

**Holding Armed Rebel Groups and Terrorist Organisations Accountable  
for Crimes Against Humanity and War Crimes, and for ‘Terrorist  
Offences’ under International Anti-Terrorist Conventions**

Duncan Brown,  
Project Researcher,  
Åbo Akademi Institute for Human Rights

## CONTENTS

<i>Introduction</i>	4
<b>PART A: LEGAL DEVELOPMENTS RELATING TO INTERNATIONAL CRIMINAL LIABILITY FOR ARMED GROUPS AND TERRORIST ORGANISATIONS UNDER INTERNATIONAL CRIMINAL LAW</b>	<b>6</b>
<b>I. The Development of war crimes and crimes against humanity</b>	<b>6</b>
(i) The importance of Nuremberg in establishing a precedent	6
(ii) Post Nuremberg Developments	9
(a) Crimes against humanity developing separate existence to war crimes	9
(b) Consolidation and expansion of criminal liability for war crimes and serious violations of international humanitarian law	11
<i>The Four Geneva Conventions and Common Article 3 (1949)</i>	
<i>Additional Protocol II to the Geneva Conventions (1977)</i>	
<i>Summary of the requirements for liability for war crimes, as laid down by the United Nations International Criminal Tribunals for Rwanda and the Former Yugoslavia</i>	
(iii) Rome Statute Establishing The International Criminal Court	15
<b>II. Multilateral and regional Conventions entailing individual criminal responsibility for members of ‘terrorist Organisations’</b>	<b>17</b>
(i) Global Anti-Terrorist Conventions	17
(ii) Regional Anti-terrorist conventions	19
<b>PART B: PRACTICAL APPLICATIONS</b>	<b>21</b>
<b>I. Some practical examples of liability of armed groups and terrorist organizations for war crimes, and the problem of distinguishing non-international armed conflict from internal disturbance/ terrorist activity</b>	<b>22</b>
(i) Post-Apartheid South Africa	24
(ii) Columbia	26
(iii) Somalia	27
(iv) Northern Ireland	29
<b>II. Some examples of liability of armed groups for crimes against humanity</b>	<b>32</b>
(i) Sierra Leone	33
(ii) Columbia	35
(iii) Somalia	35

III. The notion of “terrorism”: a workable or useful legal concept?	36
(i) The confusing nature of the term in international humanitarian law	36
(ii) The potential injustice of using the notion of ‘terrorism’ to hold ‘terrorist organizations’ accountable under the multilateral and regional anti-terrorist conventions	38
(iii) Alternative bases for liability	41
<i>Crimes against humanity</i>	41
<i>Serious violations of international humanitarian law</i>	43
<i>Domestic criminal law</i>	44
<i>Conclusion</i>	44

## *Introduction*

Soon after the Second World War international criminal law began to shift its focus from international armed conflict between sovereign States towards events taking place within states. This shift in focus was brought about for two reasons. Firstly, the proliferation of civil wars, otherwise known in lawyer speak as ‘non-international’ or ‘internal armed conflict’, was accompanied by increasingly brutal targeting and terrorizing of civilian populations by government forces and armed groups within states. It quickly became apparent that the victims of such conflicts needed some form of legal protection.<sup>1</sup>

Secondly, and in addition to such conflicts, there was an increasing realization that citizens needed protection against their own governments during peacetime. The United Nations, human rights groups and journalists have helped expose atrocities committed in this context. One example is the extermination of approximately 1.3 million Cambodians at the hands of Pol Pot’s Khmer Rouge. This extremity was carried out, by and large, by officials of the ruling State party, or by those acting at their behest.

Non-state actors can of course also violate human rights during peacetime, and this is often in the form of what has come to be known as ‘acts of terrorism’: where a group seeks to subvert a government or intimidate a population, but does not have the military capacity to engage in protracted conflict against the State. When the level of violence reaches a certain level of intensity and duration non-state actors are often labeled ‘armed rebel groups’ rather than ‘terrorists’.<sup>2</sup>

In this paper the term ‘armed group’ is chosen rather than ‘armed rebel group’. In a growing number of countries the State has either collapsed altogether, or the groups fighting within it are struggling against each other rather than against governmental authority. This being so, the term ‘armed rebel group’ is clearly inapposite in certain situations. For instance, in Somalia, armed clans are not rebelling against the government (there is no real government) but are fighting each other. For these reasons the terms ‘armed group’ and ‘terrorist organisation’ will be used throughout, though one should bear in mind that they are not used in a legal sense, but merely as descriptive terms in conformity with their generally accepted meaning in the English language.

---

<sup>1</sup> Despite the added legal protection provided by the post war development of war crimes and crimes against humanity, it was not until the creation of the *ad hoc* tribunals for Rwanda and the Former Yugoslavia that international criminal law was applied to punish the those guilty of war crimes and crimes against humanity in practice.

<sup>2</sup> Having said this, and as we shall later see in our examination of the situation in Columbia in the second half of this paper, certain organizations have been labeled as both ‘terrorist organizations and ‘armed rebel groups’.

There are presently two operational international criminal tribunals addressing past violations, and one can be fairly certain that, as well as the coming into force of the International Criminal Court Statute on July 1<sup>st</sup> 2002, more will become operational in the near future.<sup>3</sup> Both present and future tribunals, as well as the International Criminal Court itself, are be or will be prosecuting multiple human rights violations committed by non-state actors.<sup>4</sup> Broadly speaking, a large number of violations can now be attributed to what can be described as ‘armed groups’ and ‘terrorist organisations’, hence the emphasis herein.

The focus of this paper, as the title suggests, is on ways in which armed groups and terrorist organizations can be held criminally accountable for war crimes, crimes against humanity and violations of the multilateral and regional anti-terrorist conventions.<sup>5</sup> Whereas crimes against humanity and war crimes have developed along side each other, and are therefore often analysed and treated together, the multilateral and regional anti-terrorist conventions have generally been developed and considered separately. The International Criminal Court Statute includes war crimes and crimes against humanity as ‘core crimes’, but makes no mention of ‘crimes of terrorism’ (as defined by the relevant conventions).

The paper is split into two parts: Parts A & B. “Part A” examines and explains how war crimes, crimes against humanity and ‘terrorism’ have evolved as legal categories, whereas Part B seeks to consider the practical applications of the law as it stands. Part A is intended to be more descriptive and explanatory, whilst Part B seeks to be more analytical, and attempts to critically examine the law and elucidate how it would apply to armed groups and terrorist organizations in concrete situations.

Many textbooks and articles on international criminal law merely regurgitate the law with no effort whatsoever made to apply it to real life events. The result is that the reader only has an idea as to what the law might mean in the abstract. For this reason, “Part B” will include specific country examples of how the law relating to war crimes, crimes against humanity and ‘terrorist organisations’ could *potentially* be applied in practice. The use of the word “potentially” is not accidental. It is used for two reasons: firstly, political

---

<sup>3</sup> The up and running United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda are soon to be joined by the Special Court for Sierra Leone, which is expected to be operational by the end of the year. Negotiations are still ongoing between the United Nations and the Cambodian government for the setting up of a Tribunal to address past human rights violations by the Khmer Rouge regime between 1975 and 1979. Strictly speaking, the Sierra Leone Special Court is not to be an international criminal tribunal, but a quasi-international criminal tribunal (it is to be made up of both Sierra Leonian judges and lawyers and international staff).

<sup>4</sup> Whilst a large number of the atrocities in Yugoslavia, Rwanda and Sierra Leone were carried out by non-State actors, the Khmer Rouge in control of the Cambodian State at the time of the relevant acts.

<sup>5</sup> The question of whether and, if so, when, armed groups and terrorist organizations can be held accountable for genocide is not discussed in this paper. It should be noted, however, that both armed groups and terrorist organizations may in certain circumstances be liable for genocide. Modern weaponry and technology has provided the opportunity for a small armed or terrorist group to obtain and utilize weapons that could destroy cities (perhaps even countries). If an armed group or terrorist organization manage to successfully carry out such an attack with intent to destroy, in whole or in part, a national, ethnic, racial or religious group then it would ipso facto constitute genocide.

realities dictate that in a number of the examples given it is improbable that those responsible for such crimes will ever be held criminally accountable; secondly, in the examples chosen, certain legal technicalities have been conveniently overlooked for the sake of simplicity.<sup>6</sup> The country examples selected are South Africa, Columbia, Somalia, Northern Ireland and Sierra Leone. Considerable attention is devoted to the distinction between protracted armed conflict, where humanitarian law and the laws of war applies, armed conflict and terrorist activity that falls under domestic criminal law. Mention of September 11<sup>th</sup> will be made with regard to crimes against humanity. It is hoped that the attempt to apply the law to what has taken place in these countries does not result in factual or legal inaccuracy. If in some respects the assertions made happen to be erroneous or misguided, then at least some thought has been given as to how the plethora of legal rules constructed could potentially apply in contemporary examples of violence and oppression.

In the final section of “Part B”, it will be argued that the concepts of ‘terrorist acts’ and ‘crimes of terror’ are not only too emotive and politically charged to be used as credible tools to ensure accountable, but are also unnecessary. Instead, perfectly adequate existing mechanisms to hold armed groups and terrorist organisations criminally accountable may be drawn upon: these being, crimes against humanity, international humanitarian law/war crimes and domestic criminal law.

## **PART A: LEGAL DEVELOPMENTS RELATING TO INTERNATIONAL CRIMINAL LIABILITY FOR ARMED GROUPS AND TERRORIST ORGANISATIONS UNDER INTERNATIONAL CRIMINAL LAW**

### **I. The Development of War Crimes and Crimes Against Humanity**

#### (i) The Importance of establishing Nuremberg as a precedent

For the greater part of the 19<sup>th</sup> century and the early part of the 20<sup>th</sup>, international law was thought of in solely or primarily in terms of consensual agreements between sovereign States: States being seen as the subjects of international law, citizens the objects of protection. As objects, citizens had neither rights nor duties. Thus, prior 1945, it is unsurprising to find there was no precedent for holding individuals accountable under international criminal law.<sup>7</sup> Criminal prosecution was not explicitly provided for in any of the international conventions relating to international armed conflict prior to 1945. Instead, it was merely stated that certain acts were ‘forbidden’ or ‘prohibited’, with no

---

<sup>6</sup> For example, the principles of legality and non-retroactivity and the status of customary international law has been overlooked in the discussing whether international humanitarian law could be said to have applied to the conflict in Northern Ireland.

<sup>7</sup> At the end of World War I the Treaty of Versailles provide for prosecution of Kaiser Wilhelm I for “*supreme offences against international morality*”. However the trial never took place, largely as a result of the refusal of the Netherlands government to extradite him. Prosecutions and trials of Turks involved in the slaughter of over one million Armenians was provided for under the Treaty of Sevres. But this idea was later scrapped, and replaced with an amnesty in the Treaty of Lausannes, which provided a blanket amnesty to all those [for details as to the reasons behind this see Bassiouni “*Crimes Against Humanity*” (1<sup>st</sup> edition 1992), p.168-169 & 174.

explicit mention made of the criminal sanction.<sup>8</sup> In other words, States were left to decide whether or not it was expedient to conduct prosecutions. This meant more often than not those who breached the laws of war went unpunished, though there are records of a number of selective domestic war crimes prosecutions in the late nineteenth and early twentieth centuries.<sup>9</sup>

At the end of the First World War it was agreed that the German Kaiser and other alleged German war criminals were to be handed over for trial before the Allies but, for a variety of reasons, such trials were never conducted.<sup>10</sup> In the aftermath of the horrors of the Second World War the Allies did not make the same mistake. The unprecedented calamities, miseries and atrocities caused by the Nazi regime, led the Allies to conclude that Hitler's surviving henchmen must be held to account for their actions before an International Military Tribunal (the "IMT"). The Nuremberg trials proved to be of unprecedented historical and legal significance, representing a milestone in the creation, development and enforcement of international criminal law.

Individual heads of State and high-ranking officials were held criminally before an international tribunal for the first time in modern history. Crucially, the category of crimes against humanity was created, attracting individual criminal responsibility by virtue of Article 6(c) of the IMT Statute:

CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal whether or not in violation of the domestic law of the country where perpetrated<sup>11</sup>

Unlike war crimes, for which there had been previous domestic legal recognition and a number of selective prosecutions, the concept of crimes against humanity was virtually unknown before 1945.<sup>12</sup> The laws of war, (as progressively codified in the 1864 and 1907 The Hague Conventions and 1929 Geneva Convention) were international instruments aimed at protecting citizens falling under the control of foreign occupying or enemy powers in international armed conflicts. For this reason the laws of war did not

---

<sup>8</sup> For example 1907 Hague Convention provided that certain acts are "*prohibited*" or "*forbidden*". See, for example, articles 28 & 47 [Laws and Customs of War on Land, Annex to the Convention Regulations Respecting the Laws and Customs of War on Land (Hague IV), The Hague, 18<sup>th</sup> October 1907]

<sup>9</sup> For example, the United States set up war crimes tribunals in the aftermath of the Spanish-American War and the occupation of the Philippines, and tried and also convicted a U.S Confederate Prisoner of War camp commandant for war crimes. See Bassiouni C, *supra* footnote 7, examples at pages 198-199

<sup>10</sup> See details at fn. 7

<sup>11</sup> Article 6(c), Agreement For the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8<sup>th</sup> August 1945, 8 U.N.T.S 279.

<sup>12</sup> The term had only been used once previously: in a joint declaration by Russia, France and Great Britain in 1915, where massacres of Armenians under Turkish controlled territory were condemned as "*crimes against civilization and humanity*". Also, the preamble to the 1907 Hague Convention stated that the inhabitants and belligerents remain under the protection of the law of nations, as they result from [inter-alia] "*...the laws of humanity*". However it was only at Nuremberg that the concept of crimes against humanity was first utilised as a legal concept, properly so-called

apply to civil or internal conflicts.<sup>13</sup> Interference in the internal affairs of the European powers was frowned upon, though this of course did not prohibit the very same powers invading and carving up the rest of the world. Strict notions of sovereignty meant that the way in which States treated their own citizens within their own borders was not considered to fall within the ambit of international law.

The drafters of the Nuremberg Statute looked to the concept of crimes against humanity to fill the gap. Undoubtedly the inclusion of crimes against humanity in the Statute was motivated by a desire on the part of the Allies to ensure that the Nazis did not escape responsibility for the large scale atrocities perpetrated on German territory against German nationals (particularly the persecution of the Jews).<sup>14</sup> The definition of crimes against humanity extended to any of the enumerated acts “*committed against any civilian population*”, thus filling the *lacunae* created by the previous notions of State sovereignty.<sup>15</sup> However, the Tribunal stopped short of holding that crimes against humanity could be committed during peacetime. It did so on the grounds that article 6(c) of the Nuremberg Statute requires crimes against humanity be committed “*in execution of or connection with any crime within the jurisdiction of the Tribunal*”, in other words, in connection with ‘crimes against peace’ and ‘war crimes’. For this reason, crimes perpetrated against Jews and others *prior* to the outbreak of the War were held to fall outwith the jurisdiction of the Tribunal.

As we begin a new millennium, the concept of crimes against humanity will be an invaluable tool for ensuring accountability for human rights violations of non-state actors. For the time being it sufficient to note that, had the Nuremberg Trials not taken place, there would have been no precedent for international enforcement of international criminal law, nor would there be any legal foundation for crimes against humanity, as later defined and elaborated on by the Statutes for the United Nations International Criminal Tribunals for the Former Yugoslavia, Rwanda and the International Criminal Court. Notwithstanding well-documented shortcomings,<sup>16</sup> it is fair to say that the

---

<sup>13</sup> ICRC Commentary to Additional Protocol II, para 4342

<sup>14</sup> The ICTY Trial Chamber observed that: “*The decision to include crimes against humanity in the Nürnberg Charter and thus grant the Nürnberg Tribunal jurisdiction over this crime resulted from the Allies' decision not to limit their retributive powers to those who committed war crimes in the traditional sense but to include those who committed other serious crimes that fall outside the ambit of traditional war crimes, such as crimes where the victim is stateless, has the same nationality as the perpetrator, or that of a state allied with that of the perpetrator*” [Tadic Trial Judgement (7<sup>th</sup> May 1997), paragraph 619]

<sup>15</sup> Article 6(c) *supra* footnote 11.

<sup>16</sup> Shortcomings which may be divided into “substantive”, procedural and jurisdictional: substantive, in that the drafters of the Nuremberg Statute not only omitted to include crimes suspected to have been committed by Allied forces on as large or a larger scale than the Nazis (for example, rape), but they also created new crimes which did not previously exist in international law (specifically, crimes against peace and crimes against humanity); procedural, in the sense that the defendants were charged, tried and convicted by their enemies (including a Russian General whose hatred of his enemies standing trial before him was blatantly obvious from the judgment); jurisdictional, in that Article 6 limited trial and punishment to “*major war criminals of the European Axis Countries... acting in the interests of the Axis Countries*” (as a consequence, no allied soldier or official could ever be brought to trial for any atrocity). For all of the above reasons the integrity of the Nuremberg Trials has been seriously questioned, with many leveling accusations of double standards and victors justice. Similar accusations have been made against the International Military Tribunal for the Far East (the “Tokyo Tribunal”), to give two examples: the Tokyo Tribunal’s seemingly

Nuremberg trials planted the future seeds for holding non-State actors accountable for war crimes and crimes against humanity.

## (ii) Post Nuremberg Developments

### *(a) Crimes against humanity developing a separate existence to war crimes*

As stated above, the IMT interpreted Article 6(c) of the Nuremberg Statute in such a way that individuals could only be held accountable for crimes against humanity if the relevant acts were related to armed conflict. However, post-Charter developments brought about a clear break in the link between armed conflict and crimes against humanity, thus allowing the latter to establish an identity separate to and distinct from war crimes.

Two years after the conclusion of the Nuremberg Trials of the Major War Criminals ended, the 1948 *Convention for the Prevention and Suppression of the Crime of Genocide* was adopted.<sup>17</sup> Article 1 of the Convention states that genocide is a crime under international law, whether committed in time of peace or time of war.<sup>18</sup> Furthermore, the United Nations War Crimes Commission concluded that it is possible for crimes against humanity to be committed in peacetime as early as 1948.<sup>19</sup> The jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and Rwanda confirm that customary international law has evolved to the stage where a connection with armed conflict no longer needs to be established for a given act to constitute a crime against humanity.<sup>20</sup>

Moreover, the Genocide Convention makes it clear that persons committing the crime of genocide are punishable regardless of whether they are state or non-state actors,<sup>21</sup> as does the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>22</sup> and the Apartheid Convention.<sup>23</sup> The Tadic Trial Judgment

---

harsh application of the doctrine of command responsibility to General Yamashita, and the hypocrisy and audacity of the United States for placing Japanese leaders on trial for war crimes after dropping two atomic bombs on civilian population centers. For ‘victors justice’ arguments of this kind see, for example, Thompson & Strutz, *“Doenitz at Nuremberg: A Re-Appraisal”* (1983).

<sup>17</sup> 78 U.N.T.S. 277

<sup>18</sup> Article 1

<sup>19</sup> “History of the United Nations War Crimes Commission and the Development of the Laws of War compiled by the United Nations War Crimes Commission, 1948” (reprinted in Bassiouni, *supra* footnote 7 at page 566).

<sup>20</sup> Prosecutor V Dusko Tadic a.k.a “Dule”, Decision on the Defence motion for Interlocutory Appeal on Jurisdiction (2<sup>nd</sup> October 1995). The Appeals Chamber pointed out that: *“It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all”* (paragraph 141)

<sup>21</sup> Article IV provides that: *“Persons Committing genocide...shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”*.

<sup>22</sup> Article II reads in part: *“...the provisions of this Convention shall apply to representatives of the State authority and private individuals..”* [Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968)]

confirmed that non-state actors are liable for crimes against humanity under international law:

As the first international tribunal to consider charges of crimes against humanity alleged to have occurred after the Second World War, the International Tribunal is not bound by past doctrine but must apply customary international law as it stood at the time of the offences. In this regard the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. The Prosecution in its pre-trial brief argues that under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a *de jure* state, or by a terrorist group or organization. The Defence does not challenge this assertion, which conforms with recent statements regarding crimes against humanity.<sup>24</sup>

Although the Nuremberg Statute had stated that crimes against humanity could be committed against “*any civilian population*”, no mention was made of the scale and context required for any given attack against civilians to constitute crimes against humanity. This leaves open the question of how to distinguish crimes against humanity from, in the case of armed conflict, war crimes and, in the case of peacetime, terrorist or armed gang related attacks against members of the public that would ordinarily fall under domestic criminal law. Article 3 of the ICTR Statute deals with this problem by requiring that the alleged offence be committed in the context of a *widespread* or *systematic* attack against any civilian population and, although the ICTY Statute has no corresponding requirement in Article 5 of its Statute, the ICTY jurisprudence confirms that the *widespread* or *systematic* requirement is what distinguishes crimes against humanity from ordinary crimes under domestic law.<sup>25</sup> A widespread attack requires a large number of victims, whereas a systematic attack suggests a common or methodical plan.<sup>26</sup> For alleged offences to constitute crimes against humanity they must in some way be related to a widespread or systematic attack against a civilian population, and the accused must have knowledge that they were so related.<sup>27</sup>

*(b) Consolidation and expansion of criminal liability for war crimes and serious violations of international humanitarian law*

### The Four Geneva Conventions and Common Article 3 (1949)

---

<sup>23</sup> Article III of the Apartheid Convention reads in part: “*International criminal responsibility shall apply, irrespective of the motive involved, to individuals, members of organizations and institutions and representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State.*” [Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. GAOR Supp (No.30), at 75, U.N. Doc A/9030 (1973) Entered into force: 18<sup>th</sup> July 1976, in accordance with Article XV].

<sup>24</sup> Tadic Trial Judgement Para 654

<sup>25</sup> See Prosecutor V Dusko Tadic a/k/a “Dule”, Trial Judgement, May 7<sup>th</sup> 1997, para 644-648

<sup>26</sup> Ibid, 648

<sup>27</sup> Prosecutor V Tadic, Appeals Judgement (15<sup>th</sup> July 1999), para 272.

Before the outbreak of the Second World War the term ‘laws of and customs of war’ was used to describe obligations on the part of States to abstain from harming or protect those not taking part in hostilities. Shortly after Nuremberg trials, the 1949 Geneva Conventions were adopted. The Conventions replaced the traditional term ‘laws and customs of war’ with the more elastic and sophisticated notions of ‘international’ and ‘non-international armed conflict’. Also, and as a consequence of the influence of human rights discourse on international law, the body of law dealing with international and non-international armed conflict came to be known as ‘international humanitarian law’.

The 1949 Geneva Conventions (to be supplemented twenty-seven years later by Additional Protocol I) represents a codification and elaboration of that part of ‘international humanitarian law’ relating to international armed conflict. The reasoning behind the emphasis on international armed conflict is to be found in the post-war context surrounding the adoption of the Geneva Conventions. At this time, armed conflict was seen primarily in terms of battles sovereign independent states. The ICRC proposed that the Conventions should be applicable to both international and internal conflicts, but this was rejected on the grounds that it would constitute an unwarranted interference in state sovereignty. The ICRC proposal was seen by State parties as an attempt to protect all forms of insurrection, rebellion anarchy and disintegration of States.<sup>28</sup> Considering the unprecedented destructiveness of two World Wars, the focus on international armed conflicts in the Geneva Conventions seems, at least when seen through the spectacles of those responsible for drafting and negotiating them at the time, reasonable and understandable. Although the Geneva Conventions were aimed at international armed conflicts Common Article 3 did offer a minimum degree of protection in internal armed conflicts as a compromise. Common Article 3 prohibits the following in non-international armed conflicts:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Taking of hostages;
- Outrages upon personal dignity, in particular humiliating and degrading treatment;
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.<sup>29</sup>

Before the establishment of the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda (the “ICTY” and “ICTR”) it was not clear whether Common Article 3 prohibitions attracted individual criminal responsibility. The reason for the uncertainty lies in the fact that not all breaches of the laws of war or international humanitarian law are war crimes. In the Geneva Conventions many acts are prohibited or forbidden. But it is only in those articles outlawing certain acts as “grave breaches” where explicit mention is made of the criminal sanction. In the remainder of the

---

<sup>28</sup> Kittichaisaree K, “*International Criminal Law*” (2001), at 188.

<sup>29</sup> Common Article 3 to the IV Geneva Conventions, 12<sup>th</sup> August 1949.

Conventions, for instance “prohibited” acts under Common Article 3, no explicit is made of the criminal sanction.

It therefore remained unsettled whether the “prohibitions” mentioned in Common Article 3 and attracted individual criminal responsibility under international law, thereby effectively constituting war crimes. The jurisprudence of the Rwanda and Yugoslavia Tribunals have now resolved this question, confirming that Common Article 3 attracts individual criminal responsibility by virtue of customary international law.<sup>30</sup> This is a finding of substantial significance for non-state actor accountability, since a large number of human rights violations are carried out by non-state actors in internal armed conflicts.

#### Additional Protocol II to the Geneva Conventions (1977)

Soon after the 1949 Geneva Conventions were adopted it became clear that the level of protection offered by Common Article 3 was, in comparison with the far more detailed legal protection offered to victims of international conflicts found in the remainder of the Conventions, inadequate. During the second half of the 20<sup>th</sup> century the number of civil wars proliferated and those conducting them, whether governments in power or the armed rebel groups attempting to oppose or overthrow them, appeared to use increasingly brutal and ruthless methods. Yet, aside from the handful of basic prohibitions in Common Article 3, the victims of non-international conflicts remained unprotected by international humanitarian law until the late 1970’s.

In order to extend the level of protection in non-international conflicts, Additional Protocol II to the Geneva Conventions was adopted in 1977.<sup>31</sup> Article 4.2 of Additional Protocol II lays down a number of fundamental humanitarian guarantees for those involved in internal armed conflicts. Although certain provisions of Article 4 merely repeat and reiterate the minimum yardstick of protection offered by Geneva Conventions Common Article 3, the greater part of article 4 extends and elaborates on the protection to victims of non-international armed conflicts. Article 4 prohibits the following acts, in so far they relate to persons who take no direct part in hostilities (such as civilians) or have ceased to take part in hostilities (such as soldiers who have surrendered, been captured or can no longer fight):

---

<sup>30</sup> Tadic Jurisdiction Appeal sup cit n., paragraph 134-136; Prosecutor V Jean Paul Akayesu (Trial Judgement 2<sup>nd</sup> September 1998) paragraphs 611-616; Prosecutor V Alfred Musema ICTR 96-13, Trial Judgement 27<sup>th</sup> January 2000, para 242; Prosecutor V Bagilishema ICTR 95-1A-T, Trial Chamber Judgment, 7<sup>th</sup> June 2001, para 98. In the “Celebici” Appeal, the Appeals Chamber followed the Tadic Jurisdiction Decision, stating “*that the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule*” (Prosecutor V Delalic et al, Appeals Judgment, 20<sup>th</sup> February 2001), para 161.

<sup>31</sup> Protocol Additional to the Geneva Conventions of 12<sup>th</sup> August 1949, and Relating to the Protection of Non-International Armed Conflicts (Protocol II) [U.N Doc.A/32/144 Annex II.]. Adopted 8<sup>th</sup> June 1977 (entered into force 7<sup>th</sup> December 1978, in accordance with article 23). For historical circumstances surrounding the adoption the adoption of Additional Protocol II, see ICRC Commentary, paras 4360-4418. It can be found at the ICRC website: [www.icrc.org](http://www.icrc.org) ]

- Ordering that there shall be no survivors;<sup>32</sup>
- Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- Collective punishments;
- Taking of hostages;
- Acts of terrorism;
- Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- Slavery and the slave trade in all their forms;
- Pillage;
- Threats to commit any of the foregoing acts<sup>33</sup>

Protocol II does not apply to “*situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts*”.<sup>34</sup> Additionally, Protocol II requires that the dissident armed forces or other organized armed groups are able to meet the following conditions:

- That they act under “responsible command”.
- That they exercise such control over part of the territory in the State where conflict is taking place as to enable them to carry out sustained and concerted military operations and to implement the Protocol<sup>35</sup>

Both of these requirements, particularly the latter, are more difficult to establish than the conditions required for the application of Common Article 3. Indeed, ICTR jurisprudence has confirmed that the threshold for applicability for Additional Protocol II is higher than that of Common Article 3 and that, once the material requirements for the Additional Protocol II have been met, the less stringent requirements for application of Common Article 3 are satisfied automatically.<sup>36</sup>

It seems reasonable to assume that many armed groups and terrorist organizations act under some kind of organized command structure, thus meeting the “responsible command” requirement. Furthermore, both the Rwanda and Yugoslavia Tribunals consistently point out that there is no requirement that the armed groups be structured in a hierarchical as conventional armies. Rather, what is needed is that organization can plan sustained and concerted operations and be capable of imposing discipline upon its members.<sup>37</sup> Many armed groups and terrorist organizations will fail to meet the latter requirement: that is, they will be unable to control part of the State territory such as to

---

<sup>32</sup> Article 4.1

<sup>33</sup> Ibid, Article 4.2 (a)-(h)

<sup>34</sup> Article 1.2

<sup>35</sup> Article 1.1

<sup>36</sup> Prosecutor V Rutaganda ICTR 96-3, Trial Chamber Judgment, 6th December 1999, para 94; Baglishema Trial Judgment supra n, para 100

<sup>37</sup> See Musema sup cit. footnote 31, para 257 and Provost R, “International Human Rights Law and Humanitarian Law” (2001), at p. 262

enable them to carry out sustained military operations and implement the Protocol. Lastly, it should be noted that Additional Protocol II does not apply to so-called ‘failed states’ with no de facto central government (such as Somalia), but only between a State and opposing armed forces.<sup>38</sup>

*(c) Summary of the requirements for liability for war crimes, as laid down by the United Nations International Criminal Tribunals for Rwanda and the Former Yugoslavia*

The jurisprudence of the Rwanda and Yugoslavia Tribunals suggest that the following conditions must be met for non-state actors to be liable for war crimes:

- A state of armed conflict must first exist for international humanitarian law to apply. An armed conflict has been defined by the Tadic Jurisdiction Appeal as “resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State”.<sup>39</sup> For this reason Common Article 3 does not apply to acts of banditry and internal disturbances characterized by isolated or sporadic outbreaks of violence (even when the government is forced to resort to police and armed units to restore law and order)<sup>40</sup> or to short lived insurrections and terrorist activities,<sup>41</sup> but covers open hostilities involving organized armed forces to a greater or lesser extent.<sup>42</sup>
- International humanitarian law applies from the initiation of hostilities, and extends beyond cessation of hostilities until a peaceful settlement has been reached. Between initiation of hostilities and peaceful settlement international humanitarian law applies to the whole territory under the control of a party, regardless of whether or not actual armed conflict takes place there.<sup>43</sup>
- A close nexus between the alleged offence and the internal armed conflict is required. This does not necessarily mean that the offence must take place in the same part of the territory occupied by the opposing forces. However the alleged crimes must be closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.<sup>44</sup>

---

<sup>38</sup> See Additional Protocol II, Article 1.1 and discussion infra on Somalia

<sup>39</sup> Tadic Jurisdiction Decision, para 70. To all intents and purposes this definition has been transplanted to Article 8.2(f) of the Rome Statute for the International Criminal Court Statute

<sup>40</sup> Akayesu Trial Judgement supra n. , para 248

<sup>41</sup> Tadic Trial Judgment, para 562; Celebici Trial Judgment, para 184. In Tadic, the Trial Chamber held that the intensity of the conflict and the organization of the parties to the conflict as being the essential ingredients for Common Article 3 to apply. These ingredients distinguish armed conflict from banditry, unorganized and short-lived insurrections and terrorist activities, which are not subject to international humanitarian law [para 562]. In Celebici it was said that the protracted nature of the conflict and the organization of the parties were what distinguished a non-international armed conflict from civil unrest or terrorist activities [para 184]. Also, Musema Trial Judgment para.248 and Rutaganda Trial Judgment, para 90.

<sup>42</sup> Bagilishema V Prosecutor, ICTR-95-1A-T, Trial Judgment, 7<sup>th</sup> June 2001, para 99.

<sup>43</sup> Tadic Jurisdiction Para 70; Blaskic Trial Judgement (March 2000), para 63-64

<sup>44</sup> Tadic Jurisdiction para 70 and Bagilishema ibid, para 105

- Not all violations of international humanitarian law are war crimes. The violation must be “serious”. That is to say, it must constitute a breach of a rule protecting important values, and such a breach must involve grave consequences for the victim.<sup>45</sup> Violations of international humanitarian law falling below the ‘serious threshold’ do not attract individual criminal responsibility. Both Common Article 3 Geneva Conventions and Article 4 Additional Protocol II have been found to be serious violations of international humanitarian law, thus constituting liability for war crimes.<sup>46</sup>
- The victims must not be taking part in hostilities at the time of the alleged violation.<sup>47</sup> In other words the victims must not be actively in combat as soldiers or directly contributing towards the war effort at the time of the alleged violations.<sup>48</sup>

### (iii) Rome Statute Establishing The International Criminal Court

The International Criminal Court Statute<sup>49</sup> (“ICC Statute”) represents what one might call a consolidation of the “core crimes” of international criminal law: those core crimes being the crime of aggression, genocide, crimes against humanity and war crimes. The definition of genocide has been transplanted directly from the Genocide Convention, whereas the enumerated acts constituting crimes against humanity and war crimes have been expanded substantially from Nuremberg, the ICTY and the ICTR Statutes. Apartheid, previously condemned as a ‘crime against humanity’ in the 1973 Apartheid Convention, and enforced disappearances of persons, as previously condemned in the UN Declaration on the Protection of All Persons From Forced Disappearances,<sup>50</sup> are declared crimes against humanity under the ICC Statute.<sup>51</sup> A number of prohibitions from the Geneva Conventions and Additional Protocols, for instance the prohibition against

<sup>45</sup> Akayesu Trial Chamber Judgment, para 616; followed by Bagilishema Trial Judgment, para 102

<sup>46</sup> The Trial Chamber in Akayesu applied individual criminal responsibility to Article 4 Additional Protocol II in the same way as the ICTY jurisprudence applies individual criminal responsibility to Common Article 3: “The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds” (Akayesu Trial Judgment, para 616).

<sup>47</sup> Prosecutor V Krnojelac, IT-97-25, Trial Chamber Judgement, 15<sup>th</sup> March 2002, (“Krnojelac Trial Judgement”) para 51.

<sup>48</sup> This is with the exception of those rules forbidding use of certain types of weapons and the prohibition of perfidy. These forbidding perfidy and employment of certain types of weapons were codified in the 1907 Hague Conventions, and have now been inserted into the Rome Statute as “War Crimes”. Articles 8.2 (b)xvi-xx of the ICC Statute provides that use of certain types of noxious gases, weapons and projectiles against an adversary will be war crimes. Article 8.2(b), however, only applies to international armed conflicts. The prohibition of perfidy applies to both international and non-international armed conflicts: “Killing or wounding treacherously individuals belonging to the hostile nation or army” is a war crime under Articles 8.2 (b)(xi) & 8.2(e)(ix) respectively.

<sup>49</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9 (1998).

<sup>50</sup> G.A Res 47/133. See also, Article 18(i) of the 1996 ILC Draft Code of Crimes Against Peace and Security of Mankind

<sup>51</sup> ICC Statute Article 7.1 (i) & (j)

recruitment of soldiers under the age of 15,<sup>52</sup> have been incorporated into article 8 of the ICC Statute as war crimes.

One should note that ICC threshold of applicability for internal conflicts is significantly lower than that of Additional Protocol II:

[I]t applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.<sup>53</sup>

This definition is partially borrowed from the Tadic Jurisdiction Decision, where the ICTY Appeals Chamber first made reference to “*protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*”.<sup>54</sup> This wider definition opens up the possibility of holding armed groups in failed States with no effective central government accountable for ‘war crimes’. Also, there is no requirement that the armed group exercise “responsible command” structure and control over territory to as to enable it to conduct sustained military operations. Furthermore, the need for operations to be “protracted” does not, in contrast to the Protocol II requirement that operations be “sustained”, imply that such operations must be kept going continuously by the warring parties.<sup>55</sup>

Omission of the requirement that the armed group or terrorist organization must control part of the territory is crucial in the ICC Statute is crucial: although many armed groups and terrorist organizations do not have the military capacity and capability to control territory and conduct sustained operations, they may nevertheless be sufficiently well armed to reek death and destruction on a fairly large scale. We will return to the question of when the threshold of armed conflict, which, when reached, triggers liability serious violations for war crimes, later. Before doing so, developments relating to ‘terrorist offences’ in international law will be addressed.

## **II Multilateral and Regional Conventions Entailing Individual Criminal Responsibility For Terrorist Organisations**

### (i) Global Anti-Terrorist Conventions

---

<sup>52</sup> Ibid, Article 8.2(e)(vii). Interestingly, the Sierra Leone Special Court Statute also incorporates the provision prohibiting recruitment of child soldiers as a crime (Article 4.c). See [www.specialcourt.org](http://www.specialcourt.org)

<sup>53</sup> Article 8.2(e), following Tadic Jurisdiction Appeals decision supra fn 39.

<sup>54</sup> See Trifferrer O et al, “Commentary on the Rome Statute of the International Criminal Court” (1999), p.285

<sup>55</sup> Trifferrer ICC Commentary, ibid, at 285

A whole host of activities considered by many to be acts of ‘international terrorism’ have been criminalised. Yet there has never been any genuine consensus on what the word ‘terrorist’ actually means- “*one man’s terrorist is another man’s freedom fighter*”. Legal measures dealing with international terrorism are therefore very controversial. The United Nations has nonetheless established global conventions outlawing acts considered by many to be acts of ‘terrorism’. All of the global conventions, save for the *International Convention for the Suppression of Terrorist Bombings*<sup>56</sup> and Financing of Terrorist Conventions have, perhaps wisely, steered clear of using the highly emotive ‘terrorist’ label:

Instead, [they] define particular conduct that, regardless of its motivation, is condemned internationally and therefore is an appropriate subject of international law enforcement co-operation.<sup>57</sup>

That ‘internationally condemned conduct’ includes:

- Aircraft hijacking;<sup>58</sup>
- Aircraft sabotage;<sup>59</sup>
- Crimes against diplomatic agents and internationally protected persons;<sup>60</sup>
- Hostage taking;<sup>61</sup>
- Theft of nuclear materials;<sup>62</sup>
- Certain unlawful acts of violence at airports;<sup>63</sup>
- Certain unlawful acts against and aboard ships;<sup>64</sup>

States are placed under an obligation on States to either extradite or prosecute any of the above offences.<sup>65</sup> *The International Convention for the Suppression of Terrorist*

---

<sup>56</sup> Fully cited at footnote.69, infra.

<sup>57</sup> Witten S.M, “The International Convention for the Suppression of Terrorist Bombings”, (1998) Am Jnl of International Law Vol 92, 774, at 775.

<sup>58</sup> The Hague Convention for the Unlawful Seizure of Aircraft, 16<sup>th</sup> December 1970, 22 UST 1641

<sup>59</sup> The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, September 23<sup>rd</sup>, 1971, 24 UST 564.

<sup>60</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.

<sup>61</sup> The International Convention Against the Taking of Hostages, December 17<sup>th</sup>, 1979, TIAS No.11.081, 1316 UNTS 205

<sup>62</sup> Convention on the Physical Protection of Nuclear Materials, with annex, October 26<sup>th</sup>, 1979, TIAS no. 11,080,

<sup>63</sup> Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the convention of September 23<sup>rd</sup>, 1971, February 24<sup>th</sup>, 1988, S. TREATY Doc No. 100-19 (1988).

<sup>64</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, with related Protocol, March 10<sup>th</sup> 1988, S. TREATY Doc. No. 101-1 (1989)

<sup>65</sup> Article 8 of the Hostages Convention provides a typical example. “*The State party to the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purposes of prosecution..Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that state*”.

*Bombings*<sup>66</sup> was the first global convention to explicitly label a category of offences as being ‘terrorist’. It deserves separate treatment from the others by virtue of the breadth and importance of the ‘terrorist’ activity it is designed to cover.

The Convention was prompted by a spate of bombings in public and military places in the mid-1990’s: a massive IRA bomb in Manchester, the deadly chemical attacks in the Tokyo subways and the fatal bombing attack on U.S military personnel in Dharaan, Saudi Arabia.<sup>67</sup> It would also cover ‘terrorist’ acts proceeding it (for instance, the Omagh bombing in Northern Ireland which indiscriminately killed dozens of civilians in the middle of a packed shopping precinct in July 1998). Previous international conventions would not have covered any of these acts, as they were piecemeal attempts to deal with specific instances of ‘terrorism’ (aircraft sabotage, aircraft hijacking, attacks on airports et cetera). The new Convention covers bombings in both public places and state facilities. An offence is committed under the Bombings Convention when:

[A] person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

- With the intent to cause death or serious bodily injury; or
- With the intent to cause or extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.<sup>68</sup>

The most recent global anti-terrorist convention, the *International Convention for the Suppression of the Financing of Terrorism*,<sup>69</sup> makes it an offence to provide or collect funds with the intention that they should be used or knowledge that they are to be used to:

- Carry out an act falling under any of the previous anti-terrorism conventions; or
- Any other act designed to cause death or serious bodily injury to a civilian, or to any other person not taking part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature and context, is to intimidate a population, or to compel a government or international organization to do or abstain from doing any act.<sup>70</sup>

## (ii) Regional Anti-terrorist conventions

Europe, or at least Western Europe, has come to its own agreements in relation to extradition of ‘terrorists’. Before September 11<sup>th</sup>, the European anti-terrorist conventions focused on tightening extradition laws (in particular, by prohibiting the refusal of extradition on the basis that the offence in question was of a political nature), and

---

<sup>66</sup> Adopted 15<sup>th</sup> December 1997, 37 ILM 249 (1998).

<sup>67</sup> See Whitten sup cit fn 57

<sup>68</sup> Article 2(1) [In International Legal Materials, Vol XXXVII, March 1998, at p.253].

<sup>69</sup> G.A Res. 54/109 (9<sup>th</sup> December 1999). The Convention can be found online at

[www.un.org/law/cod/finterr](http://www.un.org/law/cod/finterr)

<sup>70</sup> Article 2

generally promoting mutual legal assistance between States in combating terrorism. The first of these was the *European Convention on the Suppression of Terrorism*<sup>71</sup> (ECST). Article 1 ECST states that none of the following are never to be regarded as political offences for the purposes of extradition:

- Aircraft hijacking and sabotage;<sup>72</sup>
- Offences involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if such use endangers persons; and
- A serious offence involving an attack against the life of an internationally protected persons, including diplomatic agents;
- Attempts to commit any of the above.

Under Article 13, however, the above prohibitions against employing the political offence exception to extradition are subject to a right of reservation at the time of signature or ratification. If this reservation is made, then the requested state may consider such offences political, and thus non extraditable, so long as it considers “*any serious aspects of the offence, including*”:

- That it created a collective danger to the life, physical integrity, or liberty or persons;
- That it affected persons foreign to the motives behind it; or
- That cruel or vicious means have been used in the commission of the offence.<sup>73</sup>

About half of the States who are parties to the ECST have exercised the reservation option.<sup>74</sup> Those who did not make a reservation will be unable to refuse extradition on the grounds that any Article 1 offence was of a political nature. But they may still refuse extradition under the Article 5 ‘discrimination clause’.<sup>75</sup> Those who did make the reservation, on the other hand, may still refuse extradition so long as they consider the above listed criteria.

Building on the ECST, we have the more recent *European Union Convention relating to extradition between the Member States of the European Union*.<sup>76</sup> The preamble stresses that “*Member States have an interest in ensuring the extradition procedures operate efficiently and rapidly in so far as their systems of government are based on democratic principles*” and human rights.<sup>77</sup> Reservations made pursuant to Article 13.1 of the ECST are no longer to apply between Member States.<sup>78</sup> None of the violent acts listed under

---

<sup>71</sup> European Treaty Series, No.90 (Strasbourg, 27<sup>th</sup> January, 1977).

<sup>72</sup> As defined in the Hague and Montreal Conventions supra footnotes 59 and 61

<sup>73</sup> ECST, Article 13.

<sup>74</sup> Van den Wyngaert C, “The Political Offence Exception to Extradition: How to Plug the Terrorist’s Loophole”. In Israeli Yearbook on Human Rights, (1989), 297

<sup>75</sup> Discrimination clauses in extradition law prohibit extradition where “[T]he request... has been made for the purposes of punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would prejudice that person’s position for any of these reasons”.

<sup>76</sup> OJ 96 C 313/02 (27<sup>th</sup> September 1996).

<sup>77</sup> Preamble, *ibid*.

<sup>78</sup> Article 5.4

the ECST can ever be considered political offences under this convention.<sup>79</sup> Nevertheless, other than the acts covered by Article 1 of the ECST,<sup>80</sup> Member States remain free to treat other terrorist related acts of violence offences as being of a political nature, and thus non-extraditable.

In the wake of September 11<sup>th</sup> the European Commission proposed a Council Framework Decision on Combating Terrorism<sup>81</sup>, adopted, modified and provisionally agreed upon by the Council of the European Union in December 2001.<sup>82</sup> Article 1 of the Framework Decision bears some similarity in its structure to the core crimes of genocide, crimes against humanity and war crimes in the ICC Statute. The first part of Article 1 sets out the special elements of the ‘crime of terrorism’:

Each Member State shall take the necessary measures to ensure that terrorist offences include the following list of intentional acts which, given their nature or their context, may seriously damage a country or international organization, as defined as offences under national law, where committed with the aim of:

- (i) Seriously intimidating a population; or
- (ii) Unduly compelling a Government or international organization to perform or abstain from performing any act; or
- (iii) Seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization

Thus, it is the specific motivations of the perpetrator, combined with the nature and context of the acts being as such as may damage a country or international organisation, that turns what would otherwise be an ordinary domestic crime into a ‘terrorist’ crime. These special elements serve to distinguish terrorist offences from ordinary domestic crimes, just as the special elements of crimes against humanity and genocide serve to distinguish them from all other crimes.<sup>83</sup> The distinct nature of ‘terrorist offences’ is confirmed in that Member States are obligated to ensure heavier prison terms for specified offences than would be the case with the same offence committed in absence of the special intent.<sup>84</sup> The following intentional acts are ‘terrorist offences’ when the above mentioned special are present:

- Attacks upon a person’s life which may cause death;<sup>85</sup>

---

<sup>79</sup> Article 5.2 read with Article 3.4.

<sup>80</sup> Aircraft hijacking; aircraft sabotage; kidnapping and hostage taking; acts of violence against internationally protected persons (including diplomatic agents); offences involving the use of a bomb grenade rocket launcher, automatic firearm or letter bomb.

<sup>81</sup> OJ C 332 E/300 (2001)

<sup>82</sup> 14845/1/01

<sup>83</sup> The special elements for crimes against humanity being ‘a widespread or systematic attack against any civilian population’ with knowledge that the enumerated offence was related to such an attack; and, for genocide, ‘acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group’.

<sup>84</sup> Article 4.2

<sup>85</sup> Note that the European Commission had originally proposed “murder”, which is far narrower than an attack which may cause death: murder requires that intention to kill and a dead victim, whereas an attack

- Attacks upon the physical integrity of a person;
- Kidnapping or hostage taking;
- Causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
- Seizure of aircraft, ships or other means of public or goods transport;
- Manufacture, possession, acquisition, transport, supply or use of weapons, explosives or nuclear, biological or chemical weapons, as well as research into an development of biological and chemical weapons
- Release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
- Interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- Threatening to commit any of the above listed acts.<sup>86</sup>

Acts committed by armed groups or terrorist organisations during periods of full blown armed conflict, which is governed by international humanitarian law, do not fall under the Framework Decision.<sup>87</sup> In this respect, the Framework Decision differs from the Convention for the Suppression of Financing Terrorism, which covers financing of acts causing deaths to civilians in armed conflict, instead following the approach taken by the Terrorist Bombings Convention, which excludes acts of terrorism falling under international humanitarian law and the law of armed conflict.

## **PART B: PRACTICAL APPLICATIONS**

Having overviewed legal developments relating to crimes against humanity, war crimes and terrorism one can see that under contemporary international law a detailed panoply of offences exist under which armed groups and terrorist organizations can be held criminally accountable for human rights violations. Yet many unresolved issues remain, and the development of the law has thrown up a variety of questions. The problem is less whether there is a sufficient legal basis for ensuring accountability in the form of the criminal sanction- there clearly is- but more how it is to be applied in practice.

### **I. Some practical examples of liability of armed groups and terrorist organizations for war crimes, and the problem of distinguishing non-international armed conflict from internal disturbance/ terrorist activity**

At the time of Post World War II Nuremberg trials and the adoption of the 1949 Geneva Conventions, armed conflict was still seen as a battle between warring sovereign states. The distinction between war, where States were bound by the laws and customs of war,

---

which may cause death could be said to include any attack is obviously much wider (death need not necessarily occur and, in those cases where it does, all that is required is that it was foreseeable). Cf original Commission Proposal sup cit n, with the Council of Europe Provisional Agreement sup cit n.

<sup>86</sup> Article 1(iii)(a)-(j)

<sup>87</sup> Id, Framework Decision (11)

and peace, where states could do as they pleased within their own borders, was legally clear cut; and, given the scale of human suffering unleashed in first and second world wars, it no doubt seemed logical at that time. However, as the second half of the 20<sup>th</sup> century unfolded, the number of internal conflicts multiplied and, as the clear distinction between inter-state war and peace was increasingly broke down, the term 'laws of war' was replaced with the term international and non-armed conflict. The law thus adapted to changing circumstances.

As we begin the 21<sup>st</sup> century it is clear the distinction between war and peace is not absolute but runs on a continuum:

- From *full blown intensive warfare* between two powerful armies of roughly equivalent strength;
- To *guerrilla wars*, where one side maintains control over territory, but has to resort to hit and run tactics to combat its more powerful state adversary;
- To conflicts between *governments and 'terrorists'*, where one party is unable to control any part of the territory in the area of conflict and thus relies on the tactic of sporadic and surprise attack.

Generally speaking, conflicts involving armed groups and terrorists will frequently fall into either the second and third categories, whereas international conflicts between militarily viable sovereign states will usually fall under the first category. However, this need not necessarily always be so, since international wars between states are not in all cases equal, and individual operations are not in all cases intense and protracted (for example, the Gulf War and the U.S invasion of Afghanistan). Nor, one might add, are conflicts between governments and armed rebel groups always necessarily one sided (one need only look at the decades of civil war in Angola, Eritrea, Mozambique and Sierra Leone to see that armed rebel groups often provide an equal match to official governments).

Although the legal distinction between war and peace in international law has now evolved to a far more refined state, the problem of distinguishing non-international armed conflicts with insurrections, terrorism and organized crime remains in practice. It is largely a matter of applying such criteria to concrete individual cases. Political realities dictate that only a minority of armed groups or terrorist organizations are ever likely to appear before an international criminal tribunal charged with war crimes. However one should remember that war crimes, by contrast to domestic or even international acts of terrorism and organized violence, invite universal jurisdiction: that is, any State in the world may prosecute individuals for war crimes, regardless of where the crime is committed and regardless of the nationality of the perpetrator. Attempting to distinguish non-international conflict from internal disturbances covered by domestic criminal law is therefore of considerable importance, not least when one considers:

- The entry into force of International Criminal Court Statute on 1<sup>st</sup> July 2002; and

- The continuing trend towards setting up ad hoc international criminal tribunals to hold government forces and armed groups responsible for genocide, crimes against humanity and war crimes in specific countries

It is interesting to note that, whereas no criminalisation of ‘terrorism’ is made in the ICTY or ICC Statutes, ‘acts of terrorism’ are prohibited as serious violations of international humanitarian law by Article 4(d) of the ICTR Statute (as transplanted from Additional Protocol II). At the same time, the ICTY Trial Chamber has found that ‘terrorist activities’ do not fall under international humanitarian law and the rules relating to non-international armed conflicts.<sup>88</sup> If such findings are representative of customary international law then ‘terrorist activities’ *ipso facto* cannot constitute war crimes, and international criminal liability for such acts must alternatively be predicated on crimes against humanity and/or the global and regional anti-terrorist conventions afore mentioned.

It is unfortunate that the ICTY jurisprudence provides no elaboration of what is meant by ‘terrorist activities’ being excluded from international humanitarian law. One can only assume that what is meant is acts of violence not reaching a certain threshold of intensity and duration (such as occasional and sporadic bombings) instead fall within the purview of the global and regional domestic anti-terrorism conventions and domestic criminal law. The prohibition of ‘acts of terrorism’ in Article 4(d) of the ICTR Statute, by contrast, clearly relates to acts of terror committed in the context of a fully blown internal armed conflict. Interestingly, Additional Protocol I to the IV Geneva Conventions has an equivalent ‘terror’ provision for international armed conflicts, though it does not prohibit ‘terrorism’ as such. Article 51.2 reads in part: “*Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited*”.

The rather confused and seemingly contradictory use of the term ‘acts of terrorism’ and ‘terror’ is perhaps explicable by the inherently vague and elastic nature of the notions themselves. One does not have to look far to find contemporary and historical examples of the maxim ‘one man’s terrorist is another man’s freedom fighter’. In the words of Walzer:

The word ‘terrorism’ is used most often to describe revolutionary violence. That is a small victory for the champions of order, among whom the uses of terror are by no means unknown. The systematic terrorizing of whole populations is a strategy of both conventional and guerilla war, and of established governments as well as radical movements<sup>89</sup>

What is clear is that the United Nations and European instruments relating to ‘terrorism’ are directed almost exclusively towards individuals or groups seeking to overthrow or undermine governments and/or intimidate civilian populations, whereas international humanitarian law is directed against States and armed groups carrying acts of terror

---

<sup>88</sup> See Tadic Trial Judgment, paragraph 562.

<sup>89</sup> Walzer, “Just and Unjust Wars- A Moral Argument With Historical Illustrations” (1992, 2<sup>nd</sup> edition), at p.197

during ‘protracted’ military offensives in international and internal armed conflicts. Much of course depends on the meaning of the word ‘protracted’, and in this respect the ICC Commentary indicates that ‘protracted’ does not necessarily imply that military operations need be continuous.<sup>90</sup>

The question remains as to whether the nature of the activities of certain ‘terrorist organisations’ can ever fall within the law of armed conflict, thus attracting individual criminal responsibility under customary international law, or whether such actions should always be dealt with by domestic jurisdictions in accordance with obligations set forth in the global and regional anti-terrorist conventions.

Some attention has already been devoted to the distinction between armed conflict and terrorism/internal disturbance by the International Criminal Tribunals. There are obvious cases where a group is engaged in protracted armed conflict, international humanitarian law thus being applicable. And there are other equally obvious cases where the laws of armed conflict is not applicable, for example, those armed groups and terrorist organisations which, although more often than not being capable of capture and criminal conviction, are clearly not powerful enough to present challenge the government itself. These groups remain can instead be held accountable under multilateral, regional and anti-terrorist and domestic criminal legislation.

The distinction between internal armed conflict and domestic criminal law enforcement does not always mean a great deal in the abstract. It may therefore be constructive to explore contemporary examples of violent conflict within states. There are two possibilities: on the one hand, the violence is of such a nature and intensity as to amount to an internal armed conflict subject to international humanitarian law, or it does not meet such a threshold, thereby falling under anti-terrorist conventions and/or domestic criminal law.

#### (i) Post-Apartheid South Africa

In South Africa crime rates remain exceptionally high.<sup>91</sup> Heavily armed gangs operate unchecked in certain areas, for instance, in the Cape townships of Nyanga, Crossroads and the notorious gang infested areas of Hillbrow (Johannesberg) and Manenberg (Cape Town). Manenberg has become so infested violent crime and gangsterism that electric fences have been erected at the local high school in order to protect pupils and teachers from armed gangs.<sup>92</sup> In such places, the South African Police Service has been shown to be both unwilling and unable to control the situation, with ‘gang warfare’ raging intermittently throughout the Cape Flats.<sup>93</sup> To all intents and purposes these gangs

---

<sup>90</sup> See Triffterer Rome Statute Commentary sup cit n.55

<sup>91</sup> According to the INTERPOL statistics (made up of 96 countries), South Africa had the second highest murder and highest rape rates in the world. See “Marsh R, *‘With Criminal Intent- The Changing Face of Crime in South Africa’*, Cape Town, 1999

<sup>92</sup> See [www.sundaytimes.co.za/1999/24/01](http://www.sundaytimes.co.za/1999/24/01)

<sup>93</sup> The areas surrounding Cape Town are known as the Cape Flats, and such areas could be said to include the districts of Crossroads, Nyanga, Langa, Phillipi, Khayelitsha and Manenberg. These places are largely

exercise control over the areas in which they operate, with the result that local communities live in an atmosphere of fear and terror. The lack of totally inadequate law enforcement has led to a growth in vigilantism in South Africa, with the formation of groups such as “People Against Gangsterism and Drugs (PAGAD)”. The police presence in certain areas is virtually non-existent. As well as carrying out assassinations of gang leaders, PAGAD have also planted a large number of explosive devices in public places, killing and maiming a number of civilians (most notably bombing of Planet Hollywood in Cape Town in 1998).

All of this in itself may be described as a form of internal armed conflict. But the question is whether it is an internal conflict of such a nature as to trigger international humanitarian law and liability for war crimes. In other words, going by the International Criminal Court Statute definition, does the present situation in South Africa constitute “*protracted armed conflict between governmental authorities and organised armed groups or between such groups*”?

Although South Africa has some of the highest levels of criminal violence in the world, and despite the fact that only a small proportion of crimes result in convictions under the criminal justice system, the situation in South Africa clearly fails to meet the Tadic Jurisdiction and ICC threshold. Neither the armed gangs nor the terrorist cells such as PAGAD have the capacity to engage in anything other than sporadic and piecemeal acts of violence against the State and between themselves. Yet PAGAD and the organized criminal gangs are armed with automatic weapons, and may exercise something approaching de facto control over local townships. Furthermore, competing groups often fight amongst themselves over their patches, and vigilante groups mete out their own forms of summary justice towards the gangs. The government has lost effective control of the situation in the sense that law enforcement agencies cannot control the spiraling crime rates. But this does not mean that PAGAD or the criminal gangs are presently in the position to present a serious form of military challenge to the government. If the gangland violence became especially severe, the South African Defence Force could bring in the army to deal with any such emergency without any protracted armed conflict taking place. It follows that, even in a State of emergency had to be declared, acts of organized criminal gangs, vigilante groups and terrorist cells could never be considered war crimes. Instead, they remain purely matters of domestic criminal law.<sup>94</sup> It would be stretching the notion of non-international armed conflict beyond credulity to suggest otherwise.

## (ii) Columbia

---

a product of the Apartheid regime’s policy of evicting black and coloured people from their homes in those areas earmarked as suburbs, and dumping them in ‘townships’ to the east of Cape Town.

<sup>94</sup> Though South Africa, of course, is obligated under international law to implement the anti-terrorist conventions it has signed and ratified. Given that terrorism is not yet an international crime under the ICC none of these conventions attract individual criminal liability at an international level (except in so far as the State prosecutes ‘terrorists’ under the international conventions as enforced by the State).

Colombia, like South Africa, is known for high levels of crime (in particular, the powerful influence of the organized drug cartels). However, although both countries have very high levels of criminal violence, both organized and unorganized, there is a major difference for the purposes of our present discussion: in South Africa, the organized crime and terrorist groups do not yet have the capacity to present a sustained challenge the armed forces of the State. In Colombia, by contrast, the paramilitary and organized crime units are so heavily manned and armed as to seriously undermine State sovereignty. In fact, organized crime, terrorism and military capacity go hand in hand in Colombia.

There are two major paramilitary movements/armed rebel groups in Columbia: the (purportedly) radical left wing movement “Revolutionary Armed Forces of Columbia-People’s Army” (“FARC”), and the United Self Defense Groups of Columbia (“AUC”). Both were declared “terrorist organizations” by the U.S State Department.<sup>95</sup> The European Union has also declared the FARC to be a ‘terrorist organisation’. The FARC controls 15 000 square miles of territory in southern Columbia, and has around 17 000 armed followers.<sup>96</sup> The five municipalities under its control have an estimated 90 000 inhabitants. Kidnapping is frequently used as a source of income, as is production, distribution and sale of cocaine.

Given that the FARC controls a portion of southern Columbia, and considering how heavily armed and numerous the FARC is as a group, the conflict between them and other paramilitary groups, and between the Columbian army, is clearly a non international armed conflict under the Tadic Jurisdiction and ICC Statute thresholds. Protocol II applies when opposing forces in an internal armed conflict exercise a responsible command, exercise enough control over territory to conduct sustained and coordinated military operations and to implement protocol II. As Human Rights Watch has pointed out, this situation clearly applies in Columbia.<sup>97</sup> The FARC, rival paramilitary movements (and indeed government forces) are heavily involved in organized crime, drug trafficking and carry out hostage taking and terror attacks on civilian populations on a regular basis. To this degree organized crime, terrorism and armed conflict are heavily intertwined in Columbia. In fact armed groups such as the FARC and AUC could potentially be prosecuted under anti-terrorism and organized crime legislation and/or international criminal law.<sup>98</sup> Which option is chosen, if any, may depend as much on political circumstance as anything else.

---

<sup>95</sup> The FARC in October 1997, the AUC in September 2001.

<sup>96</sup> See “Rebel Abuses Worsening”, Letter to Manuel Marulanda (leader of the FARC), 10<sup>th</sup> July 2001. See [www.hrw.org/press/2001/07/farc-0709-ltr.htm](http://www.hrw.org/press/2001/07/farc-0709-ltr.htm)

<sup>97</sup> Letter from Jose Miguel Vivanco (Executive Director of Human Rights Watch, Americas) to Manuel Marulanda, 8<sup>th</sup> May 2002. See [www.hrw.org/press/2002/05/colombia](http://www.hrw.org/press/2002/05/colombia)

<sup>98</sup> As already stated, only the core crimes of aggression, genocide, crimes against humanity and war crimes have been criminalized under the International Criminal Court (see in far). However ‘terrorism’ and ‘organised crime’ can be prosecuted domestically in so far as State parties have ratified and implemented the multilateral anti-terrorism conventions and the United Nations Convention Against Transnational Organised Crime (signed on 15<sup>th</sup> November 2000), which will come into force when it has been ratified by 40 State parties.

### (iii) Somalia

Somalia has been without central government since the collapse and overthrow of the Said Barre's dictatorial regime in 1991. At this time large parts of the country, including the capital Mogadishu, disintegrated into anarchy, with conflict breaking out between at least thirty clan and regional based factions.<sup>99</sup> The north western region of the country, known as "Somaliland", declared its independence shortly after the collapse of the Barre regime, although it is yet to be recognised by international community and the United Nations. However the Special Rapporteur to the UN Human Rights Commission pointed out that the international community has acknowledged the increasing level of security and stability achieved in "Somaliland" since 1991.<sup>100</sup> The neighbouring region to the east of Somaliland is known as "Puntland", which makes up the north eastern part of Somalia. Unlike "Somaliland", "Puntland" does not consider itself as a separate entity to Somalia, but as a semi-autonomous region. It came into existence in 1998, and has created a municipal parliament and constitution since this time.

From the collapse of Siad Barre's regime in 1991 to the present day extensive violations of human rights have taken place throughout the country. Given that there has been no central government all of, or at least the vast majority of, such violations will have been committed by non-state actors: specifically, by competing armed factions and clans.

In January 2000 the UN Special Rapporteur expressed concern over serious violations human rights violations perpetrated against Somali civilians in the central and southern region of the country including violence against life, looting, rape and other forms of sexual violence. She asserted that some of the violations in southern and central Somalia constitute war crimes and crimes against humanity.<sup>101</sup> However no attempt was made to link these specific allegations to the requirements for war crimes and crimes against humanity.

Instead it is merely stated that:

As for what constitutes war crimes or crimes against humanity in the Somali context, the independent expert has been asserting that international humanitarian law relating to non-international armed conflict applies in the whole territory of Somalia, irrespective of whether a specific area is engulfed in active fighting or not. This application extends to the "Puntland" regional government in the north-east, which considers itself part of Somalia, as well as to "Somaliland", which is asserting independence, although there is no international recognition of its separate status<sup>102</sup>

---

<sup>99</sup> E/CN.4/1997/88. UN Human Rights Commission Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmawi pursuant to Commission resolution 1996/57 of 19 April 1996, para 14

<sup>100</sup> E/CN.4/2000/110 (26 January 2000) Commission on Human Rights, fifty sixth session: Situation of human rights in Somalia: Report of the Special Rapporteur, Ms. Mona Rishmawi, submitted in accordance with Commission on Human Rights resolution 1999/75, paragraph 79

<sup>101</sup> Ibid, paragraph 165

<sup>102</sup> Ibid, at paragraph 33.

The Special Rapporteur appears to treat liability for war crimes, crimes against humanity and violations of international law as being one of the same. Yet, as has already observed, not all violations of international humanitarian law constitute war crimes: only those violations breaching an important rule and resulting in grave consequences for the victim attract individual criminal responsibility.<sup>103</sup> One should also recall that crimes against humanity have developed an entirely separate existence and will, provided the requisite elements are met, entail individual criminal responsibility regardless of the applicability of international humanitarian law.

Previous rapporteurs have also pointed out that the law relating to non-international armed conflict applies throughout Somalia. After quoting Tadic Jurisdiction definition, the 1997 Special Rapporteur made the following observations:

Accordingly, and as long as the faction leaders, the militias and other irregular armed forces continue their conflict in Somalia and until a peaceful settlement is reached, International Humanitarian Law relating to internal armed conflicts applies in the whole territory of Somalia irrespective of whether or not a specific area is engulfed in actual fighting. All the parties are therefore bound by customary international law relating to armed conflict<sup>104</sup>

The way in which the jurisprudence of the Rwanda and Yugoslavia Tribunals is being applied to here is of some significance, not least because of the recent recommendations to set up an International Criminal Tribunal to prosecute the perpetrators of human rights violations in Somalia with war crimes and crimes against humanity. In reporting to the UN Human Rights Commission in January 2002, the Special Rapporteur recommended the establishment of an international or, political conditions permitting a national tribunal, to address past violations.<sup>105</sup>

There is no precedent for holding non-state actors carrying out violations within a collapsed State criminally accountable. Somalia is the classic case of a collapsed State, with no de facto governmental authority and no state organs.<sup>106</sup> Prior to the Tadic Jurisdiction definition in 1995, Somalia could not have been conceived of as a non-international armed conflict falling under Common Article 3 and Additional Protocol II, since there was no government forces in opposition to armed rebel groups.

---

<sup>103</sup> See discussion at I(ii) supra: “Post Nuremberg Developments for crimes against humanity and war crimes and the contribution of the jurisprudence of the United Nations International Criminal Tribunals for Rwanda, the Former Yugoslavia and the International Criminal Court”

<sup>104</sup> E/CN.4/1997/88 (3<sup>rd</sup> March 1997), Report on the situation of human rights in Somalia, prepared by the Independent Expert of the Commission on Human Rights, Ms. Mona Rishmawi, pursuant to Commission Resolution 1996/97 of April 1996, para 55

<sup>105</sup> E/CN.4/2002/119 (14<sup>th</sup> January 2002), Situation of human rights in Somalia, Report of the independent Expert, Mr Ghanin Alnajjar, submitted in accordance with Commission on Human Rights resolution 2001/81, para 11. Such a proposal has been suggested in earlier reports. See E/CN.4/2000/110, (26<sup>th</sup> January 2000), page 6

<sup>106</sup> There has been a Transitional Governmental Authority since August 2000. However it only controls a tiny portion of territory, and has not yet gain full control of the capital of Mogadishu (the capital).

It is a truism to suggest that in a State where there is no central government human rights violations will be committed almost exclusively by non-State actors: in the case of Somalia, by a large number of competing armed groups. In a situation like this the distinction between war and peace, and between war crimes and violations of international humanitarian law, on the one hand, and anarchy, banditry and organized crime, on the other, becomes somewhat opaque. In the year 2000 the UN Special Rapporteur concluded that much of the violence is now criminal rather than political.<sup>107</sup> This being so, the only way in which a non-international armed conflict could be said to be still taking place is by virtue of the fact that a lasting peaceful settlement between all relevant parties is yet to be reached.

Although international humanitarian law clearly applies until the reaching of a peaceful settlement, doubt remains as to how many of the violations carried within Somaliland and Puntland during several peaceful and stable years could qualify as war crimes. The law, as laid down in the ICTR and ICTY jurisprudence, requires that there be a close nexus between the alleged violations and hostilities occurring in other parts of the territories controlled by the parties to the conflict.

The northern regions of “Somaliland” and “Puntland” have set up their own governments, law enforcement agencies, prisons and constitutions. There has appears to have been no protracted armed conflict within or between these self-declared States in recent years; but rather, isolated acts of banditry and other localized human rights violations (such as denial of the right to fair trial). What armed conflict there is takes place in the central and southern end of the country, and perhaps also on the Ethiopian border, where some tensions remain. Nor is there any protracted armed conflict between the self-declared autonomous regions and the clans warfare in the more volatile central and southern portions of the Somalia. This being so, it is difficult to see how violations committed in “Somaliland” or “Puntland” bear any relationship whatsoever with those committed in the capital Mogadishu (hundreds of kilometers to the south), where competing armed factions remain engaged in sporadic violent clashes. For this reason isolated acts of murder, rape, pillage (etc) within the self-declared autonomous regions of “Somaliand” and “Puntland” may not qualify as war crimes.

#### (iv) Northern Ireland

All of the above cases could be said to be relatively clear-cut examples one way or another. In other contexts, however, there are reasons for both asserting and denying that humanitarian law applies. The conflict in Northern Ireland, which took place between the early 1970’s and the middle of the 1990’s, may be such a case. Northern Ireland has been in a stage of uneasy peace for some time now. After the signing of the Belfast Peace Agreement<sup>108</sup> prospects presently seem far more positive, though it is still by no means certain whether a permanent peaceful solution will come out of the agreement.

---

<sup>107</sup> E/CN.4/2000/110 sup cit, page 8

<sup>108</sup> “Agreement Reached in Multi-Party Negotiations”, 10<sup>th</sup> April 1998 (known as “The Belfast Peace Agreement” and “The Good Friday Agreement”). It can be found at [www.nio.gov.uk](http://www.nio.gov.uk)

During the thirty years of conflict both the Provisional Irish Republican Army (IRA) and Pro-British loyalist paramilitaries such as the Ulster Volunteer Force (“UVF”) carried out attacks, both on civilians and against each other, on a regular tit-for-tat basis. At the same time, the British army maintained a heavy military presence in Northern Ireland, with bases set up at strategic points for the purpose of intercepting the IRA. The IRA did not have anything approaching the military strength or capacity to wrench control of part of the territory of Northern Ireland from the British army such as to enable them to conduct sustained military operations. On this basis they would fail to meet the relatively high threshold of Additional Protocol II; and on this basis the British government could have argued that international humanitarian law did not apply (thus permitting the various ‘counter terrorism’ measures they employed, such as legislation permitting prolonged internment without trial). Because both IRA and the Protestant paramilitary military operations fell short of the legal requirements for non-international armed conflict under Protocol II, neither the British government nor the IRA could ever be held criminally accountable for war crimes nor, it is suggested, Common Article 3.

However, when one applies the more liberal test for non-international armed conflict laid down in the Tadic Jurisdiction Decision and Article 8.2(e) of the International Criminal Court Statute, the legal position of the conflict in Northern Ireland becomes less clear. Although the British government always treated the conflict as an internal matter for domestic criminal law enforcement, the prolonged nature of the conflict, combined with the regular number of casualties on both the pro-British and Pro-Republican sides, suggests that the hostilities in Northern Ireland could constitute “*protracted armed conflict between governmental authorities and organised armed groups or between such groups*”. Hundreds if not thousands of the victims were innocent protestant and catholic civilians killed and maimed by the IRA and UVF (and, indeed, in the case of events such as “Bloody Sunday”, the British army). Many of these victims had no connection whatsoever or, at best, a very tenuous connection, with either the British army or any of the paramilitary groups. In other words the victims were not participating in hostilities. It necessarily follows that those responsible could, under the broader concept of internal armed conflict as set out in the Tadic and the ICC Statute, be held legally accountable for war crimes and serious violations of international humanitarian law.<sup>109</sup>

Although the conflict in Northern Ireland arguably triggers international humanitarian law under Tadic and ICC definitions, the IRA and the UVF could not possibly be granted prisoner of war status legally speaking (nor indeed do they deserve it morally speaking). This is the case for several reasons. First of, legally speaking, the obligation to provide prisoner of war status applies only to combatants in international armed conflicts. Secondly, even if one was to argue that the conflict in Northern Ireland should be categorized as an international conflict by virtue of Article 1.4 of Additional Protocol I, which in itself remains doubtful,<sup>110</sup> the IRA and the protestant paramilitaries would in

---

<sup>109</sup> It is doubtful, however, whether groups such as the IRA or the UVF could or should be entitled to prisoner of war status.

<sup>110</sup> Article 1.4 states that international armed conflicts include “*conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles*

any case be denied prisoner of war combatant status by virtue of Article of the third Geneva Convention.<sup>111</sup> Article 4.2 of Convention No.III states that militias and organized resistance movements are to be provided prisoner of war status *so long as* they meet the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.

Quite probably groups such as the IRA and the UVF would meet the first requirement, but certainly not the other three. They did not carry arms openly or wear any kind of recognizable uniform, nor were the majority of their operations carried out in accordance with the laws and customs of war (the laws and customs of war do not license the random and indiscriminate slaughter of civilians and those not taking part in hostilities). Denial of prisoner of war status does not mean that the British authorities can do as they wish to captured paramilitaries, since they remain under an obligation to treat prisoners humanely. However they can be treated as war criminals or terrorists (as opposed to prisoners of war), and thus be subject to domestic prosecution before military or civilian tribunals. As things stand with the Tadic Jurisdiction and ICC definitions of armed conflict they could also, leaving aside the principle of non-retroactivity of criminal law and political considerations, be held liable for war crimes under international criminal law.

This begs the question as to whether ‘terrorist acts’ committed in such conflicts may be accommodated under the laws of non-international armed conflict, or whether they simply do not reach a sufficient level of intensity to be war crimes, properly-so-called, but rather merely domestic or transnational acts of terrorism.

### **III. Liability of Armed Groups for Crimes Against Humanity**

The development of crimes against humanity from the time of Nuremberg has already been discussed in some detail above. Armed groups and terrorist organizations may be held liable for crimes against humanity. Some further country examples will be given to

---

*of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*”. Northern Ireland may (arguably) be considered to be such a case: English settlers have been forcibly colonising Northern Ireland as far back as the time of King Edward I of England in the 13<sup>th</sup> century. However, we are no longer in the 13<sup>th</sup> century, and at the present moment it is clear that the majority of the people of Northern Ireland wish to remain part of the United Kingdom. Most of the 38% catholic minority would wish to see a united Ireland, whereas the protestant majority wish to remain as part of the United Kingdom. The 1998 Belfast Peace Agreement provides for the future possibility of a united Ireland, but if, and only if, the majority of people in Northern Ireland vote in favor of such a move in accordance with their right to self-determination. See “Constitutional Issues” in “Belfast Peace Agreement”, *ibid*.

<sup>111</sup> Article 4.2

explore the potential scope of liability. Before doing the developments so far should be recalled:

- Crimes against humanity can be perpetrated during both peacetime and wartime, and by both state and non state actors
- For an alleged offence to be a crime against humanity it must be committed in the context of a *widespread* or *systematic* attack against a civilian population, and the accused must have knowledge of such an attack.<sup>112</sup> This excludes acts isolated acts of violence unrelated to the attack, and implies some form of governmental, organizational or group policy.<sup>113</sup> Provided these requirements are met terrorist organizations could be convicted and punished for crimes against humanity<sup>114</sup>
- Such an attack must relate to one of the enumerated acts recognised as crimes against humanity to date (for the purposes of the present discussion “to-date” will be taken to mean the International Criminal Court Statute). The enumerated acts appearing under the ICC Statute are:

-Murder;

-Extermination;

-Enslavement;

-Deportation or forcible transfer of population;

-Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

-Torture;<sup>115</sup>

-Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of violence of comparable sexual gravity;

-Persecution of any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

-Enforced disappearance of persons;

-The crime of apartheid

-Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or mental or physical health;

Given the varied and expansive nature of the enumerated crimes, the potential scope of liability of armed groups and terrorist organizations could potentially be very wide

---

<sup>112</sup> Tadic Appeals Judgment (15<sup>th</sup> July 1999), para 271

<sup>113</sup> Tadic Trial Judgement, para 644, Akayesu Judgement, para 580.

<sup>114</sup> Tadic Trial Judgement 654, *ibid*

<sup>115</sup> Under customary international law the definition of torture required the physical or mental pain or suffering inflicted upon the victim be committed by a State official or someone acting at the instigation or acquiescence of a State official. The Rome conference considered that crimes against humanity could be committed by both State and Non-State actors, and thus Article 7(2)(e) of the Rome Statute does not require that a State official must be involved for an act to constitute torture as a crime against humanity.

indeed. Much depends on how the courts interpret the special element: the requirement that the alleged crimes be part of widespread or systematic requirement against a civilian population. If it is interpreted liberally then armed groups and, in some cases, terrorist organizations, could be held liable for crimes against humanity in a large number of conflicts around the world. If it is interpreted restrictively, liability will only be triggered for atrocities committed on a massive and/or highly destructive scale. In practice one can assume that only the most atrocious and extensive crimes will ever be prosecuted before the limited resources of the International Criminal Court. However, crimes against humanity trigger universal jurisdiction, and such crimes may therefore be prosecuted before any national justice system regardless of where and by whom the crimes were committed. Thus whether the widespread or systematic attack is interpreted liberally or restrictively is of considerable importance.

Some further country examples will be given in order to explore the potential scope of liability of non-state actors for crimes against humanity.

#### (i) Sierra Leone

Sierra Leone, a former British colony, enjoyed relative stability for thirty years after its independence in 1961. However, as in many other sub-saharan African countries, people became increasingly disillusioned with the way in which the governing elite was abusing its power. By the beginning of the 1990's there was a widespread perception amongst the poorer rural people that members of the government were corrupt and were enriching themselves with Sierra Leone's considerable diamond wealth. Out of this resentment grew the Revolutionary United Front ("RUF"), set up in 1991 by a former army corporal, Foday Sankoh. At this time an alliance was formed with a Liberian paramilitary group, led by Charles Taylor, now president of neighbouring Liberia. From 1991 onwards the RUF fought a civil war against successive Sierra Leonian armies. In 1996 President Kabbah was democratically elected in what were perceived to be the fairest elections in the country for some time.

In 1997, the RUF formed an alliance was formed with another militia: the Armed Forces Revolutionary Council (AFRC), and overthrew President Kabbah in May 1997. In February 1998, the military junta was then itself overthrown by ECOMOG, a Nigerian led coalition of West African States. As a result, President Kabbah was able to return from exile to reclaim power. Some RUF and AFRC members surrendered, but many thousands of others retreated into the bush to regroup (allegedly with assistance from Burkino Faso and Liberia).

Towards the end of 1998 the RUF and AFRC rebels launched an offensive on the capital, Freetown and, in January 1999, the RUF captured and occupied Freetown for a three week period. It was during this time that some the most serious and widespread atrocities of the nine year conflict took place. At least 2000 civilians were murdered, and more than 3000 children and 570 adults were reported missing after the offensive.<sup>116</sup> The RUF is also alleged to have launched operations to round up women and young girls, who

---

<sup>116</sup> See [www.hrw.org](http://www.hrw.org), Sierra Leone reports.

were taken to rebel command centers and multiply gang raped. Well over a hundred of the girls became pregnant, and many of the victims under 12 died.<sup>117</sup> The RUF also carried out a large number of mutilations, where the limbs of both adults and children were hacked off in order to warn the civilian population not to side with the government.

After the RUF withdrawal, widespread atrocities continued until the signing of the Lome Peace Accords, agreed between the Government of Sierra Leone and the RUF in July 1999. The Lome Accords granted a general amnesty for all crimes committed during the nine year civil war. For the nine months following the peace agreement there was relative calm, although a number of cases of RUF amputations were still documented.

In May 2000, hostilities resumed after the RUF captured five hundred UN peacekeepers. The conduct of the RUF rebels and the collapse of the peace process brought about a re-consideration of the July 1999 amnesty. For this reason, the United Nations and the Government of Sierra Leone agreed to set up the Special Court for Sierra Leone in August 2000.<sup>118</sup>

The Special Court, unlike the Tribunals for Rwanda and the Former Yugoslavia, is to be made up of a combination of Sierra Leonian judges and international lawyers appointed by the UN. The Special Court shall have the power to prosecute crimes against humanity,<sup>119</sup> violations of Common Article 3 and Additional Protocol II,<sup>120</sup> other serious violations of international humanitarian law<sup>121</sup> and crimes under Sierra Leonian law.<sup>122</sup> It is expected to be fully operational by the end of this year.

There is little doubt that the armed rebel groups, (particularly the RUF) carried out an organized policy of widespread and systematic attacks against the civilian population of Sierra Leone. They are thus guilty of crimes against humanity. The policy of hacking off of the limbs of children in order to warn civilians from supporting the government is a crime against humanity: the enumerated acts being “torture” and “other inhumane acts” under Articles 2(f) & (i) of the Special Court Statute. There is also the preplanned RUF policy of abducting women and young girls to be multiply raped at RUF command centers as a crime against humanity: the enumerated act being rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence under Article 2(g) Special Court Statute. There is also the slaughter of a large number of civilians: “murder” as a crime against humanity under 2(a) of the Special Court Statute. That there was an organized and systematic policy of targeting civilians is evident from the names given to RUF operations: “Operation Burn House” (a series of arson attacks) and “Operation No Living Thing” speak for themselves.<sup>123</sup>

---

<sup>117</sup> Ibid

<sup>118</sup> UN Security Council Resolution 1315/2000

<sup>119</sup> Statute of the Special Court for Sierra Leone (agreed 16<sup>th</sup> January 2002), Article 2

<sup>120</sup> Article 3

<sup>121</sup> Article 4

<sup>122</sup> Article 5

<sup>123</sup> See “A Country Torn by Conflict”, by BBC Africa Correspondent Caroline Hawley.

[www.bbc.co.uk/hi/english/special\\_report/1999/01/99/sierra\\_leone](http://www.bbc.co.uk/hi/english/special_report/1999/01/99/sierra_leone)

## (ii)Columbia

The FARC is known for taking civilians to be used as hostages. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law is one of the acts enumerated as a crime against humanity in the Rome Statute. It is clear that Hostage taking is a violation of fundamental rules of international law: under Article 1 of the 1979 Hostages Convention,<sup>124</sup> as a grave breach of the Geneva Conventions of 1949,<sup>125</sup> as a violation of Common Article 3,<sup>126</sup> as a breach of Article 4.2(c) of Additional Protocol II<sup>127</sup> and as a war crime under the Rome Statute itself.<sup>128</sup> One must then ask whether the nature of the hostage constituted a severe deprivation of physical liberty, and if it is carried out as part of an organizational policy. When one considers that in the year 2001 alone the FARC carried out over one thousand kidnappings of civilians, in many cases resulting in death or lengthy periods in captivity, the answer is most probably be yes.<sup>129</sup>

## (iii)Somalia

Somalia, like Columbia, has already been discussed in the context of liability for serious violations of international humanitarian law/war crimes. As alluded to earlier, the Special Rapporteur's to the United Nations Commission on Human Rights recommended that an international criminal tribunal should be set up to prosecute past violations, and that war crimes against humanity crimes have been committed in Somalia.<sup>130</sup> No mention in the UN reports is made of the context or circumstances under which crimes against humanity are alleged to have been committed, save perhaps for the example of a mass grave found in the vicinity of the town of Hargesia (in the north eastern breakaway region of "Somaliland").<sup>131</sup> No conclusions can be therefore be drawn without further evidence as to the identify of the victims, the context in which they were killed and who was responsible. If the proposal to set up an International Criminal Tribunal for Somalia does ever materialize light could be thrown on these questions through further investigation.

### **III. The notion of "terrorism": A workable or useful legal concept?**

The multilateral and regional anti-terrorist conventions have been described in some detail above, as has international humanitarian law, which has now evolved to the stage

---

<sup>124</sup> International Convention Against the Taking of Hostages (1979) sup cit n.

<sup>125</sup> For example Geneva Convention (No IV) Relative to the Protection of Civilian Persons in Time of War, Article 147

<sup>126</sup> sup cit n.

<sup>127</sup> Additional Protocol 4.2(c), sup cit n.

<sup>128</sup> Rome Statute Article 8.2(a)(viii) (transplanting Geneva Conventions grave breaches provisions with regard to international armed conflicts) and Article 8.2 (c)(iii) (transplanting Common Article 3 with regard to non-international armed conflicts)

<sup>129</sup> See website links of [www.hrw.org](http://www.hrw.org) cited infra

<sup>130</sup> See discussion infra

<sup>131</sup> E/Cn.4/2000/110, (26 January 2000) Commission on Human Rights, fifty sixth session: Situation of human rights in Somalia: Report of the Special Rapporteur, Ms. Mona Rishmawi, submitted in accordance with Commission on Human Rights resolution 1999/75, para 114

where ‘acts of terror’ constitute war crimes.<sup>132</sup> The answer to the question of whether the notion of “Terrorism” is workable or useful as a legal concept can be answered in the negative. It is neither a workable or useful as legal concept for two interconnected reasons: firstly, the notion of ‘terrorism’ is too politically charged to ever sensibly be used as a legal concept, and it is for this reason it been has impossible to gain anything approaching agreement on it’s meaning and scope;<sup>133</sup> secondly, utilizing terrorism as a tool of legal liability throws up the potential for great injustice.

(i)The confusing and unnecessary nature of the term in international humanitarian law

When applying the law relating to war crimes and crimes against humanity to concrete situations one can see the overlap between, on the one hand, armed groups falling under international humanitarian law and, on the other, internal disturbances, organized crime and acts of terrorism falling under the anti-terrorist conventions and domestic criminal law. Using the emotive terrorist label as a legal concept merely adds to the perplexity of what is already a perplexing area.

Take the situation in Columbia: paramilitary organizations such as the FARC have been declared “terrorist organizations” by the United States and the European Union whilst, at the same time, clearly being subject to humanitarian law as an armed rebel groups (the FARC is capable of controlling territory such as to enable it to conduct sustained military operations and so it even meets the higher threshold of Protocol II).

How does this relate to liability for war crimes under international humanitarian law, one might ask? The jurisprudence of the Rwanda and Yugoslavia tribunals holds that ‘terrorist acts’ do not fall under international humanitarian law. Thus we are left in the confusing position where organizations such as the FARC are simultaneously declared ‘terrorist organizations’ falling outwith international humanitarian law whilst, at the same time, the acts they are alleged to have committed comfortably fall within the notion of ‘protracted armed conflict’ (as defined in Tadic Jurisdiction). One is then left to discern what ‘acts of terrorism’ actually means in differing contexts of armed conflict. Is the FARC a ‘terrorist organisation’, an armed rebel group or both? And which regime applies: international humanitarian law, the multilateral anti-terrorist conventions or both? Logically, it cannot be both, since the two are held to be mutually exclusive<sup>134</sup>

---

<sup>132</sup>To date there have been convictions for before the International Criminal Tribunals for either ‘acts of terrorism’ (Article 4.2(d) Additional Protocol II) or “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population” (Additional Protocol I, Article 51.2). The jurisprudence of the Tribunals confirms that Additional Protocol II Article 4 has evolved to the stage where it attracts individual criminal responsibility, and the same may well be true of Additional Protocol I, Article 51.2.

<sup>133</sup> Proposals were made to include “terrorism” as one of the core crimes in the International Criminal Court Statute. However it was felt that “terrorism” was far too politically loaded, and that no agreement could be reached on its meaning and scope. See Rome Statute Commentary, sup cit. convictions for ‘acts of

<sup>134</sup>The ICTY/R jurisprudence excludes ‘terrorist’ activities from the scope of international humanitarian law, and the anti-terrorist conventions, with the exception of the Financing of Terrorism Convention, expressly exclude themselves from situations already covered by international humanitarian law.

To add to the confusion we have Additional Protocol 4.2(d), ICTR Statute 4(d) and Article 51.2 of Additional Protocol I all declaring ‘terrorist acts’ and ‘acts of terror’ as violations of international humanitarian law. By virtue of the jurisprudence of the International Criminal Tribunals such acts constitute serious violations of international humanitarian law, and are thus prosecutable under the laws and customs (essentially making them war crimes).

There is no need to have of ‘terrorising civilians’ or ‘acts of terrorism’ under international humanitarian law. Such violations include hostage taking, intentionally bombarding civilians and civilian objects, carrying out extrajudicial executions, murder, mutilation, torture, rape, forcible transfer of civilian population et cetera. All of these crimes are likely to create a state of terror amongst the victims and those in the vicinity of where the crimes take place. It therefore adds little to create a separate category of crime outlawing ‘acts of terrorism’. Doing so creates an indeterminate and unnecessary piece of excess baggage. The only possible significance of an intention to terrorise through commission of such acts is in assessing factors in aggravation or mitigation of sentence.

Admittedly, the multilateral and regional anti-terrorist conventions define the acts considered ‘terrorist’ in a more precise manner than is the case under international humanitarian law. Even so, there remains a disturbing degree indeterminacy in instruments such as the E.U Council Framework Decision on Terrorism. In any case, instruments such as the Terrorist Bombings Convention and the Council Framework Decision are set out in such a manner as impose a system of strict liability against all those who seek to promote political change using force. Although in many cases terrorist organizations will carry out wanton acts of violence and destruction, in some cases the need to achieve political change may be so great, and the means used to achieve may of such a nature as to achieve such change proportionately, that the strict liability regime of the anti-terrorist conventions is made to seem harsh and unjust. To this question we shall now turn.

(ii) The potential injustice of using the notion of ‘terrorism’ to hold ‘terrorist organizations’ accountable under the multilateral and regional anti-terrorist conventions

One may argue that the law relating to ‘terrorist acts’ under the anti-terrorism conventions and violations of international humanitarian are perfectly reconcilable: the prohibitions against terrorism mirror what is already illegal under the law of armed conflict. So the argument goes. However it is not the case that ‘terrorist acts’ in peacetime and ‘acts of terror’ committed by armed forces during war are necessarily comparable. In a certain sense they are: when a soldier intentionally kills civilians this may constitute a war crime, just as when a ‘terrorist organisation’ blows up innocent civilians this constitutes an act of terrorism under the terrorist bombings convention.

Yet in other crucial respects acts carried out by ‘terrorist organisations’ during peacetime cannot be equated with acts carried out by soldiers in times of armed conflict. In armed conflict soldiers are permitted to kill opposing forces, and to destroy property so long as it militarily necessarily (and so long as such destruction does not involve intentional or

indiscriminate bombardment of civilians and civilian objects). In the case of ‘terrorism’, by contrast, it is less a case of two armed groups openly in combat, but more a case of an organization, usually operating covertly, carrying out attacks against government officials and/or random attacks against civilians. ‘Terrorist organisations’ attacking governments is obviously not the same thing as armed groups opposing each other in protracted armed conflict. But this does follow that those acts outlawed by the anti-terrorist conventions will always be unjustifiable. There may be cases where necessity dictates that governments, armed forces and security services be subject to attack where they carry out massive and systematic violations of human rights in situations falling short of non-international armed conflict (i.e. in peacetime). This may be termed ‘political necessity’.

But there is no obviously no such thing as either military nor political necessity under the multilateral and regional anti-terrorist conventions. Article 5 of the Terrorist Bombings Convention places an obligation on State parties to ensure that none of the offences listed thereunder can be justifiable by considerations of a political, philosophical, ideological, racial, ethnic or religious nature.<sup>135</sup> Whereas under international humanitarian law armed groups are permitted to kill opposing forces and carry out destruction justified by military necessity, there is no such no equivalent concept of ‘political necessity’. This essentially creates a regime of strict liability for ‘terrorists’.

Most of the multilateral and regional anti-terrorist conventions impose an ‘extradite’ or ‘prosecute’ obligation on States which means that, even if the State against whom the offences were directed has an appalling human rights record, the requested State is under an obligation to prosecute if extradition is refused.

It is true that organisations such as Al Qaeda offer political and ideological justifications for barbarous atrocities against innocent civilians. Looking at the nature of the attacks carried out by such organizations may lead one to conclude that outlawing all acts of ‘terrorism’, regardless of motivation and justification, is the most sensible means of tackling the problem. It avoids the familiar and potentially slippery slope of ‘the ends justify the means’. Having said this, the outrages committed by Bin Laden do not necessarily lead us to conclude that none of the enumerated acts under the multilateral and regional conventions can ever be justified. There may be many cases where States are carrying out widespread and systematic violations of human rights against their own people. In such cases, those who form an organization to target those responsible for such violations (such as government officials and security police) should not *a priori* be treated in the same manner as organizations such as Al Qaeda.

As Van Wyngaert puts it, there seems to be a general presumption that in conflicts between opposing governments and terrorists, the former are the ‘virtuous’ whereas the latter are the ‘criminals’.<sup>136</sup> She is right to assert that such presumptions bear no relationship with the frightful everyday realities of the real world.

---

<sup>135</sup> Article 5 Terrorist Bombings Convention *sup cit n.*

<sup>136</sup> Van den Wyngaert, “Plugging the Terrorists Loophole..”, at p.305

Syria may be serve as an example of the dangers of attempting to promote international crime control and mutual legal assistance by utilizing the notion of ‘terrorism’ as a legal concept. At the risk of unfairly singling out Syria, it is chosen as one of numerous possible examples (including the neighbouring countries of Iraq, Egypt and Israel).

Syria has signed the Torture Convention (perhaps as some kind of token gesture), but it is not uncommon for Syrian students to disappear, sometimes never to return, for expressing any kind of dissatisfaction with government policy.<sup>137</sup> They are removed by security services to be stretched on racks, injected with unimaginably unpleasant drugs, multiply raped and so on. They are then charged with blatantly political crimes, such as ‘belonging to a unauthorized political organisations’. If they are still alive at the end of it all they are given long prison sentences. Ironically, when passing sentence, the judges often label them ‘terrorists’.<sup>138</sup> And yet, were these people to form a group attempting to change such an oppressive regime, the global anti-terrorist conventions impose a system of strict liability labeling them ‘terrorist criminals’. If such a group were to decide to attempt to bring about change by causing serious damage to state security facilities, it would remain an inherently unjustifiable act under the Terrorist Bombings Convention (even if none of the state security personnel involved in the torture actually lost their lives or escaped uninjured).

Throughout the world, it is very common to hear of people’s lives being made misery for no other reason that they wrote in article in a newspaper expressing dissatisfaction with government policy. An endless stream of examples can be given by the United Nations Commission on Human Rights, Amnesty International and Human Rights Watch. And yet the multilateral and regional anti-terrorism conventions impose a regime of strict liability on anyone who seeks to oppose governments using any of the enumerated acts.

And it is not only in middle eastern countries where there is the potential for great injustice. The Council of Europe Framework Decision, as well as sweeping new anti-terrorism legislation in countries like the United Kingdom, has been criticized by civil liberties and human rights groups on the grounds that terrorist offences are defined in an excessively broad manner, and may therefore impinge on legitimate rights to freedom of expression and protest.<sup>139</sup> As Statewatch points out, members of environmental groups such as Greenpeace, as well as anti-globalization protesters after the events in Genoa and Stockholm, could be convicted and sentenced to heavy terms in prison for ‘terrorist offences’ according to the definition of the Council of Europe Decision.

Common to popular perception, permitting political change by force in certain limited circumstances does not provide a license to international criminality. Acts carried out by a large number of majority of modern ‘terrorist organisations’ cannot possibly be justified by any political goals, since they are aimed at innocent civilians rather than the soldiers or government officials allegedly responsible for the oppression, colonial domination et

---

<sup>137</sup> See [www.bbc.co.uk/education/humanrights](http://www.bbc.co.uk/education/humanrights) and more generally, [www.humanrightswatch.org](http://www.humanrightswatch.org) and [www.amnesty.org](http://www.amnesty.org)

<sup>138</sup> Ibid

<sup>139</sup> See [www.statewatch.org](http://www.statewatch.org)

cetera.<sup>140</sup> However, in cases where an organization acts to counter gross and systematic violations of human rights committed by totalitarian states, it does not seem fair or reasonable to label them terrorists (which is precisely what the global and regional anti-terrorism conventions do). Much of course depends on the circumstances and means used, and generally speaking the less indiscriminate the attacks (it being preferable to target those directly responsible for the violations) and the less violent (destruction of property being preferable to attacks on human life) the better.

The concerns raised by Statewatch about Greenpeace and the anti-globalisation riots in Stockholm and Genoa are of an entirely different nature, since no sane person would argue that the United States and the European Union violate the rights of their citizens in to the same extent as totalitarian regimes. Statewatch nevertheless makes an important point: the Council Framework decision is a knee jerk panic reactions to September 11th, and a disproportionate and potentially unjust piece of legislation to deal with 'terrorism'. The special elements and enumerated acts under Article 1 of the Framework Decision are wide enough to bring Greenpeace activists who interrupt or interfere with a North Sea oil platform, or protestors who run around smashing a couple of windows in Stockholm and Genoa as 'terrorists', with the consequence that could face years in jail on conviction. This is not to say that such people should be immune from prosecution, but rather that it would be preferable to instead prosecute them for ordinary offences under domestic criminal law (such as criminal damage to property).

### (iii) Alternative bases for liability

All of the above suggests that there are serious drawbacks to utilizing the concept of 'terrorism' and 'acts of terror' to prosecute non-state actors under both multinational anti-terrorist conventions and international humanitarian law. Such concepts should therefore be expunged from international criminal law. Three perfectly adequate alternative bases for criminal liability exist:

- Crimes against humanity; and/or
- Where there is a state of protracted armed conflict, serious violations of international law & war crimes; or
- Where the relevant violations fall short of the widespread or systematic requirement or the level of violence falls short of an armed conflict, those involved in 'terrorist acts' can instead be prosecuted under domestic criminal law for murder, manslaughter, kidnapping (et cetera)

### *Crimes against humanity*

---

<sup>140</sup> For example, the militant Palestinian 'terrorist organization' Hamas makes no effort whatsoever to distinguish between innocent civilians and those it considers responsible for the oppression of the Palestinian people. Instead it denies Israel's right to exist and is bent on the destruction of the Israeli state and its people. It does takes little much imagination to consider what would occur if they happened to have the military capacity to achieve their goals. Nor does it take much imagination to contemplate what the IRA might have done do to Irish protestants had they not been checked by opposing forces.

Certain ‘terrorist’ attacks may be so destructive as to attract liability for crimes against humanity. The ICTY Trial Chamber has recognized that, under certain circumstances, ‘terrorist acts’ may give rise to liability for crimes against humanity.<sup>141</sup> Nothing further is said. Consequently, one is left to muse over where to draw the line between an ordinary ‘act of terrorism’ and an ‘act of terrorism as a crime against humanity’.

If every systematic attack against a civilian population is a crime against humanity then, given that many terrorist organizations systematically and methodically attack civilians, it would follow that the vast majority of fatal terrorist attacks against civilians could be said to constitute crimes against humanity. There must be something more which distinguishes crimes against humanity from ordinary ‘terrorist crimes’. A distinguishing feature of crimes against humanity has been said to be that crimes against humanity are so serious as to have international repercussions or exceed in magnitude or savagery any limits tolerated by modern civilisation.<sup>142</sup>

In considering whether terrorist attacks could be described as crimes against humanity and if so, which ones, the obvious place to start would be September 11<sup>th</sup>. This was not only the worst ‘act of terrorism’ in history. It was also arguably the most unusual, sophisticated and effectively executed. Thousand civilians lost their lives. It was carried out, as everyone by now is all too aware, by the Al Qaeda network with Osama Bin Laden as its head. Al Qaeda is a highly sophisticated organization alleged to be responsible for previous serious attacks against the United States and its citizens (for example, the attacks on the U.S embassies in Kenya and Tanzania).

The goal of Al Qaeda is to undermine western interests and, ultimately, to overthrow western democracies and replace them with Islamic states. Particular attention is paid to attacking the United States.<sup>143</sup> It is not a small group with a tightly knitted command structure, but a loose coalition of terror cells spread throughout the world which often remain inactive for long periods, only to be suddenly called up for lethal attacks.<sup>144</sup> The Consultation Council, with Bin Laden at its head, approves major undertakings.<sup>145</sup>

As regards September 11<sup>th</sup>, the Pentagon could, in sense at least, be considered a military target in that it contained a certain number of personnel working directly to enhance America’s national security interests. However this is irrelevant since, at the time of the attacks, the U.S and Al Qaeda were not in a state of war. The deaths of those in the pentagon thus fall to be considered as murder.<sup>146</sup> It seems fairly obvious that no attempt whatsoever was made to distinguish between members of the American armed forces and

---

<sup>141</sup> Tadic Trial Judgment, para 654

<sup>142</sup> Schwelb E, “Crimes Against Humanity” (1946) 23 BYBIL 178 at 195-197, quoted in Kittichaisaree K, “International Criminal Law (2001), p.85

<sup>143</sup> See [www.pbs.org](http://www.pbs.org) (Frontline)

<sup>144</sup> A short description of the structure and aims of Al Qaeda is given by South Asia Terrorism Portal [www.satp.org](http://www.satp.org)

<sup>145</sup> Ibid

<sup>146</sup> Even if the United States was at war with Al Qaeda, it would be implausible to suggest that each and every worker in the Pentagon could be said to contribute directly to the American war effort such as to that lose their protected persons status under international humanitarian law.

the American people. Equally obvious is the fact that flying commercial airlines into the Pentagon and the World Trade Center must have required a high degree of planning and organization (training the pilots, assessing possible bars to success et cetera). Almost all of the victims were civilians.

All of the above points towards the conclusion that the attacks on September 11<sup>th</sup> meet all the requirements for crimes against humanity. This being so, Al Qaeda members could be prosecuted, tried and convicted for crimes against humanity (specifically, murder as a crime against humanity). Crimes against humanity, like war crimes, invite universal jurisdiction, and thus any State in the world which happens to apprehend Al Qaeda members could either try them for crimes against humanity or extradite them to the United States to face trial.

The status of other highly destructive ‘terrorist attacks’ is less certain. The bombings of the U.S embassies in Kenya and Tanzania in 1998 were also alleged to have been masterminded by Bin Laden and Al Qaeda. The attacks on the Nairobi and Dar es Salam attacks were carried out simultaneously. Were these crimes against humanity as well, or are we to draw a line and say that the cold calculation and death and scale of destruction of the September 11<sup>th</sup> attacks sets them apart from all others attacks (such the Nairobi and Dar es Salam embassy attacks and, indeed, the Lockerbie bombing, where 270 perished)?

The bombings of the U.S embassies in Kenya and Tanzania and the Lockerbie bombing clearly caused a large degree of suffering and loss of life (226 people lost their lives in the embassy attacks, whilst 270 perished in the Lockerbie disaster). Although the definitions of genocide and crimes against humanity are concerned with intent as much as consequence, it is obvious that we cannot label every systematic ‘terrorist attack’ against a civilian population as a crime against humanity. In this regard one should remember that since the time of Nuremberg genocide and crimes against humanity have come to be established as the most serious crimes under international law. For this reason we must resist the temptation to label all but the most serious and shocking atrocities as genocide or crimes against humanity, as this is what sets them apart from all other crimes.

One suspects that September 11<sup>th</sup> could be set apart from other serious fatal ‘terror attacks’ by virtue of the sheer scale of destruction. However, such assumptions are difficult to make without further guidance from an international criminal tribunal as to the nature and scope of crimes against humanity in this context. Theoretically speaking, an ad hoc tribunal could have been set up for September 11<sup>th</sup> in the same way as the International Tribunals were set up to prosecute and punish the atrocities which took place in Rwanda and Yugoslavia. However, considering that the U.S has already captured and transferred many Al Qaeda suspects for trial before U.S special courts, this seems very unlikely to occur. If Bin Laden is captured by another State they would have a legal basis for placing him on trial for crimes against humanity by virtue of universal jurisdiction. But in practice the political pressure to hand him over to the United States would be overwhelming.

### *Serious violations of international humanitarian law*

Numerous acts constituting breaches of international humanitarian law which could also be said to amount to ‘acts of terrorism’ against civilians during armed conflict have already been described. Maintaining a separate category of war crime outlawing ‘terrorist acts’ is therefore unnecessary and, if anything, special intent to terrorise should only be considered in aggravation of sentence. As already stated, armed groups such as the FARC could be prosecuted for, inter-alia, hostage taking, intentionally directing attacks against the civilian population and violence to life and person, including murder, ill treatment and torture.<sup>147</sup>

### *Domestic criminal law*

Above, it has tentatively been suggested that only the most destructive and atrocious ‘terrorist attacks’ would be of such a scale as to warrant the label crimes against humanity. Since many attacks by ‘terrorist organizations’ take place are perpetrated in peacetime, it follows that the vast majority of ‘terrorist attacks’ are better dealt with under domestic criminal law.

In fact, domestic criminal law can quite adequately deal with such crimes. The Special Scottish Court in the Netherlands tried the alleged perpetrators of the Lockerbie bombing under Scots law.<sup>148</sup> There is no need to resort to emotive, amorphous and politically charged notions such as ‘terrorism’. The term ‘terrorism’ is constantly being branded about by governments and newspapers in a reactionary manner, and as such is not fitting for a court of law. The Lockerbie defendants were charged (inter-alia) with murder and conspiracy. With two hundred and seventy victims this was the largest ever murder trial under Scots law. Everyone understands that the murder of 270 people is an especially serious crime. Again, one should say that an ideological motive to attack a particular group of persons because of their collective identity can be taken into account as an aggravating factor when assessing sentence.

### ***Conclusion***

In “Part A” we have seen that were it not for Nuremberg Trials, crimes against humanity may never have been invented as a legal concept. Nor would have been any legal precedent for prosecuting war crimes and crimes against humanity before an international

---

<sup>147</sup> All of these acts are now war crimes in non-international armed conflicts under Articles 8.2(c) & (e) of the ICC Statute

<sup>148</sup> Although Scots criminal law can quite adequately deal acts such as the Lockerbie bombing, serious questions have been raised about the way in which this particular trial has been conducted. The UN Special Observer to the trial, Dr Hans Kochler, has pointed out that the conviction of one of the accused is based solely on circumstantial evidence. Also, the special defence of incrimination (that it was a Syrian based Palestinian extremist group, not Libya, that was responsible) was dropped by defence lawyers at a crucial point in the trial. He doubts whether the convicted accused received a fair trial, and accuses the judges of finding a guilty verdict for reasons of political expediency. See “Report on the Evaluation of the Lockerbie Trial Conducted by the Special Scottish Court at Kamp van Zeist” (3<sup>rd</sup> February 2002), by Dr Hans Kochler, Special Observer appointed by the UN Secretary General.

tribunal. At that time of the Second World War, war crimes were only considered to apply to offences committed in occupied territory against foreign nationals. For this reason crimes against humanity were invented to fill the gap, thereby punishing atrocities perpetrated by the Nazi regime on German territory against German nationals of Jewish origin.

Since this time, the law relating to war crimes and crimes against humanity has developed considerably, with crimes against humanity evolving and expanding as a separate category. As things stand, the ICC Statute provides a detailed list of crimes against humanity and war crimes in both international and non-international armed conflict for which non-state actors can be held accountable. The problem is that armed groups and terrorist organizations are perpetrating war crimes and crimes against humanity across the world on an almost daily basis with impunity. Thus, the dilemma is not so much whether or a sufficient legal basis has been developed to hold them accountable, but how to ensure that they are brought to justice in practice. Progress has been made with the International Criminal Tribunals for the Former Yugoslavia, Rwanda, the Sierra Leone Special Court and the International Criminal Court Statute. However there is clearly a long way to go, and it is therefore preferable not to have overly optimistic expectations and take things one step at a time.

In “Part B” some practical examples were given as to how the law could be applied in practice to hold armed groups and terrorist organizations accountable. Although in some cases it will be obvious whether or not the a state of conflict within a state triggers liability for war crimes (eg in South Africa criminal violence has clearly not reached the stage where the laws of armed conflict), in other cases there will be reasons for asserting and denying that international humanitarian law applies (e.g the former conflict in Northern Ireland). There is a similar problem in delineating crimes against humanity from war crimes and ordinary crimes (such as mass murder) under domestic law. The boundaries of liability will become clearer as they are applied to a greater and greater number of concrete situations.

‘Crimes of Terror’, ‘and ‘acts of terrorism’ are wonderful adjectives for newspapers and governments and opposition groups making accusations and counter accusations in political struggles (such as Northern Ireland and Israel/Palestine). This in itself should tell us that such words are inevitably politically loaded, and for this reason they are neither appropriate (they introduce the potential for great injustice) nor necessary (perfectly adequate alternative bases for legal liability) for use as legal terms.

## INTERNATIONAL CONVENTIONS

1907 Hague Regulations Respecting the Laws and Customs of War on Land, annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, UK Treaty Series 9 (1910), cd. 5030

Convention for the Prevention and Suppression of the Crime of Genocide (1948), 78 U.N.T.S 277 (“Genocide Convention”)

Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12<sup>th</sup> August 1949, 75 UNTS 31 (“Geneva Convention I”)

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12<sup>th</sup> August 1949, 75 UNTS 31 (“Geneva Convention II”)

Geneva Convention Relative to the Treatment of Prisoners of War 12<sup>th</sup> August 1949, 75 UNTS 135 (“Geneva Convention III”)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War 12<sup>th</sup> August 1949, 75 UNTS 287 (“Geneva Convention IV”)

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (1968), G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218

Hague Convention for the Unlawful Seizure of Aircraft, 16<sup>th</sup> December 1970 22 UST 1641 (“Aircraft Hijacking Convention”)

The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, September 23<sup>rd</sup> 1971, 24 UST 564 (“Aircraft Sabotage Convention”)

Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, 14<sup>th</sup> December 1973

Convention on the Suppression and Punishment of the Crime of Apartheid (1973), U.N. GAOR Supp (No.30), at 75, U.N. Doc A/9030 (“Apartheid Convention”)

Convention on the Physical Protection of Nuclear Materials, with annex, October 26<sup>th</sup> 1979, TIAS no 11080 (“Nuclear Materials Convention”)

Protocol Additional to the Geneva Conventions of 12<sup>th</sup> August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 12<sup>th</sup> December 1977, 1125 UNTS 3 (“Additional Protocol I”)

Protocol Additional to the Geneva Conventions of 12<sup>th</sup> August 1949, and Relating to Protection of Victims of Non International Armed Conflicts of 12<sup>th</sup> December 1977, 1125 UNTS 609 (“Additional Protocol II”)

International Convention Against the Taking of Hostages. December 17<sup>th</sup> 1979. 1316 UNTS 205 (“Hostages Convention”)

Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention of September 23<sup>rd</sup> 1971

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, with related Protocol March 10<sup>th</sup> 1988

International Convention for the Suppression of Terrorist Bombings, 15<sup>th</sup> December 1997, 37 ILM 249 (1988) (“Terrorist Bombings Convention”)

International Convention for the Suppression of the Financing of Terrorism G.A Res. 54/109, 9<sup>th</sup> December 1999 (“Terrorist Financing Convention”)

#### REGIONAL INSTRUMENTS

European Convention on the Suppression of Terrorism, European Treaty Series no.90, Strasbourg, 27<sup>th</sup> January 1977

European Union Convention Relating to Extradition Between the Member States of the European Union, OJ 96 C 313/02 (27<sup>th</sup> September 1996)

European Commission Proposal for Council Framework on Combating Terrorism OJ C 332 E/300 (October 2001)

Council of Europe Framework Decision on Combating Terrorism (December 2001)

#### INTERNATIONAL CRIMINAL STATUTES

Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, London, 8<sup>th</sup> August 1945, 8 UNTS, 279 (“Nuremberg Charter”)

Statute of the International Criminal Tribunal for the Former Yugoslavia (1993) (“ICTY Statute”)

Statute of the International Criminal Tribunal for Rwanda (1994) (“ICTR Statute”)

International Criminal Court Statute (1998) (“ICC Statute”)

Statute for the Special Court of Sierra Leone (2002)

#### CASES

Prosecutor V Dusko Tadic, ICTY Appeal Chamber Decision on the Defence Motion for Interlocutory on Jurisdiction of 2<sup>nd</sup> October 1995 (“Tadic Jurisdiction”) (ICTY)

Prosecutor V Dusko Tadic, ICTY Trial Judgment, 7<sup>th</sup> May 1997 (“Tadic Trial Judgment”) (ICTY)

Prosecutor V Dusko Tadic, ICTY Appeals Judgment, 15<sup>th</sup> July 1999 (“Tadic Appeals Judgment”)

Prosecutor V Blaskic, ICTY Trial Judgement, 3<sup>rd</sup> March 2000 (“Blaskic Trial Judgment”)

Prosecutor V Delalic et al, ICTY Trial Judgement, 16<sup>th</sup> November 1998 (“Celebici Trial Judgment”)

Prosecutor V Delalic et al, ICTY Appeals Judgment, 20<sup>th</sup> February 2001 (“Celebici Appeal Judgment”)

Prosecutor V Krnojelac, ICTY Trial Judgment, 15<sup>th</sup> March 2002 (“Krnojelac Trial Judgment”)

Prosecutor V Jean Paul Akayesu, ICTR Trial Judgment, 2<sup>nd</sup> August 1998 (“Akayesu Trial Judgment”)

Prosecutor V Alfred Musema, ICTR Trial Judgment, 27<sup>th</sup> January 2000 (“Musema Trial Judgment”)

Prosecutor V Clement Kayishema & Obed Ruzindana, ICTR Trial Judgement, 21<sup>st</sup> May 1999 (“Kayishema/Ruzindana Trial Judgment”)

Prosecutor V Georges Rutganda, ICTR Trial Judgement, 6<sup>th</sup> December 1999 (“Rutaganda Trial Judgment”)

Prosecutor V Bagilishema, ICTR Trial Judgement, 7<sup>th</sup> June 2001 (“Bagilishema Trial Judgement”)