaries of the terrorist organization (usually one or several governments)
2. The constituency/society of the adversary
3. The targeted direct victims and their families and friends
4. Others who have reason to fear that they might be the next targets
5. “Neutral” distant audiences
6. The supporting constituency of the terrorist organization
7. Potential sympathetic sectors of domestic and foreign audiences.
8. Other terrorist groups rivalling for prominence
9. The terrorist and his or her organization



## UNIT 5 TREATMENT OF TERROR SUSPECT DURING AN INVESTIGATION

### 5.0 Introduction

In the aftermath of a terrorist attack the authorities, particularly the police and other investigating agencies, often are under enormous pressure from the public and from political leaders—to identify those responsible and bring them to justice without delay. The plot will often have been carried out by a highly sophisticated and secretive organization, making the identification and arrest of those responsible particularly challenging. Quickly identifying those responsible and gathering evidence against them can be exceedingly difficult

### 5.1 Learning Outcome

At the end of this unit, a student should be able to:

1. Explain the provision of the law regarding the treatment of suspects and their rights during an investigation
2. Discuss the constitutional provision of the presumption of innocence
3. Explain the due process of a fair hearing
4. Evaluate the international, regional and national laws concerning terrorists

### 5.2 Right to Fair Treatment

The right to a fair trial is of crucial importance in the investigation, trial and punishment of terrorist offences. Safeguarding a fair trial is not a process which starts at the door of the court house, when the trial commences. A criminal justice system is a complex system comprised of a number of mutually interdependent actors: the police or other investigators, the prosecution, the defence, the judiciary and also the public. In order to reach a “fair trial” all actors have to fulfil their role and responsibilities in a proper and professional way from the start of the investigation.

Fundamental problems of fairness which develop prior to court proceedings risk harming (and can even render impossible) a fair trial before the trial itself has even begun. For instance, failure to provide an individual with prompt access to a lawyer puts at risk the fundamental fairness of the eventual proceedings against the individual. Similarly, prejudicial comments by, for example, members of the judiciary or other public officials implying that a suspect is guilty before that suspect has faced trial may call into question the fairness of any proceedings eventually brought. Thus fair trial guarantees are all of crucial importance both before court proceedings as well as in the course of such proceedings, if the guarantee of a fair trial is to be respected in practice.

The present unit will first explore a number of overarching principles of international human rights law which must guide the investigation of any criminal offence, including terrorist offences. These principles include the presumption of innocence and equality before the law. They also include rules governing the treatment of juvenile suspects. Respect for these principles is crucial both during the investigative and trial phases of proceedings, and the material in the present unit will serve as an overall introduction to these principles. The chapter then thematically addresses a range of specific areas concerning the investigation of terrorist offences and examines the application of human rights law in each of these different contexts

### 5.3 Presumption of Innocence

The presumption of innocence is fundamental to fair criminal proceedings. It must be respected not only during the trial but throughout the entirety of the investigation of a criminal offence. The presumption of innocence is enshrined, either expressly or implicitly in the major universal and regional human rights treaties as an aspect of the right to a fair trial. Article 14(2) of ICCPR provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”

The Inter-American Commission on Human Rights warns that the presumption of innocence “can be considered violated where a person is held in connection with criminal charges for a prolonged period of time in preventative detention without proper justification, for the reason that such detention becomes a punitive rather than precautionary measure that is tantamount to anticipating a sentence”.

Adverse comment by public officials: An important obligation deriving from the presumption of innocence is a restriction on adverse public comment by State officials in respect of a person suspected or charged with a terrorist offence.

### 5.4 Presumption of innocence and media coverage

A difficult issue arises with regard to media coverage portraying a suspect or accused as guilty before the matter has been decided by a court. On the one hand, media campaigns prejudging the outcome of criminal proceedings may create a climate in which the objective, detached collection and examination of the evidence in favour and against a suspect’s guilt becomes very difficult. This is particularly so where a case is to be tried before lay judges or a jury. On the other hand, media coverage of criminal justice, and particularly of an issue as important to the life of a nation as terrorism investigations and trials, is protected by the right to freedom of expression.

### 5.5 Case study. The Krause case

In the Krause case, the European Commission on Human Rights addressed the situation of public officials making statements with regard to terrorist suspects under investigation. Ms. Krause was detained on remand in Switzerland pending trial for terrorist offences. A terrorist commando composed of German and Palestinian terrorists had hijacked a plane. The commando demanded the release of various prisoners, including Ms. Krause, a woman connected to a German terrorist group.

The Swiss Federal Minister of Justice was asked on television how his Government intended to react. In a first interview, he stated that “Petra Krause cannot be considered a simple Palestinian freedom fighter. She has committed common law offences relating to the use of explosives. She will stand trial in autumn as a remand detainee. The fight against terrorism cannot be conducted by releasing terrorists.” In a second television interview he declared that Ms. Krause was linked to several explosives incidents, “she has to stand trial—I do not know the judgement. Terrorism cannot be fought by renouncing the rule of law”.

Ms. Krause complained to the European Commission on Human Rights that these statements violated the presumption of innocence. The Commission stressed that the presumption of innocence would be violated where a public official declared that a suspect is guilty of an offence before a court has established guilt. At the same time, authorities will not violate the presumption by informing the public about ongoing investigations, about arrests, about confessions made by suspects.

The Commission noted that the Swiss Federal Minister of Justice could have chosen his words more carefully. However, he had made clear that Ms. Krause still had to stand trial. In the second interview, he had specifically stated that he did not know what the outcome of the court proceedings would be. The Commission therefore concluded that the presumption of innocence had not been violated.

**5.6 ECHR, Krause v.Switzerland, Merits, Application No. 7986/77, Judgement of 3 October 1978**.

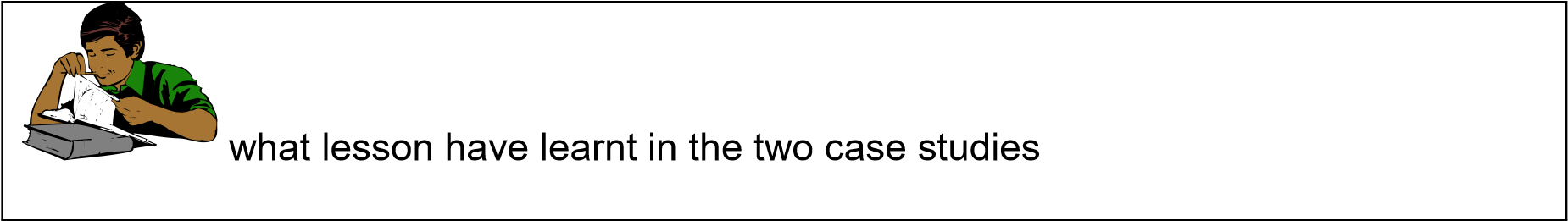
As highlighted by the Krause case, public officials must be very careful in speaking to the media regarding an ongoing terrorism case to avoid statements that could be seen as violating the presumption of innocence. To some extent, there is also a positive obligation on the authorities to ensure that, even in the absence of prejudicial statements from public officials, media coverage does not become as inflammatory as to prejudge the possibility of a fair trial taking place. Where a court is trying an accused in relation to whom there has been sustained highly damaging media coverage, the court must consider first whether it is possible to ensure a fair trial, notwithstanding such publicity. The authorities may consider measures including imposing appropriately tailored and proportionate reporting restrictions on the trial, ensuring that witnesses, lay judges or jurors have not seen, or been unduly influenced by, adverse media coverage and considering a change of venue for the trial. If, despite such measures, a fair trial is not possible it will be necessary, as a last resort, to stay proceedings

### 5.7 Case study. The Birmingham Six case

In 1974 bombs placed in two pubs in Birmingham, England, caused 21 deaths and injured more than one hundred persons. Six men suspected by the police of being supporters of the terrorist organization Irish Republican Army (IRA) were arrested the same evening as they were about to board a ferry that would have taken them to Northern Ireland . In police custody some of the men made statements amounting to confessions. At trial, they retracted these statements, claiming that while in detention they had been subjected to various forms of coercion, including beatings, sleep and food deprivation, threats of being shot and threats to harm their families if they did not make a confession. Evidence of their confessions was admitted at trial. The jury found the six men guilty relying on the expert forensic evidence provided by the prosecution witness (controverted by the defence expert witness) and the evidence of police interviews which included the confessions provided by the defendants. Appeals courts upheld the convictions.

In the following years, investigative reporters and lawyers convinced of the Birmingham Six’s innocence brought to light evidence suggesting police fabrication and suppression of evidence which cast significant doubts on the police’s version of how the interviews and confessions occurred. Also the forensic evidence relied on at trial was shown to have been significantly inaccurate.

In 1990, the Birmingham Six applied to have their cases reopened and the convictions overturned. The prosecution did not oppose this application. The appellate court hearing the case found that the evidence regarding the confessions to the police interviews and the forensic evidence were both so unreliable that the convictions were unsafe and unsatisfactory. The six men were released and each awarded compensation in the range of £840,000 to £1 .2 million. As of today, the real perpetrators of this terrorist act, one of the worse to take place in the United Kingdom, have not been identified. R. v. McIlkenny and others, 93 Cr .App. R. 287, Judgement of 27 March 1991



## UNIT 6 DETENTION OF TERRORIST SUSPECTS

### 6.0 Introduction

Detention of one form or another often forms a central element of States’ criminal justice response to terrorism. Imprisonment is by far the most frequent sanction for persons found guilty of terrorism offences. Detention prior to conviction may be used to prevent a suspect facing trial absconding, intimidating witnesses or otherwise tampering with the evidence. Detention is sometimes used outside the context of the criminal justice process, as a security measure, to protect the public or national security by controlling or limiting an individual’s movements

**6.1 Learning Outcomes**

Upon completion of study of this unit, a student should be able to:

1. Explain the use of force by the state law enforcement agencies
2. Discuss what amounts to obstruction of justice
3. Explain what torture is, inhumane degradation and prohibition of ill treatment

### 6.2 Use of Force to Effect an Arrest or Detention

Detention is also used to secure the presence of a person subject to extradition proceedings. In all these circumstances, the scope for the misuse of the power to detain is significant and the consequences for the individual of such misuse substantial. For this reason, international human rights law carefully limits the extent to which an individual may be deprived of his or her liberty and subjects it to procedural safeguards. The limits of the power to detain, and safeguards controlling its permissible use, will be explored in the present chapter. This unit deals with additional human rights questions relating to the imprisonment of terrorist offenders following conviction and the imposition of a custodial

Law enforcement officials are permitted to use force in order to carry out an arrest. Such use of force must meet the twin requirements of “necessity” and “proportionality”. In the words of article 3 of the Code of Conduct for Law Enforcement Officials (A/RES/34/169) adopted by the General Assembly, “law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”

Regarding the use of firearms, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials state that “law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.” (Principle 9, emphasis added). The Basic Principles add that “exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles” (principle 8).

Arrest, detention, deprivation of liberty and restrictions on freedom of movement

The terms “arrest” and “detention” carry slightly different meanings from one legal system to the other. Human rights treaties use the concept of “deprivation of liberty” as the overall concept.

Examples of “deprivation of liberty” include, for instance, police custody, remand detention, imprisonment after conviction, house arrest, involuntary hospitalization, internment of captured combatants or civilians during armed conflict, and also include being involuntarily transported.

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the United Nations General Assembly (A/RES/43/173) defines

“arrest” as “the act of apprehending a person for the alleged commission of an offence or by the action of an authority”. A “detained person” is defined as “any person deprived of personal liberty except as a result of conviction for an offence”. The Body of Principles defines “imprisonment” as deprivation of liberty as a result of conviction for an offence.

For the sake brevity, in this publication the term “detention” will be used to refer to all forms of deprivation of liberty, in the context of criminal justice and outside, from the moment of arrest to (and including) the serving of a sentence of imprisonment . This corresponds to the use of the term by the United Nations Working Group on Arbitrary Detention.

In addition to the right to liberty of person, international human rights law also protects liberty of movement. Everyone lawfully within the territory of a State enjoys, within that territory, the right to move freely and to choose his or her place of residence. International human rights law (e .g., article 12 of ICCPR) authorizes the State to restrict freedom of movement to protect national security, public order, public health or morals and the rights and freedoms of others. To be permissible, restrictions must have a basis in law, must be necessary in a democratic society for the protection of these purposes, and must be consistent with all other rights recognized in the Covenant. There is no bright line criterion to distinguish limitations on freedom of movement from “deprivation of liberty”, but deprivation of liberty involves more sever

Where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused, failing which a clear issue of torture or inhuman or degrading treatment arises.52 The burden of proof is on the authorities to explain and justify any injuries sustained. For this reason, keeping careful records in relation to those in detention is crucial. Medical examination of those detained is important both to prevent abuse and also to protect the officials involved in detention against false allegations. Any injuries suffered by an individual in detention must be fully investigated and, if necessary, criminal proceedings brought against those responsible.

International human rights law imposes a number of obligations in relation to the arrest and detention of any individual, whether in the context of criminal justice proceedings or in other circumstances.

Legality and non-arbitrariness Arrest and detention of any individual must satisfy the requirements of legality and non-arbitrariness.

### 6.3 Legality

The arrest and detention of an individual must be authorized by domestic law. Domestic law must be sufficiently precise to ensure that all those affected by its application can foresee the circumstances in which they may be lawfully arrested or detained, and the remedies available against deprivation of liberty, if need be with appropriate advice

Even where the legal basis for detention is clear, the law must not confer overbroad discretion on police officers or other public officials as to the way in which it can be exercised. In its Concluding Observations on Trinidad and Tobago (2000), the Human Rights Committee stated:

“The Committee is concerned about chapter 15-01 of the Police Act which enables policemen to arrest persons without a warrant in a large number of circumstances. Such a vague formulation of the circumstances in the Act gives too generous an opportunity to the police to exercise this power.”53

Thus, even where the general legal basis for detention is clear, the law must provide a reasonably precise framework within which decisions to detain can be exercised.

### 6.4 Prohibition of Torture

All of the major international and regional human rights systems enshrine the prohibition on torture, inhuman and degrading treatment. This prohibition is absolute and may not be derogated from in any circumstances. This is made clear in article 2(2) of the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which is, in turn, reflective of customary international law. It states:

“*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture*

The Code of Conduct for Law Enforcement Officials adopted by United Nations General

Assembly in Resolution 34/169 (1979) equally states that “no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment, nor may any law enforcement official invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.”

For its part, the Committee against Torture has also stated that, just as the prohibition against torture, the prohibition on inhuman and degrading treatment “must be observed in all circumstances”. ECtHR has equally held that not only torture, but also inhuman or degrading treatment are prohibited in absolute terms, and that no derogation from this prohibition is possible even in the event of a public emergency threatening the life of the nation.

In the context of armed conflict, torture of a prisoner of war or of a civilian in times of war constitutes a grave breach of Geneva Conventions III and IV and a war crime. Also in situations of non-international armed conflict, torture and “outrages upon personal dignity, in particular humiliating and degrading treatment”, are prohibited at all times according to common article 3 of the Geneva Conventions of 1949.

Elements of torture: Article 1(1) of the Convention against Torture defines torture as

* Any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person.
* For such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.
* When such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

## SELF ASSESSMENT

1. Explain the current international, regional and national position on torture for all suspects
2. Under what circumstances can force be used by law enforcement agencies

## SUMMARY

This unit concerns itself with detention of terrorist suspects. We have discussed the use of force to effect arrest and the prohibition of torture to suspects.

## UNIT 7 INTERNATIONAL TRANSFER OF PERSONS IN COUNTERING TERRORISM

### 7.0 Introduction

In the context of counter-terrorism efforts it is often necessary for States to cooperate with one another in apprehending, investigating, prosecuting and punishing those responsible for acts of terror. International cooperation in criminal matters is essential to the success of global counterterrorism efforts. This is also emphasized by the United Nations Resolutions and Conventions Against Terrorism

### 7.1 Learning Outcome

At the end of this unit, a student should to be able to:

* Explain procedures of transfer of persons under international
* Discuss procedural safeguards regarding deportation and extradition
* Explain the principle of non-refoulement

### 7.2 Counter -Terrorism Cooperation

International counter-terrorism cooperation, in the form of information exchange between intelligence and law enforcement agencies of different States, mutual legal assistance or extradition, raises many significant human rights issues. The present unit will focus on the human rights aspects of the transfer between States of persons suspected, accused or convicted of terrorist offences.

International human rights law requires that any transfer of a terrorism suspect or convict from one State to another be based on law and follow the procedures set forth in law. Moreover, and equally importantly, there is a right to an effective review mechanism for any decision to expel, deport or extradite. Article 13 of the International Covenant on Civil and Political Rights provides:

“An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

The African Commission on Human Rights has also emphasized in a number of cases in which “ouster legislation” had prevented individuals from accessing courts in order to challenge the lawfulness of deportation decisions that it is a fundamental requirement of international human rights law that persons to be deported have access to the courts in order to challenge the legality of their removal

### 7.3 Case studies on procedural safeguards regarding deportation and extradition

The Giry case:

Following a two-day visit to the Dominican Republic, Mr.Giry, a French citizen, went to the airport of Santo Domingo to take a flight back to his place of residence, Saint- Barthélemy (Antilles), a French overseas territory . There law enforcement officers, acting on information that he was sought on drug trafficking charges by the United States of America, took him to the police office at the airport and, after less than three hours, forced him on a plane to the United States, where he was arrested and charged with drugs offences . He was subsequently sentenced to 28 years imprisonment by a United States court. The government of the Dominican Republic justified this process on the ground that Mr. Giry was internationally sought on charges of drug trafficking, and therefore constituted a national security danger for the Dominican Republic, which, as any sovereign State, was entitled to take the necessary steps to protect national security, public order, and public health and morals (art . 4 .3) .

The Human Rights Committee observed that extradition comes within the scope of article 13 of ICCPR. It further noted that Mr .Giry was neither afforded an opportunity to submit the reasons against the decision to remove him to the United States nor to have his case reviewed by the competent authority. The Human Rights Committee “stressed that States are fully entitled vigorously to protect their territory against the menace of drug dealing by entering into extradition treaties with other States. But practice under such treaties must comply with article 13 of the Covenant, as indeed would have been the case, had the relevant Dominican law been applied in the present case” (Art . 5 .5)

### 7.4 Principles of Non Refoulment

The principle of non-refoulement is a fundamental principle of international law which has its origin in refugee law. The term comes from the French “refouler”, which can be translated as

“pushing back” or “turning back” a person. The principle of non-refoulement obliges States not to extradite, expel or otherwise remove a person to another State where that person faces a real risk of being subjected to arbitrary killing, torture or other serious violations of his or her human rights. The non-refoulement principle is contained in international refugee law (section 7.3.1), in international human rights law (section 7.3.2) and also in the universal counter-terrorism legal instruments (section 7.3.3)

The office of the United Nations High Commissioner for Refugees (UNHCR) has called the principle of non-refoulement “the cornerstone of asylum and of international refugee law”.121 In a Note on the Principle of Non-Refoulement, UNHCR explains: “Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger.”

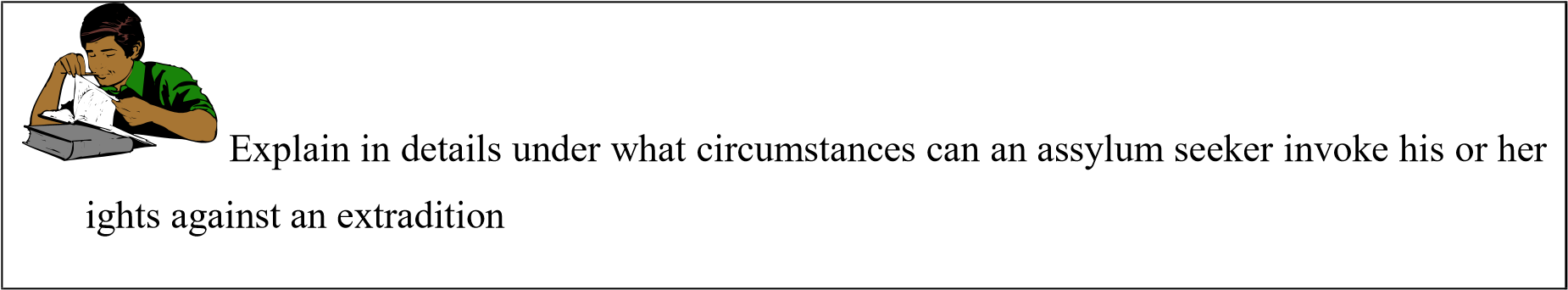
Article 33 of the 1951 Convention Relating to the Status of Refugees (together with its 1967

Protocol) provides that no State party shall expel or return (“refouler” in the French version of the Convention) “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

**7.5 Who is a refugee?**

A refugee is defined in article 1(A) (2) of the Refugee Convention (read alongside the 1967

Protocol Relating to the Status of Refugees). It states that a refugee is “***a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution***”. Article 1(1) of the OAU Convention Governing Specific Aspects of the Refugee Problem in Africa defines the concept of refugee in the same terms. Refugees are entitled to the rights conferred upon refugees by the 1951 Convention. Given the declaratory nature of refugee status, the principle of nonrefoulement applies even where individuals have not had their status as refugee formally recognized by a host state or its courts, including, in particular, where individuals are asylumseekers



## UNIT 8 SEIZURE OF PROPERTY

### 8.0 Introduction

The requesting State may ask for premises in the foreign State to be searched and any relevant evidence seized and transferred to it. Compatibility with national law. Often, different provisions of the national law of the requested State, concerning, for example, issuing a warrant to enter private premises, will often regulate, and in some cases limit, the scope of the mutual assistance that may be provided.

### 8.1 Learning Outcome

At the end of the study of this unit, students must be able to:

* Explain the process of seizure of property at international level
* Discuss what procedures are to be followed during the search
* What role does Interpol play
* Discuss the issue of jurisdictions of courts and the effect of court documents

### 8.2 Grounds for the measure

The reasons for the request must be specified. In order to justify the request, it is advisable to take the law of the requested State into account, concerning both the applicable procedure and the basic conditions for search and seizure. Thus, the following wording can be used: “The requested State shall execute requests for search and seizure and delivery of any material to the requesting State if the request includes the grounds for which the search and seizure is requested with regard to the legislation of the requested State.” Such a justification for the request thus requires a minimum knowledge of the rules governing search and seizure in the requested State

### 8.3 Depending on the Legal System and on The Grounds, It Will Be Necessary To

**Establish:**

**Probable and reasonable cause**.

1. In most States the possibility of exercising procedural acts is given on the basis of established facts and/or specific standards. For example, in countries with common law systems, the requirement of justification is of particular importance, where any infringement of a person’s rights, and notably search and seizure, is normally conditional on the existence of a warrant issued by the authority with local jurisdiction. The issuing of that warrant is subject to showing the proportionality of the measure to the offence in question; the need for

it; and that there are reasonable grounds for believing that there is material on the premises that is likely to be of substantial value in the investigation of the offence; or,

1. A simple presumption. In some systems, such probable and reasonable cause can be presumed if the request for search and seizure emanates from a judge or a court in the requesting State

### 8.4 Describing the Measures to be taken and the Items to Seize

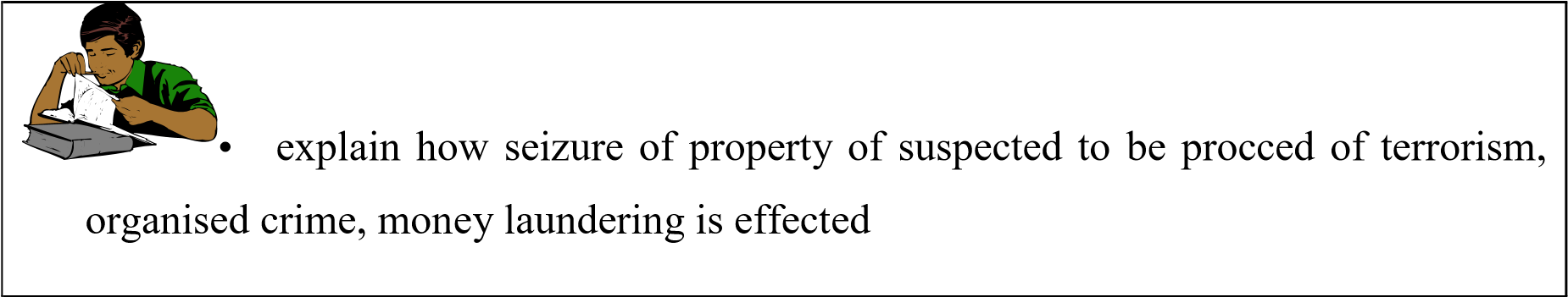
An exact description of the evidence sought and of the premises in which the investigations will be carried out is required. In certain cases, in particular where certain details cannot be provided when the request for mutual assistance is drafted, the inclusion in the request of the requesting judicial authority’s contact information enables the requested authority to request, at any time, any additional information it feels may be necessary or to suggest any additional measures to the requesting State.

### 8.5 Authorities to Be Present During the Search

In most States, it is unlikely that foreign police or officers will be authorized to participate in the search, other than as observers. In fact, although all legal systems recognize the right to carry out searches and seizures under specific conditions, it may be that certain States have never had to use such powers on behalf of another State in the absence of evidence leading to the belief that the national law has been violated. One should then examine in depth the multilateral or bilateral treaties that regulate how this type of mutual assistance may be executed.

If the authorities concerned wish to carry out coordinated searches, it is useful to call upon liaison magistrates, if possible (only some States have liaison magistrates), as they can contribute to the preparation of such operations. Thus, preparatory meetings with the requesting magistrate, the It may be useful for the requesting State to ask the competent authority of the requested State to provide an attestation or official report:

1. Indicating what the seized item is;
2. Mentioning every official having been entrusted with the seized item; and (c) Indicating the conditions in which the item is being held.



## UNIT 9 ASSEST RECOVERY AND FUGITIVE ARREST

### 9.1 Introduction

Whether pursuing assets through criminal or non-conviction based (NCB) confiscation or through proceedings in a foreign jurisdiction or through a private civil action, the objectives and fundamental process for recovery of assets are generally the same

### 9.2 Learning Outcomes

At the end of study of this unit, a student should be able to:

* Discuss the criminal procedure of enforcing court orders
* How asset recovery is done at international level
* Explain the importance of international cooperation
* Identify assets and the procedure of returning stolen assets

### 9.3 Under Cover Operations

Collection of Intelligence, Evidence and Tracing Assets Evidence is gathered and assets are traced by law enforcement officers under the supervision of or in close cooperation with prosecutors or investigating magistrates, or by private investigators or other interested parties in private civil actions. In addition to gathering publicly available information and intelligence from law enforcement or other government agency databases, law enforcement can employ special investigative techniques. Some techniques may require authorization by a prosecutor or judge (for example, electronic surveillance, search and seizure orders, production orders, or account monitoring orders), but others may not (for example, physical surveillance, information from public sources, and witness interviews). Private investigators do not have the powers granted to law enforcement; however; they will be able to use publicly available sources and apply to the court for some civil orders (such as production orders, on-site review of records, prefiling testimony, or expert reports

### 9.4 Securing the Assets

During the investigation process, proceeds and instrumentalities subject to confiscation must be secured to avoid dissipation, movement, or destruction. In certain civil law jurisdictions, the power to order the restraint or seizure of assets subject to confiscation may be granted to prosecutors, investigating magistrates, or law enforcement agencies. In other civil law jurisdictions, judicial authorization is required. In common law jurisdictions, an order to restrain or seize assets generally requires judicial authorization, with some exceptions in seizure cases

### 9.5 International Cooperation

International cooperation is essential for the successful recovery of assets that have been transferred to or hidden in foreign jurisdictions. It will be required for the gathering of evidence, the implementation of provisional measures, and the eventual confiscation of the proceeds and instrumentalities of corruption. And when the assets are confiscated, cooperation is critical for their return. International cooperation includes “informal assistance,” mutual legal assistance (MLA) requests, and extradition. Informal assistance is often used among counterpart agencies to gather information and intelligence to assist in the investigation and to align strategies and forthcoming procedures for recovery of assets. An MLA request is normally a written request used to gather evidence (involving coercive measures that include investigative techniques), obtain provisional measures, and seek enforcement of domestic orders in a foreign jurisdiction

### 9.6 Court Proceedings

Court proceedings may involve criminal or NCB confiscation or private civil actions (each described below and in subsequent chapters); and will achieve the recovery of assets through orders of confiscation, compensation, damages, or fines. Confiscation may be property based or value based. Property-based systems (also referred to as “tainted property” systems) allow the confiscation of assets found to be the proceeds or instrumentalities of crime—requiring a link between the asset and the offense (a requirement that is frequently difficult to prove when assets have been laundered, converted, or transferred to conceal or disguise their illegal origin). Valuebased systems (also referred to as “benefit” systems) allow the determination of the value of the benefits derived from crime and the confiscation of an equivalent value of assets that may be untainted. Some jurisdictions use enhanced confiscation techniques, such as substitute asset provisions or legislative presumptions to assist in meeting the standard of proof

### 9.7 Enforcement of Orders

When a court has ordered the restraint, seizure, or confiscation of assets, steps must be taken to enforce the order. If assets are located in a foreign jurisdiction, an MLA request must be submitted. The order may then be enforced by authorities in the foreign jurisdiction through either (1) directly registering and enforcing the order of the requesting jurisdiction in a domestic court (direct enforcement) or (2) obtaining a domestic order based on the facts (or order) provided by the requesting jurisdiction (indirect enforcement). This will be accomplished through the mutual legal assistance process

## 9. 8 Asset Return

The enforcement of the confiscation order in the requested jurisdiction often results in the confiscated assets being transferred to the general treasury or confiscation fund of the requested jurisdiction (not directly returned to the requesting jurisdiction). As a result, another mechanism will be needed to arrange for the return of the assets. If UNCAC is applicable, the requested party will be obliged under article 57 to return the confiscated assets to the requesting party in cases of embezzlement of public funds or laundering of such funds, or when the requesting party reasonably establishes prior ownership. If UNCAC is not applicable, the return or sharing of confiscated assets will depend on domestic legislation, other international conventions, MLA treaties, or special agreements (for example, asset sharing agreements). In all cases, total recovery may be reduced to compensate the requested jurisdiction for its expenses in restraining, maintaining, and disposing of the confiscated assets and the legal and living expenses of the claimant.

Assets may also be returned directly to victims, including a foreign jurisdiction, through the order of a court (referred to as “direct recovery”). A court may order compensation or damages directly to a foreign jurisdiction in a private civil action. A court may also order compensation or restitution directly to a foreign jurisdiction in a criminal or NCB case. Finally, when deciding on confiscation, some courts have the authority to recognize a foreign jurisdiction’s claim as the legitimate owner of the assets.

If the perpetrator of the criminal action is bankrupt (or companies used by the perpetrator are insolvent), formal insolvency procedures may assist in the recovery process.

A number of policy issues are likely to arise during any eff orts to recover assets in corruption cases. Requested jurisdictions may be concerned that the funds will be siphoned off again through continued or renewed corruption in the requesting jurisdictions, especially if the corrupt official is still in power or holds significant influence. Moreover, requesting jurisdictions may object to a requested country’s attempts to impose conditions and other views on how the confiscated assets should be used. In some cases, international organizations such as the World Bank and civil society organizations have been used to facilitate the return and monitoring of recovered funds.

### 9.9 Legal Avenues for Achieving Asset Recovery

The legal actions for pursuing asset recovery are diverse. They include the following mechanisms:

* Domestic criminal prosecution and confiscation, followed by an MLA request to enforce orders in foreign jurisdictions;
* NCB confiscation, followed by an MLA request or other forms of international cooperation to enforce orders in foreign jurisdictions;
* Private civil actions, including formal insolvency process;
* Criminal prosecution and confiscation or NCB confiscation initiated by a foreign jurisdiction (requires jurisdiction over an offense and cooperation from the jurisdiction harmed by the corruption offenses); and
* Administrative confiscation.

The availability of these avenues, either domestically or in a foreign jurisdiction, will depend on the laws and regulations in the jurisdictions involved in the investigation, as well as international or bilateral conventions and treaties.

### 9.10 Criminal Prosecution and Confiscation

When authorities seeking to recover stolen assets decide to pursue a criminal case, criminal confiscation is a possible means of redress. Practitioners must gather evidence, trace and secure assets, conduct a prosecution against an individual or legal entity, and obtain a conviction. After obtaining a conviction, confiscation can be ordered by the court. In some jurisdictions, particularly common law jurisdictions, the standard of proof for confiscation will be lower than the standard required for obtaining the conviction. For example, “balance of probabilities” will be needed for confiscation, whereas “beyond a reasonable doubt” will be required for a conviction. Other jurisdictions apply the same standard to both conviction and confiscation. Generally, unless enhanced confiscation provisions apply, confiscation legislation will provide for confiscation of proceeds and instrumentalities that are directly or indirectly traceable to the crime.

International cooperation, including informal assistance and requests for MLA, will be used throughout the process to trace and secure assets in foreign jurisdictions, as well as to enforce the final order of confiscation.

A benefit of criminal prosecution and confiscation is the societal recognition of the criminal nature of corruption and the accountability of the perpetrator. Further, penalties of imprisonment, fines, and confiscation serve to deter future offenders. In addition, criminal investigators generally have the most aggressive means of gathering information and intelligence, including access to data from law enforcement agencies and financial intelligence units (FIUs), use of provisional measures and coercive investigative techniques (such as searches, electronic surveillance, examination of financial records or access to documents held by third parties), as well as grand juries or other means of compelling testimony or evidence. And, in most jurisdictions, MLA is provided only in the context of criminal investigations. However, significant barriers may exist to obtaining a criminal conviction and confiscation: insufficient evidence; lack of capacity or political will; or the death, flight, or immunity of the perpetrator. Furthermore, the conduct giving rise to the request may not be a crime in the jurisdiction where the relief is being sought.

## 9. 11 Non-Conviction Based Confiscation

Another type of confiscation gaining traction throughout the world is confiscation without a conviction, referred to as “NCB confiscation.” NCB confiscation shares at least one common objective with criminal confiscation—namely, the recovery and return of the proceeds and instrumentalities of crime. Likewise, deterrence and depriving corrupt officials of their ill-gotten gains are other societal equities realized by NCB confiscation.

NCB confiscation differs from criminal confiscation in the procedure used to confiscate the assets. A criminal confiscation requires a criminal trial and conviction, followed by the confiscation proceedings; NCB confiscation does not require a trial or conviction, but only the confiscation proceedings. In many jurisdictions, NCB confiscation can be established on a lower standard of proof (for example, the “balance of probabilities” or “preponderance of the evidence” standard), and this helps ease the burden on the authorities. Other (mainly civil law) jurisdictions require a higher standard of proof— specifically, the same standard required to obtain a criminal conviction.

## 9. 12 Private Civil Action

Authorities seeking to recover stolen assets have the option of initiating proceedings in domestic or foreign civil courts to secure and recover the assets and to seek damages based on torts, breach of contract, or illicit enrichment. The courts of the foreign jurisdiction may be competent if a defendant is a person (individual or business entity) living or incorporated in the jurisdiction (personal jurisdiction), if the assets are within or have transited the jurisdiction (subject matter jurisdiction), or if an act of corruption or money laundering was committed within the jurisdiction. As a private litigant, the authorities seeking redress can hire lawyers to explore the potential claims and remedies (ownership of misappropriated assets, tort, disgorgement of illicit profits, contractual breaches). The civil action will entail collecting evidence of misappropriation or of liabilities based on contractual or tort damages. Frequently, it is possible to use evidence gathered in the course of a criminal proceeding in a civil litigation. It is also possible to seek evidence with the assistance of a court prior to filing an action.