

HOLDING NON-STATE ACTORS DIRECTLY RESPONSIBLE FOR ACTS OF INTERNATIONAL TERROR VIOLENCE

**- The Role of International Criminal
Law and International Criminal
Tribunals in the Fight against Terrorism**



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Abbreviations

CoE	Council of Europe
EIF	entry into force (of a convention)
EU	European Union
FIN	Finland (or Finnish ratification)
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
NATO	North Atlantic Treaty Organisation
OAS	Organization of American States
OSCE	Organization for Security and Co-operation in Europe
SP	State Parties
UN	United Nations

1. INTRODUCTION

1.1. The Background of the Study: The Terror Attacks against the United States on 11 September 2001

The terror attacks against the United States on 11 September 2001 re-actualised in a dramatic way the question how States and the international community can and should deal with terrorism. The unforeseen use of civil airliners as missiles had catastrophic consequences. It is estimated that the attacks against the World Trade Center towers and the Pentagon Building resulted in the death of some 4,000 people.¹

The initial debate after the terrorism attacks concentrated on the question whether military or non-military responses were to be preferred. Especially international criminal law and international criminal tribunals were put forward as alternatives to military responses. For example, the Parliamentary Assembly of the Council of Europe concluded that it considered the terrorist actions to be crimes rather than acts of war.² As it soon became evident that the United States was going to make use of armed force, the relationship between the different responses became topical. While it is difficult to define the relationship, it appears that the international community expects that the military actions will be supplemented with some judicial responses.³ The importance of bringing those responsible for the attacks to justice is constantly stressed.

How the terrorist attacks should be addressed legally is, however, controversial. On the one hand, it is debated what crimes the terrorists should be prosecuted for. The international community has for decades in vain tried to agree on a terrorist crime definition that would allow the effective prosecution and punishment of persons committing acts of terrorism. In practice, this means that terrorists usually are convicted for common crimes (like murder) and

¹ Associated Press 2001

² CoE Doc. Resolution 1258 (2001), para. 8

³ See, for example, the comment made by UN Secretary General Kofi Annan in an interview: "Question: Mr. Secretary-General, [...] what is your understanding, your interpretation of what the goal of the current military actions are? Is it to catch Mr. Bin Laden, to bring him to whatever court? Is it the goal to get him killed? Is it the goal to topple the Taliban Government? What is the goal of this military action? The Secretary-General: [...] I am not privy to the military operations strategically or tactically, it is not a United Nations operation, and I cannot give you a detailed response to that. But if I follow the Security Council resolution, the idea would be to

certain manifestations of terrorism (like the taking of hostages), instead for the crime of terrorism. Some domestic jurisdictions, however, have legislation where a crime called terrorism is defined. When it comes to the 11 September attacks it has, among others, been argued that the attacks constituted aircraft hijacking and crimes against humanity.

On the other hand, the 11 September terrorist attacks also actualised the question who should prosecute the accused persons and how. First and foremost, the question has been whether an international or a domestic court is more suitable. The *Military Order on Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism* adopted by President George W. Bush on 13 November 2001⁴ has been strongly criticized for not providing a suitable forum both in the United States and elsewhere.⁵ The international community clearly requires a tribunal that respects established fair trial guarantees.

1.2. The Aim and Structure of the Study

The aim of the study is to discuss the role of international criminal law and international criminal tribunals in the fight against international terrorism. International terrorism is the subject of a number of international instruments, but despite this a great need for new legislation is perceived. The study will evaluate critically the existing legislation and to some degree put in question the need for more legislation. The study will focus on legislation establishing individual criminal responsibility or, with other words, on legislation making it possible to hold non-State actors directly responsible for acts of international terrorism. All questions relating to State responsibility fall outside the scope of the study.

A central question in the study is the relationship between so-called treaty crimes and crimes under general international law (or international core crimes). Certain manifestations of terrorism have namely been internationally outlawed in multinational conventions (treaty crimes), whereas others are criminal directly based on international customary law

bring the perpetrators of the 11 September attacks to justice. As for what the broader ultimate goal of this current operation is and all that, I am not in the loop on that" UN Press Release SG/SM/8011/Rev.1

⁴ <http://usinfo.state.gov/topical/pol/terror/01111402.htm>

⁵ See e.g. Amnesty International 2001, Fédération Internationale des ligues des Droits de l'Homme 2001, Goldstone 2001, Human Rights Watch 2001 and Slaughter 2001. See also Lane 2001

(international core crimes).⁶ As it will be shown later, the difference is significant, because the criminalization of treaty-crimes (like the taking of hostages) often follows a different technique and rationale than the criminalization of international core crimes (like genocide).⁷

The study is divided into five main chapters. In Chapter 2 the international anti-terrorist conventions are addressed and in Chapter 3 the international core crimes. The aim of these chapters is to discuss how these branches of international criminal law approach the problem of international terrorism by, among others, elaborating on to whom and when the provisions apply. Chapter 4 will be devoted to the role of international criminal tribunals in the fight against international terrorism and Chapter 5 to some reflections on the Finnish legislation with regard to terrorism. In Chapter 6 concluding observations will be made.

1.3. Some Reflections on the Doctrinal Basis for the International Criminalization Basis

When discussing international criminalizations it is often pointed out that crimes of international concern do not only violate individuals, but the international community as a whole. This international interest in certain crimes is, however, not only due to the seriousness or harmfulness of the crimes. Looking at the crimes deemed to be of international concern, it seems that at least the following problems often are connected with them:

Impunity: The crimes in question are often such that if the international community does not engage in their suppression they remain unpunished. State approval of or participation in the crime commission is not uncommon.

Partiality: Many international crimes have a discriminatory element (for example, genocide and persecution as a crime against humanity), which makes it difficult for the societies victimized to deal with the crimes impartially.

Internationality: The crimes often have an international or a trans-national element, which makes it difficult to prosecute and punish the perpetrators without

⁶ International core crimes are "acts most widely recognized as crimes under international law". Sunga 1998, p. 379. Genocide, crimes against humanity, war crimes and the crime of aggression are often regarded as the international core crimes.

⁷ Yarnold argues that the international community up to these days has criminalized conduct on an *ad hoc* basis, instead of making a thorough survey into which conduct it should criminalize on an international level. It is, therefore, according to her, important to develop a doctrinal basis for the international criminalization process. Yarnold 1999 (1994), p. 130. With other words, it is important to dwell on *why* and *how* we criminalize certain conduct internationally in order to succeed in developing a legislation that is well adapted to its purpose.

international co-operation. It is more practical to try to suppress the crimes through international co-operation.

Inter-State relations: Some of the crimes of international concern furthermore clearly threaten inter-State relations (e.g., the crime of aggression and the killing of diplomats).

These and similar factors can be used to *explain* why the international community engages in the suppression of certain forms of anti-social behaviour, but also to *categorise* the international crimes. At this point, M. Cherif Bassiouni's influential "factors reflecting the policy of international criminalization" and Barbara M. Yarnold's interpretation thereof should be noted. Bassiouni has identified twenty-five categories of international crimes⁸ and distinguished four criminalization policy elements, which are:

(1) the prohibited conduct affects a significant international interest (including threats to peace and security);

(2) the prohibited conduct constitutes an egregious conduct deemed offensive to the commonly shared values of the world community (including conduct shocking to the conscience of humanity);

(3) the prohibited conduct involves more than one State (transnational implications) in its planning, preparation or commission either through the diversity of nationality of its perpetrators or victims, or because the means employed transcend national boundaries; and

(4) the conduct bears upon an internationally protected interest which does not rise to the level required by (1) or (2) but which cannot be prevented or controlled without its international criminalization.⁹

International criminalizations can thus, according to Bassiouni, be explained with the international (1-2) or transnational (3) elements in the crimes or with practical considerations

⁸ Namely aggression, genocide, crimes against humanity, war crimes, crimes against UN and associated personnel, unlawful possession or use or emplacement of weapons, theft of nuclear materials, mercenarism, apartheid, slavery and slave-related practices, torture and other forms of cruel, inhumane and degrading treatment, unlawful human experimentation, piracy, aircraft hijacking and unlawful acts against international air safety, unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, threat and use of force against internationally protected persons, taking of civilian hostages, unlawful use of the mail, unlawful traffic in drugs and related drug offences, destruction and/or theft of national treasures, unlawful acts against certain internationally protected elements of the environment, international traffic in obscene materials, falsification and counterfeiting, unlawful interference with submarine cables and bribery of foreign public officials. Bassiouni 1999(a), p. 32-33

⁹ Bassiouni 1999(a), p. 33

(4).¹⁰ Using the Bassiounian categorization, Yarnold argues that the international criminalization of genocide can be explained with its international element, the taking of hostages with its transnational element and crimes against humanity with its international and transnational elements, etc.¹¹ One can question Yarnold's categorisations when it comes to the particular crimes, but her study makes one thing clear: *the international criminalizations do not follow one rationale, but many*. This criminalization technique with no clear underlying philosophy is susceptible to inconsistencies and legitimacy problems: conduct that should not be internationally criminalized can nevertheless be it.¹²

When looking at the different international criminalizations relating to international terror violence, it is valuable to try to identify the reasons behind the different criminalizations. When considering future criminalizations it is also important to consider why we want to criminalize certain behaviour in general and, especially, internationally. International terrorist crime criminalizations should not be an end in itself.

1.4. Some Reflections on Terrorism

Matkustajakoneen muuttaminen itsemurhaohjukseksi on selvästi terroriteko, mutta onko palestiinalaisnuorten kivien heittäminen terroriteko?¹³

In everyday speech, the concepts of terrorism and terror-violence are used in many different meanings and there are no generally accepted definitions of the terms. The international community has, indeed, for decades tried to agree on a terrorism definition, but the political realities in different countries have made the attempts unsuccessful. One big problem has been to draw the line between legal and illegal use of violence.¹⁴ It is often said that one man's terrorist is another man's freedom fighter. Another problem has been the use of the word "terrorism" in many different, although related, meanings. The word is, for instance, both

¹⁰ See Yarnold's discussion on Bassiouni's categorization, Yarnold 1999 (1994), p. 131-132. See also Bassiouni 1983, p. 28-29

¹¹ Yarnold 1999 (1994), p. 134, 135, 140

¹² Yarnold 1999 (1994), p. 152

¹³ Raivio 2001, p. C1

¹⁴ UN Special Rapporteur Koufa notes that: "One of the major reasons for the failure to come to a generally acceptable definition of terrorism is that different users of definition concentrate almost entirely on behavioural description (i.e. on certain conduct and behaviour and its effects) and do not spell out clearly who can use

used to describe systematic State violence against own citizens and to describe small-scale anti-State criminality. It has, with other words, been impossible to internationally identify the essence of terrorism. For some the essence is the targeting of civilians, for others the terror-spreading tactics, etc.¹⁵

In this study no attempt is made to give an elaborated legal terrorism definition. The word is simply used to implicate "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political [or ideological] purposes."¹⁶ Given the fact that the study is about non-State actor responsibility, the study will focus on so-called individual or group terrorism (see Box 1). Individual or group terrorism is "terrorism from below" often directed against a State or government.¹⁷ The terrorist activity by non-State actors can be State-sponsored in which case one speaks of State-sponsored terrorism. State-sponsored terrorism is a form of surrogate warfare, which allows a State to strike at its enemies in a way that is relatively inexpensive and less risky than conventional armed conflict.¹⁸ Some attention will be given to so-called non-conventional or contemporary terrorism. Non-conventional terrorism includes nuclear terrorism, chemical terrorism and biological terrorism and terrorist use of new information techniques. This form of terrorism is by the international community perceived as especially threatening, because of the extensive harm terrorists can cause by using these unconventional methods. Only terrorism that has an international element, that is, international terrorism, will be dealt with.

terrorism. Yet, the term "terrorism" carries almost always the flavour of some (subjective) moral judgement: some classes of political violence are justified whereas others are not." UN Doc. E/CN.4/Sub.2/2001/31, para. 32

¹⁵ On the problems of defining terrorism see e.g. Murphy 1989, p. 13 ff., Skubiszewski 1989, p. 39 ff. and Schmid 1983, p. 1 ff.

¹⁶ UN Doc. A/RES/55/158, p. 2

¹⁷ Lambert 1990, p. 14-15

¹⁸ Lambert 1990, p. 20 (citing Wilkinson)

BOX 1: DIFFERENT TYPES OF TERRORISM

Means used: One can speak of **conventional terrorism** and **non-conventional or contemporary terrorism**. Non-conventional terrorism includes terrorist use of weapons of mass destruction (e.g., nuclear terrorism, chemical terrorism and biological terrorism) and terrorist use of new information techniques (cyber-terrorism).¹⁹

International dimension: One can speak of **international terrorism** and **domestic terrorism** depending on whether the terrorist attack has an international element or not.

Target of the terrorist act: The acts of terrorism can be committed **against States** and **against private persons**.

Number of casualties: One can speak of **high-casualty terrorism** and **low-casualty terrorism**. UN Terrorism Prevention Branch, for example, classifies as high-casualty terrorist attacks incidents involving more than 100 fatalities.²⁰

Perpetrators: One can speak of **State terrorism** and **individual terrorism**. State terrorism can be divided into: (a) **regime or government terror** (= terrorism by a State against its own population or the population of an occupied territory in order to suppress challenges to its authority); (b) **State-sponsored terrorism** (= terrorism supported by a State in pursuance of its foreign policy goals); and (c) **international State terrorism** (= use of illegal or otherwise objectionable means to interfere with other States' internal affairs, "coercive diplomacy"). Acts of individual terrorism are committed by private persons individually or as a group. Individual terrorism is often directed against States, but there are a great variety of exceptions to this general rule.²¹

Terrorist-State relationship: In **old terror**, the cause of the terrorists is clearly identifiable and there often exists an established relationship between the terrorist group and the State they function in. **New terror**, on the other hand, is characterized by "no borders, no front, no clear ideology, no state, no government, and no physical structure."²²

¹⁹ See e.g., Laqueur 1999, p. 1 ff., UN Doc. E/CN.4/Sub.2/2001/31, paras. 82-101 and http://www.ict.org.il/inter_ter/noncon/noncon.htm. Nuclear terrorism includes: (1) attacks against nuclear facilities; (2) attacks committed with nuclear weapons; and (3) attacks committed against or with radioactive sources. http://www.iaea.org/worldatom/Press/P_release/2001/nt_pressrelease.shtml

²⁰ http://www.undcp.org/terrorism_high_casualty.html

²¹ UN Doc. E/CN.4/Sub.2/2001/31, paras. 36-70. One can also speak of terrorist acts committed by public actors and terrorist acts committed by private actors. Franck & Lockwood 1974, p. 72-73

Participation in both individual and State terrorism (see Box 1) can entail individual criminal responsibility based on international criminal law. From a legal point of view it is interesting to note that public international law has generally addressed these different types of terrorism in different ways. By simplification, one could say that State terrorism is foremost addressed through human rights law and international core crime norms, whereas individual terrorism foremost is addressed through conventions on specific manifestations of terrorism. International criminal tribunals have been used to address terror violence occurring in armed conflicts. Finally, State-sponsored terrorism is as a rule addressed as an unjustified interference into another State's affairs.²³

The use of different "branches" of international criminal law to suppress terror violence will be addressed in more depth in the following two chapters. First, the conventions on specific manifestations of terrorism that are normally used to tackle individual or group terrorism will be dealt with.

²² El-Ayouty 1999, Ch. I

²³ Dinstein makes an interesting survey into different settings in which acts of terrorism occur and the international law responses to these settings. He distinguishes between: (1) acts of terrorism committed by one government against another in peacetime; (2) acts of terrorism committed by one government against another in wartime; (3) acts of terrorism committed by a government against individuals in peacetime; (4) acts of terrorism committed by a government against individuals in wartime; (5) acts of terrorism committed by individuals against other individuals in peacetime; (6) acts of terrorism committed by individuals against other individuals in wartime; (7) acts of terrorism committed by individuals against a government in peacetime; and (8) acts of terrorism committed by individuals against a government in wartime. Dinstein 1989, p. 57-68

2. INTERNATIONAL AND REGIONAL ANTI-TERRORISM CONVENTIONS

2.1. Introduction

Terrorism is an ancient problem that for the first time gained international legal attention between the two world wars. The assassinations of King Alexander of Yugoslavia and the French Foreign Minister Barthou in the 1930s gave rise to legislative activity within the League of Nation. In 1937, the League adopted the *Convention on the Prevention and Punishment of Terrorism*. The convention was very ambitious - it, among others, contained a terrorism definition - which maybe explains the fact that the convention only was ratified by one State and never entered into force. The outbreak of Second World War ultimately directed the international attention away from anti-terrorism legislation.²⁴

In the 1960s, the international community anew became interested in international terrorism after a series of airplane hijackings had made it evident that the modern way of life was very susceptible to terrorism. The killing of Israeli athletes at the 1972 Munich Olympic Games and other spectacular terrorist attacks during the 1970s continued to underline this fact. As a response to the terror violence, the UN Secretary General Kurt Waldheim, in September 1972, asked that the issue of international terrorism to be placed on the General Assembly's agenda. Since then, terrorism has regularly been debated within the UN. The terrorism debates have been surrounded by great controversy, despite a shared concern for terrorist criminality. Most notably, there has been a difference of opinion between States that would want certain acts to be prohibited regardless of the perpetrator's motivation and States that do not consider acts by freedom fighters as acts of terrorism.²⁵

The controversy surrounding terrorism has reflected itself in the anti-terrorism conventions adopted by the UN and its specialized agencies ICAO (International Civil Aviation Organization) and IMO (International Maritime Organization). The inability to develop a comprehensive approach to terrorism has namely forced the organizations to deal with the

²⁴ On the pre-World War II efforts to control terrorism, see e.g. Franck & Lockwood 1974, p. 69-70, Gal-Or 1985, p. 80-81, Lambert 1990 p. 28-29 and Sohm 1994, p. 165. In the League convention acts of terrorism were defined as criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons, or the general public. See Lambert 1990, p. 29

²⁵ On the history of UN anti-terrorism activity, see e.g. Lambert 1990, p. 32-45 and <http://www.undcp.org/terrorism.html>

problem in a piecemeal fashion, that is, by internationally outlawing certain offences favoured by terrorists.²⁶ Lambert summarizes, in 1990, the development by stating that:

Thus, as things stand, the UN and the specialized agencies have managed to adopt instruments dealing with many common terrorist crimes. Instead of dealing with the issue of "terrorism" as a whole, with all its political baggage and resulting definitional polemics, the approach has been to draft a number of treaties, each listing in an objective fashion discrete offences which are to be suppressed and punished without regard to the cause or motive of the offender. None of the instruments even mentions the word "terrorism" in any of its substantive provisions. [...] [Noemi Gal-Or] has termed this the "object-oriented" or "segmented" approach. [...] Whatever it is called, the break-up of the larger problem of terrorism into smaller and more manageable units of individual and clearly defined offences has proved to be the only way of obtaining any sort of international agreement on the suppression of terrorist offences.²⁷

After 1990, the segmented approach has continued and in the 1990s two further conventions were adopted namely the *International Convention for the Suppression of Terrorist Bombings* and the *International Convention for the Suppression of the Financing of Terrorism*. The result of the approach has been a high number of anti-terrorism instruments. Bassiouni notes that between 1963 and 1999, fourteen international conventions, six draft conventions, thirty-four resolutions, forty-six reports, seven studies by the *Ad Hoc* Committee on International Terrorism, five notes by the Secretary-General and eighteen miscellaneous documents pertaining to terrorism, totalling 112 instruments and documents were adopted by UN bodies and agencies on the subject.²⁸ Beside the UN, various regional organizations have engaged in the suppression of terrorism, which has further increased the number of anti-terrorism instruments.

²⁶ Lambert 1990, p. 47. The piecemeal approach can also be called object-oriented or segmented. Gal-Or 1985, p. 87

²⁷ Lambert 1990, p. 49

²⁸ Bassiouni 1999(b), p. 767. Within the UN, the work against terrorism has essentially been conducted by the General Assembly's Sixth Committee, the Security Council, the Economic and Social Council and certain specialized agencies (like the ICAO, the IMO and the IAEA (International Atomic Energy Agency)). Bassiouni 1999(b), p. 766

2.2. United Nations and Its Specialized Agencies: The International Anti-Terrorism Conventions

2.2.1. Introduction

The United Nations anti-terrorism work has essentially focused upon individual or small group violence directed against civilians, diplomats, civilian aircraft, commercial maritime navigation and sea-based platforms and attacks involving the use of explosives and weapons of mass destruction.²⁹ Several instruments have been adopted by the UN and its special agencies during the years. In the following the conventions will be dealt with shortly, so that the provisions establishing individual criminal responsibility will be highlighted.

2.2.2. Acts of Terrorism Directed Towards International Civil Aviation

The first international anti-terrorism convention to enter into force was the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* adopted in Tokyo in 1963.³⁰ The provisions of this convention were very modest (compared to later anti-terrorist conventions) as they, in principle, only focused on dealing with gaps in jurisdiction which existed with respect to crimes committed on board of civil airplanes.³¹ The Tokyo Convention did not define any offences nor provide for a duty to extradite or prosecute.

The first convention to define an international terrorist offence was the *Convention for the Suppression of Unlawful Seizure of Aircraft* adopted in Hague in 1970.³² In the convention it is provided that any person who on board an aircraft in flight unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft commits an offence (Article 1). The State Parties to the convention undertake to make the offence punishable by severe penalties (Article 2) and to either extradite or prosecute the offenders (Article 7). Attempt and participation as an accomplice shall also be criminalized. (Article 1)

²⁹ Bassiouni 1999(b), p. 765

³⁰ EIF: [= year during which the convention or protocol entered into force]: 1969, FIN [= Finnish ratification]: yes

³¹ See e.g. Lambert 1990, p. 51

³² EIF: 1971, FIN: yes

The Tokyo and Hague Conventions were in 1971 followed by the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* adopted in Montreal.³³ The aim of this convention is to deal with other types of violence against civil aviation by, among others, providing that any person commits an offence if he unlawfully and intentionally:

- (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
- (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or
- (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or
- (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
- (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight. (Article 1)

Attempt and participation as an accomplice are also offences under the convention. (Article 1) Like the Hague Convention, the Montreal Convention requires State Parties to make the offences punishable by severe penalties. (Article 3) The *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* of 1988 extends the provisions of the 1971 Montreal Convention to encompass terrorist acts at airports.³⁴

All the anti-terrorism conventions relating to threats to civil aviation have been ratified by numerous States and the crimes have been proscribed in domestic legislation. Christopher C.

³³ EIF: 1973, FIN: yes

³⁴ EIF: 1989, FIN: yes. The protocol provides that any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon: (a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or (b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport (Article II).

Joyner and Robert A. Friedlander therefore conclude that aircraft hijacking and attacks against air navigational facilities clearly are crimes under the law of nations today.³⁵

2.2.3. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons

In an effort to deal with the problem of terrorist attacks against internationally protected persons, the UN General Assembly adopted the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents* in New York in 1973.³⁶ The convention requires State Parties to criminalize and punish the international commission of:

- a murder, kidnapping or other attack upon the person or liberty of an internationally protected person; and

- a violent attack upon the official premises, the private accommodation or means of transport of an internationally protected person likely to endanger his person or liberty.

Threats and attempts to commit the prohibited acts, as well as the participation as an accomplice, shall further be punishable. The punishment shall be appropriate, that is, it shall take into account the grave nature of the offence. (Article 2)

2.2.4. The Convention against the Taking of Hostages

To internationally condemn the taking of hostages during peacetime, the international community adopted the *Convention against the Taking of Hostages* in New York in 1979.³⁷ The convention stipulates that any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or to abstain from doing any act as an explicit or implicit condition for the

³⁵ Joyner & Friedlander 1999, p. 850

³⁶ EIF: 1977, FIN: yes

³⁷ EIF: 1983, FIN: yes. On hostage-taking in general and the convention see e.g. Bassiouni 1999(c), p. 859 ff. and Lambert 1990, p. 1 ff.

release of the hostage commits the offence of taking hostages. Attempt and participation as an accomplice shall also be regarded as criminal. (Article 1) The State Parties to the convention undertake to make the offences punishable by appropriate penalties, which take into account their grave nature. (Article 2)

2.2.5. Conventions against Maritime Terrorism

The seizure of the Achille Lauro cruise ship in 1985 by Palestinian terrorists prompted the international community to adopt the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* in Rome in 1988.³⁸ This convention, adopted under the auspices of the International Maritime Organization, is clearly modelled after conventions relating to terrorist attacks against civil aviation.³⁹ Article 3 of the convention stipulates that any person commits an offence if that person unlawfully and intentionally:

- (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
- (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
- (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
- (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
- (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
- (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
- (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth.⁴⁰

³⁸ EIF: 1992, FIN: yes

³⁹ On the convention in general see Halberstam 1988, p. 269 ff. and Joyner 1989, p. 343 ff.

⁴⁰ Halberstam notes that most other anti-terrorism conventions do not make it an offence to injure or kill a person. Halberstam 1988, p. 294 and Halberstam 1989, p. 332-333

Attempt and participation shall be criminalized as well as abetting and certain cases of threatening (Article 3). The State Parties to the convention undertake to make the offences punishable by appropriate penalties, which take into account their grave nature. (Article 5)

The *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* also adopted in Rome in 1988⁴¹ extends the requirements of the 1988 convention to fixed platforms such as those engaged in the exploitation of offshore oil and gas (Article 2).

2.2.6. Non-Conventional Terrorism

While there is no anti-terrorism convention dealing with non-conventional terrorism proper one can identify certain international conventions that can be helpful in combating nuclear, biological and chemical terrorism. Most notably, there is the *Convention on the Physical Protection of Nuclear Material* adopted in Vienna in 1979.⁴² This convention provides that the intentional commission of:

- (a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;
- (b) a theft or robbery of nuclear material;
- (c) an embezzlement or fraudulent obtaining of nuclear material;
- (d) an act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;
- (e) a threat:
 - (i) to use nuclear material to cause death or serious injury to any person or substantial property damage, or

⁴¹ EIF: 1992, FIN: yes

⁴² EIF: 1987, FIN: yes

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

(f) an attempt to commit any offence described in paragraphs (a), (b) or (c); and

(g) an act which constitutes participation in any offence described in paragraphs (a) to (f),

shall be made a punishable offence by the State Parties. Like with regard to other anti-terrorism conventions, the State Parties to the convention undertake to make the offences punishable by appropriate penalties, which take into account their grave nature. (Article 7)

The *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction* of 1972⁴³ and the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction* of 1993⁴⁴ likewise expect State Parties to prohibit certain things. The chemical and biological weapons conventions are, however, disarmament conventions, which explains their modest provisions from an anti-terrorism perspective.

2.2.7. Terrorist Bombings

The United States initiated the *International Convention for the Suppression of Terrorist Bombings* in the aftermath of the truck bombing attack on its military personnel in Saudi Arabia in 1996.⁴⁵ The convention was adopted by the UN General Assembly in New York

⁴³ EIF: 1975, FIN: yes Article IV: "Each State Party to this Convention shall [...] take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery [...] within the territory of such State, under its jurisdiction or under its control anywhere."

⁴⁴ EIF: 1997, FIN: yes. Article VII: "[...] 1. Each State Party shall [...] [p]rohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity [...]. Article I: "1. Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention." See also Hunt 1999, p. 523 ff. and Scharf 1999, p. 477 ff.

⁴⁵ Witten 1998, p. 774-775

one year later.⁴⁶ Like its predecessors, the convention requires State Parties to make certain acts punishable. It provides that any person commits an offence if that 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: (a) with the intent to cause death or serious bodily injury; or (b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss. (Article 2)

It is also punishable to attempt to commit the offence, to participate as an accomplice in the crime commission and to organize or direct others to commit the offence. (Article 2) From the point of view of individual criminal responsibility it is interesting that the convention broadens the scope of the responsibility by providing that it is also prohibited to:

In any other way contribute[...] to the commission of one or more offences as set forth [in the convention] [...] by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit that offence or offences concerned. (Article 2(3)(c))

The aim of this inclusion was to "strengthen the ability of the international community to investigate, prosecute and extradite conspirators or those who otherwise direct or contribute to the commission of the offenses."⁴⁷ Like with regard to earlier anti-terrorism conventions, the State Parties to the convention undertake to make the offences punishable by appropriate penalties, which take into account their grave nature. (Article 4)

It should be noted that there exists a *Convention on the Marking of Plastic Explosives for the Purpose of Detection*⁴⁸ that is regarded as an anti-terrorism convention. This convention adopted in Montreal in 1991 does not, however, establish a State Party obligation to make certain offences punishable and it is therefore not reviewed here.

⁴⁶ EIF: 2001, FIN: no (signed)

⁴⁷ Witten 1998, p. 776

2.2.8. Financing of Terrorism

The *International Convention for the Suppression of the Financing of Terrorism* adopted in New York in 1999⁴⁹ provides that any person commits an offence within the meaning of the convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

- (a) an act which constitutes an offence within the scope of and as defined in one of the international anti-terrorism convention; or
- (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. (Article 2)

Unlike the earlier anti-terrorism conventions, the financing convention does thus not deal with a certain manifestations of terrorism. Instead, it tries to deal with the terrorism phenomenon as a whole, but by focusing on certain terrorist offence participants, namely the financiers.⁵⁰ The convention includes a general terrorism definition in paragraph (b), which is historical. Like with regard to earlier anti-terrorism conventions, the State Parties to the convention undertake to make the offences punishable by appropriate penalties, which take into account their grave nature. (Article 4)

Like the terrorist bombing convention the financing convention provides for a comprehensive individual criminal responsibility for natural persons. (Article 2) The financing convention, however, differs from earlier conventions that legal entities should also be held directly responsible for financing terrorism. Article 5 of the convention namely provides that:

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under

⁴⁸ EIF: 1998, FIN: yes

⁴⁹ EIF: not yet, FIN: no (signed). On the convention in general see Lavalley 2000, p. 491 ff. and Morris & Pronto 2000, p. 585-586

⁵⁰ Lavalley 2000, p. 492 and Morris & Pronto 2000, p. 585

its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in Article 2. Such liability may be criminal, civil or administrative. 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences. 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

2.2.9. Final Remarks on the International Conventions

The anti-terrorism convention adopted within the United Nations and its special agencies have many things in common. As a rule these conventions at least provide for State Party obligations:

- (1) to *aut dedere aut judicare*, that is, an obligation to either extradite or prosecute suspected offenders;
- (2) to make listed offences punishable under domestic laws and to establish jurisdiction over the offences in certain circumstances;
- (3) to take steps to prevent the offences;
- (4) to render assistance to each other in connection with criminal proceedings in respect of the listed offences; and
- (5) to consider the offences as extraditable in certain situations.⁵¹

The criminalization technique used in the conventions has, however, changed somewhat over time. An analysis of this and comments on the conventions in general will be made after some regional instruments are presented.

2.3. Regional Instruments against Terrorism

2.3.1. Introduction

Also regional intergovernmental organizations have taken part in the fight against terrorism by drafting and adopting various instruments, including legally binding conventions. Due to the limited scope of this study, only the anti-terrorism work of Council of Europe and the

European Union will be discussed shortly here. One should, however note that also, among others, the Organization for Security and Co-operation in Europe,⁵² the Organization of American States⁵³ and the Organization of African Unity⁵⁴ have engaged in the suppression of terrorism.

2.3.2. The Council of Europe

The Council of Europe has during a longer time been active in the fight against terrorism. The organization's most important anti-terrorism instrument, the *European Convention on the Suppression of Terrorism*, however, dates back to 1977. The convention is today signed by all 43 Council of Europe Member States and ratified by 36 of them.⁵⁵ The *European Convention on the Suppression of Terrorism* was the first convention in which terrorism was treated generically in the sense that the convention gave a list of terrorist acts.⁵⁶ The convention encompasses the following acts:

- (a) an offence within the scope of the 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft*;
- (b) an offence within the scope of the 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*;
- (c) a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- (d) an offence involving kidnapping, the taking of a hostage or serious unlawful detention;

⁵¹ Lambert 1990, p. 54-55

⁵² See, for example, OSCE Doc. MC(9).DEC/1 and OSCE Doc. Standing Committee of the OSCE Parliamentary Assembly Declaration "Security through Solidarity" of 9 October 2001

⁵³ The inter-American system has one anti-terrorism convention, namely the *Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance* adopted in 1971. Article 2 of that convention provides that for the purpose of the convention "kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive." The OAS aims at adopting a more comprehensive hemispheric anti-terrorism treaty in 2002. See OAS Doc. OAS News November-December 2001

⁵⁴ The organization adopted the *Convention on the Prevention and Combating of Terrorism* at Algiers in 1999. See UN Doc. A/56/160, p. 19

⁵⁵ EIF: 1978, FIN: yes

⁵⁶ EU Doc. COM(2001) 521 final, p. 4

(e) an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons; and

(f) an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence. (Article 1)

Like most global anti-terrorism conventions, the European convention requires State Parties either to extradite or prosecute suspected offenders (Article 7).

2.3.3. The European Union

The *Treaty on European Union*⁵⁷ provides in Article 29 that the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. The objective shall be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud, through: (1) closer cooperation between police forces, customs authorities and other competent authorities in the Member States; (2) closer cooperation between judicial and other competent authorities of the Member States; and (3) approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e). Article 31(e) provides that the common action on judicial cooperation in criminal matters shall include progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

The seriousness of the terrorist attack against the United States in September 2001, led the European Union to quickly take up the question of terrorism. Only a good week after the terrorist attack, the Commission of the European Communities put forward a proposal for a Council framework decision on combating terrorism.⁵⁸ "Europe must have common

⁵⁷ EU Doc. OJ C 340 (1997)

⁵⁸ EU Doc. COM(2001) 521 final

instruments to tackle terrorism", the Commission argued.⁵⁹ The aim of the framework decision is to approximate the substantive laws of the Member States and to ensure that terrorist offences in all Member States are punished by "effective, proportionate and dissuasive criminal penalties."⁶⁰ In its proposal, the Commission noted that the:

legal rights affected by this kind of offence are not the same as legal rights affected by common offences [...] [Terrorist] acts usually damage the physical or psychological integrity of individuals or groups, their property or freedom, in the same way that ordinary offences do, but terrorist offences go further in undermining the [political, economic, or social structures of a country] [...].⁶¹

On the Justice and Home Affairs Council meeting in early December 2001 a political decision on the framework decision could be reached.⁶² In the framework decision a "terrorist offence" is defined as:

intentional acts which, given their nature or their context, may seriously damage a country or international organisation, as defined as an offence under national law, where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation:
 - (a) attacks upon a person's personal life which may cause death;
 - (b) attacks upon the physical integrity of a person;
 - (c) kidnapping or hostage taking;
 - (d) [...];
 - (e) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
 - (f) seizure of aircraft, ships or other means of public or goods transport;
 - (g) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into and development of, biological and chemical weapons;

⁵⁹ EU Doc. Press Release IP/01/1284 (2001)

⁶⁰ EU Doc. COM(2001)521 final, p. 7

⁶¹ EU Doc. COM(2001)521 final, p. 7

⁶² Oikeusministeriö 2001

- (h) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life;
- (i) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (j) threatening to commit any of the acts listed above.

and an "offence relating to a terrorist group" as

- (a) directing a terrorist group: or
- (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.⁶³

In December 2001 the Council also adopted a common position on combating terrorism and a common position on the application of specific measures to combat terrorism.⁶⁴ To the latter position a list of persons, groups and entities involved in terrorist attacks is included. Terrorist acts are in this common position defined in the same way as terrorist offences in the framework decision.⁶⁵

2.4. Remarks on the Anti-Terrorism Conventions

2.4.1. Introduction

From the beginning of the 1970s, the international community has adopted international and regional instruments to combat terrorism with provisions on individual criminal responsibility. These conventions⁶⁶ have followed a certain pattern which best can be described under the following headlines:

⁶³ EU Doc. Council of the European Union, 14845/1/01/REV 1, 7 December 2001

⁶⁴ EU Doc. OJ L 344 (2001). As a response to the anthrax letters sent in the United States and the "fake" anthrax mails sent globally, the European Council of 19 October 2001 further put forward that the "Member States will react firmly with regard to any irresponsible individuals who take advantage of the current climate to set off false alarms, particularly by applying severe criminal penalties for such offences." EU Doc. SN 4296/2/01 REV 2, para. 5

⁶⁵ EU Doc. OJ L 344 (2001), p. 93-94

- a strong reliance on domestic law and courts;
- the use of an objective criminalization technique;
- a broadening individual criminal responsibility;
- awareness of participation is central; and
- punishments that reflect the serious nature of the offences.

2.4.2. A Strong Reliance on Domestic Law and Courts

When considering the existing anti-terrorism conventions, it is essential to keep in mind the central role these conventions give to domestic laws and courts. Principally, this central role is due the non-existence of an international enforcement forum for terrorist offences (see Chapter 4). The drafting of most anti-terrorism conventions has taken place in a situation where no international court with jurisdiction over terrorist offences has existed nor has been seriously planned. Joseph J. Lambert therefore concludes that: "These instruments, therefore, do not attempt directly to create individual liability under international law for the specified offences."⁶⁷

Today, thus, only domestic courts can convict individuals for terrorist offences and the courts base their convictions on domestic law (domestic implementing law). The obligations to criminalize in the treaties have forced State Parties to *harmonize* their penal legislation to a substantial degree.

Important to note at this point is, however, that the anti-terrorism conventions do not require State Parties to make their anti-terrorism laws *uniform*. Lambert notes with regard to the 1979 Hostage Convention that States in practice have chosen two ways to implement the convention. Some States have adopted specific legislation making hostage-taking punishable, whereas other States have relied on existing legislation regarding kindred offences like kidnapping and false imprisonment. The central thing is that the offences are punishable by appropriate penalties.⁶⁸

⁶⁶ This survey does not include the 1963 Tokyo Convention, the 1991 Montreal Convention nor the two disarmament conventions on biological respectively chemical weapons.

⁶⁷ Lambert 1990, p. 55

⁶⁸ Lambert 1990, p. 101

In short, the existing anti-terrorism conventions establish State Party obligations and lead to harmonisation of domestic penal laws. The goal of the conventions is to ensure the prosecution of persons accused of terrorist offences, not to establish individual criminal responsibility *directly* based on international law.

2.4.3. The Use of an Objective Criminalization Technique

Most international anti-terrorism conventions require that the certain acts shall be punishable regardless of who the perpetrator is and for what reason the person commits the offence. This criminalization technique has been called *objective* by Lambert.⁶⁹ In practice, this means that certain acts are regarded as terrorist offences regardless of the existence of a "terrorist motivation" in a particular case.⁷⁰ To a high degree, international anti-terrorism regulation has therefore followed M. Cherif Bassiouni's advice that "contemporary international law should be more clearly and unambiguously focused on proscribing certain forms of violence, irrespective of by whom, where, or why such violence occurs."⁷¹

The trend seems, however, to be to internationally attach more significance on the perpetrators' intentions, which means that the objective technique is now more and more replaced with a non-objective criminalization technique. The 1999 *International Convention for the Suppression of the Financing of Terrorism* was the first international anti-terrorism convention to include a so-called residual offence of terrorism.⁷² The convention namely stipulates that it is an offence to finance any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the *purpose of such act*, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act. (Article 2(1)) The future EU *Council Framework Decision on Combating Terrorism* goes even further in this respect, as the framework decision always

⁶⁹ Lambert 1990, p. 49

⁷⁰ John F. Murphy therefore questions whether the conventions rightly are called anti-terrorist. He further argues that as long as there is no terrorism definition there is no international crime of terrorism. Murphy 1986, p. 37

⁷¹ Bassiouni 1999(b), p. 779

⁷² Morris & Pronto 2000, p. 585

requires a terrorist intention. To fall under the framework decision terrorist offence definition an act must namely have been committed *with the aim of*: (a) seriously intimidating a population; or (b) unduly compelling a Government or an international organisation to perform or abstain from performing any act; or (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. (Article 1)

2.4.4. A Broadening Individual Criminal Responsibility

When it comes to the scope of the responsibility it is clear that a person herself *committing* an offence is liable to punishment when an act is regarded as criminal (direct individual criminal responsibility or principal perpetrator responsibility).⁷³ All conventions also regard it as an offence to *attempt* to commit the offence and to participate in the commission as an *accomplice*. It is noteworthy that some later conventions have chosen to broaden the responsibility to participation in the forms of *abetting, organising, directing others, threatening* to commit and/or *contribution in any other way to the commission of an offence by a group of persons acting with a common purpose*. There seems indeed to be a trend to broaden the individual criminal responsibility to ensure that all persons involved in the terrorist activity can be punished.

From a terrorism and non-State actor perspective, it is remarkable that the EU *Council Framework Decision on Combating Terrorism* introduces the concept of a terrorist group. (Article 2) A terrorist group is regarded as a *criminal organization* and is defined as a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. The Member States of the EU are required to criminalize the directing of such a group and the participating in the activities of such a group. Participation shall be criminal when a person has participated "with knowledge of the fact that such participation will contribute to the criminal activities of the group." Despite the requirement of participation for individual criminal responsibility, the inclusion of offences relating to terrorist groups can be criticized. Membership may be punishable even without the group having committed a single act of terrorism. Therefore, the general principle of requiring

both a terrorist act and a terrorist intention will be compromised.⁷⁴ One can indeed question whether it is necessary to introduce "offences relating to a terrorist group" when various participation forms with regard to "terrorist offences" are outlawed.

2.4.5. Awareness of Participation Is Central

The 1970 Hague Convention is silent on the required mental state of the offender. In later conventions it is, however, required that the crime commission is intentional. This development is in line with the idea that the offender's guilt shall be the central criterion for liability.

2.4.6. Punishments That Reflect the Serious Nature of the Offences

The anti-terrorism conventions are characterised by a State Party obligation to make certain offences punishable by penalties that are "severe" or "appropriate, but taking into account the offences' grave nature." These formulations stress: (a) that terrorist offences are regarded as serious crimes; and (b) that State Parties to anti-terrorism conventions, in the end, can largely choose how to deal with terrorist offences. The "severe formulation" is used in the older conventions and was for the first time replaced with the "appropriate formulation" in the 1979 Hostages Convention. The difference between the two formulations is minimal; in contrast to the severe formulation, the appropriate formulation explicitly recognizes that the conventions may cover offences of varying severity.⁷⁵

A new approach is introduced with the EU *Council Framework Decision on Combating Terrorism* that requires that the prohibited acts are punishable by effective, proportionate and dissuasive criminal penalties and that establishes minimum maximum penalties for certain offences:

2. Each Member State shall take the necessary measures to ensure that terrorist offences [...] are punishable by custodial sentences heavier than those imposed under

⁷³ Cf. *Tadic* Opinion and Judgment, para. 666 and *Akayesu* Judgement, para. 472

⁷⁴ Argument put forward by Professor Martin Scheinin in an e-mail to the author.

⁷⁵ On the difference between the severe and appropriate formulations, see Lambert 1990, p. 106-107

national law for such offences in the absence of the special intent required [...], save where the sentences imposed are already the maximum possible sentences under national law.

3. Each Member State shall take the necessary measures to ensure that the [offences relating to a terrorist group] [...] are punishable by custodial sentences, with a maximum sentence of not less than fifteen years for [directing a terrorist group] [...], and for [the participation in the activities of a terrorist group] [...] a maximum sentence of not less than eight years. Insofar as the [directing of a terrorist group] [...] refers only to [threatening to commit a terrorist offence] [...] the maximum sentence shall not be less than eight years. (Article 4)

The requirement of harsher penalties due to the special terrorist intent, in paragraph 2, makes the terrorism legislation reminiscent of hate crimes legislation. By imposing harsher penalties for offences committed with a terrorist motivation, the society indicates that it regards the harms these offences impose as different from and worse than (similar) harms (e.g. the death of several people) inflicted for other reasons.⁷⁶ The minimum maximum penalties established in paragraph 3 curtail the national legislators freedom of choice when it comes to determining appropriate sentences for terrorist offences. These kinds of provisions ensure uniformity, but can lead to inconsistencies with the general punishment practice in a given country. The rather harsh minimum maximum penalties in the terrorism framework decision, for example, are in contrast to the Nordic criminal policy ideal of humaneness,⁷⁷ even though they are not totally in conflict with Nordic system.⁷⁸ In sum, in contrast to the earlier anti-terrorism conventions that only require penalties that take into account the grave nature of the offences, the minimum maximum penalties in the framework convention are prone to increase penal repression, which is problematic.

2.4.7. Concluding Observations

The various forms terrorism can take and the differences in opinion have made it impossible for the international community to internationally outlaw the crime of terrorism. The international community has instead chosen to outlaw certain manifestations of terrorism

⁷⁶ Cf. Kahan 2001, p. 182

⁷⁷ On trends in Scandinavian penal thinking, see Lahti 2000, p. 141 ff.

⁷⁸ At first a maximum minimum penalty of 20 years was suggested for some crimes, but the Nordic countries were able to negotiate a change due to the total inconsistency of such a penalty with their legal systems.

through domestic law. From a non-State perspective the anti-terrorism conventions have clearly made it more likely that persons committing terrorist offences will be held directly responsible for their deeds. The fragmented nature of the international terrorism regulation is, however, problematic from the point of view of comprehensiveness. The history has shown that terrorists change tactics over time and that the piecemeal regulation easily leads to situations where new tactics are not covered by the existing conventions. No anti-terrorism convention to date, for example, deals with cyber-terrorism. The trend towards non-objective criminalizations - illustrated by the EU *Council Framework Decision on Combating Terrorism* and the planned comprehensive anti-terrorism convention - will make the anti-terrorism legislation more comprehensive. At the same time, the nature of the terrorism legislation changes markedly and new problems with the terrorism legislation occur. The non-objective criminalization technique namely has shortcomings of its own like the risk for too broad criminalizations that allow power abuse by authorities.

2.5. The Future?

The process of concluding anti-terrorism conventions has historically been reactive, that is, conventions have often been concluded after spectacular terrorism offences.⁷⁹ The trend seems to continue as the terrorist attack against the United States on 11 September 2001 has speeded up the anti-terrorism work in many regional and international organisations. The political decision on the EU *Council Framework Decision on Combating Terrorism* was adopted remarkably quickly. While it surely is "smart" of the international community to make use of politically suitable moments to adopt difficult decisions, one should be careful not to adopt bad legislation. When it comes to terrorism legislation many human rights concerns easily arise.

When it comes to topical legislative proposals one should at least notice that the UN has reinforced its work on a comprehensive convention on international terrorism that would "prohibit terrorist activities in all their forms and manifestations, and in particular to cover

Helsingin Sanomat 2001. See also Perustuslakivaliokunnan lausunto 41/2001 and Lakivaliokunnan lausunto 20/2001

⁷⁹ Gilbert 1995, p. 12 (citing Nadelmann)

those offences which are outside the scope of the specialized conventions".⁸⁰ The UN also works on a convention for the suppression of nuclear terrorism.⁸¹ In Europe both the EU and the Council of Europe have been very active. The Council of Europe has, among others, started the work on updating the existing Council of Europe anti-terrorism instruments.⁸² With other words, there seems to be coming even more international and regional anti-terrorism conventions. Whether these conventions make the regulation better suited to handle its task or just more complicated and problematic from a human rights perspective remains to be seen.

⁸⁰ UN Doc. Press Release, 5 November 2001 (citing Hans Corell)

⁸¹ On the proposed conventions see e.g. UN Doc. A/56/37 and UN Doc. A/C.6/56/L.9

⁸² Immediately after the terrorist attacks against the United States, the Council of Europe's Committee of Ministers decided to hold a special meeting to discuss, among others, the scope for updating the European terrorism convention. The Council of Europe's determination to develop its anti-terrorist instruments was reaffirmed by the European ministers of justice in October 2001 and the Committee of Ministers that shortly after the ministers of justice meeting established a Multidisciplinary Group on International Action against Terrorism (GMT) to, among others, review the operation of, and to examine the possibility of updating, existing Council of Europe anti-terrorism instruments. See e.g. CoE Doc. Declaration of the Committee of Ministers on the Fight against International Terrorism, CoE Doc. Resolution No. 1 on Combating International Terrorism Adopted by the 24th Conference of European Ministers of Justice in Moscow 4-5 October 2001 and CoE Doc. Terms of Reference of the GMT Adopted by the Committee of Ministers at Its 109th Session on 8 November 2001

3. INTERNATIONAL CORE CRIMES AND ACTS OF TERRORISM

3.1. Introduction

The word "terrorism" was to begin with used to describe State politics of terror governance.⁸³ Today, oppressive State acts are still, from time to time, called acts of terrorism, but more often they are called human rights violations or, when the acts are committed during armed conflicts, violations of international humanitarian law. In 1974, Franck and Lockwood noted that:

Western states [...] rejected the invitation to include governmental acts within the category of terrorism. They did this not because state acts, however callous, are sacrosanct, but for exactly the opposite reason: that adequate international law already restrains state violence. Laws - albeit insufficiently enforced - relating to aggression, genocide, crimes against humanity, reprisals, as well as General Assembly resolutions, and various human rights conventions all speak of the issue of state behavior and seek to regulate the state's proclivity to violence.⁸⁴

Certain forms of terrorism can thus be met with the laws relating to genocide and crimes against humanity. This branch of international law is today often called international criminal law and the crimes "genocide" and "crimes against humanity" serious violations of international humanitarian law or international core crimes. These serious violations of international law are of interest here because they do not only give rise to State responsibility, but to individual criminal responsibility for both State and non-State agents involved in the commission of the crimes. Beside genocide and crimes against humanity, war crimes and the crime of aggression are regarded as international core crimes.

The international core crimes all have a different history, but they have in common the fact that international criminal tribunals have played a central role in their crystallisation. The International Military Tribunal (hereinafter, Nuremberg Tribunal) and International Military Tribunal for the Far East (hereinafter, Tokyo Tribunal) established after the Second World War, for example, clearly established that war crimes, crimes against humanity and crimes

⁸³ "In the late 19th century the term terrorist, originally used for violence in the name of the revolutionary state and then the reactionary state of the Restoration, became associated with anti-state violence under the impact of the Russian terrorists of the 1880s and the anarchists of the 1890s." Schmid 1983, p. 66

⁸⁴ Franck & Lockwood 1974, p. 74

against peace are crimes against international law and that these crimes entail individual criminal responsibility. In the 1990s two *ad hoc* tribunals established by the United Nations Security Council, namely the International Criminal Tribunal for the Former Yugoslavia (hereinafter, the Yugoslavia Tribunal) and the International Criminal Tribunal for Rwanda (hereinafter, Rwanda Tribunal), reaffirmed the customary international law status of war crimes, crimes against humanity and genocide.⁸⁵ Also the 1998 Rome Statute of the forthcoming permanent International Criminal Court stresses the customary nature of these crimes.⁸⁶ The above-discussed terrorist crimes (Chapter 2) thus part from the international core crimes in that they have so far only been enforced through the mediation of States.

Another difference between international core crimes and terrorist crimes is that international core crime legislation has mostly been used to judge militaries and politicians for crimes committed during armed conflicts, whereas terrorist laws mostly have been used to punish individuals that clearly are non-State agents for crimes committed during peacetime. The aim of this chapter is foremost discuss to what extent the international core crimes legislation can be used to judge the type of crimes normally dealt with by anti-terrorism legislation, that is, to adjudicate individual or group terrorism.

3.2. Acts of Terrorism as War Crimes

The concept of war crimes is not a new one even though the international law based individual criminal responsibility for these crimes were not clearly established before the "spectacular" Nuremberg and Tokyo trials after the Second World War.⁸⁷ Article 6 of the Nuremberg Charter provided – like Article 5 in the Tokyo Charter and Article II of the Control Council Law No. 10 - that the post-Second World War tribunals had the power to try and punish persons who, as individuals or as members of organizations, committed war crimes, that is, *violations of the laws or customs of war*. The post-Second World War instruments provided that punishable violations of the laws or customs of war included, but were not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners

⁸⁵ UN Doc. S/RES/827 (1993) and UN Doc. S/RES/955 (1994)

⁸⁶ UN Doc. A/CONF.183/9

of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

The individual criminal responsibility for war crimes has been reaffirmed and developed by the statutes of the Yugoslavia Tribunal, the Rwanda Tribunal and the International Criminal Court. The subject-matter jurisdiction of the Yugoslavia Tribunal includes “grave breaches of the Geneva Conventions of 1949” (Article 2) and “violations of the laws and customs of war” (Article 3), whereas the subject-matter jurisdiction of the Rwanda Tribunal includes “violations of Article 3 common to the Geneva Conventions and of Additional Protocol II” (Article 4). Finally, the Rome Statute of the International Criminal Court distinguishes between four types of war crimes, namely: (a) grave breaches of the Geneva Conventions of 12 August 1949; (b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, (c) in the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949; (e) other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. (Article 8) These war crime provisions are foremost based on rules regulating warfare found in the four *Geneva Conventions of 12 August 1949*, the *1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land* and the Regulations annexed thereto and the Nuremberg Tribunal Charter.

BOX 2: ARTICLE 8 ON WAR CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: [...]
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]

⁸⁷ Sunga 1997, p. 3. See also e.g. Green 2000, p. 286-291

(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment; (iii) Taking of hostages; (iv) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.

(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; (ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law; (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict; (iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives; (v) Pillaging a town or place, even when taken by assault; (vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions; (vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities; (viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand; (ix) Killing or wounding treacherously a combatant adversary; (x) Declaring that no quarter will be given; (xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons; (xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;

(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It 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. [...]

From a terrorism perspective, it is clear that some acts prohibited as war crimes coincide with what we understand as terrorist offences (see Box 2). The Statute of the International Criminal Court, for example, regards as war crimes the taking of hostages, intentionally directing attacks against the civilian population, and intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians when these acts are committed in an armed conflict.⁸⁸ The Statute of the Rwanda Tribunal even explicitly prohibits "acts of terrorism" as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (Article 4(d)).⁸⁹

The usefulness of the war crimes provisions in prosecuting terrorists is, however, limited by the requirement that the prohibited conduct takes place in the context of *and* is associated with an international (inter-State) or a non-international armed conflict.⁹⁰ The Yugoslavia Tribunal's Appeals Chamber defined in the *Tadic Case* armed conflicts as situations where there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁹¹ Unorganised and short-lived insurrections are not regarded as armed conflicts, which means that to establish the existence of an armed conflict one has to look at both the *intensity* of the armed violence and the *organization* of the parties to the conflict.⁹² From a non-State

⁸⁸ One should, however, note that some terrorist-type offences can be punished for with the help of provisions that are not that clearly terrorism connected. In the *Celebici Case* before the Yugoslavia Tribunal some of the accused were found guilty of creating an "atmosphere of terror" in the Celebici prison camp and punished for the offences of wilfully causing great suffering and serious injury to the body and health (Article 2, grave breaches) and cruel treatment (Article 3, violations of the laws or customs of war). *Celebici Judgement*, para. 1086-1091 and 1121-1123

⁸⁹ "Article 4, subparagraph (d) of the Rwanda Tribunal Statute covers acts of terrorism. There is no corresponding prohibition in common Article 3. This provision reproduces Article 4, paragraph 2(d) of Protocol II which prohibits "acts of terrorism." The ICRC initially proposed limiting this provisions to acts of violence committed against protected persons. However, the prohibition against acts of terrorism was expanded by the adoption of the more general language. The commentary to the provision explains the scope of the prohibition as follows: "In fact, the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations which would cause victims [harm] as a side-effect." The commentary further indicates that acts of terrorism directed against the civilian population are considered to constitute a special type of terrorism and are specifically prohibited under Article 13 of Protocol II." Morris & Scharf 1998, p. 212-213 (citing "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" of 1987)

⁹⁰ UN Doc. PCNICC/2000/1/Add.2. For this reason Wedgwood's characterization of the 11 September 2001 attacks as war crimes must be regarded as incorrect. See Wedgwood 2001

⁹¹ *Tadic Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, para. 70

⁹² "The above reference criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections [...]. The term, armed conflict in itself suggests the

actor perspective it is also interesting to note that the *Akayesu* Trial Chamber required the perpetrator to be affiliated with a "party to an armed conflict" or an "armed force", which can be a problematic requirement if one wants to prosecute terrorist group members.⁹³ The *Akayesu* Appeal Chamber, however, rejected this finding when it comes to so-called common Article 3 responsibility.⁹⁴

In short, when acts of terrorism are associated with an armed conflict, the provisions criminalizing war crimes are well suited to deal with these crimes. The close kinship between war crimes and terrorist crimes is, among others, illustrated by terrorism expert Alex Schmid's definition of acts of terrorism as peacetime equivalents of war crimes⁹⁵ and Article 12 in the 1979 Hostages Convention that excludes from the anti-terrorism convention's subject-matter certain acts of hostage-taking that are punishable under the rules of war.⁹⁶ Terrorism violence by terrorist groups, however, seldom fulfils the required level of the intensity to be regarded as armed conflict violence.⁹⁷

existence of hostilities between armed forces organized to a greater or lesser extent [...]. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict." *Akayesu* Judgement, para. 620. See also e.g. *Rutaganda* Judgement and Sentence, para. 93

⁹³ For instance when it comes to non-international armed conflicts the Common Article 3 of the Geneva Conventions requires that the perpetrator must belong to a "party" to the conflict and the Additional Protocol II that the perpetrator must be a member of the "armed forces" of either the Government or of the dissidents. This does not, however, mean that only military persons can commit war crimes. Also civilians that have a connection with a party to a conflict can be held responsible for war crimes. See e.g. *Akayesu* Judgement, para. 630-634 and *Rutaganda* Judgement and Sentence, para. 96-98

⁹⁴ *Akayesu* Appeal Judgement, para. 425-446

⁹⁵ http://undcp.or.at/terrorism_definitions.html. See also e.g. Ganor 2001 and Mallison & Mallison 1975, p. 79

⁹⁶ Article 12: "In so far as the Geneva Conventions of 1949 for the protection of war victims or the Protocols Additional to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of an armed conflict as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations." On the interpretation of this article, see Lambert 1990, p. 263-298

⁹⁷ Crenshaw notes that terrorism is often confused with guerrilla warfare since both activities involve *low-level violence* (in terms of physical destructiveness). Crenshaw 1989, p. 8

3.3. Acts of Terrorism as Genocide⁹⁸

Genocide will only occur under certain anomalous, anomic social conditions. Ideological mass indoctrination, perversion of society's sense of justice and moral standards, impunity warranted by the state, collective perpetration, and the perpetrators' dependence on authoritative power are preconditions of genocide [...].⁹⁹

The crime of genocide is of a rather recent origin. In 1940s, the Polish scholar Raphael Lemkin argued for the international recognition of the crime, which he defined as "the destruction of a nation or of an ethnic group."¹⁰⁰ Lemkin's appeal was responded to and in 1946 the United Nations General Assembly adopted a resolution recognizing genocide as a crime under international law.¹⁰¹ In December 1948, the General Assembly adopted the *International Convention on the Prevention and Punishment of the Crime of Genocide* (hereinafter, Genocide Convention) that cemented genocide as a crime under international law entailing individual criminal responsibility.

In the Genocide Convention, Article II, genocide is defined as:

[...] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

This definition of genocide has been reaffirmed, among others, by the statutes of the Yugoslavia Tribunal (Article 4), the Rwanda Tribunal (Article 2) and the International Criminal Court (Article 6). From a non-State actor and terrorist perspective, it is noticeable that the Genocide Convention clearly establishes that genocide can be committed in

⁹⁸ For a short (not especially legal) reflection on the relationship between terrorism and genocide, see Cohen, Mendelsohn and Joyner 2001, p. 8-13

⁹⁹ Schneider 1982, p. 310

¹⁰⁰ Lippman 1999, p. 590 (citing Lemkin)

¹⁰¹ UN Doc. G.A. Res. 96(I) of 11 December 1946

peacetime (Article I)¹⁰² and that the perpetrators can be constitutionally responsible rulers, public officials or private individuals (Article IV). It is also of interest that the Genocide Convention foresees a broad individual criminal responsibility by prohibiting also conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide (Article III).

For a crime of genocide to have been committed it is thus necessary: (1) that one of the acts listed have been committed (i.e., killing members of a group, etc.); (2) that the particular act has been committed against a national, ethnical, racial or religious group; and (3) that the crime has been committed with the special intent to destroy, in whole or in part the group, as such.¹⁰³ Of these elements, the third of "genocidal intent" is what really distinguishes genocide from other crimes.¹⁰⁴ Also the second element - the special identity of the victim requirement¹⁰⁵ - is special for genocide.

From a terrorism perspective, it is difficult to regard genocide as a crime that would be very useful for prosecutions. The genocidal intent is namely something else has targeting individuals for them belong to a group, that is, genocide must be distinguished from crimes like hate crimes and persecution. In genocide, the perpetrator aims at *destroying a community as such*.¹⁰⁶ This genocidal intent is not easy to prove. Normally, it would be difficult for non-State actors to perform the underlying offences on a scale that implies genocidal intent.¹⁰⁷

¹⁰² The Genocide Convention, most importantly, extended the genocide prohibition to peacetime genocide. Prior to the convention, only certain genocidal acts were internationally outlawed as war crimes and crimes against humanity. In 1948, the norms prohibiting war crimes and crimes against humanity only applied to situations of international armed conflict. Sunga 1997, p. 105

¹⁰³ *Akayesu* Judgement, para. 499

¹⁰⁴ See e.g. *Sikirica, Dosen & Kolundzija* Judgement on Defence Motions to Acquit, para. 89. Sunga notes that measures designed merely to alter the economic, social or cultural character of the group, such as assimilation policies, are not covered by the Genocide Convention. Only measures that aim at the destruction of the *physical existence* of the group can constitute genocide. Sunga 1997, p. 109

¹⁰⁵ Rückert & Witschel 2001, p. 66

¹⁰⁶ "Genocide therefore differs from the crime of persecution in which the perpetrator chooses his victims because they belong to a specific community but does not necessarily seek to destroy the community as such." *Jelisić* Judgement, para. 79

¹⁰⁷ Cf. "The Trial Chamber observes, however, that it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system." *Jelisić* Judgement, para. 101 and "It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf note that "it is virtually impossible for the crime of genocide to be committed without some or indirect involvement on the part of the State given the magnitude of this crime." They suggested that "it is unnecessary for an individual to have

Science can, however, make this possible in the future. In the *Kayishema and Ruzindana Case* the Rwanda Tribunal suggests that the creation of conditions of life that lead to mass killing could be done by "introducing a deadly virus into a population."¹⁰⁸

3.4. Acts of Terrorism as Crimes against Humanity

The most important developments regarding the crime "crimes against humanity" have taken place after the Second World War. The first definition of crimes against humanity in an international document for the purpose of prosecuting individuals for the crime can be found in the Nuremberg Charter. In this charter, crimes against humanity were defined as "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" (Article 6(c)). From a terrorism perspective, it is interesting to note that Roger S. Clark argues that:

In the minds of the [Nuremberg] Tribunal, the core of the concept of Nazi crimes against humanity which came within the Tribunal's bailiwick must have been "terror" and "persecution" - including killings and concentration camps - directed at political opponents and Jews.¹⁰⁹

During the Nuremberg trials, the concept of crime against humanity, however, remained vague and often overlapped with that of war crimes.¹¹⁰ In fact, it has been argued that provision on crimes against humanity was adopted only to ensure that offences committed by Germans against Germans also could be prosecuted.¹¹¹ Later international codifications and case law has made the concept of crimes against humanity clearer and distinctive from war crimes.

knowledge of all details of the genocidal plan or policy." The Chamber concurs with this view." *Kayishema & Ruzindana* Judgement, para. 94

¹⁰⁸ *Kayishema & Ruzindana* Judgement, para. 146 (regarding crimes against humanity in the form of extermination)

¹⁰⁹ Clark 1990, p. 195

¹¹⁰ See e.g. Clark 1990, p. 197 and Roberge 1997, p. 654

¹¹¹ Sunga 1992, p. 44. At the time the Nuremberg Charter was adopted international law was only supposed to deal with inter-State relations and hence international armed conflicts.

In the International Criminal Court Statute of 1998 - that is the latest and most authoritative international instrument - crimes against humanity are defined as "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender [...], or other grounds that are universally recognized as impermissible under international law [...]; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. (Article 7(1))

In short, the Rome Statute of the International Criminal Court (and the draft elements of crimes adopted) and the case law of the Yugoslavia and Rwanda Tribunals suggest that the crimes against humanity have three essential elements:

(1) The perpetrator has taken part in the commission of *an inhumane act* causing great suffering, or serious injury to the body or mental or physical health, that is, the perpetrator has committed one of the enumerated acts/underlying offences;¹¹²

(2) The underlying offence was committed as part of a *widespread or systematic attack directed against a civilian population* ("the contextual element");¹¹³ and

(3) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population ("*mens rea* relating to the contextual element")¹¹⁴

¹¹² See and cf. e.g., *Akayesu* Judgement, para. 578, *Jelisić* Judgement, para. 52, *Rutaganda* Judgement and Sentence, para. 66 and UN Doc. PCNICC/2000/1/Add. 2, p. 9-17

¹¹³ See and cf. e.g., *Akayesu* Judgement, para. 578, *Jelisić* Judgement, para. 53-54, *Rutaganda* Judgement and Sentence, para. 66 and UN Doc. PCNICC/2000/1/Add. 2, p. 9-17 and Rückert & Witschel 2001, p. 72

¹¹⁴ See e.g. UN Doc. PCNICC/2000/1/Add. 2, p. 9-17 and Rückert & Witschel 2001, p. 72. See also the opinion of the Appeals Chamber in the *Tadić Case*: "The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population and that the accused must have

From a terrorism perspective, it is interesting that the Appeals Chamber in the *Tadic Case* rejected the existence of a general requirement of discriminatory intent for crimes against humanity before the Yugoslavia Tribunal. A reason for this rejection was that "a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity."¹¹⁵ One should also note that it is today well established that crimes against humanity can be committed both during peacetime and wartime.

Of the above-mentioned accepted crimes against humanity elements, especially the "committed as part of a widespread or systematic attack directed against any civilian population" has been thoroughly elaborated in the case law of the Yugoslavia and Rwanda Tribunals. In the case law the words or terms included in this element have been given the following meanings:

widespread = massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims¹¹⁶

systematic = thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources¹¹⁷

attack = unlawful acts of the kind of the enumerated in the statute¹¹⁸

civilian population = members of the civilian population are people who are not taking any active part in the hostilities. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not

known that his acts fit into such a pattern. [...] [If] the exclusion of "purely personal" behaviour is understood simply as a re-statement of the two-fold requirement that the acts of the accused form part of a context of mass crimes and that the accused be aware of this fact, then there is nothing objectionable about it [...]. It is only if this phrase is understood as requiring that the motives of the accused ("personal reasons", in the terminology of the Trial Chamber) not be unrelated to the armed conflict that it is erroneous. Similarly, that phrase is unsound if it is taken to require proof of the accused's motives, as distinct from the intent to commit the crime and the knowledge of the context into which the crime fits." *Tadic* Appeal Judgement, para. 248, 250

¹¹⁵ *Tadic* Appeal Judgement, para. 285. Likewise a general discriminatory intent requirement was rejected on the Rome Conference adopting the International Criminal Court Statute. See Robinson 1999, p. 46-47

¹¹⁶ *Akayesu* Judgement, para. 580

¹¹⁷ *Akayesu* Judgement, para. 580

¹¹⁸ *Akayesu* Judgement, para. 581. The *Akayesu* Trial Chamber argues that an attack may be non-violent in nature and gives as an example of a non-violent attack the imposition of a system of apartheid. The *Foca* Trial Chamber, however, defines an attack as a course of conduct involving the commission of acts of *violence*. *Foca* Judgement, para. 415

deprive the population of its civilian character.¹¹⁹ The term "population" is used to indicate that crimes against humanity have a collective nature, that is, single or isolated acts cannot rise to the level of crimes against humanity. The emphasis is on the collective, not on the individual victim.¹²⁰

any = the word "any" is intended to make it clear that crimes against humanity can be committed against: (a) civilians of the same nationality as the perpetrator; (b) civilians that are stateless; and (c) civilians that are not of the same nationality as the perpetrator¹²¹

In the International Criminal Court Statute an "attack directed against any civilian population" is defined as "course of conduct involving the multiple commission of acts referred to in [the crimes against humanity Article] [...] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" (Article 7(2)(a)).

The fact that the attack must be *directed* against a civilian population has furthermore been interpreted as a requirement of some sort of planning or policy (the so-called policy element).¹²² This requirement is interesting from a non-State actor perspective, because traditional customary international law required that the policy was a State policy.¹²³ The case law of the Yugoslavia and Rwanda Tribunals has, however, made it clear that a State policy is no more required and that non-State actors are possible perpetrators of crimes against humanity.¹²⁴ In some cases before the *ad hoc* tribunals, it has even been questioned whether there at all exists a policy requirement.¹²⁵ In a sense, the *ad hoc* tribunals have therefore accepted the International Law Commission's low-threshold-policy-requirement, namely that the crime is "instigated or directed by a Government or by any organization or group".¹²⁶ The

¹¹⁹ *Akayesu* Judgement, para. 582

¹²⁰ *Tadic* Opinion and Judgement, para. 644

¹²¹ *Tadic* Opinion and Judgement, para. 635

¹²² Robinson 1999, p. 48. "[The] reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts." *Tadic* Opinion and Judgement, para. 653

¹²³ See e.g. *Tadic* Opinion and Judgement, para. 654 and *Kayishema & Ruzindana* Judgement, para. 125

¹²⁴ See e.g. *Tadic* Opinion and Judgement, para. 654-655, *Kayishema & Ruzindana* Judgement, para. 125-126

¹²⁵ "The Trial Chamber notes that there has been some difference of approach in the jurisprudence of the ICTY [= Yugoslavia Tribunal] and ICTR [= Rwanda Tribunal], and in that of other courts, as well as in the history of the drafting of international instruments, as to whether a policy element is required under existing customary law." *Foca* Judgement, para. 432

¹²⁶ UN Doc. A/51/10, p. 93 (draft Article 18). "The second condition requires that the act was "instigated or directed by a Government or by any organization or group". The necessary instigation or direction may come

approval is made especially clear in the *Kayishema and Ruzindana Case* before the Rwanda Tribunal were the Trial Chamber put forward that:

The Trial Chamber concurs with the [International Law Commission's] [...] view and finds that the Tribunal's jurisdiction covers both State and non-State actors. As Prefect, Kayishema was a State actor. As a businessman Ruzindana was a non-State actor. To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organisation or group.¹²⁷

From a terrorism perspective, one should, however, keep in mind that the *ad hoc* tribunals deal with atrocities committed during armed conflicts and that the non-State actors these tribunals have in mind often are non-State actors that can exert State-type powers. What the Trial Chamber in the *Tadic Case*, for instance, argues is that members of "forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory", can commit crimes against humanity.¹²⁸ The reliance on the work of the International Law Commission gives, however, forth that the essential thing for the Commission and the tribunals is that there exists a group or an organization that has the capability to orchestrate mass atrocities.¹²⁹ In 1991, the Commission namely argued that:

It is important to point out that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the

from a Government or from an organization or a group. This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization. This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity. It would be extremely difficult for a single individual acting alone to commit the inhumane acts [...]. The instigation or direction of a Government or *any* organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State." UN Doc. A/51/10, p. 95-96

¹²⁷ *Kayishema & Ruzindana* Judgement, para. 126

¹²⁸ *Tadic* Opinion and Judgement, para. 654. Cf. "Thus, these non-state actors must have some of the characteristics of state actors, which as the exercise of domination or control over territory or people, or both, and the ability to carry out a "policy" similar in nature to that of "state action or policy. [...] It is therefore that underlying "policy" that constitutes the international or jurisdictional element that distinguishes "crimes against humanity" committed by non-state actors from crimes within domestic jurisdiction of the state where the crimes in question occurred." Bassiouni 1999(a), p. 27.

¹²⁹ One should note that the requirement of a "policy" does not mean that there always is a requirement of a "systematic attack." The required degree of organization for a policy is much lower than for a systematic attack. Robinson 1999, p. 50-51

crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article [...].¹³⁰

In the International Criminal Court Statute it is also recognized that it is enough that there is an organizational policy to commit crimes against humanity attacks.¹³¹ Terrorist organizations can clearly have a sufficient degree of organization to commit crimes against humanity. The high level of organization of certain terrorist organizations is reflected in the following characterisation of the Al Qaeda terrorist group in the Moussaoui Indictment relating to currently ongoing proceedings against Mr. Moussaoui before the United States District Court for the Eastern District of Virginia:

Al Qaeda had a command and control structure which included a *majlis al shura* (or consultation council) which discussed and approved major undertakings, including terrorist operations. Al Qaeda also had a "military committee" which considered and approved "military" matters.¹³²

To conclude, the provisions on crimes against humanity can be used to prosecute individuals taking part in a terrorist attack committed pursuant to or in furtherance of terrorist organization policy in peacetime. The attack must, however be widespread or systematic and committed against a civilian population. This limits the application of this crime to extreme terrorist attacks, like the one (most probably) committed by members of the Al Qaeda group against the World Trade Centre on 11 September 2001.¹³³ At this point, it is important to remember that a crime against humanity conviction (in contrast to a crime of terrorism convention) always shows that person has committed one of the *most* serious crimes known to humanity.

¹³⁰ UN Doc. A/46/10, p. 266

¹³¹ "The solution reached in Rome was to refer only to a state or organization, as it was agreed that using the term "organization" would sufficiently capture the present state of customary law. The term "organization" is fairly flexible, and to the extent that there may be a gap between the concepts of "group" and "organization," it was considered that the planning of an attack against a civilian population requires a higher degree of organization, which is consistent with the latter concept." Robinson 1999, p. 50 (footnote 44)

¹³² <http://news.findlaw.com/cnn/docs/terrorism/moussaoui1201.pdf>

¹³³ The attacks have been called crimes against humanity by, among others, An-Na'Im 2001, Esposito 2001, Ferencz 2001, Ratner 2001, Robertson 2001(a), Ulrich 2001 (citing Kai Ambos) and Mary Robinson in UN Doc. Press Release, 25 September 2001. See also Cassese 2001, p. 1-2

3.5. Some Reflections on the Crime of Aggression and Acts of Terror Violence

The question what constitutes just and unjust war has been on the international agenda for centuries. The significance of the question is reflected in the fact that from 1899 to 1999 forty-nine multilateral treaties dealt with the prohibition of war and the preservation of peace.¹³⁴ Despite the numerous treaties, the scope of the individual criminal responsibility for acts of aggression is, however, unclear. The existing international treaties lack legal specificity from a criminal law perspective, that is, they do not contain a definition of aggression that could be used as a crime of aggression definition. One should note that legal definitions of the crime against peace - a broader concept than the crime of aggression - can be found in some post-Second World War instruments, but that these definitions have been criticised.¹³⁵

Due to the controversy surrounding the crime of aggression, it is interesting that Article 5 of the International Criminal Court Statute provides that the court shall have jurisdiction over the crime. This jurisdiction is, however, conditional in the sense that the court can only exercise jurisdiction after the State parties have agreed upon the conditions under which the court shall exercise its jurisdiction, that is, after a statute amendment including a crime of aggression definition. Article 5(2) provides that the provision shall be consistent with the relevant provisions of the Charter of the United Nations. Most notably, this means that the provision must be reconcilable with Charter Article 39 that provides that the Security Council shall determine the existence of any act of aggression. In 1999, Bassiouni and Ferencz commented this relationship between *acts* and *crimes* of aggression in the following manner:

The definition of Aggression can serve two purposes: political and judicial. The political purposes puts states on notice of the prohibited conduct and also of the type of conduct that justifies resort to the use of force under "self-defence", as it arises

¹³⁴ Bassiouni & Ferencz 1999, p. 315. Of these, the following are especially important: The Hague Conventions of 1899 and 1907 on the pacific settlement of international disputes, The Treaty of Versailles of 1919 which condemned aggressive war, The Covenant of the League of Nations of 1920 which prohibited wars of aggression, The Kellogg-Briand Paris Pact of 1928 on the renunciation of war as an instrument of national policy, The 1945 London Charter which criminalized war, The United Nations Charter of 1945 which prohibited war in self-defence. See Bassiouni & Ferencz 1999, p. 315

¹³⁵ See Sunga 1997, p. 40-48 (especially p. 43). According to Sunga, the crimes of aggression, threat of aggression, intervention and colonial domination relate "in a general sense" to crimes against peace as defined in the Charter of the Nuremberg Tribunal. Sunga 1997, p. 31

under Articles 51 and 52 of the U.N. Charter and as it arises under customary law. Such a definition, though serving a political purpose, is essentially a legal one, even though the appreciation of the facts leads to the conclusion that the given state's conduct constitutes aggression or constitutes legitimate self-defense. A definition to determine such political findings does not have to be as rigid as one that is required to determine individual criminal responsibility. The latter needs to satisfy the principles of legality and focus on the elements of the crimes for which individuals are to be held personally accountable. In this context, the crime of aggression is necessarily committed by those decision-makers who have the capacity to produce those acts which constitute an "armed conflict" [...] against another state.¹³⁶

Today, the Preparatory Commission for an International Criminal Court has a working group on aggression that in vain has tried to agree on a definition of the crime of aggression and the conditions for the exercise of the court's jurisdiction. The main unresolved questions have been: (1) whether the crime definition should include an illustrative or exclusive list of acts constituting aggression or should be more general; (2) how to differentiate between individual criminal acts and illegal State acts; and (3) whether the Security Council holds the primary or exclusive authority to determine that a State has committed aggression.¹³⁷ When it comes to the crime definition, it is interesting to note that the working group coordinator in October 2001 concluded that the principle under which the crime of aggression is committed by political and military leaders *of a State* seem to enjoy widespread support.¹³⁸

Taking into account the complicated relationship between acts of aggression and crimes of aggression *and* the fact that aggression is presumed to result from State action, it is interesting that the American characterisation of the 11 September 2001 attacks against the United States as *acts of war* justifying self-defence measures¹³⁹ was accepted by, among others, the UN Security Council¹⁴⁰ and NATO.¹⁴¹ This acceptance actualises the question: If non-State actors

¹³⁶ Bassiouni & Ferencz 1999, p. 347

¹³⁷ Schense 2001

¹³⁸ UN Doc. PCNICC/2001/L.3/Rev.1, p. 16

¹³⁹ President Bush, for example, argued that: "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war." <http://usinfo.state.gov/topical/pol/terror/01091208.htm>

¹⁴⁰ In its resolutions triggered by the terrorist attacks, the Security Council recognized "the inherent right of individual or collective self-defence according to the UN Charter. See UN Doc. S/RES/1368 (2001) and S/RES/1373 (2001). Note, however, Carsten Stahn's argumentation: "First, one cannot fail to note that the Security Council is hesitant in formally stating the existence of self-defence under the concrete circumstances. When characterizing the events in New York, Washington and Pennsylvania on 11 September 2001, the Council avoids speaking of an "armed attack", as required by Article 51 of the Charter, using instead the notion of "terrorist attack", without expressly linking this notion to Article 51 of the Charter, which is mentioned in a

can commit *acts* of aggression, can their leaders also be held accountable for *crimes* of aggression? Taking into account the controversy surrounding the crime of aggression and the principles of legality this is highly unlikely today.

In the following, the crime of aggression is not included in the discussion of international core crimes, as this crime lacks a legal definition.

3.6. Elements of Individual Criminal Responsibility

The fourth self-justification [for those participating in the Holocaust] concerned the perpetrator's own role in the destruction process, a role which was played down. The participant in the destruction process was "working" and "fighting" as one man of a group or team. [...] There was very little a drop of water could do in such a wave. [...] Among his superiors he could always find those who were doing more than he, among his subordinates he could always find somebody eager to fill the position he was holding.¹⁴²

3.6.1. Introduction

The principle of individual criminal responsibility for certain serious violations of international humanitarian law based on international law is today well established. Most notably, this principle was crystallized by the Nuremberg Tribunal following the Second World War. In essential, the Nuremberg Tribunal established that "individuals have international duties which transcend the national obligations of obedience imposed by the individual State" and that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁴³ The principle of international individual criminal responsibility has been reaffirmed by the other trials following World War II, the

separate paragraph. The difference in wording becomes particularly evident if one compares the wording of SC Resolutions 1368 (2001) and 1373 (2001) with SC Resolution 660 (1999) in which the Council affirmed "the inherent right of individual or collective self-defence, in response to the *armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter*". Furthermore, it is quite telling that, in its two resolutions concerning the 11 September attacks, the Council mentions neither a specific state as the holder of the right to self-defence, nor a concrete author of the attacks. Finally, the Security Council refrains from expressly attributing the 11 September attacks to the Taliban regime." Stahn 2001, Ch. 2

¹⁴¹ NATO Doc. Press Release (2001)124, 12 September 2001

¹⁴² Schneider 1982, p. 311-312

¹⁴³ Nuremberg Judgement, Section: The Law of the Charter

Yugoslavia and Rwanda Tribunals and the Statute of the International Criminal Court, among others.

In the following, the constituent elements of this international criminal responsibility will be discussed to some length. The report will follow the established distinction between individual criminal responsibility proper and superior responsibility. Some remarks on organizational guilt will also be made.

3.6.2. Individual Criminal Responsibility Proper

When discussing individual criminal responsibility, a distinction should be made between: (1) the required mode of participation (objective element or *actus reus*); and (2) the required knowledge or intent (subjective element or *mens rea*).¹⁴⁴ When it comes to the required participation, it is established that all persons who in some way contribute to the commission of international core crimes can be held individually responsible.¹⁴⁵ The statutes of the Yugoslavia and Rwanda Tribunals, for example, provide that a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime shall be individually responsible for the crime.¹⁴⁶ The reach of the individual criminal responsibility before the *ad hoc* tribunals was summarised by the Trial Chamber in the *Tadic Case* in the following way:

[The] accused will be found criminally culpable for any conduct where it is determined that he *knowingly participated* in the commission of an offence that violates international humanitarian law and his *participation directly and substantially affected the commission of that offence* through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.¹⁴⁷

¹⁴⁴ See e.g. *Tadic* Appeal Judgement, para. 227-228. Or to cite the trial chamber in the *Kayishema and Ruzindana Case* "The Trial Chamber is of the opinion that [...] there is a further two stage test which must be satisfied in order to establish individual criminal responsibility [...]. This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime." *Kayishema & Ruzindana* Judgement, para. 198

¹⁴⁵ UN Doc. S/25704, para. 54

¹⁴⁶ Yugoslavia Tribunal Statute Article 7(1) and Rwanda Tribunal Statute Article 6(1)

¹⁴⁷ *Tadic* Opinion and Judgement, para. 692

This has in later judgements been accepted as the current customary international law standard for individual criminal responsibility for international core crimes. When it comes to responsibility for attempt, it is - taking into account the serious nature of the crimes - remarkable that only attempt to commit genocide is punishable under the *ad hoc* tribunal statutes.¹⁴⁸ The Statute of the International Criminal Court, on the other hand, establishes attempt responsibility for all core crimes.¹⁴⁹

Box 3 below elaborates the participation forms identified by the *ad hoc* tribunals by pointing out the main elements of these participation forms. It should be noted that the participation form "participation in a common purpose" is not, like the other participation forms, explicitly set out in the *ad hoc* tribunal statutes. From a terrorism perspective it is interesting that the *Tadic* Appeal Chamber in its search for a customary international law standard notes that notion of common plan has been upheld in at least two international treaties, namely the *International Convention for the Suppression of Terrorist Bombing* and the Statute of the International Criminal Court (which is clearly influenced by the terrorist bombing convention).¹⁵⁰

¹⁴⁸ *Akayesu* Judgement, para. 473

¹⁴⁹ Article 25(3): "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: [...] (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose. [...]"

¹⁵⁰ *Tadic* Appeal Judgement, para. 221-222. See also Ambos 1999, p. 483 and Saland 1999, p. 199-200

BOX 3: DIFFERENT PARTICIPATION FORMS AS RECONIZED AND INTERPRETED BY THE YUGOSLAVIA AND RWANDA TRIBUNALS

(a) Forms of participations relevant for all crimes

committing = direct personal or physical participation of the accused in the actual acts which constitute the crime with the requisite knowledge ("principal perpetrator")¹⁵¹

planning = one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases¹⁵²

instigating = prompting another to commit an offence.¹⁵³ The ordinary meaning of instigating, namely, "bring about" the commission of an act by someone, corroborates the opinion that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.¹⁵⁴

ordering = a person in a position of authority uses it to convince another to commit an offence. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it.¹⁵⁵ It is not necessary that the order be given in writing or in any particular form. It can be explicit or implicit and does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. The fact that an order was given can be proved through circumstantial evidence. What is important is the commander's *mens rea*, not that of the subordinate executing the order. Therefore, it is irrelevant whether the illegality of the order was apparent on its face.¹⁵⁶

aiding and abetting = aiding means giving assistance to someone, whereas abetting stands for facilitating the commission of an act by being sympathetic thereto.¹⁵⁷ In short, the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence.¹⁵⁸

participation in a common purpose/joint criminal enterprise responsibility = The objective elements of joint criminal enterprise responsibility are: (1) a plurality of persons; (2) the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute; and (3) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.¹⁵⁹ When it comes to the subjective

¹⁵¹ *Kordic & Cerkez* Judgement, para. 376. See also e.g. *Tadic* Appeal Judgement, para. 188 and *Foca* Judgement, para. 390

¹⁵² *Akayesu* Judgement, para. 480. "[Planning] is similar to the notion of complicity in Civil law, or conspiracy under Common law [...]. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person." *Akayesu* Judgement, para. 480

¹⁵³ *Akayesu* Judgement, para. 482

¹⁵⁴ *Blaskic* Judgement, para. 280

¹⁵⁵ *Akayesu* Judgement, para. 483

¹⁵⁶ *Blaskic* Judgement, para. 281-282

¹⁵⁷ *Akayesu* Judgement, para.484

¹⁵⁸ *Furundzija* Judgement, para. 249. See also *Aleksovski* Appeal Judgement, para. 162-164

¹⁵⁹ *Tadic* Appeal Judgement, para. 227

element, the *Tadic* Appeals Chamber distinguished between crimes committed in the execution of the agreed upon objectives of the criminal enterprise and crimes upon which the participants had not agreed but which were a natural and foreseeable consequence of the plan.¹⁶⁰ If the crime charged falls within the object of the joint criminal enterprise, the prosecution must establish that the accused shared with the person who personally perpetrated the crime the state of mind required for that crime. If the crime charged goes beyond the object of the joint criminal enterprise, the prosecution needs to establish only that the accused was aware that the further crime was a possible consequence in the execution of that enterprise and that, with that awareness, he participated in that enterprise.¹⁶¹

(b) Forms of participations relevant for genocide

conspiracy = ¹⁶²

direct and public incitement to commit genocide = directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication. The *mens rea* required lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide. The direct and public incitement to commit genocide is punishable, even where such incitement failed to produce the result expected by the perpetrator.¹⁶³

complicity = a person is liable as an accomplice to genocide if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such¹⁶⁴

Looking at the participation form box one must conclude that the individual criminal responsibility for the serious violations of humanitarian law before the *ad hoc* tribunals is very broad in the sense that it covers all participation forms that directly and substantially affects the commission of the crimes. This broad responsibility for international core crimes, covering all material stages of the crime commission, is reaffirmed by the Statute of the International Criminal Court.¹⁶⁵ The broad responsibility can, among others, be motivated with the type of crimes international core crimes are:

¹⁶⁰ *Tadic* Appeal Judgement, para. 228. See *Krstic* Judgement, para. 613

¹⁶¹ *Brdanin & Talic* Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 31. See also *Krstic* Judgement, para. 613

¹⁶² On the Rwanda Tribunal's rather confusing use of the concept "conspiracy" see Schabas 2000, p. 264-265

¹⁶³ *Akayesu* Judgement, para. 559-560, 562

¹⁶⁴ *Akayesu* Judgement, para. 545

¹⁶⁵ Article 25(3): "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is

Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder [...], etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less - or indeed no different - from that of those actually carrying out the acts in question.¹⁶⁶

Considering that international terrorism in most cases also is "collective criminality" the ability to prosecute all persons involved in the commission of crimes is crucial. The attacks against the United States on 11 September demonstrate the importance of a broad responsibility for serious terrorist offences. If only those persons that physically participated in the actual acts, which constitute the crime, could be prosecuted, no one could be prosecuted for the crimes as all the terrorists on board the airplanes lost their lives in the attack. Considering the apparent participation of other individuals in the planning, financing, etc. of the attack it is only reasonable that these accomplices can be held responsible for their deeds. When the international terrorist offences fulfil the requisite for international core crimes, the rules on international individual criminal responsibility naturally apply to them.

3.6.3. Superior Responsibility

The doctrine of superior responsibility entails an *expansion* of the superior's individual criminal responsibility from responsibility for his orders *to responsibility for his subordinates' unlawful conduct, which is not based on his orders* (imputed criminal responsibility).¹⁶⁷ This

criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide; [...]."

¹⁶⁶ *Tadic* Appeal Judgement, para. 191

¹⁶⁷ Cf. Bassiouni 1992, p. 368. "The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) [individual criminal responsibility proper] and Article 7(3) [superior responsibility] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime through his subordinates, by "planning", "instigating" or

expanded superior responsibility has its roots in military laws and is based on the idea that military commanders normally effectively can control their subordinates' doings. The imputed responsibility is not absolute and the superior can only be punished for his personal failure to take reasonable steps to prevent and repress the unlawful conduct.¹⁶⁸

The essential elements of superior responsibility is, according to the Trial Chamber in the *Celebici Case*, that: (1) there exists a superior-subordinate relationship; (2) the superior knew or had reason to know that the criminal act was about to be or had been committed; and (3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹⁶⁹ The case law of the *ad hoc* tribunals further makes it clear that superior can be both a military and a civilian authority and that there is no requirement of formal legal authority. Essential is that the superior has *effective control* over the persons committing the underlying violations in the sense of having the *material ability* to prevent or punish the commission of the violations.¹⁷⁰ These requirements make it quite difficult to establish superior responsibility in organizations that are not clearly hierarchical:

Even though arguably effective control may be achieved through substantial influence, a demonstration of such powers of influence will not be sufficient in the absence of a showing that he had effective control over subordinates, in the sense of possessing the material ability to prevent subordinate offences or punish subordinate offenders after the commission of the crimes. [...] A showing that the official merely was generally an influential person will not be sufficient.¹⁷¹

Like the *ad hoc* tribunals, the forthcoming International Criminal Court recognizes the special responsibility of superiors, but in contrast to the *ad hoc* tribunals the permanent Court will make a clear distinction between military and civil superiors. The Rome Statute namely makes it more difficult to hold civilian superiors responsible by requiring that the superior

“ordering” the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.” *Krstic* Judgement, para. 605

¹⁶⁸ See e.g. *Aleksovski* Judgement, para. 72

¹⁶⁹ *Celebici* Judgement, para. 346

¹⁷⁰ *Celebici* Judgement, para. 354, 378

¹⁷¹ *Kordic & Cerkez* Judgement, para. 415

knew or "consciously disregarded" information, which clearly indicated that his subordinates were committing or about to commit crimes.¹⁷²

From a non-State actor perspective, it is noticeable that non-State actor superiors also can be held responsible under the doctrine of superior responsibility as no difference is made between State and non-State actors in the law. Another thing is that when it comes to certain types of non-State organizations, like terrorist organizations, it is more or less impossible to establish superior-subordinate relationships that could entail superior responsibility. Terrorist groups are today often rather small¹⁷³ and organized so that it for outsiders is difficult to establish their structures. Terrorists prefer to work in the hidden. In sum, the doctrine of superior responsibility seems to be of little help when trying to use international criminal law to hold terrorist organization/group leaders responsible for terrorist offences.

3.6.4. The Question of Organizational Guilt

Article 9 of the Nuremberg Tribunal Charter established that at the trial of any individual member of any group or organization, the tribunal could declare that the group or organization of which the individual was a member was a "criminal organization." Furthermore, Article 10 of the Charter set forth that in cases where a group or organisation was declared criminal by the Tribunal, the competent national authority of any signatory had the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation was to be considered proved and should not be questioned.

This concept of "organizational guilt" was new to international criminal law, though not to some domestic jurisdictions.¹⁷⁴ In essence, the idea was that after declaring an organization criminal, its members could be found guilty on proof of membership alone, that is, the legal doctrine of organizational guilt would have made it practically possible to convict the huge number of persons involved in the commission of the World War II atrocities by eliminating

¹⁷² Article 28. Note that the Trial Chamber in the *Kayishema & Ruzindana Case* followed this way of reasoning. *Kayishema and Ruzindana* Judgement, para. 227-228. See also *Celebici* Appeal Judgement, para. 240

¹⁷³ Laqueur 1999, p. 36

¹⁷⁴ Taylor 1992, p. 41

the need to prove the complicity of the individual organization members.¹⁷⁵ The Nuremberg Charter, however, failed to provide any defences or mitigating circumstances that the members could raise or the scale of punishments that could be imposed, and was immediately criticised for allowing the punishment of innocent organization members.¹⁷⁶ Even more criticised was Control Council Law No. 10 that allowed the death penalty to be imposed for criminal organization membership alone.¹⁷⁷

The Nuremberg Tribunal responded to the criticism and ruled out the possibility of convicting persons for membership alone. In its judgement, the Tribunal argued that:

Article 9, it should be noted, uses the words "The Tribunal may declare" so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group this Tribunal should not hesitate to declare it to be criminal because the theory of "group criminality" is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will, as has been pointed out, fix the criminality of its members, that *definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.*¹⁷⁸

¹⁷⁵ Taylor 1992, p. 36, 41

¹⁷⁶ Taylor 1992, p. 75

¹⁷⁷ Taylor 1992, p. 283. Control Council Law No. 10, Article II: "1. Each of the following acts is recognized as a crime: [...] (d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal. [...] 3. Any persons found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following: (a) Death. (b) Imprisonment for life or a term of years, with or without hard labor. [...]"

¹⁷⁸ Nuremberg Judgement, Ch. The Accused Organizations (author's italics)

One can therefore say that the Nuremberg Tribunal rejected the presumption of guilt for criminal organization members that the Charter established: (a) by stressing that criminal responsibility is personal; and (b) by requiring either commission of a criminal act by the member *or* membership with knowledge that the organization was used for the commission of the crimes.¹⁷⁹

The post-World War II international criminal tribunals have rejected the controversial concept of criminal organizations and they can only prosecute and punish natural persons "as individuals and not as members of a group."¹⁸⁰ It should be noted that collective criminality has been rejected due to human rights concerns¹⁸¹ even though the Second World War showed that there can exist organizations with the sole goal of committing international core crimes.¹⁸² The presumption of innocence requires that guilt never is presumed. In short, the doctrine of criminal organizations is today foreign for the international core crimes regime.

3.7. Conclusions

The group of international core crimes consists of crimes of different nature with the fact in common that they are regarded as *very serious* by the international community. Of these crimes, the crime of aggression is the least developed and it is questionable if anybody at all at the moment can be held internationally responsible for this crime. War crimes, on the other hand, require a connection between the unlawful behaviour and an armed conflict. The

¹⁷⁹ See e.g. Schick 1947, p. 787-788, Wright 1947, p. 70, and Wright 1949, p. 754

¹⁸⁰ See e.g. Morris & Scharf 1995, p. 93-95 and Morris & Scarf 1998, p. 268-269. Schraga and Zacklin, however, note that the French letter to the Secretary-General with regard to the establishment of the Yugoslavia Tribunal put forward that membership in a *de jure* or *de facto* group whose primary or subordinate goal is to commit crimes coming within the jurisdiction of the tribunal would constitute a specific offence. Schraga & Zacklin 1994, p. 369 (footnote 35) In his report, containing the draft Yugoslavia Tribunal Statute, the Secretary-General, however, argues that: "The question arises, however, whether a juridical person, such as an association or organization, may be considered criminal as such and thus its members, for that reason alone, be made subject to the jurisdiction of the International Tribunal. The Secretary-General believes that this concept should not be retained in regard to the International Tribunal." UN Doc. S/25704, para. 51

¹⁸¹ Most notably the right to be presumed innocent until proved guilty according to law. E.g. *International Covenant on Civil and Political Rights*, Article 14

¹⁸² It should be pointed out that there is currently a trend of accepting the sanctioning of legal entities (like companies), which has influenced international criminal law, albeit not the core crime "sector" of the law. Bassiouni notes that contemporary international efforts to deal with organized crime, corruption, and drug trafficking are moving in this direction. Bassiouni 1999(a), p. 17-18. The rejection of the inclusion of a corporate criminal responsibility provision in the International Criminal Court Statute should also be noted. See e.g. Ambos 1999, p. 477-478 and Saland 1999, p. 199

requirement of an armed conflict makes it impossible to apply the war crime provision to many terrorist offences.

Of the international core crimes, the crime against humanity is the one best suited to tackle terrorist crimes with. The central requirement of crimes against humanity is that the illegal act must be committed as part of a widespread or systematic attack directed against a civilian population. This crime element is not easy to establish, but possible when it comes to very serious terrorist offences. Even more difficult is it to establish the occurrence of the crime of genocide. One should note that a crimes against humanity/genocide conviction stresses the extreme seriousness of the offence, but at the same time gives no special account to one specific feature of terrorism, namely the intent to intimidate a population.¹⁸³

The individual criminal responsibility for international core crimes is very comprehensive, which makes it rather unimportant that the doctrines of superior responsibility and organizational guilt are badly suited respectively not applicable when terrorist offences are prosecuted as international core crimes.

In short, the international core crimes provide some means to tackle international terrorism, but it is difficult to agree with those who argue that the forthcoming International Criminal Court, that only has jurisdiction over international core crimes, will play a central role in the fight against international terrorism.¹⁸⁴

¹⁸³ See Cassese 2001, p. 2

¹⁸⁴ Cf. "[The Coalition for an International Criminal Court] and its individual member organizations have worked to inform the public, the media and governments around the world that the Rome Statute and the future ICC could also be a powerful tool to address certain aspects of international terrorism. While the Rome Statute does not explicitly include the crime of terrorism, the drafters of the treaty ensured that certain serious terrorist acts could fall within the definitions of the crimes within the Statute, namely crimes against humanity, war crimes and genocide, depending on the facts " Pace 2001

4. INTERNATIONAL CRIMINAL TRIBUNALS AND TERRORIST OFFENCES

4.1. Introduction

International criminal law is today enforced both by national and international tribunals and courts. In practice, national courts bear the main burden as the functioning international tribunals have a very limited jurisdiction. The Yugoslavia Tribunal, for example, can only prosecute for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.¹⁸⁵ No international tribunal has competence to adjudicate the so-called terrorist crimes discussed in Chapter 2. The significance of international tribunals is also curtailed by the often very limited resources these tribunals have.

In this Chapter, the role of international criminal tribunals will be discussed against the background that the currently functioning international criminal tribunals only can prosecute individuals for crimes committed during specified armed conflicts. The emphasis will therefore be put on the future possibilities, that is, on the forthcoming International Criminal Court and on possible new *ad hoc* tribunals.

4.2. Generally on the Importance of International Criminal Tribunals

The rationale behind international criminal tribunals has mainly been to break the impunity for certain serious crimes. The history of mankind is namely regrettably full of examples of gross atrocities that have gone unpunished. The impunity is often the result of State involvement or approval of the crimes committed. When it comes to terrorism, it seems that especially State terrorism and State-sponsored or "State-protected" terrorism are susceptible to impunity.

In recent years, those in favour of international criminal tribunals have more and more started to support their support of the tribunals with other sorts of arguments. The work of the *ad hoc* tribunals for the former Yugoslavia and Rwanda have shown that international adjudication has other virtues than diminishing impunity. For example, international adjudication, as a

rule, attracts more international attention and has more prestige than purely national proceedings. International proceedings can also be more practical and suitable due to the international or trans-national character of the offence. Finally, international criminal tribunals can, in some cases, provide greater guarantees of neutrality or impartiality than domestic courts. Important to remember is, however, that international proceedings entail a de-empowerment of victimized societies and an acceptance of the drawbacks of international proceedings.¹⁸⁶

When it comes to serious terrorist offences that attract much publicity it is difficult to find courts that are *perceived* as impartial. It has, for example, been argued that no American court could free Osama bin Laden for the 11 September 2001 attack, that is, that every American trial against him would in some sense be a show trial. While the internationality of a proceeding as such does not guarantee the impartiality of it, it is clear that in some cases the internationality can be of help. *Multilateralism* can thus be used to improve the *de facto* and perceived impartiality of the trials and to give the trial outcomes a higher legitimacy.

4.3. The Permanent International Criminal Court and Terrorist Offences

The first serious attempts to establish a permanent international criminal court were made in the inter-World War period and included the League of Nations' *Convention on the Establishment of an International Criminal Court* of 1937.¹⁸⁷ These attempts failed, as did the corresponding attempts following World War II.¹⁸⁸ The establishment of the two *ad hoc* tribunals for the Former Yugoslavia and Rwanda in the 1990s, however, brought the question anew strongly fore and, in 1998, the Statute of a permanent International Criminal Court

¹⁸⁵ UN Doc. S/RES/827 (1993)

¹⁸⁶ These international tribunals, among others, have to deal with numerous working languages, cultural differences, lacking in-depth knowledge of the offence context, high dependence on State cooperation and a lacking criminal justice system context.

¹⁸⁷ From a terrorism perspective, it is interesting that this draft convention was annexed to the League of Nations *Convention on the Prevention and Punishment of Terrorism*. Neither convention entered into force. Lambert 1990, p. 28

¹⁸⁸ On the international efforts to establish a permanent international criminal court, see Morris & Scharf 1998, p. 17-28

could be adopted in Rome. Currently, the Rome Statute that requires 60 ratifications for entry into force has 50 ratifications.¹⁸⁹

The question whether terrorist offences should be included in the subject-matter jurisdiction of the permanent court has constantly been topical and most draft statutes and draft articles on individual international criminal responsibility have included some terrorist offences. The International Law Commission's 1991 draft articles on crimes against the peace and security of mankind, for example, include in the list of offences international terrorism (draft Article 24). From a non-State actor perspective it is remarkable that the individual responsibility for this crime is put forward in the following way: "An individual who as *an agent of or representative of a State* commits or orders the commission of any of the following acts: - undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public [...]."¹⁹⁰ This requirement of State actor affiliation can partly be explained with the characterization of international terrorism as a crime against peace at that time.¹⁹¹

Likewise, the International Law Commission's 1994 Draft Statute of an International Criminal Court included some terrorist offences in the subject-matter jurisdiction of the court. The 1994 draft statute made a distinction between "crimes under general international law"¹⁹² and

¹⁸⁹ <http://www.iccnw.org/>

¹⁹⁰ UN Doc. A/46/10, p. 249 (author's italics). The Commission notes that: "International terrorism is terrorism organized and carried out by a State against another State, whereas internal terrorism is organized and carried out in the territory of a State by nationals of that State. Such terrorism comes under international law, since it does not endanger international relations." UN Doc. A/45/10, p. 63. This differentiation has been criticized by, among others, Mosconi. Mosconi 1993, p. 277-278. In the 1954 draft, the crime was defined in the following way: "The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State." UN Doc. A/2693, Ch. III

¹⁹¹ In its commentary the Commission notes: "Notwithstanding the proportion which the phenomenon has assumed nowadays, particularly in the framework of certain entities (terrorist organizations or groups, which are usually motivated by the desire for gain) and the danger which it represents for States, it has not seemed possible to consider terrorism by individuals as belonging to the category of crimes against peace to the extent that such activities are not attributed to a State. [...] [The Commission] intends to revert to international terrorism by individuals when it examines provisions relating to crimes against humanity." UN Doc. A/45/10, p. 64

¹⁹² Including the crimes of genocide and aggression, serious violations of the laws and customs applicable in armed conflicts and crimes against humanity.

"treaty-crimes" and placed the terrorist offences in the latter category of crimes.¹⁹³ Treaty-crimes were in the commentary defined as "crimes of international concern defined by treaties"¹⁹⁴ and to fall under the court's jurisdiction the crimes had to "constitute exceptionally serious crimes of international concern".¹⁹⁵ The suggested treaty-crimes included the unlawful seizure of aircraft as defined by Article 1 of the *Convention for the Suppression of Unlawful Seizure of Aircraft* of 1970, the crimes defined by Article 1 of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* of 1971, the crimes defined by Article 2 of the *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents* of 1973, hostage-taking and related crimes as defined by Article 1 of the *International Convention against the Taking of Hostages* of 1979 and the crimes defined by Article 3 of the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* of 1988 and Article 2 of its protocol.¹⁹⁶

At the International Criminal Court preparatory committee meetings in the 1990s and the Rome Conference in 1998, the inclusion of terrorism offences in the subject-matter jurisdiction of the permanent court was likewise debated. Herman von Hebel and Darryl Robinson, for example, note that:

From the beginning of the preparatory negotiations, a clear trend emerged in favor of limiting the jurisdiction of the Court to the core crimes. It was considered that this would promote the broadest acceptance of the Court and would enhance the credibility and moral authority of the Court. However, the concept of "core crimes" was not always understood uniformly, and some delegations regarded one or two of the treaty crimes as core crimes. This applied in particular to the crimes relating to terrorism and drug trafficking.¹⁹⁷

¹⁹³ UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 38. Note, however, that in the commentary it is argued that: "As yet, the international community has not developed a single definition of terrorism, although there are definitions of the term in some regional conventions. A systematic campaign of terror committed by some group against the civilian population would fall within the category of crimes under general international law in subparagraph (d) [= crimes against humanity], and if motivated with ethnic or racial grounds also subparagraph (a) [= genocide]." UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 41

¹⁹⁴ UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 41 (para. 18)

¹⁹⁵ Draft Article 20 reads: "The Court has jurisdiction in accordance with this Statute with respect to the following crimes: [...] (e) Crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern."

UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 38

¹⁹⁶ UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 67-68

¹⁹⁷ von Hebel & Robinson 1999, p. 80-81

At the meetings, suggestions were made both to the end of introducing crimes or acts of terrorism as *treaty-crimes*¹⁹⁸ and as forms of the *core crimes* (namely of war crimes¹⁹⁹ and crimes against humanity²⁰⁰). At the end, it was, however decided to exclude terrorism offences from the subject-matter jurisdiction of the court and to avoid the controversial "terrorism" term altogether. This decision was reached both due to the risk of overburdening the court and due to the controversy surrounding terrorist crimes.²⁰¹ It was also noted that terrorist offences are "often similar to common crimes under national law" and can therefore be more effectively tackled by national authorities alone and working together.²⁰²

The outcome of Rome Conference thus means that the forthcoming permanent International Criminal Court will only be able to deal with acts of terrorism in the rare cases when these acts fulfil the requirements of one of the four core crimes covered by the Statute. After the 11 September 2001 attack against the United States it has been put forward that the Statute of the forthcoming International Criminal Court should be amended to better allow terrorist crime prosecutions.²⁰³ The Statute can, however, neither be amended quickly nor easily.²⁰⁴ In the final act of the Rome Conference it is, however, recommended that terrorist offences one day are included in the list of offences over which the Court has jurisdiction.²⁰⁵

¹⁹⁸ See e.g. UN Doc. A/AC.249/1997/L.5, p. 16 and UN Doc. A/AC.249/1998/L.13, p. 34

¹⁹⁹ See e.g. UN Doc. A/AC.249/1997/L.5, p. 12

²⁰⁰ von Hebel & Robinson 1999, p. 86 (citing UN Doc. A/CONF.183/C.1/L.27/Corr.1)

²⁰¹ See e.g. Esposito 2001, UN Doc. A/50/22, para. 81-85, UN Doc. A/51/22, para. 103-107, von Hebel & Robinson 1999, p. 85-87

²⁰² UN Doc. A/51/22, p. 107

²⁰³ E.g., the Parliamentary Assembly of the Council of Europe called on the Council of Europe member states to "give urgent consideration to amending and widening the Rome Statute to allow the remit of the International Criminal Court to include acts of international terrorism". CoE Doc. Resolution 1258 (2001), para. 17(ix). See also CoE Doc. Press Release 24 January 2002

²⁰⁴ International Criminal Court Statute Article 121: "1. After the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. [...] 2. No sooner than three months from the date of notification, the Assembly of States Parties, at its next meeting, shall, by a majority of those present and voting, decide whether to take up the proposal. The Assembly may deal with the proposal directly or convene a Review Conference if the issue involved so warrants. 3. The adoption of an amendment at a meeting of the Assembly of States Parties or at a Review Conference on which consensus cannot be reached shall require a two-thirds majority of States Parties. [...] 5. Any amendment to articles 5 [= the article on crimes within the jurisdiction of the Court], 6, 7 and 8 of this Statute shall enter into force for those States Parties which have accepted the amendment one year after the deposit of their instruments of ratification or acceptance. In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory. [...]"

²⁰⁵ "Recognizing that terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community, [...] Recommends that a review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of

4.4. Terrorist Offences and *Ad Hoc* Tribunals

4.4.1. Introduction

In the aftermath of a serious terrorist attack it is possible to envisage the establishment of two types of *ad hoc* tribunals, that is, tribunals that are established for a specific case. Firstly, the UN Security Council could establish an *ad hoc* tribunal of the type established for the Former Yugoslavia and Rwanda. Secondly, a special court could be convened through special agreement. In the following, these action alternatives will be developed somewhat.

At this point it is good to recall that the establishment of an international tribunal always reflects the perceived seriousness of the underlying crimes. Two Yugoslavia Tribunal judges have, for example, commented the mandate of this international tribunal in the following manner:

"[We] cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions. We are not concerned with the actions of domestic terrorists, gang-leaders and kidnapers. [...]."²⁰⁶

4.4.2. An *Ad Hoc* Tribunal Established by the UN Security Council

Reports of Second World War-type atrocities occurring in the Former Yugoslavia prompted the UN Security Council to take a series of steps culminating in the establishment of an *ad hoc* international criminal tribunal in 1993 "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace."²⁰⁷ This tribunal, established by the Security Council acting under Chapter VII of the UN Charter, has been the subject of some controversy due to

terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court." UN Doc. A/CONF.183/10, p. 7-8 (Resolution E)

²⁰⁶ *Erdemovic* Appeal Judgement (Joint Separate Opinion of Judge McDonald and Judge Vohrah), para. 75

its unprecedented establishment procedure. Today, it is, however, recognized that the Security Council has the power to establish *ad hoc* tribunals to maintain or restore international peace and security when it considers that there exists any threat to the peace, breach of the peace, or act of aggression.²⁰⁸ As non-State actor terrorist activity can threaten international peace and security,²⁰⁹ it would be possible for the Security Council to establish an *ad hoc* tribunal to prosecute persons responsible for certain terrorism offences.²¹⁰ The willingness of the Security Council to act, however, depends besides on the seriousness of the offences on political realities as the topical victim and offender States. It is not difficult to envisage a situation where a permanent Security Council member vetoes the establishment of a terrorist tribunal.

When it comes to the terrorist attack against the United States on 11 September 2001, many have stressed the need to have a multilateral response to the attack and have put forward the establishment of Yugoslavia Tribunal-type tribunal to try those responsible for the attack.²¹¹ Considering the fact that no serious efforts to establish an *ad hoc* tribunal have been undertaken, the suggestions put forward have been tentative. Some authors have, however, put forward that, in the present case, the bench of judges should include Islamic judges to "improve the West's credibility within Islamic countries."²¹² It seems that the crime of the terrorists in the 11 September case would be prosecuted for its crimes against humanity.

The advantages of international *ad hoc* tribunals established under UN Charter VII include that these tribunals can be tailored to "fit the task" and that all States are obliged to cooperate with these tribunals, which may make it easier to obtain evidence, etc. The previous *ad hoc* tribunals are also generally regarded as impartial international tribunals. In the 11 September case, the fact that two of the main "victim States" (that is, the United States and United Kingdom) are permanent members of the Security Council allegations of victors' justice

²⁰⁷ UN Doc. S/RES/827 (1993), para. 2 and Morris & Scharf 1998, p. 29

²⁰⁸ See e.g. *Tadic* Appeal Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 10 ff.

²⁰⁹ See e.g. UN Doc. S/RES/731 (1992) and UN Doc. S/RES/1373 (2001)

²¹⁰ "Article 39 provides that in order to take enforcement measures under Chapter VII, the Security Council must follow a two-step process. It states: The Security Council *shall determine* the existence of any threat to the peace, breach of the peace or act of aggression and *shall make recommendations, or decide* what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Patel King 1996, Ch. II

²¹¹ E.g. Cassel 2001(a) (citing Richard Goldstone), Cassel 2001(b), Ferencz 2001, Robertson 2001(b), Slaughter 2001, Underhill 2001 (citing William Pepper)

²¹² See Baldwin 2001. See also e.g., Robertson 2001(b), Underhill 2001 (citing William Pepper)

could, however, occur. The establishment of an *ad hoc* tribunal for the "11 September terrorists" would therefore require special consideration.²¹³

4.4.3. The Establishment of *Ad Hoc* Tribunals Through Special Agreements

On 21 December 1988, an explosion on board of Pan Am Boeing 747 airplane caused the death of 259 persons on board and 11 residents in the town of Lockerbie, Scotland. This terrorist attack led long controversy between Libya and United States and United Kingdom, based on Libya's refusal to extradite to terrorist suspects to the above mentioned victim states. After many years of negotiations, the affected states finally agreed on a Scottish trial to be held in the neutral Netherlands.²¹⁴ This unprecedented agreement shows that it is possible for terrorist "offender" states and terrorist "victim" states to make up special tribunals when no suitable domestic or international criminal court can be found. It is, however, questionable whether the Lockerbie court can be called international only because it was agreed upon inter-State, as the court was constituted of Scottish judges who applied Scottish law.

4.5. Conclusions

The aim of this chapter has been to demonstrate that international criminal tribunals, at the moment, are of little help in the fight against non-State actor terrorism. The present *ad hoc* tribunals and the forthcoming International Criminal Court that can prosecute individuals all concentrate on the type of criminality normally occurring in armed conflict. Some extreme peacetime terrorist offences could, however, in the future be prosecuted as crimes against humanity (or even as acts of genocide) before the International Criminal Court. It is also possible to envisage the establishment of *ad hoc* tribunals in the wake of extremely serious terrorist attacks. Given the political hurdles that have to be overcome in order to establish *ad hoc* tribunals, it is likely that domestic courts continue to alone prosecute persons suspected for terrorist offences in the near future.

²¹³ Questions that should be addressed are, for instance, whether the tribunal also should deal with possible crimes committed by the United States and its allies in the "war against terrorism" and whether the tribunal can have judges from the United States or its close allies.

²¹⁴ On the *Lockerbie Case*, see e.g. Aust 2000, p. 278 ff., Morgan 2001, p. 255 ff., Scharf 2000, Scharf 2001 and Verdict in the Trial of the Lockerbie Bombing Suspects 2001

In the following, the Finnish legislation with regard to terrorist offences and international core crimes will be shortly commented upon. After this concluding observations will be made in Chapter 6.

5. SOME REFLECTIONS ON THE CRIMINALIZATION OF TERRORIST CRIMES IN FINLAND

Finland has ratified most of the anti-terrorism conventions dealt with in Chapter 2, namely:

- The 1963 *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (→ ratification in 1971)
- The 1970 *Convention for the Suppression of Unlawful Seizure of Aircraft* (→ ratification in 1971)
- The 1971 *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (→ ratification in 1973)
- The 1973 *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents* (→ ratification in 1978)
- The 1977 *European Convention on the Suppression of Terrorism* (→ ratification in 1990)
- The 1979 *International Convention against the Taking of Hostages* (→ ratification in 1983)
- The 1979 *Convention on the Physical Protection of Nuclear Material* (→ ratification in 1989)
- The 1988 *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (→ ratification in 1998)
- The 1988 *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation* (→ ratification in 1998)
- The 1988 *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (→ ratification in 2000)
- The 1991 *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (→ ratification in 2001)

Furthermore, Finland has signed the 1997 *International Convention for the Suppression of Terrorist Bombings* and the 1999 *International Convention for the Suppression of the Financing of Terrorism* and is now preparing the ratifications of these conventions.²¹⁵

In Finland, the terrorist crimes are foremost criminalized as so-called crimes causing general danger (*yleisvaaralliset rikokset*) in Chapter 34 of the Finnish Penal Code. This Chapter, among others, contains criminalizations of aggravated causing of damage (*törkeä tuhotyö*) in Section 3 and hijacking (*aluksen kaappaus*) in Section 11. Some terrorist crimes can furthermore be prosecuted as crimes against life and health (Chapter 21) and as crimes against freedom (Chapter 25). The latter crime group contains, among others, the crime of hostage taking (Section 4).²¹⁶ In short, Finnish legislation seems to have a good capability to deal with terrorist crimes. It should be noted that these crimes are not called "crimes of terrorism" and that Finland thus traditionally has followed the objective criminalization technique favoured by the international anti-terrorist conventions. The EU *Council Framework Decision on Combating Terrorism* decision, however, requires the adoption of anti-terrorism legislation proper, that is, legislation where the perpetrator's terrorist intentions are given special consideration. As noted earlier, the framework decision requires both the consideration of the intent when criminalizing certain acts and when punishing the perpetrators.²¹⁷ The framework decision also requires other changes, such as the introduction of the concept of "terrorist group" into the Finnish legislation. It should be noted that criminalization of participation in the activities of a criminal organization earlier has been regarded as problematic in Finland, among others, due to the problems of defining the crime with the required specificity and due to the risk of misuse of such legislation.²¹⁸

²¹⁵ According to a Governmental Bill, Finland aims at ratifying both conventions in 2002. HE 231/2001

²¹⁶ On the implementation of the anti-terrorism conventions, see, for example, the Governmental Bills HE 94/1993, HE 238/1997, HE 106/1998, HE 152/1999, HE 95/2001 and HE 231/2001.

²¹⁷ E.g. Article 4(2): "Each Member State shall take the necessary measures to ensure that terrorist offences [...] are punishable by custodial sentences heavier than those imposed under national law for such offences in the absence of the special intent required [...], save where the sentences imposable are already the maximum possible sentences under national law."

²¹⁸ "Kokemukset vastaavan kaltaisen lainsäädännön soveltamisesta Saksassa viittaavat siihen, että tällaisen rangaistussäännöksen rikoksesta nostetaan mm. näyttövaikeuksien vuoksi syyte harvoin mutta rikosprosessuaalisten pakkokeinojen käyttö rikoksesta epäiltyyn on tavallista. [...] Perusoikeussuojan kannalta on vaarana, että tällaisesta rikosoikeuden vakiintuneen osallisuusopin yli menevästä kriminalisoinnista yhdessä muun lainsäädännön kanssa seuraa poliisin tiedonhankintavaltuuksien ja rikosprosessuaalisten pakkokeinojen kohdistaminen rutiinimaisesti itse päärikoksen kannalta etäistenkin sivullisten asemassa oleviin henkilöihin." Perustuslakivaliokunnan lausunto 10/2000. See also Governmental Bill 183/1999

When it comes to the international core crimes, the Finnish legislation is less up to date. The Finnish Penal Code contains a Chapter on war crimes and offences against humanity (Chapter 11). Despite the title, this Chapter does not contain any provisions on crimes against humanity. Instead there are various war crime and genocide sections and a section on the breach of the prohibition of chemical weapons. The lack of a crime against humanity criminalization is a problem, as it is not appropriate to prosecute the criminal behaviour under common crime provisions (like murder).²¹⁹ The essence of the crime against humanity is namely not the underlying offences (like murder), but the widespread or systematic attack against any civilian population. As noted by the International Law Commission with regard to crimes against humanity:

The hallmark of such crimes lie in their large-scale and systematic nature. The particular forms of unlawful act (murder, enslavement, deportation, torture, rape, imprisonment, etc.) are less crucial to the definition than the factors of scale and deliberate policy, as well as in their being targeted against the civilian population in whole or in part.²²⁰

The Finnish war crimes provisions do not follow the International Criminal Court model, but they are anyway comprehensive. The comprehensiveness is due to the general criminalizations of acts against the "established rules and customs" of war and armed conflicts (see especially Sections 1 and 4). The genocide prohibition clearly follows the international model.

In many countries, the ratification of the Rome Statute of the International Criminal Court has led to an evaluation of the compatibility between the substantive criminal law norms in domestic and international law. For example, in Germany a "Völkerstrafgesetzbuch" project

²¹⁹ Note that in "The Implications for Council of Europe Member States of the Ratification of the Rome Statute of the International Criminal Court - Report by Finland" it is argued that: "the provisions in Chapter 11 of the Penal Code do not fully cover those acts that are defined as crimes against humanity in Article 7 of the Statute. It should be remembered, however, that the differences do not mean that such crimes would go unpunished under the Finnish Penal Code. Crimes against humanity usually fulfil the elements of homicide and bodily injury, sexual offences and offences against personal liberty within the meaning of the Penal Code". CoE Doc. Consult ICC (2001), p. 4

²²⁰ UN Doc. A/CN.4/SER.A/1994/Add.1 (Part 2), p. 40. This comment is approved by the Yugoslavia Tribunal in the *Blaskic* Judgement, para. 198

was launched and in Sweden an investigator appointed to evaluate the compatibility.²²¹ While it can be argued that the Rome Statute does not require the harmonisation of domestic law with international law, it should be remembered that in the preamble the State Parties to the Statute affirm "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level." One can thus argue that there exists at least a moral duty to have appropriate international core crime legislation.

In short, Finland thus has appropriate terrorism legislation, but a less satisfactory core crime legislation. The core crime legislation should be modernized to have the means to judge terrorist offences as the most serious crimes known to humankind. One can namely say that terrorist crimes are regarded as *serious* crimes internationally, but that the core crimes of crimes against humanity and genocide as the *most serious* crimes. This is due to the fact that the concept of terrorist crimes also covers some less serious crimes.

²²¹ See e.g. Werle 2001, p. 885 and Romstadgan för Internationella brottmålsdomstolen 2001, p. 129

6. SOME CONCLUDING REMARKS

During the 20th century, the international community has in various forums discussed the terrorism phenomenon and tried to agree on measures to eliminate the problem. The complexity of the phenomenon and the various political realities in different States have often made the efforts unsuccessful. As a result of the unsuccessful efforts to deal with the terrorism problem as a whole, we today have numerous anti-terrorism instruments with a limited scope. The current anti-terrorism legislation, adopted in accordance with the piecemeal approach, is prone to creating lacunas and inconsistencies. As a whole, the international anti-terrorism regulation, however, is rather comprehensive.

It is also important to question whether the lacunas created by the piecemeal approach always are a problem. Even if there does not exist an international crime called nuclear terrorism, crimes against humanity and genocide are internationally outlawed and murder is criminal in all states. It is indeed difficult to foresee a situation where a person committing a deadly terrorist attack would go unpunished because there does not exist any criminal law provision according to which the person could be punished. The central question is therefore *how* we want to punish terrorists.

When looking at the international and regional anti-terrorism instruments adopted since the early 1960s, one can see a trend from instruments that try to solve a very concrete practical problem (e.g. no State has jurisdiction over a certain crime and extradition hurdles), to instruments that foremost want to establish the blameworthiness of certain behaviour. For example, the EU *Council Framework Decision on Combating Terrorism* adopted politically recently makes it clear that the central thing is not that there is a provision according to which a terrorist can be convicted, but that there exists a provision that clearly indicates that the terrorist has committed a terrorist offence and that terrorist offences are very blameworthy. With other words, it is not enough that that the terrorist is convicted for a common crime like murder:

[The] legal rights affected by this kind of offence are not the same as legal rights affected by common offences [...] [Terrorist] acts usually damage the physical or psychological integrity of individuals or groups, their property or freedom, in the

same way that ordinary offences do, but terrorist offences go further in undermining the [political, economic, or social structures of a country] [...].²²²

This trend towards legislation that shows that "other legal rights or interests have been affected" in fact makes the new anti-terrorism legislation reminiscent of international core crimes legislation. The central characteristic of these crimes is not the underlying offence (like murder), but the so-called contextual element. To simplify, if the contextual element cannot be established the crime is not a genocide/crime against humanity/terrorist offence, but a common crime not of interest to the international community. Technically these kinds of offences with a central contextual element have often been criminalized with a provision containing a chapeau with the contextual element and a list of underlying offences:

Contextual elements:

Genocide → any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (ICC Article 6)

Crimes against humanity → any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (ICC Article 7)

Terrorist offences → intentional acts which, given their nature or their context, may seriously damage a country or international organisation, as defined as an offence under national law, where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation (EU framework decision, Article 1)

This legislation technique is thus due to distinguish terrorist offences from common offences and to underline that these offences do not only offend the actual victims, but the international community as a whole. Beside this rapprochement when it comes to the rationale behind international anti-terrorism legislation and international core crimes legislation, one can also identify other current common characteristics of these two branches of international criminal law. Both branches of international criminal law, for example, put forward a broad individual criminal responsibility. Some differences between the law branches have, however, remained like the strong customary international law status of the core crime legislation and the central

²²² EU Doc. COM(2001)521 final, p. 7

role international criminal tribunals play in the development of this legislation. One can also identify new differences. Recent anti-terrorism legislation contains provisions on criminal organizations, whereas no current international core crime instrument supports this concept.

In short, one can say that there today exist two branches of international criminal law that make it possible to hold non-State actors directly responsible for acts of international terrorism. Together these branches of law make the legislation comprehensive, but by no means flawless. Both branches of international criminal law can and should be developed to allow the more effective prosecution of serious terrorist offences that threaten international peace and security. When it comes to the role of international criminal law in combating non-State actor terrorism, it is, however, important to remember that criminal law alone cannot solve all societal problems. It is indeed as misplaced to expect international criminal law to eradicate the problem of international terrorism as it unrealistic to expect domestic criminal law to solve the whole problem of domestic criminality.²²³ When adopting new international criminal law one must therefore remember the limits of criminal law and its repressive nature.²²⁴

²²³ Lambert 1990, p. 8

²²⁴ See e.g. Nils Jareborg's warning for so-called symbolic legislation. Jareborg 1995, p. 29

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