THE ERIK CASTRÉN INSTITUTE OF
INTERNATIONAL LAW AND
HUMAN RIGHTS

Indirect Responsibility for Terrorist Acts

Redefinition of the Concept of Terrorism Beyond Violent Acts

by
Marja Lehto

MARTINUS NIJHOFF
PUBLISHERS

LEIDEN
BOSTON

Indirect Responsibility for Terrorist Acts

The Erik Castrén Institute
Monographs on International Law and Human Rights

Volume 10

General editor
Martti Koskenniemi

The titles published in this series are listed at the end of this volume.

Indirect Responsibility for Terrorist Acts

Redefinition of the Concept of Terrorism Beyond Violent Acts

by

Marja Lehto

MARTINUS
NIJHOFF
PUBLISHERS

LEIDEN • BOSTON
2009

Printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Lehto, Marja.
Indirect responsibility for terrorist acts : redefinition of the concept of terrorism beyond violent acts / by Marja Lehto.
p. cm. — (The Erik Castrén Institute monographs on international law and human rights ; v. 10)
Includes bibliographical references.
ISBN 978-90-04-17807-6 (hardback : alk. paper)
1. Terrorism. 2. Accomplices. 3. Criminal liability (International law) I. Title.
K5256.L445 2010
345'.02—dc22

2009033396

ISSN: 1568-2765
ISBN: 978 90 04 17807 6

PRINTED AND BOUND IN THE NETHERLANDS.

THE MONOGRAPH SERIES

The Series of *International Law Monographs* by the *Erik Castrén Institute of International Law and Human Rights* seeks to bring to the reader high-quality research in international law with particular emphasis on the theoretical and historical aspects of the topics dealt with. The Series encourages doctrinal and practical criticism, a multidisciplinary approach and broad syntheses. Manuscripts that seek to renew the field's intellectual energy and political commitment are welcome. The Series is based on a conviction that theoretical ambition and practical relevance cannot be dissociated from each other and that even as it looks for a rejuvenation of the field it insists on speaking to both academic and practising lawyers.

Martti Koskenniemi
General Editor

TABLE OF CONTENTS

ABBREVIATIONS

AIDP	Association Internationale de Droit International
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts
BCN weapons	biological, chemical and nuclear weapons
BYIL	British Yearbook of International Law
BWC	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
Can. YBIL	The Canadian Yearbook of International Law
Case W. Res.J.Int'l.L	Case Western Reserve University Journal of International Law.
CETS	Council of Europe Treaty Series
Chicago J Intl L	Chicago Journal of International Law
CIS	Commonwealth of Independent States
CJIL	Chinese Journal of International Law
CODEXTER	Council of Europe Committee of Experts on Terrorism
CoE	Council of Europe
CP	EU Common Position

CTC	Counter-terrorism Committee of the UN Security Council
CTED	Executive Directorate of the Counter-Terrorism Committee
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
ECtHR	European Court for Human Rights
EJIL	European Journal of International Law
EU	European Union
Eur. J. Crime, Crim. L. & Crim. Jus.	European Journal of Crime, Criminal Law and Criminal Justice
FATF	Financial Action Task Force
Fordham Intl. L.J.	Fordham International Law Journal
FRY	Federal Republic of Yugoslavia
FYBIL	Finnish Yearbook of International Law
G8	Group of Eight
GMT	Council of Europe, Groupe multi-disciplinaire de terrorisme
GYIL	German Yearbook of International Law
Harv. ILJ	Harvard International Law Journal
HRLJ	Human Rights Law Journal
ICAO:	International Civil Aviation Organisation
ICC	International Criminal Court
ICJ	International Court of Justice
ICFTU	International Confederation of Free Trade Unions
ICG	International Crisis Group
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICS	International Chamber of Shipping
ICTR	International Criminal Tribunal for Rwanda

ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
IMO	International Maritime Organisation
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
Int' l & Comp L. Q.	International and Comparative Law Quarterly
Intl L. and Politics	International Law and Politics
Int' l L. Quarterly	International Law Quarterly
Intl Rev. of Penal L.	International Revue of Penal Law
IO	International Organization
IRRC	International Review of the Red Cross
Isr Y.B. Hum. Rts	Israel Yearbook of Human Rights
ISF	International Shipping Federation
JCE	joint criminal enterprise
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MJ	Maastricht Journal of European and Comparative Law
NATO	North Atlantic Treaty Organization
New England L.Rev.	New England Law Review
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
NYIL	Netherlands Yearbook of International Law
OAS	Organization of American States
OECD	Organization for Economic Cooperation and Development
OIC	Organisation for the Islamic Conference
OJ	Official Journal of the European Union

OSCE	Organization for Security and Cooperation in Europe
PACE	Council of Europe Parliamentary Assembly
PKK	Kurdish Workers' Party
PLO	Palestinian Liberation Organisation
RCADI	Recueil des Cours de Droit International
RGDIP	Revue Générale de Droit International
RTLM	Radio-Télévision Libre des Mille Collines
SLSC	Special Court for Sierra Leone
SR	FATF Special Recommendation
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
SUA Protocol	Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf
TFC	International Convention for the Suppression of the Financing of Terrorism
TCL	`transnational criminal law'
TOC	transnational organized crime
TPB	Terrorism Prevention Branch of the United Nations Office for Drugs and Crime
UK	United Kingdom of Great Britain and Northern Ireland
US	United States of America
UN	United Nations
UNGA	United Nations General Assembly
UN GAOR	Official Records of the United Nations General Assembly
UNODC	United Nations Office for Drugs and Crime
UNRIAA	UN Reports of International Arbitral Awards
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTS	United Nations Treaty Series
YBILC	Yearbook of the International Law Commission
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

PREFACE

Few topics have generated more international law writing in recent years, both scholarly and polemical, than terrorism. From the definition of that notion to the consequences anti-terrorism laws have had on civil and political rights, "terrorism" has become the bête noire of law, an object of passion and anxiety as its explosiveness has appeared to extend also to conventional legal definitions and categories. So it is a genuinely welcome surprise when someone brings out a study that has a fresh angle on the topic, and all the more so if the writer not only fulfils what appears like an obvious gap in existing literature but does that with analytical precision, bearing simultaneously in mind the important political and theoretical, even philosophical implications of this contentious topic. This is what Marja Lehto does in this carefully crafted, insightful and hugely relevant study of what she suggests we call 'indirect responsibility' for terrorist acts.

It is well-known that the roots of organized crime penetrate deep into the normal operations of society, its economic and financial patterns, sometimes also its bureaucracy and ideological apparatuses. Drug trafficking, traffic in persons or terrorist networks could not exist if they did not engage large groups of people and routine patterns of social and economic behaviour. Often the "indirect" actors remain hidden, however, and beyond the reach of the coercive arm of the law. The problem was visible already in the trials of German industrials that ended up as a rather disappointing sideshow or epilogue to the Nuremberg trials. And yet, of course the German economy had been deeply implicated in the rise of Nazism and the consequent organisation of the crimes against humanity during the war.

In an analogical way, "terrorism" emerges from and is sustained by a wide network of ideological, economic, financial and other actors and activities. Marja Lehto's intention in this work is to map the way in which international legal regulation, particularly the new conventions adopted within the UN after 1996 have sought to extend international responsibility beyond the groups of immediate perpetrators, to the sources or incitation, recruitment, and financing of terrorist activities. Her focus is particularly on the UN Convention for the Suppression of the Financing of Terrorism of 1999 which she regards a "groundbreaking instru-

ment" because it deals with such ordinary economic activities. In fact, this study is the most significant analysis of that international treaty and its implications to international criminal law so far produced. Needless to say, important questions of legal theory and even political philosophy are implicated. How far may "indirect responsibility" extend? This question seems particularly important inasmuch as, as Marja Lehto stresses, the Convention (and others like it) intend to hit at the relevant activities before the acts of terror have been committed. What is the required *mens rea*? While not forgetting issues of criminal law theory, Marja Lehto analyses such questions by reference to recent case-law especially from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and from the process of drafting the Statute of the International Criminal Court – a process in which she herself was heavily involved. In fact, she also played a significant part in the drafting of the Terrorist Financing Convention and has been at the forefront of the developments in international criminal law within the United Nations and in Europe for more than a decade.

This is why her writing has such an authoritative tone, why she is able to connect the various conventions and case-law to each other so as to produce an overall view of the situation that is both realistic and nuanced in its appreciation of particular problems. Along the way Marja Lehto is also compelled to deal with some of the thorniest questions in the field – from the significance and difficulties in the of efforts to define "terrorism" to the need of a "general part" of international criminal law, and the role of a political organ – the United Nations Security Council – in the preventing and punishing the crime of terrorism. The theoretical (and, it needs to be said, political) question at the core of the developments is the issue of complicity. To deal with this the ICTY developed the notion "joint criminal enterprise" and much of the analysis of the new conventions and the case-law here illustrate the possibilities and limits of that concept. What kinds of activities are included and what are excluded? How is the threshold of criminality to be defined? Response to these questions is not made any easier by the co-existence of two separate regimes of responsibility – individual responsibility under international criminal law and State responsibility under public international law – that are far from having been calibrated so as to work harmoniously together. What if indirect criminal responsibility extends to operatives of a State whose actions might under the rules of attribution of public international law trigger State responsibility? What if it does not? The relationship between the two regimes is discussed in Chapter 5.

The extended discussion of the 1999 Terrorist Financing Convention plus its follow-up at the regional level in Europe and with respect to the revisions of the 1988 Convention on Suppression of Unlawful Acts against Maritime Navigation (SUA) in Part III of the study shows in detail how novel notions of indirect responsibility

are penetrating international criminal law, and not always in a coherent manner. But perhaps the most politically interesting parts of the study deal with the role of the UN Security Council as a kind of extended arm of international criminal law. Of course, the Council is neither a court nor an "executive" but a body of diplomats that are called upon to negotiate among themselves for pragmatic measures for the "maintenance of international peace and security". To carry out this task, it cannot remain oblivious of acts of terrorism – as of course it has not been since the terrorist acts that touched one of its permanent members in 2001. Marja Lehto's analysis highlights the specific character of the Council's intervention – the way, for example, in which the imprecise concepts with which it operates as a political organ or its definition of any indirect participation also as "terrorism" are hard to fit within a criminal law context.

The fight against terrorism is one of the most visible themes of today's international law-making. It is a theme that rouses not only diplomatic or scholarly interest but also political passions from a wide variety of standpoints. To understand the phenomenon and the responses to it is necessary to have a view on the special nature of the phenomenon – the political motivation, the collective nature of the act and the intangibility of the conceptual boundaries within which it is enclosed. To have a clear view of the problems, no work is better than the present study by Marja Lehto. It is problem-centred and well-balanced between the legal detail and the wider frame. It is written with elegance and precision. It is a pleasure to bring it to the legal audience.

Cambridge, 23 February 2009

Martti Koskenniemi
Goodhart Visiting Professor of Legal Science
(University of Cambridge, 2008-2009)
Academy Professor (University of Helsinki)

INTRODUCTION

The international law of terrorism has undergone a significant, if largely unnoticed, change in recent years. Much of the current discussion is focused on the tensions, pressures and contradictions between the law, on the one hand, and the imperative need to combat terrorism, on the other: some observers claim that the present framework of international law does not allow for effective measures against terrorism in the post-September 2001 world, or, indeed, that no legal framework is available,[1] while others assert that the existing rules are both adequate and sufficient.[2] Less attention has been paid to the specific features of the actual developments in the international law of terrorism. New anti-terrorist instruments are often seen as sequels to a story already well known, a cumulative addition that only strengthens the original argument, be it against the 'criminal law approach' (because of its allegedly narrow and restricted scope) or in favour of it (because of its compatibility with strict standards of legality).[3] What is not easily recognised, or not deemed important, is that the latest anti-terrorist legal instruments seem

1 In this vein, Slaughter and Burke-White have submitted that "[t]o respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules". Anne-Marie Slaughter & William Burke-White, 'An International Constitutional Moment', 43 *Harv. ILJ* (2002), 1– 22, at 2. See also Roy S. Schöndorff, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', 37 *Intl L. and Politics* (2004), 1–52 and John B. Bellinger III, 'Armed Conflict with Al Qaida?', 15 January 2007, available at http://opiniojuris.org/posts/1168473529.shtml.

2 Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2005; Jelena Pejić, 'Terrorist Acts and Groups: A Role for International Law?', in 75 *BYIL* (2004), 71–100; Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, 2004; Andrea Bianchi, (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004.

3 Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against Its Financing', 14 *EJIL* (2003), 365–378, at 372–373; Robert Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 227–281, at 229–231.

to have taken a new direction and have some fairly extensive assumptions built into them. This study suggests that the reports of the death of the criminal law approach to international terrorism are greatly exaggerated[4] and that the international law related to terrorist acts has not only adapted to a changed situation but has grown into a far more complicated body of law than before; some parts of it have intriguingly novel features which might deserve closer consideration. This is the case, for instance, with certain new interpretations of individual and state accountability for terrorist activities.

There is no denying that the terrorist attacks of 11 September 2001 were a watershed in the international community's response to terrorism, one that occasioned a notable shift from an exclusive law enforcement approach to a broader spectrum of measures ranging from inter-cultural dialogue and technical assistance to coercive measures such as asset freezing, travel bans and, as the last resort, military operations. International obligations are nevertheless still at the core of state action against terrorism, as it is recognised that the threat is international and requires co-ordinated action. The last few years have also seen an intensive development of procedures and methods to monitor the national implementation of counter-terrorism obligations. It has become a commonplace to say that the events of September 2001 and their aftermath have shaped the legal landscape of combating international terrorism. New legal issues abound such as the qualification of terrorist acts as armed attacks, the attribution of terrorist acts to states, and the role of the UN Security Council in the development of international law. A considerable number of commentaries have been written with a special focus on the relationship of the anti-terrorist regulation to international humanitarian law and human rights law, reflecting the regrettable lack of due process safeguards in many anti-terrorist measures states have instituted. According to many early comments, fundamental changes seemed to be underway, as is apparent from such titles as "terrorism is also disrupting some crucial legal categories of international law",[5] "international law at the crossroads",[6] or questions like "où va le droit inter-

4 Compare Louis Henkin, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated', 65 *AJIL* (1971), 544–548.

5 Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001), 993–1001.

6 Carsten Stahn, 'International Law at a Crossroads? The Impact of September 11', 62 *ZaöRV* (2002), 183–255.

national?"[7] or "vart är folkrätten på väg?".[8] While some scholars still advocate far-reaching systemic changes, others have sought to put 9/11 and the terrorism issue into perspective, emphasising the capacity of the international legal system to cope with successive catastrophes.[9]

The point of departure for the present study is the expansion and diversification of international legal responses to the terrorist threat during the past decade. Since the late 1990s, heightened attention to the need to intensify international efforts against terrorism has produced three new multilateral conventions within the framework of the UN.[10] Three other UN anti-terrorist instruments have been completely revised.[11] The total number of anti-terrorist conventions and protocols adopted within the UN framework is now sixteen. The UN Security Council has redirected the sanctions instrument to counter-terrorist purposes and has assumed

7 Luigi Condorelli, 'Les attentats du 11 septembre et leurs suites: où va le droit international?', 105 *RGDIP* (2001), 829–848.

8 Marie Jacobsson, 'Vart är folkrätten på väg?', *Internationella Studier* 3: 2003, 21–31, with a focus on the Iraq War, however, rather than on September 2001. As for similar titles, reference can also be made to an article by the present author: Marja Lehto, 'Terrorism in International Law – an Empty Box or Pandora's Box?', in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus Nijhoff, 2003, 290–313.

9 For instance, Georges Abi-Saab, 'Introduction. The Proper Role of International Law in Combating Terrorism', in Andrea Bianchi, (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, xiii-xxii.

10 International Convention for the Suppression of Terrorist Bombings, adopted on 15 December 1997, UN Doc. A/RES/52/164, UNTS Vol. 2149, p. 256; International Convention for the Suppression of the Financing of Terrorism, adopted on 9 December, 1999, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229; International Convention on the Suppression of Acts of Nuclear Terrorism, adopted on 3 April, 2005, UN Doc. A/RES/59/290.

11 Protocol to amend the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on 14 October, 2005, IMO Doc. LEG/CONF.15/DC/1; Protocol to amend the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted on 14 October, 2005, IMO Doc. LEG/CONF.15/DC/2; Amendment to the Convention on the Physical Protection of Nuclear Material, adopted on 8 July 2005, IAEA Doc. GOV/INF/2005/IO-GC(49)/INF 16 of 6 September 2005. See also Chapter 8. Negotiations have been initiated to revise also the instruments on the suppression of unlawful acts against the safety of civil aviation, see Special Sub-Committee on the preparation of one or more instruments addressing new and emerging threats, second meeting, Montréal, 19–21 February, 2008, ICAO doc. LC/SC-NET-2.

a new role in the enforcement of counter-terrorist norms.[12] Several new anti-terrorist treaties have been adopted at the regional level as well.[13] The development of soft law within the framework of regional and expert institutions such as the Financial Action Task Force (FATF) has also contributed to the multiplication and refinement of anti-terrorist obligations as well as to the monitoring of their implementation.[14] One notable development has been the shift from responding ex post facto to terrorist acts that have actually occurred – an area already extensively regulated at the international level – to preventive measures such as pro-active criminalisations that address various preparatory phases of terrorist acts. As this development reflects a profound change in the way the problem of terrorism is perceived by the international community, it will be useful to briefly outline the basic features of the changes involved.

1. The Change in International Terrorism

While terrorism is an age-old phenomenon, one which has developed through several earlier phases,[15] the developments that have taken place since the end of

12 As for the monitoring role, reference can be made to the UN Security Council's Counter-Terrorism Committee (CTC) and its Executive Directorate (CTED), the Committee established by UN Doc.S/RES/1267(1999) and the Committee established by UN Doc. S/RES/1540(2004). See also Chapter 9.1.

13 For instance, The Arab Convention on the Suppression of Terrorism, signed on 22 April, 1998; Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, done on 4 June 1999; Convention of the Organisation of the Islamic Conference on Combating International Terrorism, adopted on 1 July 1999; OAU Convention on the Prevention and Combating of Terrorism, adopted on 14 July, 1999; Inter-American Convention Against Terrorism, adopted on 3 June 2002. The English texts of these conventions have been reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004. See also European Union, Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002; Protocol amending the European Convention on the Suppression of Terrorism, adopted on 15 May 2003, CETS 190; Council of Europe Convention on the Prevention of Terrorism, adopted on 16 May 2005, CETS 196.

14 Examples of influential guidelines include the FATF Special Recommendations on Terrorist Financing of 31 October 2001; Guidance Notes for the Special Recommendations on Terrorist Financing and Self-assessment Questionnaire, 27 March 2002; Interpretative Note to Special Recommendation III: Freezing and Confiscation of Terrorist Assets, 3 October 2003, Interpretative Note to Special Recommendation II: Criminalizing the financing of terrorism and associated money laundering, 1 July 2004, all available at html://www.fatf-gafi.org/publications/standards.

15 See Bruce Hoffman, *Inside Terrorism*, Columbia University Press, 1998; Martha Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995.

the Cold War present a number of new features. Whether these features justify the term 'new terrorism', is a debated question.[16] The prevalent form of international terrorism today – a force that has been able to produce co-ordinated attacks on the scale of the embassy bombings in Nairobi and Dar-Es-Salaam in 1998, the attacks against the World Trade Center and the Pentagon in 2001, the attacks in Bali and Mombasa in 2002, Madrid in 2004, London in 2005 and the thwarted attempt to explode several airplanes over the mid-Atlantic in 2006 – is said to be different from all that preceded it in the way of political violence [17] and to shatter "some of our most basic assumptions about terrorism".[18] The emergence of what has been called 'hyperterrorism',[19] or '*Megaterrorismus*',[20] has also called into question the validity of the established legal responses to terrorism. As the present study is limited to discussing what this development means in terms of adapting the legal responses, the following enumeration of the new characteristics of the international terrorism is selective and focuses on some of the transformations that have a bearing on how the responsibility for terrorist acts is apportioned between various actors, whether states or individuals. Such features can be grouped, for the purposes of the present study, under four headings: 1) the destructive capability of terrorist attacks, 2) the degree of internationalisation of terrorist movements and

16 Literature on the new terrorism abounds. Many scholars and experts tend to agree that international terrorism as a phenomenon has changed significantly during the past ten to fifteen years. See Hoffman, *supra* note 15, at 197; Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror*, 3rd Edn., Berkley Books, 2003, at 320; The 9/11 Commission Report: *Final Report of the National Commission on Terrorist Attacks upon the United States*, W.W. Norton, 2004, at 323. See, however, also Martha Crenshaw, 'The debate over "New" vs. "Old" Terrorism', in Ibrahim A. Karawan, Wayne McCormack and Stephen E. Reynolds (eds.), *Values and Violence*, Part II, Springer, 2008, 117–136 and Isabelle Duyvesteyn, 'How New is New Terrorism?', 27 *Studies in Conflict & Terrorism* (2004), 439–454.

17 Robert O. Keohane,' The Globalization of Informal Violence, Theories of World Politics, and the "Liberalism of Fear"', *IO* 2002, 29–43.

18 Hoffman, *supra* note 15, at 204. He also refers, at 197, to the indiscriminate nature of terrorist violence as a new feature. While it can be claimed that the rise of indiscriminate murder as a form of terrorism took place already in the 1970s, the fatwa, which formally authorised the killing of innocents, was not given by Usama bin Laden's religious advisers until 1992. See Eric Hobsbawm, *Globalisation, Democracy and Terrorism*, Little, Brown Book Group, 2007, at 124.

19 For the term, see Jean-François Richard, 'The State of the Islamist Threat', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 46–50, at 47, see also Frédéric Mégret,' Justice in Times of Violence', 14 *EJIL* (2003), 327–345, at 331.

20 Walter Laqueur, 'Selbstmordattentäter', 31 *Europäische Rundschau* (2003), 123–127, at 123.

their methods of operation, 3) such movements' preferred form of organisation, and 4) the relationship of terrorist groups with states.

The terrorist attacks directed against the World Trade Center and the Pentagon on September 11, 2001 claimed a larger number of victims than any other terrorist operation in history.[21] The unprecedented scale of the destruction made it possible for the UN Security Council, followed by other international organisations such as the Organization of American States (OAS) and the North Atlantic Treaty Organization (NATO), as well as the great majority of states, to equate the strikes with an armed attack in the meaning of the UN Charter. The 'new terrorism' was widely recognised as a security threat. The increased destructive capability of terrorist groups and organisations[22] has prompted international cooperation to counter terrorism. It is also a factor that has redirected the legal responses to terrorism, for it has become more imperative to take pro-active measures to prevent deadly attacks. To quote Dinstein, "Indisputably, a terrorist suicide attack *à la* 9/11 is a crime under international law. The problem in a nutshell is that no effective lawful method [...] has been found, as yet, to avert the crime. Needless to say, the issue is prevention and deterrence, rather than punishment."[23] Or, as Wedgwood has put it, what was not understood in the 1990s was "the importance of disrupting and dislodging the infrastructure of international terrorism. The US treated Al-Qaida's terrorist attacks as isolated criminal incidents, with the prosecution of expendable operatives."[24] The new policies, both at the national and international levels, aim at defining terrorist offences more broadly so as "to target the entire chain of responsibility" and to hold accountable "also those who act indirectly".[25]

While the internationalisation of terrorism can be traced back to the late 1960s and early 1970s, the emergence of loosely connected terrorist groups with global

21 Over 3000 according to the U.S. Department of State, *Patterns of Global Terrorism* 2001, Department of State Publication 10940, 2002, at xx.

22 For a statistical analysis, see Walter Enders and Todd Sandler, 'Is Transnational Terrorism Becoming More Threatening?', 44 *Journal of Conflict Resolution* (2000), 307–332, at 328.

23 Yoram Dinstein, 'Defining Suicide Bombing', a Briefing Paper, November 2003. http://www.ihlresearch.org/portal/ihli/alabama.php.

24 Ruth Wedgwood, 'Countering Catastrophic Terrorism: An American View', in Andrea Bianchi, (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 103–117, at 108. Wedgwood has put forward this argument in defence of the 'war paradigm' as applied to the fight against terrorism, but the same change of perspective has influenced the specifically legal measures against terrorism.

25 Corinne Lepage, 'Terrorism and Weapons of Mass Destruction', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 24–27. See also Jean-Paul Laborde and Michael De Feo, 'Problems and Prospects of Implementing UN Action against Terrorism', 4 *JICJ* (2006), 1087–1103.

ambitions and the capability to project deadly violence at the global level has been seen as a distinctly new phenomenon beginning from the mid-1990s.[26] The largest and best known of the new kind of terrorist networks, Al-Qaida, reportedly operates or has operated in almost 80 countries.[27] The global reach of Al-Qaida is based on several factors. Before September 2001, it relied on a well-organised recruitment and training system inherited from the time of the first Afghan war when it had served to enlist *mujahedeen* in the fight against the Soviet invasion.[28] Since then, a distinction has been made between the core Al-Qaida and a decentralised structure formed by inner and outer circles, the latter relying on largely autonomous local cells.[29] What is common to the two phases of the network, and a factor that has contributed to its global reach, is a persuasive ideology which draws on and abuses Islam as one of the world's major religions.[30] Compared to its predecessors, Al-Qaida has been called the first multinational terrorist group in history.[31]

A prime example of the internationalisation of terrorism in the 1970s was the Palestinian Liberation Organisation (PLO).[32] The international approach in its *modus operandi* included cooperation with other terrorist groups, extensive training of terrorists in camps specifically set up for the purpose, recruitment of terrorists from abroad to participate in joint operations, selection of targets abroad, and the mounting of spectacular operations designed to attract international attention and publicity.[33] The PLO's ability to co-operate with different groups and organisations was impressive at the time, although necessarily limited when compared to

26 According to Crenshaw, *supra* note 16, at 119, "The idea that the world confronted a 'new' threat appears to have taken hold after the 1993 World Trade Center bombing".

27 Gunaratna, *supra* note 16, at 105.

28 Its predecessor, the Afghan Service Bureau was established in Pakistan in 1984: see Gunaratna, *supra* note 16, at 24, 27 and 74.

29 Brian A. Jackson, 'Groups, Networks, or Movements: A Command-and-Control-Driven Approach to Classifying Terrorist Organizations and Its Application to Al Qaeda', 29 *Studies in Conflict & Terrorism* (2006), 241–262; see also Gunaratna, *supra* note 16, at 128 and Richard, *supra* note 19, at 49.

30 Gunaratna, *supra* note 16, at 129 has referred to the ability of Al-Qaida to appeal to Muslims irrespective of their nationality as a key to its global reach. The 9/11 Commission Report, *supra* note 16, at 362, identified Islamist terrorism as the major threat. See also EU Strategy for Combating Radicalisation and Recruitment to Terrorism, Brussels, 24 November 2005, 14781/1/05 rev.1 For an analysis of the role of religion in Al-Qaida, see Abdel Bari Atwan, *The Secret History of Al-Qa'ida*, SAQI Books, 2006, at 64–88.

31 Gunaratna, *supra* note 16, at 1.

32 Hoffman, *supra* note 15, at 67.

33 One of the best-known examples is the murder of eleven Israeli athletes by Palestinian terrorist at the Munich Olympic Games in 1972.

the current age of globalisation and the 'democratisation of violence by Internet'.[34] The political agenda of the PLO focused on one concrete territorial issue, the creation of an independent Palestinian state, and the range of its operations was much more limited than that of Al-Qaida. The PLO belonged to the 'first generation of international terrorism', which in general pursued ethnic-nationalist or separatist objectives.[35]

While it is clear that the methods used by the PLO and other similar terrorist groups active in the 1970s were violent and often resulted in indiscriminate bloodshed – the preferred acts included aerial hijacking and hostage-taking – one difference to the 'Al-Qaida method' has often been mentioned: the operations were usually mounted to attain specific political goals, such as the release of prisoners, and it can be claimed accordingly that there was an element of negotiation inherent in the message addressed to the state.[36] As the ultimate goal was to gain international recognition and political respectability, terrorist methods were conditioned on their success in terms of influencing political changes.[37] In comparison, the political agenda of the new terrorism is diffuse at best. While Al-Qaida's stated objectives have included such specific goals as the withdrawal of the US forces from Saudi Arabia, or a regime change in the states of the Persian Gulf and the Middle East, they have been subordinated to wider utopian goals.[38] It can also be pointed out that the decision of the US government to withdraw its troops from Saudi Arabia in 2003 did not seemingly bring about any change in terrorist action or in the messages delivered by Usama bin Laden and his aides. Regional conflicts, in particular the situations in the occupied Palestinian territories, Chechnya, and Iraq have been presented in extremist propaganda as examples of a global cam-

34 For the notion, see Aidan Kirby, 'The London Bombers as 'Self-starters': A Case Study in Indigenous Radicalisation and the Emergence of Autonomous Cliques', 30 *Studies in Conflict & Terrorism* (2007), 415–428, at 425–426. Atwan, *supra* note 30, at 220, has also attributed Al-Qaida's significant global constituency primarily to the effect of the Internet.

35 Hoffman, *supra* note 15, at 67–86.

36 *Ibid*., at 128; see also Mégret, *supra* note 19, at 330.

37 The PLO again provides an example. It renounced terrorist operations in Europe in 1974, and operations outside Israel and the occupied territories in 1978. See Hoffman, *supra* note 15, at 85.

38 According to Gunaratna, *supra* note 16, at 119, such mid- and long-term goals include the creation of true Islamic states, or a Caliphate, in the Middle East, and building a common Islamic army to wage war on the US and its allies.

paign against Muslims, but the policy of the new type of terrorism rarely focuses on concrete political action.[39]

Although scholars and experts debate the degree of organisation vs. autonomy within Al-Qaida, there is a fairly general perception that a distinction must be made between the structure of the movement during the period from1996 to 2001 and its structure today.[40] During the late 1990s, the leadership of the movement, enjoying the protection of the Taliban regime, was settled in Afghanistan, from where it directed attacks and activities worldwide relying on a centralised pattern of recruitment and training.[41] The infrastructure of Al-Qaida in Afghanistan, according to most accounts, was largely destroyed by the US-led military campaign in 2001–2002.[42] It is commonly agreed that the destruction of Al-Qaida's physical base in Afghanistan has contributed to making the movement more resilient.[43] Relying on quasi-autonomous local cells, Al-Qaida has acquired new mobility, flexibility and fluidity.[44] From the point of view of legal responses, the loose and compartmentalised structure of the movement called Al-Qaida is a complicating factor that makes it difficult to detect terrorist activities at the stage of the preparation of attacks. The structure that relies on both active and 'sleeper' cells is in line with and supports the *modus operandi* of Al-Qaida. One of the hallmarks of the movement has been the methodical planning and preparation of attacks, sometimes over several years before the actual operations are mounted.[45] The details of the attacks are typically shared fairly late with the persons chosen to carry out the operations, enabling them to lead a quiet and law-abiding life in a sleeper capacity. Some of the most recent terrorist attacks seem to be the result of completely independent actions by local groups 'inspired' by the ideology of Al-Qaida.[46]

One of the main features of the network mode of organisation, from the point of view of law enforcement, is the difficulty of identifying the groups to which the

39 While some concrete territorial ambitions have been attributed to Al-Qaida concerning Pakistan's tribal areas, the political blueprint seems detached from the aspirations and daily life of local Muslim communities.

40 Jackson, *supra* note 29, at 250–251.

41 Gunaratna, *supra* note 16, at 52–71.

42 *Ibid*., at 80. See also the 9/11 Commission Report, *supra* note 16, at 336–338.

43 Gunaratna, *supra* note 16, at 81.

44 *Ibid*., at 128. According to Richard, *supra* note 19, at 47, the traditional hierarchical structures of terrorist groups "increasingly gave way to a form or structure that was essentially horisontal, protean, shifting".

45 Gunaratna, *supra* note 16, at 10.

46 The London attacks in July 2005 have been seen as a prime example of such 'self-radicalisation'. For an analysis, see Kirby, *supra* note 34.

immediate authors of violent acts may belong, or of knowing whether they indeed are backed by a wider circle of supporters and collaborators. It is not always possible to ascertain whether a particular terrorist act has been directed, facilitated or just inspired by Al-Qaida – an entity described by the United Nations Security Council Sanctions Committee as "a network, movement, loose affiliation and an ideology" rather than an organisation.[47] It is not necessary for purposes of the present study to analyse the ideology of Al-Qaida, referred to by some scholars as 'Islamist' in order to emphasise its nature as a distortion of the Islamic religion[48] and by some as 'Jihadist' to lay the stress on the centrality of the concept of war[49] – even though the concept of *jihad* cannot be reduced to that one meaning.[50] However, it should be pointed out that both concepts may be misleading because of their religious connotations. For the purposes of a legal analysis, it is sufficient to refer to Al-Qaida's way of thinking as an ideological construction that serves to justify violent action.

The generations of international terrorism are not only successive but also co-existing. While global terrorism has drawn the most attention in recent years, all terrorism is not global or even international as many groups limit their action to just one country. Terrorist groups of the first generation entangled in territorial conflicts are still active in many areas.[51] Despite a certain alignment of previously local groups with Al-Qaida in Kashmir and elsewhere, and in many cases an active infiltration of such groups by Al-Qaida,[52] the 'new' terrorism has not engulfed or replaced more 'traditional' forms of terrorism, and they share a number of common

47 Second report of the Monitoring Group established pursuant to resolution 1363(2001) and extended by resolutions 1390(2002) and 1455(2003), on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them, 2 December 2003, UN Doc. S/2003/1070, para. 11, at 8. See, however, Jackson, *supra* note 29, at 251, who has pointed out that even in its broadest construction, "Al Qaeda is more than *just* an idea or concept – it is not *fully* leaderless resistance" (original emphasis).

48 Gunaratna, *supra* note 16. See also International Crisis Group, 'Understanding Islamism', Middle East/North Africa Report No. 37, 2 March 2005.

49 For this term, as well, see International Crisis Group Report, *supra* note 48.

50 For an analysis of the notion of *jihad* in the context of legitimising or the de-legitimising use of force, see Abdoullah Cisse, 'Islam, Secularism and terrorism: Justifying the Use of Force in the Name of Islam', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 36–45.

51 Analyses of such groups, many of which are still active, can be found in Crenshaw (ed.), *supra* note 15.

52 For instance the 2006 ideological 'merger' between Al-Qaida and the Algerian GSPC, see Guy Taylor, 'Algeria Bombings Contain Clues About Al-Qaida's Current, Future Strength', *World Politics Review*, 20 April 2007.

features as expressions of political violence.[53] Furthermore, the 'new' terrorism draws from the`old' for justification and, in that sense, can be seen as its prolongation. The PLO has above been characterised as a terrorist movement in the service of a nationalist cause, but the impact of the continuation of the Palestinian conflict on the perceived legitimacy of terrorism as resistance to oppression is felt worldwide.[54]

While the 'new' terrorism can be largely identified with the Islamist network of Al-Qaida, other religions have been used and abused for terrorist purposes.[55] Historically, terrorist groups have drawn on different political or nationalist ideologies which have amplified the attraction of their message and served to justify their methods.[56] The ideology of Islamist terrorism is no exception in this respect. More than the older terrorist groups, however, it has benefited from the development of information technologies and global communication systems which provide for quick and easy dissemination of information worldwide. The 'Al-Qaida way of thinking' therefore exercises independent influence in addition to and alongside any active recruitment to terrorist groups. Its influence is spread using, among other means, specific web-sites and videotapes containing images and messages which propagate the view of a global conflict between the 'true' interpretation of Islam and its enemies. Mayer has stressed the importance of apocalyptic views, conspiracy theories and the feeling of being threatened in legitimising violent action: "when the feeling that one's very existence is threatened develops, extreme behaviour suddenly seems justifiable".[57] A remotely similar argument, one could note, was put forward by the International Court of Justice in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which the Court concluded that the threat or use of such weapons would in general be illegal, but an exception could possibly be made for extreme situations where a state's survival is at stake.[58]

53 As emphasised by Crenshaw, *supra* note 16. See also Martha Crenshaw, 'Old and New Terrorism – Lessons Learned', Jihadi Terrorism – Where Do We Stand?, Second IRRI Conference on International Terrorism, February 13, 2006, available at http://www.egmontinstitute.be/speechnotes/06/060213-jihad.terr/crenshaw.htm.

54 Of the importance of the Palestinian problem to the legitimation of terrorism, see Jean-François Mayer, 'Terrorism and Religion: Continuity and Change in Political Violence', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 28–35, at 31.

55 Hoffman, *supra* note 15, at 87–129.

56 For a historical survey of different forms of terrorism, see Crenshaw (ed.), *supra* note 15.

57 Mayer, *supra* note 54, at 34.

58 ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 97.

A further change concerns the role of states in supporting terrorist movements. In the 1970s, the PLO could often rely on the support of the neighbouring Arab states. Supporting and supplying terrorist groups was also more broadly seen as a form of covert warfare during the Cold War. Both the United States and the Soviet Union were in many ways involved in various regional conflicts,[59] but the end of the superpower rivalry notably reduced the demand for the kind of "services" terrorist groups could provide. State support for terrorism has been in decline since the 1990s.[60] At the same time, new forms of interaction between states and terrorist groups have emerged. The role of failed or failing states in breeding terrorism has drawn considerable attention, but weak or fragile states are also vulnerable to being abused by terrorist groups.[61] An absence of governmental authority may leave safe areas for terrorist groups to settle in and hide, and a lack of effective control of the territory or borders facilitates the transit and logistics of terrorist groups. It has also been pointed out that a lack of governmental services can afford terrorist networks an opportunity to settle in the country and win the support of the population by providing funding to and infiltrating charities.[62] More complex forms of mutual co-existence or collaboration between fragments of state authority and terrorist groups can also be found: one of the most original ones was the 'symbiotic' relationship between the Taliban regime of Afghanistan and Al-Qaida, which has sometimes been described as "a state within a state".[63] One of the ques-

59 For instance, Beau Grosscup, *The Newest Explosions of Terrorism*, New Horizon Press, 1998, at 123–162; Hoffman, *supra* note 15, at 26–28.

60 Enders and Sandler, *supra* note 22, at 312.

61 Gunaratna, *supra* note 16, at 186, has pointed out that only some 35 per cent of Yemen is under the permanent influence and control of the government, which would make it "an ideal base for Al Qaeda". See also International Crisis Group, 'Yemen: Coping with Terrorism and Violence in a Fragile State', ICG Middle East Report No.8, 8 January 2003; 'Indonesia Background: How the Jemaah Islamiya Terrorist Network Operates', Asia Report No. 43, 11 November, 2002; 'Bin Laden and the Balkans: the Politics of Anti-Terrorism', ICG Balkans Report No. 119, 9 November, 2001. A different view has been put forward by Schmid: "Many of the alleged causes of terrorism such as poverty, failed states, state-sponsoring, or discrimination rest on very weak or no empirical bases." See Alex P. Schmid, 'Why Terrorism? Root Causes, Some Empirical Findings, and the Case of 9/11', presentation at the International Conference 'Why Terrorism? – addressing the conditions conducive to terrorism' organised by the Council of Europe on 25–26 April, 2007, at 3, available at http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/8_conference.

62 Gunaratna, *supra* note 16, at 198–199. This phenomenon should be distinguished from the more traditional situation of 'multi-vocational' terrorist organisations which maintain political, social and charitable activities along with armed activities.

63 *Ibid.*, at 82.

tions that have generated extensive discussion afterwards is how such a relationship should be described in legal terms and what degree of involvement in terrorism is sufficient to trigger a state's international responsibility.[64]

The way the threat of international terrorism is generally perceived has undergone significant changes in recent years. In order to illustrate this change, reference is made to a linguistic study that captures an essential shift in news reporting on terrorism after September 2001 based on news materials from two major international news agencies in 2002.[65] While the study analysed the 'counter-terrorism discourse' on the basis of news dispatches, most of the examples are extracts of direct or indirect quotations from politicians, officials and experts in which "the expressions chosen must be attributed to the quoted source and not to the journalist"[66] and can therefore be taken to be indicative of a more general change of discourse. It was argued in the study that the image of a terrorist had become more diffuse in the everyday (English) language: "the view of a terrorist as an actor – author of violent acts – has given way to the view of terrorism as a general and unspecified threat" in which "the agency is often left implicit".[67] While the notion of terrorist threat had previously been used to refer to somebody who makes concrete threats, it was now found to describe a continuous state of affairs, a static and abstract danger.[68] As far as the concept of 'terrorist suspect' is concerned, the author of the study noted, the accusation sometimes seemed to be based on futurity, planning and preparing an attack that was never made while, in other examples, the news reports seemed to indicate that the suspects facing arrest and trial were charged with 'being terrorists' and not with any specific act of terrorism.[69]

It is argued in the present study that a somewhat similar change can be discerned in the specifically legal discourse, and in the development of anti-terrorist instruments. The emergence of a new kind of terrorism has been an essential factor in reshaping the means and methods to counter international terrorism, which in recent years have increased in number and sophistication. Conventions and protocols which address specific acts of terrorism have been coupled with new instruments and measures that target terrorist networks in a more general and comprehensive manner. In terms of responsibility – both individual and state responsibility – there has been a shift of focus from specific terrorist acts to terror-

64 Chapter 8.3

65 Maija Stenvall, 'An Actor or an Undefined Threat? The Role of "Terrorist" in the Discourse of International News Agencies', 2 *Journal of Language and Politics* (2003), 361–403.

66 *Ibid*., at 375.

67 *Ibid*.

68 *Ibid*., at 377.

69 *Ibid*, at 379.

ist activities understood more broadly, and to activities supporting and sustaining terrorism.[70] This development can be described as an introduction of more indirect forms of responsibility through a redefinition of the targets of international anti-terrorist instruments.

2. The Change in Legal Responses to International Terrorism

The reality and general perception of the new terrorism as 'an invisible army' has posed a challenge to the international cooperation against terrorism and especially to the legal responses which have traditionally been developed mainly within the framework of international criminal law. The new challenges for international cooperation against terrorism include the need for preventive action, as a result of the increased destructive capacity of terrorist attacks; the need for enhanced cooperation because of the multi-national nature of the terrorist movements; the difficulty of identifying those responsible for terrorist attacks; and the need to strengthen the counter-terrorist capabilities of failing or fragile states. The legal instruments addressing international terrorism have typically been formulated in response to a certain type or 'wave' of terrorism that was prevalent at the time – such as aerial hijacking and attacks against internationally protected persons in the 1960s and 1970s – or to specific attacks such as the Tehran hostage crisis which prompted the adoption of the Hostages Convention in 1979,[71] or the Achille Lauro incident, which led to the adoption of the SUA Convention in 1988.[72] In a similar manner, the most recent measures against financing of terrorism, illegal transportation of weapons of mass destruction that may fall into the hands of terrorist

70 According to a Europol Report of 10 April, 2007, more than 700 persons were arrested for terrorist crimes in the EU in 2006. 32 % of those arrested were suspected of either preparation of or involvement in a terrorist attack; 41 % were suspected of being members of a terrorist organisation. The other most common suspected terrorist activities included the financing of terrorism and its facilitation, such as falsification of documents, organisation of travel and provision of safe houses. *TE-SAT*, EU Terrorism Situation And Trend Report 2007, 8065/07 Annex DG H 2A, Europol, March 2007, at 17–18. It has also been pointed out that it is in general quite common in the fight against terrorism that "more abettors, symphatizers and accomplices are arrested than actual perpetrators". See Reynaud Ottenhof, 'A Criminological and Victimological Approach to Terrorism', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 349–357, at 353.

71 International Convention Against the Taking of Hostages, New York, 19 December 1979, UNTS Vol. 1316, p. 205, No. 21931.

72 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, IMO Doc.SUA/CONF/15/Rev.1, UNTS Vol. 1678, No. 29004.

groups,[73] and incitement to terrorism can be construed as attempts to respond to a more persistent and diffuse threat of terrorism, not just to terrorist acts as separate and isolated incidents.

The increased destructive power of terrorist attacks, which calls for preventive action, and the loose and compartmentalised structure of the new terrorist networks, which makes them hard to detect and suppress, are relevant also to the framing of the legal responsibility for terrorism. Equally important are the lengthy planning of terrorist operations, typically involving a large number of persons, and the new and complex relationships that increasingly powerful terrorist groups have with failing, weak, or isolated states. The broad base of terrorist attacks creates pressures to expand individual criminal responsibility, while the way the terrorist groups interact with failing and fragile states, in particular, has prompted new interpretations of state responsibility for terrorism. At the same time, it is worth noting that the broadening of criminal responsibility has been codified as a result of a quick development of specific legal obligations on states to criminalise conduct that was not punishable earlier. It is more questionable whether new standards of attribution have been introduced in the law of state responsibility.

The new line of thought that justifies criminalising increasingly remote forms of participation in terrorist crimes has been summarised, for instance, in a 2004 statement of the Justice and Home Affairs Ministers of the prestigious Group of Eight (G8, also known as Group of Seven and Russia), which highlights the importance of legal frameworks that permit law enforcement action "against terrorists and their supporters, even where terrorist objectives are unknown and attacks are not imminent".[74] It has thus become necessary to criminalise and prosecute a broad range of terrorist-support activities, including recruitment of persons to commit terrorist acts and the provision of financial and other material support to them.

> A person who engages in such conduct should be held criminally liable not only where he or she knows or intends that the conduct will facilitate the commission of a specific attack, but also where he or she knows or intends that the conduct will facilitate the commission of future unspecified attacks.[75]

The shift of focus to what could be called 'anticipatory offences' or 'abstract endangerment offences' is closely related to and has been justified by the emergence of a systematic pattern of acts that bear the hallmark of Al-Qaida – simultaneous,

73 2005 SUA Protocol; UN Doc S/RES/1540(2004).

74 G8 Justice and Home Affairs Ministers, statement issued at the Sea Island Summit in May 2004, in file with the author.

75 *Ibid.*

spectacular terrorist attacks against civilian targets causing mass victimisation and requiring extensive preparations over a long time before the actual attacks are launched.[76]

The adoption in 1999 of the Convention on Terrorist Financing, in particular, has introduced a new way of thinking about terrorist crimes at the international level. While the earlier UN anti-terrorist conventions and protocols attach criminal responsibility to the commission of, or attempt to commit specific types of terrorist acts, as well as to some forms of complicity, the crucial step taken in the Financing Convention was to criminalise acts that are only indirectly linked to the ultimate violent act. Outside the context of criminal law, the role of the UN Security Council has been instrumental in redefining 'international terrorism' for the purposes of imposing collective measures on individuals or non-state entities involved in terrorist activities. The landmark resolution 1373(2001), adopted shortly after the terrorist attacks of September 11, calls on all states to take extensive measures to combat terrorism and the financing of terrorism, including freezing the assets of persons and entities involved.[77] While 'terrorism' has not been defined and states have wide discretion as to how they implement the obligation, the resolution makes it clear that the focus is broader than actual terrorist acts. The same is true in the case of measures taken by the Security Council against persons, groups and entities supposedly 'associated with' Al-Qaida, Usama bin Laden or the Taliban. Although targeted sanctions directed against individuals are not strictly speaking criminal sanctions, they contribute to laying down the parameters of a broad notion of terrorism.

The concept of material support – even if not yet defined in any international legal instrument – has been central to the broadening of individual responsibility. Material support is a broad category which may include financial or logistical support, transfer of specific expertise or services, or protection.[78] In terms of defining an offence, the *actus reus* – the provision of material support – is heavily dependent on a specific criminal intent. The crime of terrorist financing, for instance, can consist of transactions that would be perfectly lawful, were it not for the accompanying terrorist intent. In terms of responsibility for terrorist acts, the concept of

76 To quote British Minister of Justice, David Blunkett, "We have to have prevention under a new category which is to intervene before the act is committed rather than to do so by due process after the act is committed which is too late", BBC News on 2 April, 2004. See also Erling Johannes Husabø, 'Strafferetten og kampen mot terrorismen', 91 *Nordisk Tidsskrift for Kriminalvidenskab* (2004), 180–193.

77 UN Doc. S/RES/1373(2001), para. 1(c).

78 For a proposal concerning an International Convention for the Suppression of material support to terrorism, see Noah Leavitt, 'Could a "Material Support" Treaty reduce Suicide Bombings?', available at http://writ.findlaw.com/commentary/20030826_leavitt.html.

material support entails a reassessment of the distinction between violent crimes, on the one hand, and various supporting activities that may facilitate the commission of the violent acts, on the other. This seems a logical direction, given that terrorist crimes are more broad-based than before and the new terrorist networks have become amorphous in structure, relying on a number of independent contributions which together make possible the commission of large-scale terrorist acts. At the same time, it has become more difficult to determine, who is a 'terrorist' and to pinpoint the responsibility for terrorist acts. One of the recommendations of the UN Security Council Committee monitoring the sanctions regime against Al-Qaida – that one "should not seek to differentiate between its associated groups, elements and individual supporters"[79] – is indicative of the broad policy focus that has accompanied the 'prevention paradigm'.

As far as individual criminal responsibility is concerned, related developments can be discerned in other areas of international criminal law. Attempts to respond to drug trafficking, trafficking in human beings and other forms of transnational organised crime have raised questions about the tension between "the complex criminological reality of organized crime" and "the individual approach of traditional criminal law" as the problem has been expressed by the Council of Europe.[80] More elaborate penal provisions dealing with different forms of responsibility, such as responsibility for the act of another, responsibility for crimes committed by groups of persons, or corporate criminal responsibility, have been introduced in instruments dealing with these new and complex crimes.[81] Drug trafficking, trafficking in human beings and other forms of transnational organised crime have been subject to international regulation and have led to specific developments which do not easily fit in with the old concepts and distinctions.[82] The traditional

79 Second report of the Monitoring Group, *supra* note 47, para. 11, at 8.

80 *The Fight against Terrorism: Council of Europe Standards*, Council of Europe, December 2003, at 246.

81 As Bassiouni has noted, "as a result of the expansion of organized crime groups and drug trafficking, many states have enacted laws that provide for organizational criminal responsibility, either under the common law conspiracy model or under hybrid models that combine participation, intent and some conduct". See M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd Rev. Edn., Kluwer Law International,1999, at 391.

82 Beare has drawn attention to the international influence in matters of crime control affecting transnational organised crime but noting: "with regard to anti-terrorism enforcement, there is even stronger pressure to conform to a uniform, near-global response", Margaret E. Beare, 'Introduction', in Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, University of Toronto Press, 2003, xi–xxix, at xviii.

notion of individual criminal responsibility has been reinterpreted to capture the social and organisational dimensions of organised crime.[83]

Most of the fundamental questions about the relationship between individual and group responsibility and about the boundaries of criminal liability have nevertheless been raised with regard to a particular category of international crimes, namely genocide, crimes against humanity and serious war crimes. This category of crimes must therefore enter any consideration of general questions of individual criminal responsibility in international criminal law. As these crimes represent another form of politically inspired violence, their treatment in international criminal law may shed light on the specific developments with regard to terrorist offences and help place such offences in an appropriate context.

There are specific features in the norms concerning the most serious international crimes and in the application of the norms: for example the focus on those most responsible, the nearly objective standard of command responsibility, or the common purpose doctrine which extends criminal responsibility far from the actual commission of crimes in the quest to "catch the accomplices",[84] who are often political and military leaders. These elements have been seen as justified because of the strong policy need to deter and to prevent such crimes.[85] Singling out the leaders by means of command responsibility, expansive interpretations of complicity and the common purpose doctrine have a clear symbolic function, which is seen to create the necessary deterrence in the face of widespread policy-type criminality. The particular danger of such crimes is that there is no distinct group of 'professional' criminals, as just about anybody could become involved in mass criminality. Indeed, as the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted in the *Kvočka* case, "In situations of armed conflict or mass violence [...], law abiding citizens commit crimes they would ordinarily never have committed".[86] Terrorist crimes have not figured prominently in this doctrinal debate. Certain recent developments with regard to terrorist crimes nevertheless point to a tendency towards broader and more

83 Christine van den Wyngaert, 'Transformation of International Criminal Law in Response to the Challenge of Organized Crime', General Report, 70 *Intl. Rev. Penal L.* (1999), 133–221.

84 William A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 *IRRC* (2001), 439–459. See also Chapters 3 and 4.

85 Bassiouni, *supra* note 81, at 392–393.

86 *Prosecutor v. Kvočka et al.* Case no. IT-98-30/I-T, Judgement of 2 November 2001, para. 310.

pro-active criminalisations,[87] raising questions about the scope and attribution of criminal responsibility that come close to those discussed with regard to genocide, crimes against humanity and serious war crimes.

3. The Approach and Structure of the Study

The focus of the study is on how international law has developed in recent years in face of the new kind of terrorist threat. As the topic so defined would be unnecessarily broad, and as it is argued that the international law of terrorism has gained considerable substance in recent years, the specific subject of the study will be limited to one aspect of the new development, namely how the perceived changes in terrorism have affected the way legal responsibility for terrorist violence has been framed. It is submitted that both individual criminal responsibility and the international responsibility of states have been redefined to encompass increasingly indirect forms of contributing to terrorist acts. The choice of the notion of indirect responsibility therefore directs the focus of the study as much as does the concept of terrorism. The concept of indirect responsibility does not seem to have an established meaning in international criminal law. Most often, it is used either as a residual category denoting the responsibility of the persons involved in a crime other than the immediate perpetrators, or in the specific sense of superior responsibility.[88] As used in this study, the term embraces both understandings but is not limited to them. The notion of indirect responsibility will be used as a general term for the various developments that broaden the responsibility for terrorist acts to encompass increasingly indirect ways of contributing to terrorism. In this sense, the notion of indirect responsibility also covers the principal perpetrators of the new indirect crimes such as terrorist financing. Furthermore, the concept is used here in a descriptive sense to refer to developments both within international criminal law and in the law of state responsibility.

As far as individual criminal responsibility is concerned, the focus of the study is on how the requisite knowledge and intention have been defined in the legal instruments which extend that responsibility to new categories of material acts. 'Indirect responsibility' in this sense is concerned with the additional or derivative accountability of the presumed masterminds, intermediaries and 'material sup-

87 The term 'pro-active' refers to early intervention in preparatory phases before the actual crimes have taken place. It has been used in this sense also by Jean-Paul Laborde, 'The United Nations and the Fight against Terrorism: Legal and Criminal Aspects', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 68–71, at 67, as well as by Husabø, *supra* note 76.

88 For more detail, see Chapter 4.4.

porters' of terrorist operations and activities. The term 'extended responsibility' will also be used, often interchangeably with 'indirect responsibility', as a descriptive term referring to the extension of criminal responsibility to persons with less actual involvement in the crime. With regard to state responsibility, it can be asked whether the diffuse nature of the new terrorist movements can correctly translate into rules of state responsibility. The focus will be on the relationships between a state and a terrorist group or organisation that do not imply direct involvement of the state in the commission of terrorist acts. The concept of indirect responsibility excludes situations where private individuals act on behalf of the state but covers more indirect forms of support for, or toleration of, terrorist acts,[89] extending to a lack of adequate control and failure to take measures against terrorism insofar as these amount to a breach of a due diligence obligation. While the questions raised in this study also concern the attribution of acts of private violence to the state, the more subjective areas of due diligence in the observance of the obligation of the state to provide for order and security in its territory, as well as the obligation not to allow in its territory terrorist activities directed against the interests of other states are of obvious interest, given the increased importance attached recently to compliance with international anti-terrorist obligations.

It is claimed that the broadening of responsibility for terrorist acts has an impact on and changes the premises of some of the perennial questions – such as the definition of terrorism, or the nature of terrorist crimes and their proper place in the emerging system of international criminal law. The international community is closer today to a universal definition of 'terrorist act' than ever before. Most of the forms and manifestations of international terrorism have been subject to a universal prohibition by way of specific criminalisations. Moreover, the UN General Assembly,[90] the UN Security Council[91] and even the International Criminal Tribunal for the former Yugoslavia[92] have, in remarkable unison, laid down definitions or descriptions of terrorist acts, echoing an earlier customary law development around a 'hard core' definition of terrorism as an international crime.[93] At the same time, the growth and diversification of anti-terrorist regulation has introduced a sweeping change, one which has broadened the scope of prohibited conduct far beyond the hard core of the existing definition of terrorism as a violent crime.

89 For more detail, see Chapter 5.4.

90 The 1994 Declaration, Terrorist Financing Convention, art. 2(1)(b); Chapter 1.

91 UN Doc. S/RES/1566(2004); Chapter 8.2.

92 *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion of 5 December 2003, para 133.

93 Chapter 2.2.1.

`Human rights and terrorism' has become a recurrent theme of discourse and research in recent years. This study, too, hopes to make a contribution to this debate while taking a less-trodden path: instead of concentrating on the many instances where states have pursued counter-terrorism policies in disregard of their legal obligations, it will focus on legal measures which have been adopted through the established procedures of international law-making, and which, in fact, form the core legal obligations of states in the fight against terrorism. The shift towards indirect responsibility is an emerging trend, the effects of which can only be outlined in a summary fashion. This does not mean that the more problematic aspects of the new development should be overlooked, or its achievements be assessed purely from the point of view of technical effectiveness. Suffice it to say here that some of the questions raised in the study – such as the scope of punishable conduct in the new criminalisations, or the relationship of anti-terrorist sanctions to criminal penalties – are of fundamental importance for the legal rights of individuals.

Part I: The International Law of Terrorist Crimes

Part I, which comprises Chapters 1 and 2 will address situational and structural questions related to the place of terrorist crimes in the emerging system of international criminal law. The first question discussed is whether the international legal regulation on terrorist crimes forms a sufficiently coherent body of law to merit a name of its own. Or is terrorism a redundant concept, one that does not add much to the legal regulation of violent crimes, and even less to that of irregular use of force by states or armed groups? This question –whether there is an 'international law of terrorism', or a need for such a denomination – is similar in nature to the question of raising certain categories of crime to a higher level in the 'hierarchy of evil',[94] either as a closed system (`ICC crimes') or as a developing category (international criminal law *sensu sricto*). Lately, the trend has been rather to emphasise the exclusivity of the core crimes, in part in an effort to promote the early establishment of the International Criminal Court and to consolidate its status. At the same time, one of the most frequent arguments against considering terrorist crimes as part of the category of 'international criminal law sensu stricto' is their exclusion from the ICC Statute.[95]

Is there a need to differentiate between manifestations of violent crime? This question is closely connected to the emergence of international criminal law as a

94 For the term, see Roger S. Clark, 'Crimes Against Humanity and the Rome Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 75–93, at 75.

95 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544.

system of its own. Establishing hierarchies and differentiation of concepts are part of creating any system. The task set for Part I of situating terrorism in the system of international criminal law presupposes that there is such a system, although Chapter 2 also tries to prove that hierarchies are not always set in stone. While the division of international criminal law (ICL) into 'ICL *sensu stricto*' and 'ICL *sensu largo*' is accepted as a structural principle, it is not always easy to find a proper place for each specific crime. Chapters 1 and 2 seek to situate the law of terrorist crimes, not only in the sense of whether it forms a system of its own, but also regarding its relationship to other international crimes and its place in the hierarchy of international crimes.

Part II: Questions Related to International Responsibility

Part II, which comprises Chapters 3, 4, and 5, will follow recent developments with regard to individual criminal responsibility under international law with a particular reference to those instances where responsibility is extended beyond the circle of immediate perpetrators. It is generally accepted that the notion of individual criminal responsibility needs some redefinition in order to address crimes that are committed collectively, whether as part of a policy or a criminal campaign affecting hundreds or thousands of participants. In such crimes "[t]he 'accomplice' is often the real villain"[96] and broad concepts of responsibility are required to reach the level of the 'intellectual authors' of the crimes. At the same time, as pointed out by Judge Cassese, caution is required as "A policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle of nullum crimen sine lege".[97]

An underlying theme in both Parts I and II will be a comparison between terrorist crimes, on the one hand, and the core crimes (`the atrocities regime'), on the other. There are two reasons for this choice of approach. In Part I, the basic question will concern the definition and acknowledgement of terrorism as one of the most serious international crimes, one approaching the threshold of international criminal law *sensu stricto*. At the same time, as will be claimed in Chapter 1, the rapid developments that have taken place recently with regard to terrorist crimes can be analysed in terms of a significant broadening of the individual criminal responsibility for terrorism. In order to better grasp this development, reference will be made in Part II to the established theories of collective or extended responsibility as they have been developed in international criminal law. The analyses of

96 William A. Schabas, *Genocide in International Law,* Cambridge University Press, 2000, at 286.

97 *Prosecutor v. Drazen Erdemović*, Case No. IT-96-22-A, Judgement of 7 October, 1997, Separate and Dissenting Opinion of Judge Cassese, para. 11.

collective crime carried out with regard to aggression, genocide, crimes against humanity and serious war crimes help to put the developments of the anti-terrorist law in a legal context and to elaborate on the questions raised above.

Chapters 3 and 4 will address the legal doctrines and techniques created for the purpose of prosecuting the most serious international crimes. The focus of Chapter 3 will be on international jurisprudence, the Nuremberg and Tokyo Tribunals as well as the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Chapter 4, for its part, will address the role of notions of extended responsibility in the relevant codifications, e.g. the ILC Draft Code of the Crimes against the Peace and Security of Mankind[98] and the Rome Statute of the International Criminal Court, as well as the doctrinal discussion concerning the specific rules of attribution applicable to the 'core crimes'. Variations of the same concepts and techniques – derivative liability, responsibility for criminal omission, foreseeability as a lowered mental standard, and specific intent as a way to capture the potential harm which may result from a small act – come up recurrently, but the ICTY jurisprudence, on the one hand, and the ICC Statute, on the other, as the two principal modern interpretations of the Nuremberg legacy, also differ from each other in important respects.

State involvement has historically been a feature common to most of the international crimes that have been deemed exceptionally serious. Increasingly sophisticated analyses of the degrees of state involvement, and the indispensable policy background in the commission of mass atrocities, have been presented as a part of the development of a specific doctrine of the international criminal responsibility of the individual. Chapter 5 will discuss how this development relates to the rules concerning state responsibility, and on what basis states can be held accountable for acts committed by individuals or other non-state actors.

Unlike Parts I and III, Part II, which deals with questions of international responsibility, will not deal primarily with terrorist crimes. It is nevertheless closely linked both to Part I, through the recognition of the similarity of some forms of terrorism with the core crimes, and to Part III by providing the basic concepts that will be used in analysing the new trends in the international law of terrorism which are the subject of Chapters 6 to 9.

Part III: Indirect Responsibility for Terrorist Acts

It was claimed in relation to Part I that it is possible to discern an established definition of terrorist crime on the basis of the UN *droit acquis*, consisting of both

98 Draft Code of the Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its 51st session 6 May–26 July 1996, UN GAOR 51st session, Supplement No. 10 (A/51/10).

treaties and declarations and supported by UN Security Council resolutions. Yet, this 'hard-core' definition would cover only a part of the international anti-terrorist criminalisations. The limits of the international law of terrorism must be drawn much wider. This argument will be further elaborated in Part III (Chapters 6, 7, 8 and 9) in addressing the question of where exactly these limits lie, and what the answer means for the concept of terrorism. The last chapters will analyse recent developments in the international law on terrorism concentrating on the shift of focus from actual terrorist acts to prevention. This shift from violent acts to indirect activities, supporting structures and networks amounts to a constant redefinition of terrorism as the target of international law and action, and hence a redefinition of terrorism.

Chapter 6 will analyse the Terrorist Financing Convention as a model for further preventive criminalisations, paying special attention to the elements of the offence and to their relation to notions of extended responsibility in the law of the core crimes. Chapter 7 will examine three other recent anti-terrorist instruments which also contain pro-active criminalisations: the 2002 European Union Framework Decision on combating terrorism, the 2005 Protocol to the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and the 2005 Council of Europe Convention on the Prevention of Terrorism. These are not the only recent anti-terrorist instruments but unlike the 1997 Convention on Terrorist Bombings and the 2005 Convention on the Suppression of Acts of Nuclear Terrorism, for instance, they represent a specific trend that can be described in terms of indirect responsibility. Other new regional instruments such as the OIC Convention, the CIS Convention, the AU Convention, or the Inter-American Convention, have also been left out of this study. Although some of these conventions contain particularly broad criminalisations,[99] they belong to a different category of instruments in that they concentrate on acts that are intended to cause immediate harm, whilst the four instruments cited above address what could be called anticipatory or intermediary offences.

Finally, Chapters 8 and 9 will examine the actions of the UN Security Council and their implications for the perception of terrorism as a legal category, and for the determination of individual and state responsibility. The new role of the Security Council as 'a global legislator' will be commented on, and the lack of a definition in resolution 1373(2001) duly noted, but it will also be claimed that the Al-Qaida and Taliban sanction regime has reshaped the understanding of what constitutes

99 Extending, for instance, to violent acts or threats undermining public safety or imperiling the honour of a people. See the CIS Convention, art.1, *International Instruments*, *supra* note 13, at 175–176 and the OIC Convention, art. 1(2), *International Instruments*, *supra* note 13, at 190.

terrorism. By directing counter-terrorism sanctions at private individuals and entities the UNSC has introduced a novel concept of international accountability. Targeted sanctions directed at individuals and entities involved in terrorist acts (the 1373 regime) or associated with Al-Qaida and Taliban (the 1267 regime) have been developed on the basis of restrictive measures against states and governments. It has been consistently underlined that sanctions are preventive measures that must be distinguished from penal sanctions as punitive measures. When directed at private individuals, asset-freezing can nevertheless be seen as a quasi-criminal measure which influences the notion of international terrorism as an activity prohibited by international norms and action.

Chapter 9 will discuss developments with regard to state responsibility. The UN Security Council has played a key role in carrying out or setting in motion processes that have resulted in increased attention to state behaviour with regard to terrorism. This is an area where the Security Council has also traditionally played a role, but its actions used to be limited to emergency measures, while it now exhibits a continuous focus on compliance and counter-terrorism performance that shows no sign of flagging. At the same time, scholars have had difficulties explaining the legal connection between the Taliban regime of Afghanistan and the terrorist attacks of September 11, 2001. The UNSC counter-terrorist activities and its apparent endorsement of military action in self-defence against Afghanistan will form the subject of the last part of Chapter 9. The focus of the discussion will be on the ways a state's implication in private terrorist violence may trigger its international responsibility and on how the concepts of due diligence and obligations of prevention are applicable to such situations.

Part I

The International Law of Terrorist Crimes

CHAPTER 1 THE INTERNATIONAL LAW OF TERRORISM

1.1. Much Ado about Nothing – Terrorism as an Empty Concept?

While legal comments after September 2001 have referred to a confluence of legal regimes applicable to terrorism,[1] depending on whether it should be seen as crime or war,[2] the international law of terrorism was until quite recently seen as an empty concept. In her article on 'the general international law of terrorism', published in 1996, Rosalyn Higgins gave expression to what was a widely shared view at the time in concluding that terrorism had not become a distinct subject of international law with substantive rules of its own.[3] Altogether ten anti-terrorist conventions

1 William K. Lietzau, 'Combating Terrorism: Law Enforcement or War', in *Terrorism and International law: Challenges and Responses*. Contributions presented at the meeting of independent experts on terrorism and International Law in San Remo, 24–26 September 2002, 75–84, at 75.

2 Or, to use the terms suggested by Abi-Saab, 'micro' or 'macro' analysis. See Georges Abi-Saab, 'Introduction. The Proper Role of International Law in Combating Terrorism', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, xiii–xxii.

3 Even more sceptical comments had been presented earlier, and are still being referred to, such as the one attributed to Christine van den Wyngaert, who stated in *The Political Offence Exception to Extradition*, 1980, at 200: "We have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose", cited by Cécile Tournoye, 'The Contribution of Ad Hoc International Tribunals to the Prosecution of Terrorism', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 298–308, at 298. A similar comment by William K. Baxter, in 'A Skeptical Look at the Concept of Terrorism', 7 *Akron Law Review* (1974), 380–387, at 380, has been referred to by Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, at 5. See also Michel Wieviorka, 'Terrorism in the Context of Academic Research', in Martha Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995, 507–606, at 507, of the formerly 'untouchable' nature of terrorism, which had only recently "become a worthy subject of inquiry".

and protocols had been elaborated under the auspices of the United Nations, but while they addressed international terrorism, the umbrella concept of terrorism was hardly necessary to deal with the specific unlawful acts covered by these instruments. For Higgins, the use of the catch-all term 'terrorism' was merely "a convenient way of alluding to a variety of problems with some common elements, and a method of indicating community condemnation for the conduct concerned."[4] As further proof of the emptiness of the concept of international terrorism as a legal category, she referred to the *Nicaragua* Judgement of the International Court of Justice.[5] Even though the substantive charges against the United States included "recruiting, training, arming, financing and supplying and otherwise encouraging, supporting, aiding and directing military and paramilitary actions in and against Nicaragua", as well as the "killing, wounding and kidnapping citizens of Nicaragua", the Court managed to deal with the case without even mentioning the concept of terrorism.[6]

In 1996, the relevant UN conventions and protocols included five instruments related to the safety of civil aviation, elaborated at the International Civil Aviation Organization (ICAO),[7] a convention on the suppression of unlawful acts against diplomats and other internationally protected persons,[8] a conven-

4 Rosalyn Higgins, 'The General International Law of Terrorism', in Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 13–29, at 28. See also Marja Lehto, 'Terrorism in International Law – an Empty Box or Pandora's Box?', in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus Nijhoff, 2003, 290–313.

5 *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Reports (1986), p. 14.

6 Higgins, *supra* note 4, at 20.

7 Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September, 1963, UNTS Vol. 704, No. 10106; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, UNTS Vol. 860, No. 12325; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal 23 September 1971, UNTS Vol. 974, No. 14118; 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, done at Montreal on 23 September 1971, Montreal, 24 February 1988, ICAO Doc. 9518; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991, U.N.Doc. S/22393, UNTS Vol. 2122, p. 359.

8 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December, 1973, UNTS Vol. 1035, No. 15410.

tion against the taking of hostages,[9] a convention on the protection of nuclear material,[10] and two instruments dealing, respectively, with unlawful acts against maritime navigation and fixed platforms located on the continental shelf, both elaborated at the International Maritime Organization (IMO).[11] All these instruments addressed criminal acts typically committed for terrorist purposes, and were drafted in response to the predominant *modus operandi* of terrorist groups at the time. Most of the conventions and protocols followed an identical structure and approach.[12] They defined certain offences and required states to criminalise those offences if they had not done so already. They also made these offences subject to nearly universal jurisdiction. According to the prosecute-or-extradite regime, an essential feature of international anti-terrorist instruments, a state party is obliged to either extradite a person present in its territory who has allegedly committed one of the acts criminalised in the relevant convention or submit the case to the competent authorities for investigation and prosecution.[13] Moreover, the relevant instruments included provisions on mutual legal assistance and other forms of international cooperation as well as on measures to prevent the illegal activities of those involved in the offences in question. These conventions and protocols belonged, in 1996, to the hard core of international counter-terrorist regulation, complemented by declarations and resolutions of the UN General Assembly.[14] As

9 International Convention Against the Taking of Hostages, New York, 19 December 1979, UNTS Vol. 1316, p. 205, No. 21931.

10 Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979, UNTS Vol. 1456, No. 24631.

11 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, UNTS No. 29004 and Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome 10 March 1988, UNTS Vol. 1678, p. 294.

12 Notable exceptions are the 1963 Tokyo Convention, which also addresses fairly minor crimes and the 1991 Convention on the Marking of Plastic Explosives, which does not contain a criminalisation obligation.

13 While *aut dedere aut judicare* is not as such a basis for jurisdiction, Kolb has referred to the regime as 'conventional universal jurisdiction', see Robert Kolb,' The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, 227–281, at 249–256.

14 Terrorist acts were described as criminal for the first time by a consensus resolution of the UNGA in 1985, UN Doc. A/RES/40/61. Reflecting the earlier disputes concerning the nature of terrorism, the title of the resolution still referred to "measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause

criminal law conventions, they clearly established the obligation to criminalise the defined conduct.

The anti-terrorist conventions and protocols adopted under UN auspices provided a basis for worldwide harmonisation of legislation and cooperation in criminal matters related to terrorist acts. Participation in the respective instruments, as well as their practical implementation left a great deal to be desired, however. In 1989, Cassese listed four major problems with regard to the multilateral treaties covering specific types of terrorist acts: 1) that the number of ratifications was insufficient and, in particular, that those states who faced terrorism in their territory were seldom parties to the relevant conventions; 2) that the anti-terrorist conventions did not contain any effective enforcement provisions; 3) that the instruments, as a general rule, left full freedom to states parties to regard terrorist-type acts as political offences and thereby exempt them from extradition; and 4) that the obligations of states parties to search for and arrest suspects were treated "in an insufficiently rigorous way" which left states a large measure of discretion as to the arrest of terrorist suspects.[15] Cassese also identified two aspects of international terrorism and state responses to it that had largely been left unregulated: interception of vessels and aircraft and other coercive responses to terrorist acts as well as structural violence that may give rise to terrorism.[16]

A 1988 report of the Hague Academy of International Law drew attention to the same problems with regard to treaty obligations on countering terrorism. It also made a bold attempt to establish a list of general principles on obligations of states and state responsibility with regard to international terrorism[17] without claiming, however, that all the principles enjoyed the same degree of acceptability and normative force.[18] The report recognised that states had an obligation to prosecute perpetrators of terrorist acts committed on their territory against foreign nationals or interests, but only encouraged states to accept the principle of *aut dedere aut judicare* where persons suspected of such acts are found in their territory. Likewise, the wish was expressed that serious crimes affecting the life or

some people to sacrifice human lives, including their own, in an attempt to effect radical changes".

15 Antonio Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *Int' l and Comp. L.Q.* (1989), 589– 608, at 593–595.

16 *Ibid.*, at 596–603 and at 607.

17 Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism*, Martinus Nijhoff Publishers, 1989 (Hague Academy Report).

18 The reports of the French and English-speaking sections were modestly entitled as "bilan de recherches" and "state of research", not 'state of law'.

personal integrity of persons in an indiscriminate manner should not be treated as political crimes.[19] At the same time, the report established beyond doubt the basic principles of state responsibility for terrorist acts, namely that states have the obligation under international law to refrain from 1) organising, instigating, assisting or participating in terrorist acts in other states and 2) from acquiescing in activities within their territory directed towards the commission of terrorist acts in other states.[20] The customary nature of these two principles was considered obvious on the basis of the UNGA Declaration on the Friendly Relations of States,[21] the more so as the relevant obligations could also be seen as an inherent trait of the very concept of sovereignty, as confirmed by the Permanent Court of Arbitration in *Island of Palmas*.[22] One of the two rapporteurs even described these obligations to prevent terrorist activities as an obligation *erga omnes*.[23]

Terrorist acts in the sense of the principles established in the Hague Academy's report included "attacks on or threats to life or personal integrity, affecting people in an indiscriminate way or using heinous methods condemned by the international community", provided that they contained an international element. An international element was present if the act was prepared or performed across an international boundary, or directed at foreign nationals "because they are foreign nationals", or if the perpetrators fled to another country.[24] In recognition of the difficulties included in the notion of terrorism, this definition was not, however, included in the list of principles.[25] According to one of the rapporteurs, there was no autonomous notion of terrorism in contemporary international law *de lege*

19 Hague Academy Report., *supra* note 17, principles 5.1.–5.3., at 17.

20 *Ibid.*, principles 1.1. and 1.2., at 15.

21 UN Doc. A/RES/ 2625(XXV); Juan Antonio Carrillo Salcedo, 'Bilan de recherches de la section de la langue française du Centre d'étude et de recherche de l'Académie', Hague Academy Report, *supra* note 17, 19–53, at 23.

22 *Ibid.,* pointing out that territorial sovereignty of a state has as its corollary the obligation to protect the rights of other states within the territory. See also the *Island of Palmas Case (Netherlands v United States of America)*, 2 UNRIAA 831.

23 Salcedo, *supra* note 21, at 36.

24 Hague Academy Report, *supra* note 17, separate statements at the end of the list of principles, at 16 and 17.

25 "It would have been surprising if these difficulties had not materialized in the two sections of the seminar, given the widely diverging cultural background of its members." See Jochen A. Frowein, 'The present state of research carried out by the English-speaking section of the Centre for Studies and Research', The Hague Academy Report, *supra* note 17, 55–96, at 55–56.

lata.[26] The picture given by the report of the situation twenty years ago can be summarised as follows: while state responsibility for supporting terrorism was well anchored in customary law, there were many uncertainties with regard to the establishment of individual criminal responsibility for acts of international terrorism as well as the legal definition of terrorism. Since then, a number of important developments have taken place with regard to the treatment of terrorist crimes in international law.

In 1994, the General Assembly adopted the Declaration on the Measures to Eliminate International Terrorism, which has been deemed particularly outstanding because it condemned unequivocally "all acts, methods and practices of terrorism, as criminal and unjustifiable wherever and by whomever committed".[27] Even more importantly, the Declaration contained a quasi-definition of terrorist acts in stating:

> Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons, or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.[28]

The 1994 Declaration has been seen as an important step in the crystallisation of a customary law definition of terrorist acts.[29] Two years later, it was complemented by another declaration, which opened the door for further progressive develop-

26 "Il n'existe pas en droit international contemporain une notion autonome de terrorisme", Salcedo, *supra* note 21, at 19.

27 Declaration on the Measures to Eliminate International Terrorism, 9 December 1994, UN Doc. A/RES/ 49/60, 9 December 1994, para. 1.

28 *Ibid* , para. 3.

29 Robinson has argued that "the relevant GA resolutions (in particular, the powerful and unequivocal legal characterization in the first three paragraphs of the 1994 Declaration) which were all adopted without a vote, may [...] be viewed as establishing a customary rule which not only criminalizes as terrorist acts intended or calculated to provoke a state of terror, but also requires States to take certain action to prevent and punish these acts". See Patrick Robinson, 'The Missing Crimes', in Antonio Cassese, Paola Gaeta and R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 11.7., 497–525, at 520 as well as Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 24 and 128–130. See also Antonio Cassese, 'Terrorism as an International Crime', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, 213–225, and 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *JICJ* (2006), 933–958.

ment of the law of terrorist crimes during by setting up a new Ad Hoc Committee whose task was to elaborate "a comprehensive network of international conventions" to suppress terrorism.[30]

The network of conventions and protocols existing at the time was a result of the sectoral approach to terrorism, which consisted of identifying "particular offences which undoubtedly belong to the activities of terrorists and working out specific instruments for their suppression".[31] As a general rule, the instruments referred to above have a fairly narrow scope of application and the respective criminalisations have been defined strictly either in terms of the target of the crime, such as ships or aircraft, or by reference to the specified conduct, such as hostage-taking. Two conventions elaborated on the basis of the mandate given by the General Assembly in 1996, the 1997 Convention for the Suppression of Terrorist Bombings[32] and the 2005 Convention on the Suppression of Acts of Nuclear Terrorism,[33] the negotiations for which were nearly completed already in 1998, share the same basic approach. The conventions and protocols that have been adopted to enhance the safety of civil aviation and airports prohibit acts of hijacking, various acts of aviation sabotage and certain unlawful acts of violence at airports.[34] The 1988 SUA treaties, frequently referred to as the 'maritime ter-

30 UN Doc. A/RES/51/210, 17 December 1996, para. 9.

31 Tullio Treves, 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law*, Martinus Nijhoff Publishers, 1990, 69-90, at 71–72.

32 International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Doc. A/RES/52/164, Annex, UNTS Vol. 2149, p. 256.

33 International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, UN Doc. A/RES/59/290.

34 The 1970 The Hague Convention, art. 1, defines the principal offence as follows:

> "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 [...]".

The 1971 Montreal Convention, art.1(1), lists the following acts:

> " 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 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

rorism convention' and its protocol, prohibit unlawful acts against the safety of maritime navigation and against the safety of fixed platforms located on the continental shelf.[35] The New York Convention of 1973 prohibits violent crimes against

(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."

Finally, the 1989 Montreal Protocol, art. II criminalises similar acts committed at an airport:

"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 is likely to endanger the safety at that airport".

35 The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 3, reads as follows:

"Any person commits an offence if he unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat of force 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.

(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 in subparagraphs (a) to (f)".

The 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, art. 2(1), deals with similar acts committed against a fixed platform on the continental shelf:

"Any person commits an offence if he unlawfully and intentionally:

(a) seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or

diplomats and other internationally protected persons or diplomatic premises.[36] The 1979 Hostages Convention contains a general prohibition of hostage-taking.[37] The 1980 Convention on the Physical Protection of Nuclear Material, the 2005 Protocol to amend this Convention, and the 2005 Nuclear Terrorism Convention prohibit acts of unlawful possession or use of nuclear material, as well as attacks against nuclear facilities.[38] The Terrorist Bombings Convention of 1997 differed

(b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or

(c) destroys a fixed platform ship or causes damage to it which is likely to endanger its safety; or

(d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or

(e) injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (d)".

36 The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 2(1), defines the principal offences as follows:

"The intentional commission of;

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

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

[...]"

37 The International Convention against the Taking of Hostages, art. 1(1), defines the primary offence as follows:

"Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits an offence of taking of hostages within the meaning of this Convention."

38 The 1988 Convention on the Physical Protection of Nuclear Materials, art. 7(1), defines the principal offences as follows:

"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) theft or robbery of nuclear material;

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

from the earlier sectoral anti-terrorism treaties in that it defined both the methods and the targets of the prohibited acts in a particularly broad manner, covering attacks against public places, state or government facilities, public transportation systems and infrastructure facilities.[39] The Convention criminalised not only the delivering, placing, discharging or detonating of an explosive, but also the use of 'other lethal devices', which were defined as any weapon or device designed to have or having the capability to cause death or serious bodily injury through the release of toxic substances or radioactive material.[40] It thus addressed what has become the most common method of terrorist acts – use of explosives[41] – but it also did a great deal to fill in the gaps left by the earlier conventions.

A characteristic feature of all the sectoral conventions and protocols is the objective technique of criminalisation, whereby the acts concerned are criminalised regardless of the existence of a terrorist motive in a particular case.[42] For example, the 1970 Hague Convention applies to "unlawful seizure or exercise of control of an aircraft by force or threat thereof, or by any other form of intimidation".[43] The

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

39 International Convention for the Suppression of Terrorist Bombings, art. 2(1), defines the principal offence as follows:

"Any person commits an offence within the meaning of this Convention 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 or is likely to result in major economic loss".

40 A 'lethal weapon' has been defined in art. 1(3) of the Terrorist Bombings Convention as "(a) an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or (b) a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material."

41 Conventional Terrorist Weapons, UNODC fact sheet, available at http://www.unodc.org/unodc/terrorism_weapons_conventional.html.

42 Joseph J. Lambert, *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979*, Grotius Publications Limited, 1990, at 49. See also Mikaela Heikkilä, *Holding* N*on-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,* Institute for Human Rights, Åbo Akademi University, 2002, at 25.

43 Convention for the Suppression of Unlawful Seizure of Aircraft, art. 1.

1988 SUA Convention applies, for instance, to "seizing or exercising control over a ship by force or threat thereof or any other form of intimidation" and "performing an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship".[44] Such formulations cover the specified conduct irrespective of the typical features of terrorist acts such as political motivation or political purposes, the presence of an audience, indiscriminate nature or symbolic aspects.[45] As a lone exception, the Hostages Convention contains the qualification that the offence must be committed "to compel a third party, namely a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage".[46]

The objective technique used in the UN conventions and protocols may account, at least to some extent, for the assessment that 'terrorism' as a term is without legal significance. This view was reflected in the practice of of many states parties to the relevant conventions and protocols establishing the proscribed acts as criminal offences in their national penal codes without specifically recognising them as 'terrorist offences'.[47] The sectoral strategy emerged as a response to the failure of the UN General Assembly, in the early 1970s, to agree on a single convention containing an over-arching definition of terrorism,[48] and was largely viewed

44 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, art. 3, paras. (1)(a) and (1) (b).

45 For typical aspects of terrorist crimes, see Bruce Hoffman, *Inside Terrorism*, Columbia University Press, 1998, at 43; M. Cherif Bassiouni, 'International Terrorism', in Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 765–801, at 781–783; Gilbert Guillaume 'Terrorisme et droit international', 215 *RCADI* (1989), 287– 416, at 304–305. For a non-legal assessment, see Alex P. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature,* North Holland Publishing Company and Transaction Books, 1984 and 'Terrorism – the Definitional Problem', in 36 *Case W. Res.J. Int'l L.* (2004), 375–419.

46 Hostages Convention, art. 1.

47 This was the situation in a number of EU member states including Finland before the adoption of the 2002 Framework Decision on combating terrorism: see for instance Kimmo Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law', 4 *JICJ* (2006), No. 5, 998–1016. See also William A. Schabas and Clémentine Olivier, 'The State of Anti-Terrorist Legislation in the Other Member States', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 219–237.

48 Work on a single convention against terrorism was postponed in 1973, and the ad hoc committee set up to study the phenomenon of international terrorism soon concluded that the views on the issues involved were too widely divergent for the committee to

as a way to circumvent the task of defining terrorist crimes in general terms.[49] The lack of consensus on how to define terrorism was viewed as a setback for international action against terrorism;[50] however, it did not prevent the General Assembly, or UN specialised agencies, from embarking time and again on more restrictively defined law-making projects, which gradually produced an extensive network of conventions and protocols criminalising the most obvious examples of terrorist acts. Higgins, in the article cited above, envisaged that attempts to arrive at a consensual definition at the United Nations would continue to be doomed to failure because of the politically loaded nature of the term. At the same time, she pointed out an intellectual dilemma: how could the international community devise normative responses to prohibited conduct if there was no agreement on what conduct was prohibited, on what uses of force, by whom and in what circumstances, were to be considered as 'terrorism' ?[51] At first sight, this criticism seems to miss the point as far as the sectoral strategy is concerned, since none of the ten conventions and protocols of the time even mentioned the word 'terrorism', although they defined in considerable detail the type of conduct that was prohibited. In view of the subsequent developments, however, the question of the specificity of terrorism as a crime and as a concept of international law remains valid.

1.2. Defining Terrorism for Legal Purposes

1.2.1. The UN *Droit Acquis*: Terrorism as Serious Crime

The UN *droit acquis* with regard to terrorist crimes consists of different elements. In addition to the 1994 Declaration, the sectoral conventions and protocols have drawn the outlines of a definition of terrorism, even if in a piecemeal manner. As Duez has pointed out, international legal regulation on terrorism plays an important role in shaping the perceptions of the phenomenon:

> [L]es dispositions juridiques en matière de terrorisme doivent être apprehendées non pas sous l'angle ordinaire de modalités concrètes de régulation sociale

be able draw any workable conclusions. See the Report of the Ad Hoc Committee on International Terrorism, UN GAOR, 28th session, UN Doc. A/9028 (1973).

49 See Treves, *supra* note 31, at 71–72 and Cassese (2004), *supra* note 29, at 216.

50 For many observers, this was the primary shortcoming of and obstacle to effective international action against terrorism. See for instance Lambert, *supra* note 42, at 46; Elizabeth Chadwick, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict,* Kluwer Law International/Martinus Nijhoff Publishers, 1996, at 96.

51 Higgins, *supra* note 4, at 14.

> mais comme des modalités symboliques de l'action politique, vecteurs d'une représentation de la société et de son agencement. Les règles juridiques, en tant qu'instruments de l'autorité politique établie, participent en effet directement au combat symbolique autour de la définition du terrorisme.[52]

The *droit acquis* of the sectoral instruments, supported by the 1994 and 1996 declarations as well as by innumerable resolutions, defines terrorism as specific forms of serious violent crime. While the resolutions of the UN General Assembly adopted before 1985 sent somewhat contradictory messages, treating expressions of terrorism both as a crime and as a form of a legitimate struggle,[53] the subsequent resolutions have consistently regarded terrorism as criminal conduct. The criminal law approach, which regards terrorism as first and foremost a reprehensible method, was formally endorsed in the 1994 Declaration and remains the prevailing one in the General Assembly. The more recent UN anti-terrorist conventions also underline the criminal nature of terrorist acts regardless of the political motives their perpetrators may have, an approach evident both in the provision on 'non-justification' which reiterates the formulation of the 1994 Declaration[54] as well as in the prohibition of the 'political offence exception'.

According to the most recent conventions and protocols, states parties may not refuse extradition or mutual assistance in the case of offences under these instruments solely on the grounds that an offence was politically motivated.[55] It

52 Denis Duez, 'De la définition à la labellisation: le terrorisme comme construction sociale', in Karine Bannelier *et al*. (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 105–118, at 114 , (footnotes omitted). Also in general, criminalisation of a certain conduct provides a powerful means of communication. The symbolic power of holding a person criminally responsible has been emphasised for instance by Victor Tadros, *Criminal Responsibility*, Oxford University Press, 2007, at 1–8 and 373.

53 See for instance Lambert, *supra* note 42, at 29–45.

54 The same text appears in art. 5 of the Terrorist Bombings Convention and reads as follows: "Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public, a group of persons, or particular persons for political purposes are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished with penalties consistent with their grave nature". See also International Convention on the Suppression of the Financing of Terrorism, adopted on 9 December, 1999, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229, art. 6, and art. 6 of the Nuclear Terrorism Convention.

55 Terrorist Bombings Convention, art.11, Terrorist Financing Convention, art. 14; Nuclear Terrorism Convention, art. 15, Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on 14 October 2005, IMO Doc.

has been pointed out that the impetus for the categorical exclusion of political offence exception is "to deactivate political considerations, and to treat terrorists as common criminals".[56] At the same time, the agreement that terrorist offences can under no circumstances be regarded as political offences can be seen to reflect the increasing recognition of the serious nature of terrorist crimes,[57] in line with the statement that terrorist acts cannot be justified by any political, philosophical or religious grounds. To the extent that the concept of a political offence, as an exception to most extradition regimes, is based on humanitarian grounds – that a political offender should not be extradited to a state in which he or she risks an unfair trial – its essence has been preserved in what is known as a discrimination clause. A necessary corollary to the prohibition of the political offences exception, the discrimination clause provides that there is no obligation to extradite or to afford mutual assistance if the request appears to have been made for the purpose of prosecuting a person on account of his or her race, religion, nationality, ethnic origin or political opinion.[58] Some commentators view this as a circular conclusion, amounting to a 're-politicisation' of the crime.[59] It should be noted, however, that the requested state, in refusing extradition, may not base its decision on the alleged motives of the offender but only on those of the requesting state.[60] What has been removed is the political discretion with regard to terrorist crimes, which earlier allowed any state party to invoke the '*droit de résistance*' in a particular case.

LEG/CONF.15/DC/1, (the 2005 SUA Protocol), art. 10 (art. 11 a of the amended convention).

56 Jan Klabbers, 'Rebel with a Cause? Terrorists and Humanitarian Law', 14 *EJIL* (2003), 299–312, at 306.

57 Historically, the political offence exception was first precluded with regard to international crimes; see Convention on the Prevention and Punishment of the Crime of Genocide, New York, 9 December 1948, 1021 UNTS Vol. 78, p. 277, art. VII. See also Valerie Epps, 'Abolishing the Political Offence Exception', in M. Cherif Bassiouni (ed.), *Legal Responses to International Terrorism; U.S. Procedural Aspects,* Martinus Nijhoff Publishers, 1988, 203–217.

58 Terrorist Bombings Convention, art. 12, Terrorist Financing Convention, art. 15.

59 Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against Its Financing', 14 *EJIL* (2003), 365–378, at 369.

60 As Bassiouni has noted with regard to hostage-taking, "Although the alleged hostage-taker's motive, even if political or ideological, will [...] not bar such individual's extradition, the motives of the state requesting extradition will be likely to be a bar to such request if its purpose is to prosecute or punish such individual because of his race, nationality or political opinions". See M. Cherif Bassiouni, 'Kidnapping and Hostage-Taking' in Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 859–864, at 863.

Where the perpetrators are concerned, terrorism is mostly understood as private violence,[61] even though the 1994 Declaration also refers to terrorist acts in which states are "directly or indirectly involved".[62] A textual analysis suggests that the UN anti-terrorist conventions and protocols apply to any natural persons with no distinction between representatives and agents of a state, on the one hand, and private individuals, on the other. Most of the crimes under these conventions and protocols can be committed by 'any person', and the Terrorist Financing Convention also foresees responsibility for legal persons. Treves has nevertheless questioned this interpretation. In his view, it is doubtful whether states would have treated obliquely such a delicate question with complex legal and political implications. He has also pointed out that a proposal to explicitly include acts by governmental agents was rejected in the negotiations concerning the 1988 SUA Convention, and that the Convention does not provide for an exception to the rules of immunity of states from jurisdiction.[63]

The Terrorist Bombings Convention, as well as a number of other recent conventions, explicitly exclude from their scope of application acts committed by the armed forces of a state, either in an armed conflict or in the exercise of their official duties otherwise.[64] The term 'official duties' is a broad one, but the exemption clause applies only to 'military forces', defined in article 1 of the Convention as "forces in the service of national defence or security, as well as persons under their control".[65] It is further specified in the Preamble of the Convention that the exclusion of certain actions from the coverage of the Convention does not condone or

61 Bassiouni, *supra* note 45, at 765–767.

62 1994 Declaration, Preamble, para. 8.

63 Treves, *supra* note 31, at 85, commenting on the 1988 SUA Convention. He has admitted, however, that the question is open to different interpretations and that it seems possible to hold the view that acts committed on behalf of governments were not excluded.

64 Terrorist Bombings Convention, art.19 (1), states that "[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a state in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention". According to art.19(2), "Nothing in this Convention shall affect other rights, obligations or responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law". See also Nuclear Terrorism Convention, art. 4, 2005 SUA Protocol, art. 2(a)(2); 2005 Amendment to the Convention on the Physical Protection of Nuclear Material, new art. 2(4)(b).

65 Terrorist Bombings Convention, art. 1(4): "Military forces of a state" means armed forces of a state which are organized, trained and equipped under its internal law for the primary purpose of national defence or security, and persons acting in support of those armed

make lawful acts that are otherwise unlawful, or preclude prosecution under other laws.[66] The exception is therefore predicated on the assumption that any unlawful activities undertaken by military forces of a state in the exercise of their official duties will be governed by other rules of international law.[67] If those other rules have not been specified, it should not be taken as an indication that governments are free to do as they please. Governmental activities have been regulated in a fairly comprehensive manner in international law at least insofar as violent acts are concerned.[68]

The targets of terrorist acts have played an important role in the definition of the offences under the UN anti-terrorist instruments. The first conventions and protocols apply to acts against specially protected persons, airplanes and airports, or ships in international navigation. The Terrorist Bombings Convention broadened the target to include any victims as far as the intention is to cause death or serious bodily injury, as well as to public places and property.[69] The Convention on Terrorist Financing contains the broadest and the most detailed definition of the targets of terrorist acts in international law to date. The generic definition of terrorist acts in the Financing Convention referred to above – even though intended only to define the criminal intent required for the crime of financing terrorism – covers certain violent acts directed at civilians or other persons not taking an active part in the hostilities in a situation of armed conflict. That definition would be equally applicable in times of peace and armed conflict, however the conflict is defined. An important addition is the reference to non-combatants (persons not taking an active part in an armed conflict), without which the term 'civilian' would seem to exclude military targets in times of peace as well as certain groups of non-combatants in an armed conflict. As the distinction between civilian and military targets becomes applicable only after the threshold required for the application of international humanitarian law is reached – defined inter alia in terms of a certain intensity of violence necessary for the concept of an armed conflict – it is clear that the nature of the target cannot be the sole and decisive criterion of terrorism.

forces who are under their formal command, control and responsibility." It therefore does not apply to other governmental officials.

66 *Ibid.*, Preamble, para. 11.

67 *Ibid.*: "governed by rules of international law outside the framework of (the) Convention".

68 As pointed out by Christian Tomuschat, 'Report on the Possible "Added Value" of a Comprehensive Convention on Terrorism', Council of Europe, CODEXTER (2004)05, reprinted in 26 *HRLJ* (2005), 287–306, para. 42 at 294–295.

69 Terrorist Bombings Convention, art. 2(1). Note that acts intended to cause material damage have been further qualified by requirements concerning the seriousness of the act.

Situations of internal strife and tension that do not meet the requirements of an armed conflict would be a case in point, as acts of violence are often committed under such circumstances.

On the basis of the foregoing, international terrorism as addressed in the sectoral conventions and protocols could be defined as primarily private violence against civilian or non-combatant targets (for political purposes). The requirement of a private nature would exclude acts of terrorism in the sense of international humanitarian law, at least as far as acts of armed forces are concerned.[70] A further requirement for terrorist acts would seem to be a certain scale or gravity. Terrorist offences are undoubtedly serious crimes and have been considered such by governments all over the world, as well as by the UN General Assembly, the Security Council and other international organisations. Terrorist acts have been condemned by consecutive UNGA resolutions as "in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them".[71] The same formulation, with minor modifications, was subsequently included in the Terrorist Bombings Convention[72] and the Convention on Terrorist Financing[73] as well as in Security Council resolution 1566 (2004)[74] and the 2005 Council of Europe Convention on the Prevention of Terrorism.[75] All the above-mentioned instruments also explicitly state that the offences defined in them are grave.[76] While there is no reference to a 'widespread' or 'systematic' commission of the offences such as that found in the case of crimes against humanity,[77] the requirement of gravity can also be discerned from the way the offences and their intended effects – such as death or serious bodily injury, extensive destruction likely to result in major economic loss, or endangerment of the safe navigation of a ship – have been defined in the relevant

70 For further discussion concerning this limitation, see 1.3. and Chapter 2.2.3.2.

71 UN Doc. A/RES/49/60, para. 3 and subsequent resolutions on the item 'Measures to Eliminate International Terrorism'.

72 Terrorist Bombings Convention, art. 5.

73 Terrorist Financing Convention, art. 6.

74 UN Doc. S/RES/1566(2004), para. 3.

75 The Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, CETS No. 196, art. 11.

76 Terrorist Bombings Convention, art. 4 (b) requires that states parties make the offences set forth in art. 2 punishable by appropriate penalties which " take into account the grave nature of those offences". Similarly, the Terrorist Financing Convention, art 4(b). UN Doc. S/RES/1566(2004), para. 9, also calls on states to ensure that terrorist acts are punished by penalties consistent with their grave nature.

77 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, art. 7, *chapeau*.

instruments. It has also been pointed out in the preambular parts of the conventions and protocols that the terrorist acts falling within their scope "create a serious threat to the maintenance of normal international relations",[78] "seriously affect the operation of maritime services",[79] or constitute "an offence of grave concern to the international community",[80] to mention only a few examples of the formulations used. The UN anti-terrorist instruments – with the notable exception of the recent UNSC resolutions[81] – have also been restricted to acts of international terrorism where the territories or nationals of more than one state are involved.[82]

The importance of the UN legal instruments in defining terrorism is underscored by the fact that the Security Council, although it has become an important actor in the field of anti-terrorist measures in recent years, has refrained from putting forward a definition of its own and has mainly drawn on the work done by the General Assembly. With the adoption of the comprehensive anti-terrorist resolution 1373(2001) and a number of subsequent resolutions on the fight against international terrorism the Security Council has contributed to the development of new legal responses to terrorism, in particular as its determinations under Chapter VII of the UN Charter are binding on states. With the adoption of targeted sanctions against individuals and non-state actors, the Security Council has also acquired a role in defining individual accountability for terrorism. For a long time, however, it has hesitated to put forward a definition of its own and has opted to rely on lists of designated individuals and entities or let member states apply definitions of their own choosing. When the Security Council finally adopted, in resolution 1566(2004), a description of terrorist violence, it took care to tie the for-

78 Convention on Crimes against Internationally Protected Persons, Preamble, para. 2.

79 SUA Convention, Preamble, para. 4.

80 Hostages Convention, Preamble, para. 4.

81 See Chapter 8.1.

82 The 'international element' in the conventions typically excludes the application of the obligation to extradite or prosecute in situations where the offence is committed within a single state, the alleged offender and victims are nationals of that state, the alleged offender is found in the territory of that state and no other state has a legal basis to exercise jurisdiction with regard to the offence. See for instance art. 3 of the Terrorist Bombings Convention and art. 3 of the Terrorist Financing Convention. Kolb, *supra* note 13, at 243–244, has presented a somewhat broader definition of an 'international element', which excludes acts committed within one state not affecting other states or targets having an international status. It is worth noting that also the title of the terrorism item on the agenda of the UNGA has been restricted to 'international terrorism'. The Security Council has nevertheless also referred to 'terrorism' without further qualifications.

mulation to the existing conventions and protocols.[83] Similarly, the International Court of Justice has avoided taking a stand on the definition of terrorism, even though it has often dealt with situations of (state-supported) private violence.[84]

As noted earlier, the sectoral conventions and protocols are applicable to the prohibited conduct irrespective of the motives of the perpetrator. In contrast to this approach, the resolutions of the UN General Assembly, in particular the 1994 Declaration, view terrorism in terms of criminal acts committed for political purposes and with the intention to provoke fear. Some of the recent UN anti-terrorist conventions have moved from objective criminalisations to subjective ones including a terrorist motive as an element of the crime. This is the case, most notably, with the generic definition of 'terrorist act' under the 1999 Convention on Terrorist Financing, which covers acts

> 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 an 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.[85]

83 This has also provoked comments to the effect that the Security Council should have imposed a definition of its own; see for instance Andrea Bianchi, 'Security Council' s Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *JICJ* (2006), 1044–1073, at 1048–1051.

84 Lim has referred in particular to the Lockerbie case as a lost opportunity for the Court to rule on the status of (state-sponsored) terrorism in general international law. See C.L. Lim, 'The Question of a Generic Definition of Terrorism Under General International Law', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005, 37–64, at 48–49. See also *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Yamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ reports (1992), p. 114; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Yamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports (1992), p. 3. Maurice Flory, 'International law: an instrument to combat terrorism', in Rosalyn Higgins and Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 30–39, at 32 already regarded the Iran Hostages case as a lost opportunity for the ICJ to attempt to establish a definition of terrorism. See *Case concerning United States Diplomatic and Consular Staff in Tehran*, (United States of America v. Iran), Judgement of 24 May 1980, ICJ Reports (1980), p. 3.

85 Terrorist Financing Convention, art. 2(1)b).

The definition of terrorist offences under the Draft Comprehensive Convention on the Suppression of Terrorism contains the same requirement of 'terrorist intent':

> Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, does an act intended to cause:
> (a) death or serious bodily injury to any person; or
> (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or
> (c) damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,
> 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. [86]

Some of the new offences added in 2005 to the SUA Convention include the same requirement.[87] While the examples above are taken from fairly recently drafted texts, the interest in the 'terrorist motive' is not a new phenomenon. It is related to the other strand of the international law of terrorist crimes: the tradition concerned with the generic definition of a terrorist act, which both preceded the sectoral strategy and has outlived it.[88]

1.2.2. Some Problems with the 'Definition of Terrorism'

The issue of the 'definition of terrorism' is by no means confined to the UN debates, but lives and thrives in the academic discussion where it is addressed from a number of different perspectives, ranging across the disciplines of history, sociology, political science, philosophy, law and others. The definitions suggested in the literature present terrorism as communication by means of violence or emphasise its war-like qualities or context-specific aspects.[89] This wealth of literature can be

86 Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth session (28 January–1 February 2002), UN Doc.A/RES/57/37, at 6.

87 For more detail, see Chapter 7.2.

88 The first phase of this tradition, which has focused on state terrorism, will be examined in more detail in Chapter 2.2.1.

89 *Ibid*., 380–381. See also Jean-François Mayer, 'Terrorism and Religion: Continuity and Change in Political Violence', in Ghislaine Doucet (ed.), *Terrorism, Victims and*

a source of inspiration and has much to provide for the UN negotiators, but it is worth pointing out that the questions that are pending before the UN General Assembly are fairly specific as the ambition is only to define terrorist acts for law enforcement purposes. Even the Draft Comprehensive Convention only seeks to define a 'terrorist act' and not the wider phenomenon. While the UN General Assembly's resolutions speak of "terrorism in all its forms and manifestations"[90] and the Security Council has taken an equally broad view referring to any and all acts of terrorism,[91] not all characteristics of terrorism as a phenomenon are relevant for the purposes of criminal law.[92]

To illustrate this point, reference is made to a list of characteristic elements of terrorism, many of which are frequently present in both academic definitions and national legislation:

> 1) the demonstrative use of violence against human beings, 2) the conditional threat of more violence, 3) the deliberate product of terror/fear in the target group, 4) the targeting of civilians, non-combatants and innocents, 5) the pur-

International Criminal Responsibility, SOS Attentats, 2003, 28–35, at 33, who has also stressed the nature of terrorism as primarily a distorted form of communication, or 'performance violence'. Hoffman, *supra* note 45, at 131–155, has presented terrorism as a "violent act that is conceived specifically to attract attention and then, through the publicity it generates, to communicate a message". See also Martha Crenshaw, 'Relating Terrorism to Historical Contexts', in Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995, 3–24, at 4, emphasising the "high symbolic and expressive value" of terrorist acts.

90 UN Global Counter-Terrorism Strategy, adopted 20 September 2006, UN Doc. A/RES/60/288, Preamble, para. 7.

91 See Chapter 8.1.

92 It should be recalled, however, that some regional conventions, such as the OIC Convention and the CIS Convention contain fairly broad definitions of an act of terrorism, extending it to acts against the 'honour' of a person or the 'safety' of the State. See The Convention of the Organization of the Islamic Conference on Combating International Terrorism, 1 July 1999, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 188–209, art. 1(2); Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 175–187, art.1. The variety in definitions of terrorism is even greater at the national level. See Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc. E/CN.4/2006/98, 28 December 2005. See also Christian Walter, 'Defining Terrorism in National and International Law', in Walter *et al.* (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer Verlag, 2004, 23–44.

> pose of intimidation, coercion and/or propaganda, 6) the fact that it is a method, tactic or strategy of conflict waging, 7) the importance of communicating the act(s) of violence to larger audiences, 8) the illegal, criminal and immoral nature of the act(s) of violence, 9) the predominantly political character of the act, and 10) its use as a tool of psychological warfare to mobilize or immobilize sectors of the public.[93]

As the list above has not been drafted for legal purposes, it will be complemented here by eight 'primary factors' of terrorism, which have been presented as legally relevant: the factor of violence, the required intention, the nature of the victims, the connection of the offender to the state, the justice and motive of their cause, the level of organisation, the element of theatre, and the absence of guilt.[94]

While both lists can offer helpful tools for analysing terrorism, neither of them can easily serve as a basis for an anti-terrorist criminalisation. As Fletcher has pointed out with regard to the latter list, not all 'primary factors' apply at the same time: "Any proposed definition produces counterexamples."[95] This seems to apply even to the most obvious characteristics, such as the element of 'theatre', or the presence of an audience, which is present in both lists. While it can be submitted that "[y]ou cannot commit terrorism behind closed doors"[96] – and most anti-terrorist criminalisations mentioned above target acts committed in or against public places, means of transportation, or infrastructure – there are specific forms of terrorism that do not display this characteristic. For instance, bioterrorism is very different from the basic *modus operandi* of terrorist groups, the use of improvised explosive devices. Bioterrorism presents a number of unique features including 1) the impossibility of defining the geographical boundaries of an attack ("the attack exists wherever and whenever one person transmits the infectious agent to another"); 2) the difficulty in identifying perpetrators (due to "the lag between an initial attack and the emergence of symptoms"); and 3) unclear intent ("It may be difficult, or even impossible to determine whether a bioterrorist attack is intentional or not. Depending on the biological agent used, it could easily look like a

93 Schmid (2004), *supra* note 45, at 403–404.

94 George P. Fletcher, 'The Indefinable Concept of Terrorism', 4 *JICJ* (2006), 894–911, at 901–910.

95 *Ibid.*, at 911.

96 *Ibid.*, at 909.

naturally occurring, albeit unusual, outbreak.").[97] Another example is found in the area of cyberterrorism, in which publicity is often considered undesirable.[98]

A further oft-cited feature of terrorist violence is the normless character of the offences, exemplified in the random or symbolic choice of the victims and the fact that warlike acts are carried out in peacetime as a "peacetime equivalent of war crimes".[99] The "radically different value systems, mechanisms of legitimisation and justification, concepts of morality and worldview" [100] of the new terrorism have been frequently cited in the literature. The perception of terrorism as radically different from ordinary crimes and of terrorist movements as ultra-normal actors may also have contributed to the transgressions of law by many governments in combating terrorism – the resulting violations of human rights and international humanitarian law have been a subject of legitimate concern world-wide and have been dealt with in numerous studies.[101] It is, however, difficult to find much support for the criterion of an indiscriminate or normless nature in the UN anti-terrorist conventions and protocols; the prohibition of terrorism under international humanitarian law is more explicit in this respect.[102] The objective strategy of criminalisations has only recently given way to a differentiation between terrorist offences and ordinary crimes.

Some other definitions of terrorism in the literature have been specifically put forward as ideal definitions that could be applied for legal purposes and would provide an alternative to the fragmented state of the definitions in the existing framework of conventions. According to Sorel, "To the extent that definitions of

97 Quotations from Marc L. Ostfield, 'Bioterrorism as a Foreign Policy Issue', XXIV *SAIS Review of International Affairs* (2004), 1–15, at 2–3. See also Christina Hellmich and Amanda J. Redig, 'The Question is When: The Ideology of Al Qaeda and the Reality of Bioterrorism', 30 *Studies in Conflict & Terrorism* (2007), 375–396.

98 Ulrich Sieber, *Cyberterrorism and other use of the Internet for terrorist purposes*: Threat Analysis and Evaluation of International Conventions. Expert Report prepared for the Council of Europe, 2 April 2007, at 11.

99 Schmid (1984), *supra* note 45, at 17–18 and 81.

100 Hoffman *supra* note 45, at 94.

101 See for instance Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2006; Jelena Pejić, 'Terrorist Acts and Groups: A Role for International Law?', in 75 *BYIL* (2004), 71–100.

See also considerations of terrorism as 'the Other' or 'the Evil': Ileana M. Porras, 'On Terrorism: Reflections on Violence and the Outlaw', *Utah Law Review* (1994), 119–146; Jarna Petman, 'The Problem of Evil and International Law', in Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus Nijhoff, 2003, 111–140.

102 Chapter 2.2.3.1.

terrorism do appear they are enumerative, descriptive, not to say a confused mix."[103] Saul has held that terrorism should be defined as "a special offence with additional and distinct elements to sectoral offences".[104] The tentative definition Sorel has put forward refers to international terrorism as "an illicit act (irrespective of its perpetrator or its purpose) which creates a disturbance in the public order as defined by the international community, by using serious and indiscriminate violence (in whatever form, whether against public or private property) in order to generate an atmosphere of terror with the aim of influencing political action".[105] Saul's definition includes serious violent acts against persons or property, when committed outside an armed conflict for political, ideological, religious or ethnic purposes and intended to create extreme fear.[106] Interestingly, both definitions include the same basic elements – seriousness, political purposes and the aim of intimidation – that are present in the quasi-definition of the 1994 Declaration, in the 'mini-definition' of the Terrorist Financing Convention and in the Draft Comprehensive Convention. At the same time, both definitions depart from the basic assumptions of the sectoral strategy and seem to have little to offer to an analysis of the sectoral conventions and protocols, which deal with specific crimes defined only by their method or target.

While it is evident that the scope of the anti-terrorist criminalisations in the sectoral conventions and protocols does not correspond to the scope of what has been seen as the emerging customary law definition of terrorism,[107] it may be claimed that the real divide between terrorist and other violent crimes lies in the political motivation of the former, rather than in the requirement of intent, which

103 Sorel, *supra* note 59, at 368. See also Sorel. 'Existe-t-il une définition universelle du terrorisme?', in Karine Bannelier *et al.* (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 35– 68, at 52, and Lim, *supra* note 84, at 61.

104 Saul, *supra* note 3, at 190.

105 Sorel, *supra* note 59, at 371.

106 Saul, *supra* note 3, at 65-66. The suggested definition, heavily influenced by the EU Framework Decision on combating terrorism, reads as follows: "(1) Any serious, violent, criminal act intended to cause death or serious bodily injury, or to endanger life, including by acts against property; (2) where committed outside an armed conflict; (3) for a political, ideological, religious, or ethnic purpose; and (4) where intended to create extreme fear in a person, group, or the general public, and: (a) seriously intimidate a population or part of a population, or (b) unduly compel a government or an international organization to do or to abstain from doing any act". The definition also includes a somewhat repetitive safeguard clause, according to which "[a]dvocacy, protest, dissent or industrial action which is not intended to cause death, serious bodily harm, or serious risk to public health or safety does not constitute a terrorist act". See also EU Council Framework Decision on combating terrorism, 13 June 2002, OJ L 164, 22.6.2002 and Chapter 8.1.

107 *Supra* note 29.

often may be inferred from the material act. The quasi-definition of terrorism in the 1994 Declaration refers to "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons *for political purposes*".[108] The mention of political purposes and terrorist intent in the Declaration is an integral element of terrorist crime and part of the understanding of the phenomenon.

As was pointed out earlier, most of the anti-terrorist conventions and protocols adopted by the UN and its specialised agencies do not require political motivation, although the 'non-justification' clause in the newest instruments can be taken as an attempt to reconcile the sectoral tradition with the view that 'purely' terrorist crimes are those committed for political purposes and with the intention to intimidate. This clause does not, however, affect the definitions of crime in the relevant instruments which remain applicable to a broader category of unlawful acts. Some of the acts criminalised under these instruments, such as hostage-taking, can be and often are used to obtain a ransom or other private gain.[109] At the same time, the sectoral conventions and protocols are also applicable to the more strictly defined offences which require both political motivations and a 'terrorist intent'. Unlike in the definition of piracy,[110] there is no explicit requirement that the acts in question have to be committed for private ends. Furthermore, the types of acts criminalised under the sectoral conventions and protocols are those typically committed for terrorist purposes, and they closely reflect what have been the prevalent *modi operandi* of terrorist groups at the time the respective instruments were drafted.[111] The clear anti-terrorist focus of these instruments can therefore not be denied, even though they can occasionally be applied to acts carried out for other criminal purposes.

Some commentators have nevertheless regarded the over-inclusiveness of these instruments as a problem, which has led them to submit that, when implemented in national law, the offences defined in the sectoral conventions should

108 UN Doc. A/RES/49/60, Annex (emphasis added).

109 See, for instance International Crisis Group, 'Yemen: Coping with Terrorism and Violence in a Fragile State', *ICG Middle East Report* No. 8, 8 January 2003.

110 United Nations Convention on the Law of the Sea, 10 December 1982, UNTS Vol. 1833, p. 396, art. 101. Ronzitti has considered it clear that acts of violence committed for political ends cannot be regarded as piracy. He has also pointed out that piracy and maritime terrorism were clearly considered as separate issues at the time of the drafting of the 1988 SUA Convention. See Natalino Ronzitti, 'The Law of the Sea and the Use of Force Against Terrorist Activities', in Ronzitti (ed.), *Maritime Terrorism and International Law*, Martinus Nijhoff Publishers, 1990, 1–14, at 2.

111 Hostage-taking is the most ambivalent offence in this respect, since it is often used only to obtain ransom.

be accompanied by a requirement of the terrorist intent. Scheinin has held that such a 'cumulative approach' combining terrorist intention with the definitions laid down in the UN anti-terrorist instruments would form "a safety threshold to ensure that it is only conduct of a terrorist nature that is identified as terrorist conduct".[112] Similar proposals were recently made in the IMO Legal Committee negotiations on the Protocol to amend the 1988 SUA Convention, as well as in the negotiations on the 2005 Council of Europe Convention on the Prevention of Terrorism.[113] Both instruments rely on an enumerative method in the definition of offences, whereby they refer to the offences defined in the UN anti-terrorist conventions and protocols.[114] The attempts to qualify the existing offences by adding a 'terrorist intent' were countered in both negotiations with the argument that doing so would undermine the UN *acquis*: the universal condemnation of the acts within the scope and as defined in the UN anti-terrorist conventions and protocols. From this point of view, bringing in an additional intent requirement seemed not only unnecessary but also harmful. Much as in the case of the 'cumulative approach', however, the obvious reason for proposing such a qualification was the wish to avoid overbroad criminalisations.

In the scholarly debate, the terrorist motive has sometimes been seen as the most important element of the definition, or a substitute for a definition. It has thus been submitted that terrorism is not a crime, but a different and more dangerous dimension of crime,[115] or an aggravating factor in violent crime.[116] Wattad has submitted that "[t]errorism is nothing but common crimes although committed with an overriding motivation of imposing extreme fear on the nation as such".[117] While such comments share some ground with the claim of the limited usefulness of the notion of 'terrorism' in legal analysis, they also seek to highlight the factor that gives terrorist crimes their specificity. It is nevertheless worth asking why the primary focus should depend on the actor's subjective state of mind instead of his or her objective conduct.[118] The terrorist motive, where it is one element of the crime in the universal anti-terrorist instruments, has not been defined in substantive terms: it does not embody the political goals to be furthered by the prohib-

112 Scheinin, *supra* note 92, para. 38, at 11.

113 See Chapter 7.2. and 7.3.

114 Omitting the Tokyo Convention and the Convention on the Marking of Plastic Explosives, *supra* note 12.

115 Fletcher, *supra* note 94, at 900.

116 Mohammed Saif-Alden Wattad, 'Is Terrorism a Crime or an Aggravating Factor in Sentencing?', 4 *JCIC* (2006), No.1, 1017–1030.

117 *Ibid*., at 1017.

118 Bassiouni, *supra* note 45, at 783.

ited conduct, but merely refers to the purpose of the act in terms of its nature or context which may reveal the objective of spreading terror (intimidation of a population) or forcibly imposing a political change (compelling a government or an inter-governmental organisation). The standard formulation of the 'terrorist motive' therefore lays emphasis on the objective features of the crime, such as the unpredictability, arbitrariness, or particular atrocity of the act, rather than on the subjective intent.

Furthermore, as Weigend has pointed out, the requirement of a 'terrorist intent' in addition to the other elements of a terrorist offence, say, a terrorist bombing, does not necessarily raise the threshold for prosecution.[119] If a criminal act is one of those typically committed by groups or individuals for terrorist purposes – and it should be recalled that the sectoral strategy amounted to criminalising selected acts that fall precisely in this category – the existence of a terrorist intent can be presumed unless the accused can make it clear that he or she has acted on personal or other private motives. As Weigend has noted, "a person who has intentionally killed someone or taken a person hostage or seized an aircraft will, if the circumstances do not indicate an interpersonal motive or an interest in material gain, hardly be able to convince the court that he did *not* act to 'intimidate a population' or 'compel a government to do something or to abstain from doing something".[120]

On balance, it would seem that the political agenda which terrorist crimes are meant to serve – including political objectives expressed in religious terminology – is the most significant feature distinguishing terrorism from other types of violent transnational crime. Political motivation is an essential part of the understanding of terrorist crimes as distinct from piracy or organised crime,[121] and a fea-

119 Thomas Weigend, 'The Universal Terrorist: The International Community Grappling with a Definition', 4 *JCIC* (2006), 912–932, at 931–932.

120 *Ibid.*, (original emphasis).

121 Bassiouni and Vetere have discussed the similarities between organised crime and terrorism, including the fact that organised crime may seek to control or influence political processes and outcomes, and that, in some regions, close contacts and alliances between criminal organizations and insurgent guerrilla groups may emerge. Those authors have nevertheless pointed out that "whatever these links may be, they should not lead to confusing organized groups and terrorist groups". M. Cherif Bassiouni and Eduardo Vetere, 'Organized Crime and its Transnational Manifestations', in M.Cherif Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 883–903, at 892–894. The essential difference between the two lies in the private vs. political aims they pursue.

ture consistently emphasised in the UNGA resolutions on terrorism.[122] As Cassese has pointed out, political, ideological or religious motivation is important

> because it serves to differentiate terrorism as a manifestation of *collective criminality* from criminal offences (murder, kidnapping and so on) that are instead indicative of *individual criminality*. Terrorist acts are normally performed by groups or organizations, or by individuals acting on their behalf or somehow linked to them. A terrorist act, for instance blowing up a disco, may surely be performed by a single individual not belonging to any group or organization. However, the act is terrorist if the agent was moved by a collective set of ideas or tenets (a political platform, an ideology or a body of religious principles), thereby subjectively identifying himself with a group or organization intent on taking similar actions. It is this factor that transforms the murderous action of an individual into a terrorist act.[123]

The 'cause', or political motive involved effectively distinguishes terrorism from other types of crime. It also explains many other features of terrorism such as the 'absence of guilt' which Fletcher listed among its key characteristics, and which is related to the perpetrator's belief in the higher goal he or she is seeking to achieve by the criminal act.[124]

The UN legal response to international terrorism is fairly consistent in treating terrorism as violent crime committed for political purposes in order to intimidate or compel; what has muddied the waters, however, is that the sectoral treaties also apply to offences that do not display these characteristics. There is nevertheless no reason to exaggerate the impact of the 'overbroad' scope of the sectoral conventions and protocols on the definition of terrorism. While the dividing line between terrorist and other crimes cuts directly through the sectoral instruments, they, too, have contributed to a common understanding and agreement on what constitutes terrorism. When committed for political purposes and with a terrorist intent as they frequently are, the acts defined in them would also fall under the

122 Reference can be made to the 1994 Declaration, which defined terrorist acts as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes", UN Doc. A/RES/49/60, para. 3.

123 Cassese (2006), *supra* note 29, at 937.

124 In this regard, terrorism comes close to massive violence orchestrated by the state. One of the most perplexing features of genocide and crimes against humanity is that under certain circumstances almost anyone can become a perpetrator. The psychological techniques that make political violence seem justified have been discussed in various criminological theories; see e.g. Frank Neubacher, 'How Can it Happen that Horrendous State Crimes are Perpetrated?', 4 *JICJ* (2006), 787–799.

generic definition of terrorist acts.[125] There is much reason to emphasise "the substantial convergence of views on the general definition" of terrorist act, as Bianchi has done,[126] and to caution against discarding too easily the essential thrust of the UN *acquis*. At the same time, the existence of two different approaches and legal traditions with regard to international terrorism in the UN has undoubtedly contributed to the widely shared view that there is no agreement on the definition of terrorism. That it has become nearly commonplace to refer to the inherent ambiguity of the concept of terrorism also reflects the state of the negotiations on the Comprehensive Convention on the Suppression of Acts of Terrorism which have still not been concluded.

1.3. Why a Definition? The Issue of a General Convention against Terrorism

Is it worthwhile to try to define terrorism? The question can be raised in view of the decade-long and to this date unsuccessful quest for a 'general' or 'comprehensive' UN convention against terrorism. Why has the final outcome been elusive – surely not for any lack of effort? This question has been deliberately formulated to mirror Julius Stone's powerful criticism of the UN General Assembly's 1974 definition of aggression.[127] According to Stone, the much-praised consensus definition of aggression was "but *an agreement on phrases with no agreement as to their meaning*".[128] As finally worded, the definition did not, in his view, resolve the critical conflicts that had for many years prevented progress in the negotiations. Rather, it "codified or otherwise preserved them within the intricately interwoven equivoca-

125 The Draft Comprehensive Convention recognises this in a provision regulating its relationship to the sectoral anti-terrorist conventions. According to art. 2*bis*, any of the sectoral instruments would prevail as *lex specialis* when the concerned states are parties both to it and to the Comprehensive Convention and both are applicable to the particular act. Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth Session, 28 January–1 February 2002, UN Doc. A/57/37. Kolb, *supra* note 13, at 241, referring to the sectoral and the global approach, has also pointed out that "the merging of the two streams can easily be achieved at the level of definition".

126 Andrea Bianchi, 'Enforcing International Law Norms Against Terrorism: Achievements and Prospects', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, 392–534, at 496. Similarly, Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, 2006, at 116.

127 Julius Stone, *Conflict Through Consensus: United Nations Approaches to Aggression*, The John Hopkins University Press, 1977 (Stone 1977a); Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression', 71 *AJIL* (1977), 224–246 (Stone 1977b). See also UN Doc. A/RES/3314(XXIX), 14 December, 1974.

128 Stone (1977a), *supra* note 127, at 143 (emphasis in the original).

tions, contradictions or silences of what its authors presented as a 'delicately balanced' text, based on 'fragile' consensus".[129] A clear definition of aggression that would once and for all make aggression distinguishable from other uses of force was for him illusionary, and perhaps not worth searching for.[130] While there are many differences between the concepts – and legal definitions – of aggression and terrorism, respectively, and some responses have been given above as to the more usual queries concerning the "definition of terrorism", Stone's comments provide a basis for deepening the consideration of what a successful outcome on the "issue of a comprehensive convention" could eventually amount to, over and above of being a long-awaited conclusion of a difficult negotiation process.

One of Stone's criticisms was related to the caution of the negotiators of resolution 3314(XXIX) to introduce any new interpretations of the UN Charter provisions on the use of force, while their statements after its adoption hailed the groundbreaking qualities of the new definition. In stating that it could not be interpreted as in any way affecting the scope of the relevant provisions, the definition in fact 'reimported the uncertainties of the Charter'.[131] As for the Draft Comprehensive Convention, there is also a reason to distinguish any ungrounded expectations from what its true potential could be. The absence of a universal definition of terrorism has often been regarded as a major impediment to effective action against the scourge,[132] as well as a factor encouraging future terrorism.[133] In a similar manner, the lack of 'an overarching legal framework' has been seen as affecting the implementation of the existing anti-terrorism conventions and protocols, which "do not agglomerate into a coherent whole".[134] The protracted negotiations on the Comprehensive Convention against terrorism have been described as 'a quest for a common understanding of terrorism'.[135] Certain of these comments seem either to overlook the extent of common understanding that is reflected in the existing network of conventions and protocols and the other operational tools developed by both the General Assembly and the Security Council to combat terrorism, or to assume that a universal definition would be applicable to the existing

129 *Ibid*., at 21.

130 *Ibid*., at 16.

131 Ibid., at 26.

132 Gerhard Hafner, 'The Definition of the Crime of Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 33–43, at 35.

133 Schmid (2004), *supra* note 45, at 378 and 380.

134 Jörg Friedrich, 'Defining the international public enemy: the political struggle behind the legal debate on international terrorism', 19 *LJIL* (2006), 69–91, at 71.

135 *Ibid.*

UN conventions and protocols, moulding them into a 'coherent whole'. It should not be taken for granted that an agreement on a generic definition would have an impact on how these instruments are applied; after all, they do not deal with 'terrorism' but with independent offences with self-contained definitions.

As noted earlier, the draft outcome of the negotiations on the UN Comprehensive Convention contains an explicit provision that is meant to preserve the *acquis* of the existing conventions and protocols and make the Comprehensive Convention a residual instrument.[136] In this sense the Draft Convention seems to share the same approach to the preceding instrument(s) as resolution 3314, but the sectoral conventions and protocols, unlike the broad provisions of the Charter in articles 2(4)[137] and 51,[138] contain few uncertainties, limited in scope and precisely formulated as they are. Although produced in a piecemeal manner, the sectoral instruments do form a fairly coherent whole as to the basic obligations and definitions of crime. The generic definition of terrorist act in the Draft Comprehensive Convention would only complement the existing network of conventions by filling the gaps between specific criminalisations. Furthermore, the initiation of the negotiations on the Comprehensive Convention in 2000, as foreseen already in several UNGA resolutions,[139] was not directly related to any operational failure in the application of the sectoral instruments. Neither has the absence of agreement on the Comprehensive Convention been an obstacle to quite far-reaching practical cooperation within the UN system.[140] The reasons for launching the negotiations on the Comprehensive Convention were eminently political, and so are the main obstacles to reaching an agreement. Suffice it to say that the symbolic value of agreeing on a definition of a terrorist act at the global level would outweigh the added value of the Comprehensive Convention in legal terms. The UN High Level Panel rightly pointed out in 2004 that the stakes were, rather, related to the credibility of the UN, in particular the General Assembly, in the action against terrorism: "lack of agreement on a clear and well-known definition undermines the

136 Draft Comprehensive Convention, art. 2 bis; *supra* note 125.

137 Containing the general prohibition of the use of force.

138 Containing the provisions on the right to self-defence.

139 UN Doc. A/RES/52/165, Preamble, para. 8; UN Doc. A/RES/53/108, Preamble, para. 8; UN Doc. A/RES/54/110, para. 13.

140 Reference can be made to both UNSC action and to the conventions and protocols adopted after 2001, as well as to the UN Global Counter-Terrorism Strategy and Action Plan of 2006, which were adopted without a vote. For the strategy, see *supra* note 90.

normative and moral stance against terrorism and has stained the United Nations image".[141]

The outstanding issues in the context of the negotiations on the Draft Comprehensive Convention do not have much bearing on the questions related to the 'definition of terrorism' discussed above. As will be discussed in more detail in Chapter 2, the disputed article is not related to the generic definition of a terrorist act or the relationship between the Comprehensive Convention and the earlier UN anti-terrorist instruments, although these issues are often mentioned in the same context.[142] The area of disagreement is confined to the formulation of an exemption clause that would settle the scope of application of the Convention with regard to the activities of the armed forces of a state and possibly other parties to an armed conflict.[143] This means that the remaining legal uncertainties are not related to the essential elements of the generic definition intended to be applicable mainly in times of peace. Given the intractable nature of the dispute about the "military carveout", however, there is reason to ask whether the problems identified by Stone apply, on a smaller scale, to this exemption clause, and how the exemption clause relates to the definition.

First of all, it is recalled that the UN General Assembly's approach to terrorism has evolved over time. While the present dispute echoes the problems that led in the 1970s to the failure of the first negotiations on a general convention against terrorism, a gradual acknowledgement of the criminal nature of terrorist acts has narrowed down the scope of the disagreement. The first resolutions of the General Assembly on measures to eliminate international terrorism reflected a characteristic ambiguity as to what would be the proper approach to terrorism. They condemned terrorism while making it clear that repressive acts by colonial, racist and alien regimes which denied peoples their right to self-determination and independence were also to be condemned and recognising the legitimacy of peoples' struggle against such regimes. Even though the General Assembly fell short of justifying outright the use of armed force in the exercise of the right of self-determination, many non-aligned delegations held that this was a legitimate

141 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, para. 159; See also 'Uniting against terrorism: recommendations for a global counter-terrorism strategy', Report of the Secretary-General, UN Doc. A/60/825 of 27 April 2006.

142 They are part of the 'final package' in accordance with the common method in negotiations whereby nothing is agreed unless everything is agreed.

143 See Chapter 2.2.3.2.

option.[144] Conceptually, the debate focused on the question of possible perpetrators (individuals, states, national liberation movements), and the main question was whether the political purposes for which violent acts were carried out should be decisive for their classification as criminal or justified. The other view, which later gained ground, regarded terrorist acts as unlawful regardless of their underlying motivation.[145]

The focus on perpetrators and their motives obviously made it difficult to devise any general rules. As Koskenniemi has pointed out, terrorism cannot be defined according to the motives of the perpetrators:

> Terrorism is amorphous: any clear-cut definition will be both over- and under-inclusive – any broad standard creates the possibility of illegitimate constraint [...] A definition of terrorism that ignores motivations is unjust: surely the fight against fascism, racism, or alien domination might sometimes require unorthodox measures. But a definition of terrorism that takes motivations into account provides a dangerous licence: what is 'fascism', 'racism', or 'alien domination', after all?[146]

The emergence in the UN General Assembly of a consensus view on the terrorism item, as well as the building of the network of anti-terrorist conventions and protocols, was closely linked to the separation of terrorist methods from political motives of the perpetrators. It was ultimately recognised that there could be no alternative to the consistent outlawing of certain violent methods, irrespective of the circumstances in which they were resorted to. In 1994, the UN International Law Commission (ILC) concluded that "terrorism practiced in any form is universally accepted to be a criminal act".[147] The question of certain special circum-

144 The relevant resolutions included, most notably, the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625(XXV), 24 October 1970.

145 Report of the Sixth Committee, UN GAOR, 27th session, Agenda item 92, Annexes 2–9, UN Doc A/8969 (1972). See also Lambert, *supra* note 42, at 33–34.

146 Martti Koskenniemi, 'Solidarity measures: State Responsibility as a New International Order?', 22 *BYIL* (2001), 337–356, at 352. As is clear from the quotation, however, Koskenniemi saw problems in any definition of terrorism.

147 ILC Final Draft Statute and Commentary (1994) for an International Criminal Court, reproduced in Sir Arthur Watts, *The International Law Commission 1949 – 199*8, Oxford University Press 1999, Vol. II, the Treaties, 1147–1765, commentary to art. 20. para. 21, at 1484.

stances, such as national liberation and resistance to occupation, continued to be part of the discussion, but was relegated to the status of an exception.

Secondly, the historical development of "the definition of terrorism" can be seen as a side issue in the great UN achievement of advancing national self-determination. In this sense, the concept of 'generations' of international terrorism referred to above[148] can shed light on the problems related to the Draft Comprehensive Convention. As the issue emerged in the early 1970s, and subsequently prevented an agreement on a common stance against terrorism for more than a decade, it was related to the action of the first generation of international terrorists, which used violent methods to further ethnic-nationalistic goals and to fight colonial domination or foreign occupation. The near-completion of the process of decolonisation, the end of the Cold War, and the initiation of the Middle East peace process with the hopes it gave of a lasting solution to the Palestine question, made it easier to reach consensus on the condemnation of terrorism and to adopt the Declaration on the measures to eliminate terrorism in 1994. The Declaration may also have reflected increasing recognition of the transformation of international terrorism from mainly ethnic-nationalistic terrorism to politically more diffuse and fanatical forms of terror violence, and of the seriousness of the threat it posed.[149]

For Stone, one of the weaknesses of the 1974 definition of aggression was that it built in itself the conflicts that had preceded its adoption and could not prevent them from re-surfacing. Only a few months after the adoption of the consensus definition, its terms were invoked in the context of the Cyprus crisis by both sides who accused each other of aggression.[150] Does the 'definition of terrorism' possess the same potential?[151] Some of the recent developments seem to point in this direction. As stated earlier, the critical missing elements of a consensus on the comprehensive convention are not part of the definition of the crime but of the exemption clause that would draw a line between the conventional regime on the one hand, and international humanitarian law on the other. Interestingly, this is an area where the identity of the perpetrator still plays a role.

148 See Introduction, section 1 (The Change of Terrorism).

149 Eric Hobsbawm has submitted that indiscriminate murder as a form of terrorism emerged in the 1970s. As he points out, however, the fatwa (by Usama bin Laden's religious advisers) which formally authorised the killing of innocents was not given until 1992. See Hobsbawm, *Globalisation, Democracy and Terrorism*, Little, Brown Book Group, 2007, at 124.

150 See Introduction, section 1 (The Change of Terrorism), at 13.

151 As suggested by Koskenniemi: "Everyone would try to include his adversaries in the definition while keeping his allies and his own (actual or potential) activities outside it." See Koskenniemi, *supra* note 146, at 352.

The existing consensus formulation of the exemption as set out in the 1997 Terrorist Bombings Convention and replicated in a number of subsequent instruments has provided a basis for compromise in the Comprehensive Convention as well.[152] While the Terrorist Bombings Convention has been widely ratified, the chosen formulation in the exemption clause concerning activities of armed forces of states, "inasmuch as they are governed by other rules of international law"[153] has been subject to divergent interpretations. Thus, Egypt declared upon ratification that it would be bound by that particular paragraph of the Convention only "insofar as the military forces of the state, in the exercise of their duties, do not violate the rules and principles of international law", and the United States stated as its understanding that the Convention simply "would not apply" to the military forces of a state in the exercise of their official duties.[154] These interpretations are related to the question of 'state terrorism', but the other key aspect of the exemption, namely the applicability of the Convention to action by armed groups in an armed conflict, or movements of national liberation, has not been less controversial, and has continued to divide opinions after the adoption of the Convention. When ratifying the Terrorist Bombings Convention, Pakistan stated that nothing in the Convention would be applicable to struggles for the realization of right of self-determination launched against any alien or foreign occupation or domination. Several states have made a similar declaration with regard to the mini-definition in Terrorist Financing Convention.[155] Other states have objected to these understandings, taking them to amount to reservations that are directed against the object and purpose of the Convention.[156]

The legal effects of these declarations are not clear. A partial legal solution to the issue of violent acts carried out by national liberation movements was found already in 1977 in the Additional Protocol I to the Geneva Conventions which defines conflicts "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 international armed conflicts, with the rights and obliga-

152 *Supra* note 63.

153 Terrorist Bombings Convention, art. 19(2); *supra* note 64.

154 For the declarations as well as the related objections and communications, see Multilateral treaties deposited with the Secretary-General, available at untreaty.org/ENGLISH/Status/Chapter_xviii/treaty9.asp. United Nations Treaty Collection, http.www.treaties.un.org

155 *Ibid*., see the declarations by Egypt, Jordan, and Syria.

156 *Ibid.*, see the objections of Austria, Belgium, Canada, Denmark, Finland, France, Germany, Hungary, Ireland, Japan, Latvia, the Netherlands, Norway, Poland, Portugal, Spain, Sweden, UK, and US.

tions that belong to the parties to such conflicts.[157] While the practical value of the relevant provision of Protocol I has been limited, it has contributed to the strengthening of the argument asserting the criminal nature of terrorism under all circumstances.[158] One interpretation at hand is therefore that the declarations in question are not meant to unilaterally exclude the application of the Convention in situations of alien occupation or colonial domination, but rather confirm the legal standard that recognises such situations as armed conflicts.[159] It should also be pointed out that these communications have not been presented as reservations intended to modify the legal effect of the treaty in question but as interpretative declarations. Where they are so termed, the authors of the declarations seem to indicate that their understanding is covered by the terms of the Convention. However, since Additional Protocol I to the Geneva Conventions has not been universally ratified,[160] and the formulation of the exemption clause does not seem to embrace it,[161] this conclusion is not evident. Moreover, due to the broad and political formulations of the declarations, it may be asked whether the activities to be protected are lawful acts of war or terrorist acts.[162] A similar unclarity accompanies the exemption provisions in the regional conventions, some of which contain express provisions to the same effect as the unilateral declarations referred to above excluding from their scope armed struggle for national liberation.[163] In particular,

157 Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, UNTS No. 17152, art.1(4).

158 For the limited use made of this provision, see Chadwick, *supra* note 50, at 178; Theodor Meron, 'The Time has Come for the United States to Ratify Geneva Protocol I', 88 *AJIL* (1994), 678–686.

159 Pakistan's declaration expressly states that the understanding is "in accordance with international law".

160 Notably not by Israel and the United States.

161 For more detail, see Chapter 2.2.3.2.

162 See the objections to Pakistan's declaration to the Terrorist Bombings Convention: many of the objecting states point out that the declaration is contrary to the object and purpose of the Convention, which is to suppress terrorist bombings irrespective of where they take place and of who carries them out. http://treaties.un.org.

163 The Arab Convention for the Suppression of Terrorism of 22 April 1988, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 158–174, art. 2(a); Convention of the Organisation of the Islamic Conference on Combating International Terrorism, adopted on 1 July 1999, *International Instruments*, 188–209, art. 2(a); OAU Convention on the Prevention and Combating of Terrorism, adopted on 14 July 1999, *International Instruments*, 210–225, art. 3(1).

they recurrently contain the phrase "in accordance with international law", which makes them open to different interpretations.[164]

Moreover, violent acts intended to cause death or serious bodily injury, if directed at a civilian population with the intent of spreading terror, would amount to terrorist violence and be punishable as such even in the context of an armed conflict. In other words, the struggle for self-determination or against an alien occupation may serve as a justification for the use of force in the sense of *jus ad bellum*, but it does not affect *jus in bello* which regards terrorism as an inadmissible method of combat.[165] The controversy that still has prevented the conclusion of the negotiations on the Draft Comprehensive Convention is mainly related to the *jus ad bellum* aspects of the safeguard clause, also in the sense of defining the borders of the state monopoly of legitimate use of force. In this sense, the exemption can be seen as one about distribution of power, authority and legitimacy between states and armed groups – comparable to the issues that, according to Stone, were at stake in the definition of aggression.[166] As will be shown later, however, the practical effect of the formulation of the exemption clause in the Comprehensive Convention would be fairly limited.[167]

In relation to the definition of aggression, it should be added that Stone's main criticism was not directed towards this definition as a basis for criminalisation. He expressly pointed out that the notion of aggression had two distinct roles, the judicial-criminal and the political-military one, each with specific problems of its own,[168] acknowledging that "the notion of aggression, and definition of it, may [...] be valuable for other purposes, like the trial of individuals for crimes against peace" even if they would not be effective in changing state behaviour.[169] While the concept of aggression relates primarily to state action and only secondarily to indi-

164 Including one which would "resolve any potential conflict between UN and regional instruments", as suggested by Michael De Feo, 'The Political Offence Concept in Regional and International Conventions Relating to Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 113–119, at 119.

165 Whether guerrilla violence against a military target in an armed conflict would be classified as terrorism, is nevertheless open to interpretation, see Hafner, *supra* note 132, at 38.

166 Stone (1977a), *supra* note 127, at 114.

167 Chapter 2.2.3.2.

168 Stone /1977a), *supra* note 127, at 42.

169 Ibid., at 14. In thirty years, this prediction has proved true as the negotiations on a criminal law definition of aggression making use of the 1974 definition have considerably advanced, while the UN Security Council whose deliberations resolution 3314 was intended to guide, has not to this date made use of it. Special Working Group on the Crime of Aggression, report of the meeting on 29 January–1 February, 2007, ICC-ASP/5/35.

vidual participation in the collective act, the Draft Comprehensive Convention deals with a definition of a crime intended to serve as a model for national legislation and adjudication. From this perspective, a last critical question is whether the general understanding of what constitutes terrorism has crystallised into a customary law criminalisation of terrorist act, and whether the prevailing controversies affect this development.

Opinions differ as to how the continuing disagreement on the scope of the exemption in the draft Comprehensive Convention affects the definition – other than by preventing its entry into force as treaty law. Some writers have pointed out that the question of definition is intrinsically linked to the exemptions concerning certain armed activities[170] and that it would be premature to argue that terrorism could constitute a customary international crime.[171] Referring to the "uncertainties and ambiguities around the existence of a definition or its scope", Duffy has concluded that "international law cannot be said to prohibit or indeed penalise terrorism, according to an understood definition of the term under customary international law".[172] The view that the question of exemptions is of subordinate importance has been defended by Cassese, who has held that a generally accepted definition of terrorism as an international crime in time of peace, has evolved at the level of customary international law.[173] According to Cassese, a customary law crime of terrorism is supported not only by the UN instruments but also by the regional anti-terrorism conventions.[174] As for the status of the terrorist treaty crimes, already in 1997 it was considered that the conventions on aerial hijacking and hostage-taking could have attained the status of customary law because of their universal ratification.[175] Since then, it should be added, all the UN anti-terrorist conventions and protocols adopted before 2000 have attained an increasing

170 Hafner, *supra* note 132, at 37.

171 Saul, *supra* note 3, at 270; Weigend, *supra* note 119, at 926.

172 Duffy, *supra* note 101, at 41.

173 Cassese (2006), *supra* note 29, at 933 and 935; Cassese (2003), *supra* note 29, at 24.

174 The Arab Convention, art. 1(2); the OIC Convention, art. 1(2).

175 "Indeed, in relation to the core of offences which are covered by those multilateral conventions which have achieved wide adherence – such as hijacking and hostage-taking – it might be argued that the general pattern of treaty practice, which includes custody jurisdictional provisions within its obligatory forms of jurisdiction (and which seeks to extend its ambit to the nationals of signatories and non-signatories alike), suggests that not simply hi-jacking, but also a wider core of 'terrorist offences', are subject to jurisdiction according to this principle under customary international law". See David Freestone, 'International Cooperation against Terrorism and the Development of International Law Principles of Jurisdiction', in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 50–67, at 60.

number of ratifications and approached quasi-universality.[176] On the whole, there is little confusion about the criminal law parameters of a definition of a terrorist act.[177] The fact that the controversy is limited to certain exceptions rather than to the definition as such distinguishes the "definition of terrorism" from the problems of the 1974 definition of aggression, which, according to Stone, extended to the very core of the consensus definition.[178]

While the issue of exemptions thus remains contentious, there is less confusion about the criminal law definition of terrorism than ever before, given the UN *acquis* in what are now sixteen anti-terrorist conventions and protocols, supported by a number of resolutions and declarations. Two remarks are nevertheless in order. Firstly, the departures from the consensus enshrined in the Terrorist Bombings and Terrorist Financing Conventions coincide with a number of political developments; not only with the bleakened prospects of a Middle East peace process but also, more generally, with increased distrust between the global North and South, and the polarization of views in the UN General Assembly.[179] It may be that the late 1990s, an exceptionally productive period in the UN law-making, should be seen as a rare window of opportunity also when it comes to closing the remaining gaps in the common understanding of terrorism as violent crime. Secondly, it may be pointed out that the legal issues that are still outstanding with regard to the Draft Comprehensive Convention, while important enough, have overshadowed a much more influential and extensive development which has taken place

176 Cassese has submitted that the speficic acts of terrorism explicitly covered by the sectoral conventions and protocols should be characterised as international crimes proper because "the treaties at issue either restate customary rules or are indicative of customary rules, or have contributed to the formation of customary rules; in other words, they have a legal value that goes beyond the strict 'treaty dimension.'"Cassese (2003), *supra* note 29, at 130.

177 In this regard, a somewhat similar situation existed in the mid-1990s with regard to certain crimes that were to be included in the subject-matter jurisdiction of the International Criminal Court: while the customary status of these crimes was considered clear, there were open questions of definition. See James Crawford, 'The Work of the International Law Commission', in Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press 2002, Vol. I, Chapter 2.1., 23–34, at 32–33.

178 "[E]ven apart from the saving clauses [...] the very text of the Consensus Definition embodied in Resolution 3314 remains besieged by many mutually conflicting interpretations among the States concerned", Stone (1977a), *supra* note 127, at 124.

179 The goal set by the UN World Summit of concluding the negotiations during the 60th session of the General Assembly in 2006 was not reached, but the discussions continued in 2007 and 2008. See also Mahmoud Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention', 4 *JICJ* (2006), No. 5, 1031–1043.

in recent years with regard to the definition of prohibited 'terrorist' acts, both by way of new legal instruments and actions by the UN Security Council, mainly in response to the need to tackle the threat of new kinds of terrorist violence.

1.4. Redefining Terrorism: the 'Prevention Paradigm'

After the step had been taken in 1996 to establish the Ad Hoc Committee with the task of creating a comprehensive network of international conventions to suppress terrorism, three new anti-terrorist conventions were elaborated in the UN General Assembly before the end of the decade. The Terrorist Bombings Convention, the Nuclear Terrorism Convention and the Terrorist Financing Convention reflect a new perception of the terrorist threat and depart from the sectoral strategy that produced the earlier conventions and protocols.[180] It is telling that the three conventions are the first UN legal instruments to use the term 'terrorism'. While the word only appears in the titles of the three conventions, the conceptual problem of defining terrorism was addressed and partly solved in the Convention on Terrorist Financing, at least for the purposes of that convention. As pointed out above, the Terrorist Bombings Convention and the Convention on Nuclear Terrorism also address certain aspects of the 'definition of terrorism' in their respective provisions concerning the scope of application of the convention.

In many respects, these conventions advance the tradition of UN anti-terrorist instruments built on the understanding of terrorism as a phenomenon that can be divided into different forms of violent crime, yet they differ from the earlier instruments in their broad scope, achieved to a large extent by the inclusion of an elaborate set of ancillary offences. The Convention on Terrorist Financing, in particular, also contains elements of a new understanding of the dynamics of international terrorism. This Convention, together with the new instruments elaborated and adopted in recent years, amounts to a redefinition of international terrorism as a legal category. If the sectoral and generic traditions present different – although not irreconcilable – approaches to the criminalisation of terrorist acts, and thus two 'definitions' of terrorism, it can be said that the new developments have introduced a third approach and a new quasi-definition of terrorism. The rest of this chapter will summarise the *acquis* of the sectoral conventions and protocols and put forward some points of departure for understanding this new trend which will be discussed in detail in Part III.[181]

180 The Terrorist Bombings Convention was negotiated and adopted in 1997, the Convention on Nuclear Terrorism was negotiated in 1998 but not adopted until 2005. The Terrorist Financing Convention was negotiated and adopted in 1999.

181 The generic tradition will be discussed primarily in Chapter 2.2.1.

As noted earlier, most of the anti-terrorist conventions and protocols adopted during the past thirty years in the framework of the United Nations, or in regional organisations, apply to clearly limited and well-defined criminal conduct such as the hijacking of an aeroplane, hostage-taking or violent crime endangering the safe navigation of a ship. They address acts that had already been criminalised as serious crimes in most jurisdictions at the time of the adoption of the respective instrument, and aim mainly at improving international cooperation in criminal matters. Thus, it is obligations to prosecute or extradite, and to offer mutual legal assistance that are at the core of the instruments, not the definitions of crimes as such.[182] At the same time, the piecemeal, crime-by-crime approach has created a network of conventions applicable to a wide range of acts typically resorted to by terrorist groups. It can be said that the sectoral strategy was almost exhausted in the late 1990s, when the coverage of the network of anti-terrorist conventions grew more comprehensive. The negotiations on the Draft Comprehensive Convention, which was supposed to preserve the *droit acquis* of the earlier conventions and protocols while filling in the gaps between the various sectoral conventions, revealed that there were not many specific crimes that the existing instruments failed to cover.[183] The value of the new convention has therefore rather been seen in the symbolic and political significance of concluding a long-running dispute about 'the definition of terrorism'.

To illustrate the traditional understanding of the apportionment of responsibility with regard to terrorist violence, reference can be made to a national law definition of terrorism which has been in use for decades and which defines 'terrorism' as "premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents, usually intended to influence an audience".[184] The features this definition shares with the UN understanding of international terrorism are readily recognisable as far as the violent nature and political motives of terrorism are concerned. Terrorist acts can, according to this definition, be committed either by sub-national actors, in which case

182 Weigend, *supra* note 119, at 924–925, mentions also other objectives : "the various attempts at describing the phenomenon of terrorism in national and international legal instruments do not aim at creating new criminal offences, rather they pursue the threefold goal of providing enhanced penalties, permitting special means of investigation and broadening international cooperation".

183 The lack of provisions on the use of firearms and cyberterrorism have been mentioned as the most obvious gaps in the UN network of anti-terrorist instruments.

184 U.S. Department of State, *Patterns of Global Terrorism* 2001, Department of State Publication 10940, 2002, at xvi. The US Government had employed this definition of terrorism for statistical and analytical purposes since 1983. See also Scott Afran, 'Genesis of Suicide Terrorism', *Science* (2003), 1534–1539, at 1534.

they are subject to national criminal law or, to the extent the crimes have international dimensions, to international criminal law. Or, where terrorist crimes are committed by clandestine agents, state responsibility would come into play, and the sending state would have an obligation to investigate and prosecute the crimes. While the definition has not been crafted for criminal law purposes, it can be said to reflect the standard – and fairly straightforward – understanding of the allocation of responsibility for terrorist acts that obtained until recently. What is not addressed by the definition is the responsibility of transnational terrorist networks acting independently of state support or direction. This is an obvious gap in view of the transformation of terrorism described above, and it has been in this direction that the most recent legal instruments have tended to extend the limits of responsibility.

Reference could also be made to how the specific nature of terrorism as private violence was explained by Schmid in 1984:

> One can argue that the power of a State is incomparably bigger than the one of the typically small clandestine insurgent terrorist groups who are only capable of sporadic needlepoint actions. The potential for violence of the two social units is so asymmetrical that the quantitative difference turns into a qualitative one which makes the subsumption of the violent activities of the two under one and the same concept inappropriate.[185]

A striking feature in the text cited is not the different treatment of private and state-sponsored terrorism it advocates – there is a long tradition of defining crimes committed "under color of state authority" or using "the instrumentalities and capabilities of the state"[186] as a distinct category – but the description of non-state terrorist acts as "sporadic needlepoint actions". The more common view today, that major terrorist attacks can be seen to follow a consistent pattern – an Al-Qaida *modus operandi* – and form a constant security threat, has made its way into the legal responses to terrorism. Two alternative approaches have emerged so far to cope with the changed nature of international terrorism: one suggests considering whether some or all terrorist crimes could qualify as crimes under international law; the other advocates continuing the method of drafting legal instruments that oblige states to criminalise and to ensure the prosecution of terrorist crimes while, at the same time, extending the scope of the anti-terrorist criminalisations to new

185 Schmid (1984), *supra* note 45, at 104.

186 M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law,* 2nd rev. Edn., Kluwer Law International, 1999, at 378.

'supportive' and 'organisational' crimes in order to reach beyond the level of the immediate perpetrators.[187]

The first modern anti-terrorist convention, the 1997 Terrorist Bombings Convention introduced a number of new features that have since become a standard for anti-terrorist instruments, including the prohibition of the political offence exception, other provisions facilitating extradition and expanding mutual legal assistance, and the exemption concerning the activities of armed forces. The most important feature of the Convention from the point of view of criminal responsibility, in addition to the broad scope of the principal crime mentioned above, is a comprehensive set of ancillary offences including a new conspiracy-type formulation. This offence, included in article 2(3)(c) of the Convention, reads as follows:

> Any person also commits an offence if that person [...]
> In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 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 the offence or offences concerned.

As will be discussed later, conspiracy-based criminal responsibility has been one of the dividing lines between common law and civil law jurisdictions, and has not so far been universally accepted.[188] The first draft of the Terrorist Bombings Convention included conspiracy as a separate offence but made its application subject to "the constitutional principles and the basic concepts of the legal systems of States Parties".[189] Later on, attempts were made to achieve a consensual definition of conspiracy,[190] but the specific proposals did not receive general support. The

187 The first-mentioned approach will be discussed in Chapter 2, the second in Chapters 6 and 7.

188 Chapter 3.2.1.

189 Art. 2(3): "Subject to the constitutional principles and the basic concepts of the legal systems of States Parties, a person also commits an offence if that person engages in conduct which constitutes participation in, association or conspiracy to commit, or aiding, abetting, facilitating or counselling the commission of an offence as set forth in paragraph 1". The draft thus followed the example of the 1988 UN Drugs Convention, which contains a similar formulation. UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, UN Doc.E/CONF.82/15 Corr.1 and Corr.2, art. 2(1).

190 The proposal read: "Any person also commits an offence if that person agrees with another person to commit an offence as set forth in paragraph 1, and one of the persons takes a concrete action in furtherance of the agreement that manifests the intent of those persons

problem was ultimately solved on the basis of a formula originally contained in the 1996 Extradition Convention of the European Union.[191] This formulation, like the other innovations of the Terrorist Bombings Convention mentioned above, was included with minor changes in all subsequent UN anti-terrorist conventions and protocols. Furthermore, it has been reproduced, slightly reformulated, in the Rome Statute of the International Criminal Court and has been referred to by the International Criminal Tribunal for the Former Yugoslavia in the seminal *Tadić* case as one of the precedents for the Tribunal's extensive interpretation of criminal responsibility based on acts committed with a common purpose. This spill-over from anti-terrorist regulation to the core area of international criminal law has also led to this particular formulation being much more extensively commented on in the scholarly discussion concerning forms of 'collective' or 'extended' responsibility than most of the other provisions in anti-terrorist conventions. Suffice it here to say that it is because of the common purpose offence that the Terrorist Bombings Convention can be seen as the first step, within the framework of the UN anti-terrorist conventions and protocols, to shift attention from terrorism as a violent crime to more indirect ways to contributing to terrorism.

As was pointed out earlier, the main purpose of the new anti-terrorist criminalisations is prevention. Some of the earlier sectoral conventions were also geared towards that goal. The 1991 Convention on the Marking of Plastic Explosives sought to prevent terrorist explosions of airplanes in flight by obliging states parties to ensure that no explosives can be smuggled onboard. The 1980 Convention on the Physical Protection of Nuclear Materials also took a preventive approach by attaching criminal responsibility to such acts as the theft, robbery or embezzlement of nuclear material, which were made punishable because of their potential to cause destruction. For long, these two conventions remained exceptions in a network of conventions and protocols otherwise focused on violent crime.

The newest anti-terrorist conventions have broken with the traditional method of singling out certain violent acts which, defined by their target or method, have been typically resorted to by terrorist groups, and encompass a much broader variety of activities. The definition of the authors, the targets, or the (typically) political nature of terrorist acts has not been questioned. Rather, the new developments

that such crime be committed". According to another proposal, "Any person also commits an offence if that person: a) participates as an accomplice in an offence as set forth in paragraph 1 or 2; b) organizes, directs, or in any other way participates in the planning or preparation of, the commission by a group of persons acting with a common purpose of one or more offences as set forth in paragraph 1 or 2". Both proposals are in file with the author.

191 Convention relating to extradition between the Member States of the European Union, OJ C 313, 23 October 1996, art. 3(4).

have been related to how the material act, the *actus reus* of the crime, is defined. The direction taken has been to criminalise increasingly indirect forms of participation in the crime. In this sense, the 1999 Convention on Terrorist Financing has been a groundbreaking instrument because of the seemingly innocuous nature of the crime of financing which derives its unlawful nature from a connection to terrorist acts. The Terrorist Financing Convention has introduced a new way of thinking about terrorist crimes and provided a powerful model for a number of subsequent criminalisations that cover acts that are only remotely linked to the ultimate violent act. Part and parcel of this development has been the move towards more subjective criminalisations: requirements of a specific terrorist motive, intent or knowledge. In general, the most recent instruments rely increasingly on criminal intent as the definition of the material acts has become increasingly broad, reflecting a changed perception of the threat posed by terrorist acts. In this regard, it is claimed that a critical change has taken place in the international legal responses to terrorism.

CHAPTER 2 TERRORIST CRIMES WITHIN THE FRAMEWORK OF INTERNATIONAL CRIMINAL LAW

2.1. The Framework of International Criminal Law

The concept of 'international criminal law' (ICL) as a special regime has only been used in the recent decades and even then to denote a somewhat ambiguous area of international regulation.[1] Although the history of international criminalisations is long, the development of international criminal law into an autonomous branch of international law is still underway.[2] A particularly important recent develop-

1 The Study Group of the International Law Commission has referred to 'international criminal law' as a special regime, although only in the widest sense of the term. It has also pointed out that it is typical of such broad denominations that they have "neither clear boundaries nor a strictly defined normative force". See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, The Erik Castrén Institute Research Reports 21/2007, Hakapaino 2007, paras. 158, at 84–85 and 173, at 91–92.

2 Barboza has noted that, depending on the point of view chosen, "the history of international criminal law may be very short, even recent, or it may be traced back to rather remote times", see Julio Barboza, 'International Criminal Law', 287 *RCADI* (1999), 13–199, at 31. Triffterer has referred to "the rather young international criminal law", see Otto Triffterer, 'General Rreport, Part I: Efforts to Recognize and Codify International Crimes', Actes du Colloque préparatoire tenu à Hammamet, Tunisie 6-8 juin 1987, 60 *Int' l Rev. Penal L.* (1989), at 35, and has later specified that international criminal law is "a rather new and rapidly extending field in the past 100 years", see Triffterer, 'The Preventive and the Repressive Function of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 137–175, at 142–143. Bassiouni has presented a list of criminal law conventions covering the time period from from 1815 to 1985, see M. Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 3–125, at

ment in this respect has been the consolidation of the rules regarding "the most serious crimes of concern to the international community as a whole" – as aggression, genocide, crimes against humanity and serious war crimes are referred to in the Rome Statute of the International Criminal Court (ICC)[3] – into a coherent body of law. The crimes under the jurisdiction of the ICC are frequently referred to as the 'core crimes',[4] a shortcut term that has gained currency due to its practicality. Descriptive notions such as 'political macro-criminality'[5] reflect the particular characteristics of the phenomenon. As is apparent from the latter concept, the distinctive elements of such crimes include both the scale on which[6] and the exceptional political circumstances in which they are usually committed. Furthermore – and despite of the fact that members of armed groups and other non-state actors

32–33. Often, however, the point of departure for international criminal law as a separate field of international law is set at the end of the World War II. See for instance Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, 2003, at 3.

3 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, Preamble, para. 9.

4 On the use of the term see Werle, *supra* note 2, at 31. When submitting the Draft Statute of an International Criminal Court to the UNGA in 1994, the ILC noted that there was "a common core of agreement" in the Commission on the inclusion of the four crimes in the Statute even though this was without prejudice to the identification and application of the concept of crimes under general international law for other purposes. Report of the ILC on the work of its 46th session 2 May–22 July 1994, UN GAOR 49th session, Supplement No. 10 (A/49/10), para. 3, at 71. The Commission had limited the jurisdiction of the Court "to those crimes under general international law which the Commission believes should be within the jurisdiction of the Court at this stage, whether by reason of their magnitude, the continuing reality of their occurrence or their inevitable international consequences", *ibid.* para. 17, at 77–78. See also the comments of the Chairperson of the Preparatory Committee for the ICC describing the trend that emerged in favour of limiting the jurisdiction of the Court to the 'core crimes': Adriaan Bos, 'The Experience of the Preparatory Committee', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 17–27, at 24.

5 The term has been commonly used in German-language discussion as '*politische Makro-Kriminalität*'. Ambos has defined '*Makrokriminalität*' as "systemkonforme und situationsangepasste Verhaltensweisen innerhalb eines Organisationsgefüges, Machtapparates oder sonstigen kollektiven Aktionszusammenhangs", distinguished both from common crime and from certain specific forms of criminality such as terrorism, economic crime, and drug trafficking. See Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2. Auflage, Duncker & Humblot, 2004, at 50 (footnote omitted). See also Werle, *supra* note 2, at 106. Triffterer (2001), *supra* note 2, at 146, has put forward a different view distinguishing "*micro*-criminality on the *national*" from "*macro*-criminality on the international level" (original emphasis).

6 On the quantitative aspect, see Werle, *supra* note 2, at 244. Triffterer, (2001), *supra* note 2, at 147, has referred to "a dimension so far unimaginable".

and entities can be held responsible for acts of genocide, crimes against humanity, and war crimes – these crimes are often characterised by the active or benign role of the state in their planning and perpetration. The minimum requirement is that such crimes have to take place in a collective context.[7] Another particular feature of crimes under international law is the role of international judicial bodies in applying, enforcing and developing the related substantive and procedural criminal law. International criminal law *sensu stricto* can therefore also be defined as a body of law and procedure related to international prosecution of the most serious international crimes.[8]

As the efforts to codify international criminal law *sensu stricto* have been closely related to international prosecution, there has been an institutional side to the law of the core crimes that has ensured it an internal coherence and served to distinguish it from other international crimes. The constituent instruments of all international criminal tribunals so far – the International Military Tribunals in Nuremberg (IMT) and Tokyo (International Military Tribunal for the Far East, IMTFE), the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the ICC and the Sierra Leone Special Court (SLSC)[9] – define the subject-matter jurisdiction of the respective institutions in an almost

7 As the ILC has pointed out, "Crimes under international law by their very nature often require the direct or indirect participation of a number of individuals at least some of whom are in positions of governmental authority or military command", Report of the International Law Commission on the work of its 48th session , UN GAOR 51st session 6 May–26 July 1996, Supplement No. 10 (A/51/10), Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code), commentary to art. 5, para. 1, at 31. On the role of non-state actors as perpetrators of traditional 'state crimes', see Ambos, *supra* note 5, at 51–52; Bassiouni, *supra* note 2, at 25–26.

8 Danner and Martinez have characterised procedural ICL as a body of law and procedure "uniquely suited to providing accountability for episodes of mass atrocity and to coping with difficult political transformations". Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', Vanderbilt University Law School, Public Law and Legal Theory Working Paper Series, Working Paper No. 04–09, Stanford Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 87, March 2004, at 84–85. Bassiouni, *supra* note 2, at 8, has pointed out that the sources of procedural ICL include both national and international law while it requires national law for implementation.

9 Charter of the IMT, http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm; Charter of the IMTFE, www.yale.edu/lawweb/avalon/imtfech.htm; ICTY Statute, UN Doc. S/RES/827(1993) of 25 May 1993; ICTR Statute, UN Doc S/RES/955(1994), Statute of the Special Court, annexed to the Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone of 16 January 2002, available at http://www.sc-sl.org.

identical manner and encompass a limited number of crimes, namely genocide, war crimes, and crimes against humanity. Aggression – or 'crimes against peace' according to the IMT Charter, a notion that covers planning, preparation, initiation or waging of a war of aggression, or participation in a common plan or conspiracy to commit any such act – was also included in the Charter of the IMTFE, and it appears under special conditions in the ICC Statute.[10] Despite the important developments during the past ten to fifteen years, the 'Nuremberg legacy' and the post-World War II jurisprudence still constitute the foundational image of the core crimes.

Many authors argue that the term ICL in the sense of 'a comprehensive structure of norms relating to international crimes'[11] should only be used with regard to these four crimes and the related rules. So, for instance, Werle, who builds on the German tradition of *Völkerstrafrecht*[12] has distinguished 'international law crimes' (*Völkerrechtsverbrechen*) from 'other international crimes' (*sonstige internationale Verbrechen*), and limited international criminal law to the former category.[13] While many would agree that this is the minimum content of international criminal law,[14] a broader view includes all international criminalisations within the concept of international criminal law and draws the line between ICL *sensu stricto* in the sense of 'the most serious crimes' and ICL *sensu largo* which covers a more heterogeneous field of offences set forth in international criminal law conventions.[15] The reasons for the international criminalisation of such offences include the transna-

10 The Court shall exercise jurisdiction over the crime of aggression once a provision defining the crime and setting out the conditions for the exercise of jurisdiction is adopted in accordance with the appropriate amendment procedures, Rome Statute, art. 5(2).

11 For instance Ambos, *supra* note 5, at 41, has referred to "eine umfassende internationale Strafrechtsordnung". Some authors question the notion of a 'comprehensive structure' and prefer the more subdued term 'project of international criminal law' to denote the totality of efforts to establish such a structure. See Immi Tallgren, *A Study of the 'International Criminal Justice System' – What Everybody Knows?*, Yliopistopaino 2001, at 3.

12 The notion traditionally covers only crimes under international law. See Triffterer (1989), *supra* note 2, at 42; Werle, *supra* note 2, at 30: "Das Völkerstrafrecht umfasst alle Normen, die eine direkte Strafbarkeit nach Völkerrecht begründen". Similarly Ambos, *supra* note 5, at 40–41.

13 See also Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003, at 3, who has defined international criminal law as "international crimes committed by the subjects of international law".

14 Tallgren, *supra* note 11, at 7: "That would be the minimum content of criminal law according to a universal consensus that can not be argued away".

15 Triffterer (1989), *supra* note 2, at 39: "Even though the Nuremberg definition (crimes against peace, war crimes, and crimes against humanity) are generally accepted, a strict

tional nature of the criminal activities which affect several states and render purely national penalisations ineffective – hence the term 'transnational crime'.[16] The offences in the category of transnational crime are defined by treaties, and while they are recognised as crimes of international concern,[17] the relevant conventions do not attempt to create individual liability under international law for them. The criminalisations depend for their implementation on national legal systems, which may lend a special interpretation to the international proscription.[18] Boister has suggested that international criminalisations of this type – issue-specific 'suppression conventions' that create particular 'prohibition regimes' – form a sufficiently coherent regulatory framework to be distinguished from international criminal law as 'transnational criminal law' (TCL).[19] The new denomination would be based on the common features of the conventions in this category: not only the indirect system of enforcement through national judicial systems, but also the limited scope of extra-territorial jurisdiction (quasi- or subsidiary universality) and the difference of the values and interests protected by 'international' criminalisations, on the one hand, and 'trans-national' criminalisations, on the other. What Boister has proposed would be a major step forward in consolidating the structure of international criminal law *sensu largo* by dividing it into two clearly distinguishable and internally coherent parts. It can nevertheless be asked whether the criminalisations under 'TCL' present a sufficiently coherent body to be regarded as an autonomous field of law. Rather, it would seem that the law of the core crimes is a specific and exceptionally uniform category in the otherwise heterogeneous field of international criminal law.

The core of the international law of terrorist crimes as outlined in Chapter 1, which consists of the criminal law conventions and protocols related to acts of terrorism elaborated under the auspices of the United Nations, is undoubtedly part of the broader category of international criminal law *sensu largo* but not as obviously of ICL *sensu stricto*. As a form of political violence, terrorist crimes display a number of similar characteristics as the most serious international crimes. Among

and final limitation [of international criminal law] to these international crimes in the narrow sense is seen as neither necessary nor opportune".

16 Triffterer, (1989), *supra* note 2, at 41.

17 Report of the ILC on the work of its forty-sixth session, 2 May–22 July 1994, UN GAOR 49th session, supplement No. 10 (A/49/10), para. 18, at 78.

18 As Nuotio has pointed out, the "open-ended technique of writing international treaties leaves room for national lawgivers to choose how to live up to the duty to criminalize certain conduct." Kimmo Nuotio, 'Transforming International Law and Obligations into Finnish Criminal Legislation – Dragon' s Eggs and Criminal Law Irritants, X *FYBIL* (1999), 325–350, at 329.

19 Neil Boister, 'Transnational Criminal Law?', 14 *EJIL* (2003), 953–976.

them reference can be made to 'depersonalisation' as a common feature of the most serious international crimes: they do not target the victims as individuals but as representatives of an ethnic, political, national or religious group or other such collectivity.[20] Depersonalisation also applies to terrorist acts which are often defined in terms of their double target: the victims of terrorist attacks may be chosen randomly or because of their being identified with a specific group, but rarely because of their personal identity. The actual victims constitute a secondary target; the primary target is the state, government or intergovernmental organisation to which they can be connected – often only by their presence in a certain public place.[21] One may also refer to the political context in which collective crime – including terrorism – takes place and which provides it the necessary legitimation.[22] In fact, it can be claimed that the existence of a larger group of potential sympathisers is the distinguishing feature of a terrorist group.[23]

Terrorism may be the most prominent example of the crimes that have been difficult to situate – either within the core category of international crimes or outside it. Werle has noted that the proper placement of the crime of terrorism

20 Mireille Delmas-Marty, 'Les crimes internationaux peuvent-ils contribuer au débat entre universalisme et relativisme des valeurs?', in Antonio Cassese and Delmas-Marty, *Crimes internationaux et juridictions internationales*, Presses Universitaires de France, 2002, 59–67, at 67.

21 As Mani has pointed out, "Terrorism reflects a deliberate tactical relationship between the terrorist act and the target. The victims who are instrumentalised to serve the terrorist's purpose may be randomly or deliberately chosen, but there is nothing accidental about the choice of the target government, institution, or actors put on notice through the terrorist act", Rama Mani, 'The Root Causes of Terrorism and Conflict Prevention', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 219–241, at 229.

22 "The perpetrators of state crime are often not considered criminal by those in their own society, since their behaviour conforms to the expectations of others in that society", Frank Neubacher, 'How Can it Happen that Horrendous State Crimes are Perpetrated?', 4 *JICJ* (2006), 787–799, at 789.

23 Jean-François Mayer, 'Terrorism and Religions: Continuity and Change in Political Violence', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 28–35, at 33. See also Alex P. Schmid, 'Why Terrorism? Root Causes, Some Empirical Findings, And the Case of 9/11', presentation at the Council of Europe Conference 'Why Terrorism', 26 April 2007, at 8, available at http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/8_conference, at 32: "The terrorists'constituency and the constituency of their opponents (the citizens of those governments under attack) are in a way the key factors in determining whether terrorism has a future".

in the hierarchy of crimes remains controversial.[24] Boister has mentioned large-scale terrorism as an example of transnational crime that may warrant reclassification,[25] and Cassese has regretted the fact that the jurisdiction of the ICC was not extended to terrorism.[26] Bassiouni has put forward two reasons for not including terrorist crimes in the core category noting that terror-violence could be ipso iure placed in the class of international crimes, were it not, first, for the absence of state involvement and, second, for the concern about trivialising the highest category of crimes.[27] The importance of the former reason has been underlined by Cassese, for whom the element of state involvement, be it promotion, toleration, or acquiescence, is crucial for elevating terrorist acts to the rank of international crimes.[28] With regard to Bassiouni's second reason for not counting terrorism as one of the most serious international crimes, attention can be drawn to Pellet's forceful remark on the need to avoid the banalisation of the core crimes: he argued in 1997 that terrorist crimes – as repulsive, reprehensible and condemnable as they were – could not be seen to be directed at the peace and security of mankind as a whole in the same way as the core crimes. In accordance with the prevailing view of the time, which also strongly influenced the negotiations on the Rome Statute, Pellet concluded that the category of core crimes should be limited to the four crimes of aggression, genocide, crimes against humanity and war crimes – "quatre crimes et quatre seulement!".[29] Six years later, when commenting on the French

24 Werle, *supra* note 2, at 31, has noted that "[o]b über die Kernverbrechen hinaus weitere Delikte, etwa Rauschgiftshandel oder Terrorismus direkt nach Völkerrecht strafbar sind, ist umstritten. Hier befindet sich die Völkerrechtsentwicklung in vollem Fluss". Later, at 44, he refers to "eine gewisse Verwirrung". In his own view, however, at 31, "Ungeachtet der mitunter erheblichen Dimension terroristischen Straftaten gilt: Terrorismus ist als solcher kein Völkerrechtsverbrechen".

25 Boister, *supra* note 19, at 972.

26 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 24.

27 Bassiouni, *supra* note 2, at 98–99.

28 Cassese, *supra* note 26, at 129. In order to qualify as an international crime proper, however, terrorist acts should also 1) show a nexus to an armed conflict, 2) be massive enough to amount to a crime against humanity, or 3) involve state authorities and display a transnational dimension. Under the first two of these conditions, terrorism would be treated either as a war crime or as a crime against humanity. The third variant, however, would constitute an independent crime of 'state terrorism'.See also Chapter 1.3.

29 Alain Pellet, 'Le projet de statut de Cour criminelle internationale permanente – Vers la fin de l'impunité?', in *Hector Gros Espiell Amicorum Liber, Personne humaine et droit international*, Bruylant, 1997, Vol.II, at 1074–1075, cited by Sandra Szurek, 'Le jugement des auteurs d'actes de terrorisme: quels tribunaux après le 11 septembre?', in Karine Bannelier *et al.* (eds.) , *Le droit international face au terrorisme*, Editions Pédone, 2002, 297–319, at 317.

Cour de Cassation's decision of March 2001 in the *Qaddafi* case not to count terrorism among the most serious international crimes entailing denial of immunity from prosecution for foreign heads of state, Pellet pointed out that the events of 11 September 2001 had set off a change in the dominant opinion: "one could plausibly argue that, if the decision had been handed down about a year or so after March of 2001, the response would have (and should have) been different".[30]

The terrorist attacks of 11 September 2001 also triggered a new debate about the potential role of international tribunals in prosecuting terrorist crimes. The arguments raised in favour of such a role have been either practical, related to the limitations of national judicial systems faced with large-scale terrorism, or have reflected a changed view of terrorism as a security threat. Some eminent experts have pointed out that crimes of such magnitude could not be properly handled by national courts and have proposed a specific international tribunal to deal with terrorist crimes.[31] Many others have taken the view that terrorist acts on the scale of the September 2001 attacks would in any event come under the jurisdiction of the ICC as crimes against humanity.[32] Delmas-Marty has agreed with the latter view but, at the same time, has pointed out that this could not possibly be the case with

30 Alain Pellet, 'The Responsibility of Government Leaders for International Crimes of the State', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 289–297, at 295. Similarly Eric David, 'The Issue of Immunity of Foreign Heads of State in Light of the March 13, 2001 Decision of the French *Cour de Cassation* and the February 14, 2002 Decision of the International Court of Justice', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 309–323, at 310, and Salvatore Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French *Cour de Cassation* ', 12 *EJIL* (2001), 595–612, at 609–612.

31 Richard Goldstone, Crimes of War, December 7, 2001, proposed that an ad hoc tribunal be set up by the UN Security Council to deal with the crimes committed on September 11, 2001, http://www.crimesofwar.org/expert/al-goldstone.html. See also *International Terrorism: Legal Challenges and Responses*, Report by the International Bar Association's Task Force on International Terrorism, 2003. For an account of the different views, see Szurek, *supra* note 29. For a sceptical comment on the grounds for internationalising terrorism prosecutions, see Madeline Morris, 'Arresting Terrorism: Criminal Jurisdiction and International Relations', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 63–79.

32 See Roberta Arnold, 'The Prosecution of Terrorism as a Crime against Humanity', 64 *ZaöRV* (2004), 979–1000 (Arnold 2004a) and Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, 2004 (Arnold 2004b). See also M. Cherif Bassiouni, 'Legal Control of International Terrorism: A Policy-oriented Assessment', 43 Harv. ILJ (2002), 83–103, at 90, 101; Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2005, at 75 and 77–83. For a sceptical view, see William A. Schabas and Clémentine Olivier, 'Is Terrorism a Crime against

regard to any and all terrorist acts – a reason for her to doubt the pertinence of the whole concept of 'terrorism' as a generic denomination.[33] The High Level Panel set up by the UN Secretary General in 2004 proposed in its report that acts under the (then) twelve anti-terrorist conventions and protocols should once and for all be declared to constitute crimes against international law.[34] That proposal did not, however, make its way to the UN Secretary General's subsequent report[35] or to the UN Summit Outcome document in 2005.[36]

While the anti-terrorism conventions and protocols form a substantive and constantly growing body of law, they have never been at the forefront of the development of international criminal law. If not marginal, prevention and suppression of terrorism is in any event a secondary concern within this fairly new area of international law. In a doctrinal sense, terrorist crimes seem to be situated in a twilight zone that extends to both sides of the dividing line between 'the most serious international crimes' and 'other international crimes', much along the lines of the 'generic' and 'sectoral' traditions outlined above, although not coinciding completely with them. There are several reasons for this state of affairs, related both to to the specific nature of the terrorist offences as set forth in the UN conventions and protocols and to the particular context in which international criminal law *sensu stricto* has developed. This chapter will attempt to shed light on the latter aspect of the perception and characterisation of terrorism as an international crime, discussing terrorism against the background of the codification of the core crimes.

Humanity?', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 270–276.

33 Delmas-Marty, *supra* note 20, at 62: "Ce qui pourrait amener à douter de la pertinence du concept de terrorisme, tant il regroupe de comportements hétérogènes.". For a similar analysis, see Yann Jurovics, 'Les controverses sur la question de la qualification du terrorisme: crime de droit commun, crime de guerre ou crime contre l'humanité?', in Karine Bannelier *et al.*(eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 95–104, at 101.

34 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, para. 44 b), which proposed a "restatement that acts under the preceding anti-terrorist conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols."

35 'In Larger Freedom: towards development, security and human rights for all', Report of the Secretary-General, 21 March 2005, UN Doc. A/59/2005.

36 2005 World Summit Outcome, 24 October 2005, UN Doc. A/RES/60/1.

2.2. Codifications of the Crime of Terrorism as a Core Crime

2.2.1. The Tradition of State Terrorism: the ILC Draft Code

The classification of international crimes according to their gravity and the danger they pose to international peace and security is a subject that has been extensively studied by the International Law Commission in its work on the Draft Code of Crimes against the Peace and Security of Mankind. Shortly after the post-war international trials, and prompted by authoritative criticism directed against the retroactive application of law at Nuremberg,[37] the UN General Assembly asked the International Law Commission to elaborate the general principles of international law recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the IMT.[38] At the same time, the ILC was also asked to undertake a more comprehensive codification effort with a view to elaborating a Code of Offences against the Peace and Security of the Mankind. The Nuremberg Principles were submitted to the UNGA in 1950,[39] and the first version of the Code of Offences was adopted in 1954, but the work was then postponed until such time as the UNGA could agree on a definition of the crime of aggression. Even after the UNGA adopted resolution 3314 in 1974,[40] it took several years before the work on the Draft Code was resumed. In 1991, the Commission provisionally adopted the Draft Articles which were submitted to the governments for comments. Important changes were still made to the Draft Code before it was finally adopted in 1996.

The scope of the Nuremberg Principles was limited to the three categories of crimes recognised by the Charter and the Judgement of the IMT, but already the 1951 version of the Draft Code contained a much more extensive list of crimes which were deemed to be directed at the peace and security of mankind, such as aggression, armed intervention and annexation, and violation of treaty obligations designed to ensure international peace and security. The list of crimes and the commentaries to them were adopted in 1954 with minor modifications.[41] A striking

37 Hans Kelsen, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?', 1 *Int'l L. Quarterly* (1947), 153–171.

38 UN Doc. A/RES/177(II), 21 November 1947.

39 The Principles were referred by the UNGA to member states for their consideration, UN Doc. A/RES/488(V), 12 December 1950.

40 UN Doc. A/RES/ 3314(XXIX) of 14 December, 1974.

41 1954 Draft Code, arts. 2, 1–12. The Nuremberg Principles as well as the 1951 and the 1954 draft articles, together with commentaries, have been reproduced in Sir Arthur Watts, *The International Law Commission 1948–1998*, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, at 1657–1668 and 1669–1685.

feature of the list of altogether twelve independent offences is that most of them, as was also pointed out in the ILC Commentary, could only be committed by the authorities of a state, even though private individuals could participate in many of the crimes and incur international criminal responsibility in accordance with the rules concerning the ancillary crimes.[42] In a similar vein, the new crimes represented variations of the Nuremberg category of crimes against peace in the sense that they were directed at the sovereignty and territorial integrity of other states although private individuals or civilian populations might also be targeted. This was also true for the crime of terrorism which was defined as

> 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.[43]

The only precedent for addressing terrorist crimes among international legal instruments, the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism,[44] also gave support to the understanding of terrorism as mainly a phenomenon affecting states. The Convention defined terrorist crimes, whether committed by authorities or private individuals, 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 in the general public.[45]

It also contained a prohibition of the encouragement by a state of terrorist activities directed against another state.[46] This understanding of terrorism reflects the tradition of political assassinations that formed part of the original foundations of 20th century terrorism.[47] The notion of states as the ultimate targets of terrorist

42 *Ibid.*, commentary to art. 2, at 1676–1683.

43 *Ibid.*, art. 2, para. 6, at 1679. The term 'terrorism' as such was not defined.

44 Convention for the Prevention and Punishment of Terrorism, adopted on 16 November 1937, 19 LNOJ 23 (1938).

45 *Ibid.*, art. 1.

46 *Ibid.*, art. 2(6).

47 Martin A. Miller, 'The Intellectual Origins of Modern Terrorism in Europe', in Martha Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995, 27–62, at 29. Indeed, the 1937 Convention was drafted in the League of Nations as a response to the 1934 assassination of King Alexander I of Yugoslavia and French foreign minister Louis Barthou. For further detail, see Ben Saul, 'The Legal Response of the League of Nations to Terrorism', 4 JICJ (2006), 78–102.

acts has been occasionally reproduced in more recent anti-terrorist conventions, either in the jurisdictional clauses, which may include as an optional base for establishing jurisdiction the fact that the offence is committed in order to compel a state to do or to abstain from doing an act,[48] or in the so-called terrorist intent, which contains the same formulation.

The emphasis on states as perpetrators of terrorist acts was evident in the 1970 UNGA Declaration on Friendly Relations between States. According to the Declaration, every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[49] The 1994 UNGA Declaration on Measures to Eliminate Terrorism reiterated this prohibition in a more comprehensive way, reminding states of their obligations to refrain from "organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for preparation or organization of terrorist acts intended to be committed against other states or their citizens".[50] The concrete follow-up to the 1994 Declaration, including the further Declaration adopted in 1996, and the establishment of the Ad Hoc Committee tasked to "address means of further developing a comprehensive legal framework of conventions dealing with international terrorism", was nevertheless primarily focused on terrorism as non-state violence.[51]

Private individuals have a prominent place in the current understanding of terrorism, both as victims and as perpetrators, but the various versions of the ILC

48 International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UN Doc. A/RES/52/164, UNTS Vol. 2149, p. 284, art. 6(2)(b); International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229, art. 7(2)(b).

49 UN Doc. A/RES/2625(XXV) of 24 October, 1970. The implications of the declaration on state responsibility for terrorist acts will be discussed in Chapter 9.1.

50 UN Doc. A/RES/49/60 of 9 December, 1994, para. 5(a). The legal characterisation of terrorist acts in para. 3 of the Declaration as "criminal acts calculated to provoke a state of terror in the general public, or a group of particular persons" notably uses the language of the 1937 Convention.

51 UN Doc. A/RES/ 51/210, for the mandate of the Ad Hoc Committee, see para. 9. The 'Further Declaration', annexed to the resolution, addressed, inter alia, grounds for granting refugee status and stated that acts, methods and practices of terrorism as well as "knowingly planning, inciting or financing terrorist acts" are against the purposes and principles of the UN Charter, thus ensuring that such acts fall under article 1 F of the Convention relating to the Status of Refugees, 28 July 1951, UNTS Vol. 189, p.137.

Draft Code of Crimes – until the final 1996 version – drew on the tradition of state terrorism and advanced it.[52] Both the 1954 and the 1991 versions included terrorism as one of the crimes against the peace and security of mankind, and in both versions it was presented in terms of state terrorism. In the 1954 Draft Code, terrorism was situated in the context of unlawful use of force by states; it thus complemented such other offences against the peace and security of mankind as acts of aggression, threat of aggression, preparation of the employment of armed forces against another state, the organisation of armed bands for incursion into the territory of another state, undertaking or encouragement of activities calculated to foment civil strife in another state, or toleration of such activities.[53] Even after the resumption of the work in 1981, offences against the peace and security of mankind were generally understood to be those that have the capacity to threaten the independence and territorial integrity of a state.[54] As for the crimes of terrorism, it was acknowledged that there were different forms of terrorist violence, but, as one member of the Commission observed, the Draft Code should only be concerned with the kind of terrorism which was likely to endanger international peace and security; i.e. terrorism which "[w]hile it might be practised either by individual or by a group [...] derives its international dimension from the fact of state participation in its conception or execution, together with the fact that it is directed against another state".[55]

As the discussion continued in the ILC, several members raised the question whether international terrorism should continue to be restricted to acts that were committed by individuals acting as agents or representatives of a state or whether a broader spectrum of perpetrators, including private individuals, should be covered.[56] The Commission did not, however, deem it possible to deviate from the established line. The 1991 Draft Code included international terrorism as an autonomous crime, but still presented it in terms of a crime against peace, comparable to military intervention. The Commission explained the reasons for confining the article to state terrorism as follows: "Notwithstanding the proportions 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

52 As late as in 1985, the Special Rapporteur mentioned that he had taken the 1937 Convention as a guide for drafting of article 4 on international terrorism, YBILC 1985, Vol. I, at 9.

53 1954 Draft Code, art. 2, paras. 1 to 5, Watts, *supra* note 41, at 1676–1679.

54 YBILC 1985, Vol. I, at 8.

55 *Ibid*., at 14.

56 YBILC 1991, Vol. I, at 228–229. See also YBILC 1986, Vol II, 2nd part, at 46.

possible to consider terrorism by individuals as belonging to the category of crimes against peace, to the extent that such activities are not attributable to a State."[57]

At the same time, considerable attention was given by both the Commission and governments to the possibility of extending the established list of crimes. A 1987 report of the Association Internationale du Droit Pénal (AIDP)[58] also considered the advisability of adding new entries to the list of crimes against the peace and security of mankind. It did not, however, suggest a departure from the traditional state-centred understanding of international crimes *sensu stricto* and limited the proposed extension of the list of crimes to colonialism, apartheid, torture and grave violations of the environment, in the first place, mentioning also the use of nuclear weapons and the preparation of aggression insofar as these two acts should not be seen as already included in the category of crimes against peace.[59] When the Draft Code of Crimes was adopted in first reading in 1991, some of the crimes mentioned in the AIDP Report appeared on the list, namely: 'colonial domination and other forms of alien domination', apartheid, 'systematic or mass violations of human rights' and 'wilful and severe damage to the environment'.[60] War crimes were included only to the extent that they were 'exceptionally serious'.[61] Moreover, illicit traffic in narcotic drugs was included as a new crime and as the first crime in the Draft Code that could be committed by non-state actors.[62] The definitions of some of the earlier crimes were regrouped and modified which kept the total number of crimes at twelve.

State comments on the 1991 Draft Code were in general sceptical as to whether all these crimes were serious enough to be included in the category of

57 For the substantive commentary to art. 24 of the 1991 version, the Commission referred to its 1990 Report, UN GAOR, 45th session, Supplement No.10 (A/45/10), Draft Code of Crimes against the Peace and Security of Mankind (1990 Draft Code), commentary to art. 16, at 28.

58 Triffterer (1989), *supra* note 2.

59 *Ibid*. at 53. The Report shows how recently minds have met as to the precise contours of ICL *senso strictu.* While the approach of the AIDP Report – distinguishing between two categories of crimes – is the same as later, the Report ended up with a list of crimes that was widely different from the established understanding of the core crimes. For instance, 'colonialism' and 'use of nuclear weapons' have not figured in later discussions. And while apartheid was included as a crime against humanity in the Rome Statute, there are doubts about its status as an independent crime; see Cassese, *supra* note 26, at 25.

60 Report of the International Law Commission of the work of its 45th session, 29 April–19 July 1991, UN GAOR 46th session, Supplement No. 10, (A/46/10), Draft Code of Crimes against the Peace and Security of Mankind (1991 Draft Code), arts. 18, 20, 21, and 26, at 243–250.

61 *Ibid.*, art.22.

62 *Ibid.*, art. 25.

crimes against the peace and security of mankind.[63] For instance, the Netherlands wished to limit the Code to those crimes that violate fundamental humanitarian principles, or that by their very nature are likely to preclude the effective administration of justice at the national level and for which individuals can be held responsible, whether or not they are acting in a public capacity.[64] Other governments proposed the deletion of individual crimes such as serious violations of human rights, environmental crimes, drug offences, or the use of mercenaries, albeit without presenting a general definition of or general requirements for a crime against the peace and security of mankind. The scope of the Code was unanimously seen as its most critical feature, and many governments commenting on the 1991 version pointed out that the success of the Draft Code would depend on limiting its scope to the most serious crimes. It is interesting to note in this respect that no state questioned the advisability of retaining 'international terrorism' in the Draft Code. At the same time, the understanding of the crime of terrorism was called into question.The definition of 'international terrorism' in the 1991 Draft Code was more elaborate than that presented in 1954, but its essence remained the same. According to the 1991 formulation, international terrorism encompassed any "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" when committed or ordered by "an individual who is an agent or representative of a State".[65] International terrorism was thus restricted to "terrorism organized and carried out by a State against a State" and distinguished from internal terrorism, which was defined as terrorism "organized and carried out in the territory of a State by nationals of that State".[66]

The difficulties in the selection of crimes showed that the Draft Code had suffered from its lengthy preparation, during which the substantive agenda set by the post-war prosecutions remained to a large extent unchanged.[67] As some of the state comments in the early 1990s pointed out, the ILC did not seem to have taken

63 See 'General Government Comments on the Draft Code of Crimes Against the Peace and Security of Mankind', in M. Cherif Bassiouni (ed.), *Commentaries on the InternationalLaw Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Association Internationale de Droit Pénal, Érès, 1993, 63–94 (General Comments).

64 *Ibid.*, at 69; having regard to these criteria, the Dutch government wanted to limit the Draft Code to the crimes of aggression, genocide, systematic or mass violation of human rights and serious war crimes.

65 1991 Draft Code, *supra* note 60, art. 24, at 249.

66 1990 Draft Code, *supra* note 57, commentary to art. 16, para. 2, at 28.

67 M. Cherif Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind', in Bassiouni (ed.), *Commentaries on the International Law*

into account the changing nature of conflicts and the prevalence of widespread atrocities towards civilian populations by non-state actors. Another problem that, according to the comments, was not addressed, was the relationship between the Draft Code and the existing criminal law conventions. When the work was commissioned from the ILC in 1947, there were few normative sources to draw on, but the situation was obviously different in 1991 after decades of codification and progressive development in international law.[68] Many governments felt that the new list of crimes had been drawn up arbitrarily.[69] Australia noted that the selection left out serious crimes such as piracy, hijacking and crimes against internationally protected persons.[70] The United States pointed out that many of the offences that could be characterised as being directed against the peace and security of mankind had already been recognised and defined in specific conventions, which would make a comprehensive code more or less redundant. This applied not only to war crimes, genocide, and torture, but also to drug offences, slavery, traffic in women and children, piracy, maritime terrorism, aircraft hijacking, aircraft sabotage, crimes involving nuclear material, crimes against officials and diplomats and hostage-taking.[71]

In a similar manner, the substantive content of the 1991 Draft Code – the definitions of crimes – bore marks of the long history of the topic. Terrorism, as noted earlier, was still defined as a crime in the relations between states,[72] making it comparable to the other listed crimes that were either exclusively or primarily 'state crimes'. The Commission's state-centric view of international crimes must also be seen in the light of the parallel discussion on the Draft Articles on State Responsibility, another long-term codification project of the ILC. The subject of

Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind, Association Internationale de Droit Pénal, Érès, 1993, 1–22, at 15.

68 As Allain and Jones have noted, "practically all of the conventional and charter-based sources of international criminal law and international humanitarian law, which substantially, if not entirely, overlap with the subject-matter of the Draft Code, have emerged *since* 1947". See Jean Allain and John R.W.D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind', 1 *EJIL* (1997), 100–117, at 101 (original emphasis).

69 See for instance the comments by the Netherlands, General Comments, *supra* note 63, at 76.

70 *Ibid*., at 63.

71 *Ibid*., at 91.

72 This approach was also shared by some scholars; see for instance Ali Khan, 'A Legal Theory of International Terrorism', 19 *Connecticut Law Review* (1987), 945–972. The article argued that terrorism should be regarded as an international political disorder comparable to a 'dispute' between states within the meaning of article 33 of the UN Charter.

state responsibility was, along with the Nuremberg Principles, one of the original topics of the ILC, and it took more than forty years before the final Articles were submitted to the UNGA, in 2001. The notion of the crimes of state was one of the most controversial aspects of the project from the 1970s onwards nearly until its completion. While there was general agreement that there existed certain obligations which states owed to the international community as a whole, opinions were divided both in the Commission and among states on whether a breach of those obligations or some of them should be referred to as a crime.[73]

The concept of state crime was laid down in article 19, which was part of the Draft Articles on State Responsibility until a very late stage. The scope of the article somewhat overlapped with that of the list of crimes against the peace and security of mankind. The 1996 version of the Draft Articles[74] defined state crimes – or 'international crimes' as they were called – as "breaches of obligations that are essential for the protection of fundamental interests of the international community and are recognized as a crime by the international community as a whole".[75] The article also gave examples of such crimes – aggression, colonial domination, slavery, genocide, apartheid, and serious breaches of an obligation to preserve the human environment [76] – in an enumeration that was reminiscent of the twelve crimes in the 1991 version of the Draft Code and a possible source of the seemingly arbitrary additions to that latter list,[77] given that the codification of state responsibility had long been more advanced than the work on individual criminal responsibility. It may be assumed, on the one hand, that the ongoing work on the Draft Code made it seem pertinent to retain the concept of crimes also in the Draft

73 The work on the Draft Articles began in 1956 and was completed in 2001; see UN Doc. A/RES/56/83. For a historical summary, see James Crawford, 'Introduction', in Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction,Text and Commentaries*, Cambridge University Press, 2002, at 1–60.

74 In 1996, the ILC adopted provisionally, on first reading, the Draft Articles on State Responsibility. See Report of the International Law Commission on the work of its 48th session, 6 May–26 July 1996, UN GAOR, 51st session, Supplement No.10, A/51/10 and Corr.1.

75 *Ibid*., the entire text of art. 19(2) read: "An internationally wrongful act which results from the breach by a state of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime." See also Crawford, *supra* note 73, at 16–20.

76 *Ibid*., art. 19(3), at 131.

77 Commenting, in particular, on colonial domination, apartheid and environmental damage, the UK pointed out the connection to article 19 and submitted that "many of the more objectionable elements", including the three crimes, could be traced to the Special Rapporteur's reliance upon that article"; see General Comments, *supra* note 63, at 89.

Articles on State Responsibility, and, on the other, that the deliberations on the topic influenced the work on the Draft Code and perpetuated its focus on those crimes that could only be committed by states or in the commission of which states would have an important role.

The common foundation of both the definition of the crimes against the peace and security of mankind and the issues dealt with in draft article 19 was the acknowledgement that there are certain fundamental interests shared by the international community as a whole and that a violation of those interests should entail the responsibility of both the states and the individuals concerned. It nevertheless took some time before the concepts of state and individual responsibility were developed enough to be clearly distinguished. The eventual outcome, namely the dropping of the notion of crime from the Draft Articles on State Responsibility in 2001, was obviously influenced by the fact that, at that time, the concept of state crimes was the more abstract of the two notions of international crimes. International crimes entailing individual criminal responsibility were well established for the purpose of actual prosecution and punishment, at either the national or international level, whereas there was no analogous framework for addressing state crimes.[78]

It was not until the crystallisation of the concept of individual criminal responsibility with regard to the core crimes – a process that gained unforeseen speed in the 1990s[79] – that more persistent doubts about the concept of state crimes were raised.[80] At the same time, the establishment of individual criminal responsibility for the most serious crimes strengthened the conceptual basis of article 19; this may have facilitated the common understanding reached in the ILC to discard the term 'crime' while retaining in the final 2001 version of the Articles the concept of exceptionally serious wrongs that give rise to specific consequences in terms of state responsibility. This decision contributed to the internal logic and coherence of the Articles without touching on the subject-matter of the international

78 Crawford, *supra* note 73, at 18–19, referred to the precision required of the definitions of crimes by the *nullum crimen sine lege* principle, as well as the need for an adequate investigation procedure, system of due process, appropriate sanctions, and a system whereby a state could 'purge its guilt'.

79 Luigi Condorelli has characterised the Rome Statute as a codification of the results "of a customary process that took place at exceptional speed" in the 1990s. See Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 107–117, at 116.

80 Crawford, *supra* note 73, at 17, refers to "a fundamental doubt over what it means to say that a State has committed a 'crime', especially now that international law has developed the notion of criminal responsibility of individuals to such an extent".

obligations that might be breached in particular cases. It has been held that the change was primarily terminological as much of the essence of draft article 19 was retained under the new concept of "serious breaches of obligations under peremptory norms of general international law".[81] However, the pertinent articles 40 and 41 in the final version only regulate the consequences of state responsibility for the most serious violations of *jus cogens,* and do not affect the attribution of such acts to the state. The elaborated analyses of state involvement in international crimes that are familiar from international criminal law do not have an equivalent in the area of the international responsibility of states.

In the meantime, the notion of state crimes had left a mark on the way in which international crimes – or those elevated to the status of crimes against the peace and security of mankind – were perceived. As noted above, the appearance of certain crimes, such as colonial domination or environmental damage, in the Draft Code during the 1980s may be traced to the Commission's discussion on state responsibility. As far as terrorist crimes are concerned, it may be assumed that the emergence of the concept of international crimes in the sense of crimes of states contributed to the ILC's obvious fixation on crimes of terrorism defined as those involving states, and thus to the perpetuation of the tradition of the 1937 Convention. Furthermore, the centrality of the question of crimes of states raised the threshold for analysing more thoroughly the challenge posed by non-state actors. It has been noted that the Draft Code, as to its scope *ratione personae*, "suffered from the fact that at the beginning, the Commission had planned to cover not only the responsibility of individuals but also the criminal responsibility of states". Although the Commission ultimately decided to focus solely on the responsibility of individuals, it did not completely exclude the criminal responsibility of states.[82]

The Commission's view of the role of the state in the perpetration of the relevant crimes had nevertheless developed since 1954 and was no longer as categorical as it had once been. The 1991 Draft Code divided the crimes against the peace and security of mankind into three groups according to the degree of state involvement. Aggression and apartheid were set apart as leadership crimes, i.e. crimes that could only be committed by high state officials or political leaders, while certain other crimes, such as genocide or illicit trade in narcotic drugs, were punishable under the Draft Code irrespective of the perpetrator. Two crimes, terrorism and

81 Eric Wyler, 'From 'State Crime' to responsibility for 'Serious Breaches of Obligations under Peremptory Norms of General International Law' ', 13 *EJIL* (2002), 1147–1160. See also Alain Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of State for Internationally Wrongful Acts: A Requiem for States' Crime?', XXXII *NYIL* (2001), 55–79.

82 Bos, *supra* note 4, at 21.

the use of mercenaries would come under the Draft Code "whenever agents or representatives of a State are involved therein".[83] While the list was more structured, and the Commission's understanding of the crimes more nuanced than earlier, the definition of terrorism was still narrow. In any event, it stood in marked contradiction to the understanding of terrorism as private violence that had developed in the sectoral conventions and in the UN General Assembly resolutions during the preceding two decades.

Several governmental comments on the 1991 Draft Code referred to the changed nature of terrorism and advised the ILC to extend its consideration to terrorism as private violence.[84] Australia's comment on the crime of recruitment, use, financing and training of mercenaries[85] pointed in the same direction: it asked why the definition of the crime did not extend to acting as a mercenary although such conduct was recognised as a crime in the 1989 Convention.[86] It was difficult, according to these comments, to understand the limitation of the scope of the two crimes *ratione personae* to agents and representatives of states. As Australia pointed out, if "involvement in mercenary activity is to be an international crime it should be irrelevant to their criminal liability whether the individual responsible for that involvement is linked to a State entity or a non-State entity".[87]

A broader understanding of terrorism emerged in the ILC in 1995, prompted by a further variant of the definition proposed by the Special Rapporteur, which included for the first time acts committed by "an individual [...], as an agent or a representative of a State, or as an individual".[88] It seems, however, that the somewhat

83 1991 Draft Code, *supra* note 60, arts. 23 and 24, at 248–249.

84 General Comments, *supra* note 63, comments by Belarus, at 281; comments by Norway on behalf of the Nordic countries and by the UK, at 282; comments by the US, at 283.

85 1991 Draft Code, *supra* note 60, art. 23, at 248–249.

86 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN Doc. A/RES/44/34, UNTS 2163, p. 96, art. 2.

87 General Comments, *supra* note 63, comments by Australia, at 273.

88 The new text of draft art. 24 proposed by the Special Rapporteur read as follows:

> "1. An individual who, as an agent or a representative of a State, or as an individual, commits or orders the commission of any of the acts enumerated in paragraph 2 of this article shall, on conviction thereof, be sentenced [...]
>
> 2. The following shall constitute an act of international terrorism: undertaking, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create a state of terror [fear or dread] in the minds of public figures, groups or persons or the general public in order to compel the aforesaid State to grant advantages or to act in a specific way." Report of the International Law Commission on the work of its 47th session, 2 May– 21 July 1995, UN GAOR 50th session,

tautological mention of "individual [...] as an individual" in the first paragraph of the definition was a late addition, since the list of specific acts in paragraph 2, namely "executing, organizing, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State" still seemed to refer mainly to state action. Moreover, for the first time there were doubts as to whether the crime of international terrorism should be included in the Code.The adoption by the UNGA of the 1994 Declaration was viewed as having resolved the political problems related to the general definition of terrorism, but not the technical problems related to the need for precision in criminal law.[89] The question was also raised whether every terrorist act would meet the criteria for the inclusion of crimes in the Draft Code. Some members felt that "the scope of the article should not be expanded to include a lone terrorist acting independently without any affiliation to a terrorist organization or a group or any element of organized crime", while others proposed that the cases where an individual act of terrorism could be covered should be specified. State terrorism did not seem to pose a problem as most critical comments regarding the perpetrator concerned acts of terrorism committed by individuals.[90]

For the final version of the Draft Code, adopted in 1996, the Commission drastically cut the list of crimes from twelve to five: aggression, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes.[91] This decision was closely related to the developments that had taken place with regard to the establishment of the ICC. In 1992, the codification of the substantive side of criminal law was once again set aside, as the Commission was asked to focus its attention on the establishment of an international jurisdiction. In 1994, after two years of expedited consideration, the draft of a statute for an international criminal court was submitted to the UNGA. The two instruments were meant to be complementary: unlike the Draft Code, the Draft Statute did not define the crimes under the jurisdiction of the Court but was presented as a 'procedural and adjectival' instrument.[92] It did nevertheless enumerate the crimes and in so doing seemed to take into account some of the criticisms directed at the 1991 Draft Code.

Supplement No.10, (A/50/10), Draft Code of Crimes against the Peace and Security of Mankind (1995 Draft Code), at 58.

89 *Ibid*. at 56.

90 *Ibid.*, at 58.

91 1996 Draft Code, *supra* note 7, arts. 16 to 20, at 83–120.

92 ILC Final Draft Statute and Commentary (1994) for an International Criminal Court, reproduced in Sir Arthur Watts, *The International Law Commission 1949–1998*, Oxford University Press, 1999, Vol. II, Treaties, 1147–1765, (1994 Draft Statute).

The 1994 Draft Statute represented a clear break with the notion of 'state crimes' as an exclusive category of international crimes and focused on the development of international penalisations through multilateral conventions. According to the proposed statute, the Court was to have jurisdiction not only with respect to crimes under general international law[93] but also with respect to certain 'crimes pursuant to treaties', "which, having regard to the conduct alleged, constitute exceptionally serious crimes of international concern". Two criteria were introduced for the selection of treaty crimes that should come under the jurisdiction of an international criminal court. Firstly, such crimes should be defined by a treaty so that an international criminal court could apply the relevant treaty as law in relation to the crime, subject to the principle *nullum crimen sine lege*. Secondly, the treaty should create either a system of universal jurisdiction based on the principle *aut dedere aut judicare*, or the possibility for an international criminal court to try the crimes, or both, "thus recognizing clearly the principle of international concern".[94]

The treaty crimes enumerated in the Annex to the Draft Statute included 1) grave breaches of the Geneva Conventions and their first Additional Protocol, 2) the crime of apartheid as defined in the Apartheid Convention, 3) the crime of torture as defined in the Torture Convention, 4) crimes involving illicit traffic in narcotic drugs as defined in the UN Convention on Narcotic Drugs and Psychotrophic Substances,[95] as well as 5) the crimes defined in six of the then existing eight anti-terrorist UN Conventions, namely unlawful seizure of aircraft,[96] unlawful acts against the safety of civil aviation,[97] crimes against internationally protected persons,[98] hostage-taking and related crimes[99] and unlawful acts against the safety of maritime navigation or the safety of fixed platforms.[100] The traditional

93 *Ibid*., at 1477–1481, art. 20(a)–(d): genocide, aggression, serious violations of the laws and customs applicable in armed conflict, and crimes against humanity.

94 *Ibid*., commentary to art. 20, para. 18, at 1483.

95 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances, 19 December 1988, UN Doc.E/CONF.82/15 Corr.1 and Corr.2.

96 As defined by art. 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted on 16 December 1970, UNTS Vol. 860, No. 12325.

97 As defined by art.1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted on 23 September 1971, UNTS Vol. 974, No. 14118.

98 As defined by art. 2 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted on 14 December, 1973, 21931 UNTS Vol. 1316, p. 205.

99 As defined by art. 1 of the International Convention Against the Taking of Hostages, New York, 19 December 1979, UNTS Vol. 1316, No. 21931.

100 As defined by art. 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 10 March 1988, UNTS No. 29004 (SUA Convention)

definition of the crime of terrorism committed by agents or representatives of states had completely disappeared and been replaced by what could be called 'crimes of terrorism' as defined in the pertinent conventions. This solution proved decisive also for the scope of the Draft Code, which was later limited to those crimes that were not already defined in existing treaties.[101] As noted earlier, the Court was meant to exercise its jurisdiction with regard to these crimes only to the extent that they were exceptionally serious crimes of international concern. Although the proposal to include treaty crimes to the extent that they are exceptionally serious was not taken on board in the negotiations on the ICC Statute, it is notable as an attempt at a differentiated approach to terrorist crimes.

While the limited scope of the final Draft Code of Crimes may be taken to mean that only the crimes that were included can threaten international peace and security, it should be recalled that the view of the ILC as to which crimes meet this requirement has varied from version to version. In its commentaries to the final version of the Draft Code, the Commission recognised "that there might be other crimes of the same character that were not presently covered by the Code",[102] making it clear that the decision to cut the list of crimes down to five was without prejudice to the status of other international crimes. The commentary to article 20 of the 1994 Draft Statute, furthermore, pointed out that the categories of crimes under international law and 'treaty crimes' were by no means mutually exclusive, noting that "on the contrary, there is considerable overlap between them".[103] During the negotiations on the ICC Statute, an originally extensive list of crimes was narrowed down to the most obvious ones for reasons that were related not only to the nature of the crimes in question but also to the need to ensure an

and art. 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome 10 March 1988, UNTS Vol. 1678, p. 29 (SUA Protocol).

101 With the exception of crimes against UN and associated personnel defined in the Convention on the Safety of United Nations and Associated Personnel, 9 December 1994, UNTS Vol. 2051, No. 35457. See also the explanations concerning the crime of genocide which was both a 'treaty crime' and a crime under international law: 1994 Draft Statute, commentary to the Annex, para. 15, Watts, *supra* note 92, at 1482. The reasons given for the exclusion of certain treaties from the Annex of the Draft Statute repeated some of the comments made by states in 1991 with regard to the Draft Code: the Mercenaries Convention was not included as it was not in force, and a number of conventions which prohibited certain conduct were excluded because they did not establish individual criminal responsibility, i*bid*., at 1540–1542.

102 1996 Draft Code, *supra* note 7, para. 3, at 20.

103 1994 Draft Statute, commentary to art. 20, para. 2, Watts, *supra* note 92, at 1477.

expeditious process that would lead to the early establishment of the Court.[104] As Sunga has pointed out, the Rome Statute recognises a more restricted list of crimes than either that reflected in general international law or that proposed at various stages of the International Law Commission's work on the Draft Code.[105] It is also interesting in this respect that the ILC, when elaborating the Draft Statute, had in fact first proposed restricting the Court's jurisdiction *ratione materiae* to 'crimes of an international character defined by treaties', provided that the situation warranted their prosecution at the international level.[106] This proposal reflected the uncertainty as to which crimes would come under the notion of 'crimes under international law'.[107] Even after the adoption of the Rome Statute, it could hardly be said that it was declaratory of existing substantive criminal law.[108]

2.2.2. Terrorism as a Crime against Humanity

When proposing that certain treaty crimes might be included in the jurisdiction of the International Criminal Court, the International Law Commission pointed out that a systematic campaign of terror committed by some group against the civilian population would fall under crimes against humanity, or even under genocide if the campaign were motivated by ethnic or racial grounds. As the some of the members of the Commission noted, "terrorism, when systematic or sustained, is a crime of international concern covered by one or other of the crimes referred to in article 20".[109] This remark does not seem to have been extensively discussed in the ICC Preparatory Committee or in the Rome Conference, although one delegation suggested the inclusion of the most serious terrorist crimes of concern to the

104 See also Rome Statute, art. 10, which contains a clause stating that the provisions on the Court's jurisdiction are not to be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than the Statute.

105 Lyal S. Sunga, 'The Crimes within the Jurisdiction of the International Criminal Court (Part II, Article 5–10)', 6 *Eur.J. Crime,Crim.L.and Crim.Jus.* (1998), 377–399, at 378.

106 1994 Draft Statute, commentary to Part III, paras. 2–5, Watts, *supra* note 92, at 1473–1474. See also James Crawford, 'The Work of the International Law Commission', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 2.1., 23–34.

107 Crawford, *supra* note 106, at 31.

108 *Ibid*., at 33.

109 1994 Draft Statute, commentary to art. 20, para. 21, Watts, *supra* note 92, at 1484.

entire international community under the jurisdiction of the Court subject to a decision of the Security Council.[110]

When Turkey, Sri Lanka, India and Algeria, in the third week of the Conference, proposed that terrorism might be included as one of the crimes against humanity,[111] the response was mostly reserved, and the advantages or disadvantages of the proposed approach were not thoroughly weighed. While some delegations did not consider that terrorism had a place in crimes against humanity as currently defined in international law, others pointed out that there was no need to include terrorism as a crime against humanity since it was adequately covered elsewhere in international law.[112] The lack of support for the proposal was undoubtedly also due to the fact that it contained a generic definition of terrorism, which, although relatively close to that in the 1994 Declaration, had not been adopted with exactly the same wording in any other international instrument. A generic definition of a terrorist act had not been discussed in the Preparatory Committee, because terrorist treaty crimes were already defined in the conventions listed in the Annex. Moreover, the proposal was made at a fairly late stage of the negotiations. With a number of important issues still open, a clear majority at the Conference did not wish to embark on new discussions which could have diverted attention from the objective of concluding the negotiations in an expeditious manner.[113] A suggestion that the Statute would only nominally enumerate the treaty crimes and leave their definitions to be elaborated afterwards was also rejected.[114]

110 See, for instance, the statements by the Russian Federation, UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, UN Doc. A/CONF.183/13 (Vol.II) (Rome Conference Report), at 115, 177, and 289.

111 The proposed definition of terrorism as a crime against humanity read as follows: "Any act of terrorism, in all its forms and manifestations [involving the use of indiscriminate violence] is a crime [committed against persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or population][resulting in death or serious bodily injury to mental or physical health and serious damage to property] irrespective of any consideration and purpose of a political, ideological, philosophical, racial, ethnic, religious or such other motive that may be invoked to justify it". UN Doc. A/CONF.183/C.1/L.27 (brackets in the original).

112 Rome Conference Report, *supra* note 110, at 281.

113 At the beginning of the Conference, the Draft Statute contained more than 1700 sets of brackets, with each set indicating a disagreement. See Roy S. Lee, 'Introduction: The Rome Conference and its Contribution to International Law', in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 1–39, at 13.

114 Rome Conference Report, *supra* note 110, at 338–343. This solution was adopted at the end with regard to the crime of aggression.

In general, the issue of 'treaty crimes' did not command much attention or provoke substantial discussion in the preparatory phases of the establishment of the ICC, at least partly because of the tight schedule of the meetings and the huge number of complex issues to be resolved. Accordingly, the report of an important informal meeting held between the sessions of the Preparatory Committee in January 1998 pointed out that the three crimes had been discussed only in a general manner, and that time had not allowed as careful consideration as was given to the other crimes.[115] The most pragmatic course of action seemed to be to limit the Court's jurisdiction *ratione materiae* to the established customary law crimes. In addition to the four core crimes, however, three treaty crimes, namely terrorism, drug crimes and crimes against UN personnel were still under consideration at the time of the opening of the five-week Diplomatic Conference in June 1998. While the inclusion of one or more of the three crimes had staunch supporters among the delegations, their numbers were not very high.[116] Only one of the crimes finally made its way to the Statute: crimes against UN personnel were included as a war crime under article 8 in accordance with a Spanish proposal.[117]

The arguments put forward at the Rome Conference advocating the exclusion of terrorist crimes from the jurisdiction of the Court can be roughly divided into three groups, the first raising pragmatic considerations related to time constraints, the second deploring the lack of a universal definition of terrorism, and the third referring to the nature of terrorist crimes as being different from that of the core crimes. The three crimes were recurrently referred to as one single category of 'treaty crimes' without differentiating between them.[118] Many of those putting forward arguments in the first category were concerned about the delays that might be caused by beginning discussions on treaty crimes that would not gain general acceptance. Several delegations stressed that while they otherwise would like to

115 Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands, A/AC.249/1998/L.13, at 34.

116 Rome Conference Report, *supra* note 110, at 171–179, 180–182, 268–273, 276–294.

117 Rome Statute, art. 8(2)(b)(iii), criminalises intentional attacks against UN personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission; see also Convention on the Safety of the United Nations and Associated Personnel, adopted on 9 December 1994, UNTS vol. 2051, No. 35457, art. 9. For the Spanish proposal, see UN Doc. A/CONF.183/C.1/L.1.

118 Rome Conference Report, *supra* note 110, at 171-179, 180–182, 268–273, 276–294. See also Patrick Robinson, 'The Missing Crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 11.7., 497–525, at 518: "The crime of international terrorism was excluded for much the same reasons as those [...] in respect of drug crimes".

continue the consideration of treaty crimes, time was running out.[119] In the second group, many countries referred to the lack of a definition of terrorism which they saw as an obstacle to the extension of the Court's jurisdiction to terrorist crimes.[120] In the third group, some delegations had problems of principle with the idea of raising terrorist crimes to the level of the core crimes. Some said that all three treaty crimes were "definitely of international concern, but nevertheless different in nature from the core crimes".[121] Including such crimes would "raise substantive and practical difficulties because of their different nature and the different circumstances under which they occurred".[122] Still others pointed out that a framework of cooperation had already been established for the prosecution and punishment of terrorist crimes.[123] The proposal made by Norway to include in the Statute a revision clause allowing the amendment of the list of crimes in the future, and thereby postponing the whole issue, provided a pragmatic way out and received support from both states that had originally been simply against the inclusion of treaty crimes and those that had favoured it.[124]

The states that defended the inclusion of terrorism claimed that "the distinction between core crimes and treaty crimes was an artificial one: the infliction of indiscriminate violence on innocent civilians was legally unacceptable and morally reprehensible in times of war and peace alike".[125] While this statement may give the impression that the core crimes could only be committed in an armed conflict, the line of argumentation involved was not without compelling force. It was ultimately given credit when the Conference, in Resolution E attached to the Final Act, stated that terrorist acts are serious crimes of concern to the international community and recommended that a future review conference consider the inclusion of the crime of terrorism in the list of crimes within the jurisdiction of the Court. As the Statute left a full seven years between its entry into force and the convocation of the first review conference, the prospects that a generic definition of terrorist acts could be worked out in the meantime seemed reasonable.[126]

119 Rome Conference Report, *supra* note 110, at 171–179, 180–182, 268–273, 276–294.

120 *Ibid.*

121 *Ibid.*, statement of Slovakia, at 172.

122 *Ibid.*, statement of Brazil, at 277.

123 *Ibid.*, statement of Japan, at 174.

124 *Ibid.*, at 172 and 173–179, 180–182, 268–273, 276–294.

125 *Ibid.*, statement of Sri Lanka, at 339.

126 The Final Act of the Rome Conference contains the following text: "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". The Final Act also recommended "that a Review Conference pursuant to article 123 of the Statute of the ICC

It was not until the terrorist attacks of September 2001 that questions were raised in earnest about the applicability to terrorist acts of the existing definitions in articles 6 to 8 of the Rome Statute. A new perspective on the crimes of terrorism emerged as many commentators pointed out that, ipso facto, terrorist acts that were so massive in scale as to be equal to an armed attack would also constitute crimes against humanity.[127] A decisive aspect of the definition of the crimes against humanity in article 7 of the Statute in this respect is that it does not require state involvement in the attack against the civilian population, thus departing from the 'Nuremberg legacy' and settling a question on which different views had been sustained.[128] An attack against a civilian population is most often a result of state or organisational policy, yet it can encompass a wide spectrum of different situations. Whether the notion of crimes against humanity is applicable to certain terrorist acts depends on the link of the specific acts to a broader policy.

The groundwork for the legal analysis of the policy element in crimes against humanity was laid already by the ILC in the context of the Draft Code, which requires that such crimes be "instigated or directed by a government or by any organization or group".[129] The ILC pointed out in its commentary that the intention was "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".[130] While the ICTY's jurisprudence has considerably relaxed the

consider the crimes of 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." See UN Doc. A/CONF.183/10, Resolution E, at 7–8. As is recalled, a mini-definition of terrorist acts was included already the following year in the Terrorist Financing Convention, art. 2(1)(b).

127 As noted earlier, the related question of terrorist attacks as a crime of aggression has not received much attention.

128 Bassiouni has referred to "international crimes that are predicated on state action or policy" as the normal form of not only aggression, but also of crimes against humanity, genocide, and apartheid. see M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd Rev. Edn, Kluwer Law International, 1999, at 403. He has accepted that non-state groups could, in principle, commit crimes against humanity, but has limited this possibility to situations where the group in question has state-like attributes, such as territorial control or ambitions, *ibid*. at 245. According to Werle, it would be sufficient that such an organisation has de facto the capability to launch an attack against a civilian population. Cases in point here would be not only paramilitary units but also terrorist organisations, "Neben paramilitärischen Einheiten kommen insbesondere auch terroristische Organisationen in Betracht", Werle, *supra* note 2, at 248.

129 1996 Draft Code, *supra* note 7, art. 18.

130 *Ibid*., commentary to art. 18, para 5, at 95.

policy requirement, it has nevertheless emphasised the importance of excluding criminal acts that are "the work of isolated individuals alone".[131] The ICC Statute largely follows the same approach.[132] The *chapeau* of article 7 on crimes against humanity contains a disjunctive test, according to which the acts must be either widespread or systematic. This test must nevertheless be read together with the definition of attack in subparagraph 2(a) of the article, which requires the commission of "multiple acts" against any civilian population "pursuant to or knowingly in furtherance of a governmental or organizational policy to commit such acts".[133] In the end, the two requirements are thus cumulative, and the emergence of a pattern of crime is a necessary feature of crimes against humanity.[134]

The jurisprudence of the ICTY and the ICTR also provide support for a broader view of the perpetrators of crimes against humanity. In particular, the ICTY has stated that even "individuals with de facto power or organised in a criminal gang" could be held responsible for conceiving and carrying out a systematic attack against a civilian population.[135] At the same time, the requirement of a systematic plan or policy in the Rome Statute seems to set a fairly high threshold for crimes against humanity, in particular as it was later specified in the Elements of Crimes that a 'policy to commit such attack' should be understood to require active promotion or encouragement on the part of the state or organisation.[136]

131 *Prosecutor v. Dragan Nikolić*, Case No. IT- 94 -2, Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October, 1995, para. 26.

132 As Werle, *supra* note 2, at 245, has pointed out, the formulation of the policy element in the *chapeau* of article 7 was inspired by the 1996 Draft Code.

133 Rome Statute, art. 7. See also Herman von Hebel and Darryl Robinson,' Crimes within the Jurisdiction of the Court', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*, Kluwer Law International, 1999, 79–126, at 94–95.

134 This has been criticised by Mettraux as an excessively categorical requirement in view of the jurisprudence: "the overwhelming jurisprudence and laws [...] make it clear that there is nothing in customary international law which mandates the imposition of an additional requirement that the acts be connected to a policy or plan", Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 *Harv.ILJ.* (2002), 237–316, at 281 (footnote omitted).

135 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Judgement of 3 March, 2000, para. 205; see also 1991 Draft Code, *supra* note 60, commentary to art. 21, para. 5, at 266.

136 ICC Elements of Crimes, introduction to art. 7, para. 3: "It is understood that 'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population". UN Doc. PCNICC/2000/INF/3/Add.2, reproduced in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 735–772, at 741.

Furthermore, the Statute sets fairly strict limits on expansive interpretation of the definitions of crimes, notably requiring that "the definition of a crime shall be strictly construed and shall not be extended by analogy".[137] While the ICTY has promoted a more liberal understanding of the policy requirement, the threshold requirements of the *chapeau* of article 7 seem to exclude not only clearly isolated terrorist acts but all terrorist crimes which are not actively promoted or encouraged by a state, group or organisation capable of furthering a policy. This remains the essential test for terrorist acts to be considered crimes against humanity for the purposes of the jurisdiction of the ICC.

The applicability of the definitions of the specific acts under article 7 to acts of terrorism can be given less attention because of the open-ended nature of the article, which contains a provision on "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". This residual category seems broad enough in any event to encompass terrorist acts.[138] Moreover, it has been claimed that terrorist acts could also come under other subparagraphs of article 7(1). According to Arnold, this would be the case in particular with regard to murder, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, persecution, and enforced disappearance of persons.[139] It would thus follow from the applicability of article 7 that not only the attacks of September 2001, but also other serious terrorist acts such as the Lockerbie incident, the Bali and Mombasa bombings of 2002, the hostage-taking in the Moscow Dubrovka Theatre in 2003, and the attack on a Beslan school in 2004 could have been prosecuted as crimes against humanity.[140] Furthermore, Arnold has claimed that smaller-scale attacks by Palestinian groups against Israeli targets, because of their clear policy basis, could be considered as forming part of a widespread and systematic attack in the sense of crimes against humanity. Such acts could be classified as persecution, murder, or hostage-taking, depending on the method and target of the acts.[141] Arnold's approach leads, not surprisingly, to the exclusion of only "minor terrorist attacks, with no severe impact",[142] which somewhat dilutes the force of her argument.

137 Rome Statute, art. 22(2).

138 *Ibid.*, art.7(1)(k).

139 Arnold (2004a) and (2004b), *supra* note 32; Rome Statute, art.7(1)(a), (d), (e), (h), and (i).

140 Arnold (2004b), *supra* note 32, at 262–271.

141 *Ibid.*, at 264. See also Arnold (2004a), *supra* note 32, at 996.

142 Arnold (2004b), *supra* note 32, at 342.

While it is fairly easy to agree with the conclusion that article 7 of the Rome Statute can be applicable to certain large-scale and systematic terrorist acts, it is harder to see that it could be a catch-all provision to be applied to any and all 'severe' terrorist acts. In particular, the requirement that the crimes should be widespread or systematic in nature would seem to raise the threshold higher. Arnold's argument that the policy requirement "does not pose particular difficulties either, as terrorist acts are usually carefully planned by well-organized criminal enterprises with a very clear policy"[143] seems to underestimate the fragmented and heterogeneous nature of 'global' terrorism. In particular, in view of the contextual element of the crimes against humanity as defined in the Rome Statute and in the Elements of Crimes, it is questionable whether a fairly remote link such as 'Al-Qaida inspiration' could meet the requirement of a nexus between the unlawful acts and an attack against a civilian population. It can be claimed that even in situations of 'terrorism by inspiration' the perpetrator knows about the overall attack and is willing to act in furtherance of it, which would seem to provide a sufficient nexus in light of the ICTY jurisprudence. It is less clear how the Rome Statute's requirement of active promotion or encouragement should be interpreted: is it enough that the Al-Qaida core generally encourages violent acts against 'infidel' targets, occasionally also mentioning countries and leaders by name? As Dixon has noted, for the purposes of the Rome Statute, the relationship between the individual perpetrator and a broader policy he or she aims to further can be revealed in a variety of ways, which will depend on the factual circumstances of each case. The essential requirement is that the acts must not be "isolated and random conduct of an individual acting alone".[144]

Even if many recent attacks attributed or linked to Al-Qaida can be grouped together on the basis of the similarity of the acts and a shared policy element, crimes against humanity as defined in the Rome Statute also require certain geographical proximity and temporal closeness[145] which may set the threshold too high. There is also a considerable residual of terrorist acts that are not at all global in nature and can hardly be described as crimes against humanity, as well as acts such as those characterised by the ILC in 1995 as "a lone terrorist acting independently without any affiliation to a terrorist organization or a group or any element of organized

143 *Ibid*., at 340.

144 Rodney Dixon, 'Article 7, Crimes against Humanity, Analysis and Interpretation of Elements', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 122–129, at 125–126.

145 *Ibid.*, see also Arnold (2004b), *supra* note 32, at 341.

crime".[146] As noted above, the coherence and control of Al-Qaida are arguably not at a level that allows for meticulous planning of each and every attack, as these are increasingly left for autonomous action by groups that are only loosely if at all connected to wider regional or global networks. The versatility of the concept of the crimes against humanity is nevertheless evident when compared to the strict requirements concerning war crimes: the specific acts of crimes against humanity can, in most cases, "be committed by anyone [...], and [...] be directed at any person who is not performing de facto combating functions independently of his or her nationality".[147]

2.2.3. Terrorism as a War Crime

2.2.3.1. Terrorist Acts under the Geneva Conventions

Terrorism as a war crime is a situation-specific offence in the sense that any acts qualifying for this category must be committed in an armed conflict and have a connection to the conflict.[148] This is an area that has already for a long time and to a large extent been codified, as both the IV Geneva Convention and Additional Protocols (AP) I and II[149] expressly prohibit terrorist acts. The specific provisions on terrorism in the IV Convention are contained in article 33, which prohibits "collective penalties and likewise all measures of intimidation and terrorism" –wording that can cover a broad range of different acts intended to spread terror within the civilian population. Article 51(2) of Additional Protocol I contains the same prohibition in a more specific form, covering "acts or threats of violence, the primary purpose of which is to spread terror among the civilian population". Article 4(2) of Additional Protocol II mentions acts of terrorism and threats to commit acts of terrorism among the acts that, when committed against protected persons, are prohibited "at any time and in any place whatsoever". Finally, article 13 of AP II prohibits "acts or threats of violence, the primary purpose of which is to spread

146 1995 Draft Code, *supra* note 88, commentary to art. 24, para. 110, at 58.

147 Arnold (2004b), *supra* note 32, at 340.

148 The requirement of being associated with the conflict is specified in the ICC Elements of Crimes, *supra* note 136, introduction to art. 8, at 748. The requirement has also been repeated in the elements of the specific war crimes.

149 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, UNTS Vol. 75, p. 287 (IV Convention); Protocol Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, UNTS Vol. 1125, p. 3 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, UNTS Vol. 1125, at 609 (AP II).

terror among the civilian population". Although there is no mention of individual criminal responsibility in any of these provisions, it has become clear through the jurisprudence of the ICTY that serious violations of international humanitarian law give rise to criminal liability in both international and non-international armed conflicts.[150]

Furthermore, several of the other provisions of Additional Protocol I, in particular, would seem applicable to terrorist acts that are committed in an international armed conflict and associated with it. Gasser has submitted that existing humanitarian law "prohibits any conceivable form of terrorism committed in an armed conflict"[151] and mentions in this context not only wilful killing[152] and hostage-taking,[153] which are the obvious equivalents of terrorist crimes, but also paragraph 4 of article 51 of AP I which prohibits indiscriminate attacks in warfare.[154] This provision would cover any act of violence in an international armed conflict that is of a nature to strike military and civilian objectives without distinction.[155] The 2005 study on Customary International Humanitarian Law published by the International Committee of the Red Cross (ICRC) also confirms, in language that is applicable to both international and non-international armed conflicts, the principle of distinction (between combatants and civilians as well as between military and civilian objectives),[156] the prohibition of acts of violence the primary purpose

150 *Prosecutor v. Duško Tadić*, Case No. IT–94–1–AR 72, Decision on the Defence Motion for Inter-locutory Appeal on Jurisdiction, 2 October 1996 (*Tadić* Jurisdiction Decision), para. 137. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC and Cambridge University Press, 2005 (ICRC Customary Law Study), rule 151, at 551–555.

151 Hans-Peter Gasser, 'Acts of terror, "terrorism" and international humanitarian law', 84 *IRRC* (2002), 547–570, at 549.

152 *Ibid.* at 558, referring to the I Convention, art.50 and to the II Convention, art. 51. See Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, UNTS Vol. 75, p. 31 (I Convention); Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, UNTS Vol. 75, p. 85 (II Convention).

153 *Ibid.*, at 558 and 561, referring to the III Convention, art. 147 and to common article 3 of the Geneva Conventions; ; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, UNTS Vol. 75, p. 135 (III Convention).

154 *Ibid*., at 555.

155 Indiscriminate attacks are not directed at a specific military objective, employ a method or means of combat which cannot be directed at a specific military objective, or employ a method or means of combat the effects of which cannot be limited as required by law. AP I, art. 51(5).

156 The ICRC Customary Law Study, *supra* note 150, rules 1-6 and 7-10, at 3–36.

of which is to spread terror among the civilian population,[157] and the prohibition of indiscriminate attacks.[158]

The specific IHL provisions mentioned above that refer to 'terror' or 'terrorism' do not define the content of these terms, but their wording makes it clear that only violent acts are meant. Such acts must also be intimidating and be directed against a civilian population. Both the armed forces of a state and, in the case of the prohibitions in Additional Protocol II, armed groups can use terror in breach of these provisions. The ICRC commentary to article 33 of the IV Convention points out two additional features of the prohibited practices, namely their excessive severity and cruelty, as well as the fact that – like collective punishments – they strike guilty and innocent alike.[159] The commentary to article 4(2)(d) of AP II points out that the simple prohibition of 'terrorist acts' covers "not only acts directed against people but also acts directed against installations which would cause victims as a side effect".[160] The commentary to article 13(2) of AP II adds that the prohibition of acts or threats of violence primarily aimed at spreading terror envisages for instance air raids and other similar measures that "inflict particularly cruel suffering upon the civilian population". At the same time, the broad expression "any act or threat of violence" is meant to cover all possible circumstances.[161]

The ICRC commentary to article 51(2) of AP I raises a more fundamental question related to how terrorist acts can be distinguished from legitimate acts of war. Most if not all acts of violence in a war are likely to cause terror among the civilian population and attacks on armed forces may be especially envisaged to intimidate. From the point of view of the civilian population, even perfectly legal acts of war can be intimidating. According to the commentary, "This is not the sort of terror envisaged here. This provision is intended to prohibit acts of violence *the primary purpose* of which is to spread terror among the civilian population *without offering substantial military advantage*".[162] It further points out that a definition of

157 *Ibid*., rule 2, at 8–11.

158 *Ibid*. rule 11, at 37–40. Furthermore, the III Convention can be referred to as a blanket prohibition of terrorist acts against vanquished enemies. See Hans-Peter Gasser, 'Interdiction des actes de terrorisme dans le droit humanitaire', 26 *IRRC* (1986), 200–212 at 209. See also Gasser, *supra* note 151, at 558.

159 The ICRC commentary to art. 33, at 226. Available at http://www.icrc.org/info resources/treaty database.html.

160 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC and Martinus Nijhoff Publishers, 1987, para. 4538, at 1375.

161 *Ibid*., para. 4785, at 1433.

162 *Ibid*., para. 1940, at 618 (emphasis added). See, however, the *Galić* case in which the ICTY Trial Chamber pointed out that "attacking civilians or the civilian population as such

terrorist acts in international humanitarian law must necessarily observe the general framework and fundamental understandings of international humanitarian law. In addition to the presence or threat of violence, the element of intimidation, and the prohibited target (the civilian population), also the principles of military necessity and proportionality must be taken into account. The definition of terrorism in IHL is therefore a relative concept.[163] Violent acts intended to create fear in the civilian population might as such be legal in an armed conflict, unless the perpetrator acts in disregard of the principles of military necessity and proportionality, in which case he or she may be committing a terrorist act.[164]

While both the Rwanda Tribunal[165] and the Sierra Leone Special Court[166] have jurisdiction over acts of terrorism committed in an internal armed conflict, no reference to terrorism as a war crime was included in article 8 of the ICC Statute.[167] This seeming omission may be explained by the desire on the part of the negotiators to set aside the 'terrorism issue' in the context of war crimes in order to avoid spill-over from the debates on treaty crimes, in which terrorism had proved divisive. The possibility of extending article 8 to acts of terrorism was apparently not even considered at the Rome Conference, although another treaty crime – crimes against UN personnel – was included as a war crime. It was agreed that article 8 on war crimes would be framed strictly within customary law so as to avoid any law-making, but this can hardly have been the reason for omitting terrorism, since the relevant provisions of the Geneva Conventions and Additional Protocols prohibiting acts of terror were undeniably part of customary IHL in 1998.[168] The lack of an express provision on terrorism as a war crime is all the more striking as it is questionable whether the Court can draw on customary law in this respect. Article 8 has been construed as an exhaustive enumeration of the war crimes over which

cannot be justified by invoking military necessity". *Prosecutor v. Stanislav Galić* , Case No. IT–98–29–T, Judgement and Opinion of 5 December 2003, para. 44.

163 Arnold (2004b), *supra* note 32, at 78.

164 Arnold has suggested that the same criteria of distinction, necessity and proportionality could be used in times of peace to distinguish between political crimes and mere terrorist acts. *Ibid.,* at 80–84 and 335.

165 ICTR Statute, art. 4(d).

166 Statute of the Special Court, art. 3(d).

167 Spreading terror as a war crime was not mentioned in any of versions of the Draft Code, either, even though the ILC included environmental damage as a war crime in the 1991 version. It should be recalled, however, that the ILC, until almost the end, was contemplating the inclusion of international terrorism as a self-standing crime.

168 ICRC Customary Law Study, *supra* note 150, rule 2, at 8–11; Gasser, *supra* note 151, at 556.

the Court has jurisdiction, and extension of the definitions of crimes by analogy is prohibited.[169]

Terrorist acts could, however, fall under other provisions of international humanitarian law reflected in the ICC Statute, and be prosecuted as wilful killing,[170] wilfully causing great suffering, or serious injury to body or health,[171] intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,[172] or certain other war crimes recognised by the ICC Statute as applicable in international armed conflicts. Furthermore, the taking of hostages is recognised as a war crime in both the ICC Statute[173] and in international humanitarian law.[174] One limitation of this approach, however, is that the provisions of the Statute applicable to non-international conflicts are less detailed than those applicable to international armed conflicts, and, for instance, launching indiscriminate attacks is not recognised as a war crime in non-international conflicts. As Arnold has pointed out, article 8 would only be applicable only to a restricted category of terrorist acts, "usually state-sponsored attacks conducted by regular governmental armed forces or individuals linked to them".[175]

2.2.3.2. Questions of Delimitation

The relativity of the concept of terrorism in war, a necessary consequence of the recognition in international humanitarian law of 'rule-based violence',[176] stands in marked contrast to the pursuance of a categorical condemnation of terrorist acts in peacetime. This tension has been evident in a number of proposals over the years seeking to combine the two approaches. These have presented interna-

169 Rome Statute, art.22(2), See also Bruce Broomhall, 'Article 22: *Nullum crimen sine lege*', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 447–462, at 457–458.

170 Rome Statute., art. 8(2)(a) (i).

171 *Ibid*. art. 8(2)(a) (iii).

172 *Ibid*. art. 8(2)(b) (i). It may be noted that the 'mini-definition' of terrorism in art. 2(1)b) of the Terrorist Financing Convention was framed according to this provision, originally in AP I, art. 51(2).

173 *Ibid.*, art. 8(2)(a)viii.

174 IV Geneva Convention, arts. 34 and 147; AP I, art. 57. According to the ICRC Customary Law Study, *supra* note 150, rule 96, at 334–336, prohibition of hostage-taking is a part of customary humanitarian law.

175 Such acts must also be committed within the framework of an ongoing conflict and be primarily aimed at civilians. See Arnold (2004 b), *supra* note 32, at 339.

176 Schmid, *supra* note 23, at 8.

tional humanitarian law as a more appropriate framework for anti-terrorist regulation than criminal law,[177] suggested a definition of terrorist acts as the 'peace-time equivalent of war crimes',[178] or sought to introduce into the law of terrorist crimes a differentiation that would take into account the necessity, discrimination and proportionality of violent acts.[179] All these proposals would imply extending the principles of international humanitarian law into an area previously regulated by other rules of international law.[180] A similar question about the relationship between the universal anti-terrorist conventions and protocols, on the one hand, and international humanitarian law, on the other, but mainly concerned with the extension of the anti-terrorist regulation to armed conflicts has stalled the UN negotiations on the Comprehensive Convention on the Suppression of Acts of Terrorism.

Unlike hostage-taking or the use of explosives, many of the acts covered in the UN anti-terrorist conventions and protocols are not necessarily of the type usually committed in armed conflicts. This is true, for instance, of the acts against the safety of civil aviation, or the acts envisaged in the 1988 SUA treaties on maritime terrorism or the Convention on Terrorist Financing. Even though the scope of application of the sectoral conventions and protocols has not been expressly limited to times of peace, there are restrictions with regard to the applicability of the ICAO instruments to aircraft used in military, customs or police services[181] and the applicability of the SUA Convention to warships and ships owned and operated by a state and used for customs or police purposes.[182] The question of the relationship between the anti-terrorist regulations and the laws of armed conflict was first raised in the context of the negotiations on the 1979 Hostages Convention.[183] As

177 International Law Association, *Report of the Committee on International Terrorism*, Report of the 59th Conference, Montreal 1982, paras. 20–21 at 349–354.

178 Alex P. Schmid, *The Definition of Terrorism*, A Study in compliance with CTL/9/91/2207 for the U.N. Crime Prevention and Criminal Justice Branch, December 1992. See also Schmid, *supra* note 23 and Michael P. Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects', 36 *Case W. Res.J.Intl. L.* (2004), 359–374.

179 Arnold (2004b), *supra* note 32, at 51.

180 All proposals raise the question as to what would constitute 'rule-based terrorism', the two first-mentioned also whether they would imply according a special, legally recognised status to terrorist groups.

181 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal 1971, art. 4(1).

182 SUA Convention, art. 2.

183 For an account of the negotiations, see Joseph J. Lambert, *Terrorism and Hostages in International Law – A Commentary on the Hostages Convention 1979*, Grotius Publications Limited, 1990, at 263–298.

adopted, the Convention contains a specific clause which provides that it does not apply to an act of hostage-taking committed during an armed conflict if two conditions are fulfilled. Firstly, the Geneva Conventions or Additional Protocols should be applicable to the specific act and, secondly, these instruments should lay down an obligation on states parties to the Hostages Convention to either prosecute or extradite the alleged perpetrator.[184]

In a less explicit formulation as to the legal effects of non-application, the 1997 Terrorist Bombings Convention draws a line between the scope of application of the Convention and certain acts committed by military forces of a state either in times of peace or in war. The exclusion, as is recalled, applies to "the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law" as well as to "the activities undertaken by military forces of a state in the exercise of their official duties, inasmuch as they are governed by other rules of international law".[185] The 1997 formulation was subsequently reproduced in the 2005 Convention on the Suppression of Acts of Nuclear Terrorism, the 2005 SUA Protocol and the 2005 Amendment to the Convention on the Physical Protection of Nuclear Materials;[186]

184 Hostages Convention, art. 12: "In so far as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols 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 armed conflicts as defined in the Geneva Conventions of 1949 and 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 Cooperation among States in accordance with the Charter of the United Nations".

185 Terrorist Bombings Convention, art. 19(2). According to art. 19 (1), "Nothing in this Convention shall affect other rights, obligations or responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law". See also Chapter 12.1. and 1.3.

186 International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005, UN Doc. A/RES/59/290, art. 4; Protocol to amend the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005, IMO Doc. LEG/CONF.15/DC/1, 13 October, 2005, art. 2(a)(2); Amendment to the Convention on the Physical Protection of Nuclear Material, 8 July 2005, IAEA Doc. GOV/INF/2005/IO-GC(49)/INF 16, 6 September 2005, new art. 2(4)(b). See also Special Sub-Committee on the preparation of one or more instruments addressing new and emerging threats, second meeting, Montréal, 19–21 February, 2008, ICAO doc. LC/SC-NET-2, Appendix 4, art. 4 bis.

at the regional level, it was included in the EU 2002 Framework Decision on combating terrorism and in the 2005 Council of Europe Convention on the Prevention of Terrorism.[187]

The language of the Terrorist Bombings Convention differs from the exclusion clause in the Hostages Convention in two respects. Firstly, it purports to regulate not only the relationship between the Convention and the rules and principles of international humanitarian law but also the non-applicability of the Convention to acts of states. Secondly, the exclusion is broader and much less precise than that in article 12 of the Hostages Convention in that it is deemed sufficient that the excluded activities are "governed" by IHL or, in the case of activities of military forces of a state in times of peace, by "other rules of international law". The Hostages Convention, as is recalled, tries to ensure that any acts of hostage-taking are in fact prosecuted, also when they are committed in an armed conflict. Both variants are based on the recognition that conduct that constitutes a criminal act under the relevant anti-terrorist convention may, in an armed conflict and depending on the particular circumstances, either be a legitimate act or amount to a war crime. The two formulations do, however, differ in their level of specificity. The Terrorist Bombings Convention, as well as the subsequent instruments that use the same formulation, aims at broadly excluding certain categories of acts according to the perpetrator, referring in general to accountability under other rules. The Hostages Convention deals with specifically defined acts of hostage-taking and tries to ensure that there are no lacunas that could result in impunity for such acts. There are also differences in the scope of application of the respective instruments: the Terrorist Bombings Convention and the other, more recent instruments contain broader and more varied criminalisations than the Hostages Convention.

An exclusion clause similar to that of the Terrorist Bombings Convention has since then been the subject of difficult discussions within the framework of the negotiations on the Comprehensive Convention on Terrorism. As was noted above,[188] the difficulties in that context are related to both political circumstances and the symbolic value of the Comprehensive Convention as the last word in a debate on the 'definition of terrorism' that has continued at the UN since the early 1970s. At the same time, the difficulties are directly linked to the relativity of the concept of terrorism under international humanitarian law. The text of an exemption clause proposed by the Coordinator in 2001, formulated along the lines of

187 EU Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002, Preamble, para. 11; the Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, CETS No. 196, art. 26 (5).

188 Chapter 1.3.

article 19 of the Terrorist Bombings Convention, has served as a basis for negotiations:

> 1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States, peoples and individuals under international law, in particular the purposes and principles of the Charter of the United Nations, and international humanitarian law.
> 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention.
> 3. The activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.
> 4. Nothing in this article condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.[189]

According to the amendments proposed by the Organization of the Islamic Conference (OIC), the term 'armed forces' in the second paragraph should be replaced by 'parties', thus broadening the exemption to acts committed by armed groups in non-international conflicts.[190] Moreover, the OIC has called for specific mention of situations of occupation.

The legal issues involved are related both to the 'right to resist' colonial regimes and alien occupation and the status of organised armed groups in non-international armed conflicts. Although the AP I provision on 'internationalised armed conflicts'[191] recognises the legality of armed resistance to colonial domination and alien occupation, it has a very narrow scope of application[192] and has not been invoked in practice;[193] nor has it attained customary law status, as AP I has not

189 Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, Sixth Session, 28 January–1 February 2002, A/57/37, at 6.

190 The OIC proposal presented in October 2001 also aimed at limiting the scope of the exclusion of the activities of military forces of a state when exercising their official duties by excluding activities undertaken by the military forces of a state in the exercise of their official duties only "inasmuch as they are in conformity" with international law.

191 AP I, art. 1(4).

192 Lambert, *supra* note 183, at 295–297. See also Elizabeth Chadwick, *Self-determination, Terrorism and the International Humanitarian Law of Armed Conflict*, Kluwer Law International/Martinus Nijhoff Publishers, 1996, at 5, pointing out that the express reference to the 1970 Friendly Relations Declaration suggests a broader approach.

193 Gasser, *supra* note 151, at 563.

been universally ratified.[194] The second issue is more intriguing, and the limitation of the exemption to 'armed forces' has been criticised in the scholarly discussion. Without the amendment proposed by the OIC to the established text,[195] the provision would, according to its critics, extend anti-terrorist regulation into an area previously regulated by international humanitarian law, gravely affecting the balance of rights and obligations under that body of law. Under the Draft Comprehensive Convention, members of national liberation movements or other organised armed groups who under IHL would have the right to legitimately attack military targets could be regarded as terrorists and be charged for merely participating in hostilities.[196] While this can be seen as a legitimate concern, it should be recalled that the Comprehensive Convention will not alone determine the dividing line between terrorist acts and acts of war. Despite its name, the Convention is designed to be only of a residual nature. If it is adopted and enters in force, it will not replace the existing network of anti-terrorist conventions and protocols, but only apply when none of the other instruments is applicable to the specific act.[197] Because of the broad scope of its definition of crimes and nearly universal ratification status, the Terrorist Bombings Convention would seem to take precedence in most situations of armed conflict.[198]

Finally, the question of international humanitarian law as an appropriate legal framework for countering terrorism has resurfaced in the context of the so-called 'global war on terror'. As the question has been posed in that specific discourse, it is not one of drawing a line between the respective scopes of application of criminal law and international humanitarian law, but rather one of making an overall choice

194 There is no corresponding customary rule in the ICRC study.

195 'Established' in the sense that it has been incorporated in the Terrorist Bombings Convention, which has been widely ratified, and subsequently in three other universal legal instruments and at least two regional ones; *supra* notes 186 and 187.

196 Bruce Broomhall, 'State Actors in an International Definition of Terrorism from a Human Rights Perspective', 36 *Case W. Res.J.Int'l.L.* (2004), 421–441; Jelena Pejić, 'Terrorist Acts and Groups: A Role for International Law?', 75 *BYIL* (2004), 71–100. See also Mirko Sossai, 'The Internal Conflict in Colombia and the Fight against Terrorism: UN Security Council Resolution 1465(2003) and Further Developments', 3 *JICJ* (2005), 243–252.

197 Chapter 1.2.2.

198 As to the concern expressed both by Broomhall, *supra* note 196, at 434 and Pejić, *supra* note 196, at 76, that other states would be bound by the obligation to extradite or prosecute members of such organised armed groups, it should be noted that this obligation, both under the Terrorist Bombings Convention and under the Draft Comprehensive Convention, is qualified by the so-called international element (art. 3 in both instruments). If the acts committed in an internal conflict do not have any international implications, there is no obligation of international cooperation.

between the two[199] – or between the 'micro' (criminal law) and 'macro' (belligerent relations between collectivities) approaches to terrorism.[200] The basic argument has been that where law enforcement procedures are not available – as in case of Afghanistan under the Taliban – it must be possible to use forcible responses against terrorism.[201] The discussion of the legality of forcible responses to terrorism is by no means new,[202] but there is a fundamentally new aspect to some of the arguments presented recently, namely the claim that an armed conflict exists with Al-Qaida that is not limited to any specified territory.[203] This claim may best be understood in terms of the choice between 'micro' and 'macro' analyses: since not all use of force triggers the application of international humanitarian law, it is the preference for that body of law over criminal law and human rights law that has entailed an assumption about the existence of an armed conflict. While there are good grounds to define the situation in Afghanistan since October 2001 as an

199 Pejić, *supra* note 196, at 91, has recalled that it is not legally tenable to allow for states "to 'pick and choose' different legal frameworks concerning the conduct of hostilities or law enforcement, depending on which gives them more room to manoeuvre".

200 See Georges Abi-Saab, 'Introduction. The Proper Role of International Law in Combating Terrorism', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, xiii-xxii, at xv.

201 Cogen has pointed out that "the 'law enforcement' strategy becomes impossible and indeed obsolete if terrorist organizations are granted a safe haven by one or more countries". At the same time, if "the terrorist organization acts alone – and no State offers support and/or shelter – then in my view the 'law enforcement' procedure is the only legal way to fight terrorism". See Marc Cogen, 'Impact of the Laws of Armed Conflicts on Operations against International Terrorism', Proceedings of the Bruges Colloquium 26–27 October 2001, *The Impact of International Humanitarian Law on Current Security Policy Trends*, Collegium, No. 25, 121–130, at 122–123 and 125.

202 See for instance Antonio Cassese, 'The International Community's "Legal" Response to Terrorism', 38 *Int' l and Comp. L.Q.* (1989), 589 –608; Natalino Ronzitti, 'The Law of the Sea and the Use of Force Against Terrorist Activities', in Ronzitti (ed.), *Maritime Terrorism and International Law*, Martinus Nijhoff Publishers, 1990, 1–14; Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism*, Martinus Nijhoff Publishers, 1988; Gregory M. Travalio, 'Terrorism, International Law, and the Use of Military Force', 18 *Wisconsin Int' l L. J.* (2000), 145–192.

203 The United States considers itself a party to an armed conflict with Al-Qaida. See Executive Order: Interpretation of the Geneva Convention Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, George W. Bush, White House, 20 July 2007, available at http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html. See also John B. Bellinger III, 'Armed Conflict with Al Qaida?',15 January 2007, available at http://opiniojuris.org/posts/1168473529.shtml, and Roy Schöndorff, 'Extra-State Armed Conflicts: Is There a Need for A New Legal Regime?', 37 *Intl L and Politics* (2004), 1–52.

armed conflict, there are a number of problems related to the concept of an extra-territorial armed conflict with Al-Qaida.[204] Suffice it to reiterate that the provisions of international humanitarian law are meant to be applied to acts committed by armed forces of a state, or by organised armed groups in case of non-international armed conflicts and not to sporadic acts of violence that are unrelated to any armed conflict. Moreover, it is hard to see how Al-Qaida, in particular in its present decentralised and dispersed form, could qualify as a party to an armed conflict. While it may sometimes be difficult to draw a strict line between armed conflicts de jure and de facto, characterising Al-Qaida as a party to an armed conflict seems to lead to insurmountable problems of identification and delimitation.

2.3. International Jurisprudence on Terrorism as a Core Crime

Even though some commentators have referred to "a total absence" of case law on terrorist crimes under international law,[205] it is evident from the jurisprudence of the International Military Tribunal that terrorist methods and policies were seen as an important aspect of the crimes that the IMT addressed. The same approach has been adopted by the ICTY, which even charged President Milošević with having aided and abetted in the launching of 'a campaign of terror'.[206] The notions of 'terror' or 'terrorism' have long been part of the vocabulary of international tribunals when describing a campaign or policy carried out in order to force a civilian population to flee or to give up resistance. The IMT referred frequently to a policy of terror, especially when addressing the measures taken and methods employed by the SS and the Gestapo against German Jews and political opponents, or against the population of occupied territories in Poland and Ukraine. As Arnold has shown, terms such as 'terroristic policy', 'reign of terror' or 'spreading of terror' were used particularly in connection with crimes against humanity, the commission of which was seen as a way to implement an overall policy of terror.[207] Both the

204 For a cogent analysis of such problems, see Pejić, *supra* note 196, and Duffy, *supra* note 32.

205 Daryl A. Mundis, 'Prosecuting International Terrorists', in *Terrorism and International Law: Challenges and Responses,* Contributions presented at the Meeting of independent experts on Terrorism and International Law: Challenges and Responses, San Remo, 30 May–1 June 2002 and the Seminar on IHL and Terrorism, San Remo, 24–26 September, 2002, International Institute of Humanitarian Law, 2003, 85–95, at 88. Mundis nonetheless mentioned the *Galić* proceedings that were underway at the time.

206 *Prosecutor v. Slobodan Milošević et al*, Case No. IT-99-37-PT, Second Amended Indictment, 29 October 2001 (*Milošević* Indictment), para. 53.

207 Arnold (2004b), *supra* note 32, at 237–239.

SS and the Gestapo were referred to as 'terroristic organisations' or 'instruments of terror'.[208]

The IMT also considered terrorist policies in the context of the launching of a war of aggression and, notably, regarded terrorist methods as a tool to pursue and promote the aim of an aggressive war. According to Arnold, the frequent appearance of the theme of terrorism in various passages of the IMT proceedings indicates "that the whole Nazi campaign was based on terror and that it, as such, amounted to a crime against the peace and a conspiracy to perpetrate a war of aggression".[209] Even more than is the case with regard to crimes against humanity, terrorism was seen as a characteristic of a policy which relies on a vast organisation and uses terrorist methods as a tool to pursue and promote other crimes. In the context of the crime of aggression, terror was seen as ultimately directed against the interests of other states, while, as a crime against humanity, it was seen as directed against a civilian population. It may be recalled that this was the classical understanding of terrorism, in line with the 1937 League of Nations Terrorism Convention; the sectoral strategy later paved the way for a perception of terrorism as limited to a list of specific criminal acts.

The ICTY has referred, inter alia, to "a deliberate and widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo",[210] to "persecution and inhumane acts as crimes of terror", and to "terrorisation as one of the crimes of persecution".[211] In the *Kvočka* case, the use of concentration camps was considered a terrorist tool constituting a crime against humanity, and the Trial Chamber referred to "a premeditated intent to create an atmosphere of violence and terror and to persecute those imprisoned".[212] Other examples include the *Čelebići* case, in which acts creating "an atmosphere of terror" in detention facilities were punished as war crimes, either as torture or as inhuman or cruel treatment.[213] In *Blaškić*, the Trial Chamber regarded terror as an

208 IMT Judgement, available at http://www.yale.edu/lawweb/avalon/imt/proc/judorg.htm.

209 Arnold (2004b), *supra* note 32, at 315–316.

210 *Milošević* Indictment, para. 53.

211 *Prosecutor v. Radovan Krstić*, Case No. IT-98-33-T, Judgement of 2 August 2001, para. 607: "The Trial Chamber characterises the humanitarian crisis, *the crimes of terror* and the forcible transfer of the women and elderly at Potocari as constituting crimes against humanity, that is, persecution and inhumane acts" (footnotes omitted, emphasis added). See also paras. 533, 537, and 727.

212 *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement of 2 November, 2001, para. 117.

213 *Prosecutor v. Zejnil Delalić et al.* (*Čelebići case)*, Case No. IT-98-30-T, Judgement of 16 November, 1998, paras. 976, 1056, 1086–91 and 1119. *Prosecutor vs. Tihomir Blaškić*, Case

aggravating factor at the sentencing stage.[214] The *Tadić* Judgement refers to crimes against humanity as products of a "political system based on terror or persecution"[215] Interestingly, the *Tadić* proceedings also provide a nearly complete definition of terrorism as a crime against humanity, in a paragraph in which the Appeals Chamber argued against regarding discriminatory intent as a necessary element of crimes against humanity and pointed out that such a requirement would prevent the prosecution of "random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity".[216] It may also be mentioned that in several indictments the Special Court of Sierra Leone has addressed "acts of terror" as a war crime under common article 3 of the Geneva Conventions and Additional Protocol II.[217]

It can therefore be argued that certain acts of terror have long been recognised by international tribunals. While neither the Charter of the IMT nor the Statutes of the ICTY or the ICC have recognised terrorism as an independent crime, the concept of terror has been invoked to establish that other crimes have been committed.[218] Crimes of terror as addressed by the international tribunals are part of a plan or policy that is often but not always carried out by state authorities. The underlying crimes range from killing to hostage-taking, unlawful confinement, deportation, torture, rape and other inhumane acts. More important than the definition of the specific acts, however, has been the characterisation of the conduct as having a terrorist 'intent' which is usually defined in objective terms as random or indiscriminate violence apt to spread terror and intimidate a population. In order to constitute crimes against humanity, such acts must also be knowingly committed

No. IT-95-14-T, Judgement of 3 March 2000 (*Blaškić* Judgement), paras. 695, 700, 732. For a more complete account of terrorism-related passages in the ICTY judgements, see the *Galić* Judgement, para. 66, footnote 114.

214 The judgement notably referred to "the use of indiscriminate, disproportionate and terrifying combat means and methods", *Blaškić* Judgement, para. 787.

215 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement of 7 May, 1997 (*Tadić* Judgement), para. 649.

216 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement of 15 July 1999 (*Tadić* Appeal Judgement), para. 285. According to Arnold (2004b), *supra* note 32, at 253, "it is clear that the Appeals Chamber was trying to argue for the inclusion of acts of terror within the category of crimes against humanity".

217 This concept appears also in the first judgement of the Special Court, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, SCSL-2004-16-PT, Judgement of 20 June 2007.

218 See also Cécile Tournoye, 'The Contribution of the Ad Hoc International Tribunals to the Prosecution of Terrorism', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 298–308, at 303.

as a part of an attack against a civilian population, which is a standard requirement for all such crimes. The concentration camp variant of terroristic policy underlines that terrorism is used in its original meaning of a 'regime of terror' rather than as a reference to particular acts.[219] The closest the anti-terrorist conventions and protocols come to the definition of terrorism as a war crime is the generic definition of a terrorist act that is contained in article 2 (1)(b) of the Convention on the Suppression of Terrorist Financing. The Financing Convention does not, however, criminalise the defined conduct as the definition is only used to delimit the scope of the crime of financing.

The judgement of the ICTY Trial Chamber in the *Galić* case in 2003 was a landmark in the prosecution of terrorist acts as war crimes. While it was not the first occasion on which an international tribunal had discussed terrorist methods, it was the first time that the 'crime of terror against the civilian population' was recognised as an independent war crime. The Trial Chamber presented the following specific elements of the crime of terror:

1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[220]

This definition, as was underlined by the Trial Chamber, is "thematic, or subject-specific" and limited to the legal regime applicable to armed conflict, whether between states, between governmental authorities and organised armed groups, or between such groups.[221]As such, it is a specific prohibition within the general prohibition of attack on civilians.[222] In the *Tadić* case, the ICTY laid down the necessary elements for assessing the seriousness of a crime, which is one of the conditions to be fulfilled in order for the Tribunal to be able to exercise its jurisdic-

219 Lambert, *supra* note 183, at 15, has pointed out that the term terrorism originated in the Jacobin era in 18th century France and was generally associated for decades with state terror. See also Alex P. Schmid, *Political Terrorism,* North Holland Publishing Company and Transaction Books, 1984, at 64 and Miller, *supra* note 47, at 29.

220 *Galić* Judgement, para. 133.

221 *Ibid.,* para. 87, footnote 150.

222 *Ibid.,* para. 98.

tion.[223] According to what is known as the 'third *Tadić* condition', any violation of the laws and customs of war, in order to be serious, must constitute a breach of a rule protecting important values and, furthermore, involve grave consequences for the victim.[224] The crime of terror fulfils this condition as it is a serious violation of the laws and customs of an armed conflict. The Trial Chamber argued that since making a civilian population or individual civilians the object of attack with the result of causing death or injury, is a very serious violation of IHL and could also qualify as a grave breach, it was clear that "doing the same with the primary purpose of spreading terror among the civilian population can be no less serious, nor can it make the consequences for the victims any less grave".[225]

With the exception of its requirement of a specific consequence, the definition is indeed very similar to the condensed 'mini-definition' in the Terrorist Financing Convention. As is the case with the 'parent crime' of launching a deliberate attack against civilians, also the crime of terror as defined by the Trial Chamber must cause death or serious injury within the civilian population.[226] In line with other anti-terrorism conventions and protocols, the 'mini-definition' does not require that the conduct results in actual damage provided that it is carried out with the intent to cause death or serious injury. In that sense the Trial Chamber's definition, as one would expect, draws on the established rules of IHL rather than on anti-terrorist regulation.[227] It is also worth pointing out that the Trial Chamber applied the above-mentioned provisions of article 51 Additional Protocol I and article 13 Additional Protocol II as treaty law binding the parties by way of a specific agreement,[228] and thus refrained from pronouncing on the customary law status of the

223 According to the ICTY Statute, art.1, the Tribunal "shall have the power to prosecute persons responsible for *serious* violations of IHL" committed in the territory of the former Yugoslavia since 1991 (emphasis added). The *Tadić* conditions have since been recurrently used by the Tribunal to determine the issue of jurisdiction.

224 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR 72, Decision on the Defence Motion for Inter-locutory Appeal on Jurisdiction, 2. October 1996 (*Tadić* Jurisdiction Decision), paras. 94, 143.

225 *Galić* Judgement, paras. 108–109. Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, at 305, regards this as an unpersuasive argument.

226 The Trial Chamber discussed at length whether it should also be required that the conduct causes terror and concluded that this would not be warranted. *Galić* Judgement, para. 134. The Appeals Chamber confirmed that actual fear was not an element of the crime: *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement of 30 November 2006 (*Galić* Appeal Judgement), para. 104.

227 The Trial Chamber pointed out that it had deliberately *not* taken into account the anti-terrorist treaties; *Galić* Judgement, para. 87, footnote 150.

228 *Ibid* , paras. 85, 138.

crime. The ICRC study on customary international humanitarian law, as noted earlier, has confirmed the customary status of the prohibition of inflicting terror on a civilian population. In 2006, the Appeals Chamber of the ICTY confirmed the judgement and also concluded that a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary international law.[229]

The question whether terrorist acts could also qualify as genocide has been raised in the literature.[230] It may be assumed, however, in view of the difficulties related to the requirement of a specific genocidal intent, that the rare cases where genocidal acts present terroristic features would more easily fall under the concept of terror exercised by a state against its own citizens or by non-state actors in the sense of crimes against humanity. It may also be asked what purpose the additional qualification of acts of genocide as acts of terrorism would serve. For instance, in the *Pinochet* case that was discussed by the Spanish Fifth Central Magistrate, terrorism was included as one count for the extradition of General Pinochet. The National Court, while not denying that there were reasons for including terrorism, seemed to believe that the acts providing a basis for that particular charge were covered by the concept of genocide.[231]

It may be concluded that international jurisprudence has been concerned with terrorism as a war crime as well as with policies of terror as an aspect of other crimes. Terror is clearly an aspect of several of the specific acts of crimes against humanity under the Rome Statute, including those that can only be committed by a state, such as forced disappearances. Insofar as non-state entities are capable of conducting widespread or systematic campaigns of violence that amount to an attack against a civilian population, such violence would also fall under the jurisdiction of the ICC. Terrorism as a war crime can be committed either by members of armed forces or members of armed groups. The lack of specific ICC jurisdiction *ratione materiae* with regard to the prohibition of terror may, however, prevent the Court from prosecuting terrorism as an independent war crime.

229 *Ibid.*, para. 90. The Appeals Chamber confirmed that causing of actual fear was not an element of the crime, *Galić* Appeal Judgement, para. 104. See also the Separate and Partially Dissenting Opinion of Judge Schomburg, para. 24, who agreed that the prohibition of such acts and threats was customary international law at the time of the commission of the acts (1992) but did not believe that the same could be said of the penalisation.

230 Arnold (2004b), *supra* note 32; Mikaela Heikkilä, *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*, Institute for Human Rights, Åbo Akademi University, 2002.

231 Barboza, *supra* note 2, at 177.

The first international tribunal specifically mandated to address terrorism in peace-time is the 'Lebanon Tribunal' established by an agreement between the United Nations Security Council and the Government of Lebanon to investigate and prosecute the assassination of former Prime Minister Rafik Hariri and other related acts.[232] The Draft Statute of the Tribunal defines its jurisdiction *ratione materiae* in concrete terms without mentioning terrorism (or any other specific crime), referring instead to "the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri and in the death or injury of other persons". The phrase in which the Tribunal's jurisdiction, with the consent of the Security Council, is extended to other connected acts can however be seen as a skeletal definition of terrorism in listing "nature and gravity", "criminal intent (motive), the purpose behind the attacks, the nature of the victims targeted, the pattern of the attacks (*modus operandi*), and the perpetrators".[233]

232 UN Doc. S/RES/1664(2006); UN Doc. S/RES/1757(2007).

233 Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/176, 21 March 2006.

CONCLUSIONS OF PART I

The perception of which crimes belong to the category of 'the most serious international crimes' tends to change with the shifts in how the most prominent dangers to the international community are evaluated. Internal armed conflicts have been a frequent phenomenon in recent decades, clearly outnumbering international ones, and it seems that state-to-state aggression has consequently given way to genocide as the 'crime of crimes'. However, since the beginning of the 1990s, civil wars have declined steadily – partly, as the High-Level Panel set up by the UN Secretary-General has pointed out – as a result of the rapid growth of UN activity in peace-making, peace-keeping and post-conflict peace-building.[1] Terrorism and organised criminality have been mentioned increasingly often as the main security threats, which has prompted a discussion on the need to add new crimes to the jurisdiction of the ICC.[2]

As the outline of the crimes of terrorism presented above has attempted to show, there are several normative strands related to international terrorism. The tradition of state terrorism influenced the early codifications and was recognisable also in the Nuremberg proceedings. The original concept of a regime of terror was limited to one state and concerned with indiscriminate violence directed by governmental authorities against the population or part of the population with the purpose of creating an atmosphere of fear. 'International terrorism' was first concerned with either assassinations or a 'policy' or 'campaign' of terror, in particular in times of war. The first legal instrument to address the phenomenon, the

1 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004, UN Doc. A/59/565, para. 85.

2 This discussion has mainly been restricted to terrorism. See, however, Christine van den Wyngaert, 'Transformation of International Criminal Law in Response to the Challenge of Organized Crime', General Report, 70 *Int'l Rev. Penal L.*(1999), 133–221, at 144: "It is noteworthy that so far no state has put organized crime on the agenda of the discussion concerning the establishment of a Permanent International Criminal Court." To this author's knowledge, the situation is still the same, even though, as pointed out above, human trafficking has been interpreted as being included in slavery, Rome Statute, art. 7.

1937 League of Nations Convention, regarded state involvement as an essential element of the crime of terrorism, whether as perpetrator or target of the crime, and the UN codification work on the Draft Code of Crimes against the Peace and Security of Mankind brought that tradition further. The 1994 UNGA Declaration on Measures to Eliminate International Terrorism also contains formulations from the 1937 Convention. Even though none of the aforementioned instruments is legally binding, and the crime of 'serious acts of state-sponsored or -tolerated international terrorism' has not been successfully codified, there are good reasons to conclude, as Cassese does, that it may constitute a crime under customary law, with implications also for state responsibility.

The relaxation of the requirement of state involvement in the core crimes that was brought about by the jurisprudence of the two ad hoc criminal tribunals in the 1990s and was to a certain extent solidified in the Rome Statute came too late to affect the definition of terrorism in the ILC Draft Code. While terrorism, defined by the ILC in 1954 as state terrorism closely related to unlawful use of force, was completely at ease and aligned with the other crimes in the Draft Code, questions raised about the applicability of the definition to private actors became pressing in the 1990s. In the 1991 Draft Code, the ILC still defined terrorism as a `collective crime´ committed by states against states, but this approach was then abandoned. What the Commission did in the 1994 Draft Statute of the ICC was in no way a synthesis of the earlier work enriched with new ideas, but rather a complete transformation in the sense that 'treaty crimes' were adopted as a group, while state terrorism was discarded altogether. The part of terrorism that overlapped with the core crimes, whether committed by states or non-state actors, was essentially ignored. When trying to capture that part of terrorism, one has to rely directly on the jurisprudence of the international tribunals as well as on authoritative declarations by the UN without much help from the codifications.

The other strand of the UN legal response to terrorist offences, the network of anti-terrorist conventions and protocols created mainly from the 1970s to the 1990s, views terrorism as private violence. There are two important implications of the habitual formulation referring to 'any person' as the perpetrator of the relevant offences. Firstly, the scope of application of these instruments is restricted to individuals. Secondly, while the notion of 'any person', unless tempered by specific exemptions, could refer to agents of states as well as to private individuals who engage in international terrorism, state terrorism as such is not addressed and the practical implications of state involvement in the relevant offences have not been elaborated. The sectoral treaties establish individual criminal responsibility for the respective offences *tout court* without addressing the interconnections between state responsibility and criminal responsibility; nor is there a separate convention

dealing with state terrorism. It can therefore be said that the existing international treaty law for countering terrorism does not recognise state terrorism.

When it comes to the category of core crimes, terrorism has only been properly codified as a war crime. Even so, the relevant provisions of the IV Geneva Convention and the two Additional Protocols do not contain definitions of terrorist acts and are not reflected in the ICC Statute. The specific definition of the crime of terror provided by the ICTY in the *Galić* case may have opened the door for new developments, given that the Appeals Chamber has confirmed the customary nature of the crime. As war crimes are by definition context specific and only apply in an armed conflict, however, they address only part – and a diminishing one at that – of violence directed at civilians given the decrease in armed conflicts and the increase of 'grey zone' violence. The normative tradition of the crimes against humanity, for its part, is broad enough to encompass terrorist acts that fulfil the threshold requirement, even though terrorism has not been recognised or codified as a specific act of crimes against humanity. The versatility of the concept of crimes against humanity, in comparison with that of war crimes, makes it particularly apt for dealing with massive or widespread terrorist crimes. While it may be assumed that instances of 'state terrorism' can in most cases be subsumed under the established concept of crimes against humanity, that category is by no means limited to 'state crimes'.

The two traditions of state terrorism/crimes against humanity and anti-terrorist treaties are related to two different historical phases in the development of terrorism as a real-life phenomenon; 'international' terrorism as it appeared in the 1970s was very different from a 'reign of terror' built and maintained by a state. A consequential question that remains to be answered is whether the new terrorism has made this fairly clear distinction obsolete, as certain acts – or expressions – of terrorism now are considered crimes against humanity committed by non-state actors under no control by or under the collusive control of state authorities. Terrorism as a crime against humanity would cover a fairly well-defined area which partly, but only partly, overlaps with the scope of the UN anti-terrorist conventions and protocols. Cassese has suggested that state involvement should be a constitutive element of the international crime of terrorism. At the same time, he has not raised the threshold very high: 'toleration or acquiescence' would set a significantly lower standard than the state or organisational 'plan or policy' required of crimes against humanity in the Rome Statute, and would come closer to the interpretation of crimes against humanity in the ICTY jurisprudence. The requirement of a connection to a state may nevertheless be too restrictive. While the Taliban regime was held responsible for some kind of state sponsorship with regard to the rise of Al-Qaida, or at least for toleration of terrorist activities in the territory under its control, it is difficult to show a similar link between many recent terror-

ist attacks and a particular state. The 2005 London bomb attacks or the activities of Al-Qaida's Hamburg cell before September 2001 can be mentioned as cases in point.

To the extent that the development of new anti-terrorist instruments, both treaties and resolutions, can be seen as a process of defining the phenomenon of international terrorism in legal terms, there is reasonable clarity as to what constitutes terrorist violence. The existing anti-terrorist instruments target criminal conduct by private individuals or groups that has a political purpose, is of a serious nature, and is carried out in times of peace, while terrorist acts in armed conflicts are addressed in other instruments. Despite the still open issue of the 'definition of terrorism', this basic understanding has not been challenged in legal terms. Or, as Cassese has pointed out, there is hardly a reason to say that 'murder' is undefinable because it may exceptionally be justified by duress; similarly disagreement about the exact formulation of the exemption clause in the Comprehensive Convention need not amount to a total absence of a legal definition of terrorism.[3]

At the same time, some confusion has resulted from the over-inclusiveness of the sectoral conventions and protocols, which do not require a 'terrorist intent' and apply also to acts committed to promote a private agenda. While there is little doubt about the customary nature of the core 'definition of terrorism', the crucial question is whether terrorism has already crystallised into a customary law crime for which individuals can be prosecuted under international law. Furthermore, the new preventive criminalisations raise completely novel questions. The new developments of criminalising various acts intended ultimately to contribute to the commission of acts of terrorism can be viewed in different ways: either the 'redefinition of terrorism' can be seen as further diluting the understanding of what constitutes terrorism, or, as will be discussed in Part II, the broader spheres of responsibility can be taken as an expression of the danger these crimes represent to the international community and thus as a sign of a new recognition of their status among the most serious international crimes.

3 Antonio Cassese, 'Terrorism as an International Crime', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 213–225, at 215.

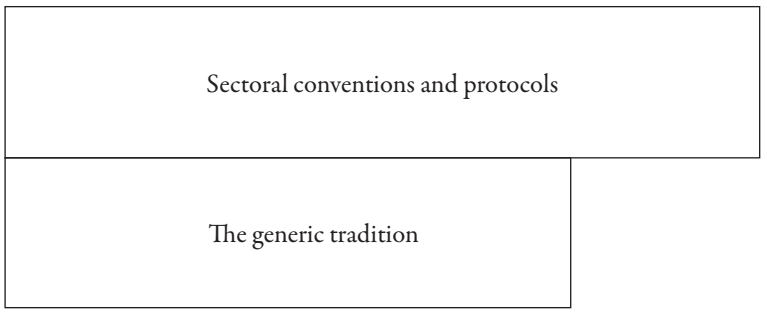

Figure 1.a

Figure 1a depicts the two traditions of the law of terrorist crimes. The first category, 'sectoral conventions and protocols', refers to those instruments which contain criminalisations, are in force and have been nearly universally ratified. Furthermore, the notion only covers instruments that address violent crime, which excludes the Terrorist Financing Convention and the Convention on the Marking of Plastic Explosives. It thus refers to the universal instruments adopted between 1970 and 1997. The second category, the 'generic tradition' refers mainly to developments in the UNGA and the ILC. It should be noted, however, that most regional conventions also contain generic definitions of terrorist acts that broadly support the 'hard core' definition of terrorism.

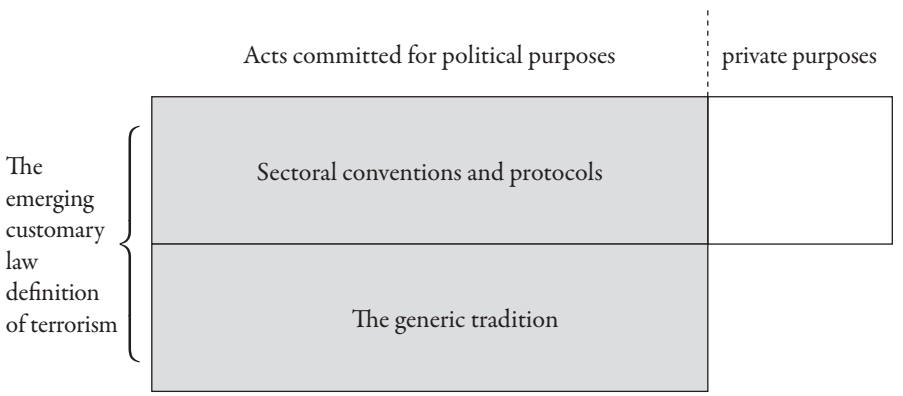

Figure 1.b

Figure 1b builds on the characteristics that are common to both traditions. It is claimed that a meaningful distinction can be drawn between crimes committed for political purposes, on the one hand, and crimes committed for private purposes, on the other. It may be assumed that since the offences under the nine sectoral conventions and protocols mirror acts that are typically committed for terrorist

purposes, they would mostly fall into the first-mentioned category. Furthermore, if private motivation is absent or cannot be proved, 'terrorist intent' can be presumed. To the extent that the offences are committed for political purposes, they can be included in the same category as the emerging customary law crime of terrorism, thus strengthening it. The remaining category would come under transnational criminality.

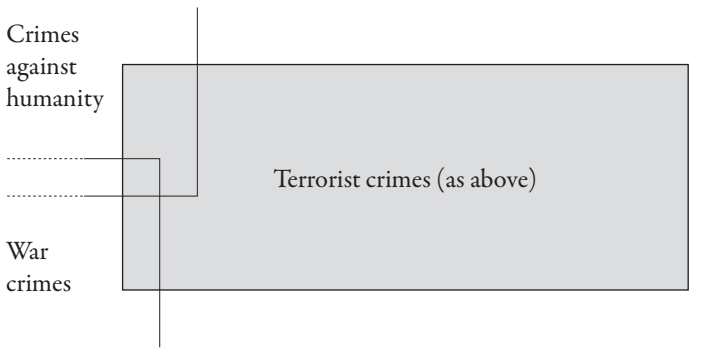

Figure 2

Figure 2 illustrates that terrorist crimes can fall under the categories of crimes against humanity or war crimes to the extent that they fulfil the necessary criteria for these crimes.

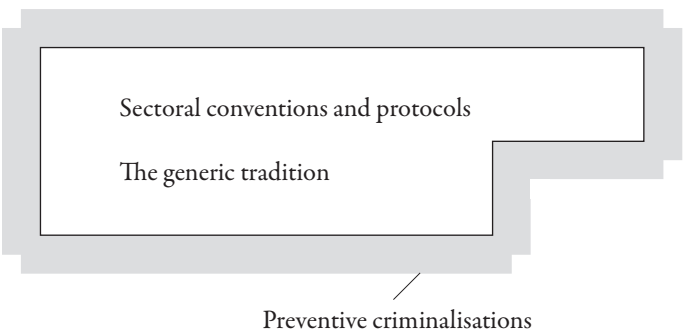

Figure 3

Figure 3 illustrates that the newest developments have significantly broadened the scope of anti-terrorist criminalisations by extending them to non-violent crime. These preventive or pro-active criminalisations address various preparatory acts that are carried out before, and in support of, the actual terrorist attacks.

Part II

Questions Related to International Responsibility

CHAPTER 3 EXTENDED RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW: JURISPRUDENCE

3.1. General Problems of a 'General Part' in International Criminal Law

The principle of individual criminal responsibility – "that nobody may be held criminally responsible for acts in which he has not personally engaged or in some other way participated"[1] – is the cornerstone of modern criminal law. An individual act or omission, together with the requisite mental element, is at the core of the system of criminal responsibility.[2] In addition to direct perpetrators – those who carry out the physical act – criminal responsibility has traditionally extended to other persons involved in the crime. The degree of responsibility of those other persons normally depends on two factors, which Fletcher has summarised as follows: 1) how much the person contributes to the crime, or how close he or she comes to causing physical harm, and 2) what his or her internal knowledge of the

1 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement of 7 May, 1997 (*Tadić* Judgement), para. 186.

2 In general, it is required of a criminal act that a person "has caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs, which is forbidden by criminal law, and [...] that he had a defined state of mind in relation to causing of the event or the existence of the state of affairs." J.C. Smith, Smith and Hogan, *Criminal Law*, London-Edinburgh-Dublin (1996), at 29, cited by Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003, at 42. The requirements of an autonomous act or omission and a certain state of mind in relation to the act or omission and its consequences exclude collective responsibility and objective responsibility. See Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 136–139. See also Farhad Malekian, 'International Criminal Responsibility', in M. Cherif Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 151–221.

action and its risks is.[3] Various forms of participation in a crime, or of contributing to its commission, have been criminalised in all criminal jurisdictions, although not necessarily in a uniform manner.[4] The relevant concepts include the notion of complicity, or 'aiding and abetting' as the concept is known in common law jurisdictions, ordering, directing and incitement, as well as conspiracy, the last being understood either as a form of participation or as an independent (inchoate) crime.[5] Command responsibility has long been known in national military practice as a specific category of criminal responsibility and has also been firmly established in international humanitarian law.

Exactly how the specific concepts have been defined differs from one jurisdiction to another. Persistent differences remain in approaches to even quite ordinary questions of criminal law between countries whose legal systems are generally close to each other, as shown by a recent study of the treatment of manslaughter and property crimes in the national legislation of certain member states of the European Union. According to the study, the criminal law systems of the EU countries "still offer quite distinct solutions to the same questions and differ widely in the details".[6] There are historical and systemic differences between the main legal systems – most notably between common law and continental civil law systems – that also touch on the general rules of attribution. This divide is apparent in approaches to complicity liability and most prominently with regard to theories of collective liability such as the common purpose doctrine or the concept of conspiracy, with which many civil law jurisdictions have never been completely at ease:[7] it has resulted in different conceptual constructions regarding the facilitation of a crime, and varying mental standards for each of them. In particular, this is the case with the standards lower than intention or knowledge. The common law

3 George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism*, Princeton University Press, 2002, at 192.

4 The differences concern also the very concept of participation, which is only recognised in the participatory model and not in the model of 'individual agency' (*Einheitstätermodell*). See van Sliedregt, *supra* note 2, at 6. See also Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2. Auflage, Duncker & Humblot, 2004, at 90–91 and 615–618.

5 Attempt, another ancillary crime which also extends to the time before actual commission, will not be discussed in this study on 'indirect responsibility', as it does not relate to the acts of others.

6 Kai Ambos, 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some preliminary reflections', 12 *MJ* (2005), 173–191, at 190.

7 Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, 2003, at 164–165; George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, 1998, at 19–192; William A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, at 259–266.

concept of recklessness applies when a person has knowingly taken an unjustifiable risk of a criminal result and extends, according to some interpretations, even to situations where a person is indifferent to such a risk. The closest equivalent in the civil law doctrine, the concept of *dolus eventualis*, requires that the person must have foreseen the result as being reasonably probable, or at least possible.[8] Often, however, the two concepts can be used interchangeably. An ICRC commentary prepared for the ICC Preparatory Commission pointed out that when applied to international crimes, the differences between civil and common law systems are real but more conceptual than substantive.[9]

Different doctrinal approaches to criminal attribution and related questions such as legal defences or justifications have made it difficult to codify general principles of international criminal law. The law of the core crimes (ICL *sensu stricto*) has developed in an ad hoc manner, and has notably lacked 'a general part' in the sense of general principles and rules that would be equally applicable to all or most of the substantive offences, such as the grounds for establishing, excluding or mitigating criminal responsibility. The attempts to develop a general approach to the construction of a crime and to the grounds for responsibility are a recent phenomenon, and one that has been closely linked to 'the project of international criminal law'. General principles of international criminal law have been developed mainly for the purposes of international prosecution, either through particular codification efforts or through judicial interpretation by international tribunals. This has been the case, in particular, with regard to the less straightforward categories of participation applied to collective or systemic crime. While the general part has been recently codified in the Rome Statute of the International Criminal Court, codified and customary law cover slightly different areas and leave certain questions to be clarified through developing jurisprudence, among them some related to the framing of individual criminal responsibility

The fact that direct enforcement has been used exclusively with regard to a specific type of international crimes – those which in scope or nature are overwhelming to competent national jurisdictions, or for which indirect national enforcement has not been efficient – has led to certain constructs within international criminal law that do not correspond to those in any specific national criminal law doctrine. These developments are related to specific requirements stemming from the nature of the crimes under the jurisdiction of international tribunals, in particular the

8 Paper prepared by the ICRC relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law, Preparatory Commission for the International Criminal Court, PCNICC/1999/WGEC/INF/2/Add.4, 15 December 1999.

9 *Ibid.*, at 8.

collective context in which they take place. They are seen as justified because many international crimes are "subject to a regime outside the scope of ordinary law",[10] which would make simple transposition of concepts of national law as such to the international level inappropriate. The 'general part' of international criminal law is not a product of comparative criminal law,[11] but national law in the sense of general principles drawn from the major legal systems of the world forms one of the sources of international criminal law, and national case law has provided inspiration and support to international courts and tribunals.[12] The autonomous existence of international criminal law has also been recognised in article 21 of the Rome Statute, which lists the sources of law to be applied by the Court, and among these "the principles and rules of international law".[13]

3.2. Post-World War II Jurisprudence

Some of the basic issues and arguments with regard to the scope of and grounds for criminal responsibility under international law were introduced already at the time of the post-World War II trials. While general provisions were rather few in the Charters of the IMT and the IMTFE, consideration of complicated questions of individual criminal responsibility was by no means alien to the Tribunals. The post-World War II jurisprudence as a whole, comprising also the subsequent proceedings conducted on the basis of Control Council Law No. 10, has laid down the foundations of the doctrine of criminal responsibility under international law, on

10 As noted by the Special Rapporteur of the ILC Doudou Thiam in his fourth report on the Draft Code of Crimes against the Peace and Security of Mankind, YBILC 1986, Vol. II, Part I, at 70.

11 See for instance Albin Eser, 'The Need for a General Part', in M. Cherif Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Association Internationale de Droit Pénal, Érès, 1993, 43–52, at 51.

12 Domestic analogy is one of the methods used by (modern) international Tribunals, see Ambos, *supra* note 4, at 45–46. See also the ILC codification of the Nuremberg Principles, commentary to Principle VII, reproduced in Sir Arthur Watts, *The International Law Commission 1949–199*8, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, 1657–1668, at 1668.

13 However, these should be applied only "in the second place" and "where appropriate", see Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, art. 21 (1)b). "General principles of law derived by the Court from national laws of legal systems of the world" are mentioned in subpara. 21(1)(c). See also Margaret McAuliffe de Guzman, 'Article 21: Applicable Law ', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 435–446, at 440–441 and 442–444.

which the modern war crimes tribunals have later built an important part of their jurisprudence.[14]

The International Military Tribunals in Nuremberg and Tokyo established the principle that individuals can be prosecuted directly under international law and that an official position is not an obstacle to prosecution.[15] They also introduced the basic categories of crimes against peace, war crimes, and crimes against humanity, which have prevailed since, although the definitions of these crimes have been further developed in subsequent codifications. Furthermore, the Charter of the International Military Tribunal also provided two new concepts of criminal participation specifically chosen or designed for the prosecution of the 'major war criminals', as the task of the Tribunal was formulated.[16] The concept of conspiracy, as noted, had a common law background, but the notion of criminal responsibility ensuing from membership in a criminal organisation was specifically devised for the purposes of the Nuremberg trial.[17] The same provisions were subsequently included in Control Council Law No.10, which provided a uniform legal basis in Germany for national tribunals and military commissions of the occupying states to prosecute war crimes and other similar offences,[18] and in the IMTFE Charter as well.[19] Both concepts broke new ground in that they were previously unknown even in some of the Allied states and their national criminal codes.[20]

14 Christian Tomuschat, 'The Legacy of Nuremberg', 4 *JICJ* (2006), 830–844.

15 *Ibid.*, at 830–831.

16 The IMT was established "for the just and prompt trial and punishment of the major war criminals of the European Axis". See Nuremberg Trial Proceedings Vol.1, Charter of the International Military Tribunal, art.1, http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm

17 See van Sliedregt, *supra* note 2, at 15–25; Ambos, *supra* note 4, at 81–83.

18 Nuremberg Trials Final Report Appendix D: Control Council Law No. 10, http://www.yale.edu/lawweb/avalon/imt/imt10.htm. See also van Sliedregt, *supra* note 2, at 25–26; Ambos, *supra* note 4, at 83–84.

19 The IMTFE Charter is available at www.yale.edu/lawweb/avalon/imtfech.htm. See also B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, 1993.

20 See van Sliedregt, *supra* note 2, at 17–20; Danner, Allison Marston & Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', Vanderbilt University Law School, Public Law & Legal Theory Working Paper Series, Working Paper No. 04–09; Stanford Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 87 March 2004, at 35.

3.2.1. Conspiracy, Criminal Organisations and Common Purpose

The specific features of conspiracy that have made it a contested concept in international criminal law are related to its nature as an inchoate offence, on the one hand, and to its background in vicarious liability, on the other. The common law tradition had long recognised "a combination between two or more persons formed for the purpose of doing either an unlawful act or a lawful act by unlawful means"[21] as a self-standing offence, whether or not the envisaged crime was eventually committed.[22] The essential substance of the crime of conspiracy as an inchoate offence is the agreement to bring about a criminal outcome. Its advantage from the point of view of criminal policy is that it enables the criminal justice system to intervene before the planned crime takes place. The doctrine of vicarious liability, drawing on private law concepts, creates a basis for criminal responsibility for the acts of another.[23] This is another essential aspect of conspiracy giving it a wide reach, not only in time, but also *ratione personae*; i.e. all those who take part in the agreement are responsible for both the agreement and its eventual consequences. Conspiracy in this sense is a far-reaching criminal policy tool,[24] which made it controversial even at Nuremberg.[25]

The notion of conspiracy was contained in the IMT Charter in two separate paragraphs of article 6. Paragraph 6(a) on crimes against peace applied to "crimes against peace, namely planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for any of the foregoing". A separate clause after paragraph 6(c) criminalised participation in the formulation or execution of a common plan or conspiracy to commit any of the crimes coming within the jurisdiction of the Tribunal of the IMT Statute by "leaders, organisers, instigators and accomplices", who would then be "responsible for all acts performed by any person in execution of such plan".[26] In the former provision, conspiracy to commit crimes against peace was included as an independent crime, in the latter, as imputed liability for all crimes committed within the framework

21 ILC, Nuremberg Principles, commentary to Principle VI, para. 118, Watts *supra* note 12, at 1665–1666.

22 Schabas, *supra* note 7, at 260.

23 Fletcher, *supra* note 7, 190–191. See also Fletcher, *Rethinking Criminal Law*, 2nd Edn., Oxford University Press, 2000, at 647–649.

24 Fletcher, *supra* note 7, at 191, has referred to it as "a favoured weapon in the prosecutorial arsenal".

25 See van Sliedregt, *supra* note 2, at 17–20.

26 IMT Charter, art. 6.

of the conspiracy. According to the IMT Indictment, the defendants were thus to be held "individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy".[27] Article 6 of the IMT Charter seems to make it possible to use conspiracy either as an inchoate crime[28] or as a specific form of participation[29] in the substantive crimes under the Charter.[30] The ambivalent application of the concept has been explained by its unfamiliarity in civil law countries. Although the Charter introduced the notion of conspiracy at the international level, it did not lay down a specific content for it.

The most obvious limitation to the Tribunal's jurisdiction with regard to the broad concept of conspiracy as imputed liability was the decision to restrict its application to the category of crimes against peace. This same limitation was imposed explicitly in Control Council Law No. 10.[31] While the Tribunal's understanding of the temporal scope of the Nazi conspiracy was broad enough to go back to the establishment of the Nazi Party in 1919,[32] it adopted a more cautious line with regard to its scope *ratione personae*, emphasising that the crime must not be defined so broadly that it includes persons too far removed from the time of decision and of action.[33] There was, consequently, a need to carefully examine in each case whether a concrete plan to wage war existed and who had participated in it. In particular, it was noted that political declarations such as the programme of the Nazi party, or the statements made by Hitler in *Mein Kampf*, did not provide sufficient evidence of a concrete plan.[34] The Tokyo Tribunal gave a more exten-

27 IMT, Indictment in I Trial of Major War Criminals before the International Military Tribunal, Count i, III Statement of the Offence, available at http://www.yale.edu/lawweb/avalon/imt/proc/count1/htm. For the objections against the notion of conspiracy at Nuremberg, see ILC, Nuremberg Principles, commentary to principle VI, para. 118, at 1665–1666.

28 IMT Charter, art. 6(a).

29 *Ibid*., art. 6(c).

30 It has been noted that the latter formulation defines the role and responsibility of conspirators in terms of complicity, see Werle, *supra* note 7, at 443. See also van Sliedregt, *supra* note 2, at 18. Schabas, *supra* note 7, at 261–262, has nevertheless argued that the Charter recognised conspiracy as a common law concept but "the intent of the drafters was not fully grasped by the judges".

31 Control Council Law No. 10, art. II (a). See also Ambos, *supra* note 4, at 102.

32 IMT Judgement, The Law as to the Common Plan or Conspiracy, available at http://www.yale.edu/lawweb/avalon/imt/proc/judlawco.htm. See also Schabas, *supra* note 7, at 262.

33 Ambos, *supra* note 4, at 102; van Sliedregt, *supra* note 2, at 19; *Historical Review of Developments relating to Aggression*, United Nations, 2003, at 73–74.

34 IMT Judgement, The Law as to the Common Plan or Conspiracy. See also Nuremberg Principles, commentary to principle VI, para. 118, Watts, s*upra* note 12, at 1665–1666.

sive interpretation to the concept of conspiracy and used it in most of its convictions.[35]

As for the concept of criminal organisations, the IMT Charter established a procedure whereby the Tribunal could declare that a group or organisation was a criminal organisation.[36] After such a declaration, any of the signatory states could bring an individual to trial in national, military or occupation courts for membership in such a criminal group or organisation.[37] The purpose of these provisions was to allow for subsequent trials to be held using an expedited procedure without specifically examining the criminal nature of the activities in which the accused had been involved. Accordingly, Control Council Law No.10 recognised membership in a criminal group or organisation declared criminal by the IMT as a crime.[38] A declaration by the Tribunal as to the criminal nature of an organisation was originally meant to pave the way for finding broad criminal responsibility on the part of members of criminal organisations, who would then be charged for being members of the organisation irrespective of any specific contribution they might have made to the crimes committed in its name.[39]

The IMT used the pertinent provision to declare certain organisations to be criminal,[40] but the practical consequences of the application of this procedure fell short of the intended result, as the Tribunal laid down additional conditions for determining participation in criminal organisations. For an organisation to be declared criminal, the IMT required that its public activities included one of the crimes mentioned in article 6, namely crimes against peace, war crimes, or crimes against humanity. It was also required that most of the members of the organisation

35 Van Sliedregt, *supra* note 2, at 20. See also M. Cherif Bassiouni, *Crimes against Humanity in International Law*, 2nd Rev. Edn., Kluwer Law International, 1999, at 383. According to Ambos, *supra* note 4, at 139, the possibility to take part in the decision-making process and awareness of the aggressive plans were equalled by the IMTFE with participation in conspiracy.

36 IMT Charter, art. 9.

37 IMT Charter, art. 10: "In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any signatory shall have the right to bring individual to trial for membership therein".

38 Control Council Law No. 10, art. II (1)(d).

39 For the theory of 'collective criminality' that provided the basis for the notions of conspiracy and criminal organisations in the IMT Charter, see van Sliedregt, *supra* note 2, at 16–17. Bassiouni, *supra* note 35, at 384, has pointed out its deviations from the established notion of individual criminal responsibility.

40 The SS, the Gestapo, and the Leadership Corps of the Nazi party were declared criminal organisations; see IMT Judgement, http://www.yale.edu/lawweb/avalon/imt/proc/judorg.htm. See also Julio Barboza, 'International Criminal Law', 278 *RCADI* (1999), 13–199, at 114.

were volunteers and knew of the criminal nature of the organisation's activities.[41] In order for the criminal liability of an organisation to be extended to its individual members, both personal participation in the activities of the organisation and knowledge of the crimes committed in its name were required. [42] It has been noted that the Tribunal approached the concept of criminal organisations from the same angle as it approached conspiracy, applying the two notions interchangeably and requiring of both the existence of a group bound together and organised for a common criminal purpose.[43] As was pointed out in the *Goering* case,

> 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.[44]

In fact, no one was ever charged for mere membership in a certain organisation.[45] At the same time, a judicial finding that an organisation was criminal created a presumption of the individual criminality of its members that they could only rebut by showing that they lacked knowledge of its criminal activities.[46] The Charter of the IMTFE did not contain the concept of criminal organisations, and the concept thus did not have direct relevance for the Tokyo proceedings.[47]

---

41 Bassiouni, *supra* note 35, at 385.

42 Ambos, *supra* note 4 , at 127.

43 Van Sliedregt, *supra* note 2, at 94–95.

44 *France et al. v. Goering et al.* (1946), IMT Judgement, http://www.yale.edu/lawweb/avalon/imt/proc/judgoeri.htm. See also Bassiouni, *supra* note 35, at 387, 390. Schabas, *supra* note 7, at 262. Fletcher, *supra* note 7, at 191, has referred to the common basis of both crimes: "The modern doctrine of conspiracy renders criminal any agreement between two or more persons to commit a crime. The idea that an organization itself is criminal could have led to the punishment of the conspiracy as an entity in itself, but in fact it led to the creation of a separate crime defined by *participating* in a conspiracy" (original emphasis, footnotes omitted).

45 Ambos, *supra* note 4, at 127.

46 Bassiouni, *supra* note 35, at 385. The restrictive approach laid down by the IMT was, however, followed in the trials conducted under Control Council Law No.10. See Ambos, *supra* note 4, at 103–104.

47 Interpretations of 'guilt by association' of questionable precedential value can, however, be found in the case law of the Tokyo Tribunal, See Bassiouni, *supra* note 35, at 383 and 386–387.

As to the incorporation of the two new concepts of extended responsibility in international law – conspiracy and the concept of criminal organisations – the IMT legacy remained mixed, reflecting the law of the Charter which has been said to "commingle the principle of individual responsibility with that of collective responsibility and with that of attribution of group or institutional conduct to the individual".[48] Although the Tribunal implemented the Charter with caution, its view of criminal participation, as Ambos has noted, was influenced by the American 'individual agency' model (*Einheitstätermodell*) with the resulting non-differentiation between the principal act and various forms of participation.[49] The Nuremberg jurisprudence did not pave the way for a general acceptance of the notion of conspiracy,[50] and even less for that of criminal organisations, which was only used in some of the trials under Control Council Law No. 10.[51] In spite of this case law which relied on broad concepts constructing liability with regard to group crime, codified law in the post-Nuremberg era leaned towards a differentiated approach to criminal participation.[52] Even after the Nuremberg trials, theories of collective liability were mainly a phenomenon of common law jurisdictions. The broad concept of conspiracy was included in the 1948 Genocide Convention,[53] but it did not have much impact on the doctrinal divide, as states parties implemented its provisions in accordance with the general principles of their national

48 *Ibid*., at 270.

49 Ambos, *supra* note 4, at 126: "Im Rahmen der *Beteiligung* wird regelmässig als ausreichend erachtet, dass *irgendeine Form* faktischer Beteiligung an einem Verbrechen vorliegt. Ganz im Sinne des dem U.S.-amerikanischen Strafrecht zugrundeliegenden formalen Einheitstätermodells wird nicht zwischen Täterschaft und Teilnahme oder gar weiter differenziert" (original emphasis). Fletcher, *supra* note 7, at 192, has also pointed out that "[t]he doctrine of conspiracy means, in effect, that it is impossible under American law to hold individuals liable simply for what they do, each according to his or her own degree of criminal participation".

50 There is still no basis in international criminal law for applying the concept of conspiracy to war crimes or crimes against humanity. See Werle, *supra* note 7, at 165.

51 See for instance the *Karl Brandt et al (Medical case),* which was conducted by a US military commission by virtue of Control Council Law No.10, available at http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=medical. See also van Sliedregt, *supra* note 2, at 28.

52 Van Sliedregt, *supra* note 2, at 39.

53 For the drafting history of the conspiracy provision in the 1948 Convention see Schabas, *supra* note 7, at 260–261. He has also noted, at 293, that Anglo-American complicity law underlay the provisions on other acts of genocide under the Convention. See also Larissa van den Herik and Elies van Sliedregt, 'Ten Years Later, the Rwanda Tribunal still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes', 17 *LJIL* (2004), 537–557, at 548.

criminal codes. Schabas has noted that the 'other crimes' of genocide may therefore have been insufficiently incorporated in national legislations in contravention of the letter and spirit of the Genocide Convention which would support a broad conception of conspiracy as an inchoate crime.[54] A further indication of the persistent division between civil law and common law jurisdictions was the solution adopted in the UN Convention on Narcotic Drugs as late as in 1988.[55] Article 3 of the Convention includes the concept of conspiracy but qualifies it with a safeguards formulation according to which the introduction of the crime in the national legislation of a state party is "subject to its constitutional principles and the basic concepts of its legal system".[56] Even the 1996 Draft Code of Crimes, in a widely criticised article, requires of all acts of genocide, including conspiracy and incitement, that the principal offence is actually committed.[57] Likewise, while the Rome Statute reproduced the 1948 definition of the crime of genocide, it did not acknowledge conspiracy to commit genocide as an independent crime.[58]

3.2.2. Command Responsibility

A third concept that played an important role in post-World War II war crime trials was command responsibility. It was neither provided for in the IMT Charter nor recognised by the Nuremberg Tribunal, but it became one of the most frequently used grounds for extended criminal responsibility in post-war national trials.[59] As the concept of command responsibility is currently understood, it goes beyond the

54 Schabas, *supra* note 7, at 257–264.

55 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 19 December 1988, UN Doc.E/CONF.82/15 Corr.1 and Corr.2 (UN Drugs Convention), art. 3(1)(c).

56 *Ibid.*, art. 3(1)c).

57 Report of the International Law Commission on the work of its 48th session , 6 May–26 July 1996, UN GAOR 51st session, Supplement No. 10 (A/51/10), Draft Code of Crimes against the Peace and Security of Mankind (1996 Draft Code), art. 2(3)(e); for critical comments, see Schabas, *supra* note 7, at 263; Jean Allain and John R.W.D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind', 1 *EJIL* (1997), 100–117, at 109–111.

58 Rome Statute, art. 6 and art. 25; for the "rejection of the common law approach", see Schabas, *supra* note 7, at 263-264. See also Schabas, 'Article 6: Genocide', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 107–116, at 115–116.

59 Ambos, *supra* note 4, at 160; 1996 Draft Code, commentary to art. 6, para. 2, Watts, *supra* note 12, at 1702. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC and Cambridge University Press, 2005 (ICRC Customary Law Study), at 559, footnote 42.

direct responsibility of a commander for any unlawful orders he or she may have given and encompasses responsibility for the acts of subordinates that the commander fails to prevent or to punish, whether this is conceived as imputed responsibility for the act[60] or as a responsibility for the failure to act.[61] The first aspect was prominent in the IMT trials which dealt exclusively with the direct responsibility of the high Nazi leaders. The Tribunal convicted several persons of crimes that had been committed as a result of the orders they had given, but this was done on the basis of accomplice liability.[62] The trials before the Tokyo Tribunal, as well as certain national trials, also addressed the question of responsibility ensuing from a failure to prevent or punish. Unlike the notions of conspiracy or criminal organisations the doctrine of command responsibility is well recognised in customary and treaty law.[63]

As a form of responsibility for omission, whereby the commander's liability arises not only because of the acts he or she has ordered, but also because of the criminal acts his or her subordinates have committed in contravention of orders, command responsibility is limited to particular types of situations. The exceptionally low standard of knowledge, expressed in Additional Protocol I to the Geneva Conventions as a requirement that the commander "knew of the commission of crimes or possessed information which should have enabled him to conclude" that crimes were committed,[64] is applicable only where the relationship between the supervisor and the subordinates is characterised by a chain of command and a system of discipline that effectively restricts independent action by the latter. The model of command responsibility comes from military law and was originally confined to war crimes. Some of the most important post-World War II war crime trials applying command responsibility as a ground for criminal responsibility, including the *Medical* case, took an important conceptual step in extending command responsibility to a civil profession such as that of medical doctors.[65] Thus, the

60 UN Doc. S/RES/827(1993); Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808(1993), S/25704, 3 May 1993, para. 56, at 15.

61 The ICRC commentary on article 86 of AP I emphasises command responsibility as a corollary to a positive duty to act, referring to lack of 'due diligence'. Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC and Martinus Nijhoff Publishers, 1987 (Commentary on the AP), at 1010.

62 Nuremberg Principles, commentary to principle VII, para. 127, Watts, *supra* note 12, at 1668.

63 Ilias Bantekas, 'The interests of States versus the doctrine of superior responsibility', 82 *IRRC* (2000), No. 837, 391–402 , at 391.

64 AP I arts. 86 and 87.

65 Ambos, *supra* note 4, at 101.

Medical Judgement relied on the assumption that the supervising doctor had a duty to control his subordinates and was responsible for the inhuman medical experiments conducted by them on the inmates of a closed institution. The IMTFE, for its part, extended superior responsibility for mistreatment of detainees in institutions controlled by the Japanese authorities to the government as a whole. Being a member of the cabinet at the time when the abuse took place was regarded as sufficient grounds for criminal responsibility, provided that the person had taken no action to prevent the abuse from taking place.[66] Prime Minister Hideki Tojo and Foreign Minister Kōki Hirota were thus convicted for their failure to prevent and punish crimes committed by the Japanese troops against prisoners of war.[67]

The most frequently cited case of command responsibility in the war crime trials of the time, and one that illustrates the main tensions inherent in the concept, is *re Yamashita*.[68] The trial was conducted by a US military commission in Manila against General Tomoyuki Yamashita, who had been the supreme military commander of the Japanese Imperial Army in the Philippines. Yamashita was sentenced to death for the widespread atrocities committed by the Japanese troops on the islands. The case was appealed by the defence and finally decided by the US Supreme Court by a narrow majority. It continues to raise questions related to the standard of knowledge applicable to command responsibility. What is known of the facts of the case seems to indicate that the troops of General Yamashita were already dispersed at the time of the atrocities; i.e. he was separated from his subordinates, stayed in a remote location, and had also formally ceded his control of the troops. As he thus had neither de jure nor de facto control of the troops at the time the offences were committed, the basis for responsibility seems to come close to

66 *Ibid*., at 133–136.

67 Record of Proceedings of the International Military Tribunal for the Far East (1946–1949), Vol. 20, at 49, paras. 843– 848 (Tojo) and paras 788–792 (Hirota), reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 20, Judgement and Annexes, Garland Publishing Inc., 1981. See also Bassiouni, *supra* note 35, at 426–431.

68 *Re Yamashita*, Supreme Court of the US, No. 61 Misc., 327 U.S. 1, 4 February 1946, Federal legal information through electronics, http://www.ess.uwe.ac.uk/WCC/inreyamashita.htm.

an objective standard.[69] It has been pointed out, however, that Yamashita's earlier command in Malaya had shown a consistent pattern of similar conduct.[70]

Even though some other post-war cases would better reflect the underlying rationale for command responsibility,[71] the *Yamashita* case has been frequently referred to since then, and is illustrative of the broad contours of the concept in customary law. Furthermore, 'the Yamashita principle' has been endorsed to a large extent in article 86 of the First Additional Protocol to the Geneva Conventions[72]: the article establishes responsibility for a failure to act even where a superior does not have direct information of any breaches of the Protocol, provided that he or she had information which should have enabled him or her to conclude in the circumstances at the time that such a breach was going to be committed. The ICRC commentary to article 86 acknowledges that the clause gives rise to problems of judgement. While it "seems to be established that a superior cannot absolve himself from responsibility by pleading ignorance of reports addressed to him or by invoking temporary absence as an excuse", the commentary emphasises that every case must be assessed in the light of the concrete situation.[73] In most cases reviewed by the ICRC, knowledge of the breaches committed by subordinates could, however, be presumed, provided that they were sufficiently widespread.[74]

3.2.3. Incitement

The IMT legacy remained ambiguous also with regard to the crime of incitement. The Tribunal convicted Julius Streicher, the publisher and editor of the newspa-

69 L.C.Green, 'Superior Orders and Command Responsibility', XXVII *Can. YBIL* (1989), at 195. Bantekas, *supra* note 63, at 398, has noted that "[i]t strains the mind to consider the possibility of upholding criminal responsibility in cases where both *de facto* control is missing and *de jure* control was already ceded for military purposes and not for the purposes of escaping criminal responsibility".

70 Green, *supra* note 69, at 195–196.

71 Ibid., at 196–198: according to the case of *Brigadeführer Kurt* Meyer, tried by a Canadian Military Court, a commander may incur criminal responsibility if he either ordered, encouraged or verbally or tacitly acquiesced in the crimes committed by subordinates, or wilfully failed in his duty as a military commander to prevent, or to take action as the circumstances required to endeavour to prevent such crimes. See also Bassiouni, *supra* note 35, at 431–431.

72 Green, *supra* note 69, at 196. He has, however, added that the case is "less satisfying" than certain other post-war trials.

73 Commentary on the AP, *supra* note 61, commentary to article 86(2), para. 3545, at 1013–1014.

74 *Ibid.*, para. 3546, at 1014. See also Ilias Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999), 573–595, at 588–590.

per *Der Stürmer* for "incitement to murder and extermination" as a crime against humanity.[75] In another judgement, however, the IMT acquitted Hans Fritsche, a radio journalist and later head of the Radio Division of the Ministry for popular enlightenment and propaganda, who had been charged with the crime against humanity of having "incited and encouraged the commission of war crimes by deliberately falsifying news".[76] A major difference between the two cases seems to be that Streicher's call for the extermination of the Jewish population, at the time when Jews were actually being brutally murdered, arguably had a direct causal link with the brutalities, whereas Fritsche did not directly urge persecution or extermination. Without explicitly stating so, the judgements thus seem to imply that punishable incitement must contain a direct call for criminal action. It was more uncertain whether such a call should also be successful in terms of leading to the commission of crimes.[77]

The crime of 'direct and public incitement' to commit genocide was later included in the 1948 Genocide Convention,[78] but views continue to differ on whether it was initially meant as a distinct offence punishable whether or not it was completed in terms of leading to genocide. Those who argue in favour of such a conclusion point out that it would otherwise be difficult to distinguish 'direct and public incitement' from incitement in the sense of prompting another person to commit a crime, which is normally seen as a form of complicity and may be termed incitement, instigation or abetting.[79] A more restrictive view, however, has also been persistent and, as noted above, made its way into the 1996 ILC Draft Code. One reason may be that the formulation of article III, paragraph (c) of the 1948 Convention, originally a compromise between two opposite positions, is somewhat unclear. While some delegations wanted to criminalise hate speech and other messages that could help to create a favourable atmosphere for genocide, others wished any limitation of the freedom of speech to be clearly defined and limited. Consequently, paragraph (c) contains a restrictive element in requiring

75 *Streicher* judgement, http://www.yale.edu/lawweb/avalon/imt/proc./judstreich.htm.

76 *Fritsche* judgement, http://www.yale.edu/lawweb/avalon/imt/proc./judfritz.htm.

77 A similar view has been expressed by Wibke Kristin Timmermann in 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?', 18 *LJIL* (2005), 258–282, at 261.

78 Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, UNTS Vol. 78, p. 277, art. III (c).

79 This is the view of Schabas, *supra* note 7, at 166–272, shared by Timmermann, *supra* note 77, at 274.

direct incitement while at the same suggesting time that nobody in fact needs to be incited.[80]

3.2.4. The Nuremberg Legacy

The Charter of the IMT gave broad and unprecedented possibilities for establishing imputed criminal liability, but the Nuremberg judges faced equally unprecedented problems in attributing guilt for crimes committed on a mass basis. Aware of the risk of imposing collective guilt on ordinary soldiers or supporters of the Nazi ideology, the judges tried to combine the overriding policy goal of prosecuting leading Nazi criminals with a principled approach of upholding legality.[81] In interpreting the Statute, they drew on national criminal law doctrines and on general principles of criminal law as they were understood in the main legal systems. The strong policy element in the establishment of the IMT by the occupying powers was thereby balanced by the judges' caution. For instance, where crimes against peace were concerned, they noted that a private individual would not, in most cases, have sufficient information of the facts that are decisive in determining whether his or her country has become an aggressor.[82] The Tribunal wanted to distinguish the major war criminals from ordinary citizens and emphasised that there must be limits to indictable criminality.[83] It can therefore be said that the Nuremberg trials represented a conscious effort to deal with ideological crimes committed on a mass scale and directed, organised, or carried out by the machinery of the state, while respecting the requirements of legality. In spite of the criticisms directed at the IMT as 'victors' justice',[84] its Judgement proved influential in the further development of the law of the core crimes.[85] This did not, however, happen any time soon and there was no noticeable spill-over of the Nuremberg law to other international crimes.

80 For the negotiating history of the Convention, see Schabas, *supra* note 7, at 266–271, and *supra* note 58, at 115.

81 *Historical Review of Developments relating to Aggression, supra* note 33, at 79.

82 *Ibid.*, citing *Trials of War Criminals before the Nuernberg Military Tribunals*, United States Government Printing Office, 1952, Vol. VIII, at 1126.

83 Ambos, *supra* note 4, at 104.

84 For the criticisms directed at the Nuremberg proceedings in Germany, see Tomuschat, *supra* note 14, at 832–834. For the criticisms in the USA, see Henry T. King Jr., 'Robert H. Jackson and the Triumph of Justice at Nüremberg', 35 *Case W. Res. J. Int' l L.* (2003), 263–272, at 268–269.

85 Sir Arthur Watts,' Nürnberg Principles. Introductory Note', in Watts, *The International Law Commission 1949–1998*, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, 1657–1658, at 1658.

In general, the approach of the IMT to the application of its Charter was one of caution. As noted earlier, the Tribunal required conclusive evidence of knowledge and active participation for conviction even when dealing with common purpose crimes. While this stance was not elaborated further in a theoretical sense – Ambos has pointed out that attribution of responsibility by the IMT was pragmatic and dependent on the available evidence,[86] with the criteria of attribution shifting from one trial to another, within one trial, and even with regard to one and the same indicted person[87] – two important implications can be discerned with regard to both the Nuremberg jurisprudence and the legacy it left for subsequent prosecutions. Firstly, it was deemed important, in accordance with the mandate given by the Allied Powers, to focus on 'the major war criminals', meaning the political and military leaders who had planned and ordered the egregious crimes. The same emphasis is prominent in present-day international criminal tribunals. While the focus on the major criminals is not an explicit requirement in the ICTY Statute, it can be said to have been "substantially based on the same assumption".[88] The UN Security Council, in endorsing the completion strategies of the ICTY and the ICTR, has made it clear that both Tribunals should focus on "the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal".[89] The mandate and statute of the Special Court for Sierra

86 Ambos, *supra* note 4, at 125

87 *Ibid*., at 88. See also the *Tadić* Judgement, para. 674. The Trial Chamber noted that the post-World War II judgements also generally failed to discuss in detail the criteria by which guilt was determined.

88 Antonio Cassese, 'The ICTY: A Living and Vital Reality', 2 *JICJ* (2004), 585–597, at 587. See also Carla del Ponte, 'Prosecuting the Individuals Bearing the Highest level of Responsibility', 2 *JICJ* (2004), 516–519, at 517, who has referred to two grounds for deeming who may bear the greatest responsibility: 1) the functional responsibility of the persons occupying the highest political and military positions which may be taken as a good indicator of possible criminal responsibility, and 2) the commission of numerous crimes in an overt, systematic and widespread manner which is likely to set an example.

89 UN Doc. S/RES/1534(2004), para. 5. See also Daryl A. Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals', in 99 *AJIL* (2005), 142–158, at 146–147 and Larry D. Johnson, 'Closing An International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', 99 *AJIL* (2005), 158–174, at 162–168.

Leone,[90] as well as the guidelines of the Office of the Prosecutor of the ICC,[91] share the same approach. They have all – partly for reasons of process economy but also as a matter of principle – made a distinction between major cases that should be chosen or continued to be considered at the international level and more ordinary ones that can be safely left or transferred to national courts.

Secondly – in a consequence implicit in the first choice – special attention was paid to different forms of accomplice liability. This approach was justified as one of the principal means to address systemic crimes, such as the extermination carried out by the Nazis, whose commission is utterly dependent on access to the resources of the state.[92] It has also proven necessary in countering defensive arguments, like the one attributed to Rudolf Höss in an interview with the Nuremberg psychiatrist Leon Goldensohn in 1946, that were based on the fact that higher officials were seldom immediate perpetrators: "I don't know what you mean by being upset about these things, because I didn't personally murder anybody. I was just the director of the extermination program in Auschwitz".[93] As Schabas has noted, the focus of international prosecution, from Nuremberg and Tokyo to the contemporary tribunals, has not been so much on the principal perpetrators, who normally count among the low-level executors as on the leaders, "who are, technically speaking, 'mere accomplices'".[94] The question of the responsibility of persons other than the direct perpetrators of the crime has been particularly relevant with regard to crimes which are massive, widespread or systematic and which frequently are committed under "the colour of the state".[95] In the case of such crimes, Schabas has argued, the accomplice or the conspirator may be as guilty, or even guiltier

90 Statute of the SLSC, art.1(1): "The Special Court shall [...] have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonian law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone".

91 Rome Statute, Preamble, para. 9 and art. 5 (references to "the most serious crimes of concern to the international community as a whole"), and art. 17 (criterion of gravity). See also 'Paper on some policy issues before the Office of the Prosecutor', September 2003, available at http://www.icc-cpi.int> office of the prosecutor.

92 Ambos, *supra* note 4, at 88, has pointed out that the role of the state was essential in Nazi crimes which otherwise could not have taken place.

93 Robert Gellately (ed.), *The Nuremberg Interviews: Conversations with the Defendants and Witnesses Conducted by Leon Goldensohn*, Pimlico, 2007, at 315.

94 William A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 IRRC (2001), 439–459, at 440; see also Schabas, *supra* note 7, at 259.

95 Bassiouni, *supra* note 35, at 378.

than the principal offender who technically committed the crime.[96] This view is shared by Bassiouni, who has proposed that a higher requirement concerning the mental element may be in order for the actual perpetrator who can often be compared to a tool in the hands of those who organise or direct the crime.[97]

3.3. The Modern International Criminal Tribunals

The second main wave of advances in the establishment of international criminal responsibility for the most serious crimes derives to a large extent from the case law of the two UN ad hoc tribunals, which has been particularly influential in clarifying the customary law related to the crimes under their jurisdiction. Established half a century after the first international military tribunals, the ICTY and the ICTR have had to assume a pioneering role, "moving from zero to a full-fledged judicial institution", as the first president of the ICTY put it.[98] The ICTR as well has drawn attention to the "complete vacuum" in which it had to start to operate, given that there were hardly any precedents of genocide trials to rely on.[99] The statutes of the ICTY and the ICTR were in general crafted with a concern about not going beyond recognised customary law[100] and in substantive terms they hardly added anything to what had already been established fifty years earlier in the IMT and the IMTFE Charters and in Control Council Law No. 10.[101] This was also true of the general principles of criminal law as no detailed 'general part' was included in either statute. At the same time, the case law of the two ad hoc tribunals, as Mettraux has noted, has "gone a long way in liberating legal concepts such as genocide and crimes against humanity from the historically charged circumstances under which they were born".[102] The instrumental contribution of the the ad hoc

96 Schabas, *supra* note 7, at 257, 259.

97 Bassiouni, *supra* note 35, at 248–249.

98 Cassese, *supra* note 88, at 592.

99 Van den Herik and van Sliedregt, *supra* note 53, at 537–538.

100 Ralph Zacklin, 'Some Major Problems in the Drafting of the ICTY Statute', 2 *JICJ* (2004), 360–367, at 161. Consistency with existing customary law was deemed important both from the point of view of legality – in case a party to the conflict was not bound by a specific treaty –and because of doubts about the powers of the UN Security Council to legislate. On the former ground, see *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, (*Tadić* Jurisdiction Decision), para. 143.

101 As noted by Bassiouni, *supra* note 35, at 407.

102 Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 *Harv.ILJ.* (2002), 237–316, at 240.

tribunals to the development of international criminal law, including the general part, has taken the form of judicial application and interpretation of the respective statutes and the underlying customary law.[103] In this way, the case law of the tribunals has opened new paths both with regard to substantive international criminal and humanitarian law and with regard to the theory of criminal responsibility.

To overcome the many obstacles to an international prosecution of complex criminal cases, the ad hoc tribunals have approached the application of their statutes in a way that has often been called innovative and even 'imaginative'.[104] Several considerations have prompted the judges of the two tribunals to assume an active interpretative role, not least the fragmented nature of the existing law and jurisprudence at the time the tribunals became operational, which made it necessary to 'spell out the contents' of the existing rules. Furthermore, as the establishment of the tribunals was influenced by a strong moral and political imperative 'to close the impunity gap', it seemed proper for them to take a pro-active approach and make full use of the jurisdiction provided for in the Statutes.[105] In accordance with this mandate, the case law of the ICTY, in particular, has produced both useful clarifications and new interpretations of the legal framework concerning war crimes and crimes against humanity. The Rules of Procedure and Evidence of the Tribunals, amended several times, have tried to accommodate and reconcile common law and civil law approaches to criminal law and have contributed to the emergence of a

103 See also Cassese, *supra* note 2, at 17, who has pointed out that the "heavy reliance by the newly created international courts upon customary rules or unwritten general principles" shows that "even the recent addition of the sets of written rules [...] has not proved sufficient for building a coherent legal system".

104 Luigi Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 107–117, at 109, pointing out that "it was necessary to establish, in an improvised and chaotic way determined by the pressure of events, an entire *corpus* of rules". The ICTY and later the ICTR have therefore "substantially enriched the normative framework [...] through an imaginative and very progressive interpretation of the rules of the Statutes".

105 As expressed by the Trial Chamber in the *Čelebići* case: "The kinds of grave violations of international humanitarian law which were the motivating factors for the establishment of the Tribunal continue to occur in many other parts of the world [...]. The international community can only come to grips with the hydra-headed elusiveness of human conduct through a [...] purposive interpretation of existing provisions of international customary law". *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement of 16 November 1998 (*Čelebići* Judgement), para. 170. See also para. 158 on judicial gap-filling, including the interpretative role of the judiciary as a means to give effect to the drafters' intentions.

'hybrid' general part for purposes of prosecuting the most serious international crimes.[106]

Some of the most important doctrinal debates concerning the extent and modes of individual responsibility for international crimes have been conducted in relation to the case law of the two ad hoc international tribunals, in particular that of the ICTY. Building on the post-World War II jurisprudence, the ICTY has made use of and further developed theories of collective liability, including command responsibility and the common purpose doctrine, in order to deal with crimes that by definition are committed to enforce a certain policy. While the ICTR has followed the line of reasoning set by the ICTY on many issues, its jurisprudence is particularly interesting from the point of view of interpreting the Genocide Convention, including the provisions on conspiracy and incitement as acts of genocide. Even the Sierra Leone Special Court has, to a large extent, operated within the conceptual framework developed by the ad hoc tribunals. The list of issues that have been revisited by the ICTY includes a general emphasis on the principle of legality, multiple participation, the responsibility of superiors, the notion of aiding and abetting, and the common purpose doctrine.[107] The following brief overview of the case law of the two tribunals focuses on how they have approached questions of extended responsibility, i.e. the responsibility of persons other than the direct perpetrators of a crime, or responsibility for acts that have the potential to cause unacceptable harm. Special attention will be paid to the common purpose doctrine and the concept of joint criminal enterprise.

3.3.1. The *Tadić* Case

One of the first and most frequently commented on cases of the ICTY, *Tadić*, has provided a wealth of new interpretations. These span the grounds on which the then ongoing conflict between the armed groups of Bosnian Serbs and Bosnian

106 At the same time, it has been pointed out that judicial law-making, if it entails "too great a shift away from practice-oriented sort of custom [...], carries with it the risk of undermining the certainty and clarity which sources of international law have to provide. In criminal trials, this risk is compounded by the fact that such a lack of certainty might seriously jeopardize the rights of the accused". Guénaël Mettraux, *International Crimes and The Ad Hoc Tribunals*, Oxford University Press, 2005, at 18 (footnotes omitted). See, however, also Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', 2 *JICJ* (2004), 999–1006, for why a certain degree of judicial interpretation is necessary even in criminal law and is compatible with the principle of legality, provided that the result is consistent with the essence of the crime.

107 Cassese, *supr*a note 88, at 592-593, has mentioned in this context also certain defences, multiplicity of offences and cumulative convictions.

Muslims was classified as an international conflict,[108] the criteria for the status of a protected person,[109] the definition of crimes against humanity,[110] the establishment of individual criminal responsibility for crimes committed in non-international armed conflicts,[111] and the different modes of responsibility for participating in a crime.[112] Many of the new interpretations set out in the *Tadić* Appeals Judgement have been influential in forming the subsequent jurisprudence of the ICTY, as well as that of the ICTR and the SLSC, a development that has also paved the way for a more general recognition of this *acquis.*[113] The *Tadić* proceedings settled important aspects of individual criminal responsibility, including the definition of accomplice liability. As far as theories of collective liability are concerned, the Appeals Chamber's discussion of the common purpose doctrine is particularly interesting.

Article 7(1) of the ICTY Statute provides that "those who plan, instigate, order, commit or otherwise aid and abet in the planning, preparation or execution" of a crime referred to in the Statute are to be individually responsible for the crime. Responsibility of a superior who 'knew or had reason to know' that the subordinate was about to commit a criminal act and failed to take measures to prevent such acts or punish the perpetrators is provided for in article 7(3). In addition to 'commission', the different modes of participation under paragraph (1) are usually referred to as 'direct' responsibility, as distinct from command responsibility in paragraph (3), which is termed 'indirect' responsibility.[114] In the case of the crime of genocide, article 4 specifically mentions conspiracy, direct and public incitement,

108 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement of 15 July 1999 (*Tadić* Appeal Judgement), see para. 84 on what is required for an international conflict. See also para. 146 for the question of the degree of control required for state responsibility; for more on this question in Chapters 5.2.1. and 5.3.

109 *Ibid.*, paras. 166–169.

110 *Ibid.,* paras. 251, 271 on the required nexus between the acts of an individual and the overall attack.

111 *Tadić* Jurisdiction Decision, para 391, also referred to in the ICRC Customary Law Study, *supra* note 59, Vol. 1, at 554.

112 *Tadić* Appeal Judgement, paras. 689–691, 190, 195–196, 202–204, 227–229.

113 The case law of the ICTY was actively used in the elaboration of the ICC Elements of Crimes, owing to the ICRC commentaries, which cited relevant case law. See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Books, 2003.

114 See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on Defence Motion to Dismiss the Indictment Based upon Defects in the Form Thereof, 4 April 1997, para. 31. See also *Prosecutor v. Zejnil Delalić et al.,* Case No. IT-96-21-A, Judgement of 20 February 2001, (*Čelebići* Appeal Judgement), para. 355, which refers to "participation [...] construed in such a way as to encompass all forms of responsibility which are included in article 7(1) [...] notwithstanding the fact that some forms are more direct than others".

attempt and complicity, thus incorporating the exact wording of the Genocide Convention.[115] While the Statute thus recognises that participation in a crime can be direct or indirect, the terms 'direct' and 'indirect' have been used in its jurisprudence in a less than uniform way.[116] Nor does the succinct formulation of the Statute shed much light on how the boundaries of the various categories should be drawn. The concept of joint criminal enterprise, which has since become one of the most frequently used tools in the ICTY to address participation in complex crimes – "the magic bullet of the ICTY" according to Schabas[117] – is not provided for in the Statute. However, when the concept was introduced in the 1999 *Tadić* Appeal Judgement, it was stated as being implicit in the wording of article 7(1).[118]

As far as complicity is concerned, a decisive step was taken by the ICTY Trial Chamber in *Tadić* when it laid down the main lines with regard to accomplice liability, choosing between two contending approaches to the issue. The prosecutor claimed that any contribution – "the most marginal act of assistance or encouragement" – to the commission of the crime would amount to participation as an accomplice. The Trial Chamber aligned itself with the more restrictive view advocated by the defence and required a significant causal relation between the act of the accomplice and the commission of the crime.[119] Drawing on a clear pattern, one recognisable in the post-World War II war crimes trials, the Trial Chamber pointed out that "intent involving requisite knowledge is not enough; there must also be a deliberate act if an accused is to be held criminally culpable and this deliberate act must directly affect the commission of the crime itself".[120] In this way, the Trial Chamber also endorsed the scope of complicity suggested by the ILC in the 1996 Draft Code, which had required of an accomplice that he or she "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime".[121] In so doing, the Trial Chamber set the tone for subsequent trials,

115 Art. 4 (3). It is worth pointing out that conspiracy does not extend to the other crimes under the Tribunal's jurisdiction.

116 See Chapter 4.4.

117 William A. Schabas, '*Mens Rea* and The International Criminal Tribunal for the Former Yugoslavia', 37 *New England L. Rev*. (2003), 1015–1036, at 1032.

118 *Tadić* Appeal Judgement, paras. 190, 195–196, 202–204.

119 *Prosecutor v. Duško Tadić*, case No. IT-94-1-T, Opinion and Judgement of 7 May, 1997 (*Tadić* Judgement), paras. 670–672. See also Ambos, *supra* note 4, at 273.

120 *Tadić* Judgement, para. 678.

121 1996 Draft Code, *supra* note 57, art. 2(3)(d).

as it soon became an established practice for the ICTY to require that complicity should have a direct and significant contribution to the principal crime.[122]

Other clarifications in *Tadić* included that complicity does not require that a person is present at the place where the crime is committed.[123] This conclusion was also reflected for instance in the *Aleksovski* and *Furundzija* Judgements, in which the Tribunal specified that being present and actually witnessing the perpetration of a crime may be regarded as an indication of complicity if the presence has a significant effect on the commission of the crime and the person present has the required *mens rea,* especially in the case of a superior whose subordinate carries out the criminal act.[124] Furthermore, the *mens rea* standard for complicity was settled as being at the level of knowledge of the criminal intention of the perpetrator.[125] The *Furundzija* Judgement also specified that it is not necessary that the aider and abettor knows about the precise crime that will be committed: "If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of the crime, and is guilty as an aider and abettor".[126]

The Appeals Chamber also underlined in *Tadić* the need to direct special attention to accomplices, noting that the crimes under the jurisdiction of the Tribunal constituted "manifestations of collective criminality", in which a number of persons apart from the physical perpetrators play a vital role in the commission of the crime, whether as participants, contributors or facilitators. As the Chamber noted, "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".[127] The

122 *Tadic* Judgement, para. 691: "The acts of the accused must be direct and substantial". See also *čelebići* judgement, paras. 325–329. See, however, Kai Ambos, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 475–492, at 481, who has criticised the ICTY for not having taken the "direct and substantial" criterion very seriously because the Trial Chamber, already in *Tadić,* included within the concept of aiding and abetting "all acts of asssistance by words or acts that lend encouragement or support", a stand that was confirmed in the *Čelebići* Decision. See *Tadić* Judgement, para. 689; *Čelebići* Judgement, paras. 325–329.

123 *Tadić* Judgement, para. 691.

124 *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1, Judgement of 25 June, 1999, paras. 65, 87; see also *Prosecutor v. Anto Furundzija,* Case No. IT-95-17/1-T, Judgement of 10 December 1998, paras. 205–207.

125 *Tadić* Appeal Judgement, para. 229. See also *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement of 24 March, 2000, para. 162.

126 *Furundzija* Judgement, para. 246. This understanding seems to equate an accomplice's knowledge to risk-taking.

127 *Tadić* Appeal Judgement, para. 191.

clearest expression of this approach, the doctrine of joint criminal enterprise, was developed by the Appeals Chamber as a response to the Trial Chamber's decision to acquit an accused by the name of Duško Tadić of charges that involved responsibility for the killing of five men in the course of a raid on two villages.[128] While Tadić had taken part in the raid, the Trial Chamber was not satisfied beyond reasonable doubt that he had had any part in the killing of the men or any of them. The fact that all five were killed in one of the villages and that no killing took place in the other village suggested, according to the Trial Chamber, "that the killing was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part".[129] The question that the Appeals Chamber faced was thus whether Tadić could be held responsible for murder as a crime against humanity even though there was no evidence that he had personally committed any of the killings. The modes of responsibility explicitly mentioned in article 7(1) did not seem to provide sufficient tools to link Tadić to the killings; obviously he did not plan, instigate, or order the killings, and complicity (aiding and abetting) was not applicable because he did not fulfil the knowledge requirement. As Tadić was a relatively low-level participant in the ethnic cleansing campaign carried out in Bosnia-Herzegovina, command responsibility was not applicable in the case either. In the end, Tadić was nevertheless convicted as a co-perpetrator of the killings.

3.3.2. Joint Criminal Enterprise

3.3.2.1. The Elements of Joint Criminal Enterprise

The additional element that the *Tadić* Appeals Chamber brought into the consideration of the individual criminal responsibility was the concept of common purpose, established in some national legal systems but hitherto not well known in international criminal law. As further elaborated by the Appeals Chamber, the main issue was whether the existence of a common criminal plan would change the assessment of the situation so that the acts of one person could give rise to the criminal responsibility of another person when both participated in the execution of a common criminal plan. If such an assumption were accepted, the consequential question would arise whether it would also cover situations where the latter person was not personally involved in the specific acts. Answering both questions in the affirmative, the Appeals Chamber laid down the foundations of a new interpretation of the doctrine of common purpose, or joint criminal enterprise (JCE),

128 *Ibid*., paras. 342–350.

129 *Ibid.,* para. 373.

as the concept later became known.[130] The material elements of a joint criminal enterprise as laid down by the Appeals Chamber include (i) the existence of a group of persons, (ii) a common plan, design or purpose that involves the commission of a crime provided for in the Statute, as well as (iii) the participation of the accused in such a common plan. The first element can be understood broadly as there is no requirement that the group has to be organised in a military, political or administrative form. It is also worth noting that the participation required in the third element does not have to involve the commission of a specific crime but can take the form of assistance in or contribution to the execution of the common plan or purpose.[131]

Joint criminal enterprise was presented in the *Tadić* Appeal Judgement as a composite concept encompassing three distinct categories. The first category is comparable to the more familiar and established forms of co-perpetration in that it requires the same criminal intent of all co-perpetrators.[132] The second is applicable to organised systems of ill-treatment such as concentration camps: it requires of all participants shared knowledge of the criminal nature of the system and an intention to further that system. Unlike these two categories, the third category (JCE III) extends the criminal responsibility of a member of a group to crimes that were not included in the common criminal plan and which therefore were committed by other members of the group without his or her knowledge or intention.[133] The three categories have subsequently been referred to as the 'basic', 'systemic' and 'extended' forms of joint criminal enterprise, respectively.[134] Each category requires a different *mens rea* standard: intent for the basic form, knowledge for the systemic form and recklessness, or *dolus eventualis*, for the extended form. It was the third, or extended, form of JCE that was applied in the *Tadić* case.

The third category of joint criminal enterprise deals with imputed responsibility for acts that are not explicitly acknowledged to be part of the common design. According to the Appeals Chamber, criminal responsibility for a death may thus be imputed to any participant within the common enterprise "where the

130 In *Tadić*, different terms were used interchangeably, such as 'a common criminal plan', 'a common criminal purpose', 'a common design' etc. See also *Prosecutor v. Radoslav Brđanin & Momir Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36, Trial Chamber, 26 June 2001, para. 24.

131 *Tadić* Appeal Judgement, para. 227.

132 *Ibid.*, para. 228; according to the Appeals Chamber, "The first category of cases requires the intent to perpetrate a specific crime (this intent being shared by all the co-perpetrators)".

133 *Ibid.*, para. 218.

134 See Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *JICJ* (2007), 159–183, at 160.

risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk".[135] Thus, no intention to kill is required to find a person guilty of murder under this category. As the Appeals Chamber explained:

> With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise, or, in any event, to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, in the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused willingly took that risk.[136]

As noted above, the concept of joint criminal enterprise was not explicitly provided for in the Statute, but the Appeals Chamber held that it could be inferred from article 7(1) as a specific mode of liability. It was pointed out that the interpretation of article 7(1) should take into account the object and purpose of the Statute as well as the specific nature of the crimes committed in a wartime situation, in particular their collective nature.[137] The Appeals Chamber was thus guided by a teleological consideration against limiting international criminal responsibility to those who actually carry out the *actus reus* of a crime. If the Tribunal confined itself to the forms of responsibility explicitly mentioned in article 7(1) – or in one of the underlying instruments that set forth the offences referred to in the Statute – it would risk disregarding the role of persons who had made it possible for the perpetrator to physically carry out the criminal act.[138] The Appeals Chamber recalled that the UN Secretary General's report that provided the basis on which the Security Council established the Tribunal had "provided that '*all persons*' who participate in the planning, preparation or execution of serious violations of international humanitarian law contribute to the commission of the violation and are therefore individually responsible".[139]

The introduction of the new theory of common purpose was based on a survey of post-World War II national case law, in which the doctrine of common design played a central role. The examples include the *Essen Lynching* and *Borkum Island* cases, which dealt with the lynching of prisoners of war, as well as a number of

135 *Tadić* Appeal Judgement, para. 204.

136 *Ibid*., para. 228, (original emphasis).

137 *Ibid.,* paras. 191, 192.

138 *Ibid.*, para. 192.

139 *Ibid.*, para. 190, (emphasis added). See also UNSG Report, *supra* note 60, para. 54.

Italian post-World War II cases concerned with similar incidents.[140] In such situations, "the ultimate act might have been something in which the [accused] did not directly participate" while he nevertheless had "lent his aid to the accomplishment of the final result".[141] Even if the crime that was eventually committed was graver than intended, "it was in any case a consequence, albeit indirect, of his participation".[142] Most of the other cases referred to were also concerned with mob violence – crimes in which it was difficult to determine among a plurality of perpetrators who had done what. Consequently, "the causal link between each act and the eventual harm caused to the victims was similarly indeterminate".[143] On the basis of a survey it had carried out, the Appeals Chamber concluded that the doctrine of common purpose was not only implicitly contained in article 7(1) but also firmly established in customary international law.[144]

The theory of joint criminal enterprise set forth by the Appeals Chamber in the *Tadić* case has since been established as one of the most important modes of liability in the ICTY jurisprudence. The concept has been 'mainstreamed' through its frequent use in, inter alia, the *Ojdanić, Kordić and Cerkez, Blaškić*, *Krstić, Kvočka, Krnojelac, Milošević* and *Haradinaj* cases.[145] When the customary nature of JCE was challenged in the *Ojdanić* case, the Appeals Chamber upheld the findings of the

140 For instance, *Aratano et al*, *Bonati et a.l*, *D' Ottavio* and *Manelli* cases.

141 *Tadić* Appeal Judgement, para. 210, citing the *Borkum Island* Judgement.

142 *Ibid.*, para. 217, citing the *Bonati et al* Judgement.

143 *Ibid.*, para. 205.

144 *Ibid.*, para. 220.

145 *Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić,* Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction, 21 May 2003 (*Ojdanić* Decision); *Prosecutor v.Dario Kordić and Mario Cerkez,* Case No. IT-95-14-PT/2-T, Judgement of 26 February 2001 (*Kordić and Cerkez* Judgement) and Case No. IT-95-14-PT/2-A, Judgement of 17 December 2004 (*Kordić and Cerkez* Appeal Judgement)*; Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement of 3 March 2000 (*Blaškić* Judgement) and Case No. IT-95-14-A, Judgement of 29 July 2004 (*Blaškić* Appeal Judgement); *Prosecutor v. Radovan Krstić,* Case No. IT-98-33-T, Judgement of 2 August 2001 (*Krstić* Judgement) and Case No. IT-98-33-A, Judgement of 19 April 2004 (*Krstić* Appeal Judgement)*; Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Judgement of 2 November 2001 (*Kvočka* Judgement) and Case No. IT-98-30/1-A, Judgement of 28 February 2005 (*Kvočka* Appeal Judgement); *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-T, Judgement of 15 March 2002 and Case no. IT-97-25-A, Judgement of 17 September 2003 (*Krnojelac* Appeal Judgement); *Prosecutor v. Slobodan Milošević,* Case No. IT-01-51-I, Initial Indictment (Bosnia Herzegovina) of 22 November 2001 and Case No. IT-02-54-T, First Amended Indictment (Croatia) of 23 October, 2002; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-1, Initial Indictment of 24 February 2005, Revised Second Amended Indictment of 11 January 2007.

Tadić Appeals judgement and pointed out that the phrase "*or otherwise* aided or abetted" in article 7(1) suggests that the provision was meant to be non-exhaustive. The Appeals Chamber was therefore satisfied that joint criminal enterprise came within the terms of article 7(1). It also clarified that holding participants in a joint criminal enterprise liable only as aiders and abettors would, depending on the circumstances, mean understating the degree of their criminal responsibility.[146] Dragoljub Ojdanić was charged as a co-perpetrator in a joint criminal enterprise aimed at the expulsion of a substantial portion of the Kosovo Albanian population from the province. When the prosecution held that the word "committing" in article 7(1) was not meant to suggest that the accused had physically perpetrated any of the crimes, the Appeals Chamber endorsed this interpretation and confirmed that participation in a joint criminal enterprise should also be seen as a form of 'commission' under article 7(1) of the Statute, provided that the accused shared the intent to further the aims of the joint criminal enterprise. As the Chamber noted, "The Prosecution's approach is correct to the extent that, insofar as a participant shares the purpose of the joint criminal enterprise (as he or she must do) as opposed to merely knowing about it, he or she cannot be regarded as a mere aider and abettor to the crime which is contemplated".[147] The term 'committing' has also subsequently been interpreted by the Tribunal to include participation in a joint criminal enterprise.

All this has not happened without criticism: already the *Tadić* case raised questions about a 're-collectivisation of responsibility', which would run counter to the very basis of international criminal law, i.e. the culpability principle, under which an individual is held accountable for his or her own conduct.[148] The criticisms have been mainly directed at the extended form of joint criminal enterprise. It has been questioned whether this mode of responsibility in fact has as firm a basis in customary law as stated by the Tribunal.[149] While the examples of post-World War II case law produced by the Appeals Chamber in *Tadić* all deal with situations of extended responsibility in which the causal relationship between the

146 *Ojdanić* Decision, para. 19 (original emphasis).

147 *Ibid.*, para. 20.

148 Marco Sassòli and Laura M. Olson, 'New horizons for international humanitarian and criminal law?', 81 *IRRC* (1999), No. 839, 733–769; Sassòli and Olson, '*Prosecutor v. Tadić* (Judgement), Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999', 94 *AJIL* (2000), No. 3, 571 - 578; Danner and Martinez, *supra* note 20.

149 Sassóli and Olson (1999), *supra* note 148; Steven Powles, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?', 2 *JICJ* (2004), 606–619, at 615, has regretted that the Defense in *Tadić* did not challenge this finding; however, see *Ojdanić* Decision, paras. 20, 43, which reiterated the argument about the customary law nature of the doctrine.

conduct of a person and the harm caused is not direct – and not easily identifiable – only one of the cases, *Aratano et al*., provides the argument on which the theory of common purpose relies.[150] The question of whether there is a broader basis for the theory was not discussed by the ICTY in *Tadić* nor has it been taken up in subsequent judgements. Since *Ojdanić*, in which the defence challenged the doctrine of common purpose, the Tribunal has not revisited the earlier international or national jurisprudence but rather has referred back to its own case law, in which JCE has been established as one of the principal modes of responsibility. A second frequently raised question is related to the low standard of *mens rea* in the extended form of JCE, which deals with crimes that fall outside the common purpose. This extended form relies heavily on the notion of risk-taking, for awareness of the possibility that other members of the criminal enterprise may commit further crimes becomes a basis of criminal liability.[151] It has been debated whether the mental state of a participant in the extended form of JCE is best described in terms of recklessness, *dolus eventualis*,[152] or objective foresight.[153]

Problems have also arisen with regard to the application of JCE III to crimes that require a specific intent, such as persecution and genocide. It has been pointed out that specific intent crimes cannot be committed recklessly.[154] At the same time, it can be submitted that the two subjective elements of crimes requiring a specific intention – the one related to the physical act (*actus reus*) and the specific intent as 'an ulterior motive'[155] – have different points of reference and must both be established independently of each other.[156] This would qualify *dolus eventualis*

150 Powles, *supra* note 149, at 617; *Tadi*ć Appeal Judgement, para. 220. Danner and Martinez, *supra* note 20, at 38, have held that the cases cited in *Tadi*ć do not give proper support to the extended form of JCE.

151 Natalie Wagner, 'The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia', 85 *IRRC*(2003), No. 850, 351–383, at 363.

152 Sassòli and Olson (1999), *supra* note 148, consider the standard lower than *dolus eventualis* and submit that it rather resembles the common law notion of recklessness.

153 Wagner, *supra* note 151, at 364; a similar view has been expressed by Ambos, *supra* note 134, at 175.

154 Danner and Martinez, *supra* note 20, at 73; Ambos, *supra* note 134, at 166.

155 For the use of the concept in the ICC Elements of Crimes, see Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 19–40, at 31.

156 Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 *LJIL* (2001), 399–408, at 403. Similarly, van den Herik and van Sliedregt, *supra* note 53, have referred to the concept of 'double intent' in which intent with regard to one's own conduct and intent with regard to the conduct of the principal perpetrator

as a sufficient mental standard even for acts of genocide. The latter view was confirmed by the Appeals Chamber in the *Brđanin* case in a decision that addressed the compatibility of the third category of JCE with the specific intent requirement of the crime of genocide.[157] The Chamber underlined that joint criminal enterprise is a mode of liability through which an accused may be held criminally responsible while not being the direct perpetrator of the crime, comparable to aiding and abetting, or to superior responsibility, and as such applicable to any particular crime.[158] Criminal responsibility arises if both the objective and subjective elements of the JCE materialise: 1) there are multiple participants acting with a common purpose, 2) a crime falling outside of the agreed design is a natural and foreseeable consequence of the execution of the joint criminal enterprise, 3) the accused is aware of the possibility of such a crime being committed and 4) participates in the enterprise with that knowledge. If the crime committed outside the common design is one of the acts of genocide, it must only be established that it was reasonably foreseeable to the accused that such an act would be committed and that it would be committed with a genocidal intent.[159] In other words, the specific intent requirement attaches to the underlying crime, not to the JCE as such.

Concern has also been expressed about the open-ended scope of the concept of joint criminal enterprise. Sassòli and Olson have pointed out that a liberal application of the concept to military activities could lead to describing an entire armed conflict as a 'joint criminal enterprise', thus blurring the established principles of international humanitarian law, which are firmly based on individual criminal responsibility, save for strictly regulated exceptions such as command responsibil-

---

must be distinguished from each other, and the latter can in fact be reduced to knowledge of the principal's intent. This is the essence of the *mens rea* of accomplice liability, and JCE can be seen as a form of complicity. On this point, see also Danner and Martinez, *supra* note 20, at 61.

157 See *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeals of 19 March 2004, (*Brđanin* Decision). According to the Appeals Chamber, para. 6, a participant in a JCE may commit genocide without the specific genocidal intent if the commission of genocide is reasonably foreseeable to him or her. The Trial Chamber later came to another conclusion, see Case No. IT-99-36-T, Judgement of 1 September 2004 (*Brđanin* Judgement), para. 265, footnote 703: "If the crime charged fall 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." A similar view was expressed by the Trial Chamber in *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-T, Judgement of 31 July 2003, (*Stakić* Judgement), para. 530: "the applicable mode of liability can not replace a core element of a crime".

158 *Brđanin* Decision, para. 5.

159 *Ibid*., para. 6.

ity.[160] To be sure, the doctrine of JCE has been applied by the ICTY to different crimes and to very different configurations since its inception during the *Tadić* proceedings. The Trial Chamber in *Kvočka* underlined the versatility of the concept of criminal enterprise noting that while a plurality of persons is a necessary requirement for a JCE, such a criminal endeavour can range anywhere "from two persons planning to rob a bank to the systematic slaughter of millions during a vast criminal regime comprising thousands of participants". The scope of a joint criminal enterprise can thus be determined in a fairly flexible way. Moreover, no explicit agreement to form a criminal enterprise is needed, as its existence may also be based on an unspoken understanding or arrangement, and be inferred from the circumstances.[161] In particular, it is not necessary to prove that an agreement has been in place in relation to each specific crime committed with a common purpose.[162] All these aspects have attracted comments, and it has been noted recently that convictions for genocide based on the extended form of JCE would only be justifiable if "JCE is stripped to its core and applied as a small-scale group crime, which requires proof of a direct link between co-perpetrators".[163]

It has also been submitted that the problem with *Tadić* was not so much the lack of elaborate arguments firmly based in earlier practice, as the discrepancy between the theoretical construction and the facts of the case.[164] In other words, "The innovative and imaginative solutions applied by the ICTY Appeals Chamber to several issues were certainly not necessary to punish Tadić for the acts he had committed".[165] Indeed, the importance of the theory, from a legal point of view, has by far exceeded the importance of the particular case in the context of which it was introduced. Joint criminal enterprise has since developed into a doctrine that "on the one hand is applied to high government and military officials in planning system criminality, and on the other hand provides a basis for constructing liability of those participating in a system of criminality, such as a concentration camp".[166] The third category of JCE has been seen as particularly well suited to imposing criminal responsibility "on the most culpable offenders operating within

160 Sassòli and Olson (1999), *supra* note 148, at 779–780.

161 *Stakić* Judgement, paras. 472, 489. See also Nicola Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *JICJ* (2004), 446–454, at 450.

162 *Krnojelac* Appeal Judgement, para. 97 (in relation to the systemic form of JCE).

163 Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 *JICJ* (2007), 184–207, at 184.

164 Van Sliedregt, *supra* note 2, at 100.

165 Sassòli and Olson (2000), *supra* note 148, at 578.

166 Van Sliedregt, *supra* note 2, at 106.

a system-criminality context, regardless of the proximity of these offenders to the physical commission of the crime(s) in question".[167] It has thus been used to capture situations where the direct perpetrators are merely tools in the hands of the persons who have designed the criminal campaign. In such a situation, it has been submitted, it would not be satisfactory to treat the mastermind – the *auctor intellectualis*[168] – of the crime as an accomplice.[169]

At the same time, it may be noted that the scope of the joint criminal enterprise in *Tadić* was defined in a rather restrictive way in order to cover crimes committed during a campaign of ethnic cleansing limited to a couple of villages and lasting a few days.[170] Likewise, it was clearly proved that Tadić was a willing participant in that campaign. While the geographical distance between his acts and the actual killings was greater than in situations of mob violence, where it is "unknown or impossible to ascertain exactly which acts were carried out by which perpetrator",[171] it was still reasonable to assume that he might have had a link to the crimes. The facts of *Tadić* were thus closer to the post-war lynching incidents than the facts of some of the subsequent cases to which the concept of common purpose has been applied by the ICTY, such as *Blaškić, Krstić* and *Milošević*, which have targeted high political or military leaders. The time-frame of these latter cases, or the proximity between the different actors, are hardly comparable to sudden outbursts of violence such as occurred in *Essen Lynching*.[172]

---

167 Katarina Gustafson, 'The Requirement of an 'Express Agreement' for Joint Criminal Enterprise Liability: A Critique of *Brđanin*', 5 *JICJ* (2007), 134–158, at 139.

168 Bassiouni, *supra* note 35, at 248, has defined the term 'moral author' as referring to "a type of perpetrator who, having the requisite mental element, sets in motion events leading to the commission of the crime" while being removed from those who commit the specific criminal acts.

169 Van Sliedregt, *supra* note 2, at 183; Schabas, *supra* note 7, at 226.

170 The geographical area under consideration in *Tadić* was 20 kilometers in diameter, as pointed out by Mettraux, *supra* note 102, at 250.

171 *Tadić* Appeal Judgement, para. 205.

172 The *Essen Lynching* (also called *Essen West*) was brought before a British military court. Three British prisoners of war had been lynched by a mob in Essen West in December 1944. According to the reports, the POWs were being marched through the town when the crowd started hitting them and throwing sticks and stones at them. A serviceman fired a revolver at one of the POWs, wounding him, and eventually the three were thrown from a bridge. One of them was killed by the fall; the other two were killed by shots from the bridge and by members of the crowd who beat and kicked them to death. While it was impossible to prove who had individually done the acts that caused the deaths, several persons were found guilty of murder because they were "concerned in the killing". See *Tadić* Appeals Judgement, paras. 207–208.

Some of these intriguing questions have been answered in subsequent judgements by the ICTY as the common purpose doctrine has matured and been refined. Although the Trial Chamber in the *Kvočka* case focused in particular on the second category of JCE (the concentration camp situation) and was careful to underline that its discussion was limited to the facts of the case at hand, its reasoning has shed light on the entire concept. In discussing the boundary between criminal and non-criminal conduct – "the level of participation necessary for criminal liability to attach" [173] – the Trial Chamber held that the requisite participation may be either direct or indirect, but that not merely any participation would be relevant for the purposes of criminal liability: the participation has to be significant, and the person has to be guilty of an act or omission that has enabled the system to run more smoothly. In particular, it was pointed out that for middle- or low-level participants a substantial level of participation must be required before criminal responsibility for acts committed by others can be imputed to them. The Trial Chamber mentioned in this context certain factors that may be taken into account in assessing the level of participation, such as the size of the enterprise, the position of the accused, the functions performed by him or her, as well as possible efforts made to prevent the criminal activities. Even the attitude of the accused may count, for instance, when the crimes are committed with particular enthusiasm or cruelty. Special weight should, however, be given to the objective assessment of the importance of such participation with regard to the scope and seriousness of the crimes. A marginal contribution, even if made with a particular zeal, would attach less responsibility than one that "substantially assists or significantly effects the furtherance of the goals of the enterprise".[174]

Another attempt in the *Kvočka* judgement to clarify the contours of the JCE concerned the distinction between aiding and abetting, on the one hand, and co-perpetration, on the other, as different forms of participation in a joint criminal enterprise. The former, according to the Trial Chamber, requires only knowledge and no shared intent; i.e."Once the evidence indicates that the participant shares the intent of the criminal enterprise, he graduates to the level of a co-perpetrator".[175] Accomplice liability may develop into co-perpetration even where the accomplice, without physically committing the offences, participates in the criminal enterprise for an extensive period or becomes more directly involved in maintaining the functioning of the enterprise.[176] A position of authority may also be a ground for elevating the status of an accomplice to that of co-perpetrator, as was accepted in the

173 *Kvočka* Judgement, para. 287.

174 *Ibid.,* paras. 311–312.

175 *Ibid.,* para. 273; a similar position was articulated in the *Ojdanić* Decision, para. 20.

176 *Kvočka* Judgement, para. 284.

Krstić case. While General Krstić neither personally killed the men of Srebrenica nor planned the killing, he was considered a principal perpetrator of the crimes because of his "high position of authority, his knowledge of the genocidal campaign and his participation in the criminal enterprise".[177] The reasoning of the Trial Chamber in the *Krstić* case was not entirely satisfactory, however, as Krstić obviously did not share the genocidal intent which is an essential element of the crime of genocide. The Appeals Chamber later overturned the judgement and found Krstić guilty only of aiding and abetting genocide, thus giving additional weight to the argument that recklessness as the *mens rea* standard is not compatible with crimes that require a specific intent.[178] The differentiation by the Appeals Chamber between participants in a JCE according to their contribution can be viewed as a balancing act: while the JCE, in particular the extended form, generally relies on the subjective side, more weight was attached to the material act.[179]

Yet another question raised by the distinction between complicity and co-perpetration in the *Kvočka* case relates to the possibility of aiding and abetting the extended form of joint criminal enterprise. Complicity does not raise particular problems in relation to the basic or systemic forms of JCE, as assistance or encouragement in the joint commission of a crime or to persons who participate in a criminal system of ill-treatment can be easily accepted as criminal. It is more difficult, however, to establish a meaningful connection between the assistance given to one of the participants in a joint criminal enterprise and the crimes that are eventually committed as a result of that enterprise, even though they have not been envisaged by any of the participants or at least not by the participant in question. Such 'incidental crimes' would be a result, although an indirect one, of the willing participation and risk-taking of that person, but he or she would lack criminal intention as far as these additional crimes are concerned. An aider and abettor must have knowledge of the principal perpetrator's intention to commit a crime, and to assist or encourage the perpetrator in its commission. In the third category of JCE, this would not be possible because the crimes in question are not part of the original plan, and no intention – only risk-taking – is required of the co-perpetrator. It has therefore been held that aiding and abetting the third category of JCE would cover acts that are too remote from the actual crimes to be a meaningful construction of criminal law.[180]

The *Brđanin* case referred to above in relation to specific intent crimes is also worth mentioning in the context of the search for the proper scope of a joint

177 *Krstić* Judgement, para. 282.

178 *Krstić* Appeal Judgement. para. 237.

179 See also van Sliedregt, *supra* note 2, at 353.

180 *Ibid.*, at 102–103; see also Powles, *supra* note 149, at 612 and Ambos, *supra* note 134, at 169.

criminal enterprise. Radoslav Brđanin was the head of a regional body (the ARK Crisis Staff) that exercised de facto authority over the municipal authorities and the police in the autonomous Krajina region in Bosnia. His personal responsibility for that body's decisions, including the forcible displacement of the non-Serb population, was confirmed by the Trial Chamber.[181] According to the prosecution, Brđanin had participated in a broad joint criminal enterprise reaching the highest political levels of the Serb republic.[182] However, the Trial Chamber did not accept that joint criminal enterprise was the appropriate mode of liability to hold Brđanin responsible for crimes committed by the other persons, which in this case included persecution, extermination and wilful killing, torture, deportation and forcible transfer. These crimes were committed for the most part by unknown members of the armed forces, the police or paramilitary groups who had not necessarily had any contact with Brđanin. In particular the Trial Chamber pointed out that there was no proof of an agreement between Brđanin as a participant in a JCE and the direct perpetrators. The Trial Chamber concluded that it would not be sufficient to show that the direct perpetrators and the accused shared the same broad policy objective, in this case the strategic plan to gain control over all Serb-populated areas in Bosnia and to link them together into a separate Bosnian Serb state. More, and in any event some kind of interaction between the two parties, would be needed to prove that they had not acted independently of each other.[183] Brđanin was found guilty of aiding and abetting, inter alia, the crimes of killing and torture that could be linked to the decisions of the ARK Crisis Staff.[184]

According to one commentator, the Trial Chamber's findings in *Brđanin* regarding the scope of a JCE and the requirement of an agreement reflect "concerns to safeguard a cornerstone of criminal law, the principle of individual guilt, which otherwise might have been jeopardized".[185] Another commentator, however, has regarded the requirement of an express agreement as "conceptually unsound and

181 *Brđanin* Judgement, para 319.

182 Together with Radovan Karadžić (President of the National Security Council of the Serbian Republic in Bosnia and Herzegovina), Momcilo Krajisnik (former President of the Assembly of Serbian People in Bosnia and Herzegovina, member of the National Security Council and expanded Presidency of the Serbian Republic in Bosnia and Herzegovina) and Biljana Plavšić (former member of the collective presidency of Bosnia and Herzegovina, acting President of the Serbian Republic, member of the Presidency of the Serbian Republic and Vice-President of Republika Srpska), among others, all of whom had also been charged with participation in a JCE.

183 *Brđanin* Judgement, paras. 347, 354–355.

184 *Ibid*., paras. 469–476.

185 Tilman Blumenstock , 'The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the *Brđanin* Case', 18 *LJIL* (2005), 65–75, at 72.

practically unhelpful".[186] This requirement, as well as the question of scope, were revisited by the Appeals Chamber which decided to reverse the Trial Chamber's findings in both respects. Referring to an earlier decision by the ICTR,[187] the *Brđanin* Appeal Judgement confirmed that JCE could extend to "a nation wide government-organized system of cruelty and injustice"[188] and that no understanding or agreement to commit a particular crime was required for JCE liability.[189] Referring to concerns regarding the limits of liability under the JCE doctrine, the Appeals Chamber held that "this doctrine as it stands provides sufficient safeguards against overreaching or lapsing into guilt by association".[190] Pointing out that for criminal responsibility to arise on the basis of joint criminal enterprise it was required that participants shared a common criminal purpose, that the accused had made a significant contribution to the common purpose, and that the intended (or, in the case of JCE III, incidental) crime had taken place, the Appeals Chamber concluded that where all these requirements were met, "the accused has done far more than merely associate with criminal persons".[191] It further observed that distinctions between different contributions above the level of 'significant', even if not recognised by the doctrine, could be taken into account at the sentencing stage.[192]

3.3.2.2. Relationship to the Traditional Concepts

How well can the concept of joint criminal enterprise be anchored to the jurisprudence of the IMT and IMTFE? The notion of joint criminal enterprise shares certain common features with the concept of both criminal organisations and conspiracy. A criminal organisation, comprising a plurality of persons sharing the same criminal purpose, would seem to meet the criteria of a criminal enterprise, which, again, has been described as a combination of "substantive crimes as well as a 'conspiracy' behind those crimes".[193] The closeness of the JCE to the notion of criminal organisations remains superficial, however, as joint criminal enterprise is a mode

186 Gustafson, *supra* note 167, at 134.

187 *Prosecutor v. André Rwamakuba*, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal regarding application of joint criminal enterprise to the crime of genocide of 22 October 2004, para. 25.

188 *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement of 3 April 2007 (*Brđanin* Appeal Judgement), para. 423.

189 *Ibid.*, para. 418.

190 *Ibid*., para. 426.

191 *Ibid*., para. 431.

192 *Ibid.*, para. 432.

193 Piacente, *supra* note 161, at 451.

of liability and not a substantive crime.[194] The Trial Chamber in *Brđanin* pointed out that mere membership in a JCE does not entail criminal responsibility,[195] and the Appeals Chamber echoed this same conclusion. The essential concept in JCE is risk-taking combined with the commission of exceptionally serious crimes. If no actual crime is committed, criminal liability is not attached to the risk-taking as such. The notions of participation or risk-taking acquire their significance from the crimes that are in fact committed. Furthermore, the extension of responsibility in the case of JCE has often been justified by the importance of the pertinent criminalisations.[196]

The extended form of joint criminal enterprise is clearly different from traditional forms of participation, in particular complicity liability, in that it includes what could be called 'inactive participation'[197] – in contrast to the direct and significant contribution required of complicity. As was made clear by the Appeals Chamber in *Tadić,*

> (i) The aider and abettor is always an accessory to a crime committed by another person, the principal.
> (ii) In the case of aiding and abetting, no proof is required of the existence of a common, concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.
> (iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property etc.), and this support has a substantial effect upon the perpetration of the crime. *By contrast, in the case of acting in pursuance of a common*

194 While JCE does not constitute a substantive crime, conspiracy can be applied both as a substantive crime and as a theory of liability. On this point, see Danner and Martinez, *supra* note 20, at 41.

195 *Brđanin* Judgement, para. 263.

196 The *Tadić* Appeals Chamber pointed out, in para. 191, that the concept of JCE was justified in view of the object and purpose of the Statute and also because of the inherent characteristic of the serious international crimes under the Statute ("by the very nature of the crimes"). See also Wagner, *supra* note 151, at 377–378: "Arguments against the extension of Article 7(1) to include the common purpose doctrine [...] can be countered by citing the explicit and prior criminalization by the Geneva conventions of the offences committed by the accused." Similarly, she has argued, at 373, that "[t]he argument for extending the grave breaches regime is thus underscored by the importance of the regime itself".

197 Wagner, *supra* note 151, at 370.

> *purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose*.
>
> (iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e. either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed) as stated above.[198]

It is clear from the above citation, which was also incorporated in the *Krnojelac* Appeal Judgement,[199] that the material act with which the participant in a JCE furthers the aims of the criminal enterprise is left undefined and all the emphasis is placed on the subjective element.[200] In this respect, the notion of joint criminal enterprise comes close to conspiracy, in which the existence of an agreement can be used to attribute responsibility to all participants in a conspiracy for crimes committed by only a few of them.[201] As an inchoate crime, conspiracy is separate from the crimes that may be committed as a result of the criminal agreement: the agreement is at the core of the concept of conspiracy and punishable as such.[202] The criminal nature of conspiracy is therefore not dependent on any further crimes taking place – the responsibility for having conspired to commit a crime is not derivative in nature – and the issue of a causal connection between the agreement and any subsequent crimes does not arise.

The concept of joint criminal enterprise is also based on a loosely defined 'agreement' which can, however, be tacit. In *Brđanin*, the Trial Chamber underlined the importance of the agreement which, at the very least, required "some kind of interaction" between the parties to it. In *Krnojelac*, the Appeals Chamber addressed the systemic form of JCE and pointed out that there would be no need to prove that the members of the group have entered into an agreement in relation to each of the specific crimes committed with a common purpose; knowledge of the system and an agreement to further it suffice.[203] While conspiracy is not

198 *Tadić* Appeal Judgement, para. 229, (emphasis added).

199 *Krnojelac* Appeal Judgement, para. 33.

200 This emphasis is not fully consonant with the findings of the Trial Chamber in the *Kvočka* case referred to above.

201 It is recalled that the ICTY or the ICTR Statutes do not provide for conspiracy except in the case of genocide.

202 Fletcher, *supra* note 23, at 218.

203 *Krnojelac* Appeal Judgement, para. 97.

provided for in the ICTY Statute as a general concept applicable to all crimes, JCE serves a similar purpose in allowing the Tribunal to define individual criminal responsibility broadly enough to encompass the inactive participants of a criminal enterprise. In terms of criminal policy, however, there is a significant difference: conspiracy makes possible early intervention in criminal plans, whereas JCE is a device for attributing responsibility after a crime has taken place. Both concepts focus on the preparatory phase of a crime, but they serve different purposes.[204]

Joint criminal enterprise, including its extended form, has become a major tool for the ICTY in addressing the responsibility of high political and military leaders. While the concept has been further developed and elaborated in subsequent judgements after *Tadić*, some aspects of it are still being debated.[205] One persistent doubt is related to the qualification of the third category of JCE as 'co-perpetration'.[206] It is questionable whether the attempt of the Trial Chamber in *Kvočka* to distinguish between two classes of participation in a JCE, aiding and abetting on the one hand and co-perpetration on the other, can lead to a satisfactory solution. Van Sliedregt has pointed out that the Trial Chamber seemed to understand JCE as a factual rather than a legal concept, whereas it should be seen as a special type of accomplice liability – and as such different from both complicity and commission (proper).[207] The clear advantage of the notion of JCE is that it permits a wide application of article 7, paragraph 1, of the Statute. While it is comparable to command responsibility as a doctrine of extended liability with a particularly low *mens rea* standard, there are notable differences. In particular the requirements related to the definition of superior and to the relationship between a superior and his or her subordinates raise the threshold for applying command or superior responsibility.

204 Punja, Rajiv K., *Issue: What is the Distinction between "Joint Criminal Enterprise" as defined by the ICTY Case Law and Conspiracy in Common Law Jurisdictions?* Memorandum for the Office of the Prosecutor of the ICTR, Case Western University School of Law International War Crimes Research Lab, 2003, at 42. See also van Sliedregt, *supra* note 163, at 198.

205 See Chapter 4.3.2.

206 For instance Powles, *supra* note 149, at 611, has noted that it is hard to see "how someone guilty of participating in the third category of joint criminal enterprise [...] can be said to have actually 'committed' the crime in question , where they do not possess the intention to commit the crime in question and may not even be aware of that crime before, during or even after the crime has been actually committed". See also Ambos, *supra* note 134, at 170–171, who has submitted that only the first form of JCE could in fact qualify as 'commission' or 'co-perpetration'.

207 Van Sliedregt, *supra* note 2, at 103.

In this regard, JCE has been deemed more effective in enabling the prosecution of persons who have acted as masterminds of collective crimes.[208]

3.3.3. Superior Responsibility

Superior responsibility is provided for in the ICTY and ICTR Statutes in a language that differs slightly from the wording of the AP I, article 86, in stating that a superior is not relieved of his criminal responsibility for acts committed by his subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrator".[209] It is worth noting that the wording "reason to know" language was later incorporated into the final version of the Draft Code. The ILC pointed out in its commentary to the pertinent provision that the phrase should be understood as having the same meaning as the AP I wording "had information enabling them to conclude", thus confirming the status of article 86 as an established standard.[210] While command responsibility was fairly well established in both customary and codified law when the ad hoc tribunals began their work, some aspects of the concept have been further clarified in their jurisprudence.

Among the questions that had not been completely settled by either state practice or AP I before the ad hoc tribunals became operative were the applicability of the concept of command responsibility to armed conflicts of a non-international nature, on the one hand, and its application to civilian superiors such as political leaders and civil servants, on the other. The uncertainty as to the former question was raised by the defence in the context of the *Hadžihasanović* case. It was claimed that the relevant provision of the Statute departed from customary law, as any case law on command responsibility that existed in 1993, when the Statute was adopted, must have related to international armed conflicts. The Trial Chamber's ruling on this issue, based on an extensive consideration of the history of the concept of superior responsibility, was that the nature of the conflict was of no consequence for the application of the principle. The doctrine of superior responsibility, it was stated, was applicable not only in international as well as internal conflicts but also

208 *Ibid.*, at 356. See, however, also van Sliedregt, *supra* note 163, at 206, who points out that in spite of attempts to apply JCE to those masterminding international crimes, the concept is not easily applicable to them.

209 ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

210 1996 Draft Code, *supra* note 57, art. 6 and commentary, para 5. More closely in Chapter 4.2.2.

in times of peace.[211] The ICRC study on customary international humanitarian law has since confirmed the customary nature of the criminal responsibility of both commanders and other superiors for war crimes committed by their subordinates "if they knew, or had reason to know" that such crimes were committed or were about to be committed and failed to take appropriate measures to prevent their commission; or if such crimes had already been committed, failed to punish the persons responsible. According to the ICRC study, this rule is applicable in both international and non-international armed conflicts.[212]

As for the question of the applicability of the principle of command responsibility to civilian superiors, even the ICTR, in *Akayesu,*[213] and later in *Musema,*[214] initially had doubts, but the issue was settled by the ICTY in the *Čelebići* case, its first important decision on command responsibility. There were precedents in the post-World War II case law of the principle being applied to civilians both by the IMTFE and by Allied military courts under Control Council Law No.10, and the ICTY built on this recognition.[215] The Trial Chamber did not see any reason why civilian leaders should not incur responsibility in the same way as military commanders, provided that such leaders have effective control over their subordinates.[216] This principle was also recognised in the 1996 Draft Code. According to the ILC Commentary, the concept of a 'superior' was sufficiently broad to cover "military commanders and other civilian authorities who are in a similar position of command and exercise a similar degree of control with respect to their subordinates".[217] In addition, the ILC indicated that superior responsibility was not restricted to war crimes but extended to all crimes listed in the Draft Code.[218] It is

211 *Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura,* Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility of 16 July 2003, paras. 151–152.

212 "Commanders and other superiors are criminally reponsible for war crimes committed by their subordinates if they knew or had reason to know that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible". ICRC Customary Law Study, *supra* note 59, Vol. 1, rule 153, at 558–63.

213 *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement of 2 September 1998 (*Akayesu* Judgement), para. 490.

214 *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-T, Judgement of 27 June 2000, para. 135.

215 *Čelebići* Judgement, paras. 356–363.

216 *Ibid*., para 363.

217 1996 Draft Code, *supra* note 57, commentary to art. 6, para. 4.

218 *Ibid.*

by now uncontested that political leaders can be prosecuted on the basis of superior responsibility provided that the criterion of effective control has been met. Moreover, they can qualify as de facto military commanders.[219]

The new approaches with regard to the applicability of the concept of superior responsibility have been based primarily on the ICTY case law.[220] Further relaxations of the concept have been introduced, for instance, in the *Kordić and Cerkez* Judgement, in which the Trial Chamber, pointing out that neither military nor civilian superiors need to be formally elected, concluded that the superior-subordinate relationship may be an indirect one.[221] The concept of effective control was explained in the *Kvočka* judgement as implying "the material ability to prevent or punish criminal conduct, however that control is exercised".[222] The *Brđanin* judgement has further recognised that the requirement of effective control must be different for civilian and military leaders. A civilian superior's sanctioning power must be interpreted broadly and take into account the de jure and de facto powers of the person in question.[223] While much has thus been done to remove the formal obstacles to the applicability of superior responsibility in a civilian context, it must be concluded that the threshold is still fairly high. Firstly, not even military commanders can be made responsible for not preventing random or isolated crimes,[224] and the same must apply to civilian leaders. Secondly, the requirements of effective control and a position of command similar to that of military commanders circumscribe the criminal responsibility of civilian leaders fairly strictly. Although the ICTR submitted, in *Kayishema,* that de facto influence and authority, even without any degree of organisation, would provide a sufficient basis for the imposition of command responsibility on civilian leaders, such a broad interpretation of the concept was expressly rejected by the ICTY Appeals Chamber in *Čelebići.*[225]

The minimum functional requirements for the applicability of the concept of superior responsibility thus include a hierarchy of authority creating a clear supe-

219 W.J. Fenrick, 'Article 28: Responsibility of Commanders and Other Superiors', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 515–522, at 517–518; van Sliedregt, *supra* note 2, at 182.

220 For a critical appraisal of the ICTR jurisprudence on this point, see Alexander Zahar, 'Command Responsibility of Civilian Superiors for Genocide', 14 *LJIL* (2001), 591–616.

221 *Kordić and Cerkez* Judgement, paras. 406, 415.

222 *Kvočka* Judgement, paras. 315, 519 The ILC Draft Code requires of the superior both legal and material possibility to take appropriate measures. 1996 Draft Code, *supra* note 57, commentary to art. 6, para. 6.

223 *Brđanin J*udgement, paras. 281, 283.

224 Bantekas, *supra* note 63, at 396.

225 *Čelebići* Appeal Judgement, para. 265.

rior-subordinate relationship, a chain of command, and effective control by the superior over his or her subordinates.[226] It can also be submitted that the superior's position should entail a duty to act to prevent the crimes or to punish those responsible.[227] The essential elements of the requisite control have been enumerated as follows: "a purposeful organisation of individuals in the form of a hierarchical unit, the existence and general awareness of a chain of command, a generally accepted practice of issuing and obeying orders, the expectation among subordinates that disobedience or insubordination may trigger a disciplinary response; and the means in the [disposal of the] superior effectively to suppress or punish unauthorized action".[228] Furthermore, and although this requirement has not always been respected in practice, it may be argued that superior responsibility should only apply to organised groups whose aims are prima facie legitimate and whose members commit crimes exceptionally rather than routinely.[229] This requirement would seem to follow also from the superior's duty to prevent and punish the commission of crimes by his or her subordinates.

A further question that has been much debated even after the adoption of AP I is the interpretation of the knowledge standard set out in article 86.[230] In the jurisprudence of the ICTY, the "reason to know" standard has been generally interpreted to require recklessness in the sense of conscious risk-taking. The *Blaškić* Judgement argued for a lower standard, according to which the superior would incur criminal responsibility whenever he or she objectively should have known of the crimes. *Blaškić* was, however, overturned by the *Čelebići* Judgement and this ruling was then confirmed on appeal.[231] Had the *Blaškić* standard prevailed, it would have introduced negligence as the relevant knowledge requirement for the criminal responsibility of superiors. The *čelebići* ruling has been criticised by some scholars who argue that the *Blaškić* standard would represent the correct interpretation of

226 *Čelebići* Judgement, paras. 658 and 647, See also Bantekas, *supra* note 74, at 578.

227 Van Sliedregt, *supra* note 2, at 135.

228 Zahar, *supra* note 220, at 609.

229 *Ibid*., at 611–612, 613.

230 Illustrative of the problems of the article 86 wording, a study proposed four different interpretations of the phrase "knew or had information that should have enabled them to conclude", ranging from recklessness to negligence and even extending to objective responsibility based on the relationship between the superior and the subordinate. See Timothy Wu and Yong-Sung (Jonathan) Kang, 'Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law', 38 *Harvard ILJ* (1997), 272–297, at 284–285. See also van Sliedregt, *supra* note 2, at 187.

231 *Čelebići* Judgement, para. 393; *Čelebići* Appeal Judgement, para. 241. See also *Blaškić* Appeal Judgement, para. 62, in which the Appeals Chamber noted that the *Čelebići* Appeal Judgement had settled the interpretation of "reason to know".

the term "had reason to know" according to customary law. The Appeals Chamber in *Čelebići*, it has been held, erred in focusing too narrowly on AP I article 86 while ignoring earlier case law.[232] The later *Orić* judgement[233] seemed to set the standard close to negligence, or wilful blindness,[234] but pointed out that "a mental element is required at least in so far as an accused must have been aware of his position as a superior and of the reason that should have alerted him to relevant crimes of his subordinates".[235] The Tribunal did not refer to the *Yamashita* case, but the similarity of its reasoning to that of the US Military Commission in Manila has been pointed out.[236] The *Orić* judgement, too, was overturned by the Appeals Chamber which found Orić not guilty of the crimes he had been charged.[237] Taken as a whole, with the *Čelebići* standard prevailing, the ICTY jurisprudence therefore seems to require at least recklessness as the *mens rea* for superior responsibility.[238]

While the mainstream jurisprudence sets the mental requirement of superior responsibility at recklessness, particular problems have arisen when the concept has been applied to genocide, ones similar to those raised with regard to joint criminal enterprise concerning the compatibility of recklessness as a *mens rea* standard with crimes of specific intent. As was already noted with respect to the *Krstić* case, the jurisprudence has not been consistent in this regard. When discussing the mental element of command responsibility in *Akayesu*, the ICTR seemed to require of the commander 'malicious intent', or at least negligence "so serious as to be tantamount to acquiescence or even malicious intent".[239] The ICTY, in *Karadžić and Mladić*, also appeared to require a genocidal intent on the part of the commander and not only the subordinates who perpetrate the crimes.[240] These early

232 Kirsten M.F.Keith, 'The *Mens Rea* of Superior Responsibility as Developed by ICTY Jurisprudence', 14 *LJIL* (2001), 617–634, at 633.

233 *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement of 30 June 2006 (*Orić* Judgement).

234 Tilman Blumenstock and Wayde Pittman, '*Prosecutor v. Naser Orić*: The International Criminal Tribunal for the Former Yugoslavia Judgement of Srebrenica's Muslim Wartime Commander', 19 *LJIL* (2006), 1077–1093, at 1092.

235 *Orić* Judgement, para. 318.

236 Blumenstock and Pittman, *supra* note 234, at 1092.

237 *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement of 3 July 2008 (*Orić* Appeal Judgement).

238 Van Sliedregt, *supra* note 2, at 186–187.

239 *Akayesu* Judgement, para. 488. A similar view has been expressed by the ICRC Commentary to AP I, *supra* note 61, art. 86, at 1012.

240 Prosecutor v. *Karadžić and Mladić*, Cases No. IT-95-5-R61 and IT-95-18-R61, Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996, paras. 84 and 94–95; Schabas, *supra* note 7, at 311–312.

cases which, according to Schabas, indicated "a profound judicial malaise with the entire concept" of command responsibility in genocide,[241] have given rise to proposals to solve the question of a commander's or superior's mental state in a more straightforward fashion.

For Schabas, the whole problem of the *mens rea* of command responsibility for genocide is somewhat moot, because the real usefulness of command responsibility is shown in cases where it is not proven beyond reasonable doubt that the commander had knowledge of the commission of the crimes. The requirement of criminal intent or knowledge therefore does not make sense, and negligence is logically incompatible with a crime of specific intent. While this would seem to lead to recklessness as the proper standard, in accordance with the mainstream jurisprudence, Schabas has proposed a special regime for the crime of genocide based on functional or vicarious responsibility of the commander. The prosecution would only have to establish that subordinates committed genocide and that the accused was their commander, whereupon the responsibility of the commander would be established according to an evidentiary presumption.[242] Other commentators have either argued for a rebuttable presumption of knowledge on the part of the superior, in particular where the crimes are widespread and notorious,[243] or have recognised a more general 'duty to anticipate' attached at least to the function of military commanders.[244]

In *Blaškić*, the Appeals Chamber approached the concept of risk that is central to both recklessness and negligence as well as to the third category of JCE, pointing out that the "knowledge of any kind or risk, however low, does not suffice for the imposition of criminal responsibility". Under the lower standard suggested by the Trial Chamber, the Appeals Chamber noted, "any military commander who issues an order would be criminally responsible, because there is always a possibility that violations would occur".[245] All relevant circumstances have to be taken into account when assessing the knowledge element.[246] The ICTY has also pointed out

241 Schabas, *supra* note 7, at 309.

242 *Ibid.*, at 311–313. Command responsibility would then be based on an evidentiary presumption that the superior must have known of genocide committed by his or her subordinates.

243 Bantekas, *supra* note 74, at 590, sees this as an emerging norm of customary law, endorsed in the post-World War II case law, the ICRC Commentary and the ICC Statute, but rejected in the *Čelebići* case.

244 Van Sliedregt, *supra* note 2, at 166–167.

245 *Blaškić* Appeal Judgement, para. 41.

246 ICRC commentary to AP I, *supra* note 61, art. 86, para. 3545, at 1014. See also Bantekas, *supra* note 63, at 587–588.

that "the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia to establish that the superior had knowledge of them".[247] In *Krnojelac*, the Appeals Chamber provided certain clarifications concerning the "reason to know" standard, in particular that the information that should have put the superior on notice of possible unlawful acts by his or her subordinates need not contain any specific details about the crimes committed or about to be committed. It would, however, have to be alarming enough to alert the superior to the risk of crimes of a certain gravity being committed.[248]

A further issue related to superior responsibility arose in the context of the *Orić* case in which the Trial Chamber elaborated on the question of the scope of the 'predicate' or 'principal' crime (the crime committed by the subordinates).[249] According to the Trial Chamber, it is obvious that the criminal responsibility of a superior under article 7(3) of the Statute is not limited to crimes committed by subordinates in person but encompasses any modes of criminal responsibility described in article 7(1).[250] Likewise, superior responsibility in such a case is not limited to 'committing' in the sense of active perpetration or participation by the subordinates, but also covers commission by omission.[251] As the Trial Chamber noted, "since commission through culpable omission is not limited to perpetration but [...] is open to all forms of participation, instigating as well as aiding and abetting can also be carried out by omission".[252] It is evident that this interpretation broadens superior responsibility in a considerable manner compared to a situation where superior responsibility would only arise in the case of active commission of crime. The Trial Chamber based its reasoning on the inconsistent use of the term 'commission' in the Statute[253] as well as on the purpose of superior responsibility, noting that enforcement of international humanitarian law would be impaired if a superior "had to prevent subordinates from killing or maltreating in person, while

247 *Aleksovski* Judgement, para. 80.

248 *Krnojelac* Appeal Judgement, paras 154 and 155. The factual question was about whether knowledge of beatings should have enabled Krnojelac to conclude that acts of torture and murders would also be committed. According to the Appeals Chamber, "it is not enough that an accused has sufficient information about beatings inflicted by his subordinates; he must also have information – albeit general – which alerts him to the risk of beatings being inflicted for one of the purposes provided for in the prohibition against torture".

249 The same issue has also been discussed in the earlier *Boškoski* case; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution's Motion to Amend the Indictment, 26 May 2006, paras. 18–48.

250 *Orić* Judgement, para. 301.

251 *Ibid.*, para. 302.

252 *Ibid.*, para. 303, (footnote omitted).

253 *Ibid.*, para. 299.

he could look the other way if he observed that subordinates 'merely' aided and abetted others in procuring the same evil".[254]

The interesting aspects of this reasoning are, firstly, that it opens up the possibility of creating chains of multiple responsibilities, extending for instance from the actual perpetrator through the instigator to his or her superior, and, secondly, the possibility of basing criminal responsibility on a chain of omissions, provided, of course, that all persons in the chain had a legal duty to act. A further interesting point related to omissions of the subordinates is that the question of the identity of the direct perpetrator seems to become a secondary – if not irrelevant – consideration. To quote the Trial Chamber in *Orić* again, "it does not matter any further by whom else, due to the subordinates' neglect of protection, the protected persons are being injured, nor would it be necessary to establish the identity of the perpetrators".[255] The crimes in *Orić* were related to the treatment of detainees in a facility Naser Orić supervised. The Trial Chamber underlined that a commander cannot discharge his responsibility to see to it that prisoners are treated properly by merely delegating this responsibility to subordinates without any further inquiries. Obviously, because of the poor supervision of the detention facilities and general indifference of the staff to the well-being of the detainees, it was not possible to identify all those who may have been able to attack them. The Appeals Chamber did not confirm this reasoning. It was not sufficient, the Appeals Chamber noted, to prove that Orić was aware of the fact that crimes were committed in the facility if none of his subordinates had participated in the commission of these crimes. In other words, knowledge of the crimes themselves could not be equated, for the purposes of superior responsibility, with knowledge of the subordinates' criminal conduct.[256]

3.3.4. Direct and Public Incitement to Genocide

The first major decision by a war crimes tribunal on the crime of incitement since the *Streicher* and *Fritsche* cases was the 2003 ICTR judgement in what is known as the *Media* case (*Nahimana et al.*).[257] While the European Court of Human Rights

254 *Ibid.*, para. 300, (footnote omitted). While the Appeals Chamber overturned the judgement, it confirmed these two understandings, see *Orić* Appeal Judgement, paras. 20–21. The Appeals Chamber specified, in para. 41, that commission by omission requires an elevated degree of concrete influence, which was not found in the present case.

255 *Orić* Judgement, para. 305, (footnote omitted).

256 *Orić* Appeal Judgement, paras. 52–60.

257 *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T, Judgement and Sentence of 3 December 2003, (*Nahimana* Judgement).

and certain other human rights bodies had acquired fairly extensive experience in questions related to combining effective protection against hate speech and racial incitement with freedom of the press, and the ICTR acknowledged the importance of this existing case law,[258] the *Media* case was unique in addressing specifically the interpretation of the criminalisation of 'direct and public incitement to commit genocide' under the 1948 Genocide Convention. Ferdinand Nahimana was the founder of the infamous Radio-Télévision Libre des Mille Collines (RTLM) which played a central role in mobilising the Hutu majority against the Tutsi minority in Rwanda. The other defendants were an RTLM executive and the editor-in-chief of the newspaper *Kangura,* also influential in spreading ethnic hatred.[259] Even though the *Nahimana* Judgement recognised that inflammatory words that denigrated another ethnic group can have drastic consequences, and referred to the fact that genocide had occurred,[260] it did not require a causal connection between the incitement and the genocidal acts. Rather, it emphasised the potential of a communication to lead to the commission of criminal acts as the core characteristic of incitement under the 1948 Convention.[261] The judgement thus seems to confirm the nature of incitement to commit genocide as an inchoate crime, an issue that was left open by the *travaux préparatoires* of the Convention.

Another, more difficult question, one which also touches on the interpretation of the qualification 'direct', was how to recognise and distinguish inciting communications from the legitimate exercise of the freedom of expression. The Trial Chamber considered a wide range of different radio transmissions, newspaper articles, and other communications, whose contents included not only hate speech and clear incitement to violence but also mistaken information and ambiguous messages.[262] It pointed out that the content of a particular communication could only be assessed in the cultural context in which it had been made available.[263] In the Trial Chamber's view, certain communications were relevant from the point of

258 *Ibid*., paras. 978–1015.

259 The three were convicted of genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, and crimes against humanity.

260 *Nahimana* Judgement*,* para. 1029.

261 *Ibid*., para. 1015.

262 Ron Davidson, 'The International Criminal Tribunal for Rwanda's Decision in *The Prosecutor v. Ferdinand Nahimana et al*.; The Past, Present, and Future of International Incitement Law', 17 *LJIL* (2004), 505–519, at 507–508, has described the materials presented by the Prosecutor in this way.

263 *Ibid.* at 515–517; Davidson has criticised the Tribunal's findings of facts and pointed out that the ICTR had, in analysing the use of a certain Kinyarwandan terminology, refused to accept an earlier finding of a Canadian Federal Court of Appeals in the case of *Mugesera vs. Ministry of Citizenship*.

view of "a process of incitement" to the extent that they could be seen as promoting "a [...] mindset in which ethnic hatred was normalised as a political ideology". The decisive criterion for defining incitement was whether the message could be construed as a call for action. A certain RTLM broadcast that had not called on listeners to take any kind of action was thus determined to be part of a "discussion of ethnic consciousness" which had to be distinguished from the promotion of ethnic hatred and which did not constitute direct incitement. At the same time, it could be seen as demonstrating "the progression from ethnic consciousness to harmful ethnic stereotyping".[264] While the judgement has been appealed, it nevertheless points to a broader concept of incitement than is apparent from the wording of the 1948 Convention.

264 *Nahimana* Judgement, paras. 1020, 1021.

CHAPTER 4 EXTENDED RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW: CODIFICATIONS AND AN EMERGING DOCTRINE

4.1. The Need for a Codified 'General Part'

As has already become evident, many of the fundamental questions regarding the boundaries of criminal liability and the relationship between individual and group responsibility have been addressed with regard to the core crimes. This body of law can therefore not be overlooked in any consideration of general questions of individual criminal responsibility in international law. The general principles of international criminal law have been established mainly for the purposes of direct enforcement by international criminal tribunals and for the fairly restricted range of crimes under their jurisdiction. The instrumental role of courts and tribunals in the development of the general part of international criminal law reflects the fact that it has been formed without a systematic codification effort. The codification work undertaken in the context of the ILC Draft Code of the Crimes against the Peace and Security of Mankind was long inconclusive and the experience of the Nuremberg and Tokyo Trials remained isolated. This applied in particular to the elements of the 'general part' that emerged from the practice of the international military tribunals and other post-World War II trials. According to Bassiouni, such elements included responsibility for the conduct of others and command responsibility, together with the removal of the absolute defence of superior orders as well as the removal of any immunities from responsibility for certain international crimes. As for other questions relating to the 'general part', there was not much of a consistent practice.[1]

1 M. Cherif Bassiouni, *Crimes against Humanity in International Law*, 2nd Rev. Edn., Kluwer Law International, 1999, at 395, has noted that these questions have been dealt

The contribution of national trials to the formation of general principles of international criminal law in the decades following the 1940s was also relatively limited, in spite of the fact that universal jurisdiction had been established for grave breaches of the Geneva Conventions.[2] A slow cumulative development strengthened the customary status of, for instance, the removal of immunities with regard to genocide, crimes against humanity, and the most serious war crimes. To this was added the horizontal expansion of the application of certain concepts that were originally specific to one category of crimes, such as the concept of command responsibility, which spread from war crimes to crimes against humanity and genocide. Yet, the overall legal framework for international prosecution remained fragmented and incomplete until the time at which the modern international criminal tribunals were established.

The international criminal tribunals for the former Yugoslavia and for Rwanda and, to a lesser extent, the Sierra Leone Special Court have played a pivotal role in filling in the gaps in the general part of international criminal law and have also given rise to distinctive developments with regard to the interpretation of the Nuremberg legacy, including the concept of individual criminal responsibility as applied to complex and collective crimes. This rich and extensive jurisprudence has not been entirely codified. Although the case law of the ICTY and the ICTR was observed and proved influential in the negotiations on the Rome Statute,[3] the Statute differs in many respects from the approach the two tribunals adopted. This is due, firstly, to the fact that the Rome Statute was adopted in 1998 and the ICTY and the ICTR have continued to develop an independent and characteristic line of jurisprudence since then. Secondly, there was a conscious effort in the ICC

with on an ad hoc basis and "sometimes in an improvised manner which does not leave much basis for precedential reliance".

2 For an overview and analysis of the most important national proceedings, including the *Eichmann*, *Menten*, *Barbie*, *Touvier*, and *Calley* cases, see Kai Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2. Auflage, Duncker & Humblot, 2004, at 54, 68. See also Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 163–258 and Minna Kimpimäki, *Universaaliperiaate kansainvälisessä rikosoikeudessa*, Gummerus Kirjapaino Oy, 2005, at 51–52.

3 See Herman von Hebel and Darryl Robinson,' Crimes within the Jurisdiction of the Court', in Roy S. Lee (ed.) *The International Criminal Court: Issues, Negotiations, Results*, Kluwer Law International, 1999, 79–126;
Antonio Cassese, 'Crimes against Humanity', in Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 11.2., 353–378, at 365–373; Luigi Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 107–117, at 109.

negotiations to lay down stricter and more detailed rules concerning all aspects of the work of the Court than had been done in the statutes of the two ad hoc tribunals.[4]

While the pioneering work for a general part specifically developed for the purposes of international criminal law has been done mainly by international tribunals, the advantages of a general codification are obvious in terms of avoiding inconsistencies that result from treating general requirements separately for each specific crime.[5] In this regard, it can be said that at least an outline of a system of international criminal law, enjoying a certain autonomy from major traditions of domestic criminal law and complete with general principles of its own, has emerged in recent years. This can be attributed in large part to the consistent and purposive jurisprudence of the ad hoc international war crimes tribunals and to the adoption of the Rome Statute, which is widely recognised as a standard-setting instrument.[6] The comprehensive codification of the general principles of international criminal law in Part III of the Rome Statute, together with the adoption of the Elements of Crimes by the ICC Assembly of States Parties in 2002,[7] have contributed to both the doctrinal development and the systematisation of the general part of ICL. While little can be said about how the ICC will implement the Statute, it is interesting to compare the *droit acquis* of the international tribunals with the comprehensive codification in the Rome Statute.

The consolidation and growth of international criminal law over the past decade has involved other actors as well. Certain post-war national war crime trials have retained their relevance as precedents for international prosecution, and recent developments have increased the interaction between national legal systems

4 On the principle of legality and the requirement of strict construction of crimes (art. 22 of the Rome Statute) as a constraint on judicial interpretation, see Bruce Broomhall, 'Article 22: *Nullum crimen sine lege' (*A. Introduction/ General Remarks), in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 447–455, at 450–451.

5 Albin Eser, 'The Need for a General Part', in M. Cherif Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Association Internationale de Droit Pénal, Érès, 1993, 43–52, at 43; while commenting on the 1991 Draft Code of Crimes of the ILC, Eser stated this was "perhaps the most important reason to include in the Code a general part".

6 For instance, Bassiouni, *supra* note 1, at 408; Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, 2003, at 93–94.

7 ICC Elements of Crimes ICC, UN Doc. PCNICC/2000/INF/3/Add.2, reproduced in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 735–772.

and international criminal law:[8] in particular national courts have become more active since the early 1990s in prosecuting international crimes on the basis of universal jurisdiction.[9] This development can be expected to continue, given that the complementarity principle in the ICC Statute makes the Court's jurisdiction residual and reserves it to situations where the competent state is either unable or unwilling to genuinely investigate and prosecute.[10] Regional courts – such as the European Court of Human Rights[11] and the Inter-American Court of Human Rights[12] – have also addressed questions similar to those dealt with by the international criminal tribunals.[13] It can be expected that the codification of general principles of international criminal law in the ICC Statute will have an impact at the national level and may lead to a greater harmonisation of national criminal law doctrines. As Cassese and Delmas-Marty have pointed out, international criminal law does not constitute a stable hierarchical order; rather, its structure is interactive and evolutive, still in the process of construction under the influence of national, regional and global norms.[14]

8 Julio Barboza, 'International Criminal Law', 278 *RCADI* (1999), 13–199, at 26; on the difficulties involved, see Werle, *supra* note 6, at 94.

9 Kimpimäki, *supra* note 2.

10 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, art. 17.

11 Antonio Cassese, 'L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux?', in Cassese and Mireille Delmas-Marty, *Crimes internationaux et juridictions internationales*, Presses Universitaires de France, 2002,143–182.

12 António Augusto Cançado Trindade, 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 253–269.

13 Ron Davidson, 'The International Criminal Tribunal for Rwanda's Decision in *The Prosecutor v. Ferdinand Nahimana et al.*; The Past, Present, and Future of International Incitement Law', 17 *LJIL* (2004), 505–519. Referring to certain national and regional proceedings Davidson has noted, at 506, that "[t]he balance of power between national, regional, and international courts over the development of international criminal law remains in flux".

14 Antonio Cassese and Mireille Delmas-Marty, 'Introduction', in Cassese and Delmas-Marty, *Crimes internationaux et juridictions internationales*, Presses Universitaires de France, 2002, 7–12, at 9.

4.2. Codifications

4.2.1. The ILC Draft Code of Crimes

The Draft Code of Crimes against the Peace and Security of Mankind was designed to be comprehensive in the sense that it would apply to a whole range of most serious international crimes. It contained some rudiments of general principles in its early versions, based on the 1950 Nuremberg Principles, and expanded on them in the 1991 and 1996 versions. The different versions of the Draft Code provided a useful reference for the Security Council in the establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda,[15] and proved helpful for the tribunals themselves. As noted above, the ICTY relied on the Draft Code on several occasions, for instance when discussing the definition of complicity in the *Tadić* case, and later described the role of the ILC work as follows:

> [T]he Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain content or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world.[16]

The final phases of the ILC codification work on the Draft Code were overshadowed by other developments, including the ongoing work of the two ad hoc international criminal tribunals established by the Security Council, and the negotiations on the establishment of the International Criminal Court. The ICC Preparatory Committee, in particular, was quickly filling in the lacunas left by the Nuremberg and Tokyo Trials and thus accomplishing the task that had been the main reason for the launching of the ILC's codification project in the 1940s. Upon the adoption of the Draft Code in 1996, the ILC proposed that it could be adopted as an independent convention (in which case it could be applied by both a future International Criminal Court and by national courts), be attached to a declaration, or be incorporated in the ICC Statute. With the outcome and timetable of

15 Sir Arthur Watts, *The International Law Commission 1949–1998*, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, at 1658.

16 *Prosecutor vs. Anto Furundzija,* Case No. IT-95-17/I-T, Judgement of 10 December 1998, para. 227.

the establishment of the ICC still being subject to further negotiations,[17] the ILC expected that national courts would play an important role in the implementation of the Code.[18] This was predictable also in view of the sheer number of situations involving crimes against the peace and security of mankind.[19] In the end the Draft Code was used as a reference document in the ICC negotiations, in accordance with the third option proposed by the ILC.

The ILC's 1994 Draft Statute of an International Criminal Court, for its part, was an offshoot of the Draft Code of Crimes. As such, it did not contain a general part which would have overlapped with the general principles already introduced in the Draft Code.[20] When adopted in 1998, the Rome Statute had nevertheless grown in size and substance and become quite different from the text proposed by the ILC as a part of the two-pillar solution consisting of the substantive Draft Code and an 'adjectival and procedural' Draft Statute. Not only did the Statute define the jurisdiction *ratione materiae* of the Court in a more restrictive way than the ILC which had proposed including both terrorism and the drug offences, but it also contained complete definitions of the crimes under the jurisdiction of the Court,[21] together with a comprehensive codification of the general principles of criminal law. There was little room or need for a separate Code of Crimes as the Rome Statute was soon recognised as the authoritative codification of both the core crimes and the general principles of international criminal law.

The Draft Code has been subject to some criticism regarding its treatment of the general principles of criminal law, and its different versions do not present a

17 For a tentative timetable for the Preparatory Committee and the decision to convene a Diplomatic Conference in 1998, see UN Doc. A/RES/51/207, paras. 4 and 5.

18 Report of the International Law Commission on the work of its 48th session, 6 May–26 July 1996, UN GAOR 51st session, Supplement No. 10 (A/51/10), Draft Code of Crimes against the Peace and Security of Mankind, (1996 Draft Code), commentary to art.1, para. 13, at 17–18.

19 As pointed out by Barboza, *supra* note 8, at 50.

20 The ILC had produced and adopted a second version of the Draft Code in 1991, when it was asked to give priority to the drafting of a statute for an international criminal court. The first ad hoc committee on the establishment of an ICC was convened in 1995. See James Crawford, 'The Work of the International Law Commission', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 2.1., 23–34.

21 Barboza, *supra* note 8, at 137, has noted that "the jurisdiction *ratione materiae* of the Commission's Court was considerably more extensive than the Rome Court and in a certain way more akin to the classical procedures of international criminal law, like referring to crimes under general international law without defining them, or to make a *renvoi* to the definition of treaty crimes".

consistent approach in this regard.[22] One reason for its focus on substantive criminal law and the insufficient elaboration of the general principles may be that it was assumed that the Draft Code would be applied by national courts most of the time, or at least it was not clear what the prevailing model of enforcement would be. Criticism has been directed in particular at the 'insufficient' or 'superficial' comprehension of inchoate crimes as different from the various forms of participation.[23] There are features in article 2(3) of the Draft Code – in particular the emphasis on intentionality and completed crimes and the almost complete absence of responsibility for the acts of another – which are striking when compared with the recent developments in the ICTY case law. Article 2 of the 1996 Draft Code reads as follows:

> *Individual responsibility*
> 1. A crime against the peace and security of mankind entails individual responsibility.
> 2. An individual shall be responsible for the crime of aggression in accordance with article 16.
> 3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
> (a) intentionally commits such a crime;
> (b) orders the commission of such a crime which in fact occurs
> (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6:
> (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including provision of means for its commission;
> (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;
> (f) directly and publicly incites another individual to commit such a crime which in fact occurs;
> (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

22 According to Bassiouni, *supra* note 1, at 391, the 1996 Draft Code of Crimes does not adequately deal with any of the questions related to participatory criminal responsibility.

23 According to Allain and Jones, the ILC would have been well advised to adopt the progressive approach evident in the emerging case law of the ICTY. Jean Allain and John R.W.D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind', 1 *EJIL* (1997), 100–117, at 112.

As is explicitly stated in the ILC Commentary to article 2, participation in a crime as described in paragraph 3 only entails criminal responsibility when the crime is actually committed or at least attempted. Subparagraph 3(d) sets forth both a mental standard (knowledge) and a requirement that the material act of aiding, abetting or otherwise assisting must be direct and substantial. The Commentary to subparagraph (d) points out in this regard that

> [A]n individual who provides some type of assistance to another individual without knowing that this assistance will facilitate the commission of a crime would not be held accountable [...] In addition, the accomplice must provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime. [...] In such a situation, an individual is held responsible for his own conduct which contributed to the commission of the crime notwithstanding the fact that the criminal act was carried out by another individual.[24]

The final version of the Draft Code also approaches conspiracy and incitement from the point of view of complicity viewing them as direct contributions to completed crimes. As the ILC Commentary explains, conspiracy requires a significant contribution to the commission of the crime "by participating jointly in formulating a plan to commit a crime and by joining together in pursuing the criminal endeavour".[25] It is clear from subparagraph 3(e) that criminal responsibility attaches to participation only if it is direct and if the underlying crime in fact occurs. According to the Commentary, subparagraph 3(e) "sets forth a principle of individual responsibility with respect to a particular form of participation in a crime rather than creating a separate and distinct offence or crime." [26] This comment reflects the reservations raised regarding the concept of conspiracy in civil law jurisdictions. According to van Sliedregt, the ILC's "mixed conspiracy-complicity concept" preserves the confused Nuremberg legacy. As is recalled, the IMT applied the broad concept of conspiracy only to crimes against peace and reduced it to complicity with regard to the other crimes under the Tribunal's jurisdiction.[27]

Subparagraph 3(f) on incitement extends the criminalisation of direct and public incitement from genocide to all crimes under the Draft Code but at the

24 1996 Draft Code, *supra* note 18, commentary to art. 2(3)(d), para. 11, at 24.

25 *Ibid.*, commentary to art. 2(3)(e), para. 13, at 24–25.

26 *Ibid.*

27 Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003, at 94–95; see also Chapter 3.2.1.

same time limits the applicability of the provision by requiring that the underlying crime "really occurs". Van Sliedregt has drawn attention to the mention of "another individual" as the addressee of the incitement which could be taken as a further limitation of the applicability of the provision.[28] On closer look, however, this does not seem to be a valid point, although there seems to be some tension in the provision between the mention of "another individual" and the characterisation of the incitement as "public". According to the ILC Commentary, the provision should be given a broader interpretation:

> The element of direct incitement requires specifically urging another individual to take immediate criminal action rather than merely making a vague or indirect suggestion. The equally indispensable element of public incitement requires communicating the call for criminal action *to a number of individuals in a public place or the members of the general public at large*.

The commentary to article 2 also mentions that the call for criminal action may be communicated by radio or television or other technological means of mass communication.[29]

Earlier versions of the Draft Code revealed some of the difficulties the ILC faced with the notion of conspiracy. The 1954 version of the Draft Code extended the application of conspiracy to all crimes against the peace and security of mankind, albeit without a definition.[30] While several governments had expressed the fear that the application of the paragraph might give rise to problems, the Commission did not change the wording, noting that "a court applying the Code would overcome such difficulties by means of a reasonable interpretation".[31] In 1990, when the ILC had thoroughly discussed the ancillary crimes included in the Draft Code, the Special Rapporteur proposed including conspiracy but presented two alternatives for doing so: one which would have preserved the nature of conspiracy as an inchoate crime and another that devised it as an act of complicity.[32] The first alternative, termed 'collective responsibility', "specified that criminal

28 Van Sliedregt, *supra* note 27, at 110–111.

29 1996 Draft Code, *supra* note 18, commentary to art. 2, para. 3(f), para. 16, at 26-27 (emphasis added).

30 1954 Draft Code, reproduced in Sir Arthur Watts, *The International Law Commission 1949–1998*, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, 1676–1685, art. 2, para. 13, at 1683.

31 *Ibid*., commentary to art. 2, para. 13, at 1683.

32 Art. 16 on conspiracy as proposed by the Special Rapporteur Doudou Thiam read as follows: "The following constitute crimes against the peace and security of mankind: (1)

responsibility attached not only to the perpetrator, but also to any individual who ordered, instigated or organised a common plan or who participated in its execution".[33] The second alternative, which presented a differentiated model and, according to the Special Rapporteur, was based on the concept of individual criminal responsibility, provided that "each participant would be punished according to his own participation, without regard to the participation of others". The first alternative could be justified because "major crimes could no longer be regarded as acts committed by isolated individuals".[34]

Some members of the Commission pointed out that the question was not one of collective responsibility for crimes against the peace and security of mankind but "of the apportionment of responsibilities in the perpetration of such a crime".[35] Some others believed that it was "not really necessary to include in the Draft Code a provision on conspiracy separate from that of complicity, since the two notions were very close to each other and often overlapped".[36] The version of the Draft Code that was provisionally adopted in 1991 presented conspiracy in the same paragraph as complicity but made it an independent offence by not requiring the execution of the underlying crime.[37] Against this background, the 1996 version reflects a particularly strong emphasis on what in 1990 was termed as "the principle of individual criminal responsibility", as against the principle of "collective responsibility". While in 1990 the ILC was still consistent in underlining the difference between a direct perpetrator (a person who commits a crime directly and physi-

Participation in a common plan or conspiracy to commit any of the crimes defined in this Code. (2) *First alternative*: Any crime committed in the execution of the common plan referred to in paragraph (1) above attaches criminal responsibility not only to the perpetrator of such crime but also to any individual who ordered, instigated or organized such plan, or who participated in its execution. *Second alternative*: Each participant shall be punished according to his own participation without regard to participation by others." Report of the International Law Commission on the work of its 42nd session, 1 May–20 July 1990, UN GAOR 45th session, Supplement No. 10 (A/45/10), Draft Code of Crimes against the Peace and Security of Mankind (1990 Draft Code), para. 56, footnote 27.

33 *Ibid.*, para. 58, at 24.

34 *Ibid.*, para. 58, at 24.

35 *Ibid.*, para. 62, at 26.

36 *Ibid.,* para. 61, at 25.

37 The same applies to incitement. According to art. 3, para. 2 of the 1991 Draft Code, "An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires or directly incites the commission of such a crime is responsible therefor and is liable for punishment". Report of the International Law Commission on the work of its 45th session, 29 April–19 July 1991, UN GAOR 46th session, Supplement No. 10 (A/46/10), Draft Code of Crimes against the Peace and Security of Mankind.

cally) and an indirect perpetrator (accomplice),[38] most of the subparagraphs in the 1996 version of article 2(3) of the Draft Code contain the qualification 'direct'. Remarkably, the ILC also added the qualification 'intentional' to subparagraph (a) on commission. According to the commentary,

> While recognizing that the word "commit" is generally used to refer to intentional rather than merely negligent or accidental conduct, the Commission decided to use the phrase "intentionally commits" to further underscore the necessary intentional element of the crimes against the peace and security of mankind.[39]

The notion of superior responsibility is addressed in article 6, which complements article 2(3)(c). It reads as follows:

> The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

As was pointed out earlier, article 6 was aligned with article 86 of AP I as well as with the Statutes of the ICTY and the ICTR.[40] Similarly, the Commentary recognised both the applicability of the responsibility of a superior to civilian superiors who are "in a similar position of command and exercise a similar degree of control with respect to their subordinates"as military commanders and "not only to war crimes, but also to the other crimes listed in Part II".[41] In view of the later *Orić* Judgement of the ICTY,[42] it is worth noting that the reference to "other crimes listed in Part II" does not seem to extend superior responsibility for a failure to prevent or repress unlawful conduct of subordinates to ancillary crimes, which were listed in Part I of the Draft Code. The principle of the criminal responsibility of a superior for unlawful orders was clearly meant to apply only to those situations

38 1990 Draft Code, *supra* note 32, para. 52, at 21.

39 1996 Draft Code, *supra* note 18, commentary to art. 2(3)(a), para. 7, at 22.

40 *Ibid*., commentary to art. 6, para. 3, at 36.

41 *Ibid*., commentary to art. 6, para. 4, at 37.

42 *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement of 30 June 2006 (*Orić* Judgement); *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement of 3 July 2008 (*Orić* Appeal Judgement); see also Chapter 3.3.3.

in which the subordinate actually carries out or at least attempts to carry out the order.[43]

4.2.2. The Rome Statute of the ICC

Compared to the ILC Draft Code, the Rome Statute contains a more complete, sophisticated and coherent codification of the general principles of criminal law which has been said to bring international criminal law closer to a mature system of criminal law.[44] It is the first international instrument that has attempted to enumerate in a comprehensive way the general principles of criminal law recognised by most national legal systems around the world.[45] The drafting of what became Part III of the Statute clearly benefited from the earlier work of the ILC but it deviates from the Draft Code in many respects. Even though the most obvious difference may be the comprehensive nature of Part III, there are also different solutions with regard to the core questions of individual criminal responsibility that were covered in the Draft Code. In addition to the work of the ILC that preceded the adoption of the Rome Statute, the jurisprudence of the ICTY and the ICTR was also frequently referred to in the negotiations on the ICC Statute and contributed to their successful completion. This was, however, more evident with regard to the substantive criminal law than the modes of liability. With regard to the latter, it has been noted that the ICC Statute, deviating from the broad notions of responsibility used by the ICTY, "is a true example of a differentiated participation model".[46] Among the provisions of the Statute that are particularly relevant to the attribution of criminal responsibility, are articles 25, 28 and 30, entitled "Individual criminal responsibility", "Responsibility of commanders and other superiors" and

43 1996 Draft Code, *supra* note 18, commentary to art. 2(3)(b), para. 9, at 23.

44 Van Sliedregt, *supra* note 27, at 360, has drawn attention in particular to the list of defences which complement the basic articles on the attribution of responsibility. Similarly Albin Eser, 'Individual Criminal Responsibility', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 20, 767–822, at 769.

45 As emphasised by Maria Kelt and Herman von Hebel in 'General Principles of Criminal Law and the Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 19–40, at 20. Even so, the Rome Statute is still less developed and less coherent than national criminal codifications. Thus, according to Eser, *supra* note 44, at 768, "The title of Article 25 raises greater hopes than it is, in the end, able to fulfil".

46 Van Sliedregt, *supra* note 27, at 113.

"Mental element", respectively.[47] The Elements of Crimes adopted two years after the Rome Conference contain clarifications on how these provisions should be applied to the definitions of crimes in articles 6 to 8 of the Statute.[48]

Article 25, paragraph 3, reads as follows:

> 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 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;

The provision on 'committing' in subparagraph 3(a) seems to be clearer than articles 7(1) and 6(1) of the ICTY and ICTR Statutes in that it deals only with the responsibility of the principal perpetrator. It has been noted, however, that commission is not limited to the definition in this subparagraph, as a person may also 'commit' a crime through the different modes of participation and extensions of

47 Arts. 22 (*nullum crimen sine lege*), 24 (non-retroactivity *ratione personae*), 26 (exclusion of jurisdiction over persons under eighteen) and 27 (irrelevance of official capacity) will not be considered in this context.

48 The Elements are "basically aimed at the principal or the primary perpetrator" and shed light particularly on article 30 and the exceptions to the default rule provided in it. See Maria Kelt and Herman von Hebel, 'What Are Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 13–18, at 18.

attribution set out in paragraph 3.[49] In subparagraph 3(a) 'commission' is defined fairly broadly to include not only direct and immediate participation ("as an individual") but also co-perpetration ("jointly with another") and 'perpetration by means' ("through another person"). As the provision does not explicitly mention commission by omission, different views have been expressed on whether it would only be covered in the case of superior responsibility.[50]

The concept of perpetration by means does not appear in the Draft Code or in the Statutes of the ad hoc tribunals. It has special significance in view of the objective of the ICC which, in line with its predecessors, seeks to target those 'most responsible' for the crimes under its jurisdiction. Perpetration by means, or 'indirect perpetration', applies to situations in which the direct perpetrators carry out crimes that have been conceived or ordered by the indirect perpetrator.[51] It has been emphasised that the domination of the latter over the former must be total, such that the direct perpetrator is a secondary actor, a tool in the hands of the indirect perpetrator and dispensable as such.[52] The acts perpetrated can therefore be attributed to the indirect perpetrator as if they were his or her own. This does not, however, mean that the direct perpetrator would have to be 'an innocent agent' [53] – a requirement that would considerably limit the applicability of the concept to situations of macro-criminality. As Ambos has pointed out, perpetration through another person would easily seem to correspond to situations of

49 Kai Ambos, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 475–492, at 478.

50 *Ibid*., at 492: the absence of an express provision can not be interpreted otherwise than as exclusion of individual criminal responsibility for omission. Similarly Eser, *supra* note 44, at 819. For a different view, see van Sliedregt, *supra* note 27, at 55. According to Per Saland, 'International Criminal Law Principles', in Roy S. Lee (ed.) *The International Criminal Court: Issues, Negotiations, Results*, Kluwer Law International, 1999, 189–216, at 213, the issue of omission was left to the Court's case law.

51 Van Sliedregt, *supra* note 27, at 68.

52 *Ibid.*, at 70. Degan has pointed out that for instance Drazen Erdemović, who was convicted by the ICTY as a perpetrator, would have benefited from the application of the concept of perpetration by means, had it been provided by the ICTY Statute. In his view, "Erdemović acted as a simple tool or instrument of his commander who was the actual, though indirect, perpetrator of the genocide". Applying the Rome Statute, the Tribunal could have acquitted Erdemović on the basis of duress which it recognises as a defence. See Vladimir-Djuro Degan, 'On the Sources of International Criminal Law', 4 CJIL (2005), 45–83, at 55–57.

53 This is required by the Anglo-American doctrine of perpetration by means. See Ambos, *supra* note 49, at 479–80; van Sliedregt, *supra* note 27, at 69–71. See also George P. Fletcher, *Rethinking Criminal Law*, 2nd Edn., Oxford University Press, 200, at 639.

Organisationsherrschaft, where the domination is carried out through a hierarchical organisational structure.[54] The requirements for perpetration by means thus come close to the functional requirements of command responsibility.[55] The cognitive requirements are nevertheless considerably stricter as the indirect perpetrator, unlike a superior responsible for the crimes committed by his or her subordinates, needs to display full intent.

Equally important with regard to the responsibility of the intellectual authors of large-scale criminal campaigns are the provisions on instigation and complicity in subparagraphs 25(3)(b) and (3)(c). 'Ordering', 'soliciting' and 'inducing' cover different situations in which a person prompts another person or persons to commit a crime. While 'ordering' is a specific term limited to situations where a superior-subordinate relationship exists, 'soliciting' and, in particular 'inducing', would seem to extend to "any conduct which causes or leads another person to commit a crime".[56] As such, it is probably the lowest possible grade of instigation.[57] As is clear from the explicit requirement to the effect that the crime must in fact occur or at least be attempted, instigation in this sense is comparable to complicity and not an inchoate crime. It has, in fact, been criticised for a certain overlap with both the concept of perpetration by means in subparagraph 25(3)(a)[58] and the notion of abetting in subparagraph 25(3)(c).[59] Unlike article 2(3), subparagraph (f), of the 1996 Draft Code, this provision does not extend to the crime of genocide. Subparagraph 25(3)(e) on direct and public incitement to commit genocide has been reproduced from the 1948 Convention and does not as such give rise to further comments.

54 Ambos, *supra* note 49, at 479. Perpetration by means is thus limited to those at the top levels of a hierarchy; see also Ambos, *supra* note 2, at 614.

55 According to Eser, *supra* note 44, at 795, the model of 'intermediary perpetration' is only justified, if there is a sufficiently tight control by the indirect over the direct perpetrator that is "similar to the relationship between superior and subordinate in the case of command responsibility".

56 Ambos, *supra* note 49, at 480–481.

57 Van Sliedregt, *supra* note 27, at 77.

58 Ambos, *supra* note 49, at 480, has pointed out that "the first alternative in subparagraph (b) actually belongs to the forms of perpetration provided for in subparagraph (a), being a form of commission "through another person". Van Sliedregt, *supra* note 27, at 78, shares this view.

59 William A. Schabas, *An Introduction to the International Criminal Court*, 2nd Edn., Cambridge University Press, 2004, at 102, has noted that "[t]here is a certain redundancy about these two paragraphs, perhaps because of an unfamiliarity of the drafters with the common law term 'abets' which, while it appears in paragraph (c), in reality covers everything described in paragraph (b)".

The forms of complicity enumerated in subparagraph 25(3)(c) are meant to cover all other types of assistance not included in paragraph 25(3)(b). The most noteworthy feature of the provision is that it does not incorporate the Draft Code requirement that the acts of an accomplice must amount to a direct and substantial contribution to the crime.[60] As a matter of fact, no quantitative threshold is set for complicity, which seems to make it overly broad. It has been pointed out, however, that the *mens rea* standard in subparagraph (3)(c) is higher than the one established in the case law of the ICTY and the ICTR: the phrase "for the purpose of facilitating" seems to require double intent while the ad hoc tribunals have required only knowledge of the principal's intent.[61]

Subparagraph 25(3)(d) on 'common purpose' is particularly interesting from the point of view of extended responsibility. It has frequently been referred to as a modified conspiracy provision.[62] It may also be recalled that the ICTY Appeals Chamber, when introducing the concept of joint criminal enterprise in the *Tadić* case, drew attention to this provision, also mentioning article 2(3)(c) of the International Convention on the Suppression of Terrorist Bombings. Even if not in force at the time, these provisions constituted for the Appeals Chamber "significant evidence of the legal views of a large number of states".[63] Some scholars have drawn a straight line from the common purpose provision in subparagraph 3(d) to the expansive interpretation given to the doctrine by the ICTY,[64] or squarely called it "the Rome Statute's Article 25 provision on joint criminal enterprise".[65] Other commentators have claimed that this provision of the Rome Statute indicates little more than a traditional form of participation.[66] It will therefore be inter-

60 It may, however, be assumed that the established requirement of a direct and substantial contribution will be taken into account in the interpretation of the provision.

61 Van Sliedregt, *supra* note 27, at 93. For a similar view, see Eser, *supra* note 44, at 801.

62 For instance Ambos, *supra* note 49, at 483–484; Schabas, *supra* note 59, at 103-104.

63 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement of 15 July 1999 (*Tadić* Appeal Judgement), paras. 221, 222.

64 Allison Marston Danner and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', Vanderbilt University Law School, Public Law & Legal Theory Working Paper Series, Working Paper No. 04-09; Stanford Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 87, March 2004, at 75. According to them, JCE clearly falls within the ambit of the Rome Statute.

65 Jens David Ohlin, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007), No. 1, 69–90; Harmen van der Wilt, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *JICJ* (2007), 91–108.

66 Ambos, *supra* note 49, at 491, has pointed out that "it is hardly conceivable that a case which entails liability according to subparagraph (d) will not do so according to subpara-

esting to take a closer look at how broad an expansion of the traditional forms of participation the provision entails.

The first phrase in subparagraph 25(3)(d) makes it clear that the starting point for the provision is complicity – contribution to the commission or attempted commission of a crime – and not conspiracy as an inchoate crime. According to the *chapeau* of the subparagraph, any contribution is covered, provided that it has been made intentionally. The material act is therefore defined broadly, and the specific limitations on the scope of the crime are all related to the mental state of the person concerned, as defined in indents (3)(d)(i) and (3)(d)(ii). According to the first alternative, the person must have acted with the aim of furthering the criminal activity or criminal purpose of the group. The person must therefore be aware of the nature of the activities or the purpose of the group, and also know that they involve the commission of genocide, crimes against humanity or war crimes under the jurisdiction of the Court. Moreover, he or she must intend to further the activities or purpose so defined which can be interpreted as a requirement of a shared intent[67] or a specific intent.[68] These requirements seem to set a higher standard than that established for complicity. According to the second alternative, the person must be aware of the intention of the group to commit the crime. If the provision is interpreted as referring to a specific crime that is being planned or prepared,[69] the second alternative comes close to complicity as it is ordinarily understood, but this is probably too restrictive an interpretation. What makes this provision different from aiding and abetting under subparagraph 25(3)(c) is, firstly, the requirement that the crime must be committed by a group acting with a common purpose and, second, that it specifically refers to contributing "in any other way" that is not included in subparagraph (c).

graph (c)". For a similar view, see Eser, *supra* note 44, at 803, and William A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, at 263. Van Sliedregt, *supra* note 27, at 36, has noted that subparagraph (d) "reflects, albeit weakly, ICTY case law on group crime". See, however, the slightly different assessment Ambos has presented in 'Joint Criminal Enterprise and Command Responsibility', 5 JICJ (2007), 159–183, at 172, in which he has noted that "the only form participation comparable with JCE II or III is that of collective responsibility as laid forth in Article 25(3)(d) ICC Statute".

67 Van Sliedregt, *supra* note 27, at 107.

68 Ambos, *supra* note 49, at 486.

69 This has been the interpretation of both Ambos, *supra* note 49, at 486, and van Sliedregt, *supra* note 27, at 108. Schabas, *supra* note 59, at 109, has taken a different stand. In his view, article 25(3)(d)(ii) "establishes criminal liability for acts committed by participants in a 'common purpose' even if they lack knowledge of the specific criminal intent of their colleagues".

Summing up, the common purpose provision in subparagraph 25(3)(d) could be described as a special form of complicity applicable to group crime. On the subjective side, the first alternative comes close to co-perpetration if the provision is seen as requiring a shared intent, while the second alternative is similar to aiding and abetting. A special feature of the provision is that the criminal responsibility it describes is heavily dependent on the guilty mind, while the material act has been left completely undefined. In this respect the common purpose formulation represents the same trend as the joint criminal enterprise. The basic and systemic forms of JCE could, in fact, be easily brought under the formulation.[70] However, the extended form of joint criminal enterprise seems to fall outside the scope of subparagraph (d).

As risk-based 'collateral responsibility' is therefore not covered by article 25, the question remains whether it could be inferred from the ICC Statute in the same way as the JCE was deduced from article 7(1) of the ICTY Statute. As noted earlier, some commentators expect the ICC to follow the line of reasoning established by the ICTY,[71] even predicting that certain provisions of the Rome Statute might soon prove retrograde in comparison with the advances made by the ICTY.[72] The Court is not prevented from applying customary law,[73] but in view of the detailed nature of the provisions of Part III of the Statute, including article 30 on the mental standard, it is doubtful whether the ICC could adopt the doctrine of joint criminal enterprise. It should also be noted that article 25 provides other means to address collective criminality where the responsibility goes far beyond the level of direct perpetrators, in particular the provision on 'indirect' perpetration by means. Article 25 does, however, leave one gap, as the provision on conspiracy to commit genocide has not been reproduced separately. As subparagraph

70 Van Sliedregt, *supra* note 27, at 108.

71 See also Mark A. Drumbl, 'Looking Up, Down and Across: The ICTY's Place in the International Legal Order', 37 *New England L. Rev.* (2003), 1037–1057, at 1044. He has doubted whether the differences in definitions should affect the precedential value of the ICTY case law.

72 This applies, in particular, to the strict distinction between international and non-international armed conflicts. See, for instance, Sonja Boelaert-Suominen, 'The Yugoslavia Tribunal and the Common Core of Humanitarian Law applicable to all Armed Conflicts', 13 *LJIL*(2000), 619–653, at 649; for a similar view, see Condorelli, *supra* note 3.

73 While customary law is not specifically mentioned in art. 21 on applicable law, the reference to rules and principles of international law can be seen to comprise also customary law. See Margaret McAuliffe de Guzman, 'Article 21: Applicable Law', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 435–446, at 441–442.

3(d) clearly falls short of a definition of conspiracy, it cannot fill in this particular lacuna.

It may be interesting at this juncture to refer back to the origins of the common purpose provision. Its immediate source, as noted earlier, was the 1997 Terrorist Bombings Convention, article 2(3)(c), which criminalises any contribution 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 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 the offence or offences concerned."[74] A further pedigree can be traced to the 1996 Extradition Convention of the European Union, which refers to

> [T]he behaviour of any person which contributes to the commission by a group of persons in the field of terrorism as in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons, punishable by deprivation of liberty or a detention order of a maximum of at least 12 months, even where that person does not take part in the actual execution of the offence or offences concerned; such contribution shall be intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned.[75]

It is worth noting that the common purpose provision in the Rome Statute that has been regarded as a prime expression of the 'collective trend' specific to the core crimes is a spill-over from the context of transnational organised crime and terrorism. At the same time, the ICC formulation is somewhat more restricted than the two precedents, in particular as it makes clear that intentionality is required in both alternatives. The the first variant of the formulation thus requires double intention: a general intention that refers to the material act, and a specific intent to further the criminal activity of the group. The second variant combines the general intent with a knowledge standard.

In a sharply critical analysis of the ICC common purpose formulation, Jens David Ohlin has drawn attention to the dissimilarity of the two alternative stand-

74 The drafting of the paragraph was improved in the Rome Statute by making clear that it was necessary, in the first alternative, that the purpose and activities of the group involved commission of the relevant offences. See also Chapter 1.4.

75 Convention relating to extradition between the Member States of the European Union, OJ C 313, 23 October 1996, art. 3(4).

ards for *mens rea* in subparagraph 25(3)(d) which nevertheless are presented as legally equivalent. As he has noted, "Because the Article 25(3)(d) requirement is disjunctive, an intentional contribution made knowing of the group's objectives yields the exact same criminal liability as intentional contribution made with the aim of furthering the criminal objectives of the conspiracy".[76] In Ohlin's view, knowledge and intention are fundamentally different concepts with knowledge of criminal activity, by itself, being "rarely morally significant".[77] Persons falling under the second alternative should therefore not be deemed as guilty as those under the first alternative. Ohlin has suggested amending the provision in article 25(3)(d) to explicitly state that all persons participating in a 'conspiracy' will be judged according to their individual participation and importance in the overall criminal scheme. Moreover, as a general rule, "substantial and indispensable contribution" should be required for criminal liability to arise.[78] Without closer consideration of Ohlin's comments it may be observed that they seem to focus on subparagraph (d) in splendid isolation, not only from international criminal law in general, where the common purpose formulation is quickly gaining ground,[79] but also from the broad formulation of article 25 as a whole, notably subparagraph (3)(c), which accepts any aid, abetting or other assistance with the purpose of facilitating a crime as complicity.[80] At the same time, his comments are indicative of a more general concern about the tendency in international criminal law to depart from the traditional understanding of individual criminal responsibility.

Article 28 on the responsibility of commanders and other superiors codifies most of the advances established so far in international criminal law concerning superior responsibility. It mentions the requirement of effective control, recognises the applicability of superior responsibility to civilian superiors, sets the knowledge standard for military commanders to 'should have known' and requires a clear causal connection between a failure to exercise control and the crimes committed by the subordinates. The requirement that the commission of the crimes is a result of a failure to properly exercise control means that superior responsibility comes close to "a genuine offence, or separate crime of omission"[81] rather than being a mode of imputed responsibility; this can be seen as a welcome development from

76 Ohlin, *supra* note 65, at 80.

77 *Ibid.*, at 79.

78 *Ibid.*, at 89.

79 In particular in anti-terrorist instruments; see Chapter 1.4.

80 Art. 25(3)(c). It may also be recalled that in the ILC Draft Code and in the ICTY case law complicity requires direct and significant – not substantial and indispensable – contribution combined with knowledge of the perpetrator's criminal intent.

81 Van Sliedregt, *supra* note 27, at 190.

the point of view the principle of individual guilt. A more controversial feature in the provision is the explicit distinction between military and civilian superiors and the respective mental requirements, which are stated separately in paragraphs (a) and (b) of article 28:

> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
> (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

While it is clear that superior-subordinate relationships are different in military and civilian contexts, with military organisations displaying a unique combination of hierarchy, discipline and control, the choice to lay down different cognitive standards for the two situations, as article 28 does, can be criticised. It has been noted that the difference between the two situations lies in the scope of control exercised by a superior, and thereby in how his or her duty to know about the

activities of his or her subordinates has been defined.[82] Applying paragraph (a) to military and civilian contexts would result in different outcomes without a need to apply a different test to the two situations. As paragraph (b) has been formulated, it seems to be applicable to a range of different situations in which the superior is in a position to exercise effective authority and control over the activities of his or her subordinates.[83] While there is no explicit limitation regarding its application to groups or associations with lawful purposes, the formulation seems to imply that the superior should act in bona fide. An additional noteworthy feature is the requirement of a causal relationship between the crimes committed by the subordinates and the failure of the superior to exercise proper control, which is obvious from the words "as a result".[84]

According to article 30 on the *mens rea* requirements applicable to the ICC crimes:

> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
> 2. For the purposes of this article, a person has intent where:
>   (a) In relation to conduct, that person means to engage in the conduct;
>   (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
> 3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Article 30 belongs to the groundbreaking elements of the Rome Statute in that it tries to lay down the general mental requirements applicable to all crimes under articles 6 to 8. The phrase "unless otherwise provided" implies, however, that there may be specific exceptions to the article. The Elements of Crimes highlights such

82 *Ibid.*, at 192.

83 As Fenrick has noted, this is a question of position, not of the superior's personal capacity or competence. See W.J. Fenrick, 'Article 28: Responsibility of Commanders and Other Superiors', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 515–522, at 518. He made this comment concerning the responsibility of military commanders but it can be assumed to be equally applicable to civilian superiors.

84 Ambos, *supra* note 66, at 178. See, however, van Sliedregt, *supra* note 27, at 190, who has submitted that causation in art. 28 should be understood in the same way as in the context of the ad hoc tribunals: "The fact that it is spelt out as a definitional element [...] does not change the fact that superior responsibility generates liability beyond direct causation".

exceptions, both in the General Introduction, which states that any exceptions to the article 30 standard are based on the Statute, including applicable law under its relevant provisions, and in the sections defining the elements of specific crimes.[85] Whether the Court could identify exceptions other than those already contained in the Statute and reflected in the Elements of Crimes is an interesting question,[86] given that the ICTY and the ICTR have extensively elaborated the subjective side of the commission of the core crimes, and, notably, lowered the threshold of what is now the 'article 30 standard'. As Werle and Jessberger have noted, the Tribunals' jurisprudence provides a "main source of subjective conditions of liability under customary international law".[87]

Both article 25 and article 30 have been regarded as ambitious attempts to regulate once and for all the question of individual criminal responsibility for the core crimes and its subjective element. At the same time, it has been pointed out that they do not quite attain this objective and leave many questions unanswered.[88] Views differ more on the substance of what has been regulated in Part III of the Rome Statute. The absence in the Statute of obvious bases for extended modes of responsibility comparable to the JCE III has been both welcomed and regretted. At the same time, it should be noted that the potential and the limits of the existing provisions in article 25, in particular 'indirect perpetration' and the 'common purpose' formulation have not yet been tested. While the ICTY line of reasoning at times seems to challenge the more restrictive approach of the Rome Statute, in particular when it comes to modes of liability, it has also been submitted that some

85 According to the ICC Elements of Crimes, *supra* note 7, para. 2 of the General Introduction, "As stated in article 30, unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge. When no reference is made in the Elements of Crimes to a mental element for a particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, i.e., intent, knowledge or both, set out in article 30 applies. Exceptions to article 30 standard, based on the Statute, including applicable law under its relevant provisions, are indicated below".

86 According to Kelt and von Hebel, *supra* note 45, at 29–30, the reference to 'applicable law' in para. 2 of the General Introduction "was intended to allow for the argument that the phrase 'unless otherwise provided' in article 30 may refer not only to the Statute itself, but also to other sources. So in case the Statute or such other source would provide for a deviation of article 30 [...], such deviation would then have to be reflected in the Elements of Crimes".

87 Gerhard Werle and Florian Jessberger, ''Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', 3 JICJ (2005), 35–55, at 53.

88 Eser, *supra* note 44, at 768–769, Werle, *supra* note 6, at 269. For a similar view, see William A. Schabas, '*Mens Rea* and The International Criminal Tribunal for the Former Yugoslavia', 37 New England L.Rev. (2003), 1015–1036, at 1025.

of the findings of the ICTY regarding the state of customary law might already be outdated in view of the adoption, entry into force and wide participation in the Rome Statute.[89] The impact of the *droit acquis* of the ICTY on the evolving jurisprudence of the ICC remains to be seen.

4.3. Emergence of a Doctrine: The Scholarly Discussion

4.3.1. Autonomous Developments

According to a well-known comment by Judge Röling of the Tokyo Tribunal, the notion of crime under international law includes both acts of a truly criminal nature and acts that could more properly be compared to 'political crimes' under domestic law in the sense that their "decisive element is the *danger* rather than the *guilt*, where the criminal is considered an *enemy* rather than a *villain* and where the punishment reflects a necessary *political measure* rather than an expression of *retribution*".[90] While the notion of the most serious crimes of international concern has undergone considerable clarification and refinement since the time of the Nuremberg and Tokyo Trials and has resurged as a pure criminal law concept embedded in a larger framework of international criminal law and procedure, danger is still an essential feature shaping the relevant criminalisations and modes of responsibility. Striking a balance between the need to counter danger, on the one hand, and the need to uphold the principle of individual guilt, on the other, is at the core of the doctrines of extended responsibility discussed in the preceding sections. For instance, command responsibility and the underlying duty to control may be taken to serve the need to suppress not only actual breaches of the law, but also potential breaches.[91] Likewise, the criminalisation of genocide combines "a rather small criminal act with a rather broad and far-reaching intent". The purpose of such a structure of the crime is to avoid greater harm in the future by having the "first appearance of a "guilty mind" [...] investigated and prosecuted before it has a chance to be set into reality".[92] A necessary consequence of such a broad approach

89 Guënael Mettraux, *International Crimes and The Ad Hoc Tribunals*, Oxford University Press 2005, at 9–10.

90 B.V.A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, 1993, at 66, (original emphasis).

91 Ilias Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999), 573–595, at 593.

92 Otto Triffterer, 'The Preventive and the Repressive Function of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 137–175, at 151.

is that a special stigma is attached not only to actual extermination but to all acts of genocide.[93]

Various scholars have emphasised the specificity of the concepts particular to the core crimes.[94] Commenting on the extent to which international criminal law should rely on existing doctrines of criminal responsibility, Bassiouni has pointed out that

> national developments in these areas [...] do not have the same policies that may exist with regard to *jus cogens* crimes as genocide and "crimes against humanity". In the latter crimes, the victimization is massive and harms the entire society. It is therefore unconscionable to think that ICL policy with regard to such *jus cogens* crimes is unable to develop independently of national criminal justice policy which relates to wholly different subjects, and whose consequences are far less harmful than genocide and "crimes against humanity".[95]

In a similar manner, Cassese has recognised a relationship between the nature of the crimes in question and the scope of the accompanying criminal responsibility in observing that a lower standard of *mens rea,* namely culpable negligence, only becomes relevant "given the [...] nature of international crimes" and when, in addition, "there exist some specific conditions relating to the objective elements of the crime, that is, the *values* attacked are fundamental and the *harm* caused is serious".[96] Van Sliedregt has also accepted the applicability of certain special participation concepts to crimes against humanity, genocide and other large-scale crime but warned that they should not be mixed with the general principles of criminal law: "The collective trend does not and should not extend to general participation modes".[97]

Two notable features can be discerned with regard to the allocation of responsibility for the core crimes: firstly, a tendency to broaden the responsibility for participation in a crime and, secondly, a tendency to do so by way of lowering the *mens*

93 As Fletcher has noted, most people assume that the term genocide denotes the murder of people on a mass scale, while the Convention "in an Orwellian distortion of language even stigmatize[s] as genocide the public incitement of others to impose birth-control measures". See George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism*, Princeton University Press, 2002, at 32.

94 Danner and Martinez, *supra* note 64, at 84, have emphasised the specificity of the law of the core crimes and in particular warned against the use of the concept of JCE in respect of terrorist crimes.

95 Bassiouni, *supra* note 1, at 392–393.

96 Cassese, *supra* note 2, at 172.

97 Van Sliedregt, *supra* note 27, at 358.

rea standard. The focus on persons other than the direct perpetrators/principal authors has been derived from the actual role of a political or military leader as the *auctor intellectualis* of a criminal campaign directed against a whole population. The methods of extended responsibility such as superior responsibility and joint criminal enterprise have been developed primarily to create a link between leaders and crimes committed on their behalf where evidence would not suffice for proving complicity.[98] While the mental element is not identical in superior responsibility and the extended form of JCE, there are certain similarities. For example, the 'should have known' requirement creates a nearly objective standard and the same could well be said of the foreseeability standard in the third category of JCE.[99] At the same time, the definitions of the core crimes often display 'a subjective excess' in terms of the mental element of the crime being emphasised. Referring to the dual nature of the victimisation in genocide and other hate crimes, according to which both the individual and the group are targets of the crime, Fletcher has noted that the "group's suffering lies primarily in the actor's intention".[100] The criminal stigma of genocide is not related to the harm that is typically caused by the acts but to the "supposed wickedness of the intention".[101] The possibility of combining the lowest degree of intent (*dolus eventualis*) with the highest (*dolus specialis*) when applying the extended form of JCE or superior responsibility to the crime of genocide has been a controversial issue in the jurisprudence of the ICTY.[102]

The doctrines of extended responsibility have different backgrounds. Conspiracy, the basic and systemic categories of joint criminal enterprise, and the common purpose mode of responsibility in article 25(3)(d) of the Rome Statute could all be said to fall under the common purpose doctrine and to draw on national law, mainly Anglo-American common law.[103] Command/superior responsibility draws on international humanitarian law, and the extended form of joint

98 See also Ambos, *supra* note 66, at 181.

99 *Ibid*., at 175: "The only way out of this impasse is to construe foreseeability as an objective requirement (in the sense of a reasonable man standard), leaving the knowledge standard as the (only) subjective or mental requirement of liability". See also Antonio Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *JICJ* (2007), 109–133, at 113, for a reference to a 'man of reasonable prudence' test in this context. For a similar view, see Schabas, *supra* note 88, at 1033.

100 Fletcher, *supra* note 93, at 66.

101 *Ibid*., at 67.

102 Chapter 4.3.1. See also Cassese, *supra* note 99, as well as Elies van Sliedregt, 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 *JICJ* (2007), 184–207, who underlines the hybrid nature of JCE and calls for subdivisions of the concept.

103 Van Sliedregt, *supra* note 27, at 106.

criminal enterprise has been broadly influenced by human rights doctrine.[104] At the same time, the third category of JCE, established through a consistent judicial line of the ICTY is a prominent example of a development that is autonomous to international criminal law. Conspiracy is still not a universally recognised concept at the national level, and there is little recent case law at the international level. While the ICTY Statute provides for conspiracy to commit genocide, in accordance with the Genocide Convention, the provision has been sparsely used.[105] So far, the concepts of superior responsibility and joint criminal enterprise have provided the principal means for the ICTY in the effort to extend criminal liability to political and military leaders, who are seen as the masterminds behind large-scale crimes committed by ordinary soldiers or fighters.

Superior responsibility is by far the most established of the three doctrines of extended responsibility discussed above. While opinions have differed as to its nature – whether it is vicarious responsibility (based on the relationship between the superior and the subordinate, irrespective of the *mens rea* of the former),[106] imputed responsibility (for the acts of others)[107] or an independent crime of omission[108] – recent developments have contributed to an increased coherence of the doctrine. It has been noted that command responsibility has not been the favour-

104 Danner and Martinez, *supra* note 64, at 10–13.

105 The ICTR case law provides more examples of interpretations of the conspiracy provision in the 1948 Convention; see for instance *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement of 27 January 2000; *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, case No. ICTR-99-52-T (the *Media* case), Judgement of 3 December 2003; *Prosecutor v. Eliézer Niyitegeka*, Case No. ICTR-96-19-T, Judgement of 16 May, 2003.

106 *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgement of 16 November 1998 (*Čelebići* Judgement), para. 645; Ambos, *supra* note 66, at 176.

107 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808(1993), S/25704 of 3 May 1993, para. 56 at 15, referred to command responsibility as imputed responsibility. Similarly, Bantekas, *supra* note 91, at 577.

108 Van Sliedregt, *supra* note 27, at 219–221. Cassese, *supra* note 2, at 206–207, has pointed out that the various categories of superior responsibility should be distinguished from each other and that a superior should only be considered responsible for genocide if he or she knew of the crimes that were about to be committed and deliberately failed to stop their commission. In such a case, Cassese has stressed, there is a clear causality between the superior's omission and the crime. Where the superior does not know that the subordinate is about to commit a crime, but its commission was foreseeable and there is a deliberate or negligent dereliction of the superior's supervisory duties, the offence imputable to the superior is different from the crime committed by the subordinate, i.e. it is an independent crime of omission. Failure to report a crime and to take measures to punish the responsible subordinates is another independent crime that cannot lead to responsibility for the crimes committed by the subordinates.

ite choice of the ICTY when dealing with cases against high political or military leaders. Rather, it would seem that there has been a clear tendency to avoid its use, either by preferring the concept of joint criminal enterprise or by subsuming superior responsibility under more direct forms of participation such as complicity by omission.[109] The doctrine of joint criminal enterprise, although of a recent origin, has become the principal instrument of the ICTY Prosecutor. The advantages of the concept of joint criminal enterprise when compared to command responsibility include the absence of strict functional requirements and an established broad interpretation. Furthermore, where political leaders act as the masterminds of a vast criminal campaign, their role and contribution may not be best described in terms of a failure to act.[110]

4.3.2. Rules of Attribution in International Criminal Law

Further refinement of the rules attributing responsibility in international criminal law has taken place mainly in scholarly contributions. Bassiouni has listed the three general categories of imputed responsibility that have been applied by the international tribunals with regard to the core crimes as follows: 1) responsibility for the conduct of another, 2) responsibility for completed crimes arising out of partial conduct, and 3) responsibility for lawful conduct producing an unlawful result.[111] According to Cassese's slightly different classification, the methods of extended responsibility (techniques of attribution) can be divided into three categories which cover, respectively, 1) the early stages of the preparation of crimes that are actually committed, 2) preliminary conduct that is considered an independent (inchoate) crime and 3) notions that refer to specific conduct likely to cause serious risk.[112] The common purpose doctrine would seem to fall under several of these categories. The extended form of joint criminal enterprise represents responsibility for the conduct of another, or vicarious responsibility, but it may also be described in terms of risk-taking. As a mode of responsibility and not a crime as such, the concept of JCE is applicable only where crimes actually take place, but despite the requirement of a common purpose or plan, JCE can not be described as a form

109 Van Sliedregt, *supra* note 27, at 192–197. According to van Sliedregt, at 192, when there is concurrence of individual responsibility and command responsibility, the two theories should only be used to prosecute the same accused for distinct acts. See also Schabas, *supra* note 88, at 1030 and *supra* note 66, at 310.

110 Van Sliedregt, *supra* note 27,at 197.

111 Bassiouni, *supra* note 1, at 404.

112 According to the three major ways of addressing unacceptable risk presented by Cassese, *supra* note 2, at 22.

of preparation. Command or superior responsibility could likewise fall under the category of risk-taking. Complicity would represent partial conduct which contributes to completed crimes while incitement and conspiracy to commit genocide represent preliminary conduct that is considered as an independent (inchoate) crime. The other acts of genocide have been criminalised as specific conduct likely to cause serious risk. While it is more difficult to find an example of "responsibility for lawful conduct producing an unlawful result" in the area of the core crimes, the extended form of joint criminal enterprise – liability for an un-concerted crime – might be described as responsibility for criminal participation that leads to an unintended result.

Different umbrella concepts from the fairly neutral 'extended responsibility' to 'collateral responsibility',[113] 'collective responsibility'[114] or a 'mixed system of individual-collective responsibility'[115] have been used to depict the introduction and frequent use of the concept of joint criminal enterprise as well as other recent developments in the ICTY jurisprudence. According to van Sliedregt, the concept of system-responsibility can be divided into two sub-categories: 1) 'institutionalised membership responsibility' would cover the notion of criminal organisations as used by the IMT as well as the second variant of JCE (the concentration camp situation); and 2) 'collateral membership responsibility' would cover the (mixed) concept of conspiracy-complicity as used by the IMT, as well as the third category of JCE.[116] While institutionalised membership responsibility comes close to strict liability, the notion of collateral responsibility – adapting the concept of collateral damage in international humanitarian law – refers to responsibility for acts that are not intentional but which nonetheless are a foreseeable result of a certain course of events.[117]

113 The term has been used by van Sliedregt, *supra* note 27, at 352, with reference to the third category of JCE.

114 Marco Sassòli and Laura M. Olson, 'New horizons for international humanitarian and criminal law?', 81 *IRRC* (1999), No. 839, 733–769, Sassòli and Olson, '*Prosecutor v. Tadić* (Judgement). Case No. IT-94-1-A. 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999', 94 *AJIL* (2000), No. 3, 571–578; Natalie Wagner, 'The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia', 85 *IRRC* (2003), No. 850, 351–383. Mark A. Drumbl,' ICTY Appeals Chamber Delivers Two Major Judgements: *Blaškić* and *Krstić*', *ASIL Insight*, August 2004, available at http://www.asil.org/insights/insigh143.htm, has referred to JCE, conspiracy, complicity, incitement and command responsibility as 'collective liability theories'.

115 Ambos, *supra* note 66, at 183.

116 Van Sliedregt, *supra* note 27, at 352–356.

117 *Ibid.* at 352–356.

Cassese's recent comments concerning the conceptualisation of JCE liability are particularly interesting given his role not only as an esteemed scholar but also as the first president of the ICTY. In particular, his remarks may shed additional light on why joint criminal enterprise became the favourite concept of the ICTY, one "routinely applied in the Tribunal's jurisprudence".[118] According to Cassese, crimes perpetrated by groups of individuals – terrorism included – pose the special challenge that it is "extremely difficult to pinpoint the specific contribution made by each individual participant in the collective criminal enterprise", both because of the different roles played by different participants and because of the problems in finding evidence of each individual contribution.[119] For the third category of JCE – which he has called "incidental criminal liability based on foresight and voluntary assumption of risk"[120] – it is necessary to find a link between participation in a JCE and the incidental crime. In this regard, Cassese has distinguished between abstract and concrete foreseeability. For criminal responsibility to arise under JCE III, he has held, the incidental crime should be abstractly in line with the crimes that have been planned. Moreover, it should be proved that the participant had knowledge of a specific fact or circumstance which made it likely that the other participant(s) might commit an un-concerted crime and that the general circumstances also made it "extremely likely" that other, incidental crimes would be committed.[121]

These concepts also put pressure on the traditional requirement of a causal relationship between the criminal act and the harm done, and represent a departure from the model of linear causality. While the ICC Statute seems to require a causal relationship of superior responsibility in the sense that the crimes committed by subordinates are a result of the criminal omission of their superior, the ICTY has denied that this is necessary.[122] Reference can also be made to the Trial Chamber's reasoning in *Orić*, according to which not only completed criminal acts by subordinates, but also a criminal attempt, participation, incitement, or preparation and an omission by the subordinate may give rise to the criminal responsibility on the part of the superior.[123] While cumulative omissions can perfectly well result in a crime, the chain of events in such situations may be difficult to prove.

118 *Prosecutor v. Milomir Stakić* (IT-97-24-A) Appeal Judgement of 22 March 2006, para. 62.

119 Cassese, *supra* note 99, at 110.

120 *Ibid.*, at 113.

121 *Ibid.,* at 116–117.

122 *Orić* Judgement, para. 338, also referring to established case law of the Tribunal.

123 *Ibid*., para 303; *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgement of 3 July 2008 (*Orić* Appeal Judgement), paras. 20–21. See also Chapter 3.3.3.

Rigaux has argued that the crime of omission can never be part of "a chain of events within which a fact is connected with its consequences", because of its nature as a hypothetical factor.[124] A similar point has been made by van Sliedregt with regard to criminalisation of planning in systemic criminality:

> Planning will normally occur in the initial stages of the commission of a crime and to those who find themselves at the top of a hierarchy. The link between the actual perpetrator and the *auctor intellectualis* can be quite distant. It is likely to pass through mid-level positions in the governmental hierarchy or a military command structure, where the plans are elaborated and implemented. Therefore, a direct or *sine qua non* causal connection would be too 'close' or direct in describing the connection between the planner and the executor of a crime. A 'decisive factor test', such as that mentioned in the Commentary on the 1996 ILC Draft [...] seems more appropriate than a *sine qua non* causal link.[125]

The mention of a 'decisive factor test' refers to a comment made by the ILC in the context of the Draft Code concerning the crime of direct planning, which, according to the Commission, was intended to ensure that high-level government officials or military commanders who formulate a criminal plan or policy are held accountable for "the major role they play which is often a decisive factor in the commission of the crimes covered by the Code".[126]

Cassese has held that the extended form of joint criminal enterprise is in fact based on causality, albeit a form of causality that is different from the one applied to common crimes. In his view, "there exists a causal link between the concerted crime and the incidental crime: the former constitutes the preliminary *sine qua non* condition and the basis of the latter", in the sense that the un-concerted crime is "the outgrowth of previously agreed or planned criminal conduct".[127] As noted earlier, the incidental crime should be abstractly in line with the agreed upon criminal offence.[128] Furthermore, the participant must also have predicted the crime and willingly taken the risk that it might occur. Interestingly, Cassese has drawn a parallel between this mode of responsibility and superior responsibility as if any participant in a JCE would have a duty to prevent not any criminal conduct, but

124 François Rigaux, 'International Responsibility and the Principle of Causality', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 81–91, at 82.

125 Van Sliedregt, *supra* note 27, at 80

126 1996 Draft Code, *supra* note 18, commentary to art. 2, para. 3(e), para. 14, at 25.

127 Cassese, *supra* note 99, at 118–119.

128 *Ibid.*, at 113.

deviations from the original plan: "There lies his *culpability*. He could have prevented the further crime, or disassociated himself from its likely commission. His failure to do so entails that he too must be held guilty".[129]

Ambos has called for efforts to articulate the system of attribution in ICL in a more coherent way than it has been to date.[130] His point of departure, as with many other scholars cited above, is a concern about the potential of "certain rules developed by the case law [...] when applied in their extreme form" to violate fundamental principles of criminal law".[131] At the same time, he has underlined that the way in which the relationship between the conduct of a perpetrator and a criminal result is structured can not be the same for crimes under ICL as for domestic crimes. The distinctive feature of genocide, crimes against humanity and war crimes is the contextual element which distinguishes these types of crimes from common crimes such as multiple murders and makes them more than just the sum total of the individual acts. Therefore, the individual (sub)crimes (*Einzeltaten*) must be distinguished from the collective act (*Gesamttat*). It can be noted that Ambos has thus proposed following the example of the crime of aggression. In the ongoing negotiations on the definition of the crime of aggression for the purposes of the Rome Statute, the collective act (act of aggression) is distinguished from the individual act (crime of aggression) but at the same time deemed to be its necessary prerequisite.[132] According to Ambos, the individual and collective elements of core crimes require two different processes of attribution, an individual and a collective/systemic attribution which are mutually interrelated. What is required is a *double perspective*. Firstly, the collective perspective would focus on the *context element* belonging to all participants, that is, the objective criminal context or situation. Secondly, this context could be attributed in whole or in part(s) to the *individual participants* by recourse to concrete rules of attribution that are yet to be established.[133]

The individualisation of responsibility is a process that has to take into account the status of the person in the group or organisation as well as his or her concrete contribution to the crime. This differentiated model of attribution also explains the prevailing focus on the persons who are most responsible. According to Ambos "such a model targets primarily the leadership level of the given organi-

129 *Ibid.*, at 120.

130 For a similar view, see Werle, *supra* note 6, at 94 and Bassiouni, *supra* note 1, at. 419.

131 Kai Ambos, 'Remarks on the General Part of International Criminal Law', 4 *JICJ* (2006), 660–673, at 661.

132 Special Working Group on the Crime of Aggression, report of the meeting on 29 January–1 February, 2007, ICC-ASP/5/35.

133 Ambos, *supra* note 131, at 663–664.

sation since only the leaders are able to control and dominate the collective action with full responsibility".[134] Again, this is particularly obvious with regard to the crime of aggression, which is commonly regarded as a leadership crime. As for the specific modes of responsibility that best fit in this model, Ambos has mentioned command responsibility and indirect perpetration/perpetration by means as examples of a systemic model of attribution which highlights the elements of control or supervision exercised over the immediate perpetrators and participants.[135] This model would share with the JCE the systemic approach of taking a criminal enterprise as the starting point.[136] At the same time, it would have a more solid legal foundation in the established understanding of 'commission'.[137] The comments van der Wilt has made on the limitations of the concept of joint criminal enterprise and the strength of the concept of 'perpetration by means', or its national law equivalent of 'functional perpetration' go in the same direction.[138] Both have called for an alternative approach to the 'subjective excess' in international criminal law.

4.4. Remarks on 'Indirect Responsibility'

Returning now briefly to the subject of terrorist crimes, the task is to consider how the rules of attribution discussed above relate to the allocation of responsibility for terrorist acts and activities. This question will be addressed in more detail in Part III on the basis of an analysis of anti-terrorist instruments; the following section will only provide some general remarks and terminological clarifications on the subject, including a discussion of the notion 'indirect responsibility'. As was shown earlier, there is no agreed view of terrorism as part of ICL *sensu stricto*; most notably terrorist crimes are not generally counted as crimes under international law although they share many of the characteristics of the core crimes. The purpose of the following review is therefore not to apply to terrorist crimes the rules of attribution that are specific to ICL *sensu stricto,* although some examples of such spill-over can be found. For instance, the concept of joint criminal enterprise has been incorporated in the definition of conspiracy in the US regulations for military commissions.[139] Similarly, US courts have also applied the laws of war

134 *Ibid.*, at 664.

135 *Ibid.*

136 Ambos, *supra* note 66, at 183.

137 *Ibid.*, at 182.

138 Van der Wilt, *supra* note 65.

139 Danner and Martinez, *supra* note 64, at 79. They have also referred, at 81–82, to the *Qosi* and *Bahlul* indictments as well as to the *Padilla* case as examples of the use of the JCE doctrine to prosecute terrorists.

to terrorist acts committed during peacetime.[140] It has also been submitted in the scholarly discussion that the doctrine of JCE would be a major contribution to the effective prosecution of terrorist acts.[141]

Instead of following this discussion, Chapters 6 to 9 present a comparative study. As was pointed out earlier, certain recent developments with regard to terrorist crimes that exhibit a tendency towards broader and more pro-active criminalisations and other coercive measures directed towards prevention of terrorism and its financing have raised questions about the scope and attribution of criminal responsibility that come close to those discussed with regard to genocide, crimes against humanity and serious war crimes. Close equivalents in terms of legal techniques can also be found in the methods of combating drug trafficking or other forms of transnational organised crime. Thus, it can be said that terrorist acts are increasingly viewed as 'predicate crimes', forming the basis for additional criminalisations of financing, support and facilitation in the same way as predicate crimes lend money-laundering its criminal nature. Transnational organised crime is comparable to terrorist crimes as any serious offence, according to the Palermo Convention, can become an act of 'TOC' when the transnational elements are present.[142] The obvious advantage in taking ICL *sensu stricto* as the main point of reference lies in the availability of a rich doctrinal debate on the subject of the core crimes.

The concepts of extended responsibility, 'collective trend' and collective responsibility have been used above as overall descriptive concepts referring to the various modes of responsibility, that are peculiar to the most serious international crimes.[143] The doctrines of joint criminal enterprise, superior responsibility

140 For the application of the laws of war to even minor terrorist acts committed during peacetime in the US, see Michael P. Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects', 36 *Case W. Res.J.Intl. L.* (2004), 359–-374, at 368 and 373. Scharf has held that at least some terrorist organisations could qualify as 'military organisations' which would also open the door for applying command responsibility.

141 "All those who either directly or indirectly participated in the crime as part of the enterprise indeed still threaten the society with the likely recurrence of other, similarly motivated criminal acts, which would take the form of either same or different offences. The JCE doctrine would permit to legally address such threat", see Cécile Tournaye, 'The Contribution of Ad Hoc International Tribunals to the Prosecution of Terrorism', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 298–308, at 305 and 307–308.

142 United Nations Convention against Transnational Organized Crime, 15 November 2000, UN Doc. A/55/383, art. 3(2).

143 Extended responsibility is the preferable concept as collective responsibility also denotes summary allocation of responsibility with no regard to individual guilt See for instance Cassese, *supra* note 2, at 137: "nobody may be held accountable for criminal offences per-

and conspiracy can all be characterised as 'extended' in comparison with the more common – and more direct – forms of individual criminal responsibility. The main characteristics of 'extended responsibility', understood as a tendency to apply criminal responsibility to persons with little actual involvement in the crime, can be summarised in the following manner: 1) an emphasis on prevention as a broad policy objective; 2) 'subjective excess' as an extended mental element, a technique widely used to criminalise acts which are especially dangerous;[144] 3) the criminalisation of conscious risk-taking related to the concept of foreseeability, for instance in the extended form of JCE and in superior responsibility; 4) criminalisation of omissions; 5) the focus on other than direct perpetrators, as well as, in a more general sense, 6) the need to take into account the broader context of the individual act, which is often a constitutive element of the crime.

Most if not all of these characteristics also apply to the new anti-terrorist criminalisations and to some of the post-2001 legal responses to international terrorism that will be the subject of study in Part III. The new developments in the law of terrorist crimes can thus be presented as examples of extended responsibility or a 'collective trend'. The specificity of the development that is the subject of Part III is nevertheless deemed to be better captured by the notion of 'indirect responsibility'. The reasons for this choice will be set out in Chapters 6 to 9, which deal with the specific features of the new intermediary crimes. The purpose of the following remarks is to provide a brief look at how the notion of 'indirect responsibility' has been used in international criminal law. Suffice it to note with regard to the various traditions of national criminal law, that the terms of 'direct' and 'indirect' responsibility have been used fairly frequently, but the usage is not consistent – save for the basic understanding that a person who physically and personally commits the *actus reus* of a crime is usually called a direct perpetrator and bears direct responsibility for the act, provided that he or she has acted with the requisite *mens rea*. In many national jurisdictions the concept of direct responsibility is limited to this category, namely the commission of the crime by the principal perpetrator, while participation in the crime as an accomplice gives rise to indirect responsibility. Indirect responsibility in this sense is derivative and only arises if the crime is committed by the principal.[145]

petrated by other persons. The rationale behind this proposition is that in modern criminal law the notion of collective responsibility is no longer acceptable".

144 Otto Triffterer, 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 *LJIL* (2001), 399–408, at 402.

145 Van Sliedregt, *supra* note 27, at 53, has pointed out that "[t]he distinction between principal/direct and derivative/indirect responsibility is recognized in most criminal law systems and constitutes a subsistent part of the concept of individual criminal responsibility".

At the international level, however, the use of these terms has been less clear-cut. A non-exhaustive reading brings up several different meanings for the concept of indirect responsibility. The ILC seemed to adopt a fairly traditional understanding of the term when discussing the general principles of international criminal law in the context of the Draft Code, making a distinction between the responsibility of the immediate perpetrators as 'direct' and the responsibility of all the other persons implicated in the crime as 'indirect'.[146] As the Draft Code also made use of the established international criminal law concepts for ancillary crimes, however, the use of the terms does not seem to have entailed an additional legal qualification. The ICTY, for its part, has regarded all types of criminal conduct enumerated in article 7, paragraph 1 of the Statute as giving rise to direct responsibility. In so doing, the ICTY terminology has drawn a strict line between paragraph 1 of the article, which deals with individual criminal responsibility, and paragraph 3 on superior responsibility. The main reason for including all the different modes of participation mentioned in paragraph 1 in one cluster together with immediate perpetration seems to have been a wish to underline the specificity of command or superior responsibility in paragraph 3.

Thus, the Trial Chamber observed in *Blaškić* that "[a] reading of the provisions of the Statute reveals the existence of two distinct types of responsibility: the one referred to in Article 7(1), which will be called direct [...] responsibility and the one referred to in Article 7(3) which will be called indirect responsibility".[147] It is noteworthy that the concept of indirect responsibility in this context was only used to denote command/superior responsibility. Similarly, the UN Secretary General's report on the establishment of the ICTY already referred to command responsibility as "imputed responsibility". An earlier example is provided by the Report of the Kahan Commission, set up by the Israeli government to examine the massacre of the civilian population in the Lebanese refugee camps of Sabra and Shatilla in 1982 by the Phalangist army, and the extent to which officers of the Israeli Defence Forces and the Minister of Defence, Ariel Sharon, might be directly or indirectly responsible for the events. The report has been seen in the literature as having tested the limits of command responsibility. For instance, Green has noted that it thus "fell to a country that refused to sign [Additional Protocol

146 1990 Draft Code, *supra* note 32, para. 52, at 21.

147 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-PT, Decision on Defence Motion to dismiss the Indictment and upon defects in the form thereof (vagueness/lack of adequate notice of charges), 4 April 1997, para. 31.

I] to be the first to consider the validity of its provisions, even though it may not have specifically conceded that it was so doing".[148]

According to a more recent understanding, individual responsibility of a superior arises because of a violation of a duty that is imposed directly on him or her.[149] The superior is thus punished not only for the crimes of others, but also for his or her own failure to intervene. As Ambos has noted in this regard, "As a result, the concept seems to create, on the one hand, *direct* liability for the lack of supervision, and, on the other, *indirect* liability for the criminal acts of others".[150] In particular, if it is required that the commission of the crimes is a result of the failure of the superior to properly exercise control over his or her subordinates, superior responsibility comes close to a separate crime of omission.[151] According to Ambos, the concept has a dual character and can be seen either as a genuine offence of omission or as an endangerment offence.[152]

Following the Trial Chamber's argumentation in *Blaškić*, the concept of joint criminal enterprise seems to belong to the category of direct responsibility since this mode of responsibility, according to a consistent line of interpretation by the ICTY, is implicit in article 7(1).[153] This would arguably be a far-reaching interpretation of direct responsibility, as there is no need for a participant in a joint criminal enterprise to personally commit any of the crimes with which he or she is charged, or in some cases to even know of their commission. In Č*elebići*, the Appeals Chamber alluded to the "basic understanding" that jurisdiction over the principles of individual criminal responsibility under Article 7(1) "is not limited to persons who directly commit the crimes in question".[154] At the same time,

148 L.C.Green, 'Superior Orders and Command Responsibility', XXVII *Can. YBIL* (1989),163–202, at 200.

149 Van Sliedregt, *supra* note 27, at 223; see also Natalie Reid, 'Bridging the Conceptual Chasm; Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law', 18 *LJIL* (2005), 795–828, at 822.

150 Kai Ambos, 'Superior Responsibility', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 11.7., 823–872, at 824, (original emphasis).

151 Van Sliedregt, *supra* note 27, at 190.

152 In German, '*echtes Unterlassungsdelikt*' and '*Gefährdungsdelikt*', Ambos, *supra* note 149, at 824.

153 Already in *Tadić*, the Appeals Chamber pointed out that any act falling under article 7(1) may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the article. *Tadić* Appeal Judgement, para. 186. See also *Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14-PT/2-T, Judgement of 26 February 2001, para 373.

154 Č*elebići* Judgement, para. 319.

it seemed to distinguish the "primary or direct responsibility where the accused himself commits the relevant act or omission" from other forms of responsibility[155] and to construe the word 'participation' in such a way as to encompass all forms of responsibility which are included within article 7(1) notwithstanding the fact that some forms are more direct than others.[156] The ICTY has thus not used the terms 'direct' and 'indirect' in an entirely consistent way.[157] Rather than giving these terms a specific normative content, the Tribunal seems to have used them in a largely descriptive sense dependent on the situation at hand.

As far as the Rome Statute of the ICC is concerned, two observations are in order. Firstly, the concept of commission as it appears in the Statute can be interpreted to extend to omission, which also gives rise to direct responsibility. Superior responsibility as well can be construed as a crime of omission, which gives rise to direct responsibility rather than a form of imputed responsibility. Secondly, the Statute defines a specific form of commission, 'perpetration by means' whereby the perpetrator acts through an agent and uses the person who actually commits the crime as an instrument. Indirect perpetration in this sense fulfils the same criteria as the situations which in the law of state responsibility are commonly included within the concept of indirect responsibility.[158]

As was noted above, the Kahan Commission's characterisation of the role of the Israeli Defence Minister in the atrocities committed by Phalangist forces in the camps of Sabra and Shatilla as one of 'indirect responsibility' can be seen as an acknowledgement of command/superior responsibility. In this sense, it can be understood as a reference to the personal responsibility of a political leader under the Geneva Conventions, which could have led to criminal proceedings had other conditions been met. However, other interpretations are also possible. The Kahan Commission came to the conclusion that the Minister of Defence bore *only* indirect responsibility for the events and was therefore not to be charged with or prosecuted for any crime. In view of the recommendations of the Commission's report which are confined to political and administrative measures, such as the demission of the Minister of Defence, and to frequent references to moral obligations, it could be argued that the concept of indirect responsibility was used in a non-legal

155 *Čelebići* Appeal Judgement, para. 345.

156 *Ibid*., para. 351.

157 As van Sliedregt, *supra* note 27, at 59–60, has pointed out, the notion 'indirect responsibility' in the ICTY jurisprudence can refer to either participatory responsibility (as distinguished from the 'direct' responsibility of actual perpetrators), superior responsibility or, more generally, responsibility for omission (as distinguished from active and 'direct' responsibility).

158 Chapter 5.4.

sense to refer to wider spheres of political and moral responsibility. At the same time, the Report can also – and probably more easily – be viewed as an account of state responsibility.[159]

In the scholarly works on international criminal law, there is little elaboration of the possible uses of the notion of indirect criminal responsibility. It has been fairly consistently used in the meaning of the criminal responsibility of superiors[160] but also generally in the meaning of vicarious responsibility (responsibility for the act of another).[161] Van Sliedregt has analysed the concepts of direct and indirect responsibility in national criminal law as well as in ICL and also drawn attention to the inconsistency of the use of the term in the ICTY jurisprudence.[162] Boister has used the notion of indirect criminal liability as a feature and a consequence of the 'indirect model of enforcement' and thus as the opposite of direct liability under international law. In that sense, it would apply to all international crimes other than the established core crimes.[163] One of the most original interpretations is that put forward by Bassiouni who has held that the term 'indirect responsibility' could be used as distinct from the 'original' responsibility of natural persons – whether principal or secondary perpetrators – to refer to cases of corporate criminal responsibility. This would be the case where a legal entity is deemed responsible for certain crimes and those crimes are attributed to the individuals occupying leading positions in the organisation: the imputed responsibility of these persons would be called 'indirect responsibility'. While such persons may often be the actual perpetrators of the crime, and thus bear direct or original responsibility, this is not necessarily the case.[164]

It may be concluded on the basis of the foregoing that the term 'indirect responsibility' does not have an established meaning in international criminal law. In this study, the use of the term does not concur with any of the specific meanings outlined above. Rather, the notion of 'indirect responsibility' will be used here to describe criminal responsibility for indirect terrorist activities, distinguished from the ultimate terrorist acts. A further characteristic of 'indirect responsibility', also applicable to some of the examples of extended responsibility discussed above

159 For a similar view, see Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, 2006, at 314.

160 Ambos, *supra* note 49, at 824.

161 Bassiouni, *supra* note 1, at 269–270.

162 Van Sliedregt, *supra* note 27, at 57–61.

163 Neil Boister, '"Transnational Criminal Law"?', 14 *EJIL* (2003), 953-976, at 961. This use of the term is consistent with the notion of 'crimes under international law', for which individuals can be held directly responsible under international law.

164 Bassiouni, *supra* note 1, at 379–380.

(e.g. JCE III, superior responsibility) is the special type of relationship linking the crimes of financing, incitement, or training to the actual terrorist acts that provide the justification for their criminalisation. It can be said, in general, that most criminalisations require a causal relationship between the punishable conduct and the harm that is inflicted on protected interests. Likewise, the different contributions to a crime that may give rise to accomplice responsibility must be causally linked to the final act. When it comes to more complex crimes and more remote conduct, causality is not always obvious: for instance, it is debated whether causality plays any role in the establishment of superior responsibility. As a matter of fact, both superior responsibility and the extended form of joint criminal enterprise have been called forms of 'vicarious', i.e. indirect responsibility.[165]

165 Ilias Bantekas, 'The interests of States versus the doctrine of superior responsibility', 82 *IRRC* (2000), No. 837, 391–402, at 393; Ambos, *supra* note 66, at 168.

CHAPTER 5 STATE RESPONSIBILITY FOR INTERNATIONAL CRIMES

5.1. The Duality of Responsibilities in International Law

The internationalisation of criminal law has been one of the most prominent developments in international law in the past ten to fifteen years. It has been widely recognised that there are crimes of concern to the international community as a whole and that accountability for such crimes must be ensured, if necessary by means of international judicial intervention. The 'project of international criminal law' has mobilised international public opinion to an unprecedented extent, leading to intensive normative and institutional development related to the investigation and prosecution of the most serious international crimes.[1] These changes which have taken place in a remarkably short time, have given rise to analyses identifying an increasing 'criminalisation' of international law.[2] Most often, this development has been described in terms of increased accountability, the alternative to continued impunity. Some commentators have nonetheless deplored what in their view has been an excessive focus on individual responsibility, and expressed a fear

1 This development inluded the establishment and case law of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the adoption and entry into force of the Rome Statute of the International Criminal Court, as well as other developments in the area of international criminal law referred to in Chapters 2–4.

2 It is notable that in speaking of the 'criminalization of international law', Meron referred to the period between 1993 and 1998, which has been followed by an even more intensive development: "Any comparison between the law today and that of five years ago demonstrates that in the area of individual criminal responsibility, international law has clearly moved towards much greater criminalization". See Theodor Meron, 'Is International Law Moving towards Criminalization?', 9 *EJIL* (1998), 18–31, at 30.

that it may contribute to a failure to take proper account of the implications of international crimes for state responsibility.[3]

The establishment of individual criminal responsibility for the most serious international crimes, although in many ways a unique legal 'success story', has coincided with other recent developments regarding the international rules of responsibility. A general codification of the rules of state responsibility, also under consideration for several decades, was completed by the UN International Law Commission in 2001 and subsequently endorsed by the UNGA.[4] The ILC has since undertaken a new codification project focusing on the responsibility of international organisations that in many respects builds on the *droit acquis* of the

3 See, for instance, Pemmaraju Sreenivasa Rao, 'International Crimes and State Responsibility', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 63–80, at 80: "by emphasizing the individual criminal responsibility and merely punishing individuals, we will not be able in the long run to stamp out the situations that provide environment for lawless behaviour [...] In [...] addressing the inadequacies of the international system, States and State responsibility have a vital role to play." Similar concerns about a one-sided emphasis on individual responsibility have been presented, inter alia, by Héctor Gros Espiell, 'International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights', in Ragazzi (ed.), op.cit. 2005, 151–160, at 159–160 and Hans Wassgren, 'State Responsibility for Violations of International Humanitarian Law', in Matti Tupamäki (ed.), *Finnish Branch of International Law Association 1946–1996:Essays on International Law*, ILA, Finnish Branch, 1998, 303–325, at 313–314. See also Albin Eser, 'Individual Criminal Responsibility', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 20, 767–822. Eser has pointed out that the Rome Statute of the ICC, while remaining true to "its fixation on individual responsibility", at the same time "limits the responsibility for international crimes to individuals, thus excluding collective criminal responsibility of States and other corporate entities". For a similar view, see Pierre-Marie Dupuy, 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of State Responsibility', 13 *EJIL* (2002), 1053–1081, at 1060, note 22: "The contemporary rise of criminal justice [...] reserves responsibility for crime to the individual, most often at the cost of a destatalization of the action, which is nonetheless carried out on behalf of the state as agent. Milosevic was Yugoslavia, but it is not by judging him that the state's responsibility is prosecuted".

4 The question of a more formal codification was nevertheless left pending. In 2001, the UNGA took note of the ILC Articles on State Responsibility and commended them to the attention of governments, while deciding to continue consideration in three years; see UN Doc. A/RES/56/83. In 2004, the UNGA again commended the articles to the attention of governments "without prejudice to the question of their future adoption or other appropriate action" and decided to include the item on the provisional agenda of its 62nd session in 2007; see A/RES/59/35. In 2007, the UNGA decided to return to the question of a possible convention on state responsibility but not earlier than 2010; see UN Doc. A/RES/62/446 of 21 November 2007, para. 4.

Articles on State Responsibility.[5] The significance of the ILC Articles on State Responsibility has already been widely recognised by governments, international institutions and scholars. Furthermore, the International Court of Justice referred to specific provisions of the Draft Articles long before they were completed.[6] In spite of the fact that the ILC Articles only exist as an attachment to a UN General Assembly resolution, there is much to say about the established status of those rules, if not for the exact formulations given to them by the ILC, then at least as a rough reflection of existing consensus.

These developments can be seen as a consolidation of the two regimes of international responsibility – individual criminal responsibility and state responsibility – which has been accompanied by an increasing differentiation between the two, evident both in the normative and institutional aspects. The slow journey from 'crimes against peace' to 'crimes against the peace and security of mankind' and to the 'core crimes' together with the development of the larger framework of international criminal law and procedure, has contributed to the individualisation of guilt which is a necessary element of individual criminal responsibility. This development has been described as a move "from the realm of moral discussion into that of criminal law where the perpetrators of crimes against humanity are common criminals, not heroes of a political crusade or imaginary criminals of a different scale or shape".[7] As the ILC Commentary to the 2001 Draft Articles pointed out, the concept of 'individual accountability' has acquired an established meaning in light of the Rome Statute as well as the statutes of the ad hoc tribunals which only apply to crimes committed by individuals.[8] Although the possibility of including legal persons within the jurisdiction of the International Criminal Court was discussed before the adoption of the Statute, delegations saw several

5 For the initiation of the work, see UN Doc. A/RES/56/83 of 12 December 2001, para. 8.

6 Claus Kress, 'L'Organe de facto en droit international public: réflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements récents', CV *RGDIP* (2001), 93–143, at 138, refers to an alliance between the ILC and the ICJ. See, however, James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *AJIL* (2002), 874–890, at 875, who holds that the governmental comments received during the second reading of the Draft Articles "paralleled and even overshadowed the less direct and more subtle "feedback loop" with the International Court of Justice".

7 Guénaël Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 *Harv.ILJ* (2002), 237–316, at 314–315.

8 The International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to art. 58, para. 4, reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, at 313.

drawbacks in that option, not least a detraction from the jurisdictional focus of the Court.[9] The centrality of the individual is programmatic in international criminal law, as expressed in the oft-cited statement of the Nuremberg Tribunal 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".[10] The autonomous nature of international criminal law is underlined by an express clause in the Rome Statute stating that its provisions are without prejudice to the rules on state responsibility.[11] The ILC Articles on State Responsibility contain a similar clause with regard to individual responsibility, underlining the distinction between the two areas of law.[12]

The 'individualisation of penal responsibility in the international order'[13] has been simultaneous with and had as its corollary the 'depenalisation of state responsibility',[14] also reflected in the ILC Articles. It may be recalled that the

9 Kai Ambos, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 475–292, at 477–478. He has cited, furthermore, problems with evidence, the fact that there are not yet universally recognised standards for corporate liability and that the absence of corporate criminal responsibility in many national legal systems would render the complementarity provisions of the Rome Statute unworkable.

10 IMT Judgement of 1 October 1946, The Law of the Charter, www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm, also cited by the ILC in Articles on State Responsibility, Commentary to Chapter III, para. 5; Crawford, *supra* note 8, at 243.

11 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, art. 25(4): "No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

12 Articles on State Responsibility , art. 58: "These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State", Crawford, *supra* note 8, at 312 –313.

13 Pierre-Marie Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. II, Chapter 26, 1085–1099, at 1098. See also Emmanuel Roucounas, 'Non-State Actors: Areas of International Responsibility in Need of Further Exploration', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 391–404, at 398 : "since the beginning of international law, the international responsibility of the *individual*, invoked in situations of extreme *anomaly*, has mainly been 'criminal' (a classical example of this being the crime of piracy)" (original emphasis).

14 James Crawford, 'Introduction', in Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, 1–60, at 36.

ILC ultimately decided the contentious question of state crimes in favour of an approach that attaches special consequences to violations of *jus cogens* norms but uses a neutral terminology devoid of penal connotations, thereby emphasising the *sui generis* nature of state responsibility.[15] While it can be said that this decision has only concerned the 'name of the crime',[16] the introduction of a single category of wrongful acts for the purposes of state responsibility has arguably had other consequences as well. Most notably, it has contributed to streamlining the application of the Articles as a set of general (secondary) rules applicable to all areas of law independently of the specific (primary) rules governing them. At the same time, the non-use of the term 'crime' makes evident and underlines the autonomous nature of state responsibility with regard to individual criminal responsibility. To be sure, a certain degree of differentiation between the rules of state responsibility has been preserved in the provision on serious breaches of peremptory norms of international law which replaced the notion of state crimes, mainly in respect of the consequences of such acts. However, those consequences have been laid down at the level of general principles, one hardly comparable to international criminal law which has grown into an elaborate structure of both substantive and procedural norms.[17]

In another sign of the increasing autonomy of international criminal law from any considerations of state responsibility, the focus of international prosecution has been broadened from state crimes to crimes committed by non-state actors.

15 See Chapter 2.2.1.1. For the *sui generis* nature of state responsibility, see the First Report on State Responsibility of Special Rapporteur James Crawford, UN Doc. A/CN.4/490/Add.1, para. 60, emphasising that the responsibility of states is "neither civil nor criminal, but purely and simply international". The autonomy of the two regimes has been stressed by André Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', 52 *Int' l and Comp LQ* (2003), 615–640, at 616, pointing out that "state responsibility neither depends on nor implies the legal responsibility of individuals".

16 According to David D. Caron, 'State Crime: Looking at Municipal Experience with Organizational Crime', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 23–30, at 27, "The main value of the notion of State crimes is the word 'crime'". See also Alain Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime', XXXII *NYIL* (2001), 55–79, at 67; Pellet has submitted that the concept of a serious breach of an obligation under a peremptory norm is distinguished from crimes of the state only by the name: "With or without the name, definitely, 'Vive le crime!' " (footnote omitted). For a similar view, see Dupuy, *supra* note 3, at 1060: "In fact, the 'thing' has indeed remained long beyond the disappearance of the word".

17 As pointed out by Dupuy, *supra* note 3, at 1094–1095.

Unlike the Charters of the IMT and the IMTFE, which authorised the two Military Tribunals to consider only crimes of individuals who acted on behalf of the Axis countries,[18] the Statutes of the ICTY, ICTR, SLSC and the ICC are also applicable to crimes committed in internal conflicts that do not necessarily raise questions of state responsibility. And even though the ILC's work on the Draft Code originally concentrated on crimes which would bring about liability on the part of states,[19] the definitions of the most serious crimes affecting the whole of the international community, apart from aggression, whether in the Draft Code or in the Rome Statute, do not refer specifically to state involvement.[20]

The increasing disassociation of the two regimes of international responsibility is a major doctrinal development which, in Dupuy's view, is also due to their different bases in substantive law, intentionality being the primary basis of individual responsibility while only a subsidiary element in state responsibility.[21] The concept of mental element does not play a distinct role in the system of international responsibility of states and is notably absent in the ILC codification on State Responsibility. State responsibility, according to the ILC Articles, is supposed to be objective insofar as the general (secondary) rules are concerned. As the ILC Commentary to article 2 notes, "In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the state that matters, independently of any intention".[22] Enforcement, as pointed out by the ILC in connection with the 2001 Articles, is also different, as state responsibility is conceived in terms of reparations and not in terms of punitive measures.[23] The 'duality of responsibilities in international law'[24] has been established also at the institutional level, where there are separate mechanisms for the enforcement of state responsibility and individual criminal responsibility.

18 Ibid., at 1087; Charter of the International Military Tribunal, http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm., art. 6.

19 Replies from Governments to questionnaires of the ILC, UN Doc. A/CN.4/19 and add. 1 and 2, 2 YBILC (1950), at 249–253; Report by J. Spiropoulos, Special Rapporteur, UN Doc. A/CN.4/25, 2 YBILC (1950), at 253 *et seq*.

20 As pointed out by Dupuy, *supra* note 3, at 1092.

21 *Ibid*., at 1096.

22 Articles on State Responsibility , commentary to art. 2, para. 10, Crawford, *supra* note 8, at 84.

23 *Ibid.*, commentary to Chapter III, para. 5, at 243.

24 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February, 2007, (*Genocide* Judgement), para. 173, at 63: "[D]uality of responsibility continues to be a constant feature of international law".

At the same time, growing criticism has been directed towards the perception of individual criminal responsibility and state responsibility as mutually exclusive paradigms in international law.[25] A 'compartmentalised approach' to the international responsibility of the state and the international criminal responsibility of individuals whereby international criminal tribunals have no jurisdiction over states and the ICJ or human rights courts have no jurisdiction over the individual perpetrators has been said to lead to and maintain impunity for the most serious international crimes in which states are involved.[26] The heightened attention directed to international prosecution has been seen as misplaced, with critics claiming that "criminal law is not the *ultima ratio* for the international community".[27] In particular, the doubt has been expressed that the advances made with regard to individual responsibility may have come at the expense of the development of rules of state responsibility which would reflect the same attention to "the most grievous violations of international law".[28] Some commentators have attributed this

25 Gros Espiell, *supra* note 3 , at 160, has advocated complementarity between the two regimes of responsibility in order to avoid impunity.

26 See Antônio Augusto Cançado Trindade, 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 253–270, at 257: "[I]mpunity is most likely bound to persist, being only partially sanctioned by one and the other". See also Natalie Reid, 'Bridging the Conceptual Chasm; Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law', 18 *LJIL* (2005), 795–828, at 828, who has argued that international law "is already moving in the direction of reassessing channels of responsibility".

27 Immi Tallgren, 'The Sensibility and Sense of International Criminal Law', 13 *EJIL* (2002), 561–595, (Tallgren 2002a), at 590. See also Frédéric Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project', XII *FYBIL* (2001), 193–247, who has submitted, at 204, that "the ICC will also be at permanent risk of grossly underestimating the structural causes of violence".

28 Reid, *supra* note 26, at 797. See also Martti Koskenniemi, 'Between Impunity and Show Trials', ICC; Guest Lecture Series of the Office of the Prosecutor, 5 August 2004; Koskenniemi, 'Evil intentions or vicious acts? What is prima facie evidence of genocide?', in Matti Tupamäki (ed.), *Liber Amicorum Bengt Broms celebrating his 70th birthday 16 October 1999*, ILA, Finnish Branch, 1999, 180–207 and Koskenniemi, 'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law', 65 *The Modern Law Review* (2002), 159–175; Frédéric Mégret, '' War' ? Legal Semantics and the Move to Violence', 13 EJIL (2002), 361–400; Immi Tallgren, 'We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court', 12 *LJIL* (1999), 683–707 and Tallgren, 'La Grande Illusion', XV *Canadian Journal of Law and Jurisprudence* (2002), 297–316 (Tallgren 2002 b); Jarna Petman, 'The Problem of Evil and International Law', in Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus

problem to certain inherent limitations of international criminal law, in particular its 'individualistic' or 'reductionist' tendencies which have been seen as a handicap when addressing the phenomenon of massive violence. It has been submitted that the criminal law approach to conflict situations tends to "frame political issues as crimes" and thereby simplify the essential features of any given conflict.[29] Consequently, it has been argued, the 'project of international criminal law' has a tendency to underestimate "the complexity and scale of multiple responsibilities"[30] that would have to be taken into account when assessing collective crime.

As an example of this strand of criticism, reference can be made to the views of Mégret who has called into question the very concept of individual criminal responsibility when applied to mass atrocities, claiming that allocation of responsibility according to the principles of criminal law is necessarily arbitrary in conflict situations where single acts are interdependent.[31] International criminal trials have in his view wrongly prioritised "the final act or [...] a single act in what is often a long chain of causation" instead of addressing the whole spectrum of responsibilities.[32] The focus on "the violence of those who do [...] at the expense of ignoring the violence of those who occupy a privileged position such that their violence never needs to be inflicted directly" has been misplaced, [33] resulting in an insufficient criminalisation of a failure to act. "The soldier who could step in to save human life is as much involved in an 'act' as the machete-wielding-criminal-in-the-making", he has held.[34] Tallgren has made the same point in noting:

> The criminal responsibility of individuals for actions that are almost by definition committed in the context of a collectivity, a community, be it political, ethnic or religious, lies at the heart of the paradoxical relationship between international law and the individual in a manner that is even more concrete than vis-à-vis human rights law in general. Is the responsible individual excluded

Nijhoff, 2003, 111–140; Philip Allott, 'Deliver us from social evil', ICC; Guest Lecture Series of the Office of the Prosecutor, 11 August 2004.

29 Mégret, *supra* note 27, at 224. See also Koskenniemi (2004), *supra* note 28, at 13, who has pointed out that "the meaning of historical events often exceeds the intentions or actions of particular individuals".

30 Immi Tallgren, *A Study of the 'International Criminal Justice System' – What Everybody Knows?*, Yliopistopaino, 2001, at 38.

31 Mégret, *supra* note 27, at 237–238.

32 *Ibid*., at 237–238.

33 *Ibid*., at 233.

34 *Ibid*., at 237.

> from the community, or is he or she a representative of, even a replacement for, the community?[35]

Mégret has also highlighted the specificity of situations where an international component such as a peace-keeping force or a crisis management operation is present in a conflict and demanded recognition of a 'structural responsibility' of third states and the international community for conflictual developments they have inadvertently helped to create. Furthermore, where peacekeepers and international organisations have assumed certain responsibilities towards a threatened or an attacked population, as was the case in Rwanda and Srebrenica, they should bear 'contingent responsibility' for attacks that are subsequently directed against the protected population.[36] While the concepts of 'structural' or 'contingent' responsibility might be taken to describe state responsibility or the responsibility of international organisations, applicable to the United Nations on certain conditions,[37] they have not been elaborated further, and were used by Mégret mainly to point out the limitations of the criminal law approach. As for the more specific question of liability for omission, widely discussed in international criminal law, it is not clear whether Mégret has argued for the extension of a general duty to prevent violations of international humanitarian law to all levels of a military hierarchy, or for its abolition also with regard to superiors; his specific comments on the concept of command responsibility and of its extension to civilians exercising de facto control over perpetrators were notably critical.[38] What seems to be a contradictory stand makes more sense outside the specific criminal law paradigm, understood as a concern about a development whereby broader political responsibility is disguised by highlighting criminal accountability.

As is clear from the brief account of the extended forms of criminal responsibility, in Chapters 3 and 4, the scholars critical of the 'project of ICL' are not alone in having raised the question of the tension between individual responsibility and collective acts, which is in fact a recurrent consideration with regard to the core crimes. According to Ambos, the traditional doctrine of participation in crime cannot "be transposed without more to international criminal law since it focuses

35 Tallgren (2002 b), *supra* note 28, at 304. See also Allott, *supra* note 28, at 65: "The true telos of the criminal law is not deterrence or retribution, as is generally supposed, but exclusion".

36 Mégret, *supra* note 27, at 233–234.

37 Third Report on responsibility of international organizations of Special Rapporteur Giorgio Gaja, UN Doc. A/CN/4/553 of 13 May 2005, (Gaja's Third Report), para. 10 at 4.

38 Mégret, *supra* note 27, at 235.

on the role and contribution of perpetrators in an individual context, rather than a collective or systemic context".[39] Fletcher has submitted that certain war crimes require a 'collective intention' demonstrated by the fact that they cannot be committed by a single soldier.[40] While "crimes in the international arena require both collective action and individual execution", the collective aspect is in his view insufficiently recognised, with the resulting danger that only the individual contribution is highlighted in criminal trials."[41] The concern about disposing of the guilt of the final perpetrators only while ignoring the indirect responsibility of those who 'pull the strings' also comes close to the legal policy considerations that have guided the two ad hoc tribunals in their quest to 'catch the accomplices'.[42] It will be recalled that the ICTY Appeals Chamber, in the *Tadić* case, warned against holding criminally liable as perpetrator only the person who materially performs the criminal act, as this would amount to disregarding the role of all those who in some way contributed to the act.[43] In *Brđanin*, the Appeals Chamber further clarified the terminology related to commission, pointing out that "at times, crimes might have been committed by omission, without any 'physical' or 'material' acts. Moreover, the *actus reus* carried out by these individuals might not have been accompanied by the requisite *mens rea*." The Appeals Chamber therefore cautioned against using terms such as 'material perpetrators' or 'physical perpetrators' and favoured instead a broader expression 'principal perpetrators'.[44]

Another strand of criticism directed at the 'project of international criminal law', a mirror-image of the one discussed so far, is concerned about its impact on the traditional criminal law concept of individual responsibility. In this regard it is useful to stress again the autonomous nature of international criminal law, which in the doctrinal sense draws on different legal traditions combining elements of international law and national criminal law.[45] Many authors have drawn attention

39 Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility', 5 *JICJ* (2007), 159–183, at 164.

40 George P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism*, Princeton University Press, 2002, at 56, has mentioned 'declaring no quarter', 'pillaging a town', and 'intentionally using starvation as a method of warfare' as examples of such crimes.

41 *Ibid*., at 62, 72.

42 See William A. Schabas, 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 *IRRC* (2001), 439–459.

43 *Prosecutor* v. *Duško Tadić*, Case No. IT-94-1-A, Judgement of 15 July 1999 (*Tadić* Appeal Judgement), para. 192.

44 *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement of 3 April 2007 (*Brđanin* Appeal Judgement), para. 362.

45 According to Bassiouni, "ICL's principal sources of law can be distinguished as between international law for the *ratione materiae*, *ratione personae*, and enforcement obligations,

to the inherent tension between these different elements. Cassese has called ICL "a hybrid branch" – "public international law impregnated with notions, principles and legal constructs derived from national criminal law and human rights law",[46] and van Sliedregt has described it "an uncomfortable combination of two inherently different types of law".[47] Schabas has emphasised the influence of international humanitarian law and human rights law on the law of the core crimes, which is also evident from the jurisprudence of the ICTY.[48] Criminal attribution in international criminal law also differs from the basic rules of criminal responsibility in national law in the case of the most serious crimes. As Ambos has noted,

> While in the latter case normally a concrete criminal result caused by a person's individual act is punished, international criminal law creates liability for acts committed in a collective context and systematic manner; consequently, the individual's own contribution to the harmful result is not always readily apparent.[49]

Danner and Martinez have presented modern international criminal law as an undertaking that draws on three distinct and often conflicting traditions of law, namely criminal law, human rights law, and transitional justice. The last concept may be more readily described as the overall context – peace-building and reconciliation in post-conflict situations – in which the new criminal tribunals operate

---

and national criminal law for enforcement modalities. Furthermore, additional collateral sources of ICL exist, namely: international and regional human rights law; general principles of criminal law recognized by the world's major criminal law systems; and emerging international criminological perspectives". M. Cherif Bassiouni, 'The Sources and Content of International Criminal Law: A Theoretical Framework', in Bassiouni (ed.), *International Criminal Law*, Vol. I *Crimes*, 2nd Edn., Transnational Publishers, Inc., 1999.

46 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 19.

47 Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003, at 4.

48 William A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, at 5. See also Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *EJIL* (1999, 237–277, who has pointed out, at 271, that "the notion of individual accountability for crimes against humanity can be fully grasped only in connection with the international human rights doctrine".

49 Ambos, *supra* note 9, at 477. See also See Otto Triffterer, 'The Preventive and the Repressive Function of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 137–175, at 155, speaking of participants in macro-criminality and pointing out that it may be "difficult to precisely locate their individual responsibility".

than as a specific legal tradition.[50] The uneasy relationship between these traditions has, in their view, a more important role to play in the doctrinal controversies within ICL than any occasional conflicts between common law and civil law doctrines.[51] The political function of transitional trials is one of the factors affecting the scope of individual criminal responsibility. In order to promote reconciliation, or to tell a compelling historical story, the prosecution may "need to introduce evidence far beyond the defendant's own actions", with the subsequent risk of broadening the person's responsibility accordingly.[52] The influence of human rights law, in Danner's and Martinez's view, tends to have a similar effect of justifying excessively broadly defined modes of responsibility.

Human rights law is predicated on state responsibility in the sense that states are the only actors capable of violating human rights. Acts of individuals affecting the enjoyment of rights under human rights conventions such as the Convention on the Elimination of Discrimination Against Women[53] or the Convention on the Elimination of Racial Discrimination,[54] can, for instance, only generate international responsibility if they can be construed as evidence of a state's failure to fulfil its obligations under these conventions. Danner and Martinez have pointed out that the origins of human rights law in the rules concerning state responsibility, together with the aspirational nature of its norms, make it "largely victim,

50 The concept of 'transitional justice' refers to a number of ways of dealing with the aftermath of violent conflicts with a view to strengthening the judicial systems and promoting reconciliation and human rights. The various approaches include domestic, hybrid and international prosecutions, truth-telling initiatives, providing reparations to victims etc. For a definition of transitional justice, see Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice*. Studies on Transitional Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice, Springer, 2009, 19–87, at 21–23.

51 Allison Marston Danner & Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', Vanderbilt University Law School, Public Law & Legal Theory Working Paper Series, Working Paper No. 04-09; Stanford Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 87, March 2004, at 35.

52 *Ibid*., at 18.

53 The Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS Vol. 1249, p. 13, art. 2e), requires States Parties to undertake "all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise".

54 The International Covenant on the Elimination of All Forms of Racial Discrimination, 7 March 1966, UNTS Vol. 660, p. 195, art. 2, requires States Parties to bring to an end racial discrimination by any person, group or organisation.

not perpetrator centered".[55] The anonymity of state responsibility for human rights makes the specific actions or the mental state – or even the identity – of the individual perpetrator irrelevant and focuses attention on the victims. Furthermore, as Schabas has noted, international human rights law is mainly concerned with the procedural issues involved in criminal trials but has fairly little to offer when it comes to the substantive offences.[56] Another specific characteristic of human rights law is the tendency towards broad and teleological interpretations of the norms prescribing the obligations of states.[57] Both features run counter to the basic presumptions of criminal law: the principle of individual criminal responsibility and strict construction of crimes according to the principle of legality.[58] Danner and Martinez have called for efforts to safeguard the integrity of the criminal law paradigm, because it alone "contains a potential to provide a brake on overexpansive doctrinal interpretations" at the expense of the rights of the defendant.[59] In this regard they have joined the other commentators who have been preoccupied with and directed specific criticisms against the collective liability theories that underlie much of the jurisprudence on the core crimes.

Both strands of criticism – the one concerned about the growth of international criminal justice at the expense of state responsibility and that concerned about its impact on the basic principles of criminal law – highlight certain inherent features in the way international criminal law approaches questions of responsibility. The essence of the critique in both cases seems to lie in the claim that the expansion of individual accountability, either as a principle to be applied to more varied contexts than before, or as a way to extend criminal liability to cover more indirect forms of conduct than before has blurred the distinction between different paradigms of international responsibility. In order to assess this argument, a closer look is needed at how the regime of state responsibility responds to international crimes, and how it relates to individual criminal responsibility.

55 Danner and Martinez , *supra* note 51, at 10.

56 William A. Schabas, 'Mens Rea and The International Criminal Tribunal for the Former Yugoslavia', 37 *New England L. Rev.* (2003), 1015–1036, at 1016.

57 Danner and Martinez , *supra* note 51, at 13.

58 *Ibid*., at 11–25.

59 *Ibid*., at 20.

5.2. International Responsibility of States for Private Acts

5.2.1. Rules of Attribution

International responsibility of states for private violence, even if not codified before the ILC Articles on State Responsibility of 2001, is in no way an uncharted territory.[60] Until the spectacular rise of international criminal law in the 1990s, state responsibility provided the main channel to 'internationalise' serious crimes. As recently as in the mid-1980s, an authoritative presentation of state responsibility asked whether the notion of the 'international responsibility of individuals' made any sense if all that an international crime of an individual could trigger at the international level was the application of norms concerning the obligations of states.[61]

The fundamental rules on state responsibility were subject to a widespread consensus long before the finalisation of the Draft Articles.[62] The doctrine of attri-

60 For analyses of the relevant earlier jurisprudence, see Ian Brownlie, *State Responsibility: System of the Law of Nations, Part I*, Clarendon Press, 1983, 181–198; Richard B. Lillich and John M. Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities', 26 *The American University Law Review* (1977), 217–313; Gordon Christenson, 'The Doctrine of Attribution in State Responsibility', in Richard B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, University Press of Virginia, 1983, 321–360; and Joachim Wolf, 'Zurechnungsfragen bei Handlungen von Privatpersonen', 45 *ZaöRV* (1985), 232–264.

61 "Parler d'une 'responsabilité internationale de particuliers' a peu de sens (et est même carrément mystifiant) si tout ce que le` "crime international' de l'individu déclenche est l'entrée en jeu pour les Etats, dans leur relations entre eux, des obligations de pourvoir à la prévention et à la répression dans leurs ordres juridiques internes, obligations assorties de fonctionnement des mécanismes de la responsabilité international de l'Etat à Etat, en cas de violation de ces obligations". Luigi Condorelli, 'L'imputation à l'État d'un fait internationalement illicite: solutions classiques et nouvelles tendances', *RCADI* 1984, 11–221, at 116. The ILC Special Rapporteur on State Responsibility, Roberto Ago also referred to the "so-called international responsibility of individuals". See Fourth Report of Special Rapporteur Ago, Extract from the *YBILC* 1972, Vol.II, A/CN.4/264 and Add. 1 (Ago's Fourth Report), para. 63, at 96. This view of the individual in international law was also criticised at the time; see for instance Rosalyn Higgins, 'Conceptual Thinking About the Individual in International Law', in Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz (eds.), *International Law: A Contemporary Perspective*, Westview Press, 1985, 476–494.

62 According to Crawford, "Since Part I of the Draft Articles was adopted in 1980, it has become part of the mental landscape of international lawyers, so much that reviewing them 20 years later conveys an unusual feeling of intangibility. The central elements of the text seem sacrosanct, whether or not they have been generally accepted". James Crawford, 'Revising the Draft Articles on State Responsibility', 10 *EJIL* (1999), 435– 460, at 435.

bution, as the main technique for creating a link between private activities and state responsibility at the level of the general (secondary) norms, has remained a relatively stable area, conforming to the strict distinction between acts of private persons and entities, which in principle are not attributable to the state under international law, and state acts. The threshold for attribution has long been established at the agency level – as acts carried out 'on behalf' of the state[63] or under its 'effective control', as stated by the International Court of Justice in the *Nicaragua* Judgement.[64] Influence of a more general nature, including the provision of material support and funding, does not engage state responsibility for private acts.[65]

Attribution has been explained by the ILC as "a normative operation whereby an action which is in fact performed by an individual is attributed to a collective entity".[66] There should thus be no confusion as to whether a state must 'commit' a crime – obviously impossible for an abstract entity – in order to be held responsible for acts carried out by its organs or on its behalf. At the same time, the rules of attribution as presently defined have a restrictive function with regard to acts of non-state groups and private individuals. When committed by private actors, international crimes do not engage state responsibility unless the fairly strict standard of control laid down in international jurisprudence is met, or the circumstances otherwise point to the failure of the state to abide by its international obligations. This general principle of non-attribution applies to all private activities in the absence of a clearly expressed rule that can be deemed *lex specialis*.[67] As an example of such a specific rule, reference can be made to certain provisions of international humanitarian law which provide that a state which is party to a conflict is to be responsible for all acts committed by persons forming part of its armed forces.[68] This rule forms an exception to the general rules of state responsibility as it does not require for the liability to arise that the armed forces act in the capacity of an official organ, but extends also to their private acts.[69] The binding nature of

63 See, for instance, I.A. Shearer, *Starke's International Law*, 11th Edn., Butterworths, 1994, at 277; Sir Robert Jennings and Sir Arthur Watts (eds.), *Oppenheim's International Law*, Vol. I Peace, Introduction and Part 1, 9th Edn., Longman, 1992, at 502.

64 *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, ICJ Rep. (1986) (*Nicaragua* Judgement), p. 14, para. 115.

65 *Ibid*., paras. 108–109, at 50–51.

66 ILC Draft Articles 1973, commentary to art. 3, para. 3, *YBILC* 1973, Vol. II, Part I, arts. 1–35 at 180.

67 Articles on State Responsibility, art. 55, Crawford, *supra* note 8, at 306–308.

68 Fourth Hague Convention, art. 3, reproduced in art. 91 of AP I.

69 Condorelli, *supra* note 61, at 147; Wassgren, *supra* note 3, at 313.

this rule as both treaty law and a customary norm is uncontested,[70] which means that it is "clearly provided" as the ICJ has required.[71]

The ILC's Articles on State Responsibility deal with attribution in articles 4 to 11. Exercise of governmental authority is an essential element in all bases of attribution recognised by the Articles, which exclude responsibility for purely private acts. Article 4 states the main rule, according to which "The conduct of any State organ shall be considered an act of that State under international law". Article 5 deals with the attribution to the state of the conduct of bodies which are not organs of a state in accordance with the internal law of that state but which are nonetheless authorised to exercise governmental authority. Article 6 deals with the more uncommon situation in which an organ of a state is temporarily put at the disposal of another state. In all three situations, the responsibility of the state is comprehensive and extends to all acts carried out in the exercise of governmental authority, even if they have been carried out ultra vires or against instructions.[72]

Articles 8 to 11 address the less straightforward situations in which no explicit transfer of state authority has taken place. This is an area where some uncertainty has prevailed in spite of the undisputed status of the objective theory of state responsibility, much of the doubt being due to a debate surrounding the two international judgements already mentioned above, the 1986 *Nicaragua* Judgement and the 1999 *Tadić* Appeal Judgement. The *Nicaragua* Judgement laid down the standard of 'effective control' requiring that for the acts of the Nicaraguan rebels, the *contras*, to be imputable to the United States, the relationship between the two must be one of effective control, defined as total dependence whereby the *contras* would have no real autonomy and could be compared to any other forces placed under US command.[73] If that was not the case, for the international responsibil-

70 Condorelli, *supra* note 61, at 146, has pointed out that IHL as a whole "est caractérisé par un régime spécial en matière d'imputation dont la nature coutumière et la portée générale ne sont pas contestables".

71 *Genocide* Judgement, para. 401. Another example is provided by art. 1(1) of the Torture Convention, to which Crawford has referred as a special rule of attribution. Art. 1(1) requires of torture that "such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity". See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Vol. 1460, p. 112 and James Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *AJIL* (2002), 874–890, at 878.

72 Articles on State Responsibility, art. 7, Crawford, *supra* note 8, at 106–109.

73 *Nicaragua* Judgement, para. 109. The question to determine was "whether or not the relationship of the *contras* to the United States was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal

ity of the United States to arise for the acts of the *contras*, those acts would have to be carried out on the specific instructions of the US.[74] As is well known, the Court did not find evidence of either type of effective control. The *Tadić* Appeal Judgement, for its part, recognised the requirement of effective control in the sense of specific instructions as valid only in relation to acts carried out by single individuals or unorganised groups of individuals. Another standard of 'overall control' was applied to the relationship between a state and an organised and hierarchically structured group such as a military unit, leading to the conclusion that the relationship between the Federal Republic of Yugoslavia (FRY) and the armed forces of Republika Srpska (Vojska Republike Srpske, VRS) could be described in such terms.[75] The *Tadić* based this conclusion, inter alia, on the case law of the Iran – United States Claims Tribunal[76] as well as on that of the European Court of Human Rights.[77]

purposes, with an organ of the United States Government, or as acting on behalf of that Government".

74 *Ibid.,* para. 115; here the Court considered whether the evidence available of US participation in the financing, organising, training, supplying and equipping the *contras* amounted to 'directing' or 'enforcing' the perpetration of the acts contrary to human rights and humanitarian law and concluded that this was not the case: "For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed".

75 *Tadić* Appeal Judgement, para. 131, p. 28: "In order to attribute the acts of military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity [...] However, it is not necessary that, in addition, the State should also issue,either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law".

76 *Yeager v. Islamic Republic of Iran*, 17 C.T.R. 92 (1987-IV), at 110–111, in which the Claims Tribunal distinguished between the Iranian militants who had stormed the US Embassy, on the one hand, and organised armed groups performing de facto official functions, on the other. See Tadić Appeal Judgement, para. 127. See also David D. Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in Richard B. Lillich and Daniel B. Magraw (eds.), *The Iran – United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, Transnational Publishers, 1998, 109–184, at 135–138.

77 *Loizidou vs. Turkey*, Merits, (40/1993/435/514), Judgement of 28 November 1996, ECHR 1996-VI, para. 56. The Court referred to the "effective overall control" exercised by the Turkish troops over the Northern part of Cyprus on which a non-recognised entity, the 'Turkish Republic of Northern Cyprus' (TRNC) had been established. The obvious difference to the *Nicaragua*, noted but not discussed in *Tadić*, was the additional element of control over territory on which the local authorities of the TRNC exercised elements of quasi-governmental authority. See *Tadić* Appeal Judgement, para. 128.

In the scholarly discussion, *Tadić* has often been presented as a challenge to *Nicaragua*, and an important opening which can pave the way to lowering the standard. In addition to this view, at least three different interpretations can be identified. First, attention has been drawn to the similarities of the approach in both judgements; secondly the seemingly irreconcilable conclusions of the ICJ and the ICTY have been seen as a sign of fragmentation of the law, amounting to the parallel existence of conflicting standards; and thirdly *Tadić* has been viewed as a misinterpretation of *Nicaragua*, in which case there would not be any real contradiction.[78] For Becker, *Tadić* is sufficiently close to *Nicaragua* to show the limitations from which both judgements suffer: "the difference between the attitudes of these two courts is one of degree, not of kind".[79] In requiring significant evidence of control that exceeds general forms of ideological, material or logistical support, "neither case provides a substantial opportunity to establish direct state responsibility in circumstances of clandestine state support to private actors".[80] According to the ILC Study Group on fragmentation of international law, "The contrast between *Nicaragua* and *Tadić* is an example of a normative conflict between an earlier and a later interpretation of a rule of international law. *Tadić* does not suggest "overall control" to exist alongside "effective control" either as an exception to the general law or as a special (local) regime governing the Yugoslav conflict. It seeks to *replace* that standard altogether".[81] Finally, Milanović has drawn attention to the ICTY Appeals Chamber's one-sided reading of *Nicaragua* whereby no consideration was given to the alternative of comprehensive control. Rather, the *Tadić* judgement argues exclusively against the standard of effective control understood as requiring specific instructions. While it is unclear whether the facts at hand in *Tadić* would have fulfilled the requirements of comprehensive control, Milanović

78 This list is illustrative and does not claim to be exhaustive.

79 Tal Becker, *Terrorism and the State*: *Rethinking the Rules of State Responsibility*, Hart Publishing, 2006, at 70.

80 *Ibid*., at 71. See also 266–268.

81 *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*. Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, The Erik Castrén Institute Research Reports 21/2007, Hakapaino, 2007, para. 50, at 32, (original emphasis). See also Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *LJIL* (2002), 553–579, at 562–567. The view of *Tadić* as a deliberate challenge gets authoritative support from Antonio Cassese, *International Law*, 2nd Edn., Oxford University Press, 2005, at 249: "The real problem, it is submitted, is whether or not the appraisal of customary international law made by the ICTY is more persuasive than that by the ICJ". See also Cassese, 'The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007), 649–668.

has held that the general standard laid down in *Nicaragua* would have in any event been more relevant to the relationship between the FRY and the VRS than the specific one.[82]

Article 8 of the ILC Articles extends state responsibility to private conduct carried out "on the instructions, or under the direction or control" of a state in a language that seems to encompass both the general and the specific standards of the *Nicaragua* Judgement. According to the ILC Commentary, such conduct is attributable to the state "only if it directed or controlled the specific operation and the conduct complained was an integral part of that operation".[83] The control must thus be understood as effective, but "where persons or groups have committed acts under the effective control of a State the condition for attribution will still be met even if particular instructions may have been ignored".[84] The ILC took note of the difference between the *Nicaragua* and *Tadić* Judgements but played it down by observing that the ICTY's mandate was directed to issues of individual criminal responsibility, not state responsibility, and that the question in *Tadić* did not concern responsibility but the applicable rules of international humanitarian law.[85] In any event, the Commission pointed out, the extent of control would be a matter of case-by-case evaluation.[86]

82 Marko Milanović, 'State Responsibility for Genocide', 17 *EJIL* (2006), 553–604, at 579–582. See also André J.J. de Hoogh, 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', 22 *BYIL* (2001), 255–292, at 290. De Hoogh has submitted that the ICTY Trial Chamber and the Appeals Chamber may have misread *Nicaragua* and equated the criterion of effective control with that of dependence and control; the Appeals Chamber nevertheless "corrected itself by holding that under customary international law there are two (or even three) tests to determine whether acts of private individuals, non-organs, can be attributed". It may also be claimed that the ICTY Appeals Chamber deliberately presented *Nicaragua* as more categorical than it really was in order to strengthen the contrary argument.

83 Articles on State Responsibility, commentary to art. 8, para. 3, Crawford, *supra* note 8, at 110.

84 *Ibid.*, para. 8, at 113, para. 8. Kress, *supra* note 6, at 136, has pointed out that there seems to be a contradiction between the requirement of specific instructions which, however, may be ignored: "L'imputabilité de l'acte *ultra vires* [...] même dans le cas où l'instruction étatique exclut spécifiquement la violation du droit international humanitaire [...] est très douteuse au stade actuel du développement du droit".

85 Articles on State Responsibility, commentary to art. 8, para. 5, Crawford, *supra* note 8, at 112. See also *Tadić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 5, who also questioned whether it was necessary to challenge Nicaragua in order to decide on the question of the nature of the conflict.

86 Articles on State Responsibility, commentary to art. 8, para. 5, Crawford, *supra* note 8, at 112.

While the *Nicaragua* Judgement gives support to a reading that distinguishes two different standards,[87] its wording is less than clear in this respect, and the various efforts at interpreting it, especially following the *Tadić* Appeal Judgement in 1999, have not led to a coherent view of the standard applicable to the attributability of private acts to a state.[88] The ICJ returned to this question, however, in the 2007 *Genocide* Judgement, which set the record straight and can be taken as a response to the continued efforts of the international law community to interpret *Nicaragua* – or, in the words of Rosalyn Higgins, "to 'find the law' in unclear pronouncements by the International Court of Justice".[89] The Court made it clear that *Nicaragua* had laid down two distinct standards and that the test of 'complete dependence', under which the Bosnian Serb armed forces could be considered a de facto organ of the Federal Republic of Yugoslavia, was "completely separate" from the issue of whether the perpetrators of genocide at Srebrenica were acting on the instructions of the FRY, or under its direction or control.[90] At the same time, the Judgement also followed the ILC Articles closely reproducing the entire text of article 4 concerning the "Conduct of the organs of a State" as well as that of article 8 on "Conduct directed or controlled by a State". The Court discussed the 'complete control' test under article 4 and specified that this article would also encompass the rare situations where persons or groups who do not have the legal status of

87 The ICTY Appeals Chamber subsumed the reasoning of the ICJ under one standard expressed in para. 115, possibly inspired by the Separate Opinion of Judge Ago which had laid emphasis on the latter test; see in particular para. 16: "It would indeed be inconsistent with the principles governing the question to regard members of the contra forces as persons or groups acting in the name and on behalf of the United States of America. Only in cases where certain members of those forces happened to have been specifically charged by United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them". Judge McDonald argued in her Separate Opinion to the ICTY Trial Judgement that the Nicaragua judgement in fact articulated two different tests. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgement of 7 May, 1997, Separate and Dissenting Opinion of Judge McDonald, at 292.

88 Kress, *supra* note 6, at 106, has concluded that both interpretations of the judgement are possible, due to the less than clear formulations of the Court: "nous souscrivons à l'opinion exprimée dans l'arrêt *Tadić* 1999 que l'arrêt Nicaragua ne présente pas toujours une argumentation cohérente en matière d'imputation". For a list of national and international jurisprudence that can be interpreted as using the 'overall control' test, see Cassese (2005), *supra* note 81, at 249–250.

89 Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, Clarendon Press, 1994, at 160. The 2007 Genocide Judgement was notably pronounced by Judge Higgins in her capacity as the President of the ICJ.

90 *Genocide* Judgement, paras. 393–394, 397.

State organs nevertheless act under such strict control by the State that they must be treated as its de facto organs for purposes of attribution.[91] The 'specific directions' test was discussed under article 8 and the Court endorsed the rule reflected in that article as "one of customary law of international responsibility".[92]

As to the substantive conclusions, the Court made three equally clear statements in support of the findings of *Nicaragua* and of the 2001 ILC Articles. First, the Court rejected the arguments of the applicant that in view of the specific features of genocide – a crime that may consist of a great number of specific acts spreading over time and space – state control over the specific acts should be not be required. According to the applicant's view, it should be sufficient that control is exercised over the entire body of operations carried out by the direct perpetrators of genocide. The Court stated that the particular characteristics of genocide did not justify departing from the criterion elaborated in *Nicaragua*.[93] Secondly, expressly commenting on *Tadić*, the Court upheld the *Nicaragua* standard of effective control, thus overlooking the considerations that had led the ICTY Appeals Chamber to apply a different standard in *Tadić*. Echoing the comment of the ILC, the Court observed that the ICTY had not been called upon in the *Tadić* case, or in general, to rule on questions of state responsibility, since its jurisdiction is criminal and extends over persons only.[94] Furthermore, in a statement that stresses the difference between the two standards and renders it rather difficult to combine the 'effective control' and 'overall control' tests or to read the latter into the former, the Court noted that

> The 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the rule of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf.[95]

Judge Mahiou has criticised this approach in his dissenting opinion, drawing attention to the differences between the factual situations in the *Nicaragua* and *Genocide*

91 *Ibid.*, paras. 390 and 391; the Court also referred back to the *Nicaragua* Judgement, para. 109, as an answer to the question whether conduct of such persons or groups can be attributed to the State.

92 *Ibid.*, para. 398.

93 *Ibid*., para. 401.

94 *Ibid*., para. 403. Critical of this argument, Cassese (2007), *supra* note 81, at 663, has submitted that "any well-founded contestation should assail [*Tadić*] on the merits of its holdings".

95 *Ibid*., para. 406.

cases. The requirement of effective control which reduces the non-state actor to an obedient servant of the state was in his view appropriate in *Nicaragua* because of the nature of the association between the US and the *contras*, which shared few common interests apart from the general desire to destabilise the Nicaraguan government.[96] The same could not, however, be said of the relationship between the government in Belgrade and the leadership of Republika Srpska which was above all characterised by a common project of creating a 'Greater Serbia'.[97] As both parties had an identical objective, Judge Mahiou held, it would not have been necessary to require specific instructions with regard to each operation as the ICJ did.[98]

While the challenge posed by *Tadić* and echoed by Judge Mahiou did not represent an alternative to the doctrine of attribution, it suggested a more elaborate theory of the link between state action and crimes committed by private perpetrators in which slightly variable standards would be allowed in different circumstances.[99] There is no doubt that the overall control standard was also meant to broaden state responsibility, even significantly.[100] The Court's conclusion that this standard might, if applied to any and all situations, go beyond the fundamental principles of state responsibility is not entirely convincing, however, given that overall control was not proposed in *Tadić* as a general standard. At the same time, the bare possibility of a different standard can be seen as calling into question the

96 *Genocide* Judgement, Dissenting Opinion of Judge Mahiou, para. 115, at 51. See also de Hoogh, *supra* note 82, at 275, who has also drawn attention to the factual differences between the *Tadić* and the *Nicaragua* Judgements: "Surely acts of the Bosnian Serb Army, the VRS, were not those of private persons or a private group: they were the acts of an entity exercising governmental authority over large parts of Bosnian territory in concert with the Yugoslav army (the CJ) and on behalf of the FRY".

97 "En finançant et en fournissant la majeure partie de son budget et de son armement, en contrôlant une partie de ses officiers notamment aux plus hauts niveaux de la Republika Srpska, en propageant l'idée de la "Grande Serbie" ethniquement propre, le défendeur a exercé effectivement un contrôle globale suffisant, même si cela n'excluait pas éventuellement une certaine autonomie ou parfois quelques divergences et conflits sur les voies et moyens d'atteindre l'objectif commun". *Genocide* Judgement, Dissenting Opinion of Judge Mahiou, para. 117, at 52.

98 *Ibid.* The Court has also been criticised for not considering thoroughly enough the role of a Serbian paramilitary group, the Scorpions, in the Srebrenica massacre. See Marko Milanović, 'State Responsibility for Genocide: A Follow-Up', 18 *EJIL* (2007), 669–694, at 673–677.

99 It is recalled that the standard of overall control was presented as applicable to situations where a state deals with a hierarchically organised group, such as military or paramilitary unit.

100 According to Cassese (2005), *supra* note 81, at 250, "the test involves a significant broadening of State responsibility".

trans-substantive nature of the rules of attribution, which is one of the strengths of the objective theory of state responsibility. The *Genocide* Judgement affirmed the general rules of attribution in a way that gives little support to the suggestions that a special rule might be emerging with regard to certain serious crimes, whether crimes against humanity[101] or terrorism.[102] As was pointed out by the Court,"the rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question in the absence of a clearly expressed *lex specialis*".[103]

Article 9 of the ILC Articles introduces a residual rule to be applied in exceptional situations where governmental authority is exercised by private persons "in the absence or default of the official authorities". The Commentary refers to a case decided by the Iran – United States Claims Tribunal, *Yeager vs. Islamic Republic of Iran*, in which revolutionary guards (*Komitehs*) had performed immigration, customs and similar functions at Tehran Airport. While the government argued that it had not been in a position to control the *Komitehs*, the Tribunal held their acts attributable to the Islamic Republic of Iran on the basis that the government must have had knowledge of the operations and had not specifically objected to them.[104] The important conclusion is that a state cannot circumvent responsibility by transferring governmental competences to private actors or by tolerating the takeover of such functions by private groups.[105] The article is intended to cover a number of different situations from a total collapse of the apparatus of the state to cases where the official authorities are not exercising some aspects of governmental authority, for instance the control of a certain locality.[106] The link to the state is thus factual, not legal.[107] Such exceptional situations are exempted from the normal rule that the conduct of private persons or entities is not attributable to the state, provided

101 See for instance Kress, *supra* note 6, at 135, who has referred to a development in the direction of a special rule of attribution for grave and systematic violations of human rights, prompted by the policy requirement which is an element of the crimes against humanity.

102 Becker has suggested the possibility of a *lex specialis* in terrorism cases. Becker, *supra* note 79, at 359. Cassese (2007), *supra* note 81, at 666, has held that the test of overall control could be particularly helpful in linking states to terrorist organisations.

103 *Genocide* Judgement, para. 401.

104 *Yeager v. Iran*, at p. 104, para. 43; Articles on State Responsibility, commentary to art. 9, para. 2, Crawford, *supra* note 8, at 114.

105 See Rüdiger Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 423–434, at 431.

106 Articles on State Responsibility, commentary to art. 9, para. 5, Crawford, *supra* note 8, at 115.

107 De Hoogh, *supra* note 82, at 277.

that the circumstances are such that they "call for" the exercise of governmental functions.[108] It has not been clarified whether the standard of control with regard to de facto organs in such exceptional situations should conform to the requirement of effective control in article 8.[109]

Article 10 contains the established rule concerning the conduct of an insurrectional movement which becomes the new government of a state and which is considered as an act of that state. Finally, article 11 lays down the principle that conduct which is not otherwise attributable to a state must nevertheless be considered an act of state "if and to the extent that the State acknowledges and adopts the conduct in question as its own". A pertinent example of such a situation is, again, related to the aftermath of the Islamic revolution in Iran. In the *Diplomatic and Consular Staff* case, the International Court of Justice decided that the endorsement and approval by the organs of the Iranian state of the activities of the militants translated the continued occupation of the Embassy of the United States and detention of the hostages into acts of state.[110] The ILC has made it clear, however, that adoption and acknowledgement must in general be separated from endorsement of and support to private acts. On the one hand, the mere approval of certain private conduct does not necessarily turn it into an act of state; on the other, a state may well decide to assume responsibility for an act which it disapproves of and has tried to prevent.[111]

The possible bases for attributing private acts to a state, according to the ILC Articles, thus range from an agency relationship through direction and control to adoption and acknowledgement, as well as tolerance of de facto exercise of governmental authority. In the 1996 version of the Draft Articles adopted in first reading, the ILC had also included 'negative attribution clauses' making clear what

108 Articles on State Responsibility, commentary to art. 9, para. 6, Crawford, *supra* note 8, at 115.

109 Wolfrum, *supra* note 105, at 431, has objected to such a requirement: "It is sufficient that States have entrusted private persons or groups with certain tasks and continue to exercise a general control over the conduct of such persons and groups. It is not necessary that States control such conduct in details to meet the standard 'under the direction or control' in Article 8 of the Commission's draft". De Hoogh, *supra* note 82, at 280 has also noted that "[i]t is inadequate and illogical to impose the same kind of standards applicable to organs of a State to de facto organs or agents".

110 *United States Diplomatic and Consular Staff in Tehran*, (United States of America v. Iran), Judgement of 24 May 1980, I.C.J. Reports 1980, p. 3 (*Diplomatic and Consular Staff* Judgement).

111 Articles on State Responsibility, commentary to art. 9, para. 6, Crawford, *supra* note 8, at 123.

kind of conduct was not attributable to the state.[112] These articles were later deleted as unnecessary. According to Crawford, the positive attribution principles were cumulative but also restrictive: "in the absence of a specific undertaking, a State could not be held responsible for the conduct of persons or entities in any circumstance not covered by the positive attribution principles".[113] Most of the other changes made to Part One of the Draft Articles in the final phase also followed the same approach, retaining the substantive content much the same while subjecting the text to editorial streamlining and polishing.[114] The statement that the 'positive' attribution rules in articles 4 to 11 cover all situations where a state could be held directly responsible for private conduct, is also substantially correct. What should not be read into the statement, or into the ILC Articles in general, however, is that these would be the sole situations where private conduct can give rise to the international responsibility of states.[115]

5.2.2. Due Diligence

Although it is not obvious from the ILC Articles on State Responsibility in their streamlined form, there is, in addition to attribution, another equally important basis for the international responsibility of states related to the acts of individuals. The standard of due care or due diligence is imposed on states by the various international obligations that require control of private activities, protection of certain values (human rights, the environment, diplomatic relations etc.), prevention of harm or damage, and punishment of wrongdoers.[116] As a failure to meet the stand-

112 The 1996 version of the Draft Articles on State Responsibility, art. 11, Report of the International Law Commission on the work of its 48th session, 6 May–26 July 1996, UN GAOR, 51st session, Supplement No. 10, A/51/10, at 128:

> "1. The conduct of a person or a group of persons not acting on behalf of the State shall not be considered as an act of the State under international law.
> 2. Paragraph 1 is without prejudice to the attribution to the State of any other conduct which is related to that of the persons or groups of persons referred to in that paragraph and which is considered as an act of the State by virtue of articles 5 to 10".

113 Crawford, *supra* note 14, at 5.

114 In Crawford's words, the Commission removed proposals that were "simply unnecessary or over-refined", *ibid*., at 23.

115 As Bodansky and Crook have noted, "the rules of attribution represent only the tip of the iceberg as to when private acts can create state responsibility". See Daniel Bodansky and John R. Crook, 'Introduction and Overview', AJIL Symposium on the ILC's State Responsibility Articles, 96 *AJIL* (2002), 773–791, at 783.

116 Pierre-Marie Dupuy, 'Quarante ans de codification du droit de la responsabilité internationale des Etats. Un Bilan', 107 *RGDIP* (2003), 305–348, at 312, has noted that "[l]a

ard of due diligence is most often the result of a lack of appropriate state action rather than a positive act of state, it is covered by article 2 of the ILC Articles, according to which an internationally wrongful act of a state may consist of an action or omission.[117] According to the ILC Commentary, "the different rules of attribution [...] have a cumulative effect, such that a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects".[118] While the ILC Articles thus take account of inaction as an act of state, it would be wrong to consider article 2 as tantamount to the due diligence requirement, since the article is applicable to any and all omissions which may or may not be conditioned by the rule of due diligence.[119]

The reasons why the final version of the ILC Articles does not elaborate on the notion of due diligence may relate to its residual nature: the obligations to protect or to prevent are set forth in the specific (primary) rules while the ILC codification only addresses general (secondary) rules applicable 'across the board'. Crawford has pointed out that "different primary rules of international law impose different standards ranging from 'due diligence' to strict liability" and that "breach of the correlative obligations gives rise to responsibility without any additional requirements".[120] Due diligence thus belongs to the category of concepts that have played an important role in the history of the codification of the rules of state responsibility but which did not seem essential in the end.[121] Whether or not it is seen as a shortcoming, the fact that due diligence is not expressly addressed by the

volonté de simplification efficace propre au dernier rapporteur spécial lui a peut-être fait un peu perdre de vue l'utilité qu'il aurait pu y avoir, notamment, à faire référence aux "standards de comportement" que l'on est en droit d' attendre de ce qu'il est convenu d'appeler aujourd'hui une "bonne gouvernance", en fonction de l'évolution constante du corps des règles coutumières s'imposant à tous les Etats dans différents branches de droit". See also Wolfrum, *supra* note 105, at 425, who has stated, referring to arts. 8 and 9 of the ILC Draft Articles, that it is "quite doubtful whether these are the only two cases where the conduct of private persons may result in international responsibility of a State".

117 Wolfrum, *supra* note 105, at 426.

118 Articles on State Responsibility, commentary to Chapter II, para. 4, Crawford, *supra* note 8, at 92.

119 As Pisillo-Mazzeschi has pointed out, diligence does not represent a general criterion for responsibility for all wrongful omissions. See Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 36 *GYIL* (1992), 9–51, at 46: "If, indeed, it is true that lack of diligence comes light only in omissive wrongful acts, it is not true that it plays a role in all omissive wrongful acts".

120 Crawford, *supra* note 14, at 13.

121 For an analysis of due diligence as an aspect of state responsibility for the conduct of private individuals, see Ago's Fourth Report, *supra* note 61, para. 65–67, at 97–98.

ILC Articles does not weaken its status as an established principle of international law.[122]

The focus on the principles of attribution in the ILC Articles reflects a strong emphasis on the distinction between the public and private spheres in the law of state responsibility.[123] While the earlier doctrine and jurisprudence had somewhat loosely referred to the responsibility of states for the acts of private individuals as 'vicarious' or 'imputed',[124] the effect of the comprehensive theory of state responsibility adopted by the ILC under Special Rapporteur Roberto Ago was to clearly define and to restrict the responsibility of states to their own acts.[125] Private activities that adversely affect foreign nationals or interests in the territory of a state, or have adverse transboundary effects, are accordingly seen as external events which do not as such give rise to the international responsibility of the state. The state may, however, have to answer for its own act or omission in not exercising the control that has been expected of it.[126] Conduct other than that of organs (whether de jure or de facto) or agents of the state should therefore, as a general rule, give rise to state responsibility only if the state is simultaneously in breach of its international obligations. An act of the state and a private act that can not be attributed to the state are logically separate and give rise to separate responsibilities, but the action

122 According to Brownlie (1983), *supra* note 60, at 162, "There is an extensive and consistent state practice supporting the duty to exercise due diligence". See also Christenson, *supra* note 60, at 326, who has presented the classical theory of state responsibility in three principles as follows: "1. Acts of agents or organs of a State are necessarily those of the State. 2. Acts of a non-state character, including acts of individuals, mobs, associations, unsuccessful insurgents, and ordinary criminals, are not those for which a State is responsible. 3. A State may be responsible for acts related to private or non-state conduct if it fails in its own duties regarding that conduct by an independent act or omission. [...] The third principle is properly a corollary of the first" (footnotes omitted). It is notable that for Christenson, 'due diligence' is an integral part of the classical theory, alongside with what could be called the rules of 'attribution' and 'non-attribution'.

123 On other implications of this distinction, see, for instance, Christine Chinkin, 'A Critique of the Public/Private Dimension', 10 *EJIL* (1999), 387–395 and Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century', 96 *AJIL* (2002), 798–816. See also Roucounas, *supra* note 13.

124 See Brownlie (1983), *supra* note 60, at 36; *Oppenheim's International Law*, *supra* note 63, at 501–502.

125 In that sense, as Brownlie has pointed out, state responsibility for private acts is a 'non-question' – state responsibility arises in any event "from the application of some particular legal duty, involving a cause of action". Brownlie (1983), *supra* note 60, at 163.

126 Ago's Fourth Report, *supra* note 61, para. 65, at 97.

of an individual or individuals or private entities can trigger state responsibility and constitute evidence of a breach by the state of its obligations.[127]

To quote the ILC Commentary to (the subsequently removed) article 11 on non-attribution:

> [T]he strictly negative conclusion reached regarding the attribution to the State of the acts of private natural and legal persons [...] does not imply, however, that the State cannot incur international responsibility for such acts on other grounds. [...] that applies, of course, where the very fact that these acts could take place makes it clear that in the circumstances there has been a breach of an international obligation on the part of organs of the State or organs of another entity exercising elements of the governmental authority. [...] the State can sometimes incur an international responsibility on the *occasion* of acts of a private person or persons [...] but [...] this responsibility derives [...] from separate conduct attributable to the state under articles 5 to 10 of the draft – conduct which is merely related to the acts in question.[128]

As the ILC codification is restricted to the secondary norms of state responsibility, the actual extent of state responsibility in each particular situation is left to be largely determined by the primary norms. The state remains directly responsible only for its own acts and omissions, but the door has been left wide open for the exact limits of state responsibility to be drawn by the 'infinite variety'[129] of primary norms governing the activities in different areas of law. The areas of law where obligations have traditionally been conditioned by the due diligence rule extend from the protection of aliens and representatives of foreign states in the territory of a state[130] to the prevention of acts of force being carried out from the territory of

127 Condorelli, *supra* note 61, at 99–101, has commented on the *Nicaragua* judgement as follows: "cette affaire permet elle aussi d'apprécier le type de lien pouvant subsister entre le fait du particulier et celui de l'Etat: celui-ci se voit imputer seulement, il est vrai, son propre fait, mais ce fait est "mis en évidence" par le premier. [...] Autrement dit, ce qui est imputé à l'Etat dans ces cas n'est jamais l'action de l'individu, mais le fait de ne pas l'avoir empêchée, bloquée ou réprimée, ou bien le fait de l'avoir encouragée, soutenue, favorisée etc".

128 Commentary to art. 11, para. 4, 1975 YBILC, Vol. II, at 71 (original emphasis). The 1996 version still contained art. 11 but referred for the commentary to the 1975 YBILC.

129 See R.R. Baxter, 'International Law in "Her Infinite Variety"', 29 *Int' l and Comp L Q* (1980), 549–566.

130 With a special duty to protect diplomatic and consular officials, recognised in customary law; see Brownlie (1983), *supra* note 60, at 80.

a state against another state, and to environmental protection.[131] More recently, however, the extensive codification of international law through multilateral law-making conventions has produced a host of specific obligations that considerably broaden the bases of state responsibility ranging from human rights to the law of the sea.[132]

While the principle of due diligence has not been systematised in the same way as the rules of attribution – and could not be, as it is 'contextually variable',[133] dependent on the particular obligations set forth with regard to certain types of activities – it has been claimed that a special regime applies for those international obligations which are conditioned by the due diligence rule.[134] Certain general requirements for its application have been laid down in customary law. The cases of international jurisprudence most often mentioned in this context and which shed light on the content of the due diligence requirement are the *Alabama Claims* arbitral decision[135] as well as *Diplomatic and Consular Staff* and even *Nicaragua*. The *Alabama* case is relevant for the general duty of any state not to tolerate the use of its territory by private persons as a base for hostile military operations against another state. According to Pisillo-Mazzeschi, such a duty, conditioned by the due diligence rule, includes the "absolute" obligation to *possess* a legal and administrative apparatus consistent with international standards and the "relative" obligation to *use* such apparatus with diligence.[136] In *Diplomatic and Consular Staff,* the ICJ also indicated that a duty of due diligence required that states have "the means at their disposal to perform their obligations". Whenever state authorities are aware of the need for action on their part and fail to use the means which are at their disposal, the international responsibility of the state is engaged.[137]

131 Pisillo-Mazzeschi, *supra* note 119, at 22.

132 Wolf, *supra* note 60, at 233, also mentions international terrorism, together with drug trafficking and mercenarism, as increasingly regulated areas which have broadened state responsibility.

133 Chinkin, *supra* note 123, at 394.

134 Pisillo-Mazzeschi, *supra* note 119, at 50.

135 *The Alabama Claims (US v. Great Britain),* 1872, reprinted in J.B. Moore, 1 *History and Digest of International Arbitrations to which the United States has been a Party* (1998), 495 *et seq*.

136 *Ibid*., at 35. See also Lillich and Paxman, *supra* note 60, at 254–258, who have noted that the *Alabama Claims* decision, while limited to the specific circumstances of the situation, can serve as a starting point for a more general theory on which to elaborate a theory of state responsibility governing matters of terrorism.

137 *Diplomatic and Consular Staff* Judgement, para. 68, at 33. Wolfrum, *supra* note 105, at 430, has submitted that the *Yeager* case should also be seen in this light: "The responsibility

Although the name *Nicaragua* has become a synonym in the law of state responsibility for the standard of control as a basis for attribution, the judgement also addressed the question of due diligence. When assessing whether Nicaragua was in breach of its obligation to prevent arms traffic to the armed opposition in El Salvador through its territory, the Court compared its performance with that of the other concerned states and concluded that it would have been "clearly [...] unreasonable to demand of the Government of Nicaragua a higher degree of due diligence than is achieved by even the combined efforts of the other three states".[138] It is clear from this statement that a due diligence obligation to prevent a harmful event is not an absolute obligation but a relative one requiring a state to use its best efforts to prevent a certain outcome.[139] The principle of *ultra posse nemo tenetur*, according to which a state cannot be held responsible for events beyond its control, also applies.[140] One obvious example often mentioned is a state's physical inability to control a remote and sparsely populated area. While physical control of a territory is the obvious point of departure for assessing state responsibility for acts affecting other states, it is generally recognised that the fact of territorial control is not as such sufficient to make the state responsible for harmful events emanating from its territory.[141] Likewise, it is agreed that the standard of diligence must be lower in sparsely settled regions.[142] In that regard, attention should always be paid to a state's insufficient capacity to meet a certain standard,[143] provided that the governmental action is not manifestly below the international standard.[144]

---

of Iran resulted rather from the failure of the Iranian Government to act than from the attribution of the conduct of a private group to the State".

138 *Nicaragua* Judgement, para. 157, at 85.

139 Pisillo-Mazzeschi, *supra* note 119, at 41, has defined an obligation of diligent conduct as the obligation "to make every effort" to reach a desired result.

140 Karl Zemanek, 'Does the Prospect of Incurring Responsibility Improve the Observance of Law?', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 125–134, at 131–132. See also Brownlie (1983), *supra* note 60, at 178, 181.

141 See for instance Wolf, *supra* note 60, at 234.

142 Brownlie (1983), *supra* note 60, at 168–170, quotes a letter of the United States Secretary of State of 1888 which makes this point strongly. According to Brownlie, at 170, "There is good reason to believe that this exposition represents law as it remains today".

143 Pisillo-Mazzeschi, *supra* note 119, at 46, has referred to the concrete possibility of fulfilment as a general limit of diligence.

144 Wolf, *supra* note 60, at 240–241, has referred to the *Neer* case of 1926 in which "insufficiency of governmental action so far short of international standards that every reasonable man would readily recognize its insufficiency" was regarded as a basis for responsibility, and to the *Mecham* case of 1929 in which "what was done [showed] such a degree of neg-

As a preliminary enumeration of the basic components of due diligence, to be specified by the relevant primary rules, a state bound by an international obligation to prevent and to punish certain private conduct would have to enact the necessary legislation and set up the administrative apparatus to implement the legislation. As noted earlier, this obligation is relative and must reflect both the general international standard and the capacity of the state to comply with it: effective implementation of an obligation may not, for instance, be possible in areas where the state does not in fact exercise effective control. In addition to setting up the necessary legislative and administrative apparatus, the state must use that apparatus in order to meet the obligation. The *Genocide* Judgement, while confining itself to determining the scope of the duty to prevent genocide under the Genocide Convention, arrived at very similar conclusions. It confirmed that the obligation is "one of conduct and not one of result" in the sense that a state "does not incur responsibility simply because the desired result is not achieved: responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide". "Within its power" also includes the capacity to influence effectively the action of persons committing or likely to commit genocide.[145] The Court also pointed out that a state can be held responsible for breaching the obligation to prevent genocide only if genocide is actually committed.[146]

The Court's reference to prevention of genocide as an obligation of conduct[147] is interesting for two reasons. It summarises the essential characteristics of obligations of due diligence and, at the same time, invokes the categories of 'obligations of conduct' and 'obligations of result' that were long part of the ILC Draft Articles but were dropped before their final adoption, together with other concepts and distinctions that were not deemed necessary or useful for the purposes of the codification.[148] The distinction between the two categories of obligations has particular

ligence, defective administration of justice or bad faith that the procedure falls below the standards of international law".

145 *Genocide* Judgement, para. 430.

146 *Ibid.*, para. 431.

147 See also *Gabcíkovo–Nagymaros Project* C*ase*, ICJ Reports 1997, p. 7, para. 135.

148 According to Dupuy, the reasons for deleting the two concepts were also related to their having been used in a misleading way in the Draft Articles. Pierre-Marie Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in relation to State Responsibility', 10 *EJIL* (1999), 371-385, at 374–378. At the same time, what was made clear by deleting the concepts, was "less the relevance of this classification as such than its usefulness in connection with codifying the law of responsibility"; see Dupuy, *supra* note 3, at 1059.

relevance for the concept of due diligence. As Pisillo-Mazzeschi has pointed out, they

> are conditioned by a different risk [...] in obligations of diligent conduct, the realization of the purpose of the obligation is more uncertain and presupposes, besides the absence of events entailing impossibility of performance, also a particular effort of diligence by the debtor and the favourable play of certain objective risk factors.[149]

The ILC has also admitted that the distinction may assist in ascertaining whether a breach of an obligation has occurred.[150] From that point of view, and building on the Court's definition of obligations of conduct, it seems clear that a state cannot be deemed to be in violation of an obligation to prevent a given harmful event only because the event takes place as a result of private action.[151] Even here, it is the actual conduct of the state, not an external event committed by non-state actors, that can be the basis for a breach of an obligation of due diligence. At the same time, it is because of the occurrence of the harmful event that the state's conduct can be scrutinised and state responsibility may arise.[152] The characterisation in the *Diplomatic and Consular Staff* case of the Iranian government's conduct as an ex post facto approval of the hostage-taking by the militants did not change the nature of that conduct as a manifest breach of the obligation to show due diligence in protecting foreign representations, but came over and above it – with the significant difference of making the Iranian state also directly responsible for the hostage-taking.

It seems clear that to determine whether a state is in breach of a certain obligation its conduct must be assessed in the prevailing circumstances. One essential question is what the state from whose territory the harm emanates has known; whether the harmful event or injury was foreseeable, and whether the state had

149 Pisillo-Mazzeschi, *supra* note 119, at 48.

150 Articles on State Responsibility, commentary to art. 12, para. 11, Crawford, *supra* note 8, at 129.

151 Commenting on the obligations of conduct, in 1978, the ILC pointed out that "[o]nly when the event has occurred because the State has failed to prevent it by its conduct, and when the State is shown to have been capable of preventing it by different conduct, can the result required by the obligation be said not to have been achieved. Consequently, for there to be a breach of the obligation, a certain causal link – indirect of course, not direct – must exist between the occurrence of the event and the conduct adopted in the matter by the organs of the State". See *YBILC* 1978 II, para. 4, at 6, at 82.

152 See also the description of the "true scope of the obligation of conduct" by Dupuy, *supra* note 148, at 378–380.

specific knowledge of an impending danger or other reason to be on the alert.[153] According to the *Corfu Channel* Judgement, the laying of mines in the northern parts of the Channel which resulted in explosions and loss of life could not have been accomplished without the knowledge of the territorial state, Albania, and therefore raised its responsibility.[154] This conclusion could not, however, be based on the simple fact of territorial control, and there was no evidence that Albania had laid the mines or that they had been laid with its complicity. The Court relied, inter alia, on the principle that every state is under an obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states. Further, it referred to the vigilance with which the Albanian Government had constantly kept watch over the waters in the area and which did not seem reconcilable with the alleged ignorance of the Albanian authorities.[155] Article 23 of the ILC Articles on *force majeure* as a ground for precluding the wrongfulness of an act that amounts to a breach of obligation would seem to reflect the same conclusion of the importance of the foreseeability of the harmful event as a criterion of state responsibility. Central to *force majeure* is the concept of 'unforeseen event', defined as an occurrence "beyond the control of the state, making it materially impossible in the circumstances to perform the obligation".[156] According to the ILC Commentary, this ground requires complete impossibility and does not cover situations brought about by the neglect or default of the state concerned, even if the resulting injury itself was accidental and unintended.[157]

A consequential question if the state has been aware of the danger is whether it has acted bona fide to prevent the danger or whether it took the risk willingly or was indifferent to it. The *Genocide* Judgement states that a duty to act should "arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed".[158] As it was clear, in view of the international concern about Srebrenica and the evidence available to the Court, that there was a serious risk of genocide in Srebrenica, the Federal

153 Lillich and Paxman, *supra* note 60, at 246, have referred to "the level of lawlessness in the locality" as a reason for a state to take preventive measures. See also Becker, *supra* note 79, at 133–136.

154 *The Corfu Channel Case*, Merits, Judgement of 9 April 1949, ICJ Reports 1949, p. 22.

155 *Ibid*., at 18–20.

156 Articles on State Responsibility, art. 23, Crawford, *supra* note 8, at 170–173. See also Andrea Gattini, 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility', 10 *EJIL* (1995), 397–404, at 401–402, and Higgins, *supra* note 89, at 161.

157 *Ibid*., commentary to art. 23, para. 3, at 170–171.

158 *Genocide* Judgement, para 431.

Republic of Yugoslavia had violated its obligation to prevent.[159] As for the obligation to punish, the case did not require an evaluation of the legislative and institutional infrastructure of FRY/Serbia and Montenegro because the country had an obligation to cooperate with the ICTY both under the Genocide Convention and the relevant UN Security Council resolutions but had not done so.[160] In general, failure to adopt the necessary measures to prevent the occurrence of a harmful event is not sufficient to engage state responsibility without the actual occurrence of such an event.[161] However, much depends on the formulation of the given obligation, which may require the adoption of certain specific measures or prohibit the toleration of certain activities.

5.3. Interconnections between the Regimes of International Responsibility

In spite of the completion of the two major codification projects on international responsibility – the Rome Statute of the ICC in 1998 and the ILC Articles on State Responsibility in 2001 – the relationship between the two regimes continues to raise questions, some of which have also been reflected in the recent jurisprudence of the ICJ related to state involvement in serious crimes. One example of the interplay between the principles of individual criminal responsibility and state responsibility is provided by a debate on the *Arrest Warrant* Judgement of 2002, the subject of which was a Belgian arrest warrant against the Minister of Foreign Affairs of Congo, who was accused of grave breaches of the Geneva Conventions and their Additional Protocols as well as of crimes against humanity.[162] Notably, the ICJ upheld the rule according immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs, pointing out that such persons could only be tried in their own country, in an international criminal trial, or after the state they represent has waived the immunity.[163] This reasoning seemed to go against

159 *Ibid*., para. 438.

160 *Ibid*., para. 449.

161 In 1978, the ILC proposed an article entitled 'Breach of an obligation to prevent a given event': "When the result required of a State by an international obligation is the prevention, by means of its own choice, of the occurrence of a given event, there is a breach of that obligation only if, by the conduct adopted, the State does not achieve that result", *YBILC* 1978, Vol. II, Part Two, at 81–86. See also Ago's 7th Report, *YBILC* 1978, Vol. II, Part 1, para. 10 and 11, at 34.

162 *Case Concerning the Arrest Warrant* of 11 April, 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February 2002, General List No. 121 (*Arrest Warrant* Judgement), paras. 13–21.

163 *Ibid*., para. 58.

the broad trend of increased accountability, reflected for instance in the *Pinochet* Judgement of the British House of Lords in 1999. The Law Lords held that the former dictator of Chile was not entitled to claim immunity from the jurisdiction of the UK courts,[164] thus taking distance from the traditional doctrine which had barred criminal responsibility for acts carried out while in public service.[165]

There was, however, a common feature in both judgements. The ICJ pointed out that a former Foreign Minister of a state may, after his or her resignation, be subjected to the criminal jurisdiction of another state, but only in respect of acts carried out prior or subsequent to his or her term of office, or for acts carried out in a private capacity.[166] In other words, a former Foreign Minister could not be held accountable for acts carried out in an official capacity during his or her term of office. The first *Pinochet* Judgement[167] also suggested that torture and related acts should not be described as official acts performed by the head of state in the exercise of his functions. The second judgement focused more narrowly on the definition of torture under the Torture Convention, concluding that since, according to article 1(1) of the Convention, the crime of torture required state involvement, it would be against the object and purpose of the Convention to regard official status as a bar to prosecution.[168] The decisions of the Law Lords were widely acclaimed and gave rise to a broader discussion of whether, in order to ensure effective prosecution of serious crimes, it should be assumed that the core crimes would never qualify as official acts and could therefore only be committed in a private capacity.[169] This proposition seemed particularly valid in view of the *Arrest Warrant*

164 United Kingdom House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others - Ex Parte Pinochet*, 38 *ILM*, 3 May 1999.

165 An important part of the development since Nuremberg has been the consolidation of an understanding that there is no immunity at the international level for the most serious international crimes. See, for instance, Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *EJIL* (1999), 425–434, at 432: "[W]hen a crime, in the meaning of Article 19 of the Draft Articles on State Responsibility is committed, then (and only then) can the individual responsibility of the persons concerned be entailed, even though they were acting on behalf of the state". At the same time, the finer implications of this principle at the level of national jurisdictions remain debated.

166 *Arrest Warrant* Judgement, para. 61.

167 The *Pinochet* case provides in fact two sets of arguments in favour of larger accountability as the proceedings were conducted twice because of an allegation of a possible bias. For an account of the proceedings, see Philippe Sands, *Lawless World*, Penguin Books, 2006, at 23–45.

168 *Ibid.*, at 38. See also Andrea Bianchi, 'Immunity versus Human Rights: The Pinochet Case', 10 *EJIL* (1999), 237–277.

169 See for instance Steffen Wirth, 'Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium Case', 13 *EJIL* (2002), 877– 894, at 890: "There is only one way to har-

Judgement, which could be taken to have ignored the role of state in the commission of the most serious international crimes.[170] The view that the core crimes should always be viewed as private acts also seemed to get support from one of the judges.[171] Paradoxically, striving to maximise the individual accountability for the most serious crimes in this way would close the circle and lead to a nearly complete exclusion of state responsibility for the same acts, which could not be attributed to the state as acts carried out in an official capacity.[172]

The other example of recent ICJ jurisprudence taken up here is also related to the question whether states can be held responsible for the commission of international crimes. It may be recalled that the decision of the ILC to remove the concept of state crimes from the Draft Articles was based mainly on practical considerations such as the absence of an adequate procedure for the investigation of state crimes, a system of due process and appropriate sanctions, not on a principled position that states could not be held criminally liable.[173] It would also be difficult to argue in favour of such a principle, given the wide acceptance of corporate criminal responsibility in domestic law, which could be taken to imply that legal entities, including states, can under certain circumstances be held responsible for crimes.[174] According to Special Rapporteur Crawford, "There is nothing inherent in the State as such which excludes it from being the subject of penal

monize the view of the ICJ with the prevailing state practice, namely, to understand the term 'official act' in such a way that it, *per definitionem*, excludes the commission of core crimes".

170 On this point, see Antonio Cassese, 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *EJIL* (2002), 853–875, at 868.

171 *Arrest Warrant* Judgement, Separate Opinion of Judge van den Wyngaert, para. 36

172 See Marina Spinedi, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium Non Datur*?', 13 *EJIL* (2002), 895–899, at 899, pointing out that "[i]t would be unsatisfactory that a state should be called to account only for failing to prevent the commission of crimes or for failing to to punish the wrongdoers, and not be called to account for the crimes themselves".

173 Crawford, *supra* note 14, at 18.

174 As pointed out by Meron, *supra* note 2, at 20. See also Caron, *supra* note 16, who has submitted that municipal experience with corporate crime could give valuable insights to strengthening the regime of state responsibility. Corporate criminal responsibility has not only gained ground in many jurisdictions but has also made its way into a number of international instruments that require sanctions to be imposed on legal entities, although these instruments usually leave it to states parties to determine, whether the responsibility of such entities is civil, administrative or criminal in nature. See for instance International Convention for the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229, art. 5.

sanctions [...]. But a crucial difficulty with taking the idea of 'international crimes' further was that even its supporters were extremely reluctant to accept a full-scale penal regime, or any punitive elements at all".[175]

This discussion was echoed in the 2007 judgement of the ICJ in the *Genocide* case. The majority of the Court concluded that a state can be held directly responsible for the commission of genocide while some judges argued that this could not be the case, basing their arguments inter alia on the abandonment by the ILC of the concept of state crimes. According to the *Genocide* Judgement,

> It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[176]

Critical of this conclusion, Judge Tomka pointed out that the Genocide Convention "contemplates genocide as a crime committed by a person entailing that person's individual criminal responsibility"[177] and thus "as a crime of individuals, and not of a State".[178] In the same vein, Judge Owada noted that it would be untenable "to hold the State directly to account for *an international crime of genocide,* on the ostensible ground that a State cannot commit a crime in the penal sense".[179] According to Judge Skotnikov, since "States do not commit crimes", the introduction of the

175 Crawford, *supra* note 14, at 19. Sicilianos has pointed out that the concept of state crimes remained mainly symbolic as the ILC "never embarked on developing a full regime tailored to the international crimes of states"; see Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13 *EJIL* (2002), 1127–1145, at 1128. For proposals concerning a special procedure to establish the criminal responsibility of states, see the 7th Report of Special Rapporteur Arangio-Ruiz, *YBILC* 1995 Vol. II, Part One, paras. 245 *et seq*., at 48 *et seq*.

176 *Genocide* Judgement, para. 166, at 63.

177 *Genocide* Judgement, Separate Opinion of Judge Tomka, para. 40, at 17. Similarly, Gaeta has doubted the validity of the Court's conclusion in view of the drafting history of the Genocide Convention, see Paola Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide', 18 *EJIL* (2007), 631–648, at 633–637.

178 *Genocide* Judgement, Separate Opinion of Judge Tomka, para. 45, at 19.

179 *Genocide* Judgement, Separate Opinion of Judge Owada, para. 52, at 13, (original emphasis).

concept of a state itself committing genocide would lead to "decriminalization of genocide, which as a result is transformed into an internationally wrongful act".[180]

These comments can be taken to represent a somewhat formalistic separation between state responsibility and individual criminal responsibility. It should be recalled that the law of state responsibility as reflected in the ILC Articles does not exclude the possibility of a state being responsible for the commission of a crime, or for complicity in a crime, provided that the acts in question have been committed by persons whose acts are attributable to the state, that is, either state organs, de facto organs or persons acting on specific instructions of the state. The fact that the underlying acts are criminal does not give a different flavour to the international responsibility of the state, which continues to be 'simply international'. Nor does it alter the rules of attribution in the absence of *lex specialis*. This stand was confirmed by the majority of the Court which stated that a prerequisite for finding a state responsible for genocide would be that one or more of the acts enumerated in article III of the Genocide Convention were committed by the organs of the state or by persons or groups whose acts are attributable to it.[181] It is therefore not clear whether the majority indeed wished to reopen the debate on state crimes, and there seemed to be very little difference on this point even in the dissenting or separate opinions.[182] In the end, the Court did not find sufficient evidence of any involvement of Serbia and Montenegro in the genocide committed in Srebrenica, and only pointed out that this state had not complied with its obligation under the Convention to prevent and punish acts of genocide.[183]

While the 2007 judgement in the *Genocide* case was the first time the International Court of Justice pronounced itself on state responsibility for genocide, it has had a few more cases on its docket related to the issue. An earlier decision in the present *Genocide* case was given in 1996 and another case between Serbia and Croatia is still pending.[184] In the *Use of Force* cases between the Federal Republic of Yugoslavia and several NATO countries involved in the Kosovo War,[185]

180 *Genocide* Judgement, Declaration of Judge Skotnikov, at 4.

181 *Genocide* Judgement, para. 181, at 68.

182 See, in particular, the Separate Opinion of Judge Owada, para. 42.

183 *Genocide* Judgement, para. 471(5), at 169.

184 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Croatia v. Serbia-Montenegro), General List No. 118.

185 *Legality of Use of Force* (Serbia and Montenegro vs. Belgium), (Serbia and Montenegro vs. Canada), (Serbia and Montenegro vs. France), (Serbia and Montenegro vs. Germany), (Serbia and Montenegro vs. Italy), (Serbia and Montenegro vs. the Netherlands), (Serbia and Montenegro vs. Portugal), (Serbia and Montenegro vs. Spain), (Serbia and Montenegro vs. the United Kingdom), (Serbia and Montenegro vs. the United States of America).

the Court commented specifically on the question of genocidal intent. These cases did not proceed to the merits, as the Court found that it did not have jurisdiction, but it had an opportunity to reflect on the question of whether the acts of the respondent states revealed a genocidal intent. As the Court stated in its conclusion, "it does not appear at the present stage of proceedings that the bombings which form the subject of the Yugoslav application indeed entail the element of intent towards a group as such", as required by article II of the Genocide Convention.[186] The intent in question, had it been found, would have been the intent of the persons exercising governmental authority on behalf of the respondent states, not of the states as such. This means that the Court is not barred from considering typical questions of criminal law even though the practice so far is limited. As to the Bosnian *Genocide* case, the task of the Court was greatly facilitated by the availability of the proceedings of the ICTY, inter alia in the *Krstić* and *Krajišnik* cases.[187] The Court confirmed nevertheless in the 2007 *Genocide* Judgement that it could make a finding of state responsibility for genocide even if no individual had been convicted of the crime.[188]

In principle, the same should apply to international criminal tribunals, which may need to consider issues of general international law in order to solve preliminary questions of relevance to the proceedings. A reference may be made in this respect to the discussion concerning the issue of standard of attribution in the *Tadić* case, in which many commentators have pointed out that it would not have been necessary for the ICTY to take a stand on the question, deliberately challenging *Nicaragua*, and wondered why it decided to do so.[189] An obvious answer is that attribution was dealt with as a preliminary question,[190] comparable to the question of the existence of an act of aggression that the ICC would have to resolve in any

186 See, for instance *Legality of Use of Force* (Serbia and Montenegro vs. Belgium), Request for the Indication of Provisional Measures, Order of 2 June 1999, ICJ Reports (1999), p. 124, para. 40.

187 *Prosecutor v. Radovan Krstić*, Case No. IT-00-39-T; *Prosecutor v. Momcilo Krajišnik*, Case No. IT-00-40-T; *Genocide* Judgement, paras. 214 and 215. For a critical assessment of the Court's fact-finding, see Richard J. Goldstone and Rebecca J. Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *LJIL* (2008), 95–112, at 103–107.

188 *Genocide* Judgement., paras. 180–182, at 68.

189 *Ibid*., para. 403; *Tadić* Appeal Judgement, Separate Opinion of Judge Shahabuddeen, para. 5; ILC Articles on State Responsibility, commentary to art. 8, para. 5, Crawford, *supra* note 8, at 112. For a similar view, see Theodor Meron, 'Classification of Armed Conflict in the Former Yugoslavia; *Nicaragua*'s Fallout', 92 *AJIL* (1998), 236–242, at 237; Becker, *supra* note 79, at 70 and Milanović, *supra* note 82, at 581.

190 *Tadić* Appeal Judgement, para. 104.

future proceedings concerning the crime of aggression. Whether such determinations would have effects outside of the specific proceedings is a different question; at least in the *Tadić* Appeal Judgement, implications for state responsibility were not excluded:

> [T]he legal consequences of the characterisation of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would *inter alia* follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.[191]

In a broader perspective, the 'dialogue' between the ICJ and the ICTY concerning the standard of attribution reflects more than an institutional schism: it betokens an inherent tension between the uneven development of international criminal law, on the one hand, and the law of state responsibility, on the other. Whether the two regimes are seen as separate or complementary, it may not be possible to avoid tensions and overlapping.[192]

While the rules of attribution specific to the law of state responsibility and those of international criminal law do not always lead to the same results when applied to the same facts, there are certain conceptual similarities. This is particularly evident with regard to command/superior responsibility.[193] The system of individual-collective responsibility put forward by Ambos[194] also comes close to the considerations of state responsibility. With one of the main functions of the specific modes of responsibility in ICL being to provide a way in which superiors, leaders and masterminds can be linked to crimes committed on their behalf, the doctrines developed for that purpose are not completely different from the legal operation whereby crimes committed on behalf of a state are attributed to it. Reid has noted that international law imposes the same negative obligations on both states and individuals, prohibiting both from committing violations of interna-

191 *Ibid*., para. 97. See also para. 121 where the Appeals Chamber referred to the "realistic concept of accountability" as a basis for the law of state responsibility.

192 While a strict division of labour between different international courts and tribunals may be desirable for the sake of stability and legal certainty, "these ends must be [...]balanced against the need for substantive justice", as Kress has pointed out. See Claus Kress, ' The International Court of Justice and the Elements of Genocide', 18 *EJIL* (2007), 619–629, at 620.

193 Reid, *supra* note 26, at 826–827.

194 Chapter 4.3.2.

tional humanitarian law and international criminal law.[195] Superior responsibility can therefore be used as evidence of state responsibility for the most serious crimes, which constitute breaches of *erga omnes* obligations of states. Establishment of superior responsibility under criminal law can thus lay the groundwork for attributing responsibility for such crimes to the relevant state.[196]

Dupuy has pointed in a more general sense to the concept of 'double crimes' which are "simultaneously a State crime and potentially an individual crime".[197] Aggression constitutes the archetype of a 'double crime' in this sense. Genocide stands apart from the other crimes because of the compromissory clause in article IX of the Genocide Convention which establishes the jurisdiction of the ICJ for disputes concerning "the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide".[198] Crimes against humanity, in Dupuy's view, come close to genocide because of their massive and systematic nature, which presupposes collective organisation.[199] Fletcher has similarly pointed out that "crimes in the international arena require both collective action and individual execution". [200] War crimes, according to Fletcher, reflect the participation of a collective organisation: many of them "must come from a collective army unit and express the will of the collective", or "by their nature must be orchestrated by the military command, even though they are executed by discrete individuals".[201]

Even in case of 'double crimes', state responsibility is separate and different from criminal responsibility. State responsibility and individual criminal responsibility are complementary: in order to establish state responsibility for a crime, it has to be proved that the crime has been committed by persons whose acts are attributable to the state in question. If that is not the case, the state can still incur responsibility for its failure to prevent or punish the crime. It is here that the similarities with superior responsibility are the most evident. Just as superior

195 Reid, *supra* note 26, at 809.

196 *Ibid*., at 826–827. According to Reid, at 824, superior responsibility fits only partially within the theoretical confines of the individual responsibility regime.

197 Dupuy, *supra* note 13, at 1089.

198 According to art. IX, disputes relating to the responsibility of a state for any of the other acts enumerated in article III are also to be submitted to the International Court of Justice.

199 Dupuy, *supra* note 13, at 1089–1090.

200 Fletcher, *supra* note 40, at 62.

201 *Ibid*., at 55–56 *et seq*. According to Dupuy, *supra* note 13, at 1090, however, war crimes "do not to the same degree show the collusion between the State crime and the individual's crime" as aggression, genocide and the crimes against humanity.

responsibility can be seen as an independent crime of omission, a state is – outside the rules of attribution – only responsible for its own failure to abide by international obligations.[202] Furthermore, just as in superior responsibility, a breach of obligation is only possible where there is a positive duty to prevent and to punish. A certain similarity can also be found between the responsibility for 'incidental crimes' in the third category of JCE, on the one hand, and state responsibility for acts carried out by state organs ultra vires, on the other.[203] If there thus has been certain spill-over and cross-fertilisation between the two regimes of responsibility, it seems that the existing similarities are the result of the doctrine of individual criminal responsibility for the core crimes adopting and developing concepts that bear some resemblance to those pertaining to state responsibility rather than state responsibility – a remarkably conservative area of law – being influenced by the development of the doctrines specific to international criminal law. It is in this light that the criticisms against increasing 'criminalisation' of international law should be understood.

5.4. The Notion of 'Indirect Responsibility' in the Law of State Responsibility

Before proceeding to the study of the new normative developments regarding terrorist crimes, some additional remarks on the notion of 'indirect responsibility' are in order. The prevailing doctrine endorsed by both the International Law Commission and the International Court of Justice characterises state responsibility as being always of a direct nature. As pointed out by the ICJ in the 2007 *Genocide* Judgement, "a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf".[204] Furthermore, the term 'indirect responsibility' in the meaning of complicity or responsibility for the act of another, was long reserved in the work of the ILC for situations where

202 For instance, the ICTY Trial Chamber referred in the *Orić* case which tested the limits of superior responsibility to the superior's "lack of due diligence". *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Judgement of 30 June 2006, para. 317.

203 It should be noted, however, that state responsibility for ultra vires acts of its organs does not require that the acts were foreseeable. At the same time, according to the ILC Commentary, drawing the line between unauthorised official acts on the one hand and private acts on the other is easier if the conduct is recurrent so that the state ought to know of it. Articles on State Responsibility, commentary to art. 7, para. 8, Crawford, *supra* note 8, at 108.

204 *Genocide* Judgement, para. 406.

a state, exceptionally, can be held responsible for the act of another state.[205] While the term did not make its way into the 2001 ILC Articles on State Responsibility, the thrust of the concept has been retained in three articles on derived responsibility, in particular article 16 on aid or assistance in the commission of an internationally wrongful act.[206]

At the same time, the notion of 'direct responsibility' of a state is commonly recognised as a specific and exclusive category.[207] The corollary – the forms of state responsibility that are not 'direct', or 'less direct' – seems to constitute a broader category than the exceptional cases of complicity or coercion between two states. It should be added, however, that the use of the term 'direct responsibility' by the ICJ in *Nicaragua* when assessing the relationship between a state and private actors, provoked a protest from Judge Ago, who saw in this formulation an "apparent contradiction" due to "linguistic improprieties" and pointed out that the concept of 'indirect responsibility' could only play a role in relations between states: "the situations which can be correctly termed cases of indirect responsibility are those in which one State, that in certain circumstances (belligerent occupation, for example) exerts control over the actions of another can be held responsible for an internationally wrongful act *committed by and imputable to* that second State".[208]

The same point was later made and explained in the Commentary to the Draft Articles:

> [T]he responsibility of the State on the occasion of acts committed by private persons can in no case be described as "indirect" or "vicarious" responsibility. In any legal system, the responsibility defined as "indirect" or "vicarious" is the responsibility which a subject of that juridical order incurs for the wrongful act of another subject of the same juridical order. This anomalous form of responsibility entails separating the subject that commits an internationally wrongful act from the subject that bears responsibility for that act. However, in cases where the State is held internationally responsible on the occasion of actions of private

205 The 1978 ILC made a distinction between 'complicity' as aid or assistance by a state to another state for the commission of an internationally wrongful act and 'indirect responsibility' as the responsibility of a state for the internationally wrongful act of another state pointing out that "[a] State may be implicated in one way or another in the internationally wrongful act of another State, whether in cases where the first State participates in the wrongful act of the second or in cases pertaining to what is generally called 'indirect responsibility' ". *YBILC* 1978, Vol. II, Part Two, at 98–102.

206 Art. 17 deals with direction and control exercised over the commission of an internationally wrongful act and art. 18 with coercion of another state.

207 *Nicaragua* Judgement, paras. 116 and 278.

208 *Ibid*., Separate Opinion of Judge Ago, para. 17 and footnote 1, at 189 (original emphasis).

> persons, those persons cannot be regarded as separate subjects of international law. The conditions for indirect responsibility are therefore entirely lacking.[209]

Two conclusions can be drawn from the Commentary: firstly, 'indirect' is used in the meaning of 'imputed' or 'vicarious'; secondly, only states are seen as capable of being complicit in each others'actions. Both the terminological issue and the limitation of indirect responsibility to relations between state actors will now be addressed briefly.

Terms such as 'indirect responsibility'[210] or 'semi-direct responsibility'[211] have been used to describe the responsibility of states for violations of international humanitarian law carried out by private armed groups. It is, however, questionable whether either concept is needed to describe the effect of common article 1 of the Geneva Conventions which requires that states parties "respect and ensure respect" for the obligations under the Convention.[212] Likewise, the concept of 'indirect horizontal effect' has been suggested for the responsibility of a state for human rights violations by non-state actors.[213] Again, what is meant by that concept is not necessarily different from the established rules of state responsibility and, in fact, would seem to correspond to the more familiar concept of due diligence.[214] A further example of the use of the term 'indirect responsibility', already referred to above, is provided by the Kahan Commission's report. While the operative recommendations of the Kahan report were confined to the personal responsibility of the leaders and authorities who had been in a position to prevent the atrocities from taking place, the Commission's discussion in that regard dealt largely with the indirect

209 ILC Draft Articles, commentary to art. 11, para. 11, 1975 *YBILC*, Vol. II, at 73.

210 The Commission of Inquiry into the events at the refugee camps in Beirut, *Final Report* 1983, XXII ILM (1983), 473–520 (The Kahan Report), at 26–29. See also L.C.Green, 'Superior Orders and Command Responsibility', XXVII *Can.YBIL* (1989), 163–202, at 200–201.

211 Tihomir Kamenov, 'The origin of state and entity responsibility for violations of international humanitarian law in armed conflicts', in Frits Kalshoven and Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, Martinus Nijhoff Publishers, 1989, 169–227, at 180 *et seq.*

212 Marco Sassòli, 'State responsibility for violations of international humanitarian law', 84 *IRRC* (2002), 401–434, at 412.

213 Silvia Danailov, 'The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations', Geneva. October 1998, at 27, available at http://www.humanrights.ch.

214 Condorelli, *supra* note 61, at 149–153.

responsibility of the state of Israel.[215] Apart from several references to customary law, obligations applying to 'every civilized nation', or to the possible applicability of the rules of belligerent occupation, which require the occupying power to take all feasible measures to ensure the well-being of the population, the essential basis for indirect responsibility was discussed in terms of the foreseeability of what happened and the failure to take any preventive measures.

The Kahan Commission's report refrained from presenting the legal foundation for such indirect responsibility, and its argumentation provides a basis for several interpretations concerning individual responsibility, some of which have already been referred to.[216] The report could also give rise to considerations of due diligence, provided that there was, on the basis of the Geneva Conventions or other rules of belligerent occupation, an obligation on the Israeli government to take action to prevent the harm done to the civilians by the Phalangist forces. Referring to the failure of the authorities to examine the situation in the camps, and to give the appropriate orders, the report concluded: "Herein lies the basis for imputing indirect responsibility to these persons who [...] did not fulfill the obligations placed on them".[217] According to this interpretation, the term 'indirect responsibility' would be equivalent to the responsibility a state incurs for violations of IHL and human rights, not because of its own involvement in violations of private rights but by reason of its lack of due diligence in preventing such violations.[218] In all three cases discussed above, the term 'indirect responsibility' has been used in the sense of state responsibility for the failure to prevent atrocities. It has also been used in this sense to describe the responsibility based on a breach of an obligation not to tolerate terrorist activities directed against other states. Thus, according to Higgins, "Connivance in, or failure to control, such non-state action [...] engages the indirect responsibility of the State, and is subsumed under 'state terrorism'".[219]

215 Becker, *supra* note 79, at 314, has been of the view that the Commission's findings were used "as a basis for establishing some measure of State responsibility".

216 See Chapter 4.4.

217 The Kahan Report, *supra* note 210, at 29.

218 See the *Velasquez-Rodriguez* case, Inter-American Court of Human Rights, Decisions and Judgements, (Ser.c) No.5 (1989). See also Cançado Trindade, *supra* note 26, at 259: "At a conceptual level, it is surely difficult not to admit the occurrence of a crime of State in general international law, above all insofar as there is intention (fault or guilt), or tolerance, acquiescence, negligence or omission, on the part of the State in relation to grave violations of human rights and of international humanitarian law perpetrated by its agents, in pursuance of state policy".

219 Rosalyn Higgins, 'The General International Law of Terrorism', in Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 13-29, at 27.

The 'anomaly of imputed responsibility', namely that the attribution of a wrongful act and the responsibility for that act are separated, has recently been discussed in the context of the ILC work on the responsibility of international organisations.[220] Notably, the ILC Draft Articles defend an analogous application of article 16 of the ILC Articles on State Responsibility to international organisations[221] – interestingly in light of the 1973 ILC Commentary cited above, which held that complicity in the sense of state responsibility could only apply to relations between states. Article 16 reads as follows:

> A state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) that act would be internationally wrongful if committed by that State.

It has further been held that article 16 reflects a general principle which can be applied not only to states but also to other subjects of international law, as well as to non-state entities that are not subjects of international law.[222] In view of the terrorist attacks of September 2001, it has thus been submitted that article 16 might provide a model for addressing complicity between a state and a non-state actor if the non-state actor is capable of launching an armed attack against a state.[223] A given action of a non-state actor could thus be attributable to a state – or to an international organisation – on three conditions: 1) it deliberately created a situation that was a necessary precondition for the wrongful action 2) the action was foreseeable ("not beyond reasonable probability") and 3) the action constituted a breach of international law.[224] Such an extension of the scope of application of article 16 would seem to get some support from the *Genocide* Judgement which refers

220 Gaja's Third Report, *supra* note 37, paras. 12 and 13 at 4–5. See also Responsibility of international organizations: comments and observations received from international organizations, UN Doc. A/CN.4/545 of 25 June 2004 and Stefan Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 405–421.

221 Gaja's Third Report, *supra* note 37, para. 26, at 10 and art. 12 at 18.

222 Rüdiger Wolfrum, 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', 7 *Max Planck UNYB* (2003), 1–70, at 33.

223 Rüdiger Wolfrum and Christine E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 6 *Max Planck UNYB* (2002), 559–597, at 592.

224 *Ibid*., at 34.

to article 16 when considering the question of possible complicity between the FRY and the Republika Srpska, that is, between a state and a non-state entity.[225]

In sum, the concept of 'indirect responsibility' as applied to state responsibility for terrorist acts would exclude situations where terrorist groups or persons involved in terrorism act under the direction and control of the state, or where the state approves of and adopts their acts as its own. The focus in Part III will be on the more typical – and indirect – forms of acquiescence or toleration of terrorist acts, or conduct carried out in the absence or due to the default of the official authorities (the 'failed state' situation).[226] While the first two situations deal with direct responsibility of the state in the sense that governmental authority is exercised to carry out terrorist acts, the latter two provide a point of departure for considering 'less direct' – or more 'indirect' – situations of state involvement in and responsibility for or in relation to terrorist acts, also extending to a lack of adequate control and a failure to take measures against terrorism. The relationship between the state and private individuals or groups involved in terrorist acts would in these latter situations be characterised by benign tolerance or indifference on the part of the state rather than by effective control.[227] Such 'indirect' forms of interaction would nevertheless be legally relevant in view of the obligation not to tolerate terrorist activities.[228]

225 *Genocide* Judgement, para. 420: "Although this provision, because it concerns a situation characterized by a relationship between two States, is not directly relevant to the present case, it nevertheless merits consideration. The Court sees no reason to make any distinction of substance between "complicity in genocide within the meaning of Article III, paragraph (e), of the Convention, and the "aid or assistance" of a State in the commission of a wrongful act by another State within the meaning of [...] Article 16 [...]".

226 Articles on State Responsibility, art. 9, Crawford, *supra* note 8, at 114–115. The distinction between public and private spheres has been challenged in situations where the state is failing or weak, and where terrorist groups have permanent structures and are resourceful and capable of long term planning.

227 Becker, *supra* note 79, at 272, has regarded "the failure to account for the complex nature of the interaction between the State and non-State terrorist actor" as the "central conceptual weakness of the traditional responsibility theories". See also Chapter 9.2.1.

228 As has been pointed out by Crook and Bodansky, state responsibility for terrorist activities is more likely to arise from the operation of primary rules than from the rules of attribution. See Crook and Bodansky, *supra* note 115, at 784.

CONCLUSIONS OF PART II

A common feature of the legal concepts and doctrines discussed in Chapters 3 and 4 is that they have been used to address collective or systemic crime in which the responsibility lies not only on the direct perpetrators but also on the collective, often a state. The task of criminal law in such situations is to provide a way to link a plurality of persons to a specific crime and to allocate responsibility between them. The main advantage that the specific concepts of conspiracy, criminal organisations, superior responsibility, joint criminal enterprise and 'perpetration by means' provide is that they reach inactive participants who were removed from the place of the immediate perpetration. Incitement and conspiracy, if understood as inchoate crimes provide the additional advantage of making possible early intervention in the preparation of a crime and thus of reaching to the time before its actual commission or attempted commission. A further technique – that of non-differentiation – also serves prevention by helping to ensure, for instance, that all expressions of a genocidal intent are punished. At the same time, non-differentiation between minor and major contributions to genocide extends the stigma of an accomplished crime to all acts related to it. Another example of non-differentiation is provided by the UN Convention on Narcotic Drugs, in which no distinction is made between different categories of narcotic substances, or between an attempted and a completed offence.[1]

The principal concepts of extended responsibility can be summarised as follows:

1 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances, 19 December, 1988, UN Doc.E/CONF.82/15 Corr.1 and Corr.2. , art. 3(a)v. It also provides early examples of criminalisation of 'promotion' and 'financing' of drug crimes. See Kimmo Nuotio, 'Transforming International Law and Obligations into Finnish Criminal Legislation – Dragon's Eggs and Criminal Law Irritants', X *FYBIL* (1999), 325–350, at 331.

Conspiracy: the thrust of the crime of conspiracy is in the agreement to bring about a criminal outcome. Its advantage from the criminal policy point of view is that it enables the criminal justice system to intervene before the underlying crime takes place. Conspiracy also creates a basis for criminal responsibility for the acts of another: all those who take part in the agreement are responsible both for the agreement and for its eventual consequences.

Criminal organisations: the purpose of the notion of criminal organisation in the IMT Charter was to facilitate the prosecution of great numbers of members of organisations declared criminal without specifically examining the criminal nature of the activities in which the accused was involved.

Superior responsibility: command responsibility is characterised by the exceptionally low standard of knowledge, apparent in the formulations "knew of the commission of crimes or possessed information which should have enabled him to conclude" and "knew or had reason to know" that crimes were committed. According to the modern interpretation, superior responsibility is applicable to civilian superiors and to situations of de facto control. The ICTY has ruled that not only completed crimes but also various forms of participation give rise to superior responsibility.

Joint criminal enterprise has been divided into basic, systemic and extended forms, which are all applicable to situations where a plurality of persons sharing a common criminal purpose participates in a criminal plan or design. The extended form of JCE requires both intent to pursue the common criminal design and foresight that additional (incidental) crimes outside the criminal common purpose are likely to be committed. The criminal liability of a participant in a JCE III can be described in terms of conscious risk-taking, which excludes mere negligence.

Incitement as an inchoate offence: the Nuremberg case law seems to have implied that criminal incitement must at least contain a direct call for criminal action. The 1948 Genocide Convention left open the question of whether the incitement should also be successful in terms of leading to genocide or whether completed incitement would be a distinct offence. On the basis of the ICTR jurisprudence, it can be concluded that incitement to commit genocide is an inchoate crime; i.e. it does not require that genocide really occurs.

Perpetration by means (indirect perpetration): the concept of perpetration by means has been introduced in the Rome Statute. It applies to situations in which the direct perpetrators carry out crimes that have been conceived or ordered by the indirect

perpetrator. It requires total domination over the direct perpetrator so that the acts perpetrated can be attributed to the indirect perpetrator as if they were his or her own. It has been suggested that the domination could also be carried out through a hierarchical organisational structure. The cognitive requirements of perpetration by means are considerably tighter than those in the extended form of JCE or in superior responsibility as the indirect perpetrator needs to display full intent.

The common purpose crime: the common purpose provision in the Rome Statute, article 25(3)(d) can be described as a special form of complicity applicable to group crime. A special feature of the provision, which is commonly used in the most recent anti-terrorist instruments, is that the criminal responsibility is heavily dependent on the guilty mind while the material act has been left completely undefined. The first variant requires an intentional contribution made in the knowledge of the group's criminal objectives, the second an intentional contribution made with the aim of furthering the criminal objectives of the group. The formulation has elements in common with the basic and systemic forms of the joint criminal enterprise, but does not seem to cover its extended form.

The status and acceptance of these concepts and techniques does not provide a homogenous picture. The concept of criminal organisations has long been discredited as an example of 'guilt by association', even though it has resurged in the areas of transnational organised crime and, to some extent, terrorism. Conspiracy has still not been universally accepted and JCE remains a contested concept. The search for the 'proper limits' of joint criminal enterprise continues actively, also within the ad hoc tribunals themselves. The more remote the link of a person to the actual commission of the crime, it has been acknowledged, the greater the risk of exceeding the limits of legality. The applicability of the extended form of joint criminal enterprise to system-wide crime has been doubted also because of the nature of such crimes. JCE III, like conspiracy, has its basis in an agreement of at least a tacit nature, whereas large and complex crimes may frequently be committed by anonymous bureaucracies. The ICC Statute – as another modern interpretation of the Nuremberg legacy – has prompted considerable interest in the scholarly discussion. German and Dutch scholars, in particular, have drawn attention to the concept of 'perpetration by means' and to its similarity with the national law concepts of *Organisationsherrschaft* and 'functional responsibility' and claimed that it could better serve the purposes of legality.[2] Furthermore, it has been argued that it would reflect the compartmentalised and fragmented nature of information within collectivities that commit systemic crimes and therefore suit

2 Chapter 4.

crimes in which states are involved or in which the participants do not have much contact with each other.[3] At the same time, as Judge Meron recently pointed out, "Whatever the merits of the overall doctrine of JCE, it is now firmly embedded in [the ICTY's] jurisprudence".[4]

The search for the proper limits of the concept of joint criminal enterprise provides a model of how to address collective crime, including networks of terrorism. The criticism against the third category of JCE directed at the method of creating new modes of liability – judicial law-making and its effect on the principle of *nullum crimen sine lege* – is not relevant to the new anti-terrorist criminalisations, which have been created as new international crimes through conventional methods of international law-making. What these pro-active criminalisations nonetheless have in common with the JCE is the factual broadening of responsibility based either on conscious risk-taking or specific intention as an ulterior motive. The most relevant criticisms in this respect are those related to 1) the insufficient elaboration of the link between the accused and the specific crimes, resting primarily on a shared purpose/criminal intention and 2) the potential for encroaching on the established criminal law concepts, as has been evident from the discussion concerning the aiding or abetting of JCE.

The specific features of the core crimes which have given rise to particular legal policy requirements, as discussed earlier, include the scale of the crimes and their special degree of atrocity or seriousness. The collective character of genocide, crimes against humanity and war crimes is a further notable feature, one not unrelated to the capacity or potential of such crimes to affect the entire society. Insofar as the collective character is an expression of a state policy or involvement, the exceptional scale of the crimes is a consequence of that involvement, and of the use of the resources and the executive machinery of the state for criminal purposes. The specific features of the international criminal law also provide a point of departure for reassessing the relationship between individual criminal responsibility and state responsibility with a view to identifying common features or underlying currents in the two regimes.

State involvement is a recurrent feature of the most serious international crimes. State involvement in such crimes also gives rise to state responsibility – alongside the criminal responsibility of the perpetrators, irrespective of their official position – as long as the perpetrators are organs or officials of the state. To that

3 Chapter 4. Reference can be made, for instance, to the contributions of Kai Ambos, Elies van Sliedregt, Harmen van der Wilt and, in general, the discussion in the Leiden Journal of International Law and in the Journal of International Criminal Justice.

4 *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Judgement of 3 April 2007, Separate Declaration of Judge Meron, para. 4.

extent, and within the limits identified by the ICJ in the *Arrest Warrant* case, it can be said that the two regimes of responsibility in current international law are genuinely complementary. State involvement of a more subtle kind in collective crime – encouragement, instigation, promotion, facilitation, creation of opportunities or giving rise to a criminogenic situation and atmosphere – presents a more complicated configuration, as is clear from the *Genocide* case. While president Milošević was indicted for participation in a joint criminal enterprise to commit genocide in Srebrenica,[5] Serbia was not found to have even aided and abetted in the genocide. The government in Belgrade was nevertheless found to be in breach of the obligation to prevent genocide and to co-operate in the prosecution and punishment of the perpetrators.

The International Court of Justice based its reasoning on the same facts and the same evidence as the ICTY had earlier, making use of its relevant proceedings. While this could be taken as an example of a slow erosion of 'compartmentalisation' in enforcement, each court and tribunal comes to its conclusions independently. The Court's decision that Serbia had violated its obligation to prevent genocide, notably by non-cooperation with the ICTY, was welcomed by many as support for the International Criminal Tribunal. At the same time, the conclusion that there was not sufficient evidence of Belgrade's direct involvement in the events of Srebrenica was not without potential to affect criminal proceedings in the future. Some commentators pointed out that the judgement would have made it impossible to convict president Milošević of genocide, had the proceedings in his case not already been terminated.[6] The question of how the thresholds for establishing state responsibility and individual criminal responsibility for the same conduct relate to each other is thus not without practical relevance in the case of the criminal responsibility of high political and military leaders. The threshold for direct responsibility is also high when compared to superior responsiblity, which, according to the boldest interpretations, could extend even to situations where the actual perpetrators were not only uncontrolled but also unknown. While the search for more realistic models of attribution in state responsibility is likely to continue, the responsibility for violating due diligence obligations provides a fea-

5 *Prosecutor v. Slobodan Milošević*, Case No. IT-01-51-I, Initial Indictment of 22 November 2001, para. 32.

6 According to Goldstone and Hamilton, the case also raises doubts "as to whether, in practice, a state will ever be held responsible for genocide outside the parameters of the prior convictions of individual perpetrators". Richard J. Goldstone and Rebecca J. Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *LJIL* (2008), 95–112.

sible alternative for holding states accountable for their indirect contribution to international crimes.

Part III

Indirect Responsibility for Terrorist Acts

CHAPTER 6 THE CRIMINALISATION OF TERRORIST FINANCING

6.1. The Role of the Terrorist Financing Convention

The International Convention for the Suppression of the Financing of Terrorism was adopted in New York on 9 December 1999, just one year after France had informally submitted the first proposal,[1] and following four weeks of negotiations that began in March 1999[2] and were completed in September 1999.[3] The Convention was adopted by consensus, but two years later, in September 2001 only 43 states had signed the Convention and four had ratified it.[4] As is well known, this relative lack of enthusiasm on the part of states to adhere to the Convention was to change quickly after the terrorist attacks of 11 September 2001: the international community of states turned its attention to the threat of terrorism and the expeditious ratification of the Convention was made one of the top priorities in the fight against terrorism. Most notably, UN Security Council Resolution 1373(2001) required, using the language of the Convention in a slightly modified version,

---

1 UN Doc. A/C.C.6/53/9, 4 November 1998.

2 The negotiations began in the Ad Hoc Committee established by resolution 51/210 in accordance with a decision taken by the UNGA in 1998, see A/RES/53/108, para. 12. For the establishment of the Ad Hoc Committee, see Chapter 1.1. The Committee held its session from 15 to 26 March 1999; see UN GAOR 54th session, Supplement No. 37 (A/54/37) (March Report).

3 The negotiations continued in the working group of the Sixth Committee of the UNGA from 27 September to 8 October 1999. For the Report of the working group, see UNGA, 54th session, Sixth Committee, Agenda Item 160, Measures to Eliminate International Terrorism, UN Doc. A/C.6/54/L.2 (September Report). The Convention was adopted on 9 December 1999; International Convention for the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229.

4 The Convention was opened for signature on 10 January 2000. By September 2001, it had been ratified by Botswana, Sri Lanka, Uzbekistan and the United Kingdom.

all states to criminalise "the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that they should be used or in the knowledge that they are to be used in order to carry out terrorist acts".[5] Subsequently, when adopting eight special recommendations on terrorist financing, the Financial Action Task Force (FATF) identified the criminalisation of the financing of terrorism on the basis of the 1999 Convention as among the priority measures to be taken by national governments.[6]

The ratification process that ensued was an exceptionally expeditious one. While it can be assumed that the different aspects of the Convention were thoroughly analysed and considered in relation to the requirements of the various national legal systems, legal commentaries were few, and the new features of the Convention did not draw much attention in the academic world, either.[7] Most often, the Terrorist Financing Convention is mentioned as another sectoral convention.[8] Practical guidelines were elaborated by the UN Office on Drugs and

5 UN Doc. S/RES/1373(2001), para. 1(b).

6 The FATF is a highly influential expert organisation attached to the Organization for Economic Cooperation and Development, OECD. Special Recommendation I urged all states to take immediate steps to ratify and fully implement the Terrorist Financing Convention. The purpose of Special Recommendation II concerning the criminalisation of the financing of terrorism and associated money laundering was to "reiterate and reinforce the criminalization standard as set forth in the Terrorist Financing Convention, in particular article 2". See Interpretative Note to Special Recommendation II, para. 1 and footnote 1. The FATF has since then, in October 2004, adopted one additional Special Recommendation concerning the financing of terrorism. All special recommendations and interpretative notes are available at the website of the FATF, http://www.oecd.org/fatf/TerFinance_en.html.

7 Among the few analyses of the Convention thus far, see Anthony Aust, 'Counter Terrorism – A New Approach: The International Convention for the Suppression of the Financing of Terrorism', 5 *Max Planck UNYB* (2001), 285–306 and Roberto Lavalle, 'The International Convention for the Suppression of the Financing of Terrorism', 60 *ZaöRV* (2000). Some authors have briefly referred to the Convention with a critical interest: see Monica Serrano, 'The Political Economy of Terrorism', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 198–218; Erling Johannes Husabø, 'Strafferetten og kampen mot terrorismen', 91 *Nordisk Tidsskrift for Kriminalvidenskab* (2004), 180–193; Mark Pieth, 'Criminalizing the Financing of Terrorism', 5 *JICJ* (2006), 1074–1086.

8 See for instance Jean-Marc Sorel, 'Some Questions About the Definition of Terrorism and the Fight Against Its Financing', 14 *EJIL* (2003), 365–378, at 372–373: "So the Convention must be considered as a framework convention which is to be added to the 'collection' of existing conventions on terrorism." For a similar view, see Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2005, at 24, and Robert Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart

Crime (UNOCD) and the FATF on how to introduce the provisions of the Convention into national law,[9] but as expressions of the strong interest on the part of the international community after September 2001 in the full implementation of the Convention, they do not shed much light on the inherent tensions in the Convention or raise questions about how its terms should be interpreted.[10] The reasons for the relative scarcity of analytical or critical interest can be put forward only tentatively. Apart from the sense of urgency created by the new international obligations that states tried to fulfil by ratifying the Convention and the emerging international consensus of the instrumental role of the Convention in the fight against terrorism, other reasons can be identified. To begin with, reference can be made to the sheer number of new legal questions related to the anti-terrorist measures adopted by governments or by international organisations after September 2001, not least those related to counter-terrorism and human rights, which have occupied both governments and scholars. If terrorism was an uninteresting subject

Publishing, 2004, 227-281, at 229–231. See, however, Andrea Gioia, 'The UN Conventions on the Prevention and Suppression of International Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 3–23, at 11. It is also telling that a collection of articles published in 2002 on the financing of terrorism reproduced the entire text of the Convention in the documentary annex but contained only a passing reference to the Convention in one article. See Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002.

9 Cf. United Nations Office on Drugs and Crime,' Legislative Guide to the Universal Anti-terrorism Conventions and Protocols' and 'Check Lists for the 12 Universal Anti-Terrorism Conventions', both available at the *UNOCD website* See also FATF, Interpretative Note to Special Recommendation II, http://www.oecd.org/fatf/TerFinance_en.html. The CTC has interpreted the Convention in the context of the ongoing dialogue with states concerning the implementation of UNSCR 1373; see for instance Walter Gehr, 'Recurrent Issues', Briefing for member States on 4 April, 2002, available at www.un.org/Docs/sc/committees/1373/rc.htm.

10 The same is true for many scholarly contributions which focus on the effective enforcement of international obligations to suppress the financing of terrorism. See Mark Kantor, 'Effective Enforcement of International Obligations to Suppress the Financing of Terror', The American Society of International Law Task Force on Terrorism, ASIL Task Force Papers, September 2002, http://www.asil.org ; Luca G. Radicati di Brozolo and Mauro Megliani, 'Freezing the Assets of International Terrorist Organisations', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 377–413 and Anna Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation', in Bianchi (ed.), *op.cit.*, 415–452, as well as Kevin E. Davis, 'The Financial War on Terrorism', in Victor V. Ramraj, Michael Hor and Kent Roach, *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005, 179–198.

in international law before 2001, the situation has clearly changed and now features a superabundance of meaningful topics.

Moreover, reference can be made to the background of the Convention and to the nature of the negotiation process. As mentioned, the negotiations were completed in a very short time and the reports show a clear focus on a limited number of questions during the two rounds of discussions. A particular feature of anti-terrorist conventions, whether universal or regional, is that they have been negotiated in a fairly closed inter-governmental setting, with fewer participants and clearly less attention from the NGO community than many other recent multilateral conventions in the fields of international criminal law,[11] international humanitarian law,[12] or in the area of international environmental law.[13] As the Terrorist Financing Convention was the twelfth in the succession of anti-terrorist conventions and protocols elaborated under the auspices of the UN, and the third such instrument to be elaborated in the Sixth Committee since 1996, it may seem natural enough that it did not provoke an extensive debate. Compared to the Rome Statute of the ICC with its more than 120 articles, the Financing Convention is a lean instrument, and most of its provisions have been reproduced as such or with minor amendments from earlier anti-terrorist conventions. There was an established tradition since the 1970s on how to draft anti-terrorist instruments, the expertise was beginning to concentrate in the UN Sixth Committee in the late 1990s and open questions were few. In this particular case, however, appearances may be deceiving, for the Terrorist Financing Convention is in fact a radically different instrument which breaks new ground with regard to not only the obligations of states but also, in particular, questions of individual criminal responsibility.

All the earlier anti-terrorist criminal law conventions, however their scope of application is defined, address terrorism as violent crime.[14] While those instruments may occasionally include certain non-violent offences, such as the communication of false information under the 1988 SUA Convention,[15] their main focus is on countering violent acts and the specific methods that terrorist groups usu-

11 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544.

12 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, UNTS Vol. 2056, p. 211.

13 Kyoto Protocol to the United Nations Convention on Climate Change, 11 December 1997, FCCC/CP/1997/L.7/Add.1, 37 ILM (1998), at 22 *et seq.*

14 The 1991 Convention on the Marking of Plastic Explosives is not a criminal law convention.

15 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, UNTS No. 29004 (SUA Convention), art. 3 (1)(f).

ally resort to. The Financing Convention, in marked contrast to the other UN anti-terrorist instruments, deals with financial transactions and provision of material support in the broad entourage of terrorist groups. Such transactions may include donations to charities, the use of shell companies and otherwise legitimate businesses, as well as the use of proceeds from organised crime, and can extend to any sector of society.[16] The specific features of the crime of terrorist financing include that the act of financing as such does not cause injury or serious damage to any person or property, or the environment. Furthermore, the actus reus of the financing crime is not necessarily illegal or in breach of the normal social rules of behaviour. Accordingly, there is for that reason no inherent stigma associated with financing, and the unlawfulness of terrorist financing is not readily apparent to the public. In this regard, and using a terminology with which Naylor has described different forms of organised crime, it can be said that the earlier anti-terrorist conventions deal with 'predatory crime', while terrorist financing is comparable to 'market-based crimes'.[17] Like the latter, terrorist financing is a victimless and apparently innocuous act which comes close to and may be difficult to distinguish from perfectly legal activities.[18] When dealing with crimes that fall outside the predatory category, "the issues are far more complex, the morality is fuzzier, the victims are harder to define, and the anti-social consequences are much more subject to debate".[19]

The construction of terrorist financing as a specific crime was unique at the time the Convention was adopted and raised contentious questions during the negotiations. A salient feature in the definition of the crime is that terrorist financing is not a self-standing offence but is defined with reference to other instruments that are listed in the Annex to the Convention. An act of financing thus becomes terrorist when it is carried out with the intention or in the knowledge that the funds will be used to commit one or more of the listed offences. Other examples

16 The diversity of the sources and methods of terrorist financing has been emphasized by Kurt Eichenwald, 'Terror Money Hard to Block, Officials Find', *New York Times*, 12/10/2001 and Kantor, *supra* note 10.

17 R.T. Naylor, 'Predators, Parasites, or Free-Market Pioneers: Reflections on the Nature and Analysis of Profit-Driven Crime', in Margaret E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, 2003, 35–53 (Naylor 2003a), at 36. Naylor has distinguished three different types of profit-driven cime: 'predatory', 'market-based' and 'commercial'. While this typology is not applicable as such to terrorist crimes, the distinction between the predatory form and the two other forms of criminality corresponds roughly to the distinction between violent terrorist crimes and non-violent financing.

18 *Ibid*.

19 *Ibid*.

of crimes so construed, and dependent on other crimes, include money-laundering which is defined with reference to a number of predicate crimes, and transnational organised criminality, which, according to the UN Convention against Transnational Organized Crime, may cover different types of crimes provided that they meet certain criteria and are serious enough in terms of the punishment prescribed in national law.[20] Terrorist financing has often been described as 'money-laundering in reverse': while money-laundering consists of channelling illegitimate funds to legal businesses, terrorist financing covers situations where legal funds are diverted for terrorist purposes.[21] As a matter of fact, it is irrelevant for the purposes of the criminalisation, whether the funds provided for terrorist purposes in accordance with the definition of the crime have been obtained by legal or illegal means. What is decisive for the criminal nature of the conduct, according to the definition of the crime, is the mental element – the intent or knowledge – of the perpetrator. The act of financing must be intentional in the sense that the aim of the financier is to make the funds available to the recipient. At the same time, he or she must intend that they should be used for committing terrorist crimes or at least be aware that they are to be so used. It would, however, be wrong to interpret this standard as requiring knowledge of any specific crimes to be committed. The focus of the Convention is broadly preventive, and it has been designed to effectively cut off the financial flows in a network of terrorist financing that, unlike in the past, is not dependent on state sponsorship but has become privatised and "far more diffuse [...] than any faced" so far.[22]

It will be claimed below that it is possible to speak of a distinct 'model of the Terrorist Financing Convention' (TFC model). This construct is justified not only because of the specific features of the definition of the crime and because the Financing Convention breaks new ground compared to the earlier UN Conventions and Protocols related to acts of terrorism, but also in view of subsequent developments. The innovative construction of the crime has since been repeated and modified in other anti-terrorist instruments, such as the 2005 Protocol to the SUA Convention and the 2005 Council of Europe Convention on the Prevention of Terrorism, which both have a preventive focus and address vari-

20 United Nations Convention against Transnational Organized Crime, 15 November 2000, UN Doc. A/55/383, art. 3(2).

21 As Gehr, *supra* note 9, at 2, has pointed out, "The difference between money laundering and the financing of terrorism is that moneys used to fund terrorist activities are not necessarily illegal".

22 Eichenwald, *supra* note 16, at 2: "Mr. Bin Laden has fundamentally changed the nature of terrorist financing. In effect, at a time when state sponsorship for terrorism was in decline, Mr. Bin Laden undertook a privatization of terror, creating a far more diffuse network than any faced in the past".

ous forms of activities preparatory to terrorist attacks. The 2002 EU Framework Decision on combating terrorism may be seen as another breakthrough rather than an instrument drafted along the lines of the Financing Convention, but it is nevertheless an interesting point of reference as it, too, significantly broadens the scope of anti-terrorist criminalisations. Moreover, it contains certain provisions that are sufficiently similar to the 'model' to be discussed in the same context. These three subsequent instruments will be examined in Chapter 7.

6.2. Analysis of the Terrorist Financing Convention

6.2.1. The Criminal Acts under the Convention

Article 2, paragraph 1, of the Terrorist Financing Convention which defines the principal act, consists of three elements, namely the chapeau and subparagraphs (a) and (b):

> 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the Annex; or
>
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The Annex mentioned in subparagraph 1(a) enumerates nine earlier UN anti-terrorist conventions and protocols, namely the two conventions and one protocol related to unlawful acts against the safety of international civil aviation and against airports serving international civil aviation, the Hostages Convention, the Convention on the Physical Protection of Nuclear Material, the SUA treaties, and the Terrorist Bombings Convention.[23]

23 Convention for the Suppression of Unlawful Seizure of Aircraft, done at the Hague on 16 December 1970, UNTS Vol. 860, No. 12325; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September

Furthermore, the definitions in article 1 are to be read together and have a bearing on the definition of the crime. According to article 1,

> For the purposes of this Convention:
> 1. Funds means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

The other terms defined in article 1 – "a state or government facility" and "proceeds" – do not affect the essence of the crime. Article 3 on the 'international element', which excludes the application of the Convention (except for mutual legal assistance and cooperation to prevent the offences) to offences that do not involve more than one state is of importance for the scope of the obligations of states, but not for the criminalisation.[24] A specific feature of the Convention is that it also

1971, UNTS Vol. 974, No. 14118; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the UN General Assembly on 14 December 1973, UNTS Vol. 1316, p. 205; International Convention against the Taking of Hostages, adopted by the UN General Assembly on 17 December 1979, UNTS Vol. 1316, p. 205; Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980, UNTS Vol. 1456, No. 24631; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988, ICAO Doc. 9518; SUA Convention; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988, UNTS Vol. 1678, p. 294; International Convention for the Suppression of Terrorist Bombings, adopted on 15 December 1997, UNTS Vol. 2149, p. 256. For the criminalisations under these instruments, see Chapter 1.1.

24 As art. 3 is formulated, it could be interpreted to exclude also the obligation to criminalise terrorist funding within one state, as it severs only arts. 12 to 18, but this can not be taken as a reasonable interpretation of the intent of the drafters. The same issue was discussed in the context of the Council of Europe Convention on the Prevention of Terrorism and clarified in the Explanatory Report as follows: "This provision does not modify the regime established by the Convention, particularly insofar as the establishment of criminal offences [is concerned]. Neither does it exclude or limit the possibility for States parties to criminalise the acts provided for in the Convention, even when the conditions of this Article are met, i.e. when only 'national' elements are present." Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, CETS

applies to the liability of legal entities, which may be criminal, civil or administrative in nature.[25]

The material act in the crime of terrorist financing covers the collection as well as the provision of funds. It does not, however, extend to the possession of funds even though possession may under some circumstances qualify as complicity in terrorist financing. Although the reception of funds is not included either, the definition is intended to cover long and complex chains of financing, provided that the intermediaries transfer the funds further for terrorist purposes.[26] The list of items in the definition of funds is illustrative and not intended to exclude any item of pecuniary value. It also extends to "assets of every kind, whether tangible or intangible", a definition which goes beyond the ordinary meaning of 'funds' and, as Lavalle has noted, comes close to 'material assistance'.[27] There are no requirements concerning the provenance of the funds: they can be either criminally acquired or lawful, and come from any private or public source. The broad definition of the funds that can be involved in such transactions further extends the scope of the crime, but does not help to draw the line between criminal and legal financing. The mental element – that the perpetrator acts knowingly or intentionally – therefore plays a central role in the definition of the crime, and is, in fact, constitutive of its criminal nature.

The mental element of terrorist financing has been defined carefully, and consists of several components: the chapeau of article 2, paragraph 1, subparagraphs 1(a) and (b), paragraph 3, and the Annex. According to the chapeau, the perpetrator must have a specific intent that the funds will be used to commit crimes, or he or she must at least know that the funds are to be so used. The addition of subparagraph 1(a) and the Annex to the chapeau means that the construction of the crime is not self-sufficient but relies on other instruments. The significance of the Annex is further underlined by paragraph 2 of article 2, according to which a state which is not a party to one or more of the treaties listed in the Annex may declare that, in the application of the Convention to it, the treaty is deemed not to be included in the Annex. The purpose of this provision was to leave it to each state party to decide whether it wished to criminalise the financing of a certain terrorist crime even if it was not a party to the relevant instrument prescribing the criminalisation of the underlying crime. A state not party to, for instance, the Hostages

196, available at http://www.coe.int./gmt , commentary to art. 16, paras. 181 and 182, at 21.

25 Art. 5. See also Aust, *supra* note 7, at 301–303.

26 September Report, Annex III, Informal Summary of the discussions in the Working Group, prepared by the Chairman, para. 38 at 55.

27 Lavalle, *supra* note 7, at 496–497.

Convention, can thus declare that it is not under the obligation to criminalise the financing of hostage-taking.

The provision may give the impression that the connection between the act of financing and any subsequent terrorist act is closer than the Financing Convention actually requires, suggesting that the financier must know about a specific crime that his or her financial contribution will facilitate, or at least be able to identify the type of crime that is being planned. The first-mentioned situation would be equivalent to complicity, provided that the principal crime is actually committed. As an independent crime, terrorist financing covers both complicity-like situations, where the financier knows of the intention of the recipient to use the funds to commit a specific crime, and situations where the financier only knows that the funds he or she has provided or collected will be used to commit some of the offences referred to in subparagraph 1(a). The actual coverage of article 2 is even broader and includes situations where no crimes are committed as a result of the act of financing. According to paragraph 3,

> 3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).

Paragraph 3 is a clarification: what it states explicitly can also be inferred from the definition of the crime. It was pointed out during the negotiations that it would be impossible in practice to prove that a specific amount of money has been used to commit a specific crime as complete financial paper trails are mostly not available or non-existent.[28] According to another practical argument, mounting terrorist attacks is normally not very costly; rather, most of the 'terrorist expenditure' goes to the long-term preparation of terrorist acts, procurement of safe houses or false identity papers, maintaining or training of terrorist networks, and other such activities that are not directly related to any specific attack.[29]

28 According to Aust, *supra* note 7, at 296–297, "Whereas it can be possible to trace the supplier of a physical object used in a terrorist attack, such as a gun, given the secrecy with which attacks are planned it would be virtually impossible to prove that a *particular* sum of money had been used to finance a *particular* attack or even a *particular category* of terrorist act" (original emphasis). Kantor, *supra* note 10, at 3, is among those who have drawn attention to the diversification of the methods of moving money, including the emergence of trust-based money transfer systems, growth of bearer instruments in the capital and commodities markets as well as the use of portable commodities such as diamonds and gold instead of diret money transfers.

29 Kantor, *supra* note 10, at 1–2; also pointed out by Jonathan M. Winer, 'Globalization, Terrorist Finance, and Global Conflict – Time for a White List?', in Mark Pieth (ed.),

Acknowledgement of this situation is also reflected in the chapeau of paragraph 1, according to which the funds are to be used "in full or in part" for the commission of terrorist offences. More importantly, however, the practical arguments made it easier to accept a construction for the crime in which no objective or material causality between the act of financing and subsequent terrorist acts needs to be proved, and the connection between the two offences is entirely created by the intention or knowledge of the financier. Taking into account this broad conception of the financing crime, it would be accurate to speak of collection or provision of funds for 'terrorist purposes' or for 'terrorist activities' even though such purposes or activities have not been defined in the Convention.[30] Article 2 thus also covers funding of the preparation for terrorist attacks,[31] an issue that was debated during the negotiations but became moot as the broad concept of terrorist financing gained ground.

Terrorist financing comes close to an inchoate crime in the sense that – unlike the financing of a specific crime as a form of complicity – it is not dependent on the commission of a subsequent crime. While financial contributions or material assistance for the commission of a crime is normally subsumed under complicity, terrorist financing is comparable to conspiracy, which is punished as such, whether or not the principal crime actually occurs.[32] It is also comparable to the planning and ordering of the core crimes, which have sometimes been addressed as inchoate crimes, the punishability of which is not dependent on the completion of the main crimes.[33] As Cassese has noted, the most serious international crimes often require

Financing Terrorism, Kluwer Academic Publishers, 2002, 5–40, at 5. Both have assessed the total expenditure of the September 11 terrorist attacks at 500,000 – 600,000 USD. See also Charles Freeland, 'How Can Sound Customer Due Diligence Rules Help Prevent the Misuse of Financial Institutions in the Financing of Terrorism?', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 41–48, at 45, who has stressed that, at the same time, "Building and maintaining an effective terrorist organisation costs a great deal of money – in the case of Al-Qaeda hundreds of millions".

30 For a similar view, see Davis, *supra* note 10, at 182.

31 Aust, *supra* note 7, at 297.

32 The same goes for the 'direct and public incitement to genocide'. Antonio Cassese, *International Criminal Law*, Oxford University Press, 2003, at 190–191, has defined this category as the 'third type of inchoate offences', the other two being preparatory acts which, when the perpetration follows, are 'absorbed' into the actual crime, and preparatory conduct which by definition cannot be followed by the intended crime.

33 While planning and preparation are not punishable according to the the Rome Statute, it remains to be seen whether 'planning, preparation and initiation' of the crime of aggression, in accordance with the IMT Charter, will find their way into the Statute. See Gerhard Werle, *Völkerstrafrecht*, Mohn & Siebeck, 2003, at 421. See also Otto Triffterer, 'The Preventive and the Repressive Function of the International Criminal Court', in

careful preparation and concertation: "In consequence, international criminal rules aim to prevent or at least circumscribe such conduct by stigmatizing it as criminal and making it penally punishable".[34]

The enumeration of the ultimate terrorist crimes nevertheless serves an important function in the construction of the crime, as it is by virtue of these crimes that an act of financing becomes the crime of terrorist financing. More specifically, the list of anti-terrorist conventions and protocols in the Annex and the reference to "the offences within the scope and as defined in [them]" in subparagraph 1(a) create a psychological connection between the act of financing and certain violent acts that have already been established as serious crimes. The criminal nature of terrorist financing relies heavily, if not exclusively, on the guilty mind of the perpetrator. For the purpose of the personal culpability of the financier, the connection is a mental one, created by the criminal knowledge or intention. The list of specific offences referred to in the Annex gives a shape and an objective formulation to that criminal knowledge or intention in enumerating the crimes the financier is supposed to be contemplating. In that sense it restricts and defines the crime of financing and draws a line between criminal and legal activity.

At the same time, and from a different perspective, the offences referred to in subparagraphs 1 (a) and 1(b) lend some of their gravity and 'colour' to the crime of financing, which becomes as serious a crime as the actual acts of terrorism. The value judgement according to which terrorist financing is of equal gravity to actual terrorist acts was the point of departure for negotiating a new convention and has also been emphasised afterwards.[35] The structure of the Convention and the obligations laid down in it, to a large extent identical to those in the earlier anti-terrorist instruments, also point to the similarity between the crime of financing and actual terrorist crimes; this is also indicated in the provision whereby states parties must not only establish terrorist financing and the related offences defined in the Convention as criminal offences under their domestic law, but also "make those offences punishable by appropriate penalties which take into account the grave nature of the offences".[36] The message is elaborated also in the Preamble, according

Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 137–175, at 142: "The mere *planning* and *preparation* of crimes is, in general, not punishable, except in very rare cases, and may be difficult to detect. But, taking influence at such an early stage can be one of the most effective ways to prevent crimes; because no *concrete* harm has yet been done nor are specific values *directly* endangered" (original emphasis, footnote omitted).

34 Cassese, *supra* note 32, at 191.

35 See Chapter 8.2.2.

36 Terrorist Financing Convention, art. 4(2) (emphasis added).

to which "the financing of terrorism is a matter of grave concern to the international community as a whole",[37] and, in nearly causal terms, "the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain".[38] There is much reason to emphasise this point. As was noted earlier, the provision or collection of funds for terrorist purposes is not distinguishable from legal business except for the purpose of the transaction and the guilty mind of the person in question. The apparent normality of the conduct underlines the need for attaching a specific stigma to it in order to point up the social unacceptability of the new crime and to enhance awareness of the relevant prohibition. Quoting Fletcher, "The taint on terrorist activity is so strong that it arguably extends to anyone who handles money in the knowledge that it might end up in the hands of an organization labelled terrorist".[39]

Subparagraph 2(1)(b) – the generic definition of a terrorist act – serves a purpose similar to that of 1(a) but is necessary for two additional reasons. Firstly, it was needed in order to cover the financing of certain specific crimes that have not, or have not yet, been the subject of international criminal law conventions. The use of firearms, assassinations and terrorist cyber attacks were the examples most often cited in the negotiations – the scarcity of other examples reflecting the fairly comprehensive nature of the network of universal anti-terrorist conventions.[40] Secondly, it was felt that a generic definition was necessary as a safeguard against new terrorist methods or terrorist attacks directed at new kinds of targets, and that restricting the criminalisation of financing to the financing of certain specific crimes would be at odds with the broad construction of the crime. From this point of view, it is noteworthy that when relying on subparagraph 1(b) there is no need to prove the specific intention of the financier to facilitate, say, a hostage-taking or a bomb attack if it can be proved that he or she had in mind and wanted to facilitate violent crimes directed in general at the lives or health of civilians, committed with the purpose of intimidating the population or compelling a government or an inter-governmental organisation to act in a particular manner; or, that he or she supported a certain policy change, as well as forcible measures to bring it about,

37 *Ibid.*, Preamble, para. 9.

38 *Ibid.*, para. 10.

39 George P. Fletcher, 'The Indefinable Concept of Terrorism', 4 *JCIC* (2006), 894-911, at 897, commenting on the practice of anti-terrorist sanctions.

40 See also Aust, *supra* note 7, at 7–8, who has mentioned murder by shooting, bludgeoning, stabbing, strangulation, suffocating, poisoning and drowning among acts not covered by the existing conventions (insofar as the victim was not an internationally protected person, it may be added).

whether or not death and injury[41] would follow. The second subparagraph can be said to set out the minimum requirements as to the supposed end-use of the funds provided or collected by the financier. The financier does not have to know the details of any terrorist plans, nor even the type of crimes that would be committed, but, according to the terms of the chapeau, he or she must either want the contribution to be used for terrorist purposes or accept that this will be the case.

The requirement of unlawfulness in the chapeau also needs an explanation, as its inclusion was not self-evident, even though the same formulation was a standard part of the definition of crimes in earlier anti-terrorist conventions and protocols. It can, arguably, be considered an oxymoron when applied to paragraph 1 as a whole: such conduct cannot possibly be lawful in any event. Applied to the material act only, it is too restrictive, as the act of collecting or transferring funds, according to the standard understanding of the criminalisation, does not need to be illegal as such. However, it was later retained as a safeguard that could prevent the crime from extending to legal activities. Furthermore, the expression "unlawfully" may also refer to "conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual). It may also denote conduct that is not covered by established legal defences or relevant principles under domestic law".[42]

Finally, article 2 has two additional paragraphs: paragraph 4 containing the criminalisation of attempt, and paragraph 5 which lays down the provisions on ancillary crimes. According to paragraph 5,

> 5. Any person also commits an offence if that person:
>
> (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
>
> (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;
>
> (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

41 It can be asked why damage to property was not included in the generic definition. One answer may be derived from the residual nature of para. 1(b): damage to property is to a large extent covered by the criminalisation of terrorist bombings, the financing of which comes under sub-para. 1(a) by virtue of the Annex.

42 These reasons for retaining the expression 'unlawfully' in a criminalisation have been cited in the Explanatory Report to the 2005 Council of Europe Convention on the Prevention of Terrorism, *supra* note 24, para. 82, at 11. See also Aust, *supra* note 7, at 294–295.

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Paragraph 5 is nearly identical to the equivalent provision in article 2, paragraph 3 of the Terrorist Bombings Convention which is widely seen as setting a modern criminal law standard for ancillary crimes.[43] In particular, the Terrorist Bombings Convention contained for the first time the common purpose provision that has since then been reproduced in a number of criminal law conventions, most notably in the Rome Statute, which improved its wording and made it less ambiguous.[44] Subparagraph 5(c) of the Financing Convention reproduces the Rome Statute formulation. The novelty is therefore not in how the ancillary provisions have been formulated but in the fact that they are applied to conduct that is in itself of a preparatory nature.[45] The criminal responsibility established in accordance with paragraph 5(c) is derivative, and dependent on the commission of the principal crime, which in this case is the crime of financing. There is no necessary link to the actual terrorist acts, other than through the intention or knowledge of the principal perpetrator. The inclusion of paragraph 5(c) did provoke some debate in the Ad Hoc Committee as it had been previously applied to more straightforward situations of serious violent crime, but the interpretation of the ancillary crimes was left to national courts which will apply the paragraph in the light of the general provisions of the respective national penal codes. The negotiations on article 2 will be described in the next section, which seeks to shed light on some of the problems encountered and solutions found in the Ad Hoc Committee and the subsequent working group sessions.

6.2.2. The Negotiations on the Convention

Although the International Convention on the Suppression of Terrorist Financing was concluded in a fairly short time-frame the negotiations involved difficult issues.[46] The first version of the Draft Convention was circulated by France in

43 Chapter 1.4.

44 Chapter 4.2.2.

45 Thus creating a chain of punishable acts in which the connection to actual terrorist acts becomes more and more indirect.

46 Aust, *supra* note 7, at 293, has referred to "the tortuous path leading to the final text".

1998, and the negotiations began in March 1999 on the basis of a revised version that took into account the initial comments received thus far from various delegations.[47] In order to save time, the articles specific to the Convention were discussed separately from those provisions that were similar to provisions in the earlier treaties and did not need as much attention.[48] The articles that were unique to the new Convention touched on definitions, criminalisations, responsibility of legal entities, seizure of funds, certain preventive measures, and the prohibition of treating terrorist financing as a fiscal offence. The new version defined terrorist financing in paragraph 1 of article 2 as follows:

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally proceeds with the financing of a person or organization in the knowledge that such financing will or could be used, in full or in part, in order to prepare or commit:
> (a) An offence within the scope of one of the Conventions itemized in the annex, subject to its ratification by the State party; or
> (b) An act designed to cause death or serious bodily injury to a civilian or to any other person, other than in armed conflict, when such act, by its nature or context, constitutes a means of intimidating a government or a civilian population.

A separate definition of financing was contained in article 1 paragraph 1:

> 1. "Financing" means the transfer or reception of funds, assets or other property, whether lawful or unlawful, by any means, directly or indirectly, to or from another person or another organization.

The final structure of the definition of the crime is already recognisable in this text which did not undergo major revisions during the negotiations. This should not, however, be taken as a sign that the concept of terrorist financing was a familiar one, for it was not in fact easily accepted or readily understood. Firstly, a number of problems were related to the list-based nature of the new crime, which was not

47 For the second version, see A/AC.252/L.7 and Corr.1, reproduced in the March Report, at 14–23. The draft Convention had also been discussed in the framework of the G7 and Russia, as well as within the European Union.

48 March Report, at 1. The articles that were unique to the new Convention were listed as follows: 1 (definitions), 2 (criminalisations), 5 (liability of legal entities), 8 (freezing and seizure of funds), and 12 (cooperation in connection with criminal investigations). For the most part, the other articles were reproduced as such from the Terrorist Bombings Convention.

defined as a self-standing offence but relied on the definitions of other crimes. Though not unique,[49] subparagraph 1(a) provoked a lengthy debate, mainly related to the situation of non-state parties to a treaty listed in the Annex, and the possibility for them to exclude such a treaty from the application of the Convention. The composition of the Annex also prompted some discussion,[50] as did subparagraph 1(b), for very particular reasons related to 'the definition of terrorism'. The main difficulties, however, were encountered when discussing the chapeau of paragraph 1, and its relationship to the two subparagraphs. As noted earlier, terrorist financing as defined in article 2 is an abstract endangerment offence in the sense that it aims at a certain result, the commission of the crimes referred to in subparagraphs 1(a) and (b), but its criminal nature is not dependent on the attainment of that result. This was a groundbreaking feature in the law of terrorist crimes.

Subparagraph 1(b) had some potential of becoming the principal bone of contention because of the political and symbolic value that clearly extended its function in article 2. According to France, the sponsor of the Draft Convention, the second subparagraph was inserted in order to cover the financing of terrorist assassinations, irrespective of the means of their commission, as killing was covered in existing instruments only if committed in specific circumstances.[51] There was, however, no desire to cover common crimes, and the formulation therefore had to include a qualifier which, by and large, corresponded to the broadly shared understanding of the specific features of terrorist acts: that they should, by their nature or context, constitute a means of intimidating a government or a civilian population.[52] Furthermore, a qualifier was needed so that the acts referred to in subparagraph 1(b) would be comparable to those referred to in 1(a), which had been qualified either by their method or their target in the terms of the different

49 The reference technique had been used earlier in the 1977 European Convention on the Suppression of Terrorism, CETS 190, UNTS vol. 1137, No.17828, as well as in a number of other regional instruments. It was also familiar to the delegations from the Draft Comprehensive Convention on the Suppression of Terrorism that was circulated by India already in 1996, UN Doc. A/C.6/51/6, 11 November 1996.

50 Most notably, proposals were made to add the Mercenaries Convention to the list (see A/AC.252/1999/Wp.17, reproduced in the March Report, at 33), as well as the four Geneva Conventions and their additional protocols (see the September Report, at 48–49).

51 March Report, Summary of the general debate, at 3.

52 As is recalled, the Declaration on the Measures to Eliminate International Terrorism, in UN Doc. A/RES/49/60, para. 3 refers to "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons, or particular persons, for political purposes". Several of the earlier anti-terrorist conventions acknowledged that the acts criminalised under them may be committed in an attempt to compel a state, see the Hostages Convention, art. 1(1), the Terrorist Bombings Convention, art. 6(2)(d).

conventions and protocols. At the same time, the inclusion of so-called 'terrorist intent' in the Draft Convention was a political signal that could not be misinterpreted by the Committee. Since 1996, the UN General Assembly had taken successive steps towards the elaboration of a Comprehensive Convention on the Suppression of Terrorism, and had agreed to address the issue after the Financing Convention was completed. Agreeing on a mini-definition in the context of the Financing Convention, it was thought, could augur well for the Comprehensive Convention, or even make it redundant. Others were afraid that introducing – unnecessarily in view of the minor role of the lacunas France had mentioned – a contentious issue in article 2 could delay the negotiations or, in the worst case, threaten the whole undertaking.[53] As it turned out, both sides erred, for the subparagraph was preserved and the Financing Convention was adopted with relatively little difficulty. The first-ever generic definition of a terrorist crime to be included in a universal legal instrument (since the unlucky League of Nations Convention of 1937) did not, however, pave the way for a consensus on the Comprehensive Convention.

One issue in relation to subparagraph 1(a) had a direct bearing on the scope of the new offences. It was raised by the proposal to qualify the reference in 1(a) so as to cover only the main offences within the scope and as defined in the treaties listed in the Annex. 'Main offence' would have been defined as any offence within the scope of one of the conventions set forth in the Annex, excluding attempts and contributory or participatory offences.[54] The proposal reflected a widely shared concern: several delegations pointed out that a financial contribution to an act that constitutes complicity in bomb attacks or hostage-taking would be fairly remote from the actual terrorist act – not to mention complicity in such a financial contribution. Prosecution of the ancillary offences of terrorist financing could lead to long chains of participation, where a person could be charged for 'contributing in any other way' to the financing of activities that only facilitate a terrorist offence. In particular, questions were raised with regard to the mental element of such an offence. Some of the other delegations dismissed this concern as overly theoretical and doubted whether the ancillary provisions of the conventions listed in the Annex would play any significant role in practice. The issue, in their view, could be safely left to the national courts to decide when applying the criminalising provisions. Financing an attempt, it was noted, was in any event a moot point as no one

53 There was a precedent even for that as the draft Convention on the Suppression of Acts of Nuclear Terrorism, almost completed in 1998, had been shelved because of an eminently political debate concerning the legality of nuclear weapons. This Convention was adopted in 2005: A/RES/59/290, 13 April 2005.

54 UN Doc. A/AC.252/1999/WP.12, reproduced in the March Report, at 31.

could have the intention to contribute to a failed attempt, or the knowledge that the commission of a planned crime would be aborted, but would necessarily have in mind a completed crime. Furthermore, limiting the reference in subparagraph 1(a) to the principal offences as proposed could leave gaps that would be open for abuse. The ancillary provisions could prove useful, even if only in exceptional cases, in making it possible to prosecute a person whose deep involvement in the planning of a terrorist attack could not otherwise be proved. As Aust has noted, "there was a great and continuing fear of loopholes".[55]

The issue of linking different forms of indirect contribution to each other remained unsolved until the time the final package was presented to the Committee.[56] Neither those who believed there was a problem in extending the scope of the crime to long chains of successive actions, and thus 'layers and layers of ancillary crimes', nor those who saw a possible danger in not doing so seemed to have a clear picture of how the definition of the crime would be applied in practice. It may be noted in hindsight that the question as a whole was moot in light of the broad conception of terrorist financing: terrorist crimes are the ultimate, but only the ultimate, objective of the financing act, whereas the funds that have been transferred may be used in various ways, including but not limited to the commission or the preparation of such crimes. If the definition of the offence in any event extends to the preparation of terrorist acts, there does not seem to be much sense in debating whether a certain mode of participation in the ultimate crime is covered or not.[57] The difficulty in combining the new construction with the established principles of criminal law, especially in civil law jurisdictions, resulted in ambitious proposals that were ultimately rejected, but not without a long debate. Just how novel the concept of terrorist financing was is shown by the fact that the same issue concerning the ancillary crimes surfaced five years later in the negotiations on the Council of Europe Convention on the Prevention of Terrorism.[58]

Otherwise, the most persistent problems appeared and the most far-reaching amendments were suggested with regard to the chapeau of paragraph 1, as well as the definition of financing in article 1. One of the many proposals submitted addressed the specific problems of humanitarian assistance workers who were routinely involved in situations of armed conflict. The issue had been brought up also by representatives of humanitarian organisations who had referred to the reality of humanitarian work, admitting the possibility that some of the material assistance

55 Aust, *supra* note 7, at 13.

56 September Report, informal summary of the discussions in the working group, prepared by the Chairman, para. 75, at 57–58.

57 As also noted by Aust, *supra* note 7, at 13.

58 Chapter 7.3.

provided might find its way into the hands of the guilty. An example of such a situation would be a refugee camp where a small group of armed persons hides among hundreds of thousands of innocent civilians and where it may be impossible to provide assistance to the latter without part of the assistance being diverted to the former.[59]

According to an amendment proposed to article 1, the term 'financing' should cover all types of fund-raising, as well as the reception of funds, but be limited to direct transfer of funds to a person or to an organisation. Furthermore, the following disclaimer was to be added to the definition of financing: "In a fund-raising context, the transfer of funds, assets or other property is not covered by the term 'financing' if it can be demonstrated or it is recognized that the property is also used for humanitarian purposes by the beneficiary person or organization".[60] While the importance of the practical problems that humanitarian workers might face and the need to avoid unduly penalising their activities was generally recognised, the proposal was regarded as too broad in scope, to the detriment of the effectiveness of the Convention. A later proposal to amend the text so as to refer only to property "meant exclusively to be used for humanitarian purposes" did not gain much support either.[61] The favoured approach was to keep the technical definitions in article 1 generally applicable and to try to include appropriate thresholds in the definition of the crime. The specific problem of possible interference with recognised activities of humanitarian relief organisations was therefore subsumed under the more general issue of how to define the offence so that it would not extend to legitimate activities, and ultimately the definition of financing was incorporated in the chapeau of article 2.

As far as article 2 was concerned, there was also considerable agreement on the description of the material act, in spite of some discussion of whether it mattered if the transfer was direct or indirect, and whether reception of funds and fund-raising should also be covered. The words "whether lawful or unlawful", originally part of the definition of financing, were dropped, but the common understanding of financing was that the origin of the funds did not play any role. This has later been confirmed and highlighted by the UN Security Council's Counter-Terrorism Committee (CTC) which has issued guidelines on how to criminalise the financing of terrorism in accordance with resolution 1373. The CTC has drawn attention to the fact that funds used to finance terrorist activities are not neces-

59 Comments by the UNHCR on the draft international convention for the suppression of the financing of terrorism, UN Doc. A/C.6/54/WG.1/INF/1 and a statement made on 19 March 1999 by the observer for the ICRC, UN Doc. A/AC.252/1999/INF/2.

60 UN Doc. A/AC.252/1999/WP.1, reproduced in the March Report, at 26.

61 March Report, informal summary of the discussion in the working group, para. 9, at 57.

sarily illegal and can range from assets and profits acquired by legitimate means and even declared to tax authorities to donations to charitable, social or cultural organisations that divert the money from its intended or stated purpose to terrorist activities.[62] Another proposal concerning the definition of financing related to the definition of the material act in article 2. It differed from the other proposals with the same mens rea standard – i.e. knowledge or intent that the financing will be used to commit or to prepare the commission of one or more terrorist offences – in that it would have limited the offence to the financing of an organisation. The reference to the financing of a person would thereby have been deleted.[63] It was proposed that an 'organisation' be defined as

> any group consisting of a large number of persons, whatever their declared objectives. Such organization shall be characterized by a hierarchical structure, strategic planning, continuity of purpose and division of labour.[64]

The rationale for this proposal as explained by the sponsor delegation was that the criminalisation of mere preparatory acts, such as financing, would not be justified unless the offence was of a particularly dangerous nature. In the context of the Draft Convention, this seemed to be true only of organisations. The particular features of organisations presented in the definition made it difficult to detect criminal activities carried out behind the organisational veil and rendered them particularly dangerous, justifying the criminalisation of the transfer of funds related to such activities.

This proposal remained on the table only for a short time and was not seriously considered as an option, but it is worth citing because of its unique purpose: it not only sought to restrict the scope of terrorist financing but also separated the most serious category of terrorist crimes from the rest and defined them in terms of a systemic crime.[65] This was consistent with the general trend in both national and international criminal law of paying attention to the group qualities – high degree of organisation and commission on a large scale – that make collective criminality

62 FATF, Interpretative Note to Special Recommendation II, para. 5: "Terrorist financing offences should extend to any funds whether from a legitimate or illegitimate source".

63 UN Doc. A/AC.252/1999/WP.11, reproduced in the March Report, at 28; see also UN Doc. A/AC.252/1999/WP.12, reproduced in the March Report, at 31.

64 UN Doc. A/AC.252/1999/WP.6, reproduced in the March Report, at 27.

65 As for the concept of a systemic crime, see Elies van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003, at 4–5: "system-criminality invariably connotes a plurality of offenders, particularly in carrying out the crimes".

particularly dangerous.[66] The drawback was that there was no precedent for such a classification in the field of the law of terrorist crimes, and the proposal therefore did not strike any familiar chords. Furthermore, it would have affected the scope of application of the Annex by introducing a threshold comparable to the ones found in articles 6 to 8 of the Rome Statute, and would have probably required a crime-by-crime consideration of the list of treaties. The majority of the Committee wished to give the offence a wider scope – or opted for an easier way – by criminalising the financing of any and all crimes under the relevant conventions. Ultimately, even the definition of an organisation proved to be difficult. Most of the proposed definitions required of an organisation some measure of hierarchy or common purpose, but as one proposal presented in the September session reduced the concept to mean "any group of two or more persons, and any legal entity such as a company, a partnership, or an association",[67] the drafters began to doubt its usefulness. The references to both a person and to an organisation were deleted from the final wording of article 2, together with the definition of an organisation, which was removed from article 1.[68] No further attempts to qualify the act of financing which could be carried out "by any means, directly or indirectly", lawfully or unlawfully, were made in the negotiations.

The attention turned increasingly to the definition of the mental element of the offence, particularly to what the financier should know in order to commit a crime. In the original version, it was sufficient that the financier knew that the funds "[would] or could be used, in full or in part, in order to prepare or commit" terrorist acts. The original choice of knowledge as the mens rea standard of terrorist financing may have been influenced by the second Declaration on the Measures to Eliminate Terrorism adopted by the UNGA in 1996, which stated that "knowingly financing" terrorist acts was contrary to the purposes and principles of the United Nations.[69] The expression "could be used" was nevertheless regarded as an overly

66 *Ibid.*, at 346.

67 UN Doc. A/C.6/54/WG.1/CRP.9, reproduced in the September Report, at 20.

68 The criminalisation should therefore cover terrorist financing irrespective of whether the recipient is a person, group or organisation. The FATF Special Recommendation II has formalised this situation by stating that all states should criminalise "the financing of terrorism, terrorist acts and terrorist organizations". It is unclear whether SR II is also intended to broaden the criminalisation to the financing of terrorist organizations irrespective of any link to terrorist offences. See Chapter 9.1.

69 Declaration to Supplement the 1994 Declaration on the Measures to Eliminate International Terrorism, UN Doc. A/RES/ 51/210 of 17 December, 1996, Annex, para. 2. This may have been the first time that financing, as well as planning and inciting terrorist acts were ranked in the same category with terrorist acts: para. 2 reads: "The States Members of the United Nations reaffirm that acts, methods and practices of terrorism are

vague formulation of the requisite knowledge and was widely criticised. Various proposals were presented to replace the words with a more specific term, ranging from a simple deletion which would have resulted in the requirement that the financier knows "that such financing will be used" to commit terrorist offences,[70] to fairly complicated proposals. According to one of the latter, the material act would have been qualified by the word "voluntarily" and the knowledge element strengthened to require that the funds be transferred, collected, or accepted "with the full knowledge and consent that the funds will be used [...] to prepare for or to commit" offences referred to in subparagraph 1(a) or (b).[71] Both proposals were rejected for the reason that they would have limited the crime of financing to the equivalent of an act of complicity which was already covered by the anti-terrorist conventions and protocols listed in the Annex. At the same time, there was considerable support for the continuing efforts to establish a more specific criminal intent on the part of those who supply funds, in order not to cover persons who contribute funds in good faith.[72]

One of the many proposals concerning the mental element offered three different *mens rea* standards, any of which would have been sufficient in a given case: 1) intention that the funds be used to commit terrorist offences, 2) knowledge that they are to be so used, or 3) a reasonable likelihood that the funds will be used for such purpose.[73] This proposal is of particular interest because the third option would have lowered the *mens rea* standard explicitly to conscious risk-taking. As the proposal was rejected by the Committee and soon withdrawn,[74] it may be concluded that it was the Committee's wish to set the standard higher, i.e. to intention or knowledge as the two alternative standards now contained in article 2 stand. It would therefore seem that the provision should be interpreted restrictively, requiring on the part of the financier either a criminal intention or knowledge of actual terrorist acts being planned or prepared. However, the structure of the crime makes this conclusion uncertain. The basic approach of the Convention is to make

contrary to the purposes and principles of the United Nations; they declare that knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations".

70 UN Doc. A/AC.252/1999/WP.2, reproduced in the March Report, at 26.

71 UN Doc.A/C.6/54/WG.1/CRP.27, reproduced in the September Report, at 38.

72 September Report, at 53.

73 UN Doc. A/AC.252/1999/WP.20/Rev.1, reproduced in the March Report, at 34–35. See also Aust, *supra* note 7, at 11–12. Another delegation also proposed mentioning likelihood: "in the knowledge that such financing is or is likely to be used...", A/AC.252/1999/WP.16, reproduced in the March Report, at 33.

74 UN Doc. A/AC.252/1999/WP.20/Rev.1, reproduced in the March Report, at 35

the collection or transfer of funds criminal as such, "regardless of whether an act of terror was ultimately committed" and "regardless of whether the funds in question were actually used to commit terrorist acts".[75] It is also worth pointing out, that there was a certain overlap in how the different standards were understood. Thus, for instance, a proposal which notably included what would become the final formulation of the mental standard – "in the knowledge or with the intention that such financing will be used..." – explained the rationale as follows: "The financing should only be a punishable act under this Convention if the money, assets or property are likely to be used for terrorist purposes".[76] This understanding of the intention or knowledge standard in the Convention now seems to be widely shared.[77]

A further proposal of particular interest was submitted towards the end of the spring session by a group of five delegations. It provided a novel option for limiting the scope of the criminalisation but required radically altering the very structure of the crime of terrorist financing as it had been outlined in all previous texts. Arguably an expression of hesitation on the part of the sponsors, it was presented as an alternative to the deletion of any reference to attempts and participatory offences under the scope of the conventions listed in the Annex. According to that proposal, the end of the chapeau of paragraph 1 would have read as follows:

> [if that person unlawfully and intentionally provides funds directly or indirectly and however acquired to any person or organization committing or attempting to commit
> (a) any offence within the scope of one of the Conventions listed in the Annex and as specified therein; or
> (b) ...

75 Kantor, *supra* note 10, at 9. In another proposal, the words "in the knowledge or with the intention that such financing will be used..." were presented as an alternative to the original "could be used" and explained as follows: "the financing should only be a punishable act under this Convention if the money, assets or property are likely to be used for terrorist purposes". This understanding of the intention or knowledge standard in the Convention seems to be widely shared.

76 UN Doc. A/AC.252/1999/WP.26, reproduced in the March Report, at 38, (emphasis added).

77 According to Aust, *supra* note 7, at 296, "it was readily accepted that the elements of *intention,* that the funds should be used for – perhaps unspecified – terrorist purposes, or the *knowledge* that they are to be so used, are what is important for constituting the offence". See also Davis, *supra* note 10, at 182 and Lavalle *supra* note 7, at 503. According to the FATF, Interpretative Note to Special Recommendation II, para. 6: "Terrorist financing offences should not require that the funds (a) were actually used to carry out or attempt (a) terrorist act(s); or (b) be linked to specific terrorist act(s)".

> Such financing shall either be made with the intention that the funds be used (or in the knowledge that the funds are to be used), in whole or in part, for the commission of the offences mentioned above.][78]

No rationale or explanation was attached to the proposal but its purpose was clear: to require that for criminal liability to attach to the act of financing a terrorist offence had to occur or at least be attempted. The sponsors of the proposal believed that there had to be a clear and recognisable connection between the transfer of funds and an accomplished or attempted terrorist act. The proposal was presented only after several failed attempts to introduce further qualifiers in subparagraph 1(a) and the Annex. It was becoming clear towards the end of the March session that the majority of the Committee favoured a wide scope for subparagraph 1(a) so that the financing of any and all acts meeting the requirements set forth in the listed conventions and protocols, including all punishable forms of participation, would trigger criminal responsibility. This meant that also the issue of 'layering different modes of participation' was fading out. While there was a reminder in the Report of the March session of the possibility of qualifying the list of treaties and limiting it to the principal crimes,[79] this proposal did not make its way to the final outcome that was presented for adoption to the working group in September. The consensus, when ultimately reached, was based on an understanding that the problem was one of interpretation, mainly theoretical and would not cause difficulties in practice.

Nor was the reference to the offences "within the scope and as defined" in the treaties listed in the Annex qualified in any other way, in spite of the fact that two proposals were tabled in September. The first proposal consisted of introducing a filter in subparagraph 1(a) to the effect of excluding other than 'serious' offences from the Annex.[80] According to the second proposal, the so-called 'terrorist intent', along the lines of subparagraph 1(b), would have been added to 1(a) so that the offences under the instruments listed in the Annex would have been covered only to the extent that they were "capable, by their nature or context, of intimidating a government or a population".[81] The purpose of the proposals was to avoid the application of the Convention to trivial offences, but neither was successful. There

78 UN Doc. A/AC.252/1999/WP.49, reproduced in the March Report, at 51 (brackets in the original).

79 All proposals presented during the session were contained in the report; see the March Report, at 24–56.

80 September Report, Annex III, informal summary of the discussions in the working group, para. 71 at 57.

81 A/C.6/54/WG.1/CRP.12, reproduced in the September Report, at 21.

was little interest in creating a complete series of new offences for the purpose of the Convention – given that no such qualifications were present in the conventions and protocols enumerated in the Annex. The reluctance even to consider the proposals in earnest may also have been related to the growing acceptance of the broad concept of terrorist financing as not being limited to the financing of specific crimes.

The proposal by the five countries followed logically the doctrine according to which preparatory acts only give rise to criminal liability if the principal crime is at least attempted.[82] In that way, it would have reduced terrorist financing to participation in a crime, instead of a distinct offence – and would have effectively curtailed the value of the Convention by reducing the crime of financing to complicity, dependent on the subsequent terrorist crime taking place or being attempted. It may have been that the proposal, inadvertently, caused a critical mass in the Committee to realise that acceptance of terrorist financing as a self-standing crime was the only way the Convention could make a difference. It is noteworthy in this respect that, when tabled at the end of the March session,[83] paragraph 3 of article 2, which confirms that it is irrelevant for the criminal responsibility of the financier how the funds are actually used, did not encounter much in the way of resistance.[84]

Paragraphs 4 and 5 of article 2 contain the established set of ancillary provisions. There was, however, quite a bit of hesitation with regard to the inclusion of both attempt in paragraph 4 and the provision on common purpose offences in subparagraph 5(c). Firstly, it was questioned what an attempt to finance could mean in practice. While it would seem right to hold terrorist 'godfathers' or 'masterminds' criminally responsible[85] even where their activities had been aborted for reasons not dependent on their will, the situation was not necessarily the same for those who were incidentally involved with terrorist financing. It should be recalled in this regard that the Convention does not distinguish between minor and major cases of terrorist financing. No requirement is laid down as to the amount of funds or the importance of the contribution; it is enough that the funds are intended

82 At the same time, there are variations in national law in how 'attempt' is defined. For a discussion of the relationship between attempt and primary offence, see George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, 1998, at 172–176.

83 Working paper prepared by France on arts. 1 and 2, the March Report, Annex B, at 12–13.

84 According to the September Report, at 59, its deletion was proposed only because "its content was implicit in paragraph 1".

85 March Report, paras. 27 and 30, at 3; the September Report, Annex III, Informal summary of the discussions in the Working Group prepared by the Chairman, para. 9, at 53.

or known to be used, in full or in part, for the commission of terrorist acts.[86] The inclusion of all the ancillary provisions along the lines of the Terrorist Bombings Convention was supported for reasons of consistency, but subparagraph 5(c) which contains the common purpose clause raised some doubts owing to the indirect nature of the financing crime. Even if it had been important to cover all aspects of group criminality by criminalising "any other contribution" to terrorist bomb attacks – or to the crimes under the jurisdiction of the ICC – the crime of financing was not regarded as comparable to them. The inclusion of 5(c), it was argued, would extend the criminalisation to acts that were remote even from the act of financing, not to mention the actual terrorist offences. Likewise, the criminalisation of complicity or "any other contribution" to an attempt to finance – a cross-reference to paragraph 4 in subparagraphs 5(a) to (c) – was resisted, but the arguments in favour of consistency prevailed. Ultimately, even this issue was left for national courts to decide.

6.3. The 'Model of the Terrorist Financing Convention'

The advantages of the new criminalisation in addressing complex networks of international terrorism with sophisticated funding systems are evident.[87] While prohibition of fund-raising for particular terrorist groups is another and later much-used method of countering terrorist financing,[88] it has been stressed that a broader approach is needed to address the problem of the 'commingling' of licit and illicit funds.[89] The principal sources of terrorist financing – criminal activity, charities, and front companies and investments[90] – include both legal and illegal activities. This problem is by no means specific to terrorist financing but rather a common feature of the different ways in which the newly globalised financial system is being

86 While it has been left to the courts to distinguish between minor and major cases of terrorist financing, it is obvious that the amounts involved would play a role.

87 Gardella, *supra* note 10, at 437.

88 Davis, *supra* note 10, at 183 *et seq*., has compared the advantages of the criminalisation of terrorist financing, on the one hand, and anti-terrorist sanctions, on the other.

89 Winer, *supra* note 29, at 26–27.

90 Aurel Croissant and Daniel Barlow, 'Following the Money Trail: Terrorist Financing and Government Responses in Southeast Asia', 30 *Studies in Conflict and Terrorism* (2007), 131–156, at 135.

abused for criminal purposes.[91] The decline in state-sponsored terrorism[92] has triggered a process of privatisation of terrorist financing that has become another form of illicit funding comparable to many other financial crimes.[93] In view of the global scale of terrorist financing, it has been referred to as 'macro crime', comparable to "organized crime [...], money laundering, grand corruption and embezzlement of State funds by dictators".[94]

Terrorist financing as a new crime has been compared in particular to money-laundering, the criminalisation of which also has a preventive focus "on the theory that taking away wealth accumulated by criminals removes both the motive (profit) and the means (operating capital) to commit further crimes".[95] There are, however, three important differences, conditioned by further similarities. First, as is often emphasised, terrorist financing is the mirror-image of money laundering in the sense that the funds used for terrorist financing, which can be legally acquired, 'become dirty' in the process of being used for terrorist purposes while in money-laundering criminal proceeds are 'laundered' by being channelled to legal businesses. The FATF Guidance for Financial Institutions also finds notable similarities: while funding from legitimate sources does not have to be laundered, there is often a need for a terrorist group to obscure or disguise its links with legitimate funding sources. According to the FATF, "It follows then that terrorist groups must similarly find ways to launder those funds in order to be able to use them without drawing the attention of authorities."[96] A second difference is related to the political nature of terrorist violence compared to profit-driven

91 According to Winer, *supra* note 29, at 26, "The world's networks of non-transparent financial services not only commingle licit with illicit funds, thus rendering the illicit funds more difficult to detect, but also provide vessels for the intermingling of different forms of illicit activity, which have the common element of being both destabilizing and involving similar persons and institutions."

92 FATF Guidance for Financial Institutions in Detecting Terrorism, 24 April 2002, reprinted in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 147–159, at 151; Croissant and Barlow, *supra* note 90, at 135.

93 According to Winer, *supra* note 29, at 6, "terrorist finance can be seen from this perspective as a subset of a larger problem, that of non-transparent movements of money in a system to which much of the world has easy access".

94 Mark Pieth, 'Editorial: the Financing of Terrorism – Criminal and Regulatory Reform', in Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 1–3, at 3.

95 R.T. Naylor, 'Follow-the-Money Methods in Crime Control Policy', in Margaret E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, 2003, 256–290 (Naylor 2003b), at 256.

96 FATF Guidance for Financial Institutions, *supra* note 92, at 153. For a similar view, see Armand Kersten, 'Financing Terrorism – A Predicate Offence to Money Laundering?', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 49–56, at 56.

crime: the criminalisation and prosecution of terrorist financing removes only the means to commit terrorist crimes without necessarily affecting their causes. But in this area as well, political and purely criminal aspects are intertwined. Levi and Gilmore have submitted that the closest analogues of 'terrorist fund laundering' are "(1) the corporate and political 'slush funds' used for transnational corruption and political finance, and (2) tax evasion for non-criminal activities".[97] At the same time, equating terrorist financing with money-laundering may lead to understating its specific features as a politically motivated crime.[98] A third difference is related to the pro-active nature of terrorist financing. While money-laundering takes place in order to disguise the origin and the nature of the proceeds of a serious crime that has actually been committed, the terrorist crime envisaged in the criminalisation of terrorist financing is only prospective.

Several reasons spoke for the establishment of terrorist financing as a primary offence. While the financing of terrorism can in general be covered as complicity to terrorist crimes, this is only possible in relation to specific accomplished or attempted crimes. Where the concepts of conspiracy or *association de malfaiteurs* are available, they can be applied to terrorist financing, but again with certain limitations. Furthermore, the *aut dedere aut judicare* obligation contained in the Terrorist Financing Convention in the same way as in most of the earlier anti-terrorist conventions, provides for a much broader reach than the provisions on complicity in terrorist offences which may not always be applicable when the principal crime has been committed outside the jurisdiction of the state concerned. Even where the general provisions of the penal code apply, it may be difficult to gather the necessary evidence if the principal crime has been perpetrated in another country. Establishing terrorist financing as an independent crime has been a clear policy choice, and one that was finally accepted by consensus in the UN General Assembly. More than three fourths of the UN member states have now ratified the Convention,[99] and while some of the edges in its provisions may have been rounded – as always – in the process of national implementation to incorporate the new criminalisations in the existing penal codes,[100] there are several monitor-

97 Michael Levi and William Gilmore, 'Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 87–114, at 91.

98 For a critical assessment of this equation, see Kersten, *supra* note 96, at 56. See also Pieth, *supra* note 7, at 1082.

99 The Convention was ratified by 167 states at the end of 2008.

100 As for national implementation in Switzerland, see Pieth, *supra* note 7, at 1079. See also Gardella, *supra* note 10, at 433. Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *JICJ* (2006), 1044–1073,

ing bodies to oversee that the essential features of the Convention are preserved.[101] In particular, the CTC and the FATF have undertaken, as part of monitoring the implementation of resolution 1373, the task of authoritatively interpreting the Convention.[102]

6.3.1. The Elements of the Crime of Terrorist Financing

Even though terrorist financing is an independent offence, its definition in the Convention is not self-standing but draws on definitions of crimes in other instruments. In order to fully understand the relationship between the crime of financing and the terrorist offences referred to in article 2, subparagraphs 1a) and 1b), a closer look should be taken at the elements of the crime of terrorist financing, which, in accordance with the *chapeau* of article 2, paragraph 1, would read as follows:

1) the person collected or provided funds,
2) the person did so with the intention that the funds should be used for the commission of an offence specified in subparagraph 1a) or in subparagraph 1(b), or
3) the person did so in the knowledge that the funds were to be used for the commission of an offence specified in subparagraph 1(a) or in subparagraph 1(b).

It has already been noted that there seems to be a certain tension between the various components of the definition. How is the intention requirement to be perceived in a situation where the conduct of the financier is only remotely and indirectly connected with any subsequent terrorist acts? What does the financier have to know to incur criminal responsibility? What is the specific context of the crime of financing? The analysis of the elements of terrorist financing will benefit from references to the Rome Statute as the first comprehensive codification of the

has pointed out that there are significant differences in national implementation of the obligation to criminalise terrorist financing.

101 The ongoing reporting obligation to the CTC and to the two other UNSC anti-terrorism Committees established by resolutions 1267(1999) and 1540(2004), respectively, as well as the FATF mutual evaluation system are the most notable examples. Already in 2002, the CTC drew attention to the fact that the auxiliary offences of 'aiding and abetting' would not suffice to implement properly the obligation to criminalise terrorist financing under Resolution 1373. According to Gehr, "The point here is not so much the wording of this subparagraph [of resolution 1373], but emanates from the obligation to become a party of the Financing Convention". See Gehr, *supra* note 9, at 3.

102 For an analytical account of the mutual evaluation process within the FATF, see Levi and Gilmore, *supra* note 97, at 95–111. See also Chapter 9.1.

general principles of international criminal law. Article 30 of the Statute, in particular, is unique in setting out systematically the requirements of intention and knowledge for the purpose of establishing individual criminal responsibility.[103]

6.3.1.1. Criminal Intention

Intention in the sense of the will to bring about a certain result is always a subjective concept as "after all, an individual alone honestly knows what he is thinking".[104] When it comes to the crime of terrorist financing, however, the intention has a hypothetical quality, as it is not the financier himself or herself but the eventual recipient of the funds whose actions will bring about the intended result at a later, unspecified point of time. Knowledge, again, does not have to be knowledge of actual terrorist crimes being prepared. If knowledge of the intention of other persons to commit terrorist offences could be proved, the act of financing would constitute complicity in the sense in which the ICTY has used the concept, provided that the financial contribution directly and substantially facilitated the perpetration of the terrorist act. In the case of terrorist financing as a global phenomenon, it can be assumed that the financier is aware at least of the general nature of the terrorist activities in which the recipient or recipients are involved. What specific knowledge the financier has will probably depend on whether he or she is involved in criminality, business activities or charities in support of terrorism.[105] The problem of 'commingling' may make it very difficult to distinguish the precise purposes for which a certain transaction is meant. And finally, a person who provides material support to a political organisation does not in general have a precise idea of the end use of the funds provided and rather does so in order to support a certain political cause;[106] what makes such financing acquire terrorist qualities is the fact that the person accepts that indiscriminate violence may be used to further the cause.

The mental element in the crime of terrorist financing thus deserves particular attention. There are two different intent requirements in the *chapeau* of article 2(1), as 1) the material act must be committed "unlawfully and wilfully", and

103 Gerhard Werle and Florian Jessberger, '"Unless Otherwise Provided": Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', 3 *JICJ* (2005), 35–55, at 37. See also Chapter 4.2.2.

104 This was noted by a Canadian military court in the *Johann Neitz* case while reasoning why intention must be presumed from the overt act. Quoted by Cassese, *supra* note 32, at 177.

105 Although even a petty criminal in the first category may have only a faint understanding of the wider purpose his or her activities serve.

106 Lavalle, *supra* note 7, at 503. See also Serrano, *supra* note 7, at 204–206.

2) the perpetrator must also have the specific intention concerning the terrorist end use of the funds, namely that they will be used for the commission of one or more of the crimes referred to in subparagraphs 1(a) and 1(b). The definition of criminal intention in article 30 of the Rome Statute would seem to capture both forms of intention by distinguishing between intention "in relation to conduct", where the person "means to engage in the conduct", and intention "in relation to a consequence", where the person means to cause a consequence or is aware that it will occur in the ordinary course of events.[107] 'Knowledge', as is recalled, is further defined in article 30 as awareness that a circumstance exists or a consequence will occur in the ordinary course of events. The phrase "ordinary course of events" has mostly been interpreted in a restrictive way to mean that, in the perpetrator' s perception of the situation, his or her conduct would cause a certain consequence unless extraordinary circumstances intervened. This follows, as Werle has pointed out, from the words 'will occur': "after all, it does not say 'may occur'".[108] This interpretation, which is widely shared, results in an unusually strict standard that seems to exclude recklessness and *dolus eventualis* and thereby a lower standard under which the perpetrator's awareness of the risk that a particular consequence may occur is sufficient to establish criminal responsibility.[109] However, as is evident from the words "unless otherwise provided", and also confirmed by the Elements of Crimes, article 30 applies as a default rule in the context of the Rome Statute and will not exclude a lower standard where it is part of the definition of a crime or applies on the basis of customary law.[110]

107 It is recalled that art. 30 of the Rome Statute sets out systematically the requirements of intention and knowledge for the purposes of establishing individual criminal responsibility. Intention relates to the conduct as well as to the consequences specified for each crime while knowledge relates to consequences and circumstances. According to art. 30, a person has intent where, (a) in relation to conduct, that person means to engage in the conduct, and (b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

108 Werle and Jessberger, *supra* note 103, at 41. See also Kai Ambos*, Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung*, 2. Auflage, Duncker & Humblot, 2004. He has submitted, at 770, that the formulation "in the ordinary course of events" amounts to a virtual certainty.

109 Werle and Jessberger, *supra* note 103, at 41–42.

110 ICC Elements of Crimes, General Introduction, para. 2, ICC Elements of Crimes, UN Doc. PCNICC/2000/INF/3/Add.2, reproduced in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 735–772. See also Maria Kelt and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crimes', also in Lee (ed.), 2001, 19–40, at 29–30.

The *chapeau* of article 2 of the Terrorist Financing Convention has been formulated in a way that would suggest a strict interpretation of the intent and knowledge requirements: "with the intention that they should be used, or in the knowledge that they are to be used" – to paraphrase Werle: after all, it does not say 'may be used'![111] The intent requirement would thus result in a standard according to which the financier must have in mind if not concrete planned crimes, then at least a specific type of crime that would take place in the ordinary course of events. 'Means to cause' would in that sense seem to be applicable to the specific intent in article 2, even though the chain of intermediate actions may be very long, and 'causation', as discussed earlier, is a hypothetical concept since there is no specific consequence required of the crime of terrorist financing. "Will occur in the ordinary course of events" is similarly adequate with regard to certain instances of terrorist financing but may be more difficult to apply to those situations where the link between the act of financing and subsequent terrorist acts is not obvious, even though it may be assumed that terrorist acts will be committed sooner or later, indirectly facilitated by the transaction.

The material elements of a crime, in general, can be divided into three parts: the (individual) conduct, the consequences of that conduct, and the (objective) circumstances in which the conduct took place, as has been done in article 30 of the Rome Statute. While most international crimes require a certain consequence or define the circumstances under which the crime has to be committed,[112] this is not the case with all crimes, and not with terrorist financing. The original version of the Draft Convention referred to a fairly straightforward case of providing funds to a person who "subsequently commits a terrorist act",[113] but article 2 as adopted does not specify any consequences for the act of financing. According to the definition of the offence, the criminal nature of the conduct is dependent on the mental element, whether intent or knowledge. The relationship between the act of financing and any subsequent terrorist acts is also dependent and builds on the malicious intent or criminal knowledge of the financier.

The structure "with the intention to cause" is familiar from the Terrorist Bombings Convention which does not require a certain consequence either, but

111 This is how Pieth, *supra* note 7, at 1079, has interpreted the article: "[T]he Convention excludes all references to negligence. Furthermore, both intent and knowledge may well be interpreted as representing a standard of firm, direct intent".

112 Werle, *supra* note 33, at 101, 102.

113 In the first draft version circulated in the autumn of 1998, *supra* note 1, the offence was formulated in the following way: "Any person commits an offence if that person intentionally organizes or proceeds with the financing of a person or group of persons [...] who commits after such financing [a terrorist crime]".

covers acts that are only likely to cause serious injury.[114] Likewise, the 1988 Protocol to the Montreal Convention on the safety of civil aviation not only criminalises violent acts that cause serious injury or death but also those that are likely to do so.[115] In a similar manner, the 1988 SUA Convention criminalises violent acts that are "likely to endanger the safe navigation of the ship".[116] There is thus a considerable practice of extending the scope of application of anti-terrorist instruments to threatening situations, and perhaps not much reason to require that the full consequences of the odious acts materialise. The same concept of intended consequences is applied to terrorist financing. However, the implications of this structure are clearly different in the crime of financing, in which the conduct element consists of acts that are innocent in and of themselves. The likelihood that placement or detonation of an explosive, in the ordinary course of events, will cause death or serious injury, or extensive material destruction, is considerably greater than the likelihood that a financial transaction, or provision of material support, will lead to the commission of a terrorist offence. The connection between the crime and its intended consequences is clearly closer in actual terrorist acts than in the crime of financing.[117]

It is also of interest in this regard that the crime of terrorist financing does not, unlike the offences directed against the safety of civil aviation or maritime navigation, require a consequence defined in terms of creating a risk or the likelihood of harm being caused. While the act of financing does not cause harm as such, terrorist financing can be seen as a typical endangerment offence that creates a risk of one or more terrorist acts taking place.[118] Endangerment offences form a special category of crime recognised in many jurisdictions: no actual harm is caused and the creation of danger is a sufficient basis for criminal responsibility.[119] This has also been the stated rationale for the criminalisation: as will be recalled, the Preamble to the Financing Convention links "the number and seriousness of acts

114 Terrorist Bombings Convention, art. 2, paras. (1)(a) and (1)(b).

115 Montreal Protocol, art. II (1).

116 SUA Convention, art. 3.

117 Possession of explosives, as well as some other 'possession offences' have commonly been deemed as serious enough to give rise to criminal liability; Fletcher, *supra* note 82, at 176.

118 Where a certain consequence is a part of the crime, it can consist either of causing harm (for instance, causing injury to a person), or endangerment – causing a risk of harm. Where a certain consequence is required, there must be a causal connection between the conduct and the consequence. See Werle, *supra* note 33, at 102.

119 See for instance Fletcher, *supra* note 82, at 176, who has referred to endangerment offences as an outgrowth of attempt liability.

of international terrorism" to "the financing that the terrorists may obtain".[120] As article 2 has been formulated, however, it lays all the stress on the subjective side (intention or knowledge) without elaborating on the material act or its intended consequences. It is therefore only possible to speak of causality in general terms, between 'terrorist financing' and the 'commission of terrorist acts', which are generally dependent on the material support provided. This relationship is necessarily indeterminate and cannot be reduced to material causality between a specific act of financing and a subsequent terrorist act.[121] Interestingly, the case law cited by the ICTY Appeals Chamber in *Tadić* refers to 'psychological' causality in the sense of a causal relationship between a "crime willed by one of the participants and a different crime committed by another".[122] On the basis of a textual analysis of the Financing Convention, it would seem that the essential relationship between a crime contemplated by the financier and any crime committed by one or more of the recipients or persons linked to them is that they belong to the same category of crimes defined in subparagraphs 1(a) and 1(b).

However, as there is no need for the latter crime to materialise, it could as well be argued that the only relevant crime here is the fictional crime willed by the financier. The criminal intention, according to the terms of the Convention, could exist independently – in a sort of vacuum – without any connection to the actions of any real perpetrator of terrorist crimes,[123] even though a hypothetical link could be created in terms of 'psychological causation'. This is obviously not the purpose of the Convention, and would require stretching its terms *ad absurdum*. There is, however, a fictional quality to intention that has not been defined in terms of the actual consequences but in terms of crimes intended and ultimately carried out by other persons. Not only are the intended consequences of the crime more remote

120 Terrorist Financing Convention, Preamble, para. 10.

121 The crime of terrorist financing does not require the commission of any subsequent terrorist offences and such offences cannot be seen as a necessary consequence of the crime of financing.

122 Of the concept of 'psychological causality', see the references to the *D'Ottavio* and *Mannelli* cases in *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement of 15 July 1999 (*Tadić* Appeal Judgement), paras. 215 and 218. These references did, however, set fairly strict limits on the use of the concept : all participants intend to perpetrate a crime, know of the actual perpetration of a crime, and foresee the possible commission of a different crime (which thereby is "caused" by them). See also references to *Aretano et al.*, para. 16.

123 It has been noted that this is a fairly unusual way to use the concept of intent; see Lavalle, *supra* note 7, at 498–499, who has held that it amounts to "some abuse of language": "one cannot hold a person accountable for merely intending, wishing or believing that an act done by him will have consequences that are entirely outside the realm of possibility."

for a financier than for a bomb-planter or an aerial hijacker, but the financier must also intend that another person, whether known to him or her or not, plants a bomb, hijacks an airplane or otherwise uses violence with the intention to cause death, serious injury or damage as specified in article 2(1).

A further difficulty concerns the proving of the intent. It is usual for courts in criminal cases to deduce the criminal intent or other requisite mental attitude from factual circumstances. A person is normally presumed to have intended the natural or necessary consequences of his or her acts.[124] As Schabas has pointed out, however, this method, which is fairly straightforward when applied to principal offenders, raises more questions in the case of ancillary offences. In the case of principal offences,

> [C]ourts [...] generally presume that absent evidence to the contrary a person is deemed to intend the consequences of his or her acts. But in the case of secondary offenders or accomplices, the acts of assistance are often quite ambiguous, and it is not as easy to simply presume the guilty mind from the physical act.[125]

Terrorist financing comes close to a secondary act in this sense as well, as it is often not possible to presume the intent from the physical act of financing, especially if the funds are of legal origin, and the transaction is part of a complex process of financing. A specific proposal to the effect of adding a new paragraph 5 to article 2 so as to incorporate an evidentiary standard concerning the proof of the requisite knowledge, intention or purpose on the basis of objective factual circumstances did not find its way into the final text of the Financing Convention.[126] Later, however, the FATF recommended, obviously recognising the particular difficulty related to the proof of the specific intent, that "the law should permit the intentional element of the terrorist financing offence to be inferred from objective factual circumstances".[127]

124 Cassese, *supra* note 32, at 177.

125 William A. Schabas, '*Mens Rea* and The International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2003), 1015–1036, at 1019.

126 The proposal read as follows: "The knowledge, intention or purpose required as elements of the offences established in this article shall be inferred from well-founded evidence or objective and actual circumstances". A/C.6/54/WG.1/CRP.10, reproduced in the September Report, at 20.

127 FATF, Interpretative note to Special Recommendation II, para. 11. It should be noted that this is a normal practice with regard to complex international crimes: see for instance the ICC Elements of Crimes, *supra* note 110, General Introduction, para. 3, according to which "Existence of intent and knowledge can be inferred from relevant facts and circumstances".

The wider context or circumstances of the act of financing should thus be taken into account as evidence of the financier's intent or knowledge, even though no particular 'context element' has been specified in the definition of the offence. This may be particularly important where the act of financing is of an innocuous or ambiguous nature and the intention cannot be presumed from the material act.[128] In the application of the Convention, it must be assumed that the financing of a group which has notoriously committed terrorist acts would meet the requirements of paragraph 1.[129] The existing lists of terrorist organisations, groups and individuals for the purposes of preventive asset-freezing spread such notoriety, even though such lists have not been drawn up for criminal law purposes. Thus, the act of financing is less ambiguous where funds have been transferred to a proscribed organisation or to a person who has been listed as an associate of Al-Qaida, Usama bin Laden or the Taliban or on the basis of UN Security Council resolution 1373.[130] In such cases it may be presumed that the financier has intended to finance terrorist activities.[131] The sanctions obligations do, however, also require states to impose penalties for the breach of the sanctions in question. Making funds available to persons or organisations subject to anti-terrorist sanctions is therefore also an offence in many jurisdictions.[132] In that sense the obligations under the sanc-

128 Abdel Bari Atwan, *The Secret History of Al-Qa'ida*, SAQI Books, 2006, at 112, has pointed out that a financier's knowledge of the recipient's intentions should not be presumed where charity is an integral part of the culture: "If, for example, someone sends a charitable contribution to an impoverished student who subsequently carries out a suicide attack, the donor risks being incarcerated for financing and supporting terrorism though they would have known nothing of the student's intentions. (This exact scenario happened to Princess Haifa of Saudi Arabia, wife of the ambassador to Washington, Prince Bandar. She provided funds in response to the request of an unknown student, who later turned out to be an al-Qa' ida associate)".

129 As confirmed by the FATF: the 2002 FATF Guidance for Financial Institutions, *supra* note 92, at 150–151, contains an example of how an "individual's account activity and inclusion on the UN list show possible link to terrorist activity".

130 See Chapter 8.2.

131 This would not apply to humanitarian transactions which often are explicitly excluded from the coverage of the sanction regime. See for instance UN Doc. S/RES/1452(2002) for humanitarian exemptions to the Al-Qaida sanctions regime.

132 In Finnish legislation, the provisions of the Terrorist Financing Convention and the sanctions obligations have been incorporated in two different provisions of the Penal Code, namely Chapter 34a on terrorist offences and Chapter 46 on regulatory offences. Rikoslaki (Penal Code), (19 December 1889/39); Chapter 34a (24 January 2003/17); Chapter 46 (24 August 1990), available in Finnish and in Swedish at http://finlex.fi.htm.

tions regimes overlap with the Terrorist Financing Convention creating a parallel system.[133]

Two preliminary conclusions are in order with regard to the specific intent that the funds should be used for the commission of terrorist acts as defined in the treaties listed in the Annex to the Convention, or in subparagraph 1(b). Firstly, as pointed out above, the conduct of the financier is only indirectly connected with the subsequent terrorist crimes given that the funds or the material assistance provided may reach the final recipient through several intermediaries[134] and that the final recipient may not take direct part in the commission of terrorist offences but may be involved in other terrorist activities, such as managing a training camp. It would therefore seem that the enumeration of specific treaties in the Annex does not quite meet the broadly understood intent requirement. At the same time, the Annex and the complementary definition in 1(b) serve an essential function in the definition of the offence by giving content to the financier's criminal intention and offering examples of the types of crimes that are within the financier's contemplation. For instance, financing a group that has been notoriously involved in aircraft hijacking or in the taking of hostages and that could be expected to continue such odious activities would satisfy the requirements of article 2. While the intent in such cases does not connect the financier to the actual commission of a specific terrorist act, it creates a link between the financier and the terrorist purposes and activities understood more broadly.

The *travaux préparatoires* of the Convention give support to this conclusion, for they show that it was acknowledged that it would be impossible to trace how particular amounts of funding are used and that the crime of financing therefore would also cover the financing of the preparation of terrorist acts. In accordance with the *travaux*, it can be assumed that in spite of the strict formulation of subparagraphs 1(a) and 1(b) and the Annex, the purpose was in fact to criminalise support to terrorist activities which include much more than just the tip of the iceberg visible in the form of the actual terrorist attacks. Terrorist activities have not been defined in the Convention – only terrorist offences have been defined although it is acknowledged that the funding may not go directly to the commission of such offences, and there is no requirement that this should be the case. A reasonable interpretation is, however, that the funded activities have some connection to terrorist crimes. Since financing is not as such a dangerous activity, the intended consequences of the financing crime could be defined in terms of abstract endangerment.

133 Both regimes were created in 1999; for an account of UNSC resolution 1267(1999), see Chapter 8.2.

134 As is the case with *hawala* banking and other trust-based systems of money transfer.

Secondly, the structure of the crime gives support to the interpretation whereby the mental element of terrorist financing can be defined in terms of risk-taking. This understanding would also be in line with the factual situation of a person who finances terrorism through charities. He or she could be a private individual or a member of a diaspora motivated by ideological, religious, or ethnic solidarity, and would rather give money in order to support a cause irrespective of the means used in its furtherance, than in order to promote specific crimes.[135] It can be assumed that in order for such a financier to incur criminal liability, he or she must intend that terrorist crimes will be committed, or at least willingly take the risk that this may be the case. The *mens rea* standard would thus be defined in terms of recklessness, or *dolus eventualis*.[136] Even though it contrasts with the actual wording of paragraph 1, this interpretation would seem justified when reading the article as a whole. While either intention or knowledge of the terrorist end use of the funds is required of the perpetrator, both concepts have a 'programmatic' character similar to that of the specific intent requirement in the crime of genocide. Cases where the financier contemplates the commission of specific crimes are covered, but the criminalisation is not limited to complicity and extends to cases where the financier willingly takes the risk that the funding will go to the commission of terrorist acts.

A further comparison may be made between the *mens rea* of the financing crime and the specific intent requirement in the crime of genocide whereby the material act is aggravated by the intent to cause the destruction of a protected group in whole or in part so that, for instance, killing becomes genocide. The specific intent in the Genocide Convention is notoriously difficult to prove, but still indispensable. Acts of genocide get their particular quality and dangerousness from the additional intent directed towards the future, the intent "to destroy in whole or in part, a [...] group as such".[137] Similarly, it is the specific intent that 'makes' the crime of terrorist financing. A particular feature of the specific intent is that it stands on its own, and, as confirmed in the ICC Elements of Crimes, is not linked to any material element.[138] While there is otherwise not much similarity

135 Whether the criminalisation should cover such situations is a policy choice and an area where there are clear differences between national implementation laws.

136 See also Lavalle, *supra* note 7, at 499.

137 Triffterer, *supra* note 33, at 149.

138 Kelt and von Hebel, *supra* note 110, at 32, have noted that "[t]he principle of *mens rea* coverage under article 30 is thus of no relevance here". For the principle of *mens rea* coverage, see *ibid.* at 26.

between the two crimes – for instance, the specific acts of genocide are criminal,[139] while the material act of financing may be legal as such – the reliance on intention makes the comparison meaningful. It has been said of the criminalisation of genocide that it combines a "rather small criminal act" with "a rather broad and far-reaching intent".[140] To be able to prevent the progress of genocidal events, already the first emergence of genocidal intent, materialised in one of the acts of genocide, has been criminalised.[141]

6.3.1.2. Knowledge

The knowledge standard in article 2 covers situations where the financier, without an active intention, is aware of the possibility that the funds he or she has collected or passed to another person, group or organisation may be used for the commission of terrorist acts. While the mental element in this second variant seems to be the same as in complicity, where only knowledge of the criminal intention of the principal perpetrator is required, there are important differences. Complicity must always be a contribution to a crime that actually occurs. Complicity in the meaning of facilitating a crime or providing means for its commission can consist of financing, provided that the funds are meant to be used for committing a specific crime and that the financier is not too far removed from the crime in terms of time and knowledge.[142] To be an accomplice, the financier should be aware that his or her acts assist in the commission of a specific terrorist crime. This would be necessary to meet the requirement laid down by the ILC Draft Code, and applied by the ICTY, that the contribution must be direct.[143] Applying the same standard,

139 As pointed out by the ILC, these acts are "by their very nature conscious, intentional and volitional acts". See 1996 Draft Code, Report of the International Law Commission on the work of its 48th session , UN GAOR 51st session 6 May–26 July 1996, Supplement No. 10 (A/51/10); Draft Code of Crimes against the Peace and Security of Mankind, commentary to art. 17, para. 5, at 88. Also quoted by the ICJ in *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February 2007, para. 186, at 69.

140 Triffterer, *supra* note 33, at 151.

141 *Ibid.,* Triffterer has compared this structure to the German concepts of '*vorgelagerte Strafbarkeit*' or '*erweiterter Vorsatz*': crimes in which an extensive intent or other mental element (`*überschiessende Innentendenz*') goes beyond the material elements which have to be established.

142 There is more flexibility with regard to geographical proximity, in particular since financing is a global phenomenon.

143 The aider and abettor must be aware of the essential elements of the crime committed by the principal offender; see *Prosecutor v. Milorad Krnojelac,* Case No. IT-97-25-T,

the contribution must also be substantial. While the act of an accomplice does not have to directly cause the act of the principal offender, the element of causality is present, for it must have had a substantial effect on the commission of the crime.[144] Terrorist financing as defined in the 1999 Convention is a much broader concept, although it may sometimes cover conduct that would also constitute complicity. In particular, there is no need – or possibility – to assess the practical effect of the act of financing. As noted earlier, the perpetrator in terrorist financing does not have to be aware of any specific crime being planned or prepared, and no actual terrorist acts need to be committed as a result of his or her financial contribution. It is therefore more accurate to say that he or she is aware of the possibility, sometimes even the probability, that the funds may be used for the commission of terrorist acts.

A concrete example of a situation where the 'knowledge standard variant' would be applicable, recurrently mentioned in the negotiations for the Terrorist Financing Convention, was the funding of an organisation that carries out multiple activities of a political and social as well as military nature, and where it may not be possible for the financier to make a distinction between the different possible end uses, or to assess the probability that the funds end up benefiting the military activities. The question therefore arises whether 'knowledge' as the term is used in the Convention fits in the definition of article 30 of the Rome Statute as "awareness that a circumstance exists or a consequence will occur in the ordinary course of events". Interpreting the Convention in this way would clarify the meaning of the provision and restrict its scope.[145] The structure of the crime, which requires no consequence, as well as the explicit confirmation in paragraph 3 of article 2 of the irrelevance of the actual use of the funds, would nevertheless speak against that interpretation. Reference could also be made, in light of the *travaux préparatoires*, to the object and purpose of the Convention, which was clearly to fill in the gaps left by earlier instruments.[146] It may therefore be asked whether 'likelihood' or 'foreseeability' rather than 'normal course of events' would better describe the relationship between an act of financing and subsequent terrorist acts that may take place much later in a different part of the world. The latter alternative, which can

Judgement of 15 March 2002, paras 88–90; van Sliedregt, *supra* note 65, at 88–89. See also Chapters 3 and 4.

144 *Ibid.*

145 See Pieth, *supra* note 7, at 1079, on the criminalisation of terrorist financing in the Swiss Criminal Code, which "explicitly states that if the perpetrator merely speculates about the possibility of financing terrorists, he will not be punishable according to this law".

146 March Report, para. 27, at 3.

rely on a logical interpretation of the Convention in the light of its object and purpose, would lower the standard of knowledge to *dolus eventualis* or recklessness.

It can also be claimed that the mental requirement of terrorist financing roughly corresponds to the *mens rea* standard of the third category of the joint criminal enterprise, namely that the additional crimes were foreseeable and that the accused willingly took the risk of such crimes being committed. The lower standard implied in the *Tadić* Appeal Judgement that the crime is merely predictable and the accused remained indifferent[147] could also apply to terrorist financing but, as pointed out earlier, would constitute a borderline case. For instance, reference could be made to situations where the primary purpose of financing is to further the political or humanitarian activities of a given group or organisation even though these activities cannot in financial terms be separated from the illegal and violent ones and the financier remains indifferent to the possibility that the funds may end up being used, say, for buying explosives. Whether the Convention can in fact be applied to such cases may depend on the national implementation, but the *travaux* indicate that the intention of the drafters was to exclude at least the situations described by the representatives of the ICRC and the UNCHR. This would point to a differentiation between active risk-taking, which would seem to be covered by article 2 and which still requires a guilty mind on the part of the perpetrator, and indifference to a possible risk. The latter could arguably be left out in view of the drafters' discussions concerning humanitarian relief organisations.

The reasoning of the ICTY Trial Chamber in the *Blaškić* case can be referred to in support of the discussion above as a plausible interpretation of the word 'knowledge'. According to *Blaškić*, knowledge includes the conduct "of a person taking a deliberate risk in the hope that the risk does not cause injury".[148] It may be recalled that the knowledge standard has been applied rather liberally by the ICTY also in other cases, and according to some commentators, is broader in customary law than in the ICC article 30 codification.[149] Cassese has submitted that the knowledge requirement can usually be reduced to either intention or recklessness with which it overlaps: "in most cases knowledge should not be considered as an autonomous criminal state of mind, but only as a means of entertaining crimi-

147 *Tadić* Appeal Judgement, para. 204.

148 *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgement of 3 March 2000 (*Blaškić* Judgement), para. 254. The original quotation is from F.Desportes, F.LeGuenelle, *Le nouveau droit pénal*, Economica, Paris 1996, at 384: "de la personne qui prend un risque de façon délibérée , tout en espérant que ce risque ne provoque aucun dommage". This would seem to apply to situations where the financier transfers funds to multivocational organizations in the hope that they will be used for humanitarian purposes but accepting the possibility that this may not be the case.

149 Chapter 4.2.2.

nal intent or recklessness."[150] Knowledge is part of the intent if the definition of the substantive crime prescribes the existence of a particular fact or circumstance as an element of the crime and requires of the perpetrator knowledge of the existence of this fact or circumstance. One could well think of facts or circumstances that would make it clear that the funds will be used for terrorist purposes, but no such requirements have been specified in the definition of the crime of terrorist financing. It would therefore not seem logical to interpret the knowledge variant as meaning intention. If the result of the criminal conduct has been specified in the definition of the crime, the knowledge requirement can be interpreted as recklessness with regard to that result: the perpetrator must know, according to Cassese, that his or her action is most likely to bring about the harmful result, yet he or she takes the risk of causing that result.[151] This would seem a proper interpretation of the knowledge requirement in article 2 of the Terrorist Financing Convention.

Furthermore, it can be claimed that the ICTY Trial Chamber's conclusion in *Blaškić* about the knowledge requirement in crimes against humanity is also relevant for the financier's knowledge. For an individual perpetrator's act to qualify as a crime against humanity, it must be part of a larger attack against a civilian population, and the perpetrator must be aware of this. According to the *Blaškić* Judgement,

> It follows that the *mens rea* specific to a crime against humanity does not require that the agent identified with the ideology, policy or plan in whose name the mass crimes were perpetrated nor even that he supported it. It suffices that he knowingly took the risk of participating in the implementation of the ideology, policy or plan.[152]

A financier's knowledge of the general terrorist purposes of the recipient person, group or organisation may be approached from the same angle. If it is not necessary for the financier to be aware of the preparation of any specific crime, he or she should mean to advance – or at least take the risk of advancing – a certain ideology, plan or policy which involves the commission of terrorist crimes. This would apply, in particular, to the definition of the boundaries of the crime of terrorist financing, i.e. the tough cases which proverbially test the general rule.

Cassese has shared the view that risk-taking is sufficient as a cognitive standard for a perpetrator of crimes against humanity. In most cases, he has noted, such a perpetrator does not directly and immediately cause the inhumane acts but is

150 Cassese, *supra* note 32, at 167.

151 *Ibid.*, at 164.

152 *Blaškić* Judgement, para. 257.

an agent of a system that is responsible for the attack: "It is not necessary that he anticipates all the specific consequences of his misconduct; it is sufficient for him to *be aware of the risk* that his action might bring about serious consequences for the victim on account of the violence and arbitrariness of the system to which he delivers the victim".[153] While it may be too far-fetched to depict a terrorist financier as 'an agent of a system', there is no doubt about the violence and arbitrariness of international terrorism. As to the specific act, Cassese's example – deliverance of a victim to a criminal system – seems to require that the perpetrator has power over a known victim, which is normally not the case with a financier, who collects or provides money or material assistance for criminal purposes and to whom the target of the crime may be unknown and the victims anonymous. What is common to the two, however, is the risk of serious crimes being committed.

The provision in paragraph 3 of article 2, according to which it is not necessary that the funds were actually used to carry out an offence referred to in subparagraphs 1(a) or 1(b), does not address the *mens rea* of the offence. It is a clarification concerning the burden of proof; the prosecutor does not have to prove that a certain amount of money has been used to commit a certain crime. It was felt to be important to state this expressly given the complex nature of terrorist financing and the fact that terrorist attacks are not very costly as such compared to the maintenance of terrorist networks and infrastructure such as training camps and safe houses. Planning of major attacks, it was pointed out, may extend over a long period of time. There were thus eminently practical reasons for not requiring a causal link between the act of financing and a subsequent act of terrorism. While paragraph 3 does not broaden or limit the constitutive elements of the crime, it confirms in more explicit terms what is already contained in the definition of the offence. The nature of terrorist financing as 'a prospective crime' that may – or may not – lead to terrorist violence is obvious from the drafting of paragraph 1.

The word "wilfully" in the *chapeau* of article 2, paragraph 1, was substituted for "intentionally" at a fairly late stage of the negotiations and the change was not discussed extensively. It is not quite clear whether the word "intentionally" was deleted in order to avoid repetition – although it was accepted that the crime of financing would need both a general and a specific intent – but this seems the most plausible interpretation.[154] The term "wilfully", however, is open to different interpretations and could also be regarded as a lower standard of *mens rea* than 'intentionally', one for which reckless conduct is enough.[155] In that sense, it would in any

153 Cassese, *supra* note 32, at 81 (original emphasis).

154 Also supported by Aust, *supra* note 7, at 295.

155 Werle and Jessberger, *supra* note 103, at 47: "The frequently used term 'wanton' also reduces the level of the required mental state [...]. The same can be presumed for `wilfullness'

event seem misplaced as a qualification of the material act of financing. However, if the notion of "unlawfully and wilfully" can be seen to qualify the definition of the offence as a whole, and therefore to extend to paragraph 1 in its entirety, this would confirm the interpretation of the state of mind of the perpetrator made on the basis of the indeterminate relationship between the act of financing and any subsequent terrorist acts. It would be a clarification that sets straight the definition and mitigates the somewhat strained relationship between the mental element (intent or knowledge) and the structure of the crime as a whole, including paragraph 3. Acting recklessly, willingly taking the risk that a financial contribution may benefit and facilitate the maintenance of terrorist structures and may also lead to the commission of terrorist acts, and fully accepting this possibility, even hoping for it, seems to be the crime that the drafters wanted to capture in article 2. The exact terms used in paragraph 1 do, however, seem to require a closer relationship between the financing offence and the actual terrorist offences[156] – a source of confusion also during the negotiations as many delegations doubted whether the Convention could add anything to the existing regulation, as it seemed to address participatory acts.[157]

It should, however, be noted that this understanding of the meaning of the word "wilfully" is not undisputed and that the notion has been used in the ICTY jurisprudence as an equivalent to "intentionally".[158] Likewise, it can be doubted whether the drafters of the Financing Convention – or even the "Friends of the Chair" who were responsible for producing the final text – were familiar with the various standards of *mens rea* in the Rome Statute. The Statute had been adopted during the summer of 1998 and the negotiations on the Elements of Crimes had

which is often required for war crimes as well: to this extent, reckless conduct is usually enough". See also Ambos, *supra* note 108, at 468, who has agreed that terms such as 'deliberately', 'wilfully' or 'wantonly' "nicht immer Wissen und Wollen entsprechen".

156 For a similar view, see Lavalle, *supra* note 7, at 498.

157 For instance, it was argued that financing an individual in order to enable him or her to commit terrorist offences could hardly be more than a participatory offence falling under the scope of the conventions listed in the Annex. For that reason, it was suggested to mention the financing of preparatory acts in the *chapeau* "since this Convention would otherwise become largely redundant"; see A/AC.252/1999/WP.11, reproduced in the March Report, at 28–30.

158 *Prosecutor v. Delalić et al.,* Case No. IT-96-21-T, Judgement of 16 November 1998 (*čelebići* Judgement), paras. 420, 433 and 439; *Prosecutor v. Stanislav Galić* , Case No. IT-98-29-T, Judgement and Opinion of 5 December 2003, para. 54, quoting the ICRC Commentary. See also Yves Sandoz, Christian Swinarski, and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, 1987, para. 3474, at 994, and Schabas, *supra* note 125, at 1020.

begun in February 1999, but the issue of the perceived inconsistencies between article 30 and the *mens rea* requirements in the individual criminalisations did not emerge until the summer of 1999. Decisive clarification of this problem was not achieved until after the Siracusa meeting held between the sessions of the Preparatory Committee in January 2000.[159] It may therefore be assumed that article 30 of the Rome Statute, if it played any role in the deliberations of the September 1999 session of the Working Group, rather seemed to set a uniform standard of intent and knowledge. The nature of article 30 as an unusually strict standard, and its function in the Statute as a default rule, were recognised only afterwards. The most plausible guess may therefore be that the Friends of the Chair, just like the ICTY Trial Chamber, looked to the Concise Oxford English Dictionary for the explanation of the word 'wilfully' and found that it was "intentional, deliberate".[160]

6.3.2. The Elements Revisited

Mirrored against the intention of the drafters and the object and purpose of the Convention, the elements of the crime of terrorist financing seem to consist of material support given to or collected for terrorist causes, and the acceptance of the possibility – sometimes almost the certainty – that terrorist crimes will be committed as a result of that support. The *mens rea*, when it is not knowledge of the purpose for which the funds are provided or the belief that they will be used for a terrorist purpose,[161] is at the level of risk-taking (recklessness, *dolus eventualis*). The elements of the crime of terrorist financing could thus be reformulated as follows:

1) the person intentionally collected or provided funds
2) the person had reason to believe that the funds would contribute to the commission of terrorist offences as specified in subparagraphs 1(a) and (b), or
3) the person willingly took the risk that they would be so used.

The act of financing must be intentional in the sense of making the funds available to a recipient. At the same time, the financier must intend or believe that the funds should be used for committing terrorist crimes or be aware that this is the probable outcome of his or her conduct. Lavalle has held that the intent standard in article

159 See Herman von Hebel, 'Developing Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 8–18, at 10–11.

160 *Čelebići* Judgement, para. 433.

161 Lavalle, *supra* note 7, at 498, footnote 21, has held that the knowledge standard should be the only prevailing standard in the implementation of the Convention.

2(1) should be subsumed under the knowledge standard.[162] There may nevertheless be reason to keep intention and knowledge separate as knowledge that terrorist acts will take place is not a necessary condition for intending that this would be the case.[163] At the same time, so as to exclude mere belief, or false belief, as a basis for criminalisation, it is submitted that intention should be understood in the sense of having (some objective) reason to believe that the financing will contribute to terrorism. Otherwise, taking into account that no direct relationship between the act of financing and subsequent terrorist acts is required, and that the drafters foresaw the possibility that the funds could be used for broad terrorist purposes including but not limited to the preparation of terrorist offences, the financier must willingly take a risk or at least be indifferent to the possibility that the funds might be used for committing terrorist crimes.

Summing up the extent of the criminal knowledge of the financier, it may be – but does not have to be – as specific as that of an accomplice. It may be rather well described using the 'conspiracy' part of the common purpose formulation in subparagraph 5(c). The malicious intention or criminal knowledge – whether or not the act of financing will result in any actual harm – is the essence of the crime of terrorist financing in much the same way as an agreement is the essence of conspiracy, whether or not that agreement will be executed.[164] It could also be compared to the knowledge required of the perpetrator concerning the context element in crimes against humanity. Such a comparison would be justified in the technical sense as the financier, too, is seen as a part of a larger collectivity whose (terrorist) purposes the act of financing serves.

Should the financier be described as a link in a chain that leads to the commission of terrorist crimes? The relationship between the act of financing and the subsequent terrorist crimes in its simplest form can be described as the relationship between person A and person B: A gives funding to B, who commits a terror-

162 *Ibid.*

163 See Victor Tadros, *Criminal Responsibility*, Oxford University Press, 2007, at 180: "Whether an agent has an intention [...] is determined by his beliefs rather than his knowledge".

164 Punja has pointed out that in the US law, "conspiracies have been divided into wheel or spoke conspiracies, and chain conspiracies. The former involves a single person dealing with two or more of the other people in the group and the latter a successive chain of communicative operations". The latter form of conspiracy would seem to bear some resemblance to terrorist financing. See Rajiv K. Punja, Issue: *What is the Distinction between "joint criminal enterprise" as defined by the ICTY case law and conspiracy in common law jurisdictions?*, Memorandum for the Office of the Prosecutor of the ICTR, Case Western University School of Law International War Crimes Reseach Lab. Fall 2003, at 35, available at http://www.law.case.edu/war-crimes-research-portal/memoranda.

ist offence. More complex, and arguably more common, situations would involve a sequence of deeds carried out by different persons from A to X. There is also reason to assume, in view of the phenomenon of the 'commingling' of licit and illicit funds, that the relationship between A and X would not always follow a linear model, but that there could be one or more intervening factors which may render it difficult to prove that a given act of financing has led to a terrorist act. It is recalled that the reasons why the requirement of a terrorist consequence was not made a part of the definition of the offence of terrorist financing were mainly related to the practical problems of following a 'money trail'. At the same time, it may be suggested that the criminalisation of terrorist financing was inspired by and based on a general idea of causality.

Terrorist financing was established as an independent offence, distinct from any subsequent offences and building on knowledge and intention – or, as has been argued above, foreseeability and risk-taking – rather than causality. The crime of financing gets its criminal nature mainly from the guilty mind of the financier. At the same time, *the idea of a causal relationship* – if not between two specific crimes, then between the *general categories* of terrorist financing and terrorism – is necessary to justify the new criminalisation. While the responsibility of the terrorist financier is not responsibility for the act of another, some meaningful and credible connection would have to exist between the two categories of crimes, to be specified by national legislation and by courts. What could a causal relationship mean in this latter sense? Causation in law does not always have to be linear,[165] but the more remote two events are from each other, the more difficult it is to establish causality.[166] Furthermore, intervening factors, such as unexpected action of other individuals, may break the chain of causation.[167]

At the same time, complex problems of causation are familiar from the law of the core crimes. Rigaux has referred to superior responsibility as an example of a legal construction in which the role of causation is unclear.[168] The crime of omission,

165 Becker has noted that "[i]n criminal law, the role of causation in the responsibility for an act of another can be more difficult to discern. While some causal connection between the original conduct and the subsequent crime is required to justify liability for the crime itself, it would be misleading to suggest that cause [...] is always a necessary element." See Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, 2006, at 301. See also Fletcher, *supra* note 82, at 59–73.

166 See Tadros, *supra* note 163, at 165.

167 *Ibid*., at 173–175.

168 The other one, he has noted, is the ethical duty to refrain from inflicting harm on other beings. François Rigaux, 'International Responsibility and the Principle of Causality', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 81–91, at 81.

he has argued, is completely outside any "chain of events in which a fact is connected with its consequences".[169] Likewise, the assumption that an intervention by a superior, or by a representative of a state in the case of state responsibility, would have prevented the harm must be deemed "a purely hypothetical factor".[170] In other situations of either criminal responsibility or state responsibility, some parts of the causal relationship are diffuse, making the analogy of 'a chain of events' hardly appropriate. Rigaux has suggested that the familiar concept of 'chain', borrowed from the natural sciences, may not be best suited to complex legal relationships. He has thus suggested two other images which complement the image of a chain of events and pick up different aspects of causality: "*Chain* rests on a linear approach of successive events; *net* indicates that diverse chains concur in the result; and *stream* gives those multiple chains of events a purposeful direction".[171] While the relationship between the crime of terrorist financing and any subsequent terrorist acts could not be easily described in terms of the analogy of a chain in which successive acts are closely related to each other, the analogy of *stream* is more helpful if the act of terrorist financing is to be seen as a purposeful contribution to terrorism.[172]

It has already been shown how different the innovative structure of the crime of terrorist financing is from the offences under the earlier anti-terrorist conventions. Another, and perhaps more relevant point of reference is offered by the doctrines of extended responsibility adopted in international criminal law *sensu stricto*, whether based on the concepts of conspiracy, criminal organisations, superior responsibility, incitement, or joint criminal enterprise. Although these concepts differ from each other, they can all be referred to as 'collective responsibility' in the sense of criminal responsibility that exceeds a person's actual contribution to a crime.[173] In superior responsibility, the superior is held responsible for the crimes committed by his or her subordinates while in the other categories each of the members of a collective is held responsible for the conduct of the collective to which they belong or for the conduct of some of its members. According to Triffterer,

169 For a different view, see Tadros, *supra* note 163, at 171–173 and Fletcher, *supra* note 82, at 67–69.

170 Rigaux, *supra* note 168, at 82, 85.

171 *Ibid.*, at 86.

172 See also Fletcher, *supra* note 82, at 63 on how the 'original causal stream' can be overwhelmed and dominated by new causes.

173 The other main type of collective responsibility would be corporate criminal responsibility whereby the collective is criminally responsible for acts committed by its members; the acts of the individuals are thus imputed to the collective. See van Sliedregt, *supra* note 65, at 351.

> [M]acro-criminality, in its most frequent appearances, is orientated on a sort of "collective responsibility" in the sense that each individual contribution is a constructive and often indispensable part of the whole, albeit the persons participating in such actions may be interchangeable. In addition, the whole functioning sometimes may depend on something which is difficult to assign to individuals. It can be described as "a State or organizational policy".[174]

In comparing the criminalisation of terrorist financing to doctrines of collective liability, a critical question seems to be related to the definition of the 'collective'. Even if terrorist organisations may occasionally fulfil the strict organisational criteria required of superior responsibility,[175] this is hardly the case for the networks of financing characterised by the problem of 'commingling'. However, as has been pointed out in Chapters 3 and 4, the law of the core crimes as applied by the ad hoc tribunals has not been limited to collective crimes committed within the framework of highly institutionalised organisations but has extended to fairly unorganised non-state groups. The concept of joint criminal enterprise, notably the third or extended category, does not require the existence of a formal organisation, but bases criminal attribution on the foreseeability of the crimes committed as a consequence of a common design. The concept of direct and public incitement to genocide also applies to situations where there is no formal relationship between the inciter and his or her audience. Van Sliedregt has distinguished two variants of group responsibility on the basis of the degree of institutionalisation: 'institutionalised membership responsibility' in the sense of attribution based on a person's function within an organisation, and 'collateral membership responsibility', in which attribution is based on the likelihood of the crimes being committed.[176] It is the latter type, in particular, that would seem to capture the doctrinal foundations of the crime of terrorist financing.

The position of the financier with regard to the terrorist group or network carrying out the ultimate crimes is not very different from that of a member of a criminal enterprise who willingly participates in that enterprise through the act of financing, either sharing the intention that crimes be committed, or fully foreseeing that this may be the case. It has in fact been suggested that financing should be counted among the ways to participate in a JCE: "The joint criminal enterprise doctrine should also imply that those who financed the commission of the crimes falling within the criminal design of the joint criminal enterprise must be

174 Triffterer, *supra* note 33, at 153.

175 See Chapter 4.4.

176 Van Sliedregt, *supra* note 65, at 352.

prosecuted".[177] The most important difference is of course that the responsibility of the financier is not of a derivative nature. In the case of terrorist financing, the financier is not prosecuted for the terrorist acts his or her financial contribution may help to bring about but for terrorist financing as an independent crime. It must also be recalled that JCE is not a factual description but a legal construct to allocate responsibility for a crime already perpetrated, which makes the approach retrospective. Both could nonetheless be seen as falling under the concept of "collateral membership responsibility", where attribution of responsibility is based on the likelihood of the crimes being committed.

Finally, it seems that article 2 of the Terrorist Financing Convention would have to be interpreted much along the lines of the original proposal, according to which a person commits an offence if he or she "unlawfully and intentionally proceeds with the financing of a person or organization in the knowledge that such financing will or could be used, in full or in part, in order to prepare or commit terrorist crimes". If intention has a fictional quality and 'intention in the vacuum' must be excluded as a crime of conscience, the knowledge standard prevails unless there is a way to link the intention to more objective circumstances. If the knowledge standard has to be extended to cover recklessness as well, a reasonable interpretation of that standard would include cases where the financier knows that funds "could be used" for the commission of terrorist crimes. It seems that for all the good attempts in the negotiations, the broad concept of financing is not easily reconcilable with thresholds and distinctions, and where they were proposed, they did not seem to have much practical meaning. This can at least partly be explained by referring to the specific features of both financing and terrorism as real-world phenomena. As for financing, its global dimensions and fungible nature made it important to adopt a broad definition of 'funds'. As for terrorist activities, it was recognised that their most visible expression, the mounting of violent acts, often requires long-term planning and conspiring as well as meticulous preparation. They do, however, also include a political component, a cause that many a *bona fide* or indifferent prospective financier may wish to support. The broad concept of financing and a liberal interpretation of the Convention extend criminal liability to acts that amount to the preparation of preparation, as much as the idea was objected to during the negotiations. This emphasises the importance of rigor-

177 Nicola Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *JICJ* (2004), 446–454, at 453. He has also suggested that the action of the ICTY Office of the Prosecutor should be more focused on financial investigations.

ous national-level implementation, so that the Convention does not constitute a sweeping tool for prosecuting minor cases of unintentional financing.[178]

178 One possibility is to introduce a filter to assess the gravity of the acts. For instance, in Finland any prosecutions of terrorist financing are subject to a decision of the Prosecutor General.This procedure also applies to the other crimes under Chapter 34a of the Penal Code concerning terrorist offences.

CHAPTER 7 THE FOLLOW-UP TO THE TERRORIST FINANCING CONVENTION

The Terrorist Financing Convention was hardly seen as a model for further instruments when it was adopted in 1999. Since September 2001, however, a 'paradigm shift' has taken place in the field of counter-terrorism with prevention being raised to the forefront. The increased destructive capability of terrorist groups has not only prompted international cooperation to counter terrorism. It is also a factor that has redirected the legal responses to terrorism, as it has become more imperative to act pro-actively to prevent deadly attacks. Important changes have taken place at the national level,[1] but the trend is also visible at the international level with some of the recent international legal instruments departing from the established tradition of anti-terrorism conventions and criminalising mainly indirect activities which may contribute to terrorism. These instruments can be said to belong to the same category as the Terrorist Financing Convention and to follow in its wake. The Financing Convention was explicitly cited as a model in the negotiations on the revision of the SUA treaties on maritime terrorism in 2002–2005,[2] as well as in the elaboration of the Council of Europe Convention on the Prevention of Terrorism

1 See, for instance, Christian Walter, 'Defining Terrorism in National and International Law', in Walter *et al* (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer Verlag, 2003, 23–44. Walter has referred, at 29, to a "development that broadens existing definitions of terrorism into a direction of including violent and non-violent but nevertheless destructive action against public facilities". For national law developments, see also Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005 and Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004.

2 Protocol to amend the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005, IMO Doc. LEG/CONF.15/DC/1 of 13 October 2005; Protocol to amend the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 14 October 2005, IMO Doc. LEG/CONF.15/DC/1 of 13 October 2005.

in 2004–2005.[3] The European Union Framework Decision on combating terrorism of 2002,[4] which criminalises a broad range of offences related to the activities of a terrorist group is another example of the new trend of pro-actively criminalising forms of conduct that may lead to the commission of terrorist offences. This trend is also very much evident in the UN Security Council's practice with two landmark resolutions on international terrorism, 1373(2001) and 1624(2005), focusing on preventive action, the former on the suppression of terrorist financing and the latter on countering incitement to terrorism.

7.1. The EU Framework Decision on Combating Terrorism

7.1.1. The Definition of Terrorism as a Violent Act

The Council Framework Decision on combating terrorism was negotiated during the autumn of 2001 on the basis of a draft submitted by the European Commission shortly after September 11, and was formally adopted in June 2002.[5] It is thus one of the first international legal instruments adopted after September 2001.[6] While the

3 The Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, CETS No. 196 (Prevention Convention); the Convention entered into force on 1 June, 2007.

4 Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002 (Framework Decision). See also Commission of the European Communities, Proposal for a Council Framework Decision on combating terrorism, Brussels 19.9.2001 COM(2001)521 final, 2001/0217(CNS) (Commission Proposal).

5 The delay was due to subjecting the text to parliamentary scrutiny in some member states. The substantive negotiations were concluded already in the autumn of 2001and the European Council gave its political endorsement to the text on 6 December 2001. See Ben Saul, 'International terrorism as a European crime: the policy rationale for criminalization', 11 *Eur. J. Crime, Crim. L. & Crim. Jus.* (2003), 323–349; Jukka Lindstedt, 'Vilket är förhållandet mellan EU:s rambeslut om bekämpande av terrorism och de grundläggande fri- och rättigheterna', *Tidskrift utgiven av Juridiska Föreningen i Finland* (2002), 436–449 and 'Terrorismipuitepäätös ja suomalaiset terrorismia koskevat rangaistussäännökset', *Rikosoikeudellisia kirjoituksia VIII*, Raimo Lahdelle 12.1.2006 omistettu, Suomalaisen lakimiesyhdistyksen julkaisuja, A-sarja, N:o 268, 2006, 231–250.

6 It has been pointed out, however, that the Commission Proposal was based on an earlier draft prepared and circulated before September 2001 and that the Framework Decision should therefore be seen as logical continuation of previous EU cooperation in justice and home affairs. According to Anne Weyembergh, 'La Coopération pénale européenne face au terrorisme: rupture ou continuité?', in Karine Bannelier *et.al.* (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 279–295, at 289: "De manière générale, les travaux réalisés dans le cadre du 3ème pilier du traité depuis le 11 septembre 2001 se situent dans la droite ligne des développements précédents: il n'y a pas à proprement parler

Framework Decision is a regional instrument binding only the member states of the European Union, it deserves attention in the context of 'indirect responsibility' because of its wide reach. The proposal for the Framework Decision was presented by the European Commission in order to not only address acts of terrorism directed at member states, but also to interrupt "conduct on the territory of the European Union *which can contribute to acts of terrorism* in third countries".[7] The rationale so defined also echoed the obligation of states not to allow preparation in their territory of terrorist acts directed at other countries, which soon became an area of heightened Security Council attention. The preventive focus was also reflected in the criminalisation of offences related to a terrorist group and offences linked to terrorist offences, and in subjecting them to severe penalties.

The Framework Decision has been noted internationally in particular for the fact that it contains a definition of terrorist acts, based on a generic chapeau and a list of offences.[8] The same definition was incorporated in the EU Common Position on restrictive measures against persons and entities involved in terrorist activities, adopted in December 2001 as part of the implementation of the UNSC Resolution 1373(2001).[9] The EU definition was also referred to in the Council of Europe in connection with the revision of the 1977 Convention on the suppression of terrorism, as well as in the discussions concerning the possible 'added value' of a comprehensive convention on terrorism at the European level.[10] The 2005

d'orientations véritablement nouvelles ni de projets nouveaux dont le dépôt serait la conséquence directe des attentats de septembre." It may be assumed, however, that the sense of urgency after the attacks of 9/11 had some impact on the process of agreeing on the text.

7 Commission proposal, *supra* note 4, at 2 (emphasis added).

8 Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, 2006, at 162-168; Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2006, at 27–29, 37; Isabelle Thomas, 'La mise en oeuvre en droit européen des dispositions internationales de lutte contre le terrorisme', 108 R*GDIP* (2004), 463–486, at 471–473; Walter, *supra* note 1, at 5, 8.; Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *JICJ* (2006), 1044–1073 and Bianchi, 'Assessing the Effectiveness of the UN Security Council' s Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *EJIL* (2007), 881–919. See also August Reinisch, 'The Action of the European Union to Combat International Terrorism', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 119–162.

9 Council Common Position on the application of specific measures to combat terrorism, 2001/931/CFSP of 27 December 2001, OJ L 344/93 of 28 December, 2001, art. 1(3).

10 The Council of Europe Parliamentary Assembly has notably suggested, in its recommendations 1550(2002) and 1664(2004), that the EU definition should be adopted in a CoE instrument. See also GMT reports, CODEXTER Report, available at http://www.coe.int/GMT.

Prevention Convention contains a part of the EU definition as a preambular provision recalling the characteristics of terrorist acts.[11] At the same time, and interestingly, neither the EU definition nor the general approach of the Framework Decision have seemingly had any impact on the ongoing negotiations on the UN Comprehensive Convention which continue to concentrate on the traditional 'core definition' of a terrorist act and possible exemptions from it, not on the supporting activities which have otherwise become the main focus of anti-terrorist action in the recent years. In this regard, as also noted earlier, the UN Draft Comprehensive Convention continues the long line of the UN General Assembly's consideration of the terrorism item, and while closely linked to the 1994 Declaration on the measures to eliminate terrorism, remains unaffected by the adoption of the Terrorist Financing Convention, the related UN Security Council action against terrorism and the shift towards the redefinition of terrorism they represent.

Article 1 of the Framework Decision defines terrorist offences as follows:

> 1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i) as defined as offences under national law, which, given their nature or context, may seriously damage a country or an intrnational organisation where committed with the aim of:
>   – seriously intimidating a population, or
>   – unduly compelling a government or an international organisation to perform or abstain from performing any act, or
>   – seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,
>
> shall be deemed to be terrorist offences:
>
> (a) attacks upon a person' s life which may *cause* death;
> (b) attacks upon the physical integrity of a person;
> (c) kid-napping or hostage-taking;
> (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
> (e) seizure of aircraft, ships, or other means of public or goods transport;

11 See Chapter 7.3.

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

threatening to commit any of the acts listed in (a) to (h).

The acts enumerated in article 1 cover much of the subject-matter of the UN anti-terrorist conventions and protocols, although the definitions are somewhat different. As noted earlier, the relevant UN instruments use variable criteria to qualify the material act, including both subjective (the fairly common 'intended to cause' formulation) and objective (`likely to cause') criteria. In comparison, article 1 of the Framework Decision refers to attacks upon a person's life "which *may cause* death" as well as to acts "*causing* extensive destruction" to a government or public facility or other specified targets, "when *likely to endanger* human life or result in major economic loss".[12] It further refers to the release of dangerous substances, or causing fires, floods or explosions and to the interference with fundamental natural resources when the effect of such action is to *endanger* human life.[13] These variations are not random: the provision seems to deliberately put an emphasis on the protection of human life, equating endangerment of human life with actual destruction of a government or public facility, transport or information systems or private property. Furthermore, the list includes attacks upon the physical integrity of a person, kidnapping and hostage-taking, seizure of aircraft, ships or other means of public or goods transport, as well as offences related to explosives or weapons of mass destruction. The list is not self-standing, and does not completely coincide with the offences within the scope of the UN anti-terrorist conventions and protocols, as the *chapeau* of paragraph 1 sets out a number of further qualifications.

It is required, firstly, that the acts enumerated in subparagraphs 1(a) to 1(h) are intentional and, "given their nature and context, may seriously damage a country or an international organisation". The obligation on member states to establish these acts as criminal offences under national law is further restricted by requiring a specific intent of "seriously intimidating a population, unduly compelling a government or an international organisation to perform or abstain from performing

12 Paras. 1(a) and 1(d), (emphasis added).

13 Paras. 1(g) and 1(h), (emphasis added).

any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation". Furthermore, paragraph 2 contains a safeguards clause recalling the obligation to respect fundamental rights and fundamental legal principles in article 6 of the Treaty on European Union which are to be taken into account when implementing the Framework Decision at the national level.

The specific acts under article 1 are for the most part previously existing offences that presumably were already criminalised in the EU member states at the time. These acts are mostly violent in nature, with the exception of the manufacture, possession, acquisition, transport and supply of weapons, explosives and weapons of mass destruction in subparagraph (f) and threatening in subparagraph (i). As chemical and biological weapons are prohibited under any circumstances by virtue of the Chemical Weapons Convention and the Convention on Biological Weapons[14] and the manufacture, possession, acquisition, transport and supply of nuclear weapons is strictly regulated under the Nuclear Proliferation Treaty,[15] the provision breaks new ground mainly by criminalising similar conduct with regard to any weapons or explosives. At the same time, it may be recalled that unlawful manufacture or possession of explosives has been criminalised in many national jurisdictions as preparation for crime. Likewise, although the approach of the UN conventions and protocols is not consistent with regard to the threat to commit the relevant offences, it is not uncommon that anti-terrorist criminalisations extend to threat. Given the conditions spelled out in the chapeau of paragraph 1, threat seems particularly well defined in the Framework Decision.

While partly based on an enumeration of different acts, article 1 can also be understood as a 'definition of terrorism'. Suffice it to note that the *chapeau* contains the customary elements of 1) seriousness, assessed on the basis of the nature or context of the offence in question, 2) government ("country") or international organisation as secondary targets, and 3) 'terrorist intent', which, in the three elements laid down in the *chapeau*, is elaborated with particular care.[16] In addition

14 Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction, 13 January 1993, UNTS Vol. 1974, p. 45 (Chemical Weapons Convention, CWC); Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, UNTS Vol. 1015, p. 163 (Biological Weapons Convention, BWC).

15 Treaty on the Non-proliferation of Nuclear Weapons, 1 July, 1968, UNTS Vol. 729, p. 123 (Nuclear Non-proliferation Treaty, NPT).

16 The definition has, however, also given rise to criticism of "hasty drafting", "tortuous language" and "complex and uncertain" wording. See Saul, *supra* note 8, at 163. According to Kimmo Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform

to the familiar notions of intimidation or compelling, "serious destabilisation" or "destruction of the fundamental structures of a country or an international organisation" qualify as elements of a 'terrorist intent'. This addition to the established understanding of terrorist crime illustrates the new perception of terrorism as a security threat. In this sense, the EU definition could also be taken as an attempt to define terrorism as a core crime. The Commission proposal underlined the distinctive nature of terrorist offences when compared to other violent crime, pointing out that the legal rights affected by this kind of offence would not be the same as those affected by common offences. While the practical effect of both types of crime was deemed similar, terrorist offences were set apart because of their capacity to undermine the political, economic and social structures of a country.[17] The qualifications in the *chapeau* of article 1 set the threshold for prosecution high in that they exclude common crimes and define a new category of particularly serious crime. The offences meeting these criteria have also been subjected, by virtue of article 5, to heavier penalties than those imposable under national law for the same offences in the absence of special intent.[18] The EU definition has been praised for being targeted and specific, in particular when compared to those found in many regional conventions,[19] but it has also been regarded as broad[20] or vague.[21] The definition has not been incorporated in other international instruments,[22] nor has it been much used for other legal purposes outside the European Union.[23]

of Criminal Law', 4 *JICJ* (2006), 998–1016, at 1007, the Framework Decision has nevertheless played a crucial role in the emergence of terrorist offences in national legal systems as distinct offences.

17 Commission Proposal, *supra* note 4, at 7. The proposal also contained in the *chapeau* of the article on terrorist offences a requirement that such offences should be committed "against one or more countries, their institutions or people", see art. 3, at 17.

18 Framework Decision, art. 5, para. 2; an exception is allowed for cases where the sentences imposable were already the maximum possible sentences under national law.

19 Saul, *supra* note 5, at 162; Thomas, *supra* note 8, at 472.

20 Walter, *supra* note 1, at 30, has pointed out that it could easily extend to any forms of violence without a political, ideological or religious motivation.

21 Duffy, *supra* note 8, at 29; Bianchi (2006), *supra* note 8, at 900.

22 The wording of the chapeau of the 'EU definition' was referred to in the negotiations on the 2005 SUA Protocol as well as in the negotiations on the Prevention Convention as an example to follow. It finally made its way only to the Preamble of the Prevention Convention.

23 For instance, it has been deemed too general for insurance purposes, as pointed out by Bernhard A. Koch from the European Centre of Tort and Insurance Law in his presentation to the Council of Europe Committee on Experts on Terrorism on 23 April 2007; see also the OECD Check-List of Criteria to Define Terrorism for the Purpose of Compensation, Appendix II, available at http://www.oecd.org/dataoecd/55/2734065606.pdf.

7.1.2. Offences related to a Terrorist Group

Article 2 concerning offences related to a terrorist group is more intriguing as an example of a new approach to the use of criminal law in combating terrorism. According to paragraph 2 of that provision,

> 2. Each Member State shall take the necessary measures to ensure that the following acts are punishable:
>
> (a) directing a terrorist group
>
> (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

Paragraph 1 of article 2 defines the notion of a 'terrorist group'. As is recalled, such a definition was deemed redundant in the Terrorist Financing Convention in view of the definition of the financing crime which comprises the financing of both groups and individuals. In article 2 of the Framework Decision, however, the definition of a group has a direct impact on the scope of the specific offences. According to paragraph 1, the term 'terrorist group' means "a structured group of more than two persons which is established over a period of time and which acts in concert to commit terrorist offences". A 'structured group' shall in turn mean "a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".

The common purpose criterion, together with the time factor – a requirement that the group must be contemplating, possibly also planning and preparing, the commission of terrorist offences over a period of time, as distinct from a group that has been formed for the immediate commission of a crime – brings the definition close to the notion of conspiracy, which also builds on the existence of an agreement to commit crimes.[24] Moreover, the criterion may be seen as a more developed and refined version of the common purpose offence familiar from the Terrorist Bombings Convention, the Rome Statute of the ICC and the Terrorist Financing Convention which, it is recalled, originally derived from an EU instrument. However, the latter type of common purpose offence is only punishable when the substantive crime actually occurs. The same cannot neces-

24 According to George P. Fletcher, *Basic Concepts of Criminal Law*, Oxford University Press, 1998, at 191, "The modern doctrine of conspiracy renders criminal any agreement between two or more individuals to commit a crime".

sarily be required of the offences related to a terrorist group under article 2 of the Framework Decision.[25]

Article 2 specifies two offences related to a terrorist group: directing a terrorist group and participating in the activities of such a group, including by supplying information or material resources or funding its activities in any way. Both offences must be intentional and as far as participation is concerned, there is a further requirement of "knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group". The final formulation of this offence is fairly restrictive compared to the original proposal, which would have extended the criminalisation to "promoting of, supporting of or participating in a terrorist group".[26] A notable feature in the original proposal was also that these offences were treated as 'terrorist offences' and located in the same article as, for instance, murder, kidnapping or hostage-taking, or disrupting the supply of water, power, or other fundamental resources. At the same time, they were subject to the same *chapeau* requirements as the other terrorist offences, namely being intentional acts "against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of a country".[27] As the material act of promotion, support or participation was not qualified in any way and the seriousness of these 'terrorist offences' was completely dependent on the far-reaching intent, there was an obvious imbalance, which was corrected during the negotiations.

It is interesting to compare the final formulation of the offence of participation in a terrorist group to the offence of terrorist financing as laid down by the 1999 Terrorist Financing Convention. The examples given of the material acts that may constitute participation in a terrorist group – supply of information or mate-

25 In the course of the national implementation of the Framework Decision in Finland, both interpretations were put forward. According to the Government Bill, the offences related to a terrorist group were punishable regardless of whether any substantive terrorist offences were committed by the group, but the Legal Affairs Committee of Parliament, advised by the Constitutional Committee, introduced a requirement that one or more terrorist offences should have been committed by the group. For the documents, see Hallituksen esitys Eduskunnalle terrorismia koskeviksi rikoslain ja pakkokeinolain säännöksiksi, HE 188/2002 vp., perustuslakivaliokunnan lausunto PeVL 48/2002 vp. , lakivaliokunnan mietintö LaVM 24/2002 vp, all available in Finnish and Swedish at http://www.eduskunta.fi . See also Nuotio, *supra* note 16, at 1010; Lindstedt (2006), *supra* note 5, at 247 and Henrik Härkönen, 'Terroristiryhmän oikeudellinen sääntely', *Lakimies* (2006), 216–235, at 233, 235. The requirement was removed in 2007 on the occasion of the ratification of the Prevention Convention; see HE 81/2007 vp. and EV 107/2007 vp, available at http://www.eduskunta.fi.

26 Commission Proposal, *supra* note 4, art. 3(1)(m), at 18.

27 *Ibid.*, art. 2 and 3, at 17–18.

rial resources, and funding "in any way" – are not only comparable to terrorist financing but largely overlapping with it. At the same time, the scope of the offence seems to be more limited than in article 2 of the 1999 Convention. Both definitions of offences require of the offender a criminal intention or knowledge that the act of financing, or procuring material resources, or information, will contribute to the commission of terrorist crimes. However, the restriction of the 'participation crime' to the framework of a structured group makes the distance between that contribution and an ultimate terrorist crime less remote and the causal relationship less hypothetical than in the 'financing crime' as it has been defined in the Terrorist Financing Convention. At the same time, it should be noted that the Framework Decision does not tie the material or financial contribution to the commission of terrorist crimes but rather to the broader criminal activities of the group. In that sense, article 2 seems to be based on a more realistic conception of the 'terrorist financing trail' than article 2 of the 1999 Convention, the construction of which is based on a hypothetical link between the provision or collection of funds and the offences referred to in subparagraphs 2(a) and (b).[28] A novelty in the Framework Decision is the criminalisation of the supplying of information to a terrorist group. Such information may be of any kind but must, because of the general requirement regarding participation, contribute to the criminal activities of the group.[29]

Directing a terrorist group is likewise a new offence. In some comments it has been criticised for lack of precision, because it "problematically criminalizes *all* directions even if lawful and, indeed, even if desirable, such as direction to surrender, observe a cease-fire or to disarm".[30] This criticism is valid only if the offence of 'directing a terrorist group' is understood in the sense of giving specific instructions to the group. The provision would, however, seem to refer sooner to 'directing a terrorist group' in the sense of managing and controlling such a group. Otherwise, it would be difficult to reconcile the generally worded offence of 'directing a terrorist group' in subparagraph (a) with the much more specific and restricted offence of 'participating in the activities of a terrorist group' in subparagraph (b), in particular as the minimum penalty laid down for directing is considerably higher than that for participation.[31] The latter interpretation receives support also from the dif-

28 Chapter 6.

29 It may nevertheless be difficult to draw a line between the two. The Finnish Government Bill, *supra* note 1596, excluded for instance legal advice from the scope of this offence.

30 Saul, *supra* note 8, at 168, referring to C. Walker, *Blackstone's Guide to the Anti-Terrorism Legislation,* Oxford University Press, 2002, at 170.

31 According to art. 5, para. 3, offences listed in Article 2 are punishable by custodial sentences with a maximum sentence of not less than 15 years for the offence of directing a

ferent language versions of the Framework Decision.[32] Control or management of a terrorist group has not been elaborated in any way in the text of subparagraph (b) but it could raise questions similar to those of the crime of directing or ordering, which has been deemed equivalent to co-perpetration or superior responsibility.[33]

Article 3 defines offences linked to terrorist activities. All of these are previously existing offences which by inclusion under article 3 have been given a special status, namely aggravated theft with a view to committing one of the acts listed in article 1, extortion with a view to the perpetration of one of these acts, and drawing up false administrative documents with a view to committing one of the acts listed in article 1, or with a view to committing the 'participation crime' as defined in article 2. The structure of these three offences shows some similarity with the crime of terrorist financing, with the important difference, however, that the initial acts are already criminal in nature and the further intent of committing terrorist offences is only an aggravating factor. Article 4 on ancillary offences requires that inciting, aiding and abetting, and attempting be made punishable. The provision does not invite particular comment as no definitions are included: it was assumed that member states would apply the existing provisions of national penal law to the new offences.[34] Finally, article 7 provides for the liability of legal persons.

Two additional remarks are in order with regard to the EU Framework Decision. Firstly, member states were required to align their internal legislation with the Decision but were, at the same time, given a considerable margin of discre-

terrorist group and a maximum sentence of not less than 8 years for the offence of participating in the activities of a terrorist group.

32 While the English language version ("directing a terrorist group", EUR-Lex-32002F0475-EN) may give rise to both interpretations, this is not the case, for instance, for the French ("la direction d'un groupe terroriste", EUR-Lex-32002F0475-FR), German ("Anführen einer terroristischen Vereinigung", EUR-Lex-32002F0475-DE), Danish ("ledelse af en terroristgruppe", EUR-Lex-32002F0475-DK), Swedish ("att leda en terroristgrupp", EUR-Lex-32002F0475-SV), Estonian ("terrorirühmituse juhtimine", EUR-Lex-32002F0475-ET) and Finnish ("terroristiryhmän johtaminen", EUR-Lex-32002F0475-FI) language versions, which all should be understood in the meaning of 'leading a group'.

33 In the Finnish Government Bill, *supra* note 25, the offence of 'directing a terrorist group' was compared to offences committed in a leading or superior position, such as leading a violent riot, or superior responsibility in case of certain military offences.

34 A comment made in relation to the ILC Draft Code which also combined incitement with 'aiding and abetting' may, however, be recalled. According to William Schabas, *Genocide in International Law*, Cambridge University Press, 2000, at 271–272, 'abetting' was understood by the ILC mistakenly in the sense of 'providing assistance' whereas it means 'to encourage, incite or set another on to commit a crime'.

tion on how to do it.[35] This may have resulted in somewhat different interpretations at the national level.[36] Secondly, the innovative nature of the new criminalisations concerning offences related to a terrorist group may not have been properly noticed in scholarly comments, some of which seem to regard the offences related to terrorist groups as little more than complicity, that is to say, conduct already covered by most national penal codes. The new criminalisations would therefore be "largely symbolic".[37] This is to lose sight of the Framework Decision as a whole. As has been pointed out by the European Commission, "the Framework Decision must not be regarded as a series of fragmentary provisions, but as [...] a global system whose elements are inevitably intertwined".[38] In particular, even though the offences related to a terrorist group have not, in the adopted version, been grouped under article 1 on 'terrorist offences', they, too, have been raised to a special category of serious crime, as is reflected in the fact that serious maximum penalties are imposed for them.

7.2. The Protocol to Amend the SUA Convention

The negotiations on a new protocol to the 1988 Convention on the Suppression of Unlawful Acts to the Safety of Maritime Navigation were conducted in the Legal Committee of the International Maritime Organization (IMO) from 2002 to

35 A framework decision is binding upon member states as to the result to be achieved but leaves to the national authorities the choice of form and methods. In that sense, it is comparable to directives. On the implementation of directives, see, for instance, John Fairhurst, *Law of the European Union*, 5th Edn., Pearson Education Limited, 2006, at 239–240.

36 See Commission of the European Communities, Report from the Commission based on Article 11 of the Council Framework decision of 13 June 2002 on combating terrorism, Brussels 8 June 2004, COM(2004)409 final.

37 Saul, *supra* note 5, at 167: "Most such conduct would already have been covered by ancillary and inchoate offences such as complicity or conspiracy. So that the offences are largely symbolic". See also Gro Nystuen, 'Terrorbekjempelse og folkerettslige normkonflikter', *Mennesker & Rettigheter* (2002), No.3, at 12, who has deemed the offences under the Terrorist Financing Convention as being little more than normal complicity: "Det er ikke usannsynligt at man i Norge, i en mindre politisk sensitiv situasjon, ville kommet til at kravene som stilles i SR 1373(2001) og i terrorfinansieringskonvensjonen ville vaert oppfyllt gjennom allerede foreliggende straffe- og straffeprocesslovgivningen. Terrorhandlinger i seg selv er dekket av alminnelige straffebestemmelser, og finansiering av straffbare handlinger vil normalt dekkes av selve straffeforbudet eller medvirkningsbestemmelser". See, however, Thomas, *supra* note 8, at 473, who has rightly pointed out the preventive nature of the offences related to a terrorist group.

38 Report of the Commission, *supra* note 36, at 5.

2005. They were initiated at the request of the IMO Assembly in November 2001 to review "on a high priority basis" the existing IMO measures to prevent acts of terrorism that threaten the security of passengers and crews and the safety of ships so as to see whether the 1988 Convention and its Protocol, or any other instruments, would need updating. If that was the case, prompt action should be taken.[39] The first draft amendments were submitted by the United States in 2002.[40] The United States also led an inter-sessional Correspondence Group and, from 2003, a Working Group of the IMO Legal Committee that negotiated the Draft Protocol. The Protocol to amend the SUA Convention, as well as the Protocol to amend the 1988 Protocol on the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, was adopted at the IMO Diplomatic Conference in October 2005.[41] The amendments to the Convention were quite far-reaching and clearly exceeded mere updating. The new criminalisations related to weapons of mass destruction alone could have justified the adoption of a new convention – so little do they have in common with the previously existing SUA offences.[42] However, when the question of elaborating an independent new instrument was raised in the Legal Committee, it did not get much support and the negotiations were continued with a view to revising the 1988 treaties.[43] The amendments to the Protocol on Fixed Platforms were less extensive, and mainly consequential on the changes made to the Convention. The following brief account will focus only on the amendments to the SUA Convention.

The amendments can be divided into three categories: 1) new criminalisations, 2) new enforcement procedures and 3) general updating and modernisation concerning international cooperation. A total of nine independent crimes were added to article 3*bis* of the Convention, and the provisions on ancillary offences were completely renewed along the lines of the newest UN anti-terrorism conventions. Equally important, a new procedure concerning the so-called boarding provisions, in article 8*bis*, created a legal basis for boarding and searching a ship suspected of being involved in one of the crimes under the Convention. These two sets of provisions raised an equal number of contentious questions during the negotiations, but as the boarding provisions are mainly related to the law of the sea,

39 IMO Assembly, resolution A.924(22) of 20 November 2001.

40 IMO Doc.LEG 85/4, 17 August 2002.

41 The International Conference on the revision of the SUA Treaties was held from 10 to 14 October 2005. For the documents, see *supra* note 2.

42 IMO Doc. LEG 86/5, para. 52.

43 IMO Doc. LEG 86/WP.6, para. 51.

there is no reason to discuss them at length in this context.[44] It should be pointed out, however, that boarding a ship on the high seas is a fairly unusual procedure, which, depending on the circumstances, may put the personnel, passengers, or cargo involved in danger.[45] The IMO Legal Committee fully acknowledged that such a procedure should not be undertaken lightly, and included a clause in article 8*bis* reminding states parties of the possibility of conducting the search in the next port of call.[46] Even without the details of the procedure related to boarding and searching, it is clear that the inclusion of such a procedure in the Convention highlights the seriousness of the crimes which can trigger its application. A third set of additions to the 1988 Convention can be described as updating it in a more formal sense; these include the prohibition of the political offence exception and other provisions related to extradition and mutual assistance, as well as the exemption from the scope of application of activities of armed forces, all along the lines of the corresponding articles of the Terrorist Bombings Convention and the Terrorist Financing Convention.[47]

The original SUA offences as laid down in article 3 of the 1988 Convention include seizure of or exercise of control over a ship by force, threat or intimidation as well as a number of specific acts if they are likely to endanger the safe navigation of the ship: acts of violence against a person on board a ship; destruction of a ship or causing damage to its cargo; and destruction of maritime navigational facilities, or seriously damaging them, or seriously interfering with their operation. Likewise, article 3 criminalises placing or causing to be placed on a ship of a device or substance which is likely to destroy the ship, or causing to the ship or to its cargo damage which endangers or is likely to endanger its safe navigation. Finally, com-

44 See, however, Marja Lehto, 'Achille Laurosta Al Qaidaan – merenkulun terrorismisopimuksen muutokset', in Timo Koivurova (ed.), *Kansainvälistyvä oikeus: Juhlakirja Professori Kari Hakapää*, Lapin yliopiston oikeustieteellisiä julkaisuja C 41, Lapin yliopistopaino, 2005, 285–305.

45 This aspect is recognised in para. 3 of article 8*bis* which reads: "States Parties shall take into account the dangers and difficulties involved in bording a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere." The boarding provisions are not, however, unique. Similar provisions can be found in certain other recent instruments; see for instance Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 related to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, UNTS Vol. 2167, p.3, art.21(8), and Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, 15 November 2000, UN Doc. A/55/383, art. 8.

46 SUA Protocol, art. 8*bis*, para. 3.

47 New arts. 2*bis*, 5*bis*, paras. 1-4 of art.11, arts. 11*bis*, 11*ter*, and 12*bis*.

munication of false information is punishable if the safe navigation of the ship is thereby endangered.[48] It is easy to see that the common denominator of all these offences, and the overriding interest to be protected by the criminalisations, is the safe navigation of a ship, including the safety of all the passengers, crew and cargo.[49] While the new criminalisations introduced in 2005 do not run contrary to this goal, they have a larger focus: they seek to address safety issues in a broader context and to protect not only maritime security but also international security from terrorist threat, including the threat of terrorist use of weapons of mass destruction.[50] It is useful at his juncture to reproduce paragraph 1 of article 3*bis* as a whole:

> Article 3*bis*
>
> 1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
> (a) when the purpose of the 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:
> (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon[51] in a manner that causes or is likely to cause death or serious injury or damage; or
> (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

48 Furthermore, causing death or injury to any person in connection of the commission or attempted commission of any of these acts is a separate crime under art. 3.

49 See also Glen Plant, 'Legal aspects of terrorism at sea', in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 68–96, who has noted, at 81, that "[t]he intention in these cases [subparagraphs (b) to (e)] is apparently to exclude acts which are not likely to endanger the *ship* –in the sense either that she is put in danger of sinking or grounding, or that the safety and lives of passengers and crew or a significant proportion thereof are threatened by acts affecting the ship as an entity".

50 For the concepts of maritime safety and maritime security, see Marie Jacobsson, 'Maritime Security: an Individual or a Collective Responsibility', in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism*, *Essays in Honor of Martti Koskenniemi*, Martinus Nijhoff, 2003, 391–412.

51 'BCN weapon' means biological and chemical weapons as well as nuclear weapons and other nuclear explosive devices. The definitions of 'biological weapons' and 'chemical weapons' are included in new art. 1 of the Convention.

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

(iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (i), (ii) or (iii); or

(b) transports on board a ship:

(i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or

(iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

(iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

[...]

The first set of offences in subparagraph 1(a) contains in many respects 'traditional' anti-terrorist criminalisations. The offences enumerated in points (i) to (iv) are violent acts intended to cause death, serious bodily injury, extensive material damage or substantial damage to the environment.[52] Moreover, and in a marked departure from the original SUA offences and the other 'sectoral' criminalisations in the UN anti-terrorist conventions and protocols, a special terrorist intent is required. The intent requirement has been formulated along the lines of the 1994 Declaration and the Draft Comprehensive Convention as intimidation or compelling a state

52 'Serious injury or damage' is defined in art. 1 as meaning "(i) serious bodily injury, (ii) extensive destruction of a place of public use, State or government facility, or public transportation system, resulting in major economic loss; or (iii) substantial damage to the environment, including air, soil, water, fauna, or flora". The definition of material damage is identical to that in art. 2 of the Terrorist Bombings Convention.

or an intergovernmental organisation to do or to refrain from doing something. In addition to 'terrorism offences', the article also includes 'transport offences' in paragraph 1(b).[53] A 'fugitive' offence concerning assistance in the evasion of a terrorist offender was included in article 3*ter* and ancillary offences in article 3*quater*.

7.2.1. Transport Offences

The new 'transport offences' in subparagraph 1(b) of article 3*bis* required extensive discussions because of their novelty. The fear of overbroad criminalisation of transport operations with the resulting legal uncertainty that could negatively affect the shipping industry was expressed by many delegations, as well as by the organisations representing the shipping industry and trade unions which participated actively in the negotiations.[54] The category of 'transport offences' also provides interesting insights into the new type of intermediary or supportive offences. The offence of transporting explosives or radioactive materials[55] follows the structure of the crime of terrorist financing in that the transport of the specified materials is punishable when such materials are intended to be used for commission of terrorist crimes and the transporter is aware of the intended use. In an earlier version, the resemblance to the 'TFC model' was even clearer as the definition of the offence was linked to a list of anti-terrorist conventions in the Annex to the Convention, similar to that attached to the Terrorist Financing Convention, but with the addition of the Financing Convention itself.[56] In the final version the Annex does not have any other function than to serve article 3*ter*, which criminalises unlawful and intentional transport of a fugitive offender, when committed knowingly and with the intention to assist that person to evade criminal prosecution.[57] Interestingly, even this provision was originally formulated according to the 'TFC model' in that it required the criminalisation of "transporting on a ship of any person whom [the offender] knows is travelling for the purpose of committing an offence".[58]

53 The offences under 3bis 1 (b) have also been called 'non-proliferation offences'. See LEG 89/4/5, at 3.

54 These organisations included the International Chamber of Shipping (ICS), the International Shipping Federation (ISF) and the International Confederation of Free Trade Unions (ICFTU).

55 Art. 8*bis* 1(b)(i).

56 IMO Doc. LEG 85/4, art. 5 (1)(j), at 4.

57 The provision applies if the fugitive offender has committed any of the acts under arts. 3, 3*bis* or 3*quater* of the SUA Convention or any of the offences set forth in the treaties listed in the Annex.

58 IMO Doc. LEG 85/4, art. 5 (1)(l), at 5.

This future-oriented crime was nevertheless rejected by the Legal Committee and reduced to complicity after the fact, which was turned into an independent crime in article 3*ter*.[59]

In the context of subparagraph 1(b)(i) concerning transport of explosives or weapons of mass destruction, the list of offences was replaced by a generic definition of a terrorist act: an act intended to cause death or serious injury or extensive damage to property or the environment, when committed for the purpose of intimidating a population or compelling a government or an international organisation to do or to refrain from doing some act. It serves a purpose similar to that of the mini-definition in the Terrorist Financing Convention – describing the intended end use of the materials transferred or transported – but the context limits it to acts carried out by using explosives or radioactive materials. Similarly, the act of transporting explosives or radioactive materials is more specific than the act of "collecting or providing funds". If not always illegal, the handling of explosives and radioactive materials is in most jurisdictions a tightly regulated and controlled activity. As was noted earlier, illegal possession of explosives is punishable as preparation of crime in many legal systems.

The treatment of threat as a further variant of this offence should also be noted. Threat is part of the original article 3 of the Convention. The 1988 formulation criminalises a threat "with or without condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or to refrain from doing any act, to commit any of the offences [...] if that threat is likely to endanger the safe navigation of the ship in question".[60] The criminalisation of threat applies only to those offences that involve direct violence: an act of violence against a person on board, destruction of a ship or causing damage to its cargo, or destroying or seriously damaging maritime navigational facilities or seriously interfering in their operation.[61] The new article 3*bis* extends this criminalisation of threat, with a slightly different formulation, to the three new offences in paragraph 1(a) which likewise involve direct violence.[62] Subparagraph 1(b)(i), for its part, does not address direct violence; rather, the threat is tied to the terrorist intention reinforced by the material act of possessing – and transporting – explosives or radioactive material, which should make the threat credible enough.

The second transport offence under subparagraph 1(b)(ii) criminalises transport of biological, chemical and nuclear (BCN) weapons when committed know-

59 The difference to 'accessory-after-the-fact' complicity is that there is no requirement of immediacy in art. 3*ter*.

60 Art. 3(2), subpara. (c).

61 Subparas. (b), (c) and (e) of art. 3(1) of the 1988 SUA Convention.

62 Art. 3*bis* (1)(a)(i).

ingly. The brief text relies heavily on the definition of BCN weapons in article 1, which is broadly formulated but excludes toxic chemicals used for lawful purposes.[63] As biological and chemical weapons are prohibited under international law by virtue of the Chemical Weapons Convention (CWC) and the Biological Weapons Convention (BWC), and that is also the case for the possession of nuclear weapons outside the legal regime set forth by the Non-Proliferation Treaty (NPT), the criminalisation does not raise many questions – apart from one raised during the negotiations: some delegations pointed out that the relevant prohibition conventions did not establish individual criminal responsibility for violation of their provisions, and asked why it should be done separately in another instrument, only with regard to transport, and, more specifically, maritime transport only.[64] The provision prohibits transport of such weapons irrespective of any further intent and the criminalisation does thus not follow the 'TFC model'.

The third transporting crime posed a number of problems to the negotiators. It relates to the transport of any source material, special fissionable material, or equipment or material that could be used in a nuclear explosive activity (precursors of nuclear weapons). A separate exemption clause, in paragraph 2, was needed in order to draw the proper limits of punishable conduct in the case of such conduct. As the criminalisation has a 'simple' structure (compared to the 'double' structure of terrorist financing), and as the difficulties were mainly related to how the different delegations interpreted the requirements of the NPT – or, for some, whether they accepted the treaty as an authoritative source of law[65] – there is not much reason to go into the details of the negotiation history. The most difficult problems during the negotiations on new offences were related to the fourth transport offence, which deals with the transport of 'dual use items' not prohibited by the BWC, the CWC or the NPT. The dual use offence is clearly more far-reaching than the other transport offences as it cannot rely on prohibitions or definitions in earlier conventions. According to the original formulation, subparagraph 1(b)(iv) would have criminalised transport of "any equipment, materials or software or related technology knowing that it is intended be used in the design or manufac-

63 Such as industrial, agricultural, research, medical, pharmaceutical or protective purposes, military purposes not connected with the use of chemical weapons, or law enforcement purposes.

64 For instance, the comments submitted by the ICS, the ISF and the ICFTU on 24 September 2004, IMO Doc. LEG/89/4/8, para. 9, at 2.

65 The formal reservations of India and Pakistan appear as Annexes 2 and 3 to the report of the 88th session of the Legal Committee, IMO Doc.LEG 88/13. See also the statement of India included as Annex 2 to the report of the 90th session, IMO Doc.LEG 90/15.

ture or delivery of a prohibited weapon".[66] While the final formulation is not very different from this original text, the Legal Committee had to traverse a difficult path to attain it.

7.2.2. The 'Dual Use Offence'

The dual use offence illustrates the new features of the crimes under subparagraph 1(b) and underlines their difference from the 'traditional' terrorist crimes under subparagraph 1(a). In the case of the original SUA offences, the principal perpetrator could easily be conceived as an outsider, i.e. a person who has infiltrated the crew or the passengers,[67] as occurred in the Achille Lauro incident in 1985, which provided the point of departure for the elaboration of the SUA treaties.[68] The same applies to the new terrorist crimes which all foresee conduct that goes against the safety of the ship while possibly also threatening the safety of other vessels or the maritime environment. It was considerably more difficult to restrict or locate the responsibility for transport offences which seemed to extend to the whole ship.[69] Seafarers, owners, charterers, and operators might all be considered potentially liable for actions related to the transportation chain. The three organisations representing the shipping industry and trade unions, supported by many governmental delegations, underlined that "[b]roadly criminalising transportation may result in the prosecution of innocent parties such as seafarers who do not have adequate responsibility and/or effective control over the goods being transported".[70] Furthermore, as they pointed out, it was unrealistic to expect seafarers to know exactly what they were transporting.[71]

While the crimes under article 3 of the 1988 Convention apply to dangerous situations that may suddenly and unexpectedly arise on board a ship, the new offences under article 3*bis* display a more continuous nature. A transport crime

66 IMO Doc. LEG/SUA/WG.2/2/1, at 8.

67 According to Plant, *supra* note 49, at 81, the acts defined in sub-paras. (b) to (e) "rather are acts involving isolated individuals which simply happen to be taking place on board" a ship.

68 See Tullio Treves, 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law*, 69–90; Malvina Halberstam,' Terrorism on the High Seas: the Achille Lauro, Piracy and the IMO Convention on Maritime Safety', 82 *AJIL* (1988), 269–310.

69 Art. 8*bis* (10)(b)(i) on liability for boarding measures refers to any act "the ship has [...] committed". The same formulation appears also in the Straddling Stocks Convention, art. 21(8).

70 IMO Doc. LEG 89/4/8, para. 7, at 2.

71 *Ibid.*, para. 14, at 3.

may commence well before the departure of the ship, although its eventual effects will be felt only thereafter. The boarding provisions in article 8*bis* are triggered by a suspicion of criminal activities or preparations taking place on board a ship. They make it apparent that the crimes in which the ship is suspected of being involved may not in any way disturb the normal and safe navigation of the ship, and may not even be noticed unless a boarding takes place.[72] In terms of responding to terrorism, transport offences address preparatory conduct which can be linked to terrorism, although no explicit link to terrorist activities is required in article 3*bis*(1)(b) criminalising the transport of BCN weapons, relevant source or fissionable material, and dual use items. Some delegations suggested therefore that the whole paragraph might be removed on the basis that the new instrument should not treat transport of materials as acts of terrorism. A proposal to add the 'terrorist motive' to the three non-proliferation offences, along the lines of subparagraph (i), was also supported by a number of delegations.[73]

Furthermore, while both the original SUA offences and the terrorist offences under subparagraph 1(a) are defined in terms of active wrongdoing, such as violence against the ship, persons on board, navigational facilities, the maritime environment or other targets, the material act in transportation offences is less distinct and may consist of omissive conduct; after all, "transportation is the function of ships" as the International Confederation of Free Trade Unions pointed out.[74] Several delegations suggested that the subjective element of transport offences should be elaborated further so as to set the threshold sufficiently high. Specific proposals included the addition of a 'terrorist intent' to all transport offences[75] and further refinement of the knowledge requirement. For instance, a proposal was made to replace the knowledge standard "knowing that it is intended" by a longer phrase "when he has serious and reliable information which makes it probable" to ensure that the element of knowledge would be established on the basis of objective evidence.[76]

72 Art. 8*bis* allows boarding at the request of a State Party who encounters a ship seaward of any State's territorial sea and "has reasonable grounds to suspect that the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, 3*bis*, 3*ter* or 3*quater*", provided that the flag state gives its authorisation.

73 IMO Doc. LEG 88/13, paras. 56 and 58, at 13.

74 Comments submitted by the ICFTU on 11 September 2003, IMO Doc. LEG 87/5/2, para. 10, at 3.

75 Reference was also made in this context to the EU Framework Decision.

76 LEG 88/13, Annex 4, at 2. See also the report of the intersessional meeting in July 2004, IMO Doc. LEG/SUA/WG.13, para. 35.

All the problems related to the novelty of 'transport offences' were present in the negotiations concerning the transport of dual use items which, moreover, displayed the additional challenge of defining 'dual use items'. According to one proposal, the dual use offence should have been narrowed down using the definition of 'related materials' in the UN Security Council's resolution 1540(2004),[77] which, however, was regarded as too imprecise for the purposes of criminal law. Another proposal was also based on existing export-control licensing regimes. It defined the offence as transport of any equipment, materials or software or related technology in violation of specified export control licensing regimes. While export control lists seemed to provide a way to anchor the new criminalisation to existing international regulations, the drawback of the proposal was that none of the existing regimes created a universal standard. The criminalisation, furthermore, would not have been applicable to transport of dual use items from countries that did not have in place adequate export control regimes.[78]

The subjective element of the offence continued to prompt comments until the very end of the negotiations. Proposals were made with regard to both the knowledge and the intent requirements. It was proposed, for instance, that the structure requiring knowledge of someone else's intent to use the materials to produce a designated weapon ("knowing that it is intended to be used") be replaced by a simple reference to the transporter's intention.[79] The addition of a terrorist motive continued to have supporters, and many delegations were interested in trying to formulate "some form of enhanced intent related to the purpose of the delivery".[80] The most ambitious of these proposals combined the terrorist motive with two other possible motives, stating that any of them would make the transport of dual use items punishable: the offence could be committed either 1) to obtain financial gain or material benefit, or 2) knowing that the prohibited weapon[81] would be used to cause death or serious injury or damage for the purpose of intimidating a population or compelling a government or an international organisation to do or to refrain from doing any act, or 3) knowing that the transfer or possession of the

77 UN Doc. S/RES/1540(2001), Preamble, para. 1, footnote, defines related materials for the purposes of the resolution as "materials, equipment and technology covered by relevant multilateral treaties and arrangements or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery".

78 A further proposal would have limited the offence to transporting dual use items to non-state actors, including terrorist groups. All proposals were made in the 89th session of the Legal Committee, IMO Doc.LEG 89/16.

79 IMO Doc. LEG/SUA/WG.2/4, para. 48, at 10.

80 IMO Doc. LEG 88/13, Annex 4, at 3.

81 The term was later replaced by 'BCN weapon'.

prohibited weapon would constitute a violation of the CWC, BWC or NPT for a state party thereto.[82] The proposal sought to exclude lawful transportation by enumerating all possible criminal intents that could come into question – a complicated task which was soon given up. It was pointed out that the offences in any event had to be 'unlawful and intentional', in accordance with the chapeau.

A further proposal sought to delimit the notion of 'knowledge' in the context of transport offences by incorporating a new clause in paragraph 1. The purpose of the proposed text was to ensure that the Protocol would not criminalise a crew member or other person who inadvertently overheard a conversation suggesting that the ship was involved in transporting a prohibited weapon, and that such information would not be interpreted as knowledge relating to the offence.[83] One of the proposed texts read as follows: "If a person acquires the knowledge he or she is transporting items covered by Article 3bis paragraph 1(b) (ii), (iii) or (iv) and immediately notifies and follows the instructions of appropriate authorities, such transport is not an offence under this Convention."[84] While several delegations supported the efforts to construe the transport offences more strictly, questions were raised as to the further implications of the proposed text. Under what circumstances would there be an obligation to report, and would omission to report give rise to criminal responsibility? In the end, this approach to the problem was not deemed promising.

The general concerns about an overbroad scope of the criminalisation of transport of BCN weapons, relevant source materials or dual use items were ultimately addressed by including a definition of 'transport' in paragraph (b) of article 1:

> 1. For the purposes of this Convention
> [...]
> (b) "transport" means to initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or an item.

By requiring a certain degree of control and decision-making authority, the definition effectively limits responsibility with regard to 'innocent seafarers'. 'Initiation' can be taken to refer in this context to the charterer, 'arrangement' to the operator and 'the exercise of effective control' to the master of the ship. These may, under

82 IMO Doc. LEG 89/4/5, Annex 1, footnote 23, at 9.

83 This concern was raised several times, for instance IMO Doc.LEG/SUA/WG.13, para. 30, at 5.

84 The proposal was presented during the 89th session of the legal committee in the working group, in file with the author.

certain circumstances, also refer to other actors or persons. Proposals to expressly exclude certain categories of persons from criminal responsibility were not successful, and – it was felt – could have undermined the purpose of the new criminalisations, which was to target organised forms of terrorist crime.

As far as the specific offence of transporting dual use items is concerned, two amendments to the original text were introduced at a fairly late stage of the negotiations, one concerning the material act and the other concerning the subjective side of the offence. While it was not deemed possible to define the 'equipment, materials, software or related technology' referred to in the text, the point was made that with no qualification at all, almost any item could fall into this category. The proposal to add a requirement that the relevant equipment, materials, software and technology "significantly contribute to the design, manufacture or delivery of a BCN weapon" received considerable support and was added to the text. It can be understood as setting both a quantitative and a qualitative threshold and thereby exclude trivial cases of transportation.[85] There was also an attempt, though not successful, to give further guidance on how to interpret the notion of 'significant contribution' by making reference to export control lists.[86] Another amendment that was made fairly late in the negotiations replaced the knowledge of someone else's intention as the mental standard of the dual use offence by the transporter's intention. The agreed formulation – "with the intention that it will be used for such purpose" – thus requires an intention on the part of the transporter to contribute, by the act of transportation, to the subsequent prohibited conduct, namely the design, manufacture or delivery of a BCN weapon.

The dual use offence is the purest example of a 'double structure' crime in the revised SUA Convention. It is similar to the crime of terrorist financing in that innocuous activity – transfer of funds, or in this case transport of cargo – becomes criminal because of the knowledge or intention of the financier or transporter regarding the future use of the funds or cargo. At the same time there are notable differences. Firstly, the dual use offence does not require a terrorist connection. The production of a prohibited weapon, such as a chemical or biological weapon or a nuclear weapon outside the regime of the NPT, is dangerous irrespective of the purpose of transportation or the identity of the recipient. While the revision

85 Courts would determine what constitutes 'significant contribution' in the context of the relevant cases related to the offence. The point was made, however, that the flag state and the boarding state might reach different interpretations. See IMO Doc.LEG/SUA/WG.2/4, para. 52, at 11.

86 The text proposed read as follows: "Evidence of such significant contribution may be generally found in the inclusion of such equipment, materials, or technology in a control list or by the requirement of a permit, licence or other authorization for its export or import". See IMO Doc.LEG/SUA/WG.2/4, para. 52, at 11.

of the SUA treaties was initiated because of the terrorist threat, and resolution 1540(2004), which was adopted during the negotiations and contained a veiled reference to their importance[87] also referred to the threat of weapons of mass destruction falling into the hands of terrorist groups,[88] the more specific counter-terrorism interest was here subsumed under the broader non-proliferation interest.

Secondly, the specific safeguards built into the criminalisation make it more strictly construed than the financing crime. The requirement that the dual use items must "significantly contribute" to the design, manufacture or delivery of a BCN weapon sets a threshold, whereas the financing crime covers all collection or provision of 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 one of the predicate crimes defined in the Convention.[89] The subjective element is defined in a similar manner in both conventions, even though the dual use offence, after the final amendments, always requires an intention on the part of the transporter. As long as the offence was based on the knowledge of somebody else's intention to commit a crime, combined with the concrete step of transporting materials that make a significant contribution to the crime, it could fulfil the definition of complicity perfectly. It should be recalled that the essence of the 'TFC model' lies in making accessory acts into independent crimes.

The last-minute change brought the offence closer to a traditional independent crime which is deliberate and intentional. The other elements of the definition also have an impact on how the intent requirement works: if the items transported are of the type and amount that they can make a significant contribution to the design, manufacture or delivery of a BCN weapon, the offence does not rely as heavily on the intent as the financing crime, and the intent can be inferred from the material act, as is customary with regard to international crimes. Furthermore, the definition of 'transport' delimits the responsibility of persons who do not have effective control over the transportation. It can therefore be concluded that while the new SUA offences of 'transport of explosives or radioactive materials' and 'transport of dual use items' follow the TFC model, they amount to a further refinement of it.

87 UN Doc. S/RES/1540(2004), para. 8(a): "Calls upon states [...] to promote universal adherence and full implementation, and, where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons".

88 *Ibid*., Preamble, para 8 which contains an explicit reference to resolutions 1267(1999) and 1373(2001).

89 See Chapter 6.

A further specificity of the amended SUA is nevertheless worth noting. The definitions of the SUA offences are intended to be applied and interpreted by national courts but not exclusively so, as they also provide a basis for ship boarding in accordance with the new article 8*bis*. Already a suspicion of one of the SUA offences having been, being or being about to be committed suffices to set in motion a procedure of consultation that may lead to a boarding and search of a ship supposedly involved in the offence. The interrelationship between the criminalisations and the boarding provisions was not discussed intensively during the negotiations, but the question was raised of whether the boarding procedure should indeed apply to all crimes under articles 3, 3*bis*, 3*ter* and 3*quater*.[90] If the possibility of interception was justified with regard to the serious nature of the new terrorist and proliferation offences, this was not necessarily the case with all of the original SUA offences in article 3,[91] the fugitive offence in article 3*ter* or the accessory offences in article 3*quater*. It was pointed out that some of the offences were clearly less grave than others, and would perhaps not justify boarding.

This intervention did not lead to changes in the draft text of the Protocol. While it was acknowledged that the issue of proportionality was not unimportant, it was also pointed out that article 8*bis* provided a procedure for assessing the gravity of the threat and the need for immediate measures, which would be discussed between the state that had requested boarding and the flag state, and that boarding, notably, always required the consent of the flag state. It was also felt that excluding specific offences from the boarding provisions could be time consuming as this would require a crime-by-crime consideration. Moreover, it was noted, exclusion of some crimes might give a wrong signal as to the seriousness of the offences under the Convention. This argument was thus directed against any differentiation between terrorist crimes.

7.3. The Council of Europe Convention on the Prevention of Terrorism

Unlike the EU Framework Decision and the SUA Convention, the Council of Europe Convention on the Prevention of Terrorism was not a result of decisions

90 IMO Doc.LEG/SUA/WG.2/4, at 14, paras. 70 to 72.

91 It is interesting to note that the possibility of other states than the flag state taking enforcement measures with regard to a ship on board of which offences under art. 3 were committed was discussed at the Rome Conference in 1988. The proposal was rejected, however, and this outcome was confirmed in art. 9: "Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag".

taken immediately after September 2001.[92] The negotiations on the Convention were not initiated until the autumn of 2004 and were concluded in early 2005. The Convention was adopted and opened for signature in May 2005. The decision to embark on negotiations on a specific instrument with a limited scope of application was, in the way of a compromise, seen as an alternative to an earlier proposal to elaborate a comprehensive convention on terrorism that had not garnered the necessary support in the Committee of Experts on Terrorism (CODEXTER).[93] The negotiations were conducted fairly expeditiously, in less than six months, partly because the Committee of Ministers had deemed them to be a priority and extra time was allocated to the CODEXTER, and partly because the Committee could rely on earlier Council of Europe (CoE) work carried out since 2001, including the Guidelines on Human Rights and the Fight against Terrorism,[94] as well as the conclusions of a working group of the Committee which had studied '*apologie du terrorisme*' and 'incitement to terrorism' as criminal offences in the national legislation of member states.[95] Furthermore, a collection of the case law of the European Court of Human Rights (ECtHR) in respect of lawful restrictions on the freedom of speech was prepared for the negotiations,[96] and an opinion was requested after the completion of the first reading of the Draft Convention from the Commissioner on Human Rights of the Council of Europe, who also consulted with a number of human rights organisations.[97]

92 The measures taken in the wake of September 2001 included the establishment of a new, multi-disciplinary working group of experts on terrorism, the GMT, which was tasked with updating the 1977 Convention on the Suppression of Terrorism. The Protocol to amend the Convention was adopted in 2003, see Protocol to amend the European Convention on the Suppression of Terrorism, 15 May 2003, CETS 190. The GMT was replaced by a Committee of Experts on Terrorism, CODEXTER.

93 Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, available at http://www.coe.int./gmt , (Explanatory Report), para. 11.

94 Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted on 11 July 2002.

95 The working group had analysed the conclusions of a report prepared by an independent expert on "apologie du terrorisme" and "incitement to terrorism"on the basis of relevant legislation and case-law in member and observer states, and the case-law of the European Court of Human Rights. See the Explanatory Report, *supra* note 93, paras. 17 and 18. See also *"Apologie du terrorisme" and "Incitement to terrorism"*, Council of Europe Publications, 2004.

96 CODEXTER (2004) 19.

97 Opinions were asked both of the Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe; see Explanatory Report, *supra* note 93, paras. 20–21. The opinions are available at the CoE website: Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of

7.3.1. Indirect Incitement to Terrorism

The Convention establishes three new offences which all are preparatory in the sense that they can lead to the commission of terrorist offences. Article 5 sets forth the crime of 'public provocation to commit a terrorist offence', article 6 the crime of 'recruitment for terrorism' and article 7 the crime of 'training for terrorism'. Article 9 sets forth ancillary offences, the formulation of which closely follows those established in the Terrorist Financing Convention. The Prevention Convention follows the 1999 Terrorist Financing Convention in many other respects as well. The criminalisations of the Convention have a 'double structure' in the sense that they rely, as do article 2 of the Terrorist Financing Convention and article 3*ter* of the SUA Protocol, on a list of UN anti-terrorist conventions and protocols.[98] Also along the lines of the Financing Convention, the new offences introduced by the Prevention Convention do not require that a terrorist offence is actually committed as a consequence of the preparatory crime. Should such a terrorist offence – any of the offences within the scope of and as defined in one of the international treaties against terrorism listed in the Annex – eventually be committed, the place of its commission is irrelevant for the purposes of establishing the commission of any of the offences set forth in Articles 5–7 and 9.[99] The prohibited conduct is deemed dangerous because it *may* lead to the commission of terrorist acts. There is thus no need to prove a causal connection: creation of danger is deemed sufficient for criminal responsibility to arise, and even this requirement is specified only with regard to the crime of public provocation. The independent nature of the new offences has been confirmed in article 8, titled "Irrelevance of the commission of a terrorist offence", which states that for an act to constitute an offence as set forth in the Convention, it is not necessary that a terrorist offence is actually committed. Public provocation, recruitment and training can therefore, like terrorist financing and transport of dual use items, be characterised as abstract endangerment offences.

As far as the definitions of the offences are concerned, however, there are two notable exceptions to what has been said above about the similarity with the

Terrorism, Strasbourg, 2 February 2005, BcommDH(2005)1, Parliamentary Assembly Opinion No. 255(2005) on the draft Convention on the Prevention of Terrorism. CODEXTER(2005)02, available at http://coe.int/gmt.

98 Art. 1 reproduces the formulations of the Terrorist Financing Convention. According to para. 1, "For the purposes of this Convention, 'terrorist offence' means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix". para. 2 gives States Parties the possibility to exclude any treaty to which they are not parties, also using the language of art. 2(2) of the Terrorist Financing Convention.

99 Explanatory Report, *supra* note 93, para. 126.

Terrorist Financing Convention. First, the 2005 Convention does not contain any generic definition – or 'mini-definition' – of terrorist acts. Public provocation, recruitment and training have been criminalised only to the extent that they are intended to lead to the commission of one of the offences within the scope of and as defined in the ten UN anti-terrorist conventions and protocols. Another deviation from 'the TFC model' is that terrorist financing, "as defined and within the scope" of the 1999 Convention, has also been listed as a terrorist offence. Public provocation, recruitment and training therefore lead to criminal responsibility also if carried out for the purpose of terrorist financing. The Explanatory Report to the Convention recalls the important role that such conduct may play even in situations where the subsequent crime is one of terrorist financing. All these actions are "links in the chain of events that leads to the commission of terrorist offences. While the prospect of violent crime may be fairly remote when speaking, for instance, of provocation to collect funds for terrorist organisations, it is what ultimately justifies the criminalisation of such conduct".[100]

The offence of public provocation is undoubtedly the most sensitive of the three offences. Article 5, paragraph 1, requires States Parties to criminalise the distributing or otherwise making available of a message to the public advocating terrorist offences. Whether this is done directly or indirectly is irrelevant for the application of the provision. According to the definition,

> 1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.
> 2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Article 5 is not only the first express international criminalisation of incitement to terrorism as an independent crime, it also provides an elaborate definition that goes further than the comparable criminalisations of 'direct and public incitement to genocide' or various forms of hate speech.[101] The first notable feature of this

100 *Ibid*., para. 101.

101 For instance, the Additional Protocol to the European Convention on Cybercrime, art. 3, para. 2, criminalises "distributing, or otherwise making available, racist and xenophobic

definition is that it is not limited to direct incitement in the sense of calls for terrorist violence, and even less for attacks against a specific target. Both kinds of incitement are covered by the definition, but it may also extend, according to the Explanatory Report, to "the instigation of ethnic and religious tensions, which can provide a basis for terrorism; the dissemination of 'hate speech' and the promotion of ideologies favourable to terrorism".[102] How the scope of the criminalisation is to be delimited, and how the line should be drawn between punishable conduct, on the one hand, and a legitimate exercise of the freedom of speech, on the other, will eventually be determined by courts in particular cases. The essential limitation provided by the definition is the requirement that the distribution of a message must create a danger that one or more terrorist offences may be committed. The fact that article 5 combines a subjective intent "to incite the commission of a terrorist offence" with an objective requirement of creation of a danger has later been cited as a 'human rights compliant' way to approach the crime of incitement.[103]

During the negotiations, views were divided as to whether the offence should be extended to '*apologie du terrorisme*', or glorification of terrorism – a new offence that was known in the criminal codes of only two member states.[104] Considerably more support for the international criminalisation of '*apologie*' was found in the Committee, however, and the Commissioner for Human Rights also suggested in his opinion that a provision on incitement could cover "the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour" which could constitute indirect provocation to terrorist violence.[105] Another view was put forward by those delegations that wished to limit the new offence to direct incitement,

material to the public through a computer system". The article does, however, contain two exceptions to the obligation to establish such conduct as a criminal offence; one concerning advocation of discrimination that is not associated with hatred and violence, and another referring to the established principles in the national system concerning freedom of expression.

102 Explanatory Report, *supra* note 93, para. 88.

103 UN Economic and Social Council, Promotion and Protection of Human Rights. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN:4/2006/98, 28 December 2005, para. 56(c) has referred to art. 5 as "a sound response which would respect human rights". The same conclusion was made at the joint CoE–OSCE workshop on 'Countering incitement to terrorism and related activities' in Vienna on 19–20 October 2006.

104 "*Apologie du Terrorisme*" *and* "*Incitement to Terrorism*", *supra* note 95.

105 Opinion of the Commissioner, *supra* note 97, para. 30, at 11. See also the Explanatory Report, *supra* note 93, para. 95.

fearing that indirect incitement could be too broad a concept to be able to set any common European standard. The final wording of article 5 leaves States Parties a certain amount of discretion with respect to the definition of the offence and its implementation. The definition may cover, for instance, glorification of terrorist acts; it is up to States Parties acting as legislators to delimit the scope of indirect incitement, but in so doing they should, as stated in the Preamble, also take into account that the Convention "is not intended to affect established principles relating to freedom of expression and freedom of association". In the final instance, it is for national courts to determine case by case whether, under the prevailing circumstances, a danger of terrorist offences being committed has been created by a particular message.

Some guidance in this respect has been given in the Explanatory Report which advises states parties, when considering whether the distribution of a particular message has caused a danger, to take into account the nature of the author and of the addressee of the message, as well as the context in which the offence is committed. These notions are to be understood in the established sense of the case-law of the European Court of Human Rights. The significance and the credible nature of the danger should also be considered when applying this provision in accordance with the requirements of domestic law. A few other conclusions of the European Court of Human Rights contained in the compilation of the relevant case law prepared for the negotiations are also worth mentioning. For instance, the Court has recognised that some limitations on the freedom of expression might be necessary, but added that they must "be construed strictly, and the need for any restrictions must be established convincingly".[106] Punitive measures taken by the state were seen as justified and an answer to a pressing social need where, for instance, they concerned articles published in the mass media which "communicated to the reader [...] that recourse to violence was a necessary and justified measure of self-defence in the face of the aggressor".[107] Furthermore, statements which

106 CODEXTER (2004)19, at 3, referring to *Ceylan v. Turkey*. The cited sentence appears in a subparagraph which reads as follows: "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. [...] it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly". *Ceylan v. Turkey*, (23556/94), Judgement of 8 July 1999, ECHR 1999-IV, para. 2.

107 *Ibid.*, at 14, referring to *Sürek v. Turkey*, (26682/95), Judgement of 8 July 1999, ECHR 1999-IV.

as such were indirect could be regarded as incitement to violence if they were likely to inflame violent acts – for instance a widely publicised statement describing PKK[108] as a national liberation movement was so regarded because it "coincided with murderous attacks carried out by the PKK on civilians in the South-East of Turkey and had to be regarded as likely to exacerbate an already explosive situation in that region".[109]

7.3.2. Recruitment and Training for Terrorism

'Recruitment for terrorism' means, according to the Convention, both soliciting another person to participate in the commission of a terrorist offence, and requesting him or her to join an association or group. According to article 6,

> For the purposes of this Convention, "recruitment for terrorism" means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.
> Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

While there is no definition of 'an association or group', the Explanatory Report does mention that a State Party "may choose to interpret the terms [...] to mean 'proscribed' organisations or groups in accordance with its national law" and the general principles of international law. As to the methods of recruitment, the Explanatory Report points out that solicitation can take place, for instance, via the Internet and not only directly by addressing a specific person.[110] What defines both alternatives – recruitment to a group and recruitment to a crime – is the purpose of committing terrorist offences. As there is no requirement that a terrorist crime must ultimately take place because of the activities of the group, the difference between the two alternatives does not seem to be significant. Nor is it necessary for the completion of the act of recruitment that the addressee actually participates in the commission of a terrorist offence or that he or she joins a group for that purpose.[111] While it is therefore possible that person A carries out the act of soliciting

108 PKK, the Kurdish Workers' Party.

109 *Ibid.*, at 14, referring to *Zana v. Turkey*, (69/1996/688/880), Judgement of 25 November 1997, ECHR 1997-VII.

110 Explanatory Report, *supra* note 93, para. 108.

111 *Ibid.*, para. 109.

person B to join a terrorist group with the purpose of contributing to its criminal activities, without the latter actually joining the group, the act of recruitment has to be clear enough for the intention to recruit to be obvious. An attempt to recruit is also criminalised by article 9, although it may not always be easy to distinguish between an attempt to solicit, on the one hand, and a completed but not successful act, on the other, if the person solicited does not commit a crime or join a group for that purpose.

This example brings to the fore one intriguing feature of the intermediary crimes related to their nature as 'complicity made an independent crime'. Treated as principal offences, they do not lend themselves easily to be combined with ordinary ancillary offences.[112] As was noted earlier, some delegations pointed out in the negotiations on the Terrorist Financing Convention that creating a new offence based on existing definitions of offences would result in long chains of criminal conduct, such as facilitation of funding of assistance to a crime. It was therefore proposed that the ultimate offences be limited to the principal crimes.[113] The same proposal also surfaced in the Council of Europe negotiations, but was rejected on the ground that the situation of layers of offences described would be hypothetical. This conclusion is reflected in the Explanatory Report which, however, also reminds states parties of the purpose of the Convention and of the principle of proportionality.[114]

The criminalisation under article 6 does not extend to the recruited person, even if he or she actually joins a group or organisation for the purpose of committing terrorist offences. While this was seen by some delegations as a shortcoming, and the Commissioner for Human Rights also urged the Committee to consider making membership in a terrorist group a criminal offence in the same way as recruitment,[115] the issue was not discussed further.

The third new offence, training for terrorism, is closely connected with the offence of terrorist financing. "While the latter criminalises the provision of finan-

112 Similarly with regard to international drug offences which "neither fall into the traditional categories of participation in crime, nor can easily be formulated as separate offences", Kimmo Nuotio,' Transforming International Law and Obligations into Finnish Criminal Legislation – Dragon's Eggs and Criminal Law Irritants', X *FYBIL* (1999), 325–350, at 331.

113 Chapter 6.2.2.

114 Explanatory Report, *supra* note 93, para. 49. It is also pointed out that the Convention "obliges States Parties to criminalise conduct that has the potential to lead to terrorist offences, but it does not aim at, and create a legal basis for, the criminalisation of conduct which has only a theoretical connection to such offences. Thus, the Convention does not address hypothetical chains of events, such as 'provoking an attempt to finance a threat'".

115 Opinion of the Commissioner, *supra* note 97, para. 33.

cial resources to terrorists or for terrorist purposes, this provision criminalises the provision of know-how", as the Explanatory Report describes the connection between the two. 'Training for terrorism' has been defined as providing instruction in methods and techniques that would be used for the purpose of carrying out a terrorist offence. Concrete examples are given in the definition, such as methods of making weapons or explosives, but the list is not exhaustive. Furthermore, the trainer must be aware of an intention on the part of the trainee to use the skills provided for that purpose. According to article 7,

> 1. For the purposes of this Convention, "training for terrorism" means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose.
> 2. Each Party shall adopt such measures as may be necessary to establish training for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

While the structure of the offence is similar to that of the crime of terrorist financing, the connection between 'training for terrorism' and actual use of the skills for the commission of a terrorist act seems closer than the relationship between terrorist financing and terrorist crimes, at least insofar as the skills provided fall under one of the examples given in the definition, i.e. the making or use of explosives, firearms or other weapons or noxious or hazardous substances.[116] Even so, the notion of 'other specific methods or techniques' may be interpreted either broadly or restrictively. During the negotiations, several delegations proposed closing the list of examples with the phrase 'other *similar* methods or techniques' which would have limited the 'terrorist techniques' to those which are closely related to violent crime. Other delegations, however, preferred an open-ended list, ending with the simple phrase 'any other methods or techniques'. The compromise formulation using the word 'specific' must therefore be understood as limitative in that the skills provided must have some connection with terrorist offences. According to the Explanatory Report, they must be "suitable for use for terrorist purposes".[117] It remains to be seen how states will interpret the term. For instance, provision of

116 The notions of explosives, firearms or other weapons or noxious or hazardous substances have not been defined in the Convention but the Explanatory Report gives some guidance on how they should be interpreted. Explanatory Report, *supra* note 93, paras. 117–121.

117 *Ibid*., para. 115.

the ground plan of a public building together with instructions on how to enter the building at night could obviously have a connection to terrorist crimes, but it is unclear whether the definition, under certain circumstances, could also extend to the provision of more generic skills.

According to article 7, the training must take place "for the purpose of carrying out or contributing to the commission of a terrorist offence". It could thus also focus on skills that are needed not for a terrorist act as such (for instance, piloting an airplane in the case of aerial hijacking) but for contributing to the commission of a crime, which makes it more open-ended. The skills needed for the commission of a terrorist offence, or for contributing to such commission, also vary from one offence to another. The inclusion of the Terrorist Financing Convention in the Annex means that article 7 also applies to methods and techniques required for provision or collection of funds. Potentially, this could expand the scope of the criminalisation in a significant way. However, practical difficulties in proving the criminal intent in situations where the training is limited to 'financing' skills may work in the other direction. Furthermore, it is unclear whether much 'specific' training is needed for a financing crime.

While article 7 does not criminalise receiving training or specific know-how, the establishment of the criminal responsibility of the trainer will very much depend on the conduct and criminal intention of the trainee. The prosecutor will not have to prove that the trainee has planned or prepared a specific crime, but the notion "for the purpose of carrying out or contributing to the commission of a terrorist offence" means that a crime must at least be in the trainee's contemplation, whether to be committed by him- or herself or by someone else with his or her assistance. When assessing whether this is the case, courts may have to take into account the past conduct of the trainee, his or her entourage and possible affiliations with terrorist groups or ideologies.

A further limitation of the offence is the requirement that the person who provides the training must know that the purpose of the training is to make terrorist crimes take place. It should again be noted that this corresponds to the mental standard of complicity: knowledge of the criminal intention of a potential perpetrator. However, in the case of training for terrorism as defined in article 7, it is not required that the trainer knows of a specific crime being planned or prepared; the connection can be more remote. This is the essence of the 'terrorist financing model': contribution to a crime which earlier would have been regarded as complicity is made an independent offence. The result is a significant broadening of the criminal responsibility, not because criminal liability would not have attached to such acts before, but because making them independent crimes extends the area of punishable conduct to a new layer of ancillary crimes: complicity in financing, transport, recruitment, training and provocation. Furthermore, even the

ancillary crimes, beginning from the Terrorist Bombings Convention, have been defined broadly – the common purpose formulation has since then been reproduced in the Terrorist Financing Convention, the SUA treaties and the Prevention Convention.[118]

It is worth noting that the definitions of offences should be read together with the human rights safeguards contained in the Convention. As the Explanatory Report states, "This is a crucial aspect of the Convention, given that it deals with issues which are on the border between a legitimate exercise of freedoms, such as freedom of expression, association or religion, on one hand, and criminal behaviour, on the other".[119] According to article 12, each State Party shall ensure that the establishment, implementation and application of the criminalisations under the Convention are carried out while respecting the applicable human rights obligations, in particular those concerning the right to freedom of expression, freedom of association and freedom of religion. The Preamble, furthermore, recognises that the "Convention is not intended to affect established principles relating to freedom of expression and freedom of association"[120] and recalls "the need to strengthen the fight against terrorism and reaffirming that all measures taken to prevent or suppress terrorist offences have to respect the rule of law and democratic values, human rights and fundamental freedoms as well as other provisions of international law, including, where applicable, international humanitarian law".[121]

118 Art. 9 on ancillary offences reads as follows:

1. Each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law:
   (a) Participating as an accomplice in an offence as set forth in Articles 5 to 7 of this Convention;
   (b) Organising or directing others to commit an offence as set forth in Articles 5 to 7 of this Convention;
   (c) Contributing to the commission of one or more offences as set forth in Articles 5 to 7 of this Convention 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 an offence as set forth in Articles 5 to 7 of this Convention; or
      (ii) be made in the knowledge of the intention of the group to commit an offence as set forth in Articles 5 to 7 of this Convention".
2. Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in Articles 6 and 7 of this Convention.

119 Explanatory Report, *supra* note 93, para. 30.

120 Preamble, para. 8.

121 Preamble, para. 7.

7.3.3. Terrorist Offences

Even when the definitions of the three offences had been agreed, a discussion continued on article 1 which affected their scope by setting out the list of the 'predicate crimes', i.e. the terrorist offences to which the acts of incitement, recruitment or training were supposed to contribute. Two proposals to limit their scope by adding a threshold to article 1, in particular, remained contentious until a late stage. First, it was proposed to add a 'terrorist intent' to the offences within the scope and as defined in the treaties listed in the Annex, a proposal that was also included in the opinion of the CoE Parliamentary Assembly.[122] One variant of this proposal borrowed language from the definition of the terrorist intent in the EU Framework Decision on combating terrorism. Ultimately, it was reflected in preambular paragraph 8, which recalls that "acts of terrorism have the purpose by their nature or context to seriously intimidate a population or unduly compel a government or an international organisation to perform or abstain from performing any act or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation". As a part of the Preamble, however, this provision does not affect the scope of the offences set forth in the Convention.[123]

The other proposal was also related to the Annex and would have excluded the Terrorist Financing Convention from the list of treaties defining 'terrorist offences'. This question was from the beginning a politicised one since many regarded the list of the UN anti-terrorist conventions and protocols as untouchable. Those who were in favour of its exclusion pointed out that the financing crime was very similar to the offences defined in articles 5 to 7 in that they all criminalised preparatory conduct. Creating a new crime on the basis of two preparatory acts, such as recruitment to financing, would amount to reaching to very indirect contributions to crime. It was also pointed out that the broad definition of the crime of public provocation as extending to both direct and indirect incitement was itself justified, and in accordance with the ECtHR case law, only if understood in the sense of provoking violence. The Committee was, however, reluctant to distinguish between UN

122 The Opinion of the Parliamentary Assembly, *supra* note 97, at 3. The PACE also proposed to qualify the offences under the treaties listed in the Annex by a terrorist intent. It was proposed to delete the words "within the scope of and as defined in one of the treaties" in art. 1 and to add the words "when the purpose of the act which constitutes the principal offence, 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".

123 The Explanatory Report, *supra* note 93, in para. 46, points out that "[t]errorist motivation is not a substantial element in addition to the requirements laid down in the operative part for the offences set forth in this Convention".

instruments and decided to retain on the list all UN anti-terrorist Conventions and Protocols that contained criminalisations and addressed serious crimes.[124]

The fact that the Financing Convention figures in the Annex to the Prevention Convention can be weighed from different angles. First, reference can be made to the broader background of raising terrorist financing to the same level as terrorist acts as has been evident in the UN Security Council's actions against terrorism since September 2001. As was emphasised in the negotiations, consistency with the UNSC approach as well as with the recently updated European Convention for the Suppression of Terrorism[125] required that the list of treaties should include *all* relevant UN anti-terrorist conventions and protocols, without distinction. Secondly, a textual analysis of the Convention could lead to the conclusion that provocation, recruitment to or training in financing – or to complicity or 'contributing in any other way' to financing – indeed amounts to an overly broad criminalisation of indirect activities. Thirdly, however, it may be claimed that as a practical matter and taking into account the safeguards and conditions contained in the Convention,[126] this risk should not be exaggerated. What seems clear in any event is that the characterisation of terrorist financing as 'a terrorist offence' is yet another example of non-differentiation between violent (direct) and non-violent (indirect) terrorist crimes.

124 On that basis, the only conventions to be excluded were the 1963 Tokyo Convention and the 1991 Convention on the Marking of Plastic Explosives. Both were already excluded from the Annex to the Terrorist Financing Convention. See Chapter 6.2.1.

125 Protocol to amend the European Convention on the Suppression of Terrorism, art. 1. It should be noted that the list of ten UN anti-terrorist conventions and protocols in the 2003 Protocol serves only the purpose of extending the application of the prohibition of the political offence exception to them. For the Protocol, see Roberto Bellelli, 'The Council of Europe', in Giuseppe Nesi (ed.) *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 141–148, at 145–148.

126 Prevention Convention, art. 12

CHAPTER 8 BEYOND CRIMINAL LAW: THE ROLE OF THE UN SECURITY COUNCIL IN ENHANCING ACCOUNTABILITY FOR TERRORIST ACTS

One of the most important changes in international anti-terrorist cooperation since September 2001 is that the UN Security Council (UNSC) has become a key actor in the formulation of a coherent international response to terrorism. It has acquired a central role in both standard-setting and monitoring as well as in the determination of responsibility for involvement in terrorist activities. The Security Council regards international terrorism, in general and not just in particular situations, as a major threat to international peace and security. This provides a basis for the exercise of the extraordinary powers it has under Chapter VII of the UN Charter. While these powers were initially meant to be used against recalcitrant states in order to force a policy change, they have been increasingly directed at non-state groups and private individuals, in particular with the purpose of combating terrorism. The impact of Security Council action is felt in all the areas touched on in earlier chapters: the definition and redefinition of terrorism, the allocation of responsibility for terrorism between states, groups and individuals, and defining the obligations of states.

Much of the Security Council's action against terrorism has been legally oriented, even though its decision-making is based on a unique mix of political and legal considerations.[1] According to Johnstone, "every operational decision it makes is an implicit interpretation of the Charter and other relevant law – some with potentially far-reaching legal consequences".[2] One of the most crucial decisions

1 Higgins noted already in 1994 that "[d]eterminations of international law are now part and parcel of decision-making on collective measures [...] in response to human-rights violations or to international aggression"; see Rosalyn Higgins, *Problems and Process, International Law and How We Use it*, Oxford University Press, 1994, at 182. See also Martti Koskenniemi, 'The Police in the Temple, Order, Justice and the UN: A Dialectical View', 6 *EJIL* (1995), 325–348.

2 Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument', 14 *EJIL* (2003), 437–480, at 452.

has been the adoption of resolution 1373(2001),[3] which has been widely regarded as an act of supra-national legislation.[4] Some commentators have held that this resolution, insofar as it purported to create general and temporally undefined legal obligations on member states, went beyond the limits of the Security Council's powers.[5] In that regard, the resolution follows a series of earlier actions that have been similarly described and which have eventually strengthened the Security Council's 'quasi-judicial' role, including the establishment of the International Criminal Tribunal for the Former Yugoslavia, the legality of which was one of the many issues settled in the *Tadić* case.[6] Resolution 1373 presents a similar narrative to that of the establishment of the first ad hoc tribunal not only because both have been generally accepted in state practice – cooperation with the Security Council's Counter-Terrorism Committee (CTC) has reached nearly universal levels[7] – but also because both have paved the way for further developments.

3 The resolution was far-reaching also in its ambitions. See for instance the statement of Secretary of State Colin Powell, speaking on behalf of the United States in the high-level meeting of the Security Council on 12 November 2001: "The Security Council took a critical step forward by its adoption of resolution 1373(2001) a little over two weeks after the attacks. Resolution 1373(2001) is a mandate to change fundamentally how the international community responds to terrorism", UN Doc. S/PV.4413 Prov., at 16.

4 Resolution 1373 has been said to "establish new binding rules of international law" or to constitute a genuine act of legislation: "Das beschlossene Regelwerk macht Resolution 1373 wegen seines generell-abstrakten Charakters zu einem echten legislativen Akt des Sicherheitsrats". For the former citation, see Paul C. Szasz, 'The Security Council Starts Legislating', 96 *AJIL* (2002), No.4, 901–905, at 902, for the latter see Jurij Daniel Aston, 'Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Massnahmen des Sicherheitsrats – Resolution 1373(2001) im Kontext', 62 *ZaöRV* (2002), 257–291, at 258.

5 Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', 16 *LJIL* (2003), 593–610, at 600, 601 and 607. For a contrary view, see Szasz, *supra* note 4, Aston, *supra* note 4 and Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight against Terrorism', 97 *AJIL* (2003), 333–341. See also Axel Marschik, 'The Security Council's Role: Problems and Prospects in the Fight Against Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 69–80, at 78.

6 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, paras. 39–40. As for the ICTR, see *Prosecutor v. Joseph Kanyabashi*, Case No. ICTR-96-15-T, Decision of 18 June 1997 on the Defence Motion on Jurisdiction.

7 By the end of March 2003, all 192 UN member states had submitted their first report to the CTC, which was an unprecedented figure. In 2006, the Executive Director of the CTED was in the position to announce that more than 600 reports had been submitted

Some commentators on resolution 1373 have presumed that there would be nothing to prevent the Council from continuing to issue 'secondary legislation' with a view to preventing threats to peace and security from arising.[8] Resolution 1540(2004) on the threat posed by the proliferation of weapons of mass destruction, which also dealt with the subject-matter of multilateral conventions and laid down complementary rules, has been viewed as another example of Security Council legislation that has bypassed the normal channels of international law-making.[9] For all its groundbreaking qualities, resolution 1373 is no framework convention or 'basic law' on the prevention and suppression of terrorism. Most notably, it does not contain a definition of terrorism. This does not, however, mean that the Security Council's overall contribution to the definition of terrorism has been an insignificant one. In defining a broad range of measures to be taken by all states against the scourge it has had a central role in shaping the common understanding of terrorism and of the primary targets in the fight against it.[10]

8.1. Terrorism as a Threat to International Peace and Security

There seems to be wide agreement on the capacity of the most serious international crimes to threaten international peace and security. It should be recalled that aggression – 'the supreme crime' at the time – was referred to as the 'crimes against peace' in the Charter of the IMT. The concept of crimes against peace was reaffirmed in the Nuremberg Principles, adopted by the UNGA in 1950, and guided the subse-

to the CTC in five years. See Javier Ruperez, 'The UN's fight against terrorism: five years after 9/11', available at http://un.org/terrorism/ruperez-article.html.

8 Aston, *supra* note 4, at 287–289, has referred to the potential role of the Security Council as a '*Notstandsgesetzgeber*'. In so doing he has built on Christian Tomuschat's lectures at the Hague Academy, see Tomuschat, 'Obligations Arising for States Without or Against Their Will', in 241 *RCADI* (1993-IV), 195–374, at 344. See also Szasz, *supr*a note 4, at 905.

9 UN Doc. S/RES/1540(2004), see also Serge Sur, 'La résolution 1540 du conseil de sécurité (28 avril 2004): entre la proliferation des armes de destruction massive, le terrorisme et les acteurs non étatiques', 103 *RGDIP* (2004), 855–882, Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *EJIL* (2007), 881–919, at 883 and 917–918, and Stefan Talmon, 'The Security Council as World Legislature', 99 *AJIL* (2005), 175–193, at 175.

10 A further reason to study this contribution is that, as Kolb has noted, "'terrorism' for the purposes of seizing financial assets of doubtful groups may not necessarily correspond to 'terrorism' when dealing with individual criminal prosecution" (footnote omitted). See Robert Kolb, 'The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 227–281, at 228.

quent codification work on the crimes against the peace and security of mankind. The contribution of the international criminalisation and effective prosecution of the core crimes to the maintenance of international peace and security has been acknowledged. In addition to the Preamble of the Rome Statute, which recognises that grave international crimes threaten the peace, security and well-being of the world,[11] reference can be made to the establishment by the Security Council of the ICTY and the ICTR and, subsequently, of the Sierra Leone Special Court as measures to maintain or restore international peace and security under Chapter VII of the UN Charter. Furthermore, it has been argued that the establishment of the ICTR ex post facto, i.e. five months after the Rwandan genocide had taken place, showed the relevance of legal proceedings as such for the maintenance of peace and collective security.[12]

As the determination of threats to international peace and security is one of the prerogatives of the UN Security Council by virtue of article 39 of the UN Charter,[13] its statements and decisions are of particular relevance for the concept, all the more so as the Security Council has shown a tendency both to interpret the notion broadly and to apply it to widely different circumstances.[14] It has been suggested above that serious crimes against human rights and international humanitarian law threaten the peace and this interpretation has been confirmed by a number of Security Council resolutions that have authorised the use of force to stop a threatening humanitarian catastrophe.[15] Although the relevant resolutions

11 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544, Preamble, para. 9.

12 Inger Österdahl, 'The International Criminal Court and Collective Security', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 291–326, at 309.

13 The provision in art. 39 is purely procedural and does not set out substantive criteria for threats of peace.

14 Österdal, *supra* note 12, at 313. See also Österdahl, 'The Continued Relevance of Collective Security under the UN; The Security Council, Regional Organizations and the General Assembly', X *FYBIL* (1999), 103–140.

15 For instance, the Security Council found that the situation in Bosnia, with its widespread violations of humanitarian law, constituted a threat to international peace and security, and authorised measures that were necessary to ensure the effective and unhindered delivery of humanitarian assistance to the area: UN Doc. S/RES/757(1992). It found that the magnitude of the humanitarian tragedy caused by the conflict in Somalia, again with widespread violations of international humanitarian law, constituted a threat to international peace and security: UN Doc. S/RES/794(1992). Concerning Haiti, such a threat was found to be caused by the deterioration of the humanitarian situation in the country and by the systematic violations of civil liberties during the illegal military regime that had overthrown the legally elected president; UN Doc. S/RES/940(1994). In UN Doc.

mostly refer to "the unique character" of the situations at hand, thus underlining their exceptional nature, the consecutive determinations constitute a uniform practice of interpretation defining attacks against the civilian population and breaches of international humanitarian law as threats to international peace and security within the meaning of article 39.[16] The Council's use of the concept has thus been evolutive: it has reflected the changing nature of armed conflicts, on the one hand, and the growing importance of human rights considerations, on the other.[17] Having originally been confined to inter-state conflict, the notion of threat to the peace has subsequently been applied to situations which have essentially been restricted to the area of one state. Finally, and in a notable departure from the traditional state-centred understanding of international crimes, the Security Council has also deemed acts by non-state actors to threaten international peace and security.[18] The groundbreaking resolutions 1373(2001), which addressed terrorist acts as well as their preparation and financing, and 1540(2004), which addressed the risk of proliferation of weapons of mass destruction to non-state actors as threats to peace can thus be seen as logical steps in a long process.

The first time the Security Council extended the concept of threat to peace and security to terrorist acts was in 1992, in connection with the destruction of Pan Am flight 103 over the Scottish village of Lockerbie in 1988 and UTA flight 772, which was blown up over the Sahara in 1989.[19] The determination was not, however, accompanied by any specific measures taken under Chapter VII, and the concept appeared in a sentence that referred to the right of every state to protect its citizens. The principal message of the resolution, as on earlier occasions when

S/RES/929(1994) concerning Rwanda, and in UN Doc. S/RES/1264(1999) concerning East Timor, the Security Council expressed its concern over the systematic, widespread and gross violations of human rights that constituted a threat to international peace and security.

16 For instance UN Doc. S/RES/940(1994), UN Doc. S/RES/929(1994) and UN Doc. S/RES/1264(1999).

17 For an account of the importance of the protection of human rights and respect for humanitarian law in the UNSC practice in the 1990s, see Inger Österdahl, *Threat to the Peace: the Interpretation by the Security Council of Article 39 of the UN Charter*, Iustus Förlag, 1998, at 105.

18 As is evident from the frequent application of the notion to situations of internal conflict; see Eric Rosand 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', 28 *Fordham Int'l LJ* (2005), 542–590, at 554–555.

19 UN Doc. S/RES/731(1992). Earlier, for instance in UN Doc. S/RES/635(1989), the UNSC had only referred to "the implications of acts of terrorism for international security". It had also characterised the taking of hostages as "offences of grave concern to the international community", in UN Doc. S/RES/579(1985) or "offences of grave concern to all states" in UN Doc. S/RES/638(1989).

the Security Council had addressed terrorist acts, was the condemnation of such acts. In subsequent resolutions, the Security Council determined that a failure by the Libyan Government to respond to the requests to extradite the persons suspected of having brought about the destruction of the aircraft constituted a threat to international peace and security.[20] In a 1996 resolution addressing the alleged involvement of the Government of Sudan in an assassination attempt on President Mubarak of Egypt, the Security Council stated that the suppression of acts of international terrorism, "including those in which states are involved", was "an essential element for the maintenance of international peace and security".[21] The second resolution on the same subject characterised Sudan's failure to comply with an extradition request as a threat to the international peace and security.[22] In a similar fashion, resolutions on the situation in Afghanistan, adopted in 1998 to 2000,[23] referred to the failure of the Taliban authorities to respond to the demands of the Security Council as a threat to peace. The resolutions also pointed out that "the suppression of international terrorism is essential for the maintenance of international peace and security".[24] It is worth noting, however, that the focus of all these resolutions was the failure of the target state to comply with its international obligations and the requests of the Security Council, not the terrorist acts as such or their individual perpetrators.[25]

A more direct characterisation of terrorist acts – or at least certain terrorist acts – as capable of threatening international peace and security was contained in resolution 1269(1999), which, for the first time, addressed international terrorism in a general manner. Once again, the Security Council condemned all acts, methods and practices of terrorism, but referred "in particular" to "those which could threaten international peace and security".[26] In resolutions 1368 and 1373, adopted in September 2001, new and more straightforward language was introduced that underlined the security threat posed by terrorist acts without differentiating between them and stated that "any terrorist act" threatens international peace

20 UN Docs. S/RES/ 748(1992) and S/RES/883(1993).

21 UN Doc. S/RES/1044(1996).

22 UN Doc. S/RES/1054(1996).

23 UN Docs. S/RES/1214(1998), S/RES/1267(1999) and S/RES/1333(2000).

24 UN Doc. S/RES/1267(1999), Preamble, para. 5.

25 According to Santori, the resolutions thus recognised only an indirect link between the acts of terrorism and the threat to peace. Valeria Santori, 'The UN Security Council's (Broad) Interpretation of the Notion of the Threat to Peace in Counter-Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 89–111, at 91.

26 UN Doc. S/RES/1269(1999).

and security. That determination soon became a standard feature of the Security Council resolutions addressing international terrorism.[27] A new agenda item was also created with the title "threats to international peace and security caused by terrorism". Some resolutions referred more neutrally to the "threats to international peace and security caused by terrorist acts",[28] whereas one resolution pointed out that "any individuals, groups, undertakings and entities" associated with Al-Qaida, as well as members of the Taliban, represented a threat to international peace and security.[29] More recently, a new variant has become recurrent, according to which terrorism "in all its forms and manifestations" constitutes "one of the most serious threats to international peace and security".[30] While this new formulation elevates the terrorist threat among the most serious ones, it also seems to shift the attention to a more general level, affirming that all *kinds* of terrorist acts are equally serious without necessarily extending this characterisation to each and every concrete act of terrorism.

The legal significance of these various formulations is not clear, and should in any event be assessed taking into account the relevant resolutions in their entirety, their adoption with or without a reference to Chapter VII of the Charter, and the kinds of measures – if any – that were adopted as a consequence of the determination of terrorist acts as a threat to peace. The normative impact of Security Council resolutions on terrorism is a question that will be studied more closely in the following section. Suffice it to note here that despite an increasing number of comments on the new role of the Security Council as a 'global legislator',[31] the practice prompting such comments has not been very extensive, and both the Security

27 For instance, UN Docs. S/RES/1373(2001), Preamble, para. 3; S/RES/1438(2002), para. 1; S/RES/1440(2002), para. 1; S/RES/1450(2002), para. 1; S/RES/1465(2003), para. 1; S/RES/1516(2003), para. 1.; S/RES/1530(2004), para. 1; S/RES/1611(2005), para. 1; S/RES/1618(2005), para. 1.

28 For instance UN Doc. S/RES/1455(2003), Preamble, para. 7; Preamble, para. 2

29 UN Doc. S/RES/1526(2004), Preamble, para. 7.

30 For instance, UN Docs. S/RES/1377(2001), Annex, para. 2; S/RES/1456(2003), Annex, para. 1; S/RES/1535(2004), Preamble, para. 2; S/RES/1566(2004), Preamble, para. 7; S/RES/1617(2005), Preamble, para. 1.

31 Szasz, *supra* note 4; Aston, *supra* note 4; Happold, *supra* note 5; Rosand, *supra* note 18; Sandra Szurek, 'La lutte internationale contre le terrorisme sous l'empire du chapitre VII: un laboratoire normatif', 111 *RGDIP* (2005), 5–49; Rolf Einar Fife, 'The Legislative Response of the United Nations to Terrorism: Perspectives on Creative Forces and Sources of International Law', in Ole Kristian Fauchelld, Henning Jakhelln and Aslak Syse (eds.), *Festskrift til Carl August Fleischer: dog Fred er ej det Bedste...*, Universitetsforlaget, 2006, 151–172; Katinka Svanberg-Torpman, 'The Security Council as a Law Enforcer and Legislator', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 85–144;

Council and its commentators still move very much in uncharted waters.[32] Because of its wide powers, it has been customary to regard the Security Council's decisions and actions as a special kind of emergency measures rather than an activity comparable to day-to-day legislation.[33] It has been noted that its decisions "are to a large extent lifted up and away from the ordinary field of international law", with the resulting difficulty of assessing the legal impact of its practice in relation to customary international law.[34]

The innovative features in the recent practice of the Security Council concerning international terrorism have been underlined by several writers. Szurek has referred to the use of Chapter VII of the UN Charter in the fight against terrorism as an undertaking with potentially important legal implications, a '*laboratoire normatif*'.[35] In defining the obligations of states in countering terrorism, she has argued, the Security Council has contributed to raising some of those obligations to a higher normative level. In particular, resolution 1373, which was adopted under Chapter VII and which calls upon states to become parties to the existing UN anti-terrorist conventions and protocols on terrorism, has, in her view, transformed those instruments to 'conventions of public order', the universal ratification of which is indispensable for the maintenance of peace and security.[36] This argument gains additional weight from the fact that the Security Council set up a specific mechanism to monitor the implementation at the national level of the obligations under the resolution as well as from the substantial increase in the

Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *JICJ* (2006), 1044 – 1073.

32 It is also worth noting that resolution 1373(2001), as the only pure expression of 'global legislation' has not been followed by other resolutions of quite the same nature.

33 Koskenniemi, *supra* note 1; Abi-Saab, Introduction. The Proper Role of International Law in Combating Terrorism', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, xiii–xxii, at xix and Rosand, *supra* note 18, at 585.

34 Österdahl, *supra* note 17, at 112, 114.

35 Szurek, *supra* note 31.

36 *Ibid.*, at 18–21. As a major drawback of resolution 1373, she has cited the lack of a definition and the fact that the anti-terrorist conventions and protocols permit reservations, which may undermine the content of the obligations and make international cooperation less effective. For a different view, see Nicolas Angelet, 'Vers un renforcement de la prévention et la répression du terrorisme par des moyens financiers et économiques?', in Karine Bannelier *et al.* (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 219–237, at 226, who has not subscribed to the view that the Security Council wanted by resolution 1373 to raise terrorism into the category of crimes under international law (crimes de droit international).

number of states parties to the Convention on Terrorist Financing after September 2001 – apparently as a result of the adoption of the resolution.[37]

From another perspective, however, one might emphasise the extent to which resolution 1373(2001) represents a substantive continuity in the legal responses to terrorist acts as defined in the framework of the United Nations. It has been pointed out that resolution 1373, as the foremost example of 'Security Council law-making' so far, did not confine itself to restating existing laws.[38] At the same time it drew on earlier instruments – both resolutions and conventions[39] – adopted by the General Assembly over the years as if trying to avoid addressing issues on which there was no consensus in the wider membership of the UN.[40] It has been stressed that the Security Council should in general, and in particular when acting as a global legislator, try to capture the emerging consensus on the relevant issues and reflect the will of states.[41] Resolution 1373 also allowed states broad discretion in the implementation of the new obligations, notably by refraining from including in the resolution a definition of terrorism – even though one was available in the Convention on Terrorist Financing, on which the resolution otherwise heavily draws.[42] While it is therefore open to argument to what extent the resolution has changed the legal status of counter-terrorist regulations, there is no doubt about the increased importance of both compliance with the existing conventions and protocols and of the action of the Security Council in this area. With reference to Boister's observation that 'transnational criminal law' in general suffers from weak

37 As pointed out earlier, only four states had ratified the Convention in September 2001. By the end of 2002, the number was 57 and by the end of 2008 167, http://untreaty.un.org.

38 For instance, Rosand, *supra* note 18, at 569, has claimed that the resolution sought to establish a new set of legal norms.

39 In particular the 1994 Declaration, UN Doc. A/RES/49/60, UN Doc. A/RES/51/210, and the Terrorist Financing Convention.

40 Rosand, *supra* note 18, at 581.

41 *Ibid*., suggesting that the Council should limit its legislative activity to accelerating the progression of *lex ferenda* into binding norms. "It should avoid creating obligations for states that do not reflect clear emerging normative standards" (footnote omitted).

42 Resolution 1373 incorporates the obligation to criminalise terrorist financing, defined in the same terms as in the *chapeau* of art. 2, para. 1 of the Convention, but leaves out the definition of terrorist acts in subparagraphs (a) and (b) of the same paragraph. Later on, in resolution 1566(2004), the UNSC did, however, adopt 'a description' of terrorism. According to Rosand, the ability to avoid dealing with divisive issues such as the 'definition of terrorism' has greatly contributed to the broad support for the UNSC action against terrorism, see Eric Rosand, 'Resolution 1373 and the CTC: The Security Council's Capacity-building', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 81–88, at 85.

enforcement and may have recourse to the enforcement powers of the Security Council only in extreme situations, such as the Lockerbie case,[43] it should be pointed out that the Security Council now has three counter-terrorist committees, all operational full-time and in constant interaction with UN member states.[44] These can hardly be characterised as emergency measures.

Finally, it should be noted that while the determination that terrorist acts threaten international peace and security is a new development, it does not seem to be controversial but rather appears to reflect the "will of the states". As was noted earlier, terrorism has been identified as a major security threat by several states and international organisations.[45] Moreover, the UN Summit of 2005 declared in its final document that 'international terrorism constitutes a threat to international peace and security', proving that all member states have agreed to this determination.[46] It may therefore be concluded that a consistent practice by a competent international organ to treat terrorist acts as a threat to international peace and security reflects a sea change in the perception of terrorist crimes in recent years. The Security Council and the measures it has taken in recent years to enforce counter-terrorist obligations have also promoted the universal condemnation of such acts as international crimes ('*Normbewusstsein*').[47] At the same time, there are also more complicated – and more problematic – aspects of the relationship between Security Council action against terrorism, on the one hand, and international criminal law developments.

8.2. The Definition of Terrorism

8.2.1. Resolution 1566(2004) and the 'Description of Terrorism'

As noted earlier, the Security Council has refrained from putting forward – or imposing – a definition of terrorism on states. The closest the numerous UNSC

43 Neil Boister, '"Transnational Criminal Law"?', 14 *EJIL* (2003), 953–976, at 960.

44 The Committee established by resolution 1267(1999), the Counter-Terrorism Committee, and the Committee established by resolution 1540(2004).

45 'A Secure Europe in a Better World', European Security Strategy, Brussels, 12 December 2003, available at http://www.consilium.europa.eu/uedocs.

46 2005 World Summit Outcome, A/RES/60/1, 24 October 2005, para. 81, at 22.

47 Werle, Gerhard, *Völkerstrafrecht*, Mohr Siebeck, 2003, at 36 has clarified in this way the preventive effect of the criminalizations under the ICC Statute: "Angesprochen ist damit nicht nur – und nicht einmal in erster Linie – die (bezweifelbare) Abschreckungswirkung des Völkerstrafrechts. Vielmehr stehen Erzeugung und Bekräftigung des internationalen Normbewusstseins (positive Generalprävention) im Vordergrund: die Fähigkeit des Völkerstrafrechts, einen Beitrag zur Stabilisierung der Normen Völkerrechts zu leisten."

resolutions on 'threats to international peace and security caused by acts of terrorism' come to a generic definition of terrorist act is the description of terrorist acts in resolution 1566(2004).[48] According to this description

> [C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.[49]

The description follows closely what could be taken as an emerging customary law definition of terrorist acts as serious violent crime committed with the purpose of either intimidating a population or compelling a government. An interesting feature of the description is the mention of the primary target of the act in the expression "including against civilians". This may be taken as shorthand for the longer but more accurate formulation in article 2 (1)(b) of the Terrorist Financing Convention, "to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict". Since acts against military targets are legal only in situations of an armed conflict as regulated by the specific rules of international humanitarian law, simple reference to 'acts against civilians' would have been too limitative. However, in view of the fact that the text falls short of specifying what the other categories of protected targets are, there is no way of knowing whether the 'description' would include acts against military targets only in times of peace, or also in situations of armed conflict and occupation. Taking into account the still ongoing negotiations on the UN Comprehensive Convention against terrorism, it may be assumed that the description is meant to leave room for different interpretations in this respect.

48 The expression 'description' is consistent with the stated aim not to present a new definition over and above the existing criminalisations in the UN anti-terrorist conventions and protocols.

49 UN Doc. S/RES/1566(2004), para. 3. The notion of an act which constitutes an offence within the scope of and as defined in the international conventions and protocols relating to terrorism is similar to that found in the Terrorist Financing Convention, art. 2(1)(a).

Further analysis of the generic part of the description seems unnecessary, as the last phrase "within the scope of and as defined in the international conventions and protocols relating to terrorism" makes it clear that the description is not meant to go beyond the existing criminalisations. The description is therefore a combination of a generic and a reference-based definition. In the broad language typical of UNSC resolutions, which do not necessarily seek the accuracy and clarity required of treaty text, it seems to refer to those acts under the existing UN anti-terrorist conventions and protocols which also meet the requirement of a 'terrorist intent'. However, no list of the relevant instruments is attached to the resolution, and while the mention of "international conventions and protocols" could be taken to refer to the eleven UN instruments containing anti-terrorist criminalisations in force at the time, a literal interpretation would cover a much larger array of treaties.[50] The text also reiterates language from the 1994 UNGA Declaration, subsequently incorporated in the Terrorist Bombings Convention and the Terrorist Financing Convention, on such acts not being justifiable. Finally, states are reminded of their obligations to prevent and punish terrorist acts. Taken as a whole, the description clearly seeks to build on the *droit acquis* of the UN General Assembly's action against terrorism. While some scholars have regarded the lack of a definition as a shortcoming,[51] it should be noted that the refusal to present one can also be seen as consistent with the willingness to align with, and not to challenge, an existing or emerging consensus in the broader membership of the UN.

The question of adopting a global definition of terrorism has also been raised indirectly in resolution 1566(2004), which set up a working group that was requested, among other things, to

> consider and submit recommendations to the Council on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaida/Taliban Sanctions Committee, including more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition, freezing of their financial assets, preventing their movement through the territories of Member States, preventing supply to them of all types of arms and related material, and on the procedures for implementing these measures.[52]

50 Most notably, it would also extend to the various regional conventions.

51 See, for instance, Bianchi, *supra* note 9, at 900, who has found it regrettable that the Security Council "did not have the courage to also impose a definition of terrorism".

52 UN Doc. S/RES/1566(2004), para. 9.

The possibility of setting up a global list of persons, groups and entities for the purposes of asset-freezing, travel bans and other targeted sanctions raises questions about the criteria by which the targets would be selected. Under the existing UN anti-terrorist sanctions regime, monitored by the Committee established by resolution 1267(1999) – known as the Al-Qaida/Taliban Sanctions Committee – designation proposals coming from member states are adopted in a procedure that does not leave much time for thorough consideration of the evidence that has been presented in their support.[53] At the same time, all submissions have to apply the yardstick given in the relevant resolutions, namely that the individuals, groups or entities whose designation is sought have to be 'associated with' Al-Qaida, Usama bin Laden or the Taliban.[54] For the purposes of a 'global blacklist', the Security Council would have to consider whether it should draw up common criteria for accepting proposals from states concerning domestic groups (a definition of terrorism!) or to rely on the relevant definitions in national penal codes.[55]

8.2.2. The Definition of 'Those Associated with Al-Qaida, Usama bin Laden or the Taliban'

The existing UNSC resolutions that require states to take measures against individuals, groups and entities involved in terrorist activities fall short of giving a comprehensive definition of terrorist acts. The successive resolutions on measures against Al-Qaida, Usama bin Laden and the Taliban and their associates have their origin in sanctions against Taliban-led Afghanistan, that is to say, traditional sanctions directed at a de facto regime of a state.[56] The scope of the measures was expanded by resolution 1390(2002) to cover individuals and entities so associated wherever located, but it was still limited by the mention of the two organisations.[57] Even though the criterion so defined is imprecise – and Al-Qaida, if it ever was a formal organisation with a registered membership,[58] has increasingly lost such qualities,

53 The 24-hour reflection time was later extended to five days as a general rule. Guidelines of the Committee for the Conduct of its Work, as amended on 12 February 2007, para. 4.

54 UN Doc. S/RES/ 1330(2000) and subsequent resolutions on the same subject.

55 For the differences between national definitions, see Ben Saul, *Defining Terrorism in International La*w, Oxford University Press, 2006, at 262–269.

56 See UN Doc. S/RES/1214(1998), UN Doc. S/RES/1267(1999), and UN Doc. S/RES/1330(2000) on the situation of Afghanistan.

57 UN Doc. S/RES/1390(2002).

58 The origin of Al-Qaida, it is recalled, was in the list of names maintained by the Afghan Service Bureau. For the views concerning the further development of Al-Qaida, see Introduction, Section 1 (The Change in International Terrorism).

becoming a loose network connected by a common ideology – the resolution gives at least an indication of where to direct efforts and excludes groups and individuals with no evident connection to Al-Qaida or the Taliban, such as those conducting their activity entirely within one country. In 2005, the Security Council adopted a resolution containing further clarifications of the concept 'being associated with'.

According to resolution 1617(2005),

> [A]cts or activities indicating that an individual, group, undertaking, or entity is "associated with" Al-Qaida, Usama bin Laden or the Taliban include:
> – participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
> – supplying, selling or transferring arms and related materiel to;
> – recruiting for; or
> – otherwise supporting acts or activities of;
> Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.[59]

While this list does not pave the way for a UNSC definition of a terrorist act, it gives an indication of how the Security Council defines the activities that should give rise to international accountability for terrorism, or, more precisely, *support* for terrorism. The resolutions do not necessarily target persons or entities involved in violent crime but those associated with such persons or entities. Again, however, the lack of textual accuracy makes comparison with existing criminalisations difficult. The second and third indents have the clearest equivalents in criminal law: supplying arms or 'related materiel' to one of the two prohibited organisations would probably constitute a crime in most UN member states, which are under an obligation to enforce a prohibition of arms supply to these organisations.[60] Likewise, recruitment to terrorist organisations,[61] while not established as a crime at the UN level, is conceivable as an offence, provided that certain other requirements, such as intentionality and unlawfulness are met, and has been defined as a crime in the Council of Europe Convention on the Prevention of Terrorism. At

59 UN Doc. S/RES/1617(2005), para 2.

60 The obligation to prevent the supply, sale and transfer to the Taliban-controlled territory in Afghanistan of "arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spareparts for the aforementioned" was contained in resolution 1333(2000), para. 5(a).

61 However, it is not clear how the Taliban should be characterised in this context, as a terrorist group or an armed group fighting for power in an internal conflict.

the same time, resolution 1617 does not refer only to recruitment to Al-Qaida or the Taliban, but also to "any cell, affiliate, splinter group or derivative" of them, which seems to give considerable latitude to states in proposing names of persons, groups or entities for inclusion in the list.

The first indent is even more imprecise. While 'financing', 'planning', 'facilitating', 'preparing' and 'perpetrating' are all criminal law concepts with an established content – and could be used in connection with, for instance, any of the offences as defined and within the scope of the UN anti-terrorism conventions and protocols without violating the principle of legality – the scope of the definition in the first indent is not limited to participation in or support for the commission of terrorist crimes. Rather, the text seems to refer to any 'acts or activities' of the two organisations, whether lawful or unlawful. This is in marked contrast to the UN anti-terrorist conventions and protocols, which have consistently made a distinction between lawful and illegal activities of terrorist groups and required states to prohibit only the latter.[62] Moreover, the expression 'support' and 'facilitation' also seems broad and, read in the context of the paragraph as a whole, would cover any support or facilitation of any activities of any cell, affiliate, splinter group or derivative of Al-Qaida or the Taliban. Furthermore, the last indent makes it clear that any other type of support would be equivalent to the ones specified.

While the definition of 'association with' is thus open-ended, it has been an important step in the efforts to make the Security Council's decision-making more transparent. There are no indications for the time being, however, that the effort is being pursued further so as to achieve a tighter definition. While it is clear that the criteria set forth in resolution 1617 do not meet the requirements of legality in the sense given to the term in criminal law, two remarks are in order. Firstly, the definition has not been put forward for the purpose of criminalising the defined acts or to be applied by national authorities for the purpose of other restrictive measures at the national level. Its primary purpose is to provide clarification for states wishing to make proposals to the 1267 Committee for new designations. Secondly, the directions given in resolution 1617 are only a point of departure for assessing a proposal concerning designation: a unanimous decision of the Committee is required for any proposal to result in a change in the sanctions list. The essential criterion

62 For instance, the Terrorist Bombings Convention, art. 5(a), reads as follows: "States Parties shall cooperate in the prevention of the offences set forth in art. 2, particularly: (a) By taking all practicable measures, including, if necessary, adapting their domestic legislation, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories including measures to prohibit in their territories *illegal activities* of persons, groups and organizations that encourage, instigate, organize, *knowingly finance* or engage in the perpetration of offences as set forth in Article 2" (emphasis added). See also the Terrorist Financing Convention, art. 18 (1)(a).

thus remains a political one: a case-by-case decision taken by consensus of the fifteen member states of the Security Council. In practice, most suggestions for designation are based on intelligence. While the Committee has recently requested states to present statements of the case that are as complete as possible to support the proposals for designation,[63] such statements have not been publicly available, which makes it difficult to assess how states have interpreted the criterion of being 'associated with' Al-Qaida, Usama bin Laden or the Taliban.[64]

Resolution 1373, which obliges states to criminalise the financing of terrorist acts as well as to freeze the funds and financial assets of persons and entities involved in the commission of terrorist acts,[65] notoriously leaves out any definition of terrorism, list-based or generic. The encouragement in the resolution to states to accede to the 1999 Convention on Terrorist Financing[66] can be seen as an attempt to fill this gap.[67] Several commentators have nevertheless interpreted the lack of any definition as an endorsement of any and all definitions under the domestic legislation of member states.[68] It is also worth noting in this context that the Financial Action Task Force (FATF) has adopted definitions of not only terrorist financing but also of 'terrorist'. According to the FATF Interpretative Note on Special Recommendation III (SR III),

> The term *terrorist* refers to any natural person who (i) commits, or attempts to commit terrorist acts by any means, directly or indirectly, unlawfully and wilfully, (ii) participates as an accomplice in terrorist acts or terrorist financing;

63 UN Doc. S/RES/1526(2004), para. 17; UN Doc. S/RES/1617(2005) para. 4; UN Doc. S/RES/1735(2006), para. 5.

64 In June 2008, the UNSC adopted resolution 1822, which directs the Committee to make accessible on its website a summary of reasons for listing for all present and future entries. See UN Doc. S/RES/1822(2008), para. 13.

65 UN Doc. S/RES/1373(2001), para. 1(b) and (c). For a closer scrutiny of these obligations, see section 8.2.

66 *Ibid.*, para. 3(d).

67 See also the FATF Special Recommendation I, available at http://www.oecd.org/fatf/TerFinance_en.html.

68 See UN Economic and Social Council, Promotion and Protection of Human Rights. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. E/CN:4/2006/98, 28 December 2005, para 50. Scheinin points out that "[t]he absence of a universal, comprehensive and precise definition of "terrorism" is problematic for the effective protection of human rights while countering terrorism". See also Helen Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2006, at 45; Ben Saul,' Definition of "Terrorism" in the UN Security Council: 1985-2004', 4 *CJIL* (2005), 141–166, at 157–158; Bianchi (2007), *supra* note 31, at 899–900.

> (iii) organises or directs others to commit terrorist acts or terrorist financing; or (iv) contributes to the commission of terrorist acts or terrorist financing by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist act or terrorist financing or with the knowledge of the intention of the group to commit a terrorist act or terrorist financing.[69]

The intriguing feature in this definition is that terrorist financing, again, is counted as an act of terrorism, and that any person who participates in the financing crime as an accomplice is regarded as a 'terrorist'. As noted above, there has been a change in the UN Security Council rhetoric whereby an overall determination that "any terrorist act" threatens international peace and security has been replaced by a less categorical formulation, according to which terrorism, "in all its forms and manifestations", constitutes "one of the most serious threats to international peace and security". At the same time, a strong message continues to be given by the UNSC practice, consistent with the preventive approach, of the danger posed not only by terrorism as such, but also by terrorist financing, as well as other support and facilitation of terrorism seen as an organised activity linking a number of persons together in a 'terrorist enterprise'.[70] Resolution 1373 singled out the Terrorist Financing Convention as the most important of the (then) twelve conventions and protocols that states were urged to ratify at their earliest convenience.[71] The CTC as well has focused on terrorist financing as a priority area. While resolution 1624(2005) has shifted attention from financing to incitement, requiring states to adopt measures to prohibit by law incitement to commit a terrorist act or acts and to prevent such conduct,[72] the focus is still on preventive action. As

69 FATF Interpretative Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets, para. 7 (e).

70 According to Sossai, "the underlying approach of Res. 1373 seems to imply that there is no terrorist without a terrorist organization". In his view, this may lead to individuals being blamed not because of the means they employ but because of the ends they pursue and the group to which they belong. See Mirko Sossai, 'The Internal Conflict in Colombia and the Fight against Terrorism: UN Security Council Resolution 1465(2003) and Further Developments', 3 *JICJ* (2005), 243–252, at 260.

71 The Terrorist Financing Convention is the only anti-terrorist convention mentioned by name in para. 3 d) of resolution 1373, which calls upon all states to "become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999".

72 The resolution was adopted under Chapter VI of the UN Charter and is therefore not mandatory; states have nevertheless been requested to report to the CTC on the implementation of the resolution.

the FATF interpretation cited above and the Council of Europe criminalisation of offences related to terrorist financing show most pointedly, resolution 1373 also set in motion a development that has gained some autonomous momentum.

This approach of non-differentiation could be taken as one of the most important – and most intractable – contributions of the UN Security Council to the definition of terrorism. Two caveats are nevertheless in order. First, the preventive approach was not invented by the Security Council; the Terrorist Financing Convention was, after all, adopted two years before September 2001 and was elaborated in response to an earlier call of the UN General Assembly to prevent terrorist activities. In 1996, the UN General Assembly declared that not only terrorist acts as such, but also "knowingly financing, planning and inciting" terrorist acts were contrary to the purposes and principles of the United Nations.[73] Adopted by consensus, the 1996 Declaration constitutes an authoritative interpretation of the UN Charter.[74] In a similar sign of an impending 'paradigm shift', the UN Secretary-General Boutros Boutros-Ghali identified in 1996 as possible areas where new legal instruments could be adopted, inter alia, terrorist fund-raising, prevention of the use of weapons of mass destruction by terrorists as well as prevention of the use of modern information technology for terrorist purposes.[75] The discussions and decisions of the Group of Eight[76] – an important source of new thinking in the area of countering terrorism – also promoted a pro-active strategy that has later been mainstreamed in the UN activities against terrorism.[77]

73 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, UN Doc. A/RES/51/210 of 17 December 1996, Annex, para. 2.

74 Ian Brownlie, *Principles of Public International Law*, 4th Edn., 1990, at 699: "When a resolution of the General Assembly touches on subjects dealt with in the United Nations Charter, it may be regarded as an authoritative interpretation of the Charter".

75 Boutros Boutros-Ghali, 'The United Nations and Comprehensive Legal Measures for Combating International Terrorism', in Karel Wellens (ed.), *International Law: Theory and Practice*, Kluwer Law International, 1998, 287–304, at 302. It appears from the article that it was written in late 1996. The Secretary-General also mentioned the decisions already taken by the UNGA at that time concerning the elaboration of the conventions against terrorist bombings and nuclear terrorism.

76 For instance the Declaration on Terrorism, adopted in the Group of Seven Summit in Lyon in June 1996, the so-called Paris Declaration adopted in the Ministerial Conference on Terrorism of the Group of Seven and Russia on 30 July 1996, UN Doc. A/51/261, 1 August 1996. The 1996 UNGA Declaration was elaborated at the initiative of the United Kingdom, the Terrorist Bombings Convention at the initiative of the G7 and Russia and the Terrorist Financing Convention at the initiative of France with support from the G7 and Russia.

77 As the Chief of the Terrorism Prevention Branch of the UN Office on Drugs and Crime, Jean-Paul Laborde has noted recently, "the risk of catastrophic consequences compels authorities to interrupt dangerous plots before they are attempted [...] the phenomena

Secondly, the preventive approach as such does not necessarily lead to non-differentiation between terrorist acts and terrorism-related activities. As Scheinin has pointed out, while "It is essential to ensure that the term "terrorism" is confined in its use to conduct that is of a genuinely terrorist nature",[78] this approach is "not inconsistent with a number of instructions by, and recommendations of, the Security Council concerning conduct in support of terrorist offences".[79] At the same time, the emphasis on terrorist financing in resolution 1373, as in the resolutions directed against Al-Qaida, Usama bin Laden and the Taliban, has not left any doubt of its being a priority. The first paragraph of resolution 1373 contains four differently worded obligations which all deal with terrorist financing, implying that terrorist financing constitutes a danger to international peace and security. In paragraph 2(e), "financing, planning, preparation or perpetration of terrorist acts or [...] supporting terrorist acts" are all presented as 'terrorist acts'.[80] Facilitating, supporting and financing acts or activities of terrorist groups have also been deemed a threat to international peace and security by virtue of resolution 1390 and subsequent resolutions against Al-Qaida, Usama bin Laden and the Taliban.[81]

It was only after the adoption of resolution 1373 that the Terrorist Financing Convention attained a nearly universal status, with the broad policy focus becoming a norm. The rapid emergence of a new anti-terrorist normative and institutional framework under the auspices of the UN Security Council after September 2001 was characterised by unprecedented cooperation and compliance. To fully grasp its implications, it is useful to refer to constructivist political science in which internalisation of and compliance with international norms has been studied as a process that is linked to identity politics, i.e. to how states see themselves.[82] The

of fanaticism and suicide bombings make the deterrent effect of the criminal justice process virtually irrelevant. If terrorist violence is to be reduced, authorities must focus upon proactive intervention against the planning and preparation of terrorist acts". See Laborde and Michael De Feo, 'Problems and prospects of Implementing UN Action against Terrorism', 4 *JICJ* (2006), 1087-1103, at 1090.

78 Such as those referred to in resolution 1566(2004), see Scheinin, *supra* note 68, at 11 and 12.

79 *Ibid*., at 12.

80 It is not clear, however, how the reference should be interpreted. See Gro Nystuen, 'Terrorbekjempelse og folkerettslige normkonflikter', *Mennesker & Rettigheter* (2002), No.3, 3–31, at 10.

81 See UN Doc. S/RES/1452(2002), UN Doc. S/RES/1455(2003), UN Doc. S/RES/1526(2004). See also resolutions 1617(2005) and 1735(2006).

82 Alexander Wendt, *Social Theory of International Politics*, Cambridge University Press, 1999, at 302–307. See also Friedrich Kratochwil, *Rules, Norms and Decisions*, Cambridge University Press, 1989, who refers, at 101, to practice-type rules that constitute a 'form of life'.

impressive show of solidarity and sympathy for the United States after September 11 was reflected in the UN General Assembly's weeklong debate on terrorism shortly thereafter.[83] At a deeper level, it may be claimed, the sharing of the shock and indignation built a momentum for common action and enhanced the stigma attached to terrorist acts and to any activities related to terrorism.[84] A change of vocabulary was later seen also in the General Assembly resolution on measures to eliminate terrorism, which, for the first time, stressed the accountability for "aiding, supporting or harbouring the perpetrators, organizers and sponsors of terrorism". This statement echoed the words in which President Bush of the United States had promised that no distinction would be made between those responsible for the attacks and those harbouring them.[85]

One subtle element in a paradigm change is the introduction of new shared understandings of what is necessary and justified in order to obtain a common goal, most effectively by authoritative institutions.[86] The institutional context of international cooperation against terrorism[87] after September 2001was largely directed by the UN Security Council, which gave it a unique position to interpret the events and to contribute to the consensual knowledge shared by states concern-

83 UN GAOR A/56/PV.12–22, Official records of the plenary debate on 1–5 October, 2001. In one of the first legal analyses of the September 2001 attacks and their aftermath, Condorelli referred to "L'immense émotion produite par les attentats du 11 septembre et l'élan général de solidarité en faveur des Etats-Unis qu'elle a engendré, ainsi que la prise de conscience quant à l'existence d'un danger grave qui guette finalement tout le monde". See Luigi Condorelli, 'Les attentats du 11 septembre et leurs suites: où va le droit international?', 105 *RGDIP* (2001), 829–848, at 836.

84 See also Wendt, *supra* note 82, at 229, who points out that "identification is usually issue-specific and rarely total". For the concept of terrorism as the 'Other', see Ileana M. Porras, 'On Terrorism: Reflections on Violence and the Outlaw', *Utah Law Review* (1994), 119–146.

85 Statement of the President in his Address to the Nation", 11 September 2001, at http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html; see also Statement by President George W. Bush before the 56th regular session of the UN General Assembly on 10 November 2001, available at http://www.state.gov/documents/organization/16967.pdf. UN Doc. A/RES/56/1 of 2001, para. 4.

86 Johnstone, *supra* note 2, at 444, has noted that this is done by "professional interpreters [...] situated within an institutional context, and interpretative activity only makes sense in terms of the purposes of the enterprise in which the interpretor is participating" (footnote omitted). An additional aspect relevant to the aftermath of 9/11 is related to the perception of international rules and regulations as an alternative to unilateralism; i.e. as representing rule of law in the sense of a culture of order. For this concept, see Sir Arthur Watts, 'The Importance of International Law', in Michael Byers (ed.), *The Role of Law in International Politics*, Oxford University Press, 2000, 5–16, at 7–9.

87 Apart from military action which was undertaken within the framework of self-defence. See Chapter 9.

ing the priorities in international action against terrorism. Quite obviously, such common understandings facilitate compliance, but compliance also contributes to the creation of consensual knowledge. Johnstone has noted that the practice of international law, whereby law "becomes embedded in bureaucratic and political processes, and compliance becomes a matter of habit or bureaucratic routine", affects the content of the legal rules.[88] It thus seems plausible that the adoption of resolution 1373, the establishment of the CTC, the heavy reporting obligations on states and their continuous monitoring, together with the other measures against terrorist financing taken by the 1267 Committee and reinforced by authoritative expert advice from the FATF, have had an effect on the understanding of terrorism. It is claimed that this sea change indicates the introduction of a monistic concept of terrorism that has replaced the earlier understanding of terrorism as a composite notion embracing the different crimes under the sectoral conventions. Even more remarkably, this notion of terrorism encompasses terrorist financing as an aspect of the larger phenomenon and as an equally serious crime. Both the binding rules issued by the Security Council and the practical understanding of the priorities of the fight against terrorism have pointed in the same direction. The UN Security Council has later calibrated its approach to allow for some differentiation – for instance, resolution 1624(2005) calls upon states to take against incitement to terrorism "such measures as may be necessary and appropriate and in accordance with their obligations under international law"[89] – but the basic message remains the same. Terrorism is seen as a broad phenomenon that calls for a broad policy focus.

8.3. Individual Accountability for Terrorist Acts

Individual criminal responsibility is by no means an unfamiliar area to the UN Security Council, which has thus far established five international or mixed criminal tribunals – one of them with a specific mandate to investigate and prosecute terrorist crimes[90] – commissioned several reports on the subject of serious international crimes and referred one situation to the International Criminal Court.[91] The

88 Johnstone, *supra* note 2, at 442. It may be said that the process of domestic implementation of international obligations always goes beyond the text and encompasses the necessary assumptions that make it function as a meaningful and coherent whole.

89 UN Doc. S/RES/1624(2005), para. 4.

90 The ICTY, the ICTR, the SLSC, the Khmer Rouge Tribunal, the Lebanon Tribunal.

91 For instance, Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808(1993), S/25704, 3 May 1993 (on the establishment of an International Criminal Tribunal for the former Yugoslavia); Report of the Secretary-General on the

most marked impact of the Security Council action on the broadening of the contours of individual responsibility for terrorist and terrorism-related acts has nevertheless been achieved through targeted sanctions directed at individuals as well as groups and entities suspected of being involved in terrorist activities. In accordance with the relevant resolutions imposing sanctions on Al-Qaida, Usama bin Laden and the Taliban as well as persons and entities associated with them, or, on the basis of resolution 1373, directed against persons or entities involved in terrorist activities, all member states have an obligation to freeze any funds, financial assets or economic resources these individuals, groups or entities may have in their territory as well as to prohibit any funds being made available to them.[92] It has become customary to speak of 'the 1267 regime' and 'the 1373 regime' to refer to the respective obligations, even though only the former constitutes a full-fledged sanctions regime closely monitored by the Committee established by resolution 1267 and its Monitoring Team.[93] In spite of the establishment of the CTC by resolution 1373, the responsibility not only for the implementation of the asset-freezing measures but also for the identification of targets (`designation') lies at the national level or, as in the case of the European Union, at the regional level.[94] While this difference is significant in many respects, it does not have bearing on the fundamental question of the legal nature of sanctions directed at private actors.

8.3.1. Legal Nature of UNSC Sanctions

An essential point of departure for discussing the legal nature of the sanctions imposed by the UN Security Council is Chapter VII of the UN Charter, in particular articles 39 and 41. Article 39 sets the context for decision-making under

Establishment of a Special Tribunal for Lebanon, S/2006/176, 21 March 2006. For the referral of the Darfur situation to the ICC, see UN Doc. S/RES/1593(2005) of 31 March 2005.

92 UN Doc. S/RES/1390(2002), para. 2(a), UN Doc. S/RES/1373(2001), para. 1(c) .

93 The 1267 Committee has so far submitted the following reports: UN Doc. S/2000/1254, UN Doc. S/2002/101, UN Doc. S/2002/1423, UN Doc. S/2004/281, UN Doc. S/2004/1039, UN Doc. S/2006/22, UN Doc. S/2007/59, and UN Doc. S/2008/25. The present Analytical Support and Sanctions Monitoring Team has issued eigth reports; UN Doc. S/2004/679 (the First report), UN Doc. S/2005/83 (the Second report), UN Doc. S/2005/572 (the Third report), UN Doc. S/2006/154 (the Fourth report), UN Doc. S/2006/750 (the Fifth report), UN Doc. S/2007/132 (the Sixth report), UN Doc. S/2007/677 (the Seventh report), and UN Doc. S/2008/324 (the Eighth report).

94 For the implementation inside the EU, see Council Common Position on the application of specific measures to combat terrorism 931(2001), 27 December 2001, OJ L 344/93, 28 December 2001, and Council Regulation (EC)2580(2001) of 27 December, 2001, OJ L 344/70, 28 December 2001.

Chapter VII: the relevant measures must be taken in order to maintain or restore international peace and security in a situation where the Council has determined a threat to the peace, breach of the peace, or an act of aggression. According to article 41, measures taken to give effect to the decisions of the Security Council may include complete or partial interruption of economic relations or means of communication, as well as severance of diplomatic relations. Firstly, it is clear that the provisions were originally meant to be applied against non-cooperating states, not individuals, and this was the way they were first used.[95] Later developments have nevertheless made article 41 fully applicable to a more varied set of measures directed both at non-state groups and private individuals.[96] Targeted or 'smart' sanctions have been developed since the mid-1990s as a cost-effective alternative to comprehensive sanctions such as interruption of economic relations, which are often costly in terms of economic loss and human suffering, and affect a number of other countries in addition to the actual target country.[97] In particular, the experience of the sanctions against Iraq – the long 'sanctions decade' between 1990 and 2003[98] with significant humanitarian and economic side effects – prompted the Security Council to actively seek other ways to use article 41.[99] This policy change was also reflected in the Secretary-General's comments in 2000 when, referring to

95 The first time the Security Council resorted to mandatory sanctions was in 1966 when measures were adopted under art. 41 against the racist minority regime in Southern Rhodesia, UN Doc. S/RES/232(1966) of 16 November 1966. Subsequently, sanctions were imposed against South Africa in 1977, UN Doc. S/RES/148(1977) of 4 November 1977, and against Iraq in 1990, UN Doc. S/RES/661 (1990) of 6 August 1990.

96 Of the ten sanctions regimes in place in 2006, eight were established with the purpose, inter alia, of designating individuals and entities as targets of sanctions. See Bardo Fassbender, *Targeted Sanctions and Due Process*, Study commissioned by the United Nations Office of Legal Affairs, Office of the Legal Counsel, 20 March 2006, http://www-un.org/law/counsel/info.htm, at 4.

97 For a discussion of the position of affected third states, see Wladyslaw Czapliński, 'The Position of States Specially Affected by Sanctions in the Meaning of Article 50 of the United Nations Charter. The Experience of Eastern Europe', in Vera Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, 335–347.

98 For the term, and for a cogent analysis of the politics of sanctions against Iraq, see David Cortright and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner Publishers, Inc., 2000.

99 The 'smart sanctions' have been conceptualised and developed through a number of conferences sponsored by the UK, Switzerland. Germany and Sweden in the context of, inter alia, the Interlaken process, the Bonn-Berlin process, and the Stockholm Process. See http://www.smartsanctions.ch, http://www.bicc.de, http://www.smartsanctions.se. For a critical view, see Matthew Craven, 'Humanitarianism and the Quest for Smarter Sanctions', 13 *EJIL* (2002), 43–61.

the lessons learned in recent years, he pointed out that "economic sanctions have proved to be [...] a blunt and even counter-productive instrument".[100]

Secondly, the measures envisaged in article 41, as well as those under article 42 on military measures, are closely connected to the existence of a particular situation that the Security Council has deemed to constitute a threat to, or breach of the peace. The increased use by the Security Council of these articles in the 1990s raised the question of the implications for the responsibility of the target state. According to the traditional view, authoritatively expressed by Dupuy and Higgins, UNSC actions under these articles must be seen as "a measure of constraint and not of responsibility",[101] because they do not have "the aim of individually punishing the culprit of a wrongful act, but of terminating a *situation* that attacks peace or is a threat to it".[102] At the same time, notwithstanding their primary purpose, coercive measures adopted under Chapter VII have often involved determinations of wrongdoing.[103] As Gowlland-Debbas has pointed out, much of the UNSC enforcement action under Chapter VII has in fact been closely related to questions of state responsibility.[104] Comparing UNSC sanctions (`institutionalised countermeasures') with judicial settlement procedures, she concluded that it would no longer be possible to speak of "two alternative methods of *dispute settlement*, the one political and the other legal, but of two alternative processes available to states within the *legal* framework of state responsibility".[105] It is now widely acknowl-

100 ' We the Peoples: the Role of the United Nations in the Twenty-first Century', Report of the Secretary-General, 27 March 2000, UN Doc. A/54/2000, para. 232. Five years later he still stressed that future sanctions regimes must be "structured carefully so as to minimise suffering caused to innocent third parties including the civilian populations of targeted States"; 'In Larger Freedom: Towards Development, Security And Human Rights for All', Report of the Secretary-General, 21 March, 2005, UN Doc.A/59/2005, para. 110.

101 Higgins, *supra* note 1, at 166; Pierre-Marie Dupuy, 'Implications of the Institutionalization of International Crimes of State', in Joseph H.H. Weiler, Antonio Cassese and Marina Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Walter DeGruyter, Inc., 1989, 170–185, at 176.

102 Dupuy, *supra* note 101, at 176 (original emphasis).

103 Koskenniemi, *supra* note 1, at 326 also noted that "the Council frequently makes declarations about the lawfulness of State action".

104 In most of the cases Gowlland-Debbas studied, the Security Council had not limited itself to a determination that there was a threat to the peace but had also found that there was a breach of a fundamental international obligation by a state or by a non-state actor. Vera Gowlland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *Int' l & Comp. L.Q.* (1994), 55–98.

105 Vera Gowlland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* case', 88 *AJIL* (1994), 643–677, at 661 (original emphasis).

edged that legal arguments are a part, although not necessarily a decisive part, of the Security Council's deliberations and that its decisions often have legal effects and legal consequences.[106] Recognising this does not amount to a reassessment of the general nature, composition, and procedures of the UN Security Council, which remain those of an inherently political organ.

A third consideration to articles 39 and 41 is their relative ambiguity or elasticity. As Heiskanen has pointed out, articles 41 and 42 do not give any guidance as to whether the application of the relevant provisions is necessary and justified in a particular context.[107] The assessment of a threat and its qualification as serious enough to put peace and security in danger is at the Security Council's own discretion. The choice of the means necessary to counter the threat is similarly dependent on how the Council interprets the requirements of the situation. Together with article 24 on the primary responsibility of the Security Council for the maintenance of international peace and security, articles 41 and 42 give the Security Council particularly extensive powers, which it has not hesitated to use for some innovative and far-reaching interpretations. As is clear from article 24, however, the Security Council's discretion is not unlimited and cannot be used for purposes that are contrary to the purposes and principles of the United Nations.[108] Whether the Security Council's action is additionally limited by fundamental human rights and in general by the peremptory norms of international law or whether these limits are identical to those imposed by the UN purposes and prin-

106 See for instance Johnstone, *supra* note 2. At the same time, discussion continues on the legal definition of sanctions, see for instance Vera Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, in particular Gowland-Debbas, 'Introduction', 1–28; Georges Abi-Saab, 'The Concept of Sanction in International Law', 29–41; Pierre-Marie Dupuy, 'Quelques remarques sur l'évolution de la pratique des sanctions décidées par le Conseil de Sécurité des Nations Unies dans le cadre du Chapitre VII de la Charte', 47–55.

107 Veijo Heiskanen, *International Legal Topics*, Lakimiesliiton Kustannus, 1992, at 227. At 239, he has concluded that "the United Nations sanctioning powers remaining irremediably ambiguous, the exercise of those powers involves a risk of discrimination and abuse". A similar view has been presented by Conforti who has referred to "[le] caractère vague et élastique de la notion de menace contre la paix", Benedetto Conforti, 'Le pouvoir discretionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression', in René-Jean Dupuy (ed.), *Le développement du rôle du Conseil de Sécurité*, Colloque, La Haye, 21–23 juillet 1992, Martinus Nijhoff Publishers, 1993, 51–60, at 56.

108 According to art. 24(2), "In discharging these duties, the Security Council shall act in accordance with the Purposes and Principles of the United Nations". However, as Koskenniemi, *supra* note 1, at 327, has noted, "the principles and purposes of the Charter are many, ambiguous and conflicting".

ciples is a debated question, but there does not seem to be much dispute about the substantive core of the international norms the Security Council must respect.[109] Furthermore, as noted earlier, the Security Council has good reasons to build on an existing consensus where possible in order to reach out to the wider membership of the United Nations.[110] Likewise, it seems clear that not all Security Council practice under Chapter VII is equally valid in legal terms. For instance, resolution 1422(2002) concerning the immunity of UN peace-keepers from the jurisdiction of the International Criminal Court, which was renewed once but then expired, or resolution 1530(2004) on the alleged (and mistaken) responsibility of the ETA for the terrorist attacks in Madrid in March 2004 were both groundbreaking in their own way,[111] but neither can be said to have left a legacy. And while the Security

109 Ad hoc Judge Elihu Lauterpacht notably held that the supremacy provided by article 103 of the UN Charter to binding decisions of the Security Council could not extend to a conflict between a Security Council resolution and *jus cogens*. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina vs. Serbia and Montenegro), Further requests for the Indication of Provisional Measures, Order of 13 September 1993, Separate Opinion of Judge ad hoc Lauterpacht, para. 100. The European Court of First Instance has also taken the position that the UNSC could not act against a j*us cogens* norm, see *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission*, case T 306/01, Judgement of 21 September 2005, paras. 260–283 and *Yassin Abdullah Kadi v. Council and Commission,* case T 315/01, 21 September 2005, paras. 209–232. Fassbender, *supra* note 96, at 25–28, has argued that the UN Charter obliges the organs of the United Nations, when exercising the functions assigned to them, to respect human rights and fundamental freedoms to the greatest possible extent. See also August Reinisch, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Sanctions', 95 *AJIL* (2001), 851–872.

110 See Szasz, *supra* note 4, at 905: "When legislating, the Council would be well advised to do so only to the extent that it reflects the general will of the world community, as expressed by the General Assembly, though this procedure is not required for the adoption of Security Council resolutions".

111 Resolution 1422 controversially linked the jurisdictional reach of the ICC to a threat to international peace and security, see UN Doc. S/RES/1422(2002), see also Carsten Stahn, 'The Ambiguities of Security Council Resolution 1422(2002)', 13 *EJIL*(2003), 85-104. Resolution 1530 deemed, for the first time, an act of domestic terrorism to be a threat to international peace and security, see UN Doc. S/RES/1530(2004). See also Therese O' Donnell, 'Naming and Shaming: the Sorry Tale of Security Council Resolution 1530 (2004)', 17 *EJIL*(2006), 945–968; Saul, *supra* note 55, at 240–244; Katinka Svanberg-Torpman, 'The Security Council as a Law Enforcer and Legislator', in Diana Amnéus and Svanberg-Torpman (eds.), *Peace and Security. Current Challenges in International Law*, Studentlitteratur, 2004, 85–144, at 127–128.

Council is not bound to treat like cases alike,[112] successive resolutions dealing with similar situations, if they create a consistent practice, [113] or landmark resolutions which are widely accepted and endorsed by state practice can obviously be singled out as having a greater legal impact or even creating new general law.

It is submitted that not only resolution 1373, which would seem to be a case in point,[114] but also the other resolutions imposing counter-terrorist sanctions belong to the last-mentioned category. They have already created significant practice in terms of monitoring and compliance, even though the Monitoring Team of the 1267 Committee has had reason to complain about the increasing 'reporting fatigue' among member states.[115] The successive resolutions on sanctions against Al-Qaida, Usama bin Laden and the Taliban have created a series of consistent obligations, and, furthermore, an expanding and gradually strengthened regime that provides for a growing number of procedural safeguards and cooperation with other international institutions.[116] At the same time, counter-terrorist sanctions continue to prompt legal queries. The concerns expressed by a number of states, scholars and academic institutions[117] do not pertain to the use of the sanctions tool against per-

112 Heiskanen, *supra* note 107, at 240. See also Kamrul Hossain, *Limits to Power? Legal and Institutional Control over the Competence of the United Nations Security Council under Chapter VII of the Charter*. Acta Universitatis Lapponiensis 119, University of Lapland Printing Center, 2007.

113 Such as the many resolutions in the 1990s that defined large-scale violations of human rights and humanitarian law as a threat to peace. See also the 2005 World Summit Outcome, UN Doc.A/RES/60/1 of 24 October 2005, para. 139, which confirmed the responsibility of the international community, in accordance with Chapters VI and VII of the UN Charter, to use appropriate peaceful means or to take collective action to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

114 Angelet, *supra* note 36, at 223, has noted that resolution 1373 goes beyond mere enforcement in that the obligations under the resolution are parallel to those under the Financing Convention and are envisaged to coexist with the latter *ad infinitum*.

115 See for instance the Third Report of the Monitoring Team, *supra* note 93, para. 18 and the Fourth Report of the Monitoring Team, *supra* note 93, para. 115.

116 For an account of the cooperation with Interpol, see the Fourth Report of the Monitoring Team, *supra* note 93, paras. 91–96.

117 Iain Cameron, The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions. Report prepared for the Council of Europe Ad Hoc Committee for Public International Law, 6 February, 2006, http://www.coe.int/t/e/legal_affairs/legal_cooperation/public.international.law/Texts & Documents/2006/I.%20Cameron%20Report%2006.pdf ; Fassbender, *supra* note 96. See also *Strengthening Targeted Sanctions Through Fair and Clear Procedures*. White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006 (Watson Institute report), http://www.watsoninstitute.org.

sons, groups and entities as such,[118] but rather to the lack of adequate safeguards for the legal rights of the targeted individuals. A particular feature in counter-terrorism sanctions is that the designated individuals and entities do not necessarily have a connection to any state.[119] The sanctions therefore do not purport to force a change in the policy of any regime or government, which has been the traditional objective of UN sanctions. At the same time, as has been increasingly underlined, the counter-terrorist sanctions are also used to bring about a behaviour change so that "those who renounce terrorism and demonstrate to the Committee's satisfaction that they are no longer associated with Al-Qaida or the Taliban" can be removed from the list.[120] Even so, coercive measures directed against individuals display a number of features that are not present when the target is a state or an organisation. In particular, the measures taken against individuals because of their individual conduct[121]– asset-freezing and travel bans under the 1267 regime and asset-freezing only under the 1373 regime – raise the question of their relationship to criminal penalties; after all, rehabilitation also figures often among the purposes of criminal punishment.

8.3.2. Legal Nature of Sanctions Against Individuals

The 1267 Committee has underlined that asset-freezing is a preventive rather than punitive measure and that it does not depend on any judicial process. According to the Committee,

> A criminal conviction or indictment is not a prerequisite for inclusion on the Consolidated List, and States need not wait until national administrative, civil, or criminal proceedings can be brought or concluded against an individual or entity before proposing names for the List. Delays in implementation of sanctions only serve to allow Al-Qaida or Taliban supporters an opportunity to circumvent sanctions.[122]

118 The counter-terrorist sanctions are not unique in this respect; *supra* note 96.

119 At the same time, the de-listing procedures have relied on a form of diplomatic protection whereby the listed individuals and entities have not been able to directly approach the Sanctions Committee in order to ask for de-listing. Resolution 1730(2006), did, however, establish a focal point to receive de-listing requests. See the De-listing procedure annexed to the resolution.

120 Fourth report of the Monitoring Team, *supra* note 93, at 48.

121 Individuals have also been targeted as representatives or agents of a state or an organisation. However, many problems are similar in both situations. See Fassbender, *supra* note 96, paras. 12.8 and 12.14.

122 UN Doc. S/2005/760, Sect. II.

The concept of counter-terrorist sanctions has been refined by not only the 1267 Committee and its Monitoring Team but also the FATF, which has recommended that states should be able to freeze terrorism-related assets pursuant to resolutions 1267 and 1373 as a preventive measure "based on reasonable grounds, or reasonable basis, to suspect or believe that such funds or other assets could be used to terrorist activity".[123] This interpretation has in turn been endorsed by the Security Council in resolution 1617(2005).[124]

It may be noted, however, that resolution 1373 defines the target of asset-freezing in terms that can only be understood in a criminal law context, inasmuch as it requires states to freeze the funds and assets or economic resources "of persons who commit, or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts".[125] At the same time, further provisions of the resolution refer to persons and entities "involved" in terrorist acts[126] as well as to "terrorists" or "terrorist persons" and "terrorist groups" without defining any of these terms. Some of this tension was later translated into the EU implementation of resolution 1373. Council Common Position 931(2001) uses the expression "persons, groups and entities involved in terrorist acts"[127] and gives definitions both to this expression and to the notion of "terrorist act".[128] Furthermore, the Common Position indicates the basis for determining whether the persons or entities concerned are involved in terrorist acts, requiring a decision of a competent national authority and specifying that the term 'competent authority' means "a judicial authority or, where judicial authorities have no competence in the area covered

123 FATF Special Recommendation III and the related Interpretative Note.

124 UN Doc. S/RES/1617(2005), para. 7, "strongly urges all member States to implement the comprehensive international standards embodied in the Financial Action task Force's (FATF) Forty Recommendations on Money Laundering and the FATF nine Special Recommendations on Terrorist Financing".

125 UN Doc. S/RES/ 1373(2001), para. 1(c) reads as follows: "Decides that all States shall [...] c) freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities".

126 UN Doc. S/RES/1373(2001), para. 2(a).

127 EU CP 2001/931, art.1(1).

128 *Ibid*., paras. 2 and 3. The definition of a terrorist act is reproduced from the EU Framework Decision on combating terrorism, see Chapter 7.1.

by this paragraph, an equivalent competent authority in that area".[129] While the definition clearly covers decisions concerning the instigation of criminal investigations, as well as final convictions, it leaves open the question of whether it also extends to national designations made in an administrative process.

In the scholarly discussion, asset-freezing has been described as a 'quasi-criminal' measure devised as an alternative to criminal proceedings.[130] In defining prohibited activity, such as being associated with Al-Qaida, and designating persons who are to be sanctioned for it – 'legislating by list' – the Security Council has been said to have "acted at the same time as legislature, judiciary and executive".[131] It has also been submitted that because it substantially affects the situation of the targeted person, designation by the Security Council could be characterised as a criminal charge in the sense given to the term by the European Court of Human Rights,[132] yet the designated persons do not enjoy the benefits of a due process. Moreover, there is a criminal law component in the sanctions regimes in that the obligation to prohibit provision of funds to the targeted persons is assumed to be implemented by enacting penal provisions or using existing ones.[133] Persons who make funds available to the listed individuals or entities can thereby be punished for an offence. Another view is that the criminal law analogy is not appropriate in view of the character and purpose of the designation process.[134] In particular, the Security Council, "[a]s a political organ [...] lacks all the necessary qualifications for a proper conduct of criminal proceedings". Designations could more fittingly be compared to administrative measures taken on the basis of sanctions resolutions, which can be compared to "legislative acts".[135] Likewise, if understood as a punishment, a designation would bar subsequent criminal proceedings because of

129 *Ibid.*, art. 1(4).

130 Iain Cameron, 'Human Rights and Terrorism', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security. Current Challenges in International Law*, Studentlitteratur, 2004, 193–232, at 227.

131 Cameron, *supra* note 117, at 8.

132 Bianchi, *supra* note 9, at 905–906, has recalled the statement of ECtHR that a criminal charge "may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect". See also Bianchi, *supra* note 31, at 1066.

133 In Finland, Penal Code, Chapter 46.

134 Fassbender, *supra* note 96, para. 12.6. Similarly, Watson Institute report, *supra* note 117, at 7, has held that the imposition of sanctions is an administrative process rather than a legal one. "Sanctions are imposed without the same standards of evidence, burdens of proof, and access to remedies of legal processes, but at the same time they are governed to some degree by administrative law procedures".

135 Fassbender, *supra* note 96, para. 12.5.

the right not to be punished twice for the same criminal offence.[136] As was already noted, the 1267 Committee holds that designations are preventive measures taken independently of criminal process. At the same time, it has pointed out that a significant percentage of persons designated by the Committee have actually faced criminal charges or been convicted of serious crimes.[137]

The analogy with criminal proceedings has been most often used to point out the procedural shortcomings of the present asset-freezing regimes and the resulting vulnerability of the targeted persons.[138] In the same vein, it has been pointed out that the conceptual basis for asset-freezing is underdeveloped. In general, sanctions are understood as an alternative to warfare[139] but this analogy is hardly applicable to measures applied to individuals, which are conceptually closer to law enforcement.[140] From the point of view of a listed person, designation and the resulting asset-freezing and travel ban, where the latter applies, can be said to come close to a criminal sanction in several respects. Firstly, they directly affect the legal rights of the targeted individual, in particular his or her right to property, freedom of movement and freedom of association.[141] Secondly, they attach to a targeted person a stigma that is easily comparable to a criminal stigma and may affect the person's life in a similar way.[142] Thirdly, there is a very fine line between criminal penalties and sanctions that can no longer be regarded as emergency measures or temporary restrictions but, rather, tend to last years.[143] This last aspect may in fact be critical

136 *Ibid*., para. 12.7.

137 According to the Fourth Report of the Monitoring Team, *supra* note 93, para. 33, this applies in particular to persons associated with Al-Qaida: "Of the 203 Al-Qaida associated persons in the Consolidated List at the end of January 2006, at least 111 (55 per cent) [had been] arrested for, convicted of or charged with a criminal offence, most of them for serious and/or violent crimes ranging from murder to participation in terrorist acts such as the 1998 embassy bombings in East Africa, the 11 September 2001 attacks in the United States and the 2002 bombings in Bali".

138 Bianchi, *supra* note 9, at 906–910.

139 See also the UNSG report (2005), *supra* note 100, para. 109, which has defined sanctions as "a necessary middle ground between war and words".

140 Fredrik Stenhammar, 'UN Smart Sanctions: Political Reality and International Law', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 145–175, at 170.

141 Sanctions may also affect the right to respect for family and private life, right to seek and to enjoy in other countries asylum for persecution as well as the right to reputation. See Fassbender, *supra* note 96, para. 6.4. and footnote 63.

142 Watson Institute report, *supra* note 117, at 5, has drawn attention to the stigmatising and psychological impact of being wrongly listed.

143 A fairly small number of individuals have so far been de-listed from the Al-Qaida sanctions list.

for the legal qualification of the designations. Even the Monitoring Team of the 1267 Committee has wondered about the meaning of 'prevention' if the individuals and entities on the Consolidated List are to remain on the list forever, and has suggested that the designations should be periodically reviewed.[144]

The closer the impact of anti-terrorist sanctions comes to that of criminal penalties, the more obvious is the need to incorporate elements of due process into the procedure. At the same time, full application of criminal process rules would easily thwart the preventive purpose of designation, for instance, if the targets of asset-freezing were notified in advance of the measures to be taken against them. This inherent limitation has been endorsed by the European Court of First Instance in the *Yusuf* case. According to the Court,

> [I]t is unarguable that to have heard the applicants before they were included in that list would have been liable to jeopardise the effectiveness of sanctions and would have been incompatible with the public interest objective pursued. A measure freezing funds must, by its very nature, be able to take advantage of a surprise effect and to be applied with immediate effect. Such a measure cannot, therefore, be the subject-matter of notification before it is implemented.[145]

There is also some further regional (European) jurisprudence concerning designations and bearing on the legal nature of the sanctions directed at individuals. Thus, the European Court of Human Rights pointed out in the *SEGI* case that designation in the EU list "does not amount to an indictment of the 'groups or entities' and still less to the establishment of their guilt".[146] At the same time, the European Court of First Instance drew attention in its first judgement concerning the EU counter-terrorism sanctions under the 1373 regime, the *OMPI* case, to the need to apply principles of settled case law concerning decisions that adversely affect a person's rights. In the context of anti-terrorist asset-freezing, this would apply in particular to the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection.[147] The Court of First Instance had indicated already

144 The Fourth Report of the Monitoring Team, *supra* note 93, para. 49. See also Larissa van den Herik and Nico Schrijver, 'Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law', in Watson Institute report, *supra* note 117, 9–23, at 14.

145 *Yusuf* Judgement, para. 308.

146 *Segi and Others v. Germany, Austria, Belgium, Denmark, Spain, Finland, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, the United Kingdom and Sweden*, (6422/02), Decision of 23 May 2002, ECHR 2002-V, at 9.

147 *Organisation des Modjahedins du Peuple d'Iran v. Council of the European Union*, case T-228/02, Judgement of 12 December, 2006.

in the 2005 *Kadi* Judgement, which pertained to the EU implementation of the 1267 regime that it would require observance of the principles of EU law when dealing with autonomous EU sanctions. The relevant paragraph made it clear that no such requirement could be imposed with regard to the 'automatic' implementation of UN sanctions:

> [T]he Community institutions [under the 1267 regime] had no power of investigation, no opportunity to check the matters taken to be facts by the Security Council and the Sanctions Committee, no discretion with regard to those matters and no discretion either as to whether it was appropriate to adopt sanctions vis-à-vis the applicants. The principle of Community law relating to the right to be heard cannot apply in such circumstances, where to hear the person concerned could not in any case lead the institution to review its position.[148]

In 2008, however, the European Court of Justice overturned this ruling in a landmark Judgement in joined cases *Kadi* and *Al Barakaat*,[149] in which the EU implementation of the UN sanctions was conceptually separated from the decisions of the Security Council, and the EU Council held responsible for having violated the rights of the applicants by not providing appropriate procedural safeguards. The Court's assessment of the procedures of the 1267 Committee was particularly blunt: the persons or entities concerned have "no real opportunity of asserting their rights" and if such a person or entity submits a request for de-listing, he or she "may in no way assert his rights himself [...] before the Sanctions Committee or be represented for that purpose". Moreover, the Sanctions Committee is not required "to communicate to the applicant the reasons and evidence justifying his appearance in the summary list".[150] Under these circumstances, the Court affirmed, the EU Council should have communicated to Mr. Kadi and the Al Barakaat Foundation the evidence used against them to justify their designation. As no procedure was set up to this effect, the 'automatic' implementation of the UN sanctions violated the rights of the applicants, especially the right to be heard and the principle of

148 *Kadi* Judgement (2005), para. 258. Fassbender, *supra* note 96, para. 4.5. has submitted that the EU law may gradually have an impact on the UN practices as well: "While at present only the EU has adopted formal rules recognizing these sources of treaty law and constitutional traditions, there is good reason to expect that the law of other international organizations, including the United Nations, will be increasingly influenced by that development as they, too, begin to engage in "supranational" lawmaking with a direct effect on individuals".

149 *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, joined cases C-402/05 P and C-415/05 P, Judgement of 3 September 2008.

150 *Ibid*., paras. 323–325.

effective judicial protection.[151] The full implications of the Judgement cannot yet be assessed, but much depends on whether the 1267 Committee will be able to provide enough information to support its designations. It is recalled that resolution 1822(2008) directs the 1267 Committee to publish narrative summaries of the reasons for listing for all entries in the list.[152] It is nevertheless not clear when such summaries will be available and whether they will be detailed enough to enable the listed persons and entities to defend themselves in a court.

The developments within the European Union should be seen as an outgrowth of a broader process towards refining the sanctions regimes. In 2005, the UN Summit called upon the Security Council to ensure that "fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions".[153] In June 2006, the Security Council held an open debate on the rule of law in international relations, focusing, inter alia, on the rule of law aspects of sanctions regimes and resulting in a Presidential Statement on international law with a prominent focus on sanctions.[154] A number of procedural changes have been introduced to the 1267 regime over the years, including procedures for humanitarian exemptions,[155] a requirement of detailed statements of case for all new submissions[156] and the establishment of a focal point in the Secretariat,[157] and the requirement of better statements of reasons.[158] The Monitoring Team has highlighted other proposals which have not yet been adopted by the Committee, such as setting a time limit for designations or ensuring an independent review of designations by an 'ombudsman'.[159] The academic reports mentioned earlier, which were commissioned by the UN Legal Counsel and by three member states, contain a number of other proposals.[160] There is every reason to expect that this development will continue, possibly prompted by further legal proceedings at the national or international level.

151 *Ibid*., paras. 348, 353.

152 *Supra* note 64.

153 UN World Summit Outcome, para. 109.

154 UN Doc. S/PRST/2006/28 of 22 June 2006.

155 UN Doc. S/RES/1452(2002).

156 UN Doc. S/RES/1617(2005).

157 UN Doc. S/RES/1730(2006) and 1735(2006).

158 UN Doc. S/RES/1822(2008); *supra* note 64.

159 Fifth Report of the Monitoring Team, *supra* note 93, para. 38.

160 See Fassbender, *supra* note 96. Watson Institute report, *supra* note 117, was commissioned by Germany, Sweden and Switzerland.

Coming back to the question of the legal nature of financial sanctions directed at individuals and entities,[161] three remarks seem obvious. Firstly, this is a new type of sanctions that should be distinguished from traditional UN sanctions which have aimed at isolating a regime, a group or a state. Secondly, the longer the persons and entities remain on the list, the clearer the punitive nature of asset-freezing and travel ban becomes, and the less reason there is to underline the distinction between designation and forms of criminal punishment. In this regard, the procedural shortcomings of the designation process are obvious and the need for strengthening the procedural safeguards that protect the targeted individuals pressing. In spite of the measures taken in recent years in this direction, there is clearly room for further improvement. Thirdly, even if seen as a political and/or administrative procedure, the designation process is not outside the law, and is in fact an increasingly regulated activity.[162] The purpose of financial sanctions is twofold: on the one hand, they provide for an early intervention in the preparation of terrorist crimes or terrorism-related activities; on the other, they also serve the additional purpose of 'black-listing' in the sense of stigmatising the targeted persons or groups. While listing decisions do not entail the establishment of criminal responsibility, the designations are nevertheless a legal tool for determining individual responsibility at the international level. The source of law is provided by the relevant UNSC resolutions, all adopted under Chapter VII of the Charter and therefore binding on all states. It can be claimed that this is a new *sui generis* type of international responsibility, the forms and procedures for which are still developing. At the same time, designations also influence the notion of international terrorism as an activity prohibited by international norms and action.[163]

161 Fassbender, *supra* note 96, para. 12.14, has pointed out that "every measure taken against an 'entity' entails disadvantageous 'collateral' effects on individuals, such as members and employees of entities and users of the services of entities" (footnote omitted).

162 Apart from the resolutions mentioned above, the 1267 Committee has issued Guidelines which were adopted on 7 November 2002 and have been revised four times, most recently on 12 February 2007.

163 For instance, it has been claimed that that the main result of the sanctions against Afghanistan was that they "helped to consolidate a growing international consensus that saw terrorism as an illegitimate activity that needed to be countered through collective actions". See Chantal de Jonge Oudraat, 'The Role of the Security Council', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 151–172, at 157.

CHAPTER 9 IMPLICATIONS ON STATE RESPONSIBILITY FOR TERRORIST ACTS

Apart from the UN Security Council'c enforcement actions resulting in determinations of state responsibility, its decisions have an indirect impact on state responsibility through the imposition of obligations on states by virtue of the UN Charter. The establishment of the ICTY, for instance, was accompanied by a general obligation on states to cooperate with the Tribunal,[1] and sanctions resolutions require that all states take the prescribed measures, whether they include severance of diplomatic relations, or freezing of assets of the named governments or individuals. Sanctions regimes also customarily include arrangements for monitoring compliance with such obligations, and for reporting of their implementation. As far as the counter-terrorism sanctions are concerned, the institutional framework created by resolution 1373(2001), is particularly noteworthy. Arguing in favour of the concept of 'transnational criminal law', Boister submitted that one of the characteristics that distinguishes ICL *sensu stricto* from what he called 'TCL' is the institutional density that accompanies certain international crimes, as exemplified by inter alia the establishment of international tribunals and the recognition of universal jurisdiction for such crimes. Transnational criminal law, Boister pointed out, does not exhibit the same degree of institutionalisation as ICL, even though 'suppression conventions' can have a profound impact on national law and some of them set forth reporting obligations.[2] The sixteen anti-terrorist conventions and protocols adopted so far within the UN framework do not in general contain genuine monitoring systems.[3] The Security Council intervention in state action

1 UN Doc. S/RES/827(1993), para. 4: "Decides that all States shall cooperate fully with the International Tribunal and its organs [...] to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance of orders issued by a Trial Chamber".

2 Neil Boister, '"Transnational Criminal Law"?', 14 *EJIL* (2003), 953–976, at 971–972.

3 The only exception in this regard is the 1979 Convention on the Physical Protection of Nuclear Material,which provides for a review conference to be convened every five years

against terrorism, in the form of resolution 1373, has nevertheless been unprecedented in bolstering the accountability of states with regard to the fulfilment of the anti-terrorist obligations.[4] The institutional apparatus set forth for the follow-up of the implementation of resolution 1373 bears no resemblance to what was in place before for the purpose of monitoring the implementation of the UN anti-terrorist conventions. Not only does the resolution impose far-reaching and temporally unspecified obligations on states, it also provides for meticulous monitoring of the implementation of those obligations through a specific body, the Counter-Terrorism Committee (CTC). The open-ended mandate of the CTC, extensive and on-going reporting requirements, coordination of technical assistance and the establishment of an executive directorate for the Committee – the CTED[5] – are all novel features previously unknown to the subsidiary organs of the Security Council, and powerful tools in mainstreaming counter-terrorism policies.

9.1. Obligations Concerning the Prevention and Suppression of Terrorism

There is little doubt about the existence of an obligation on states to prevent and suppress terrorist activities in their territory. The origins of this obligation can be traced back to the League of Nations Council decision in relation to the assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs in 1934, which also led to the elaboration of the 1937 Convention on Terrorism.[6] The Council of the League of Nations pointed out that states have an obligation under international law to prevent activities within their borders which lead to

to review the implementation of the Convention and its adequacy in the light of the prevailing situation. See Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979, UNTS Vol. 1456, No. 24631, art. 16.

4 Angelet has noted that the resolution goes beyond mere enforcement, as the obligations under the resolution are parallel to those under the Terrorist Financing Convention and are envisaged to coexist with the latter *ad infinitum*. See Nicolas Angelet, 'Vers un renforcement de la prévention et la répression du terrorisme par des moyens financiers et économiques?', in Karine Bannelier *et al.* (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 219–237, at 223.

5 The Counter-Terrorism Committee Executive Directorate was established as a part of the revitalisation of the CTC, bearing in mind "the special nature of resolution 1373(2001), the continuing threats to peace and security caused by terrorism, the important role the United Nations and the Security Council must continue to play in the global fight against terrorism, the need to reinforce the Committee as the Security Council subsidiary body responsible in this area". UN Doc. S/RES/1535(2004), Preamble, para. 15.

6 12 League of Nations O.J. 1759(1934); on the influence of the Convention, see Chapter 2.2.1.

terrorist acts in other states and that toleration of such activities gives rise to state responsibility.[7] Both principles were later reaffirmed in the 1937 Convention and, subsequently, in the 1970 UNGA Declaration on Friendly Relations, which laid down the principle that

> Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.[8] [...]
> Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.[9]

The 1994 Declaration on the Measures to Eliminate Terrorism formulated the obligation more broadly as a counter-terrorist obligation, requiring that states

> refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that their respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens.[10]

---

7 *Ibid.*, See also Richard B. Lillich and John M. Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities', 26 *The American University Law Review* (1977), 217–313, at 261, who have pointed out that "responsibility for failure to control terrorist action against innocent victims [...] cannot be dismissed as private conduct". See also Gordon Christenson, 'The Doctrine of Attribution in State Responsibility', in Richard B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, University Press of Virginia, 1983, 321–360, at 337.

8 UN Doc. A/RES/2625(XXV) of 24 October 1970, Annex, para. 9 under the principle that "States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State or in any other manner inconsistent with the purposes of the United Nations".

9 *Ibid.*, para. 2, situated under the principle concerning "the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter".

10 Likewise, reference can be made to the 1984 resolution of the International Law Association which stated that "[a] State is legally obliged to exercise due diligence to prevent the commission of acts of international terrorism within its jurisdiction". See Resolution No. 7 /1984, 'International Terrorism', art. 9, International Law Association, Report of the 61st Conference, Paris 1984, at 6. See also Chapter 2.2.1. on the ILC definitions of terrorism in the context of the Draft Code of Crimes against the Peace and Security of Mankind.

This basic obligation can be regarded as customary in nature.[11] Likewise, the duty to prevent, apprehend, and prosecute or extradite terrorist offenders can be seen as a part of customary international law.[12] A preambular paragraph of resolution 1373 also refers to this obligation.[13] It can thus be concluded that states have a general obligation to exercise due diligence to prevent terrorist acts. Often, this obligation has to be interpreted in the light of other relevant primary rules concerning, for instance, the prohibition of the use of force, the principle of non-intervention, international humanitarian law, human rights or the rules concerning the protection of diplomatic and consular relations.[14]

The specific obligations of states with regard to the prevention and suppression of terrorist acts are to be found in the applicable international legal instruments and in customary law. Examples can also be found in international judicial practice dealing with the responsibility of states for violent acts of private individuals or groups, including a number of cases dealing with state responsibility for injuries to aliens. Complicity in the form of actual involvement of the state, tolerance of or failure to suppress the activities that threaten foreign interests, or negligence with regard to their prevention or punishment have in various cases led to international responsibility.[15] The UN anti-terrorist conventions and protocols, which broaden the criminal responsibility for terrorist acts, affect state responsi-

11 Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism*, Martinus Nijhoff Publishers, 1989 (Hague Academy report), principles 1.1. and 1.2. ; Lillich and Paxman, *supra* note 7, at 265. A similar view has been put forward by Rüdiger Wolfrum 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', 7 *Max Planck UNYB* (2003), 1–70, at 34, commenting on the 1994 Declaration.

12 François Dubuisson, 'Vers un renforcement des obligations de due diligence en matière de la lutte contre le terrorisme?', in Karine Bannelier *et al*. (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 141–157, at 152; Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing , 2006, at 119.

13 Reaffirming "the principle established by the General Assembly in its declaration of 24 October 1970 (resolution 2625(XXV)) and reiterated by the Security Council in its resolution 1189(1998) of 13 August 1998, namely that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts".

14 Dubuisson, *supra* note 12, at 142–143. See also Gilbert Guillaume, 'Terrorisme et droit international', 215 *RCADI.*(1989) III, 287–416, at 390–398.

15 Chapter 5.2.2. See also Bernhard Graefrath, 'Complicity in the Law of International Responsibility', 2 *Revue Belge de Droit International* (1996), 370–380.

bility mainly by redefining and enlarging the requirement of due diligence with regard to the suppression and punishment of such crimes. Furthermore, most of these instruments contain provisions on measures to prevent the criminal acts. They have normally been generally worded, "leaving it to each one [state party] to decide the steps it will take to fulfil its responsibilities [...] and the precise extent of the cooperation it will undertake with each other party".[16] Even if such provisions are mostly rudimentary and do not seem to add much detail to the specific obligation to prevent terrorist acts codified in the Declaration on the Friendly Relations of States, the impact of certain UN Security Council resolutions, as well as the increasing international standard-setting and monitoring by the UN Counter-Terrorism Committee, the FATF and other international organisations, must be assessed in order to define the scope of the obligation to exercise due diligence in the prevention and suppression of terrorism.

As was noted earlier, the main import of the sectoral anti-terrorist conventions and protocols was long in the provisions concerning international cooperation, i.e. extradition and mutual assistance. The fact that the most recent instruments have introduced a number of new offences and expanded or elaborated the definitions of the existing ones has obviously broadened state obligations. Many of the new criminalisations have expanded the area of punishable conduct and sometimes required quite fundamental changes in the existing legislation.[17] These consequences are nevertheless conditional on the ratification and implementation of the relevant instruments and, with no proper monitoring mechanisms, shortcomings in both areas have been cited as major weaknesses of the international anti-terrorist law.[18] Resolution 1373 and the establishment of the Counter-Terrorism Committee have contributed considerably to the universality of the existing network of conventions by urging states to become parties to all the UN conventions and proto-

16 Joseph J. Lambert, *Terrorism and Hostages in International Law*, Grotius Publications Ltd., 1990, at 122. For the standard formulation, see International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Doc. A/RES/52/164, Annex, UNTS Vol. 2149, p. 256, art. 15. The provisions on prevention are more detailed under the Terrorist Financing Convention, which draws on the FATF's 40 Recommendations on action against money-laundering. See International Convention on the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229, art. 18.

17 See Kimmo Nuotio, 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law', 4 *JICJ* (2006), 998–1016.

18 As Sieber has pointed out, "The major problem facing all existing international instruments is the lack of signatures, ratifications, and implementation", Ulrich Sieber, *Cyberterrorism and other use of the Internet for terrorist purposes*, Threat analysis and Evaluation of International Conventions, Expert Report prepared for the Council of Europe, 2 April 2007, at 75. For a similar view, see Antonio Cassese, *International Law*, 2nd Edn., Oxford University Press, 2005, at 465.

cols. While this call was not formulated as a binding obligation,[19] the number of ratifications has increased noticeably and did so already during the first year after the adoption of the resolution.[20] The monitoring also concerns the obligation to freeze the assets, as well as the other obligations under resolution 1373, including the prohibition against permitting the use of a state's territory for preparing terrorist acts in other countries.

The working methods of the CTC, including the system of continuous monitoring, the establishment of the Executive Directorate (CTED), [21] closer cooperation with the Terrorism Prevention Branch of the UN Office of Drugs and Crime (TPB), as well as across the UN system[22] and with other international organisations,[23] are also unprecedented and have ensured that "counterterrorism has gone global".[24] The dialogue with member states – "a system of feed-back, control and adjustment"[25] – has produced a huge number of national reports which have not only been requested, received and circulated (with state consent) by the CTC but have also been analysed, commented on, and used as a basis for further requests for more detailed information on national legislation and administrative practices.[26]

19 Walter Gehr, 'Le Comité contre le terrorisme et la résolution 1373 (2001) du Conseil de Sécurité', Actualité et Droit International, http://www.ridi.org/adi/articles/2003/200301geh.htm, at 3.

20 Chapter 8.1.

21 UN Doc. S/RES/1535(2004) The CTED is expected to ensure the comprehensive follow-up of all CTC's decisions. See Proposal for the revitalisation of the Counter-terrorism Committee, UN Doc. S/2004/124.

22 The UN Counter-terrorism Implementation Task Force (CTITF) includes representatives of more than twenty different organisations, agencies and bodies within the UN system.

23 The CTC held the fifth special meeting for international, regional and sub-regional organisations in October 2007.

24 The quotation is from a statement made by the first chairman of the UN Security Council Counter-Terrorist Committee, Sir Jeremy Greenstock, on 4 April 2003, available at http://www.ukun.org/articles. See also 4743th meeting of the Security Council, 24 April 2003, S/PV.4743, at 3.

25 Rolf Einar Fife, 'The Legislative Response of the United Nations to Terrorism: Perspectives on Creative Forces and Sources of International Law', in Ole Kristian Fauchelld, Henning Jakhelln and Aslak Syse (eds.), *Festskrift til Carl August Fleischer. Dog Fred er ej det Bedste...* Universitetsforlaget, 2006, 151–172, at 166.

26 For a study of the national reports, see Andrea Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *JICJ* (2006), 1044 – 1073 (Bianchi 2006) and 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *EJIL* (2007), 881–919 (Bianchi 2007).

In this sense, as noted by a UN official, the practice of the CTC is legal rather than political in nature.[27] It also involves issuance of authoritative interpretations and best practices on how the various parts of resolution 1373 should be interpreted. Over and above compliance with convention obligations, the CTC has thus promoted certain methods of implementation in accordance with the broad purposes of resolution 1373. As has been pointed out by the head of the TPB, the universal anti-terrorism instruments (with the exception of the Terrorist Financing Convention) define forms of criminal liability that do not apply unless a violent act has been committed or attempted, while "[f]ulfilling the preventive mandates of Resolution 1373 requires many substantive offences and procedural mechanisms that are nowhere mentioned in the universal anti-terrorism conventions and protocols". For instance, "while criminal association and conspiracy are not included in any universal anti-terrorism agreement, they are powerful tools for implementation of the obligations of Resolution 1373".[28]

Countering terrorist financing, including by promoting ratification and effective implementation of the Terrorist Financing Convention, is quite obviously one of the priorities of the CTC. As is recalled, terrorist financing is established in the Convention as an independent crime, the punishability of which is not linked to the commission of any further crimes. Although resolution 1373 does not provide a full definition of terrorist financing, it is apparent that the CTC understands terrorist financing in a similar manner. It has recurrently advised states that treating terrorist financing as participation in a crime or equating it with money-laundering would not be consistent with their obligations under resolution 1373.[29] The CTC has also focused on the implementation of the obligations concerning asset-freezing. As has been pointed out earlier, resolution 1373 leaves a number of questions unanswered and therefore open to different interpretations.[30] One such question – how to treat requests concerning asset-freezing received from other states – is related to the fact that the resolution does not set any territorial limits but, just as the obligations under the 1267 regime, is applicable to persons who commit terrorist crimes wherever they may be located. One obvious answer, in the absence

27 Gehr, *supra* note 19, page 2.

28 Jean-Paul Laborde and Michael De Feo, 'Problems and prospects of Implementing UN Action against Terrorism', 4 *JICJ* (2006), 1087-1103, at 1091–1092.

29 Report by the Chairman of the CTC on the problems encountered in the implementation of resolution 1373, UN Doc. S/2004/70, at 5.

30 A textual analysis of the resolution would, for instance, seem to require of asset-freezing a link to criminal proceedings or investigations. For a discussion of the interpretation of the duty to bring terrorists to justice, see Stefano Betti, 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution', 4 *JICJ* (2006), No. 5, 1104–1116.

of further specifications in the text of the resolution, would be to apply existing national legislation and practices. Another argument would emphasise the purpose of resolution 1373, which is similar to sanctions resolutions in that it seeks to impose universal measures, and come to the conclusion that it is possible to infer from the general wording and purpose of subparagraph 1(c) of resolution 1373 an obligation for states to be able to freeze funds at the request of other states.[31] At the same time, a study on the national reports submitted to the CTC shows considerable variation in the methods of implementation of the obligations under resolution 1373.[32] It can also be noted that a certain flexibility in the national implementation may be conducive to broader support and implementation of the resolution.[33]

The FATF has in general been instrumental in establishing authoritative interpretations of the terrorist financing-related obligations based on the 1999 Terrorist Financing Convention and on resolution 1373. The FATF Special Recommendation II (SR II) on criminalising the financing of terrorism and associated money-laundering and the related Interpretative Note closely follow the Terrorist Financing Convention with the exception of the requirement that each country should criminalise "the financing of terrorism, terrorist acts and terrorist organisations", which seems to have the potential to go beyond the conventional obligation. There is nevertheless some uncertainty as to the scope of this FATF standard, in particular as the English and French language versions differ from each other. The explanation given in the French version of the Interpretative Note is that the offence of terrorist financing should apply to financing (a) in view of the commission of one or more terrorist acts, (b) in view of the commission of such acts by a terrorist organisation or (c) in view of the commission of such acts by an individual terrorist. This can be taken as a careful enumeration of the different situations that could fall under the more generally worded obligation in article 2 of the 1999 Convention. The English version, however, would seem to apply to any financing of 'terrorist organisations' or 'terrorists' irrespective of the purpose of the financing.[34] In the recent mutual evaluation reports, SR II has been

31 This interpretation has been advocated by Gehr, *supra* note 19, at 5: "De plus, faut-il que chaque Etat soit capable de geler des fonds sur demande d'un autre Etat".

32 Bianchi (2006) and (2007), *supra* note 26.

33 Fife, *supra* note 25, at 172.

34 Interpretative Note to SR II, para. 3. According to the English version, "Terrorist financing offences should extend to any person who wilfully provides or collects funds by any means, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used in full or in part: (a) to carry out a terrorist act(s), (b) by a terrorist organisation, or (c) by an individual terrorist". According to the French version, which would make more sense, "Les infractions de financement du terrorisme devraient s'appliquer à toute personne qui, par quelque moyen que ce soit, directement ou

taken to establish a new standard of criminalising terrorist financing, one which is not attained by incorporating the exact formulations of article 2 of the Terrorist Financing Convention in the national legislation.[35]

The FATF Special Recommendation III concerning asset-freezing as well as the related Interpretative Note cover both the 1373 regime and the 1267 regime. The innovative monitoring system of the FATF is based on periodic peer review under which a member state is subject to on-site evaluation, which, completed with extensive reporting, serves to evaluate its compliance with, inter alia, the two resolutions as well as with the FATF Special Recommendations.[36] In the case of the nine Special Recommendations on terrorist financing, there is also a FATF-inspired self-assessment procedure for members and non-members alike. The follow-up and compliance procedures of the FATF, which have widely been deemed unique and exceptionally effective,[37] also differ from the approach of the CTC/CTED. The CTED has opted for a cooperative strategy assessing national implementation but using the assessments mainly to find out shortcomings in the legislative and administrative framework with a view to identifying technical assistance needs.[38] Although it would be within the ambit of Chapter VII to use enforcement measures under Chapter VII against non-cooperative states, and the UN High Level Panel has raised the question of 'secondary sanctions',[39] this has clearly not been the Security Council's method of choice with regard to terror-

indirectement, illégalement et déliberement, fournit ou réunit des fonds dans l'intention de les voir utilisés ou en sachant qu'ils seront utilisés, en tout ou partie, soit: (a) en vue de la commission d'un ou plusieurs actes terroristes; (b) en vue de la commission de tels actes par une organisation terroriste, (c) en vue de la commission de tels actes par un terroriste".

35 Third mutual evaluation report on AML/CFT, Report on Finland, FATF/ME(2007)5, 12 September 2007, at 39–41. This view entails the use of the terms 'terrorist' and 'terrorist organisation' without any reference to the commission of terrorist acts.

36 Compliance with the two resolutions does not necessarily imply full compliance with Special Recommendation III on Freezing and Confiscating Terrorist Assets.

37 For an assessment of the FATF mutual evaluation mode, see Michael Levi and William Gilmore, 'Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 87–114.

38 Technical assistance to strengthen the legislative and administrative capacity of states to combat terrorism is a new area of international co-ordination and cooperation, both among individual donors and among international and regional organisations.

39 ' A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, New York 2004, UN Doc. A/59/565, para. 180(e).

ism, again reflecting the views of the broader membership of the UN.[40] Unlike the CTED, the FATF has preferred the term 'compliance' over 'implementation'. As the FATF recommendations are non-binding, 'compliance' must be understood in its soft law sense. Mutual evaluation is nonetheless a powerful tool and the FATF interpretations tend to create a universal standard.

It is in the spirit and nature of the obligations under resolution 1373(2001) and the FATF Special Recommendations that they are general and unlimited in time. The CTC initially divided states into three stages as to the implementation of resolution 1373 but did not declare any state as having fully implemented the resolution.[41] Recently, the CTED has moved the focus from resolution 1373 to resolution 1624(2005), which also covers a vast area of preventive measures.[42] The FATF, too, rarely comes to the conclusion that a state is fully 'compliant', and keeps renewing and expanding the recommendations.[43] Without going to the substance of the vast area of terrorist financing-related regulations, which would clearly go beyond the scope of this study, suffice it to say that the obvious consequence of all this activity is that it considerably expands state obligations to prevent and to suppress terrorism.

The nature of these obligations – to revert to the terminology the ILC chose not to use in the final version of the Draft Articles on State Responsibility – is that they are obligations of conduct, not obligations of result. The determination of whether a state is in breach of its obligations may not be made solely on the basis of its success in preventing terrorist acts from occurring. Any assessment of a failure by a state to prevent a specific terrorist attack would have to take into account the element of unpredictability inherent in terrorism and balance it with the foreseeability of the risk and the actual capacity of the state to prevent attacks. Even where a terrorist attack causes significant harm and damage, it may be difficult to prove the role that the acts or omissions of the concerned states have played in making it happen. As Becker has noted, a claim of state involvement or acquiescence in ter-

40 The proposal did not make its way to the World Summit Outcome either. Secondary sanctions have nevertheless continued to be discussed in the context of the sanctions against Côte d'Ivoire, see UN Doc S/RES/1727(2006), para. 12(f).

41 Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373(2001), UN Doc. S/2004/70, 26 January 2004.

42 Report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624(2005), UN Doc. S/2006/737, 15 September 2006. See also briefing by the Chair of the CTC to the Security Council on 22 May 2007, available at http://www.un.org/sc/ctc/22may07.shtml.

43 For instance, Special Recommendation III on asset-freezing and confiscation is to be renewed shortly.

rorist activities becomes the more convincing, the more persistent and obvious the terrorist activity in its territory.[44]

According to Pisillo-Mazzeschi, there is a special regime applying to those international obligations that are conditioned by the due diligence rule. One of its specific features is the particular way in which responsibility must be proven. In a bilateral context, the one on which Pisillo-Mazzeschi has focused, the injured state must prove the other state's lack of due diligence, a delicate task entailing an assessment of the actual conduct of the state in relation to the conduct required of it by the relevant obligation.[45] With regard to multilateral obligations monitored by specific international bodies, such as anti-terrorist obligations, the whole burden does not seem to rest on the state that invokes state responsibility.[46] For instance, in the case of Afghanistan under the Taliban regime, as will be discussed later in this chapter, much importance has been attached to the fact that the Taliban had failed to meet the obligations laid down by the Security Council in spite of its repeated requests.[47] At the same time, the case of the Taliban shows that it may be difficult

44 Becker, *supra* note 12, at 132–133, 152.

45 Riccardo Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of International Responsibility of States', 35 *GYIL* (1992), 9–51, at 50–51. The reversed burden of proof, according to Pisillo-Mazzeschi, is a way to allocate risks between the states concerned for the failure to bring about the result required by the norm.

46 International monitoring may also use standard criteria for assessing due diligence; according to Bianchi(2007), *supra* note 26, at 884, footnote 14, such criteria could include 1) the existence of legislative authority for freezing terrorist finances and cooperating with international law enforcement efforts, 2) the administrative capacity to enforce various counter-terrorism mandates, 3) the presence of a policy and regulatory framework for prioritising counter-terrorism across a range of government institutions and programmes, and 4) participation in international counter-terrorism conventions and institutions.

47 In resolution 1267(1999), para. 1, the Security Council insisted "that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice". para. 2 demanded "that the Taliban turn over Usama bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice". In case the Taliban did not fully comply with the requirement concerning the surrender of bin Laden within a month, an air embargo would be imposed on Taliban-controlled territory. Furthermore, any funds and financial resources owned or controlled by the Taliban were to be frozen. The sanctions took effect from 14 November 1999 and were expanded by resolution 1330

to prove active support of terrorist activities even where the lack of due diligence is manifest and the state has not only failed to take the precautionary measures expected of all states, but has also refused to comply with the specific obligations imposed on it.[48] In general, breach of a due diligence obligation – unlike active support or open toleration of terrorist activities in breach of the customary law obligation – does not stigmatise the state as 'unwilling' to act against terrorism but rather as 'unable' to do so. Or, to say the least, a policy element is not always apparent in a situation in which a state does not actively promote terrorist activities but may fail to prevent them.[49]

The multiplication and expansion of due diligence obligations which tend to become more specific and technically demanding, such as those concerning the prevention of terrorist financing, broadens the bases of state responsibility, but also highlights lack of capacity as a reason for non-implementation of what are ever more sophisticated obligations.[50] In this light, the strategy of dialogue and cooperation chosen by the Security Council seems to be a workable option. At the same time, one should not lose sight of the potential of this expansion to make states more accountable for counter-terrorism policies and decisions concerning the prioritisation of resources. If state performance in implementing counter-terrorism obligations is continuously assessed, the potential for identified breaches also increases.[51] Even if no obvious consequences in terms of Security Council

on 19 December 2000. In the latter resolution the Security Council also determined that the failure of the Taliban authorities to respond to the demands in resolutions 1214 and 1267 constituted a threat to international peace and security. It reiterated, in para. 2, the call on the Taliban to turn over Usama bin Laden to appropriate authorities, and demanded further, in para. 3, that the Taliban swiftly close all terrorist training camps within the territory under its control. See also the Statement of the President of the Security Council, UN Doc. S/PRST/2000/12 of 7 April 2000, in which, at 4, the Security Council stated that it held the leadership of the Taliban responsible for not taking measures to comply with the demands made in its resolutions.

48 As Becker, *supra* note 12, at 241, has noted, state support or toleration of a terrorist group is usually something both actors wish to conceal.

49 However, Kolb has noted that "[i]n the context of the best endeavours clause, the yardstick for its interpretation can be only the principle of good faith", see Robert Kolb,' The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 227–281, at 257 (footnote omitted).

50 State capacity also has to be taken into account since a state can not be held responsible for events beyond its control; see Chapter 5.2.2.

51 Similarly, Robert P. Barnidge, Jr., 'States' Due Diligence Obligations with regard to International Non-State Terrorist Organisations post-11 September 2001: the Heavy Burden that States must Bear', 16 *Irish Studies in International Affairs* (2005), 103–125.

action are attached to a breach of counter-terrorism obligations, it becomes easier to prove that a country is in breach because it has not implemented obligations, which are continuous and addressed to all states. At the same time, the ongoing normative activity adds substance to the customary obligation not to tolerate terrorist preparations that is laid down in the Friendly Relations Declaration and recalled in the Preamble of resolution 1373, the breach of which may under certain circumstances be regarded as a violation of the prohibition to use force that is laid down in article 2(4) of the UN Charter. The Security Council also has a major role in the more traditional aspects of the collective security system based on the UN Charter. Even though self-defence is an exceptional element in this system, it would not be possible to discuss self-defence against terrorism without paying close attention to the practice of the Security Council.

9.2. Responsibility for the Terrorist Attacks of 11 September 2001

From the point of view of state responsibility, the most intriguing of the UN Security Council's actions against international terrorism has undoubtedly been the adoption of resolution 1368 on 12 September 2001, condemning "unequivocally" and "in the strongest terms" the horrifying attacks that had taken place the day before. The features of the resolution that are particularly noteworthy include its somewhat enigmatic references to "the inherent right of individual and collective self-defence"and to the accountability of those who aid, support or harbour "the perpetrators, organizers and sponsors of the attacks".[52] The latter phrase echoed the speech President Bush had given the day before, stating that in the search for those responsible, no distinction would be made "between the terrorists who committed these acts and those who harbor them". Resolution 1368 did not authorise any specific course of action but it has been widely read as a prior endorsement of a military campaign in self-defence, implying that the events of September 11 were regarded as an armed attack.[53] While the resolution did not elaborate on the

52 UN Doc. S/RES/1368(2001); the UNSC recognised in resolution 1368, Preamble, para. 2, "the inherent right of individual or collective self-defence in accordance with the Charter" and stressed, in para. 3, "that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable".

53 The exercise of the right of self-defence under article 51 of the UN Charter does not require prior authorisation, but many writers have addressed the possibility of UNSC enforcement action or authorisation to use force in this context. Condorelli has pointed out that Chapter VII authorisation was an alternative to self-defence, see Luigi Condorelli, 'Les attentats du 11 septembre et leurs suites: où va le droit international?', 105 *RGDIP* (2001), 829–848, at 836. Stahn has held that because of the far-reaching impact of the Operation Enduring Freedom, "the use of force should have been based on a clear authorization of

notion of self-defence, or attribute responsibility for the attacks to any particular state, the obvious interpretation of "those responsible for aiding, supporting or harbouring" was that it could only refer to a state deemed responsible for such conduct. The resolution arguably had great influence on other international actors, who reiterated the same basic message in slightly different formulations.

The North Atlantic Council was the first to recognise, in its statement of 12 September, that the terrorist attacks against the US were "directed from abroad" and that they should be regarded as an armed attack against a member of the alliance.[54] The Council of the European Union stated on 14 September that "[i]t is not tolerable for any country to harbour terrorists"[55], and on 21 September that "[o]n the basis of Security Council Resolution 1368, a riposte by the US is legitimate".[56] A joint EU–US ministerial meeting on 20 September stated that "[t]hose responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable".[57] The Organization of American States recalled the right of self-defence and declared that the terrorist attacks against the US were attacks against all American states, which triggered the application of the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).[58] The resolution also mentioned the concept of 'harbouring', although only in the domestic context referring to the control of states parties over persons in their territory.[59] The UN General Assembly, in a resolution adopted on 18

the Council under Chapter VII", see Carsten Stahn, 'International Law at a Crossroads? The Impact of September 11', 62 *ZaöRV* (2002), 183–255, at 238, (footnote omitted). Byers has submitted that resolution 1373 could be interpreted as containing an implied authorisation to use force, Michael Byers, 'Terrorism, the Use of Force and International Law After 11 September', 51 *Intl & Comp L Q* (2002), at 401–403.

54 North Atlantic Council, NATO Press Release (2001)124, http://www.nato.int/docu/pr/2001/p01-124e.htm.

55 Joint declaration by the heads of state and government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy on 14 September 2001.

56 Conclusions and Plan of Action of the Extraordinary European Council meeting of 21 September 2001, section 1, para. 1. Also circulated as UN Doc. A/56/407 – S/2001/909. Condorelli, *supra* note 53, at 842, has commented on the unfortunate choice of the word 'riposte'.

57 Joint EU-US Ministerial Statement on combating terrorism, 20 September 2001, available at ue.eu.int/newsroom.

58 24th meeting of consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24, RC.24/RES.1/01, September 21, 2001, Preamble, para. 2 and op. part, para. 1.

59 *Ibid.*, para. 2: "If a State Party has reason to believe that persons in its territory may have been involved in or in any way assisted in the September 11, 2001 attacks, are harboring the

September, repeated the more ambiguous language of resolution 1368 and stated that "those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable".[60] While most interventions in the weeklong plenary debate in the UNGA did not expressly comment on the possibility of armed action, there was obviously little surprise when the Operation Enduring Freedom was launched on 7 October against targets in Afghanistan, and very little protest was voiced.[61] The EU foreign ministers, among others, expressed their support for "the self-defence actions in accordance with the United Nations Charter and with resolution 1368". Although it is not clear what legal weight should be given to the details of the statements cited above, they indicate an exceptionally broad and unanimous international acceptance of the US military action against Afghanistan. The legal implications of this unprecedented consensus are still being discussed, both in terms of the law of state responsibility and the law on the use of force.[62]

perpetrators, or may otherwise be involved in terrorist activities, such State Party shall use all legally available measures to pursue, capture, extradite, and punish those individuals".

60 UN Doc.A/RES/56/1, 18 September 2001, para. 4.

61 As Cassese, *supra* note 18, at 474, has pointed out, no state except for Iraq and Iran openly and expressly challenged the legality of the resort to force.

62 See for instance Condorelli, *supra* note 53; Antonio Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law', 12 *EJIL* (2001), No.5, 993–1001. See also Nico Schrijver, 'Responding to International Terrorism. Moving Frontiers of International Law for "Enduring Freedom"', *NILR* (2001), 271–291and Schrijver, 'September 11 and Challenges to International Law', in Jane Boulden and Thomas G. Weiss, *Terrorism and the UN Before and After September 11*, Indiana University Press, 2004, 55–73; Albrecht Randelzhöfer, 'Article 51', in Bruno Simma (ed.), *The Charter of the United Nation, A Commentary*, 2nd Edn., Vol. 1, Oxford University Press, 2002, 788–806; Byers, *supra* note 53; Stephen Ratner, '*Jus ad bellum* and *jus in bello* after September 11', 96 *AJIL* (2002), 905–921; Jochen Abr. Frowein, 'Der Terrorismus als Herausforderung für das Völkerrecht', 62 *ZaöRV* (2002), 879–905; Rüdiger Wolfrum and Christine E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 6 *Max Planck UNYB* (2002), 559–597; Wolfrum, *supra* note 11; Stahn, *supra* note 53, and '"*Nicaragua* is dead, long live *Nicaragua*" – the Right to Self-defence under Art. 51 UN Charter and International Terrorism', in Christian Walter *et al.* (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, Springer Verlag 2004, 827–878; Michael N. Schmitt, 'Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations', in *Terrorism and International Law: Challenges and Responses,* the International Institute of Humanitarian Law, San Remo 2003 at 39–49 and Schmitt, 'Concluding Summary: Terrorism and International Law', in *Terrorism and International Law: Challenges and Responses,* the International Institute of Humanitarian Law, San Remo 2003, 163–172; Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups', 4 *Chicago J Int'l L* (2003), 83–95; Christine Gray, *International Law*

9.2.1. The Law of State Responsibility

When the United States and the United Kingdom reported to the UN Security Council on the initiation of action in the exercise of self-defence, as required by article 51 of the Charter,[63] the Security Council members expressed their appreciation of the presentations without questioning the purpose or modalities of the operation.[64] While not precluding the possibility that further armed action might be required with respect to other organisations and other states, the US notification justified the military operations against Al-Qaida terrorist training camps and military installations of the Taliban regime in Afghanistan as follows:

> The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack inno-

and the Use of Force, 2nd Edn., Oxford University Press, 2004, at 159–194; Ove Bring and David I. Fisher, 'Post-September 11: A Right of Self-Defence against International Terrorism?', in Diana Amnéus & Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 177–192 and Ove Bring, 'Efter den 11 september – en rätt till väpnat självförsvar mot internationell terrorism?', in Ove Bring and Said Mahmoudi, *Internationell våldsanvändning och folkrätt*, Norstedts Juridik, 2006, 77–88; Said Mahmoudi, 'Self-defence and International Terrorism', in Bring and Mahmoudi *op.cit*., 167–180; Yoram Dinstein, *War, Aggression and Self-defence*, 4th Edn., Cambridge University Press, 2005, at 204–208; Edward McWhinney, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law*, Martinus Nijhoff Publishers, Nijhoff Law Specials, Vol. 61, 2004, at 19–29; William K. Lietzau, 'The Role of Military Force in Foreign Relations, Humanitarian Intervention and the Security Council', 64 *ZaöRV* (2004), 281–304; Becker, *supra* note 12. See also Giorgio Gaja, 'In What Sense was there an "Armed Attack"?, available in http://www.ejil.org/forum_WTC/ny-gaja.html and Alain Pellet, 'No, This is not War!', available at http://www.ejil.org/forum_WTC/ny-pellet.html

63 Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946 and Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2006/947.

64 Press statement on terrorist threats by Security Council, UN Doc. AFG/152, SC/7167 of 8 October, 2001.

> cent people throughout the world and target United States nationals and interests in the United States and abroad.

Analysed in terms of the law of state responsibility, it is evident from this letter as well as from other official statements of the United States at the time, that there was no attempt to claim that the Taliban had directed or controlled the attacks of 11 September, or exercised complete control over Al-Qaida. Rather, the responsibility of the Taliban regime was presented as flowing from the fact that Al-Qaida operated from Afghan territory with the endorsement or acquiescence of the Taliban. This can be taken as a fairly down-to-earth description of the situation: the Taliban could hardly be presented as the masterminds behind the attacks. As to Al-Qaida's influence on the Taliban, or on the day-to-day running of the country, different views have been presented. According to some accounts, bin Laden was instrumental in securing the Taliban's final victory in Kabul a few months after he arrived in the country;[65] his control over Mullah Omar increased continuously during the time he spent in Afghanistan;[66] and Al-Qaida in general won influence over the Taliban's political, religious and military leaders, mostly by way of generous financial grants.[67] Moreover, it has been noted that "[t]o ensure the safe passage of goods and persons, Al Qaida also required funds to pay customs and immigration officials, the police and the military. If ever there was an unambiguous example of 'a state within a state', this was it".[68] In the light of this description, there might even be grounds for claiming that the Taliban acted as a de facto state organ in the absence of central authority.

At the same time, the Taliban viewed Al-Qaida with "a significant degree of suspicion"[69] and there was initially little common ground between the two.[70] Although officially a guest in the country since 1996, bin Laden was treated with considerable ambivalence. The leader of the Taliban, Mullah Omar, is reported to have negotiated the terms of bin Laden's surrender and even to have agreed to

65 Abdel Bari Atwan, *The Secret History of al-Qa' ida*, SAQI Books, 2006, at 80–81.

66 Rohan Gunaratna, *Inside Al Qaeda: Global Network of Terror*, Rev. Edn., Berkley Publishing Group, 2003, at 57

67 *Ibid.*, at 82.

68 *Ibid.*

69 Jason Burke, Al-Qaeda: *The True Story of Radical Islam*, Rev. Edn., Penguin Books, 2004, at 166. See also *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States*, W.W. Norton & Company, 2004, at 63–67.

70 Burke, *supra* note 69, at 173.

hand him over for trial in Saudi Arabia in 1998.[71] Subsequently, with the increasing isolation of the Taliban regime, which was recognised by only three states[72] and became the target of UN sanctions from 1999 on, the relationship between the two outcasts – bin Laden was already then described as one of the world's most sought-after fugitives[73] – grew closer. The clearest evidence of the Taliban's support for and protection of Al-Qaida was its refusal to abide by resolution 1267 and extradite bin Laden. This did not, however, prevent the Taliban from briefly entering into discussions concerning his possible extradition after September 11.[74] It has also been reported that Mullah Omar expressly opposed the attacks against the World Trade Center and the Pentagon.[75] While the relationship between Al-Qaida and the Taliban in the years 1996-2001 could thus in fact be described as 'harbouring', it has not been clear what legal consequences should attach to such conduct on the part of a state.

As is recalled, state responsibility for acts of private individuals has been strictly curtailed by the ILC codification and by the ICJ jurisprudence. The main disagreements with regard to the general rules of state responsibility concerning the attribution of private acts to a state, until September 2001, were related to the degree of control, not to the requirement of control as such. Despite this, the US armed action against Afghanistan was deemed justified under the presumption that the Taliban regime was responsible for the acts carried out by Al-Qaida. The attribution of the attacks of September 11 to the Taliban regime of Afghanistan, apparently accepted as a matter of fact, if not law, by the international community at large, and endorsed by the UN Security Council, has been the subject of a keen legal debate since then.

While there is no ambiguity as to the criminal responsibility of the perpetrators of the attacks of 11 September or that of other persons who participated in their planning and preparation,[76] and criminal proceedings have already been instituted

71 *Ibid.*, at 185–186; the deal was apparently abandoned after the US missile strikes in Afghanistan in August 1998. See also Michael Plachta, 'The Lockerbie Case: the Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*', 12 *EJIL* (2001), No. 1, 125–140. The US air strikes against Al-Qaida targets in Afghanistan were a response to the embassy bombings in Nairobi and Dar-es-Salaam in the summer of 1998.

72 Namely Pakistan, United Arab Emirates and Saudi Arabia.

73 Plachta, *supra* note 71, at 137.

74 The Taliban ruling council of clerics even pronounced a *fatwa* on 27 September, asking bin Laden to leave the country. The Taliban also offered to try Bin Laden under Islamic Law, see Stahn, *supra* note 53, at 221.

75 The 9/11 Commission Report, *supra* note 69, at 251–252.

76 Many states in the UNGA debate after the attacks of September 11 stressed the importance of bringing terrorist offenders to justice, see UN GAOR A/56/PV.12–22, Official records of

against such persons in several countries,[77] the basis for state responsibility is less clear. Usama Bin Laden and the other presumed masterminds of the September 11 attacks in the loosely organised network Al-Qaida could not, as private individuals, be held responsible for the attacks outside the framework of criminal law.[78] At the same time, no clear grounds were given to support the accountability of the Taliban in terms of state responsibility. Though not formally recognised, the Taliban exercised control over significant parts of the country and was thus considered a de facto regime in Afghanistan and 'a state' for the purposes of state responsibility.[79] The arguments against the Taliban and in justification of self-defence were, confusingly, often presented in criminal law terms, for example, claiming that "[b]y aiding and abetting murder, the Taliban regime is committing murder".[80]

The scholarly comments on the subject referred to above can be roughly divided into three groups. While there have been some claims that a new rule (the standard of 'harbouring') was instantly created and accepted,[81] many commentators have tried to see whether the situation could still fall under the established rules of state

---

the plenary debate on 1–5 October, 2001. The acts of 11 September, if understood as crimes, could well fall under the definitions of crimes in the Terrorist Bombings Convention, art. 2, which applies to attacks carried out by any 'lethal weapon', or the Montreal Convention on the Suppression of Unlawful Acts against Civil Aviation, art.1 which criminalises, inter alia, destruction of an aircraft in flight. In practice, the Terrorist Bombings Convention would have been the more relevant of the two because of its broad definitions of ancillary crimes. Nevertheless, as also noted by Kolb, *supra* note 49, at 495, the United States was not a party to the Terrorist Bombings Convention at the time of the attacks.

77 Fourth report of the Monitoring Group established pursuant to resolution 1363(2001) and extended by resolutions 1390(2002) and 1455(2003), on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them, 10 March 2006, UN Doc. S/2006/154, para. 33.

78 The 1998 US missile strikes against limited Al-Qaida targets in Sudan and Afghanistan were also presented as acts of self-defence in response to the embassy bombings in Nairobi and Dar-Es-Salaam. While the military action in that case raised some legal debate, it did not focus on the question of attribution, possibly because the air strikes were directed at what allegedly were Al-Qaida targets. The Operation Enduring Freedom, as was also indicated in the notification given by the US to the Security Council, was directed at both Al-Qaida and Taliban targets. See Becker, *supra* note 12, at 230.

79 Wolfrum and Philipp, *supra* note 62, at 573–575.

80 Presidential Address to a Joint Session of Congress and the American People, 20 September, 2001, available at http://www.whitehousegov/news/releases/2001/09/20010920-8.html.

81 Jinks, *supra* note 62, at 83, has submitted that the response to the terrorist attacks "strongly suggests that the scope of state liability for private conduct has expanded". Becker, *supra* note 12, at 211, has held that the US had "clearly articulated a State responsibility doctrine that would justify targeting not only the immediate perpetrators but also those States

responsibility. One possibility, invoked by Dinstein, could be to follow the reasoning of the ICJ in the *Diplomatic and Consular Staff* case. The militant students in Tehran were deemed to have acted on their own initiative when taking over the US Embassy, but these acts were subsequently attributed to the Government of Iran when it became clear that it had given its endorsement to them. A crucial aspect for Dinstein was the complete failure of both the governments of Ayatollah Khomeini and Mullah Omar to comply with their international obligations: "At that point, the militants became the de facto organs of Iran. By the same token, Taliban-led Afghanistan assumed responsibility for the terrorist acts".[82] Dinstein's conclusion is certainly consistent with parts of the judgement, for instance the statement that "the approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State".[83] However, Dinstein seems to put more emphasis on the passive failure to act than to active 'ratification' and approval, which was required by the Court in the *Diplomatic and Consular Staff* case[84] – and which seems to be lacking in the case of the Taliban.[85] Mere failure to take appropriate measures would sooner point to another kind of responsibility, based not on attribution but on the state's breach of its international obligations to protect diplomatic personnel and premises on its territory.[86] It should also be pointed out that article 11 of the ILC Articles on

alleged to have supported or tolerated their conduct", but has not argued that such doctrine would have gained general acceptance.

82 Dinstein, *supra* note 62, at 236; for a similar analysis see Schrijver 2004, *supra* note 62, at 67. Also Byers, *supra* note 53, at 409, has held that the Taliban apparently endorsed the attacks.

83 *Case concerning United States Diplomatic and Consular Staff in Tehran*, Judgement of 24 May 1980, ICJ Reports 1980, p. 3, (*Diplomatic and Consular Staff* Judgement), para. 74.

84 *Ibid.*, paras. 71, 73. See also the ILC Articles on State Responsibility, commentary to art. 11, para. 6, in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, at 122–123.

85 Particularly in view of the reported attempts of the Taliban regime to negotiate the extradition of bin Laden after September 11and Mullah Omar's objections to the attacks of 9/11. See also Wolfrum and Philipp, *supra* note 62, at 591: "It is very questionable [...] whether [...] the Taliban retroactively accepted the attack as conduct of their own".

86 The *Diplomatic and Consular Staff* Judgement, para. 68, pointed out that the Iranian authorities were aware of the need of action on their part, had the means at their disposal to perform these obligations, and failed to use these means. As Condorelli has pointed out, "These criteria perfectly pinpoint the obligations concerning the prevention and prosecution of terrorist acts", see Luigi Condorelli, 'The Imputability to States of Acts of International Terrorism', 19 *Isr Y.B. Hum.Rts.* (1989), 233–246, at 241.

State Responsibility clearly requires more than "mere support or endorsement" and seems to set a higher standard than the one used by the ICJ in 1980.[87]

In a similar effort not to go beyond the established rules of attribution, Stahn has suggested that the new rule introduced by the ILC in article 9 concerning 'failed state' situations could be applicable to the case where a country serves as a safe haven for a terrorist organisation. According to that article, as is recalled, the conduct of a person or a group is to be considered as an act of state if the person or group in fact exercises elements of governmental authority in the absence or default of the official authorities, or where such exercise of governmental functions is called for by the circumstances. The main import of the article, according to Stahn, is that it facilitates a multiple chain of attribution, in which a terrorist organisation is controlled by irregular armed groups performing governmental functions.[88] The drawback of this suggestion is that it seems to build on the assumption that the Taliban exercised some form of control or direction with regard to Al-Qaida that was specifically linked to the events of September 11. Furthermore, article 9 would only be applicable if some of the Al-Qaida's activities in Taliban-led Afghanistan could be described as an exercise of governmental functions,[89] and even in such a case the Taliban could be held responsible only for those activities.

A further interesting attempt to square the aftermath of September 11, 2001, with traditional rules of state responsibility has been made by Wolfrum and Philipp who have argued that article 16 of the ILC Articles on State Responsibility could, *mutatis mutandis*, apply to the case.[90] The point of departure for this claim

87 The ILC Commentary to art. 11, para. 6, points out that: "[t]he phrase "acknowledges and adopts the conduct in question as its own" is intended to distinguish cases of acknowledgement and adoption from cases of mere support and endorsement. The Court in the *Diplomatic and Consular Staff* case used phrases such as 'approval', 'endorsement', "the seal of official gouvernemental approval" and "the decision to perpetuate [the situation]". These were sufficient in the context of that case, but as a general matter, conduct will not be attributable to a State under article 11 where a State merely acknowledges the factual existence of conduct or expresses its verbal approval of it". See Crawford, *supra* note 84, at 122–123.

88 Stahn, *supra* note 53, at 223.

89 There are some grounds for assuming that this may have been the case. See, however, Wolfrum and Philipp, *supra* note 62, at 591: "The *Taliban* as the *de facto* regime were exercising effective control over parts of Afghanistan and thus left no room for Al Qaeda to act on behalf of the *Taliban*".

90 Wolfrum and Philipp, *supra* note 62, at 592, 597. It is recalled that according to art. 16, "A state which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) that act would be internationally wrongful if committed by that State". See also Wolfrum, *supra* note 11, at 33, and Chapter 5.4.

seems to lie in the uncontested fact that the attacks of September 11 were deemed to constitute an armed attack in the sense of article 51 of the UN Charter. In the case of an act of aggression carried out by a state, assistance given to the aggressor by another state is deemed to constitute indirect aggression (according to the rules on the use of force) and complicity (in the sense of draft article 16) and both states are regarded as lawful targets of self-defence. What distinguishes the situation of September 11 from this scenario, however, is that the aggressor was a non-state actor. According to Wolfrum and Philipp, this cannot be a decisive factor: "The entity rendering assistance being a subject of international law cannot be privileged by the mere fact that the entity which actually has launched the attack was a non-state actor".[91] A wrongful act of a non-state actor could thus be attributable to a state or to another subject of international law if that subject "deliberately created a situation which was a necessary precondition for a later event under the condition the happening of that event was not beyond reasonable probability".[92] Compared to the suggestions discussed above, this has the advantage that it seems to better suit what is known of the relationship between Al-Qaida and the Taliban. It is also consistent with the existing rules, except for the application of the principle reflected in draft article 16 to a relationship where the other party is not a state. This seems acceptable to the extent that the non-state actor is capable of committing an act that, if carried out by a state, would be a grave violation of international law. It should also be recalled that the main reason for the ILC to exclude from the area of state responsibility the notion of indirect responsibility/complicity for the conduct of private individuals was that private persons could not be regarded as separate subjects of international law. While this argument remains generally valid, there seems to be some room for exceptions in the case of acts that would normally be carried out by states.[93]

Tal Becker has put forward the most ambitious suggestion to date for translating the 'instant consensus' of September 2001 into a coherent theory of inter-

91 Wolfrum and Philipp, *supra* note 62, at 592. For a similar view, see Frowein, *supra* note 62, at 887: "In einer Zeit, in der ein derartiger Angriff aber privat organisiert werden kann, kann die Selbstverteidigungsmassnahme in ihrer Berechtigung nicht davon abhängen, ob ein Staat dahinter steht oder nicht".

92 Wolfrum, *supra* note 11, at 34.

93 Dupuy has also suggested that "the theory concerning subjects of international law should be reviewed [...] essentially from *functional* and *teleological* perspectives. This viewpoint supports the argument that, even when not committed by States, acts of terrorism, such as those perpetrated on 11 September 2001, fall under the scope of Chapter VII of the Charter of the UN" (footnote omitted). See Pierre-Marie Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 3–16, at 7.

national responsibility – an alternative to the doctrine of attribution.[94] Critical of the strict distinction between public and private activities in the present doctrine of attribution, Becker has noted that it is wholly inaccurate to describe state involvement in "most forms of contemporary terrorist activity".[95] Like Wolfrum and Philipp, he has questioned the assumption of a hierarchy in which the state is always the stronger party, and submitted that it might be more appropriate to view states and private terrorist actors as comparable to each other, operating on the same plane and collaborating tacitly even in the absence of an agency relationship.[96] The main shortcoming of the doctrine of attribution, for Becker, is that it does not provide a basis for direct state responsibility for terrorist acts committed by private actors when the state has permitted its territory to be wrongfully used for planning and preparing such acts.[97] In that way, the state is shielded "from the full measure of accountability for the consequences of its own wrongdoing".[98]

The alternative Becker has suggested is a causality-based theory of state responsibility in which the causal link between a state's wrongdoing and the private terrorist activity which it has made possible provides a basis for direct state responsibility for the terrorist acts.[99] Becker has thus challenged the established theory, which holds that a state can only be responsible for its own acts and regards private action as an intervening factor that breaks the chain of causation. Further, in his view, an 'intervening' private act should be seen as *the means* for the state to carry out the wrongful act. In the same way, the opportunity-providing acts of a state, such as giving shelter to a terrorist group, could be treated as *the cause* of any terrorist acts of that group, in spite of the subsequent intentional acts of the latter.[100] The causal model of state responsibility for terrorism combines several arguments that are familiar from the earlier discussion. The point of departure is a breach of an obligation not to tolerate terrorist activities – a wrongful act or

94 In his view, "Even if prevailing concepts of State responsibility for private conduct are deemed a suitable mechanism for regulating some non-State activity, they are inappropriate, from a theoretical perspective, for the particular problems posed by terrorism."Becker, *supra* note 12, at 239.

95 *Ibid*., at 258.

96 *Ibid*., at 263, 272.

97 While toleration of terrorist preparations is "clearly a violation of a State's international legal obligations [...] it is quite plainly not a basis for direct State responsibility under the prevailing interpretation of the ILC scheme". *Ibid*., at 227.

98 *Ibid*., at 329.

99 *Ibid*., at 281.

100 *Ibid*., at 298.

omission duly attributed to the state.[101] In addition, the capacity and knowledge of the state, as well as any evidence of a persistent wrongful conduct, such as "the creation of an environment of lawlessness that the State has knowingly tolerated" must be assessed to see whether a causal link existed between the state's lack of due diligence and the subsequent terrorist acts. Such a causal link, he admits, would generally be established "by the operation of a hypothetical inquiry as to whether compliance with the law would have averted the terrorist activity".[102] As in the case of superior responsibility, this would require "a distinct duty of prevention, and a specific capacity to prevent the harm in the circumstances"[103] Even where both exist, an isolated terrorist attack would not be enough to prove a breach of a due diligence obligation.[104]

Becker has also referred to the jurisprudence of the Iran – United States Claims Tribunal, in particular to *Rankin vs. Iran,*[105] *Short v. Iran,*[106] and *Yeager v. Iran*,[107] as well as to the remarks David Caron has advanced with regard to the same awards concerning the difficulty of proving an explicit principal-agent relationship in situations of large-scale private violence facilitated by a state.[108] At the theoretical level, both Caron and Becker have questioned the view that an intervening private act should necessarily break the chain of causation[109] and suggested that

101 For a closer description of this process which involves a factual and a legal test, *ibid.*, at 332.

102 In this regard, Becker has referred to *The Corfu Channel* case, adapting its conclusions as follows: "If the victim can show that known or knowable terrorist activity emanated from the territory under a State's control, then it may be reasonable to presume that the State's wrongdoing was a cause of the terrorist activity. It would fall to the host State to refute the causal link by explaining how compliance with its counter-terrorism obligations would not have prevented the attack". Thus, the burden of proof, which normally rests on the state invoking the responsibility of another state for a breach of a due diligence obligation, would be reversed, i*bid.*, at 346, 347. See also *Corfu Channel Case*, Albania v. the United Kingdom of Great Britain and Northern Ireland, Judgement of 9 April 1949, ICJ Reports 1949, p. 4.

103 Becker, *supra* note 12, at 334.

104 *Ibid.*, at 335.

105 *Rankin v. Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 135.

106 *Short v. Islamic Republic of Iran* (1987) 16 Iran–US Cl Trib Rep 76.

107 *Yeager v. Islamic Republic of Iran* (1987) 17 Iran–US Cl Trib Rep 92.

108 The same awards have also been referred to in the ICTY's *Tadić* Appeal Judgement, see Chapter 5.2.1.

109 David Caron, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in Richard B. Lillich & Daniel B. Magraw, *The Iran – United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, Transnational Publishers, 1998, 109–184, at 151 and 153–155.

private conduct should be seen as a consequence of the state's wrongful actions.[110] According to Caron, the Tribunal's jurisprudence has implicitly assumed that responsibility is possible even where there are independent private actors in the chain of causation. This has been necessary, because the requirement of control between the state and the private actor is not workable in chaotic circumstances such as those that existed in revolutionary Iran.[111]

A critical question concerning Becker's model is the leap from the indirect responsibility ensuing from a breach of a due diligence obligation to direct state responsibility for any terrorist acts that the lack of due diligence has made possible. As noted earlier, it seems apparent that the Taliban was in breach of both the customary law obligation not to tolerate terrorist activities on its territory and the specific obligations imposed on it by resolutions 1267(1999) and 1330(2000). The situation of the Taliban was, however, specific precisely because of the additional obligations imposed by the Security Council.[112] Had the Security Council decided to continue from gradually tightened sanctions to authorising military action, only few legal questions would have arisen. In this regard, it also seems that the Operation Enduring Freedom as if part of a collective scheme, received additional legitimacy from the UNSC move to confirm the right to self-defence in advance. In any event, the circumstances were exceptional and the argument that unilateral action should be seen as an implementation of a Security Council-endorsed policy was not generally accepted later in the context of the Iraq war.

Only perpetuated wrongdoing in the sense that the state knowingly tolerates terrorist activities in its territory for a long time, fully aware of their criminal consequences, would give rise to responsibility. Whether this would also mean direct responsibility for the terrorist acts *as such*, as Becker has claimed, would depend, in the present system of state responsibility, on the operation of the relevant primary rules, in this case the rules governing the use of force. A consequential question is whether a *sui generis* theory is needed for state responsibility in the area of international terrorism. In this regard, the interesting and thorough study Becker has presented is related to the other attempts to completely revise the traditional international law approach to terrorism by defining it as a new kind of asymmetric

110 Becker, *supra* note 12, at 310–311.

111 Many of the acts considered by the Tribunal "were performed by private citizens who were supportive of the revolution, but who were not the actual members of the revolutionary organization, to the extent such an organization could be said to have existed." Caron, *supra* note 109, at 155–157.

112 Stahn, *supra* note 53, at 228, has also submitted that "the broad international support for the military action aganst Afghanistan has been the result of particular circumstances, such as the continuous and grave breach of previous Chapter VII resolutions by the Taliban regime".

warfare, or a new category between crime and war[113]or presenting Al-Qaida not as a de facto organ or auxiliary of another state but as a quasi-state with all the other factual attributes of a state except for territory and population.[114] Becker has referred to contemporary terrorists as "global players engaged in illicit violent activity on a scale usually associated with sovereign States and for which a police action model seems poorly suited".[115] In this sense, his study is also profoundly a *lex ferenda* project, as terrorists at present do not have a special status either under international criminal law or under the law of state responsibility.[116]

According to Becker, causal principles may in fact have played a role in how states assessed the complex questions of responsibility involved in the terrorist attacks of September 2001.[117] In this regard, however, Becker may have attached too much legal weight to the statements given after September 11.[118] While few would altogether deny the normative significance of state acquiescence to the Operation Enduring Freedom, it is hardly possible to draw the conclusion that a new standard for attribution has emerged on the basis of one single incident. As Duffy has pointed out, it is not clear, and would require an analysis of the relevant primary rules related to the use of armed force by states, whether attribution was indeed considered a prerequisite to the lawfulness of the use of force in self-defence.[119] If the only anomaly to be explained is the international reaction to 9/11, it can at least partly be accounted for by referring to the specificity of the situ-

113 Anne-Marie Slaughter and William Burke-White, 'An International Constitutional Moment', 43 *Harv. I LJ* (2002), 1–21; Roy S. Schöndorff, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', 37 *Intl L. and Politics* (2004), 1–52; John B. Bellinger III, 'Armed Conflict with Al Qaida?', 15 January 2007, available at http://opiniojuris.org/posts/1168473529.shtml.

114 Bellinger, *supra* note 113.

115 Becker, *supra* note 12, at 277.

116 Frowein, *supra* note 62, at 893.

117 Becker, *supra* note 12, at 287–289, 331. It may be asked whether this is not another way to suggest, as Sands has done in a more outright way, that lawyers quite simply were not consulted after September 11. Philippe Sands, *Lawless World: Making and Breaking Global Rules*, Penguin Books 2006. MacWhinney, *supra* note 62, at 44, already made the same comment with regard to the 1999 Kosovo War.

118 Notably, Becker has stated that the US had "clearly articulate[d] a State responsibility doctrine that would justify targeting not only the immediate perpetrators but also those States alleged to have supported or tolerated their conduct" and that "both the OAS and the European Union openly aligned themselves with the US position that those harboring the terrorists should be viewed as directly responsible for the attacks". See Becker, *supra* note 12, at 211 and 214.

119 As Helen Duffy has pointed out in *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2006, at 55.

ation in Afghanistan.[120] Furthermore, to judge from the other comments referred to above,[121] it seems easier to accept a new interpretation of the rules governing the use of force than to set aside the rules of attribution.

9.2.2. The Law of the Use of Force

The rules concerning attribution of private acts to states in the ILC codification of state responsibility, as endorsed by the ICJ, do not only set a high threshold but also lack nuance due to their general nature. As Cassese has noted, this standard "makes it very difficult to prove that a State is responsible for acts performed by individuals not having the status of State officials".[122] However, while the ILC codification is general in nature, it is also residual in the sense that it leaves to the primary rules a number of specifications related, for instance, to the role of fault, the requirement of damage, or the requirement of causality.[123] Furthermore, it allows for special regimes of attribution provided that they are clearly established by the primary rules.[124] Some views were presented already in the 1990s in support of an emerging special regime of attribution in the area of the use of force,[125] but it has

120 In any event, it would seem too hasty to conclude, as Becker has done, that "the law is in a state of flux, while [...] causation appears at least to be (re)emerging as a guiding principle of State responsibility for terrorism, and possibly for other private acts as well", Becker, *supra* note 12, at 360.

121 *Supra* note 62.

122 Even though it does not, as Cassese has claimed, require that "*every single action* contrary to international law has been the subject of *specific instructions* by the State", see Cassese, *supra* note 18, at 250 (original emphasis).

123 James Crawford, 'Introduction', in Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, 1–60, at 29–31. See also Crawford's First Report on State Responsibility, UN Doc. A/CN.4/490, 24 April 1998, para. 17, at 5.

124 ILC Articles on State Responsibility, art. 55, see also Chapter 5.2.1.

125 See, for instance Claus Kress, *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater*, Schriften zum Völkerrecht Bd. 116, Duncker & Humblot, 1995, at 243: "Die hiermit angesprochene Möglichkeit der Geltung der *alten* Complicity-Doktrin bietet neben der oben erwähnten *neueren* tendenz zur Senkung der Zurechnungsschwelle bei besonders gefährlichen Aktivitäten einen zweiten denkbaren Ansatzpunkt für die begründung eines von der ILC-Grundsatznorm abweichenden Sonderzurechnungsregimes im Primärnormenbereich des Art. 2 Ziff.4 SVN" (original emphasis). See also Gregory M. Travalio, 'Terrorism, International Law, and the Use of Military Force', 18 *Wisconsin International Law Journal* (2000), 145–192, who has discussed the possibility of a special regime of lowered imputability for terrorist acts for the purposes of military response.

been particularly since September 2001 that the argument of a lowered threshold of attributability for acts of terrorism has gained ground.[126] While some scholars hold that self-defence in general, or self-defence against terrorism in particular, should not form an exception to the rules of attribution,[127] there has been more willingness to agree that September 2001 may have led to a broadening of the concept of self-defence.

The general prohibition of the use of force in article 2(4) of the UN Charter, and the two recognised exceptions to it – collective enforcement measures under Chapter VII and self-defence in accordance with article 51 – are the only codified rules on the use of force and, together with a fairly inconsistent state practice, they leave room for different interpretations.[128] To a certain extent, the content of these rules has been clarified by the International Court of Justice.[129] Moreover, the UN Security Council and the General Assembly[130] have a role in contributing to established interpretations and, ultimately, customary law in this area. Resolutions 1368(2001) and 1373(2002), again, provide an obvious point of departure.

Resolution 1368, adopted on 12 September 2001, already laid down the basic parameters for assessing the situation. First, the reference to self-defence implied that the terrorist attacks, exceptionally, should not be merely regarded as crimes, but also as an armed attack in the sense of article 51 of the UN Charter. Even though the resolution did not formally determine that the acts were an act of aggression, but referred to them instead as a threat to international peace and security, thus

126 Cassese, *supra* note 62, at 999, has noted on Afghanistan: "Since this state has long tolerated the presence and activities of terrorist organizations on its territory and is not willing to cooperate with the international community for detaining the terrorists, its territory may become a legitimate target". See also Stahn, *supra* note 62, at 840–841.

127 See for instance Dupuy, *supra* note 93, at 11.

128 For a description of the established differences concerning the parameters of lawful self-defence, see for instance Gray, *supra* note 62, at 95–134. See also Stahn, *supra* note 62, who has referred, at 12, to the grey areas in the normative framework for self-defence and noted that "[c]ounter-terrorism measures fall often precisely within these areas".

129 *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. the United States of America), Judgement (Merits) ICJ Reports 1986, p.14 (*Nicaragua* Judgement); *Case Concerning Oil Platforms (Islamic Republic of Iran v. the United States of America)* Judgement, ICJ Reports at 161; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996(1), p. 266.

130 UN Doc. A/RES/2625(XXV) of 24 October,1970, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; UN Doc. A/RES/3314 of 1974, Definition af Aggression; the World Summit Outcome, UN Doc. A/RES/60/1 of 24 October, 2005.

assimilating the two concepts,[131] it was clear that the mention of self-defence was not incidental.[132] Since no armed forces were involved in the attacks, its inclusion implied, either, that non-state actors were capable of committing acts of aggression or that the situation was one of indirect aggression, or both. As for the latter concept, some guidance was given by the *Nicaragua* Judgement, which indicated that sending armed groups to another state, in accordance with article 3(g) of the UN Definition of Aggression, could constitute an act of agression if the use of force is significant. According to the ICJ, the use of force by armed bands can be considered an armed attack if the operation, because of its scale and effects, would have been classified as an armed attack had it been carried out by regular armed forces.[133] Although the statement in this context was limited to armed groups sent by a state, and the concept of 'sending' may not be applicable to the relationship between the Taliban and the Al-Qaida, it was clearly relevant for the assessment of the terrorist attacks of September 11, which caused the loss of thousands of lives as well as extensive material damage. The large-scale destruction – the sheer enormity of the attack – apparently affected the assessment of the attacks and contributed to the conclusion that it was indeed justified and necessary to use armed force in response to them.[134]

Secondly, resolution 1368 also determined that the terrorist attacks constituted a threat to international peace and security, which indicated that the Security Council intended to remain seized with the matter. Resolution 1373, reproduc-

131 As pointed out by Cassese, *supra* note 18, at 474.

132 The anti-terrorist measures taken by the Security Council before September 11 2001 were consistently based on the view that terrorist acts were crimes, distinct from the use of armed force or acts of aggression. See Chapter 8.1. On the Security Council's reluctance before September 2001 to endorse the justification of self-defence in the context of terrorist acts, see Gray, *supra* note 62, at 160–164. For subsequent practice, see *ibid*. at 186–187 and Cassese, *supra* note 18, at 476.

133 *Nicaragua* Judgement, para. 230.

134 Not only states and international organisations agreed to the use of force in self-defence by the US, but many scholarly comments as well regarded it as justified, see for instance by Schrijver (*NILR* 2001), *supra* note 62, at 285, who pointed out that "the hijacking [...] may well be viewed as an 'armed attack' against the United States if these words are to retain a relevance to new forms of violence. From this flows the conclusion that the United States and its allies are then justified in taking countermeasures involving the use of armed force". Byers, *supra* note 53, at 408–409, pointed out that while the claim of self-defence against Afghanistan "would normally still be contentious, this is much less of a stretch from pre-existing international law than a claimed right to attack terrorists that simply happened to be within the territory of another State". Wolfrum, *supra* note 11, at 32, has submitted that "it is not of relevance which group carries out an action but whether the action is of a scale equivalent to military actions referred to in Article 51 of the UN Charter".

ing the expression in resolution 1368, expressed the determination of the Security Council "to take all necessary steps" in order to ensure the full implementation of the resolution, which can be taken as a reference to the possibility of authorising the use of force at a later stage. The possibility of such measures was also built into the gradation of different enforcement measures in Chapter VII, considering that Afghanistan had been subject to UN sanctions since 1999. Furthermore, the Taliban had repeatedly refused to abide by the Security Council's requests concerning the surrender of Usama bin Laden[135] and had also otherwise expressed its indifference to the views of the outside world.[136] It is also notable that the US letter cited above underlined the role of the Taliban in making possible the attacks and the continuing threat against the country. In that sense, the military action against Afghanistan, even if justified as self-defence, appeared to be linked to a consistent line of UN actions.[137] As Gray has pointed out, "In the case of Afghanistan, Security Council resolutions could be cited as crucial by states explaining their willingness not to condemn the US action".[138]

As noted above, resolution 1373 contained a reference to the Friendly Relations Declaration in the preambular paragraph concerning the duty of every state to refrain not only from organising, instigating, assisting or participating in terrorist acts in another State but also from acquiescing in preparation of such acts within its territory. Although acquiescence with regard to terrorist activities does not correspond to any of the established interpretations of indirect aggression,[139] the reference is significantly located in the context of self-defence. It is an established rule of international law, expressed already in *The Corfu Channel* case, that a state may not knowingly permit its territory to be used for preparing attacks

135 *Supra* note 47.

136 For instance, turning a deaf ear to the calls concerning the preservation of the invaluable statues of Bamiyan. See BBC News 11 March, 2001, available at http://news.bbc.co.uk/1/hi/world/south_asia/1198379.stm. It has been pointed out that the sanctions were not successful against the Taliban as it had limited funds abroad, was not operating in the global economy, and the extent of Taliban-controlled air traffic was negligible. See Chantal de Jonge Oudraat, 'The Role of the Security Council', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 151–172, at 157.

137 According to Bring and Fisher, *supra* note 62, at 180, "a point had been reached where the traditional regime of prosecution or extradition would no longer suffice: it would have to be augmented by a military dimension".

138 Gray, *supra* note 62, at 172; similarly Frowein, *supra* note 62, at 886.

139 Stahn, *supra* note 53, at 228: "To equate inaction by a state with an "armed attack" under Art. 51 of the Charter seems to go beyond the express wording of this provision" (footnote omitted).

against other states, but this principle falls short of equating acquiescence with an armed attack. At the same time, the Friendly Relations Declaration, and the principle referred to above, are directly related to the prohibition of the use of force in article 2(4) of the Charter.[140] Furthermore, the Security Council had in fact stated explicitly in resolution 748(1992) concerning the Lockerbie incident that organising, instigating, assisting or participating in terrorist acts in another state or acquiescing in such activities was a violation of article 2(4) of the Charter.[141] This statement may have passed without much notice at the time, due to the specific features of that situation. The key resolution in the Lockerbie case that attracted the most scholarly comments was 883(1993), which imposed sanctions on Libya, and not 748(2002).[142] Nor did the question of state acquiescence with regard to terrorism play any major role because the alleged perpetrators acted on behalf of Libya and not as private individuals.[143] There is also reason to reiterate that for all the quasi-judicial elements of its action, the UN Security Council remains a political organ which does not have to base its decisions on legal reasoning. In hindsight, the Security Council's statement may nonetheless shed light on how it viewed the situation after the attacks of September 2001.[144]

Cassese has pointed out that the view expressed in resolution 748 is "probably too broad" because it does not differentiate between active support, acquiescence, and inability. He has nevertheless submitted that it would not be inconceivable to hold a State responsible for a breach of article 2(4) and accountable for terrorist acts

140 As pointed out by Bring, *supra* note 62, at 83. See also Bring and Fisher, *supra* note 62, at 183.

141 UN Doc. S/RES/748(1992), Preamble, para. 6.

142 See, for instance, Vera Gowland-Debbas, 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* case', 88 *AJIL* (1994), 643–677; Plachta, *supra* note 71; Jean-Marc Sorel, 'L'épilogue des affaires dites de Lockerbie devant la C.I.J.: le temps du soulagement et le temps des regrets', 107 *RGDIP* (2003), 933–944.

143 In August 2003, Libya acknowledged its responsibility for the Lockerbie attack. Letter dated 15 August 2003 from the Chargé d'affaires a.i. of the Libyan Arab Yamahiriya to the President of the UNSC, UN Doc. S/2003/818.

144 For earlier broad interpretations of the right of self-defence in situations of low-intensity conflict, see John Norton Moore, 'Low Intensity Conflict and the International Legal System', in Moore (ed.), *Deception and Deterrence in "Wars of National Liberation", State-sponsored Terrorism, and Other Forms of Secret Warfare*, Carolina Academic Press, 1997, 135–162; William O'Brien, 'Counterterror Attacks on Terrorist Sanctuaries', in Moore (ed.), *op.cit*., 163–169; L.F.E. Goldie, 'Low Intensity Conflict, Maritime Conflict and the Definition of Aggression', in Moore (ed.), *op.cit*., 171–194 and Robert F. Turner, 'State Sovereignty, International Law, and the Use of Force in Countering Low Intensity Aggression in the Modern World', in Moore (ed.), *op.cit*., 195–257.

coming from its territory, if the assistance or acquiescence is not sporadic but regular and consistent.[145] The events of September 2001 had in his view "contributed to a gradual alteration of the legal framework governing the use of force".[146] Even broader suggestions have been made along similar lines. Randelzhöfer was among the first to articulate what could be a new rule concerning military responses to terrorism.[147] In his view, it was sufficiently clear on the basis of resolutions 1368 and 1373 that large-scale acts of terrorism of private groups, if they are attributable to a state, are an armed attack in the sense of article 51. On the question of attribution, Randelzhöfer paraphrased the Friendly Relations principle: such attacks were "attributable to a State if they have been committed by private persons and the State has encouraged these acts, has given its direct support to them, planned or prepared them at least partly within its territory, or was reluctant to impede these acts". As a new element, however, he added that harbouring would give the same result: "The same is true, if a state gives shelter to terrorists after they have committed an act within another State".[148]

Another possible implication of the 11 September terrorist acts as an armed attack would be to acknowledge the possibility – even though it did not materialise this time because of the availability of the Taliban as a 'sponsoring state' – of attributing responsibility for an armed attack to the non-state actor itself. For instance, Dinstein has pointed out that the fact that violent action originates from the territory of a state does not denote that the state is necessarily implicated in the attack.[149] Several other commentators have expressed openness as to the possibility of non-state armed attack. For instance, Wolfrum has held that self-defence

145 Cassese, *supra* note 18, at 471–472. He has thus come to the same conclusion as Becker, *supra* note 12, concerning perpetuated acquiescence to terrorism, but using a different normative framework, namely that of the law of the use of force.

146 Cassese 18, at 473. For a similar view, see Gray, *supra* note 62, at 164.

147 Randelzhöfer, *supra* note 62, at 802.

148 Willingness to consider the responsibility of the Taliban as sufficiently clearly based on existing rules of international law, reinforced by binding Security Council decisions, can also be seen for instance in the comments of Wolfrum, *supra* note 11, at 31–35, Stahn, *supra* note 53, at 228; Dinstein, *supra* note 62, at 204–208. See also Gray, *supra* note 62, at 166–167. For an earlier view, see I.A. Shearer, *Starke's International Law*, 11th Edn., Butterworths 1994, at 278: "the local state may incur liability by reason of the negligent creation of opportunities for the commission of terrorist acts". See also Maurice Flory, 'International law: an instrument to combat terrorism', in Rosalyn Higgins and Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 50–67, at 36: "with respect to hostage-taking, the State on whose territory it occurs must be presumed responsible and carry the burden of establishing its innocence".

149 Dinstein, *supra* note 62, at 205.

triggered by an attack of non-state actors could be internationally accepted.[150] In the same vein, Bring and Fisher have referred to a new concept of self-defence against large-scale international terrorism – provided for, in their words, in "article 51½ of the Charter".[151] The ICJ advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* has been subject to widespread criticism for the statement that article 51 of the Charter would only recognise the existence of an inherent right of self-defence in the case of armed attack by one state against another,[152] a position which has been regarded as retrograde.[153]

At the same time, few commentators argue for the emergence of an instant customary law norm on the basis of a single event and most point out the need for more consistent practice over a longer period of time.[154] Many refer to the reluctance of the Security Council to endorse Israeli strikes against a terrorist base in Syria in 2003 as acts of self-defence.[155] It is also noteworthy that since 2001, there have been no references to self-defence in UNSC resolutions on terrorism. It seems therefore that the departure also from the established norms concerning use of force was a limited one, and could be largely explained within the traditional framework of use of force:[156] the wider claims of a global war or an international armed conflict

150 Wolfrum, *supra* note 11, at 68. Similarly Wolfrum and Philipp, *supra* note 62 and Frowein, *supra* note 62.

151 Bring and Fisher, *supra* note 62, at 187, 189.

152 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, para. 139.

153 See, for instance Christian J. Tams, 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', 16 *EJIL* (2005), 963–978. See also the Separate Opinion of Judge Higgins, paras. 33 and 34.

154 Cassese, *supra* note 18, at 475: "True, this episode shows that there was a large (albeit occasional) convergence of the international community towards a new notion of self-defence. However, such convergence, which was to a large extent motivated by the emotional reaction to the horrific terrorist action of 11 September, may not amount to the consistent practice and *opinio juris* required for a customary change". Duffy, *supra* note 119, at 161, has noted that the law on self-defence as well as the law on state responsibility, and the relationship between the two are likely to develop in light of the global practice of terrorism and counter-terrorism.

155 Gray, *supra* note 62, at 186–187; Cassese, *supra* note 18, at 476.

156 See for instance Lietzau, *supra* note 62, who has called for a broader recognition of the right to anticipatory self-defence. It may be noted, however, that while the same claim concerning the right to use force against an imminent threat was included in the UN Secretary-General's report 'In Larger Freedom: towards development, security and human rights for all', of 21 March 2005, UN Doc. A/59/2005, para. 124, the World Summit Outcome took a more restrictive view and fell short of endorsing the concept; see paras. 77–80.

with Al-Qaida were not apparent at the time and have not gained universal support afterwards. If a new supplementary norm of self-defence, an 'article 51½' has been established,[157] it entails the possibility of an armed attack being carried out by a non-state actor against a state but has not extended to cover a full-fledged war, i.e. a 'transnational armed conflict'[158] with no defined area.

157 Bring and Fisher, *supra* note 62, at 190. They have also pointed out, at 191, that "there is no carte blanche for further actions, labelled as self-defence, in the absence of clear evidence of a terrorist use of a *certain territory*, evidence which is convincing to the international community" (emphasis added).

158 Schöndorff, *supra* note 113.

CONCLUSIONS OF PART III

Terrorism as violent crime may, under certain circumstances, fulfil the criteria of crimes against humanity, but the existing anti-terrorist regulations do not distinguish between widespread and systematic terrorist acts, on the one hand, and isolated incidents, on the other. The crime of terrorist financing is construed in the 1999 Convention on the basis of the existing definitions of terrorist offences as enshrined in the earlier anti-terrorist conventions and protocols. Financing of any of these offences fulfils the requirements of terrorist financing, and the Terrorist Financing Convention thus replicates the basic non-differentiation between terrorist crimes, paying attention neither to the degree of victimisation, nor to systematic nature or state involvement. Even more importantly, the list of conventions and protocols in the Annex to the Convention only describes the ultimate purpose of the act of financing, thus leaving it to national implementation and prosecution to define when an act of financing credibly becomes one of terrorist financing; as was pointed out earlier, even the FATF guidance is not completely clear on this issue.

An important feature of terrorist financing – or incitement, recruitment, training for terrorism, direction of or participation in a terrorist group, or criminal transport of items which contribute to the design or manufacture of prohibited weapons – is that the criminal act has been separated from the harmful result. These offences are not only intermediary crimes in the sense that they form a link in the chain that leads to the commission of violent terrorist crimes; they are punishable as such, irrespective of whether they actually lead to any further criminal acts. The effect requirement has so far been specified only with regard to terrorist incitement, which, according to the Council of Europe Convention on the Prevention of Terrorism, should create a danger that one or more terrorist offences will be committed. As far as financing, or, for instance, training or transport are concerned, it can be assumed that the element of endangerment or likelihood of harm plays a role in the assessment of a concrete situation by a court, but this has not been explicitly required by the pertinent criminalisations. The notion of a chain of events is central to the criminal nature of all these acts which are seen

as embedded in a larger criminal context. At the same time, as there is no explicit requirement of a consequence, the 'chain' remains hypothetical.

The specific ways of extending criminal responsibility for terrorist offences show interesting parallels to the doctrines of collective liability applied to the core crimes – aggression, genocide, crimes against humanity and serious war crimes – in particular in the case of conspiracy and the extended form of joint criminal enterprise.The similarities are related to the criminalisation of risk-taking and to the stress on the criminal intention at the expense of the material act. It is useful to recall that the notion of conspiracy does not require local or temporal unity: charges of 'chain conspiracy' are applicable to successive but mutually related actions, which brings the offence close to terrorist financing. The ultimate terrorist crime, the possibility of which is essential in the financing crime and must be accepted by the financier, can also be compared to the incidental crimes in the case of the extended form of joint criminal enterprise, which must be foreseeable to the participant in the JCE and 'abstractly in line' with the planned criminal conduct. At the same time, a terrorist consequence is not a requirement for the financing crime. Superior responsibility has been interpreted by the ICTY as applying to a series of various acts and omissions by a superior, his or her subordinates and third persons – a configuration which is not very different from the 'layering' of various offences in the criminalisation of terrorist financing. The chain of responsibilities in terrorist financing may reach from 'contributing in any other way' to the financing at one end, to material support for training, at the other with the whole chain leaving open the possibility of actual terrorist acts.

The most obvious difference between the techniques of extended responsibility applied to the two categories of crimes is that the Terrorist Financing Convention and the subsequent criminalisations have created new independent crimes, whereas the extensions of criminal liability with regard to the core crimes have mostly focused on ancillary offences, which comprise both inchoate crimes and various forms of participation in the crime. Special participation modes have been created for particularly serious crimes. The joint criminal enterprise, instrumental in the jurisprudence of the ICTY, is not used as a distinct crime, but as a mode for allocating responsibility for crimes committed by a collectivity. Superior responsibility as well is a specific mode of responsibility, while incitement and conspiracy can constitute either separate (inchoate) crimes or forms of participation.

	Actus reus	*Mens rea*	Consequence
Conspiracy	agreement	intention	-
JCE III	participation	foreseeability/risk-taking	incidental crime
Superior responsibility	omission	knowledge/ constructive knowledge	(crime or omission by subordinate)
Common purpose	participation	intention/knowledge	committed or attempted crime
Terrorist financing	financing	intention/knowledge/risk-taking	-

Table 1. Techniques of extended responsibility

The rationale for the new intermediary criminalisations creating an 'indirect' type of responsibility is the perception that preparatory acts, because of the danger they pose to societies and to the international community, are equally serious as terrorist crimes. The list of anti-terrorist treaties in the Annex to the Terrorist Financing Convention, together with the generic definition of terrorist act, fulfil an important function in the Convention and are central in the construction of the financing crime. Were it not for the gravity of the terrorist crimes, it would not be justified to attach criminal liability to the act of financing. The relationship between the *chapeau* and the two subparagraphs of article 2 of the Convention is two-dimensional: the act of financing is seen to contribute materially to the future commission of terrorist crimes, while the gravity of the crimes 'colours' the act of financing. Terrorist financing is formally a 'financing crime', but at the level of connotative meaning it becomes another terrorist crime. This implied understanding has been formalised in a 2003 Interpretative Note of the FATF defining the term 'terrorist' as any natural person who, among other things, participates as an accomplice in terrorist financing, organises or directs others to commit terrorist financing or contributes to the commission of terrorist financing by a group of persons acting with a common purpose.[1]

The Terrorist Financing Convention redefined the international law of terrorist crimes by including in its ambit non-violent and victimless offences that are related to terrorist violence only by way of criminal intent. These new sub-categories of terrorist crime were nonetheless regarded as serious crimes which give rise

1 FATF, Interpretative Note to Special Recommendation III: Freezing and Confiscating Terrorist Assets, 3 October 2003, para. 7 (e).

to effective stigmatisation. Non-differentiation between terrorism as violent crime and acts committed in order to facilitate such crime has since become a prevalent trend. The UN anti-terrorist conventions and protocols are frequently treated as a homogenous body of law. The Protocol to amend the European Convention on the Suppression of Terrorism in 2003[2] extended the depoliticisation clause to all crimes within the scope of and as defined in the universal anti-terrorist treaties in force at the time. The 2005 Council of Europe Convention on the Prevention of Terrorism regarded all those crimes as terrorist offences for the purposes of that convention, including the financing of terrorism.[3] The need for some differentiation according to the degree of gravity of the criminal act, and proportionality in the application of the provisions concerning shipboarding, was recognised in the revision of the 1988 SUA Convention but did not affect the text of the 2005 SUA Protocol.

The most significant implication of the description of terrorist financing as a 'terrorist offence' in the Council of Europe Convention on the Prevention of Terrorism seems to be its contribution to the consolidation of the new perception of preparatory acts as legal equivalents of completed crimes as well as the approach of non-differentiation between the two, and between terrorist crimes in general. Other elements in the Convention which go in the same direction, apart from the broad set of ancillary crimes which apply with minor exceptions to the new crimes,[4] are the provisions concerning 'non-justification', the prohibition of the political offences exception, the obligation to extradite or prosecute, and mutual assistance. The inclusion of these provisions in the Terrorist Bombings Convention, as well as in the Convention on Nuclear Terrorism was justified because of the serious nature of the offences defined in those conventions. Their inclusion in the Terrorist Financing Convention also seems to have made them a standard for all subsequent terrorism-related instruments.

The law of terrorist crimes seems to be a heterogeneous category, as there is no common threshold for defining all the acts that are commonly called acts of terrorism. The wide scale of different acts would point to an obvious need to differentiate between terrorist acts according to their nature and purpose, gravity and proportionality. However, many recent trends go in the other direction, in particular, as the present legal regime on terrorist crimes embraces not only the

2 Protocol amending the European Convention on the Suppression of Terrorism, adopted on 15 May 2003, CETS No. 190.

3 Council of Europe Convention on the Prevention of Terrorism, adopted on 16 May 2005, CETS 196, art.1 and the Annex.

4 An exception has been made for the provision on attempt which does not apply to the offence of public provocation, see art. 9.

relevant conventions and protocols but also the UN Security Council resolutions related to terrorism as a threat to peace and security. It is notoriously difficult to draw legal conclusions from the practice of the UN Security Council which is a political organ, albeit one with powers to impose binding obligations on states. The change in the Council's approach to terrorism outlined above is nevertheless significant. After first appearing on the Security Council agenda only rarely, international terrorism has become almost a standing item. It is not likely that the Terrorist Financing Convention would have achieved the status it now has as the cornerstone of the network of anti-terrorist conventions and protocols without the forceful intervention of the UN Security Council in the form of resolution 1373(2001).

The seminal resolution 1373(2001) draws on preceding UNGA resolutions, reaffirms the importance of the UN anti-terrorist conventions and partially reproduces the criminalisation of the financing of terrorism as it was originally laid down in the 1999 Convention on the Suppression of the Financing of Terrorism. The resolution focuses heavily on terrorist financing and does not seem to make a clear distinction between terrorist acts and their financing as threats to international peace and security. Related UNSC action under the 1267 regime underlines this approach and gives operative content to the implied understanding that terrorist financing indeed falls under the notion of terrorism. The UN Security Council's statement that "any act of terrorism threatens international peace and security" may not have had much legal bearing were it not for the appearance of the same approach in specifically legal contexts. While the equation of terrorist financing and terrorism as crimes of the same type and gravity has been explicitly noted only in the 2005 Prevention Convention and in the 2003 FATF Interpretative Note, and not directly in UN Security Council resolutions, the approach of equal culpability can be found already in resolution 1373. The CODEXTER and FATF assessments should therefore not be seen as deviations from the UNSC line but rather as reflections of its general approach of non-differentiation, whereby it does not distinguish between terrorist offences which involve violence and terrorism-related offences which do not.

This approach amounts to a major change in how terrorist crimes are perceived and defined in international law. There have been valid reasons to develop new international responses to terrorism focusing on prevention, such as proactive criminalisations and anti-terrorist sanctions, but the accompanying trend of non-differentiation raises questions of legal policy, including the possible banalisation of the notion of terrorism, which, after all, should stand for serious violent crime. In order to be effective, it is recalled, the criminal stigma must be exclusive. When combined with the procedural shortcomings that the regimes of anti-ter-

rorist sanctions directed at private individuals still suffer from, the broad focus may also weaken the legitimacy and credibility of the measures taken.

As for state responsibility, although the actions of the Security Council can often be seen as authoritative interpretations of the law of the UN Charter, the Council has not been explicit in motivating its decisions which may have implications on state responsibility. The attempts to 'find the law' in unclear pronouncements by the Security Council are surely doomed to fail more often than those aimed at interpreting the jurisprudence of the ICJ. While the UN Security Council, unlike any of the international courts and tribunals, has made determinations of both individual and state accountability, there may be not enough evidence to conclude how its actions relate to the different standards and thresholds for individual and state responsibility for terrorist acts. The interrelationships between the two regimes have so far been identified mainly in the scholarly discussion. In this respect, the causal theory put forward by Becker would seem to bring the international responsibility of a state for terrorist acts closer to constructs that are familiar from international criminal law. As Becker has noted, "The State may be intimately involved in private terrorist acts not because it functions as the principal in an agency relationship, but rather because its wrongful acts and omissions have created a climate in which terrorism is possible".[5]

Such responsibility for 'facilitating', 'occasioning' or even for having 'created a climate in which terrorism is possible' raises questions that have already been discussed with regard to the core crimes. In particular, the question arises, whether the creation of a criminogenic situation, or a climate of lawlessness, which often provides the backdrop and a point of departure for collective crime such as the core crimes, should result in some kind of state responsibility. While the argument may sound convincing, it should be recalled that the ICJ has thus far not recognised a special regime of attribution with regard to serious crimes. Furthermore, it has pointed out that the rules for attributing alleged internationally wrongful conduct to a state are the same irrespective of the nature of the wrongful act in question unless there is a clearly expressed *lex specialis*.[6] Even if certain massive or widespread terrorist acts directed at a civilian population can be characterised as crimes against humanity, it remains to be confirmed that there is a special rule of attribution for crimes against humanity in the law of state responsibility.

5 Tal Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Hart Publishing, 2006, at 272.

6 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February, 2007, para. 401. See also Chapter 5.

The grounds for assigning the responsibility for the terrorist attacks of September 2001 to Taliban-led Afghanistan have been keenly debated. The broad endorsement of Operation Enduring Freedom has not led to the consolidation of a new standard of harbouring as a basis for state responsibility. Another and more promising attempt to explain how states may have viewed the relationship between Al-Qaida and the Taliban builds on the concept of complicity in the sense of article 16 of the ILC Articles on State Responsibility, taking into account the scale and the effects of the terrorist attacks of 11 September. Partial explanations for why the military action against Afghanistan seemed justified also include the customary rule prohibiting toleration on the territory of any state of terrorist activities directed at other states. This rule has not been reviewed by international jurisprudence, and the assessment of the degree of connivance in terrorist activities that might give rise to international responsibility has not been specified. Consequently, it remains open whether the prohibition of tolerance could develop into a special rule of attribution, in line with article 91 of Additional Protocol I to the Geneva Conventions and article 1 of the Torture Convention, and thus provide for a lower standard in the case of state support for terrorism. As it stands now, the prohibition of toleration remains less specific than the respective prohibitions in AP I and the Torture Convention and would be difficult to apply without further guidance.

As far as state practice is concerned, state toleration or facilitation of terrorist activities has sometimes been invoked as a justification for forcible responses to terrorism. This practice has also been reflected in the scholarly discussion, in which the possibility of a state incurring responsibility by reason of tolerating terrorist activities and creating opportunities for the commission of terrorist acts has seemed to strike some familiar chords. Similarly, it has been submitted that at least prolonged and consistent toleration of terrorist activities could render a state vulnerable to an armed response. The international response to the alleged role of the Taliban in supporting Al-Qaida would seem to confirm this understanding. However, the specificity of the situation in Afghanistan renders any generalisations difficult. The prohibition of toleration would more safely be understood as a specific requirement of due diligence that leads to state responsibility but provides a basis for armed response only if supplemented by and interpreted in light of other primary rules of international law.

The brief comment on the subject in the ICJ's Advisory Opinion in the *Wall* case is indicative of the difficulties involved in situating the terrorist attacks of September 2001 within a coherent theory of the use of force. According to the Court, article 51 of the UN Charter recognises the inherent right to self-defence in the case of an armed attack by one state against another state. However, as Israel had not claimed that the attacks against it were imputable to a foreign state, and

the threat emanated from the Occupied Palestinian Territories, over which Israel exercised control, the situation was different from that contemplated by the UN Security Council in resolutions 1368(2001) and 1373(2001).[7] In order to avoid acknowledging that a non-state actor may be able to launch an armed attack, the Court thus seemed to imply that the terrorist attacks of September 2001 were imputable to a state, but without elaborating on the consequential questions raised by this alternative. As some reinterpretation of the established rules and understandings would be required in both alternatives, the relationship between terrorism and self-defence will continue to prompt questions.

7 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p.136, para. 139.

CONCLUDING OBSERVATIONS

Indirect responsibility

A shift of perception is underway with regard to terrorist crimes. The basis for the international cooperation against terrorism was laid in the 1970s and 1980s, when terrorist crimes constituted a border-transgressing threat, but the terrorist 'causes' were most often traceable to some specific political or geo-political situation that the states concerned most often preferred to present as an internal matter. Terrorism used to be understood if not in the sense of lone individuals acting on their own, then at least as the work of fairly small and local groups or sub-national organisations. While all countries are still not affected in the same way by terrorist activities, the threat is more global, and has been recognised as such. The increased destructive capability of terrorist groups has redirected the legal responses to terrorism and brought about a paradigm shift as the prevention of terrorism has become a critical challenge in the efforts to counter international terrorism. Terms implying a more continuous state of affairs, such as 'terrorist networks' or 'terrorist infrastructure', have entered the legal discourse. New pro-active anti-terrorist criminalisations target different kinds of material support to terrorism. In the area of financial sanctions, a new form of international quasi-criminal accountability has been created.

In the present study, this paradigm shift has been studied from two perspectives. The main focus has been on the question of the broadening of individual and state responsibility for terrorist acts and terrorism-related activities to include increasingly indirect contributions to crime. This development has been compared with recent developments in other areas of international criminal law, in particular the law of the core crimes (international criminal law *sensu stricto*). The codification of the core crimes and the related jurisprudence provide a number of specific structures and techniques that aim at coping with exceptional social danger. They deal with acts which are committed in a collective context and systematic manner and in which the link between an individual act and a harmful result is not always

apparent. The rationale of the new anti-terrorist criminalisations, similar to that of the core crimes, is that terrorist acts, in particular if they are large-scale or widespread, require protracted preparation and a plurality of persons who contribute in different ways to the 'terrorist enterprise'. It has been submitted above that this change has also entailed a reconsideration of the legal concept of terrorism. Legal measures against terrorism, in particular criminalisations, which have a high symbolic value, necessarily affect the perception of terrorism irrespective of whether they provide a direct generic definition of a terrorist act. The extension of criminal responsibility to non-violent supportive acts thus makes the concept of terrorism broader: terrorism is no more limited to terrorist acts but comprises the victimless crimes of incitement, financing, long-term preparation as well as various aspects of material support to the maintenance of the terrorist infrastructure. Stating the obvious, a terrorist is one whose acts create terror – the FATF has nevertheless included in the definition of 'a terrorist' one who participates in terrorist financing.

The brief overview of the law of the core crimes in Part II, together with the analysis of recent anti-terrorist instruments in Part III, has shown that many of the specific techniques used in the law of the core crimes are comparable to the new anti-terrorist criminalisations. While no exact equivalents can be found, the core crimes and the related jurisprudence provide several examples of attaching criminal liability to the conscious risk-taking that has been claimed to be at the core of the crime of terrorist financing. Unlike in the case of conspiracy or the common purpose crime, an agreement is not required as an element of the crime, although the intention of the financier – or inciter, recruiter, trainer or transporter – concerning future commission of terrorist crimes can hardly exist in isolation and may in fact often be based on a tacit agreement. If this is not the case, the perpetrator must at least take the risk that terrorist crimes may be committed. The broad interpretation of the Terrorist Financing Convention is supported by the actual terms of the Convention as well as the *travaux préparatoires.* It has also been endorsed by the subsequent practice as expressed in the FATF Special Recommendation II, the related Interpretative Note and several country reports. The legal instruments that have followed the 'TFC model' have also contributed to the consolidation of this understanding. An essential feature of terrorist financing and of the other intermediary 'terrorist' crimes discussed in Chapters 6 and 7 is that they seek to prevent terrorist acts from happening by intervening in their underlying conditions. In that sense, these new 'terrorist' offences serve a purpose that is similar to the inchoate criminalisation of conspiracy to commit genocide and incitement of genocide, which seek to avoid a greater harm in the future by "having the first

appearance of a 'guilty mind' investigated and prosecuted before it has a chance to be set into reality".[1]

Extensions of responsibility are more easily accepted in the case of serious crimes. As was noted by the ICTY in *Tadić*, the interpretation underlying the doctrine of joint criminal enterprise was also warranted "by the very nature" of the international crimes under the Tribunal's jurisdiction.[2] The specificity of the crime of terrorist financing lies in the effect and subtext of making it an independent crime. It tells about a changed perception of terrorist acts committed by non-state actors as a security threat which justifies early intervention and the use of broad criminalisations for that purpose. Extending the criminal liability to those who contribute to the commission of terrorist offences by a group of persons acting with a common purpose, to those who take the risk that the funds they have collected or provided end up benefiting terrorist purposes, and to those who contribute to such financing, is indeed convincing proof of the social danger international terrorism is seen to constitute. The application in article 2(5)(c) of the Terrorist Financing Convention of the common purpose formulation familiar from the Terrorist Bombings Convention and the Rome Statute of the ICC to the crime of financing thus also signals the new perception of terrorist financing as a serious crime comparable to actual terrorist acts.

As increasingly indirect contributions are penalised, difficult problems of delimitation are encountered. Even though the criminalisations of supportive 'terrorist' offences are not altogether unique, they may cause a number of problems for national courts because of the lack of established practice of interpretation and implementation. Where should the line be drawn between freedom of speech on the one hand, and terrorist incitement on the other? When exactly does and act of financing turn into one of terrorist financing? While the relevant conventions give certain points of departure, these questions must be answered in each particular case taking into account all relevant circumstances. The fact that terrorist suspects are also targeted by preventive quasi-criminal measures such as asset-freezing may encourage broad interpretations of what is criminal conduct in a particular case. While sanctions are administrative measures, they nonetheless entail or imply allocation of responsibility. As pointed out above, asset-freezing also comes close to criminal penalties as a measure that directly affects the targeted individuals. The decisions of national legislators and judiciaries are monitored by international

1 Otto Triffterer, 'The Preventive and the Repressive Function of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate 2001, 137–175, at 151.

2 *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement of 15 July 1999 (*Tadić* Appeal Judgement), para. 191.

bodies such as the UN CTC and the FATF, which advance a consistent interpretation of the relevant obligations, but studies have shown, for instance, that there are important differences in the national implementation of the criminalisation of terrorist financing.

The requirement in the 1999 Terrorist Financing Convention of a terrorist intent or knowledge may be open to different interpretations, but it would not be consistent with the object and purpose of the Convention or with the *travaux préparatoires* to interpret the requisite intention or knowledge as an intention to contribute to a specific crime or as knowledge of a specific crime being planned. As an independent crime, terrorist financing cannot be reduced to complicity. At the same time, the offence of financing must take place in a certain context. Acts of genocide supposedly take place in situations of conflict in which 'anyone could become a genocidaire'; crimes against humanity must be part of a larger attack against a civilian population; and war crimes must be associated with an ongoing armed conflict. While a similar contextual element has not been defined for intermediary terrorist crimes, it may be claimed that some meaningful and credible connection must be proved between an act of financing, recruitment, or participation and actual endangerment/causing of harm in order not to render prosecution arbitrary.

In the international law and action against terrorism, much attention has been directed recently at the conditions that are 'conducive to terrorism'. As the most visible part of the prevention paradigm, the pro-active criminalisations and anti-terrorist sanctions have directed the focus to the individual contribution and organisational ties, overshadowing the role of the state in the creation of such conditions. State responsibility for terrorism seems to be an established area of law in which significant changes have been brought about primarily by way of expanding the specific obligations of states. Direct responsibility for the acts of non-state actors remains an exceptional case, reflecting the reality of interaction between states and terrorist groups: a state that wishes a terrorist outcome does not necessarily have to acquire total control over a group or give it explicit instructions. It has been pointed out above that the low threshold of 'policy' to prosecute crimes against humanity – or the even lower standards of 'facilitation' and 'toleration' in the ICTY jurisprudence – differ quite significantly from the high threshold of 'total control' / 'specific inctructions' required for state responsibility for such crimes. While it may be argued that an overall systematic policy conducive to crimes should lead to state responsibility, mere toleration or creation of opportunities is much more difficult to assess. As Ambos has pointed out, a broad understanding of state involvement in crime by way of omission would stretch state responsibility

ad absurdum by making nearly all states criminal.[3] The concept of harbouring has not been consolidated in the international law of terrorism, but there seems to be ample basis for indirect state responsibility in relation to terrorist attacks, either in the sense of complicity as an application *mutatis mutandis* of article 16 of the ILC Articles, in cases where a terrorist non-state actor has the capacity to carry out an act of aggression or similar acts, or in the sense of due diligence.

The Definition of Terrorism

The difference between the four established core crimes (aggression, genocide, crimes against humanity and serious war crimes), on the one hand, and terrorist crimes, on the other, is often taken for granted, if only because of the exclusion of terrorism from the jurisdiction *ratione materiae* of international jurisdictions. The intensive development of international criminal law that began in the mid-1990s was not, however, primarily concerned with the classification of the crime of terrorism but with the consolidation of the concept of the core crimes which until that time had been inadequately defined and burdened by inconsistent terminology. In this light, the exclusion of terrorist crimes from the jurisdiction of the ICC was more a consequence of the primary focus on the Nuremberg crimes than of a thorough consideration of the various forms of terrorism. This state of affairs was also reflected in the fact that the decision not to extend the jurisdiction of the ICC to terrorist crimes was accompanied by a recommendation that the issue could be revisited at a later stage. Given the transformation of international terrorism, violent acts which by their nature and context are likely to intimidate a population or compel a government may sometimes reach the level of crimes against humanity or other core crimes. The development of the normative framework for the fight against terrorism is historically different from the development and consolidation of the core crimes – in particular because of the break between the tradition focusing on state terrorism and the sectoral tradition – but the overall picture is not altogether different.

The 'institutional density' that accompanies terrorist crimes today is additional proof of their recognition as serious international crimes. Anti-terrorist obligations are numerous and they have a profound impact on national law. The accompanying reporting and monitoring requirements have created a general practice that sus-

3 "[Weil es] nahezu jeden Staat zum 'Kriminellen' machen würde, denn eine vollständige Kontroll nicht-staatlicher Kriminalität [...] ist niemals möglich", see Kai Ambos, *Der allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung.* Untersuchungen und Forschungsberichte aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Bd. 16, 2. unveränderte Auflage, Duncker & Humblot, 2004, at 51.

tains the perception of a common threat. In sharp contrast to earlier decades, everyone condemns terrorism just as everyone condemns genocide. However, while states have occasionally been reluctant to use the word 'genocide', as the protracted discussions in the UN Security Council on the situations of Rwanda and Darfur have shown, it is only too easy to label political violence 'terrorism' – to the extent that the notion itself seems to become all-encompassing. As a reaction to this perceived ambiguity, there has been a tendency to distinguish terrorist crimes from other violent crimes that do not display the terrorist purpose, often and somewhat misleadingly called 'terrorist intent'. What this catchword conveys is that the context and nature of a violent act are such that it can be expected to intimidate, terrorise and be apt to compel a government or an intergovernmental organisation. Intention in the proper sense of the word plays a much more significant role in the 'secondary criminalisations' of terrorist financing, incitement, recruitment, participation and training or transport, which become 'terrorist' because of the intent to contribute to terrorist offences and activities.

The search for a definition of terrorism is fully warranted. The existing definitional elements should, however, not be overlooked, and the network of anti-terrorist conventions and protocols has to be taken into account when discussing the emergence of a customary law definition of a terrorist act. While also applicable to purely private acts, the sectoral criminalisations are mainly directed at typical terrorist acts, which are frequently committed for political purposes. In that sense they are largely overlapping with the generic definition of terrorism as enshrined in the successive UN documents, most notably in the Friendly Relations Declaration, the 1994 Declaration on Measures to Eliminate International Terrorism, and the Terrorist Financing Convention. The consistent mention of terrorism, most often in the sense of state terrorism, in the codification efforts from the late 1940s until the adoption of the Rome Statute of the ICC nevertheless supports the claim that certain extreme forms of terrorism are crimes under customary law. The constitutive elements of the emerging customary law definition include a serious violent act committed for political purposes and displaying a terrorist purpose (`intention'). To require some degree of state involvement in addition would arguably seem retrograde, as state involvement in terrorist crimes has actually been a diminishing trend, and international terrorism is mainly viewed as private violence. It would seem odd also in view of the developments within ICL *sensu stricto.* State involvement has historically been an essential feature of all the Nuremberg crimes, but a gradual relaxation of this requirement has taken place recently. Crimes committed by non-state actors are prevalent also in the jurisprudence of international criminal courts and tribunals. While it is still debated what characteristics the organisation responsible for the 'organisational policy' in crimes against humanity should

display, the direction in international criminal law has been to cover more broadly crimes committed by armed groups and criminal gangs.

With some question as to whether a nexus to a state policy should be required of the international crime of 'terrorism', it may be claimed that all the necessary definitional elements for such a crime are present and available, partly overlapping with the existing definitions of the core crimes. What is still needed – apart from the political will and mutual confidence which constitute a *sine qua non* for a UN-wide consensus on the Comprehensive Convention on the Suppression of Acts of Terrorism, not to mention the revision of the Rome Statute of the ICC in one of the future review conferences – is an agreement on the delimitation of the concept of terrorism as an international crime proper. There is reason to emphasise that its scope should be restricted not only horizontally, in regard to related rule-based violence by state actors and armed groups in armed conflicts, but also vertically so as to distinguish between acts of lesser and greater gravity. The prevailing trend of stigmatising increasingly indirect acts as terrorism is, however, not conducive to such a differentiation.

International Law of Terrorist Crimes?

As the international law of terrorism gains substance, has it become an area of its own, distinguishable from other transnational crimes? Attention was drawn above to the heterogeneity of terrorist acts, partly overlapping with the established core crimes, partly with other transnational crimes, yet this variety has not been fully recognised in the specific criminalisations concerning international terrorism. The place of the terrorist crimes in the 'hierarchy of evil' is still somewhat undetermined. It may nevertheless be claimed that the essential distinction between violent terrorism and the core crimes today is sooner related to the separate normative and institutional developments – the crimes of terrorism having been left outside the 'atrocities regime' – than to the crimes as such. While the distinction between the core area of international criminal law and the more varied field of 'ICL *sensu largo*' has been generally accepted as a structural principle, some have questioned the sense of maintaining a strict distinction between different forms of violent crime. It has been asked, for instance, whether the distinction between international and non-international armed conflicts is justified: that is, whether it really makes a difference if a specific act has been perpetrated by armed forces or armed groups. Likewise, it can be argued that "every form of violence is potentially terror-inspiring to its victim and to those it indirectly affects".[4]

4 M. Cherif Bassiouni, 'International Terrorism', in Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 765–801, at 770. See also Anne-

The intensive normative and institutional development in the past decade has provided a basis for better situating the law of terrorism than before, yielding a strong case for arguing that the most serious terrorist acts are fully comparable to the core crimes, but views still do not concur on this. Decisions of national courts have so far not regarded terrorism as an international crime proper. International jurisprudence, while it may be strengthened in the future, is still scarce, and has mainly addressed terrorism as a war crime. How should the shift towards more indirect forms of responsibility be assessed? The above analysis leaves room for two possible interpretations: it could either be seen as a redefinition of 'terrorism' that dilutes the notion to an unprecedented degree, or as a sign of the consolidation of terrorism as one of the most serious international crimes, which are seen to require specific forms of responsibility.

It should also be pointed out that systems are always creations of doctrine. The normative and institutional developments with regard to terrorist crimes have been different, if not altogether so, from international criminal law *sensu stricto*, but the difference is even more pronounced in the doctrinal discussion and development. Depending on their factual pattern, terrorist crimes may sometimes fall under the denominations of war crimes, crimes against humanity, or even genocide, yet terrorist crimes have been effectively kept outside of the core category due to a certain 'lack of recognition'.[5] Similarly, there has been relatively little interest in the shift toward intermediary criminalisations. In this regard, a change may be underway, as there has been, since September 2001, an upsurge of legal literature on terrorist crimes, which lately is also of a theoretical and analytical nature. In addition to the ongoing UN negotiations on the Comprehensive Convention against terrorism and emerging jurisprudence, the eventual consolidation of the place of terrorism in the system of international law, as well as the refinement of the specific features of the law of terrorist crimes, will depend on how the scholarly discussion proceeds.

Finally, it may be asked whether it matters where the crimes of terrorism belong in the emerging system of international criminal law: is this not a question of purely doctrinal interest with few if any practical implications? The main point of interest, also illustrated by the story of the Terrorist Financing Convention, is related to the fact that while the new international anti-terrorist criminalisations, unlike anti-terrorist sanctions, are a result of multilateral law-making, they have

Marie Slaughter and William Burke-White,' An International Constitutional Moment', 43 *Harv. JIL* (2002), 1–22.

5 Ghislaine Doucet, 'The need for a universal criminal law response to terrorism', in Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 379–381, at 380.

not raised wider interest outside certain expert organisations and monitoring bodies. The problems of interpretation and implementation of the new obligations have therefore been approached mainly from a technical frame of reference which is a result of a specific expertise and interest different from those which have created the 'project of international criminal law' and which, understandably, has not invited the kind of questions of 'proper scope' that have been raised with regard to the core crimes. The rich and analytical debate concerning the contours of individual criminal responsibility within ICL *sensu stricto* has not yet quite touched the law of terrorist crimes, or at least its newest developments, which have been mainly assessed from the point of view of managerial effectiveness. Another example of fragmentation of international law?[6]

6 See *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, The Erik Castrén Institute Research Reports 21/2007, Hakapaino 2007, paras. 5–26.

BIBLIOGRAPHY

I Monographs, articles etc. attributable to authors

Abbott, Kenneth W., 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts', in 93 *American Journal of International Law* (1999), 361–379.

Abi-Saab, Georges, 'The Concept of Sanction in International Law', in Vera Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, Kluwer Law International 2001, 29–41.

– 'Introduction. The Proper Role of International Law in Combating Terrorism', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, xiii–xxii.

Afran, Scott, 'Genesis of Suicide Terrorism', 299 *Science* (2003), 1534–1539.

Allain, Jean and John R.W.D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind', 1 *European Journal of International Law* (1997), 100–117.

Allott, Philip, 'Deliver us from social evil', ICC, Guest Lecture Series of the Office of the Prosecutor, 11 August 2004.

Ambos, Kai, 'Article 25: Individual Criminal Responsibility', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 475–492.

– 'Superior Responsibility', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002,Vol. I, Chapter 11.7., 823–872.

– *Der allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung.* Untersuchungen und Forschungsberichte aus dem Max-Planck-Institut für ausländisches und internationales Strafrecht, Bd. 16, 2. unveränderte Auflage, Duncker & Humblot, 2004.

– 'Is the Development of a Common Substantive Criminal Law for Europe Possible? Some Preliminary Reflections', 12 *Maastricht Journal of European and Comparative Law* (2005), 173–191.

– 'Remarks on the General Part of International Criminal Law', 4 *Journal of International Criminal Justice* (2006), 660–673.

– 'Joint Criminal Enterprise and Command Responsibility', 5 *Journal of International Criminal Justice* (2007), 159–183.

– 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in Kai Ambos, Judith Large and Marieke Wierda (eds.), *Building a Future on Peace and Justice*. Studies on Transitional Justice, Peace and Development, The Nuremberg Declaration on Peace and Justice, Springer, 2009, 19–87.

Angelet, Nicolas, 'Vers un renforcement de la prévention et la répression du terrorisme par des moyens financiers et économiques?', in Karine Bannelier, Théodore Christakis, Olivier Corten and Barbara Delcourt (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 219–237.

Arnold, Roberta, 'The Prosecution of Terrorism as a Crime against Humanity', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 979–1000.

– *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, Inc., 2004.

Aston, Jurij Daniel, 'Die Bekämpfung abstrakter Gefahren für den Weltfrieden durch legislative Massnahmen des Sicherheitsrats – Resolution 1373(2001) im Kontext', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 257–291.

Atwan, Abdel Bari, *The Secret History of Al-Qa'ida*, SAQI Books, 2006.

Aust, Anthony, 'Counter Terrorism – A New Approach: The International Convention for the Suppression of the Financing of Terrorism', 5 *Max Planck Yearbook of the United Nations Law* (2001), 285–306.

Bantekas, Ilias, 'The interests of States versus the doctrine of superior responsibility', 82 *International Review of the Red Cross* (2000), No. 837, 391–402.

– 'The Contemporary Law of Superior Responsibility', 93 *American Journal of International Law* (1999), 573–595.

Barboza, Julio, 'International Criminal Law', Académie de Droit International, 278 *Recueil des Cours de l' Académie de Droit International* (1999), 13–199.

Barnidge, Robert P.,Jr., 'States' Due Diligence Obligations with regard to International Non-State Terrorist Organisations Post-11 September 2001: The Heavy Burden that States Must Bear', 16 *Irish Studies in International Affairs* (2005), 103–125.

Bassiouni, M. Cherif, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind', in Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Association Internationale de Droit Pénal, Érès, 1993, 1–22.

– *Crimes Against Humanity in International Criminal Law,* 2nd Rev. Edn., Kluwer Law International, 1999.

– 'The Sources and Content of International Criminal Law: A Theoretical Framework', in Bassiouni (ed.), *International Criminal Law,* Vol. I, *Crimes*, Transnational Publishers, Inc., 1999, 3–125.

– 'International Terrorism', in Bassiouni (ed.), *International Criminal Law,* Vol. I, *Crimes*, Transnational Publishers, Inc., 1999, 765–801.

– 'Kidnapping and Hostage-Taking', in Bassiouni (ed.), *International Criminal Law,* Vol. I, *Crimes*, Transnational Publishers, Inc., 1999, 859–864.

– 'Legal Control of International Terrorism: A Policy-Oriented Approach', 43 *Harvard Journal of International Law* (2002), 83–103.

Bassiouni, M. Cherif and Eduardo Vetere, 'Organized Crime and its Transnational Manifestations', in Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 883–903.

Baxter, R.R., 'International Law in "Her Infinite Variety"', 29 *International and Comparative Law Quarterly* (1980), 549–566.

Beare, Margaret E., 'Introduction', in Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering and Corruption*, University of Toronto Press, 2003, xi – xxix.

Becker, Tal, *Terrorism and the State*: *Rethinking the Rules of State Responsibility,* Hart Publishing, 2006.

Bellelli, Roberto, 'The Council of Europe', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 141–148.

Bellinger III, John B., 'Armed Conflict with Al Qaida?', 15 January 2007, available at http://opiniojuris.org/posts/1168473529.shtml (last visited 1 August, 2007).

Betti, Stefano, 'The Duty to Bring Terrorists to Justice and Discretionary Prosecution', 4 *Journal of International Criminal Justice* (2006), 1104–1116.

Bianchi, Andrea, 'Immunity versus Human Rights: The Pinochet Case', 10 *European Journal of International Law* (1999), 237–277.

– 'Enforcing International Law Norms Against Terrorism: Achievements and Prospects', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 392–534.

– 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview', 4 *Journal of International Criminal Justice* (2006), 1044–1073.

– 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', 17 *European Journal of International Law* (2007), 881–919.

Bianchi, Andrea (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004.

Blumenstock, Tilman, 'The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the *Brđanin* Case', 18 *Leiden Journal of International Law* (2005), 65–75.

Blumenstock, Tilman and Wayde Pittman, '*Prosecutor v. Naser Orić*: The International Criminal Tribunal for the Former Yugoslavia Judgement of Srebrenica's Muslim Wartime Commander', 19 *Leiden Journal of International Law* (2006), 1077–1093.

Bodansky, Daniel and John R. Crook, 'Introduction and Overview', American Journal of International Law Symposium on the ILC' s State Responsibility Articles, 96 *American Journal of International Law* (2002), 773–791.

Boelaert-Suominen, Sonja, 'The Yugoslavia Tribunal and the Common Core of Humanitarian Law Applicable to all Armed Conflicts', 13 *Leiden Journal of International Law* (2000), 619–653.

Boister, Neil, '"Transnational Criminal Law"?', 14 *European Journal of International Law* (2003), 953–976.

Bos, Adriaan, 'The Experience of the Preparatory Committee', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 17–27.

Boutros Boutros-Ghali, 'The United Nations and Comprehensive Legal Measures for Combating International Terrorism', in Karel Wellens (ed.), *International Law: Theory and Practice*, Kluwer Law International, 1998, 287–304.

O'Brien, William, 'Counterterror Attacks on Terrorist Sanctuaries', in John Norton Moore (ed.), *Deception and Deterrence in "Wars of National Liberation", State-sponsored Terrorism, and Other Forms of Secret Warfare,* Carolina Academic Press, 1997, 163–169.

Bring, Ove, 'Efter den 11 september – en rätt till väpnat självförsvar mot internationell terrorism?', in Ove Bring and Said Mahmoudi, *Internationell våldsanvändning och folkrätt*, Norstedts Juridik, 2006, 77–88.

Bring, Ove and David I. Fisher, 'Post-September 11. A Right of Self-Defence against International Terrorism?', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 177–192.

Brown Weiss, Edith, 'Invoking State Responsibility in the Twenty-First Century', 96 *American Journal of International Law* (2002), 798–816.

Brownlie, Ian, *System of the Law of Nations: State Responsibility*, Part I, Clarendon Press, 1983.

– *Principles of Public International Law*, 4th Edn., Oxford University Press, 1990.

Broomhall, Bruce, 'Article 22: *Nullum crimen sine lege' (*A. Introduction/ General Remarks), in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 447–462.

– 'State Actors in an International Definition of Terrorism from a Human Rights Perspective', 36 *Case Western Reserve Journal of International Law* (2004), 421–441.

Burke, Jason, *Al-Qaeda: The True Story of Radical Islam*, Rev. edn., Penguin Books, 2004.

Byers, Michael, 'Terrorism, the Use of Force and International Law After 11 September', 51 *International and Comparative Law Quarterly* (2002), 401–414.

Cameron, Iain, 'Human Rights and Terrorism', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004,193–232.

– *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, Report prepared for the Council of Europe Ad Hoc Committee for Public International Law, 6 February 2006, http://www.coe.int/t/e/legal_affairs/legal_cooperation/public.international.law/Texts & Documents/2006/I.%20Cameron%20Report%2006.pdf (last visited 7 May, 2007).

Caron, David, 'The Basis of Responsibility: Attribution and Other Trans-substantive Rules', in Richard B. Lillich and Daniel B. Magraw (eds.), *The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility*, Transnational Publishers, 1998, 109–184.

– 'State Crime: Looking at Municipal Experience with Organizational Crime', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 23–30.

Cassese, Antonio, 'The International Community's "Legal" Response to Terrorism', 38 *International and Comparative Law Quarterly* (1989), 589–603.

– 'Terrorism is Also Disrupting Some Crucial Legal Categories of International Law', 12 *European Journal of International Law* (2001), 993–1001.

– 'L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux?', in Cassese and Mireille Delmas-Marty, *Crimes internationaux et juridictions internationales*, Presses Universitaires de France 2002, 143–182.

– 'Crimes against Humanity', in Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 11.2., 353–378.

– 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', 13 *European Journal of International Law* (2002), 853–875.

– *International Criminal Law*, Oxford University Press, 2003.

–' Terrorism as an International Crime', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 213–225.

– 'The ICTY: A Living and Vital Reality', 2 *Journal of International Criminal Justice* (2004), 585–597.

– *International Law*, 2nd Edn., Oxford University Press, 2005.

– 'The Multifaceted Criminal Notion of Terrorism in International Law', 4 *Journal of International Criminal Justice* (2006), 933–958.

– 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007), 109–133.

–' The *Nicaragua* and *Tadić* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *European Journal of International Law* (2007), 649–668.

Cassese, Antonio and Mireille Delmas-Marty, 'Introduction', in Cassese and Delmas-Marty, *Crimes internationaux et juridictions internationales*, Presses Universitaires de France, 2002, 7–12.

Chadwick, Elizabeth, *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, Kluwer Law International/Martinus Nijhoff Publishers, 1996.

Chinkin, Cristine: 'A Critique of the public/private dimension', 10 *European Journal of International Law* (1995), 387–396.

Christenson, Gordon A., 'The Doctrine of Attribution in State Responsibility', in Richard N.B. Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens*, University Press of Virginia, 1983, 321–360.

Cisse, Abdoullah, 'Islam, Secularism and Terrorism: Justifying the Use of Force in the Name of Islam', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 36–45.

Clark, Roger S., 'Crimes Against Humanity and the Rome Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 75–93.

Cogen, Marc, 'Impact of the Laws of Armed Conflicts on Operations Against International Terrorism', *Proceedings of the Bruges Colloquium: The impact of International Humanitarian Law on current security policy trends, 26-27 October 2001,* Collegium No. 25, Special edition with the International Committee of the Red Cross, College of Europe, 2002, 121–130.

Condorelli, Luigi, 'L'imputation à l'Etat d'un fait internationalement illicite: solutions classiques et nouvelles tendances', 189 *Recueil des Cours de l'Académie de Droit International* (1984), Martinus Nijhoff Publishers, 1988, 9–222.

– 'The Imputability to States of Acts of International Terrorism', 19 *Israel Yearbook of Human Rights* (1989), 233–246.

– 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 107–117.

–' Les attentats du 11 septembre et leurs suites: où va le droit international?', 105 *Revue Général de Droit International Public* (2001), 829–848.

Conforti, Benedetto, 'Le pouvoir discrétionnaire du Conseil de Sécurité en matière de constatation d'une menace contre la paix, d'une rupture de la paix ou d'un acte d'agression', in René-Jean Dupuy (ed.), *Le développement du rôle du Conseil de Sécurité*, Colloque, La Haye, 21–23 juillet 1992, Martinus Nijhoff Publishers, 1993.

Cortright, David and George A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Lynne Rienner Publishers, Inc., 2000.

Craven, Matthew, 'Humanitarianism and the Quest for Smarter Sanctions', 13 *European Journal of International Law* (2002), 43–61.

Crawford, James, 'Revising the Draft Articles on State Responsibility', 10 *European Journal of International Law* (1999), 435–460.

– 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', 96 *American Journal of International Law* (2002), 874–890.

– 'Introduction', in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002, 1–60.

– 'The Work of the International Law Commission', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 2.1., 23–34.

Crenshaw, Martha, 'Relating Terrorism to Historical Contexts', in Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995, 3–24.

– 'The debate over "New" vs. "Old" Terrorism', in Ibrahim A. Karawan, Wayne McCormack and Stephen E. Reynolds (eds.), *Values and Violence*, Part II, Springer, 2008, 117–136.

– 'Old and New Terrorism – Lessons Learned', Jihadi Terrorism – Where Do We Stand?, Second IRRI Conference on International Terrorism, February 13, 2006, available at http://www.egmontinstitute.be/speechnotes/06/060213-jihad.terr/crenshaw.htm. (last visited 10 December 2008)

Crenshaw, Martha (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995.

Croissant, Aurel and Daniel Barlow, 'Following the Money Trail: Terrorist Financing and Government Responses in Southeast Asia', 30 *Studies in Conflict and Terrorism* (2007), 131–156.

Czapliński, Wladyslaw, 'The Position of States Specially Affected by Sanctions in the Meaning of Article 50 of the United Nations Charter. The Experience of Eastern Europe', in Vera Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, 335–347.

Danailov, Silvia, 'The Accountability of Non-State Actors for Human Rights Violations: The Special Case of Transnational Corporations', Geneva, October 1998, available at http://www.humanrights.ch (last visited 13 August 2007).

Danner, Allison Marston and Jenny S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', Vanderbilt University Law School, Public Law and Legal Theory Working Paper Series, Working Paper No. 04-09, Stanford Law School, Public Law & Legal Theory Working Paper Series, Research Paper No. 87, March 2004; reprinted in 93 *California Law Review* (2005), 75 *et seq*.

David, Eric, 'The Issue of Immunity of Foreign Heads of State in Light of the March 13, 2001 Decision of the French *Cour de Cassation* and the February 14, 2002 Decision of the International Court of Justice', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 309–323.

Davidson, Ron, 'The International Criminal Tribunal for Rwanda's Decision in *The Prosecutor v. Ferdinand Nahimana et al*.; The Past, Present, and Future of International Incitement Law', 17 *Leiden Journal of International Law* (2004), 505–519.

Davis, Kevin E., 'The financial war on terrorism', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005, 179–198.

De Feo, Michael, 'The Political Offence Concept in Regional and International Conventions Relating to Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 113–119.

Degan, Vladimir-Djuro, 'On the Sources of International Criminal Law', 4 *Chinese Journal of International Law* (2005), 45–83.

Delmas-Marty, Mireille, 'Les crimes internationaux peuvent-ils contribuer au débat entre universalisme et relativisme des valeurs?', in Antonio Cassese and Delmas-Marty, *Crimes internationaux et juridictions internationales*, Presses Universitaires de France, 2002, 59–67.

Dinstein, Yoram, *War, Aggression and Self-defence*, 4th Edn., Cambridge University Press, 2005.

– 'Defining Suicide Bombing', A Briefing Paper, November 2003, available at http://www.ihl-research.org/portal/ihli/alabama.php (last visited 23 April 2005).

Dixon, Rodney, 'Article 7, Crimes against Humanity, Analysis and Interpretation of Elements', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 122–129.

O' Donnell, Therese, 'Naming and Shaming: The Sorry Tale of Security Council Resolution 1530 (2004)', 17 *European Journal of International Law* (2006), 945–968.

Doucet, Ghislaine, 'The Need for a Universal Criminal Law Response to Terrorism', in Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 379–381.

Drumbl, Mark A., 'ICTY Appeals Chamber Delivers Two Major Judgements: *Blaškić* and *Krstić*', *ASIL Insight*, August 2004, http://www.asil.org/insights/insigh143.htm (last visited 30 October, 2004).

– 'Looking Up, Down and Across: The ICTY's Place in the International Legal Order', 37 *New England Law Review* (2003), 1037–1057.

Dubuisson, François, 'Vers un renforcement des obligations de due diligence en matière de la lutte contre le terrorisme?', in Karine Bannelier, Théodore Christakis, Olivier Corten and Barbara Delcourt (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 141–157.

Duez, Denis, 'De la definition à la labellisation: le terrorisme comme construction sociale', in Karine Bannelier, Théodore Christakis, Olivier Corten and Barbara Delcourt (eds), *Le droit international face au terrorisme*, Editions Pédone, 2002, 105–118.

Duffy, Helen, *The 'War on Terror' and the Framework of International Law*, Cambridge University Press, 2006.

Dupuy, Pierre-Marie, 'Implications of the Institutionalization of International Crimes of State', in Joseph H.H.Weiler, Antonio Cassese and Marina Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, Walter DeGruyter, Inc., 1989, 170–185.

– 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility', 10 *European Journal of International Law* (1999), 371–385.

– 'Quelques remarques sur l'évolution de la pratique des sanctions décidées par le Conseil de Sécurité des Nations Unies dans le cadre du Chapitre VII de la Charte', in Vera Gowlland-Debbas (ed.), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, 47–55.

– 'A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility', 13 *European Journal of International Law* (2002), 1053–1081.

– 'International Criminal Responsibility of the Individual and International Responsibility of the State', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. II, Chapter 26, 1085–1099.

– 'Quarante ans de codification du droit de la responsabilité internationale des Etats: Un bilan.', 107 *Revue Général de Droit International Public* (2003), 305–348.

– 'State Sponsors of Terrorism: Issues of International Responsibility', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 3–16.

Duyvesteyn, Isabelle, 'How New is New Terrorism?', 27 *Studies in Conflict & Terrorism* (2004), 439–454.

Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Books, 2003.

Eichenwald, Kurt, 'Terror Money Hard to Block, Officials Find', *New York Times*, 12 October 2001.

Enders, Walter and Todd Sandler, 'Is Transnational Terrorism Becoming More Threatening?', 44 *Journal of Conflict Resolution* (2000), 307–332.

Epps, Valerie, 'Abolishing the Political Offence Exception', in M.Cherif Bassiouni (ed.), *Legal Responses to International Terrorism*: *US Procedural Aspects*, Martinus Nijhoff Publishers, 1988, 203–217.

Eser, Albin, 'The Need for a General Part', in M.Cherif Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes Against the Peace and Security of Mankind*, Association Internationale de Droit Pénal, Érès, 1993, 43–52.

– 'Individual Criminal Responsibility', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, Vol. I, Chapter 20, 767–822.

Fairhurst, John, *Law of the European Union*, 5th Edn., Pearson Education, Ltd, 2006.

Fassbender, Bardo, *Targeted Sanctions and Due Process:* Study commissioned by the United Nations Office of Legal Affairs, Office of the Legal Counsel, 20 March 2006, available at http://www-un.org/law/counsel/info.htm. (last visited 18 June 2006).

Fenrick, W.J., 'Article 28: Responsibility of Commanders and Other Superiors', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 515–522.

Fife, Rolf Einar, 'The Legislative Response of the United Nations to Terrorism: Perspectives on Creative Forces and Sources of International Law', in Ole Kristian Fauchеld, Henning Jakhelln and Aslak Syse (eds.), *Festskrift til Carl August Fleischer. Dog Fred er ej det Bedste...* Universitetsforlaget, 2006, 151–172.

Fletcher, George P., *Basic Concepts of Criminal Law*, Oxford University Press, 1998.

– *Rethinking of Criminal Law*, 2nd edn., Oxford University Press, 2000.

– *Romantics at War: Glory and Guilt in the Age of Terrorism*, Princeton University Press, 2002.

– 'The Indefinable Concept of Terrorism', 4 *Journal of International Criminal Justice* (2006), 894–911.

Flory, Maurice, 'International law: An instrument to combat terrorism', in Rosalyn Higgins and Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 30–39.

Freeland, Charles, 'How Can Sound Customer Due Diligence Rules Help Prevent the Misuse of Financial Institutions in the Financing of Terrorism?', in Mark Pieth (ed.): *Financing Terrorism*, Kluwer Academic Publishers, 2002, 41–48.

Freestone, David, 'International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction', in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 50–67.

Frowein, Jochen Abr., 'The present state of research carried out by the English-speaking section of the Centre for Studies and Research', in Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism* 1988, Martinus Nijhoff Publishers, 1989, 55–96.

– 'Der Terrorismus als Herausforderung für das Völkerrecht', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 879–905.

Gaeta, Paola, 'On What Conditions Can a State Be Held Responsible for Genocide', 18 *European Journal of International Law* (2007), 631–648.

Gaja, Giorgio, 'In What Sense Was There an "Armed Attack"?', *European Journal of International Law,* EJIL forum 2001, available at http://www.ejil.org/forum_WTC/ny-gaja.html (last visited 28 March, 2004).

Gardella, Anna, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Cooperation', in Andrea Bianchi (ed.), *Enforcing International Legal Norms Against Terrorism*, Hart Publishing, 2004, 415–452.

Gasser, Hans-Peter, 'Interdiction des actes de terrorisme dans le droit humanitaire', 26 *International Review of the Red Cross* (1986), 200–212.

– 'Acts of Terror, "Terrorism" and International Humanitarian Law', 84 *International Review of the Red Cross* (2002), No. 847, 547–570.

Gattini, Andrea: 'Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility', 10 *European Journal of International Law* (1995), 397–404.

Gehr, Walter, 'Recurrent Issues', Briefing for Member States on 4 April, 2002, available at www.un.org/Docs/sc/committees/1373/rc.htm. (last visited 28 March 2003).

– 'Le Comité contre le terrorisme et la résolution 1373 (2001) du Conseil de Sécurité', *Actualité et Droit International*, Revue ADI 2003, 1-11, available at http://www.ridi.org/adi/articles/2003/200301geh.htm. (last visited 11 June 2007).

Gellately, Robert (ed.), *The Nuremberg Interviews: Conversations with the Defendants and Witnesses Conducted by Leon Goldensohn*, Pimlico, 2007.

Gioia, Andrea, 'The UN Conventions on the Prevention and Suppression of International Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 3–23.

Goldie, L.F.E., 'Low Intensity Conflict, Maritime Conflict and the Definition of Aggression', in John Norton Moore (ed.), *Deception and Deterrence in "Wars of National Liberation", State-Sponsored Terrorism, and Other Forms of Secret Warfare,* Carolina Academic Press, 1997, 171–194.

Goldstone, Richard, Crimes of War, December 7, 2001, http://www.crimesofwar.org/expert/al-goldstone.html. (last visited 15 May 2002).

Goldstone, Richard J. and Rebecca J. Hamilton, '*Bosnia v. Serbia*: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia', 21 *Leiden Journal of International Law* (2008), 95–112.

Gowland-Debbas, Vera, 'Security Council Enforcement Action and Issues of State Responsibility', 43 *International and Comparative Law Quarterly* (1994), 55–98.

– 'The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* case', 88 *American Journal of International Law* (1994), 643–677.

– 'Introduction', in Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, Kluwer Law International, 2001, 1–28.

Gowland-Debbas, Vera (ed.), *United Nations Sanctions and International Law*, Kluwer Law International, 2001.

Graefrath, Bernhard, 'Complicity in the Law of International Responsibility', 2 *Revue Belge de Droit International* (1996), 370–380.

Gray, Christine, *International Law and the Use of Force*, 2nd Edn, Oxford University Press, 2004.

Green, L.C., 'Superior Orders and Command Responsibility', XXVII *Canadian Yearbook of International Law* (1989), 163–202.

Gros Espiell, Héctor, 'International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 151–160.

Grosscup, Beau, *The Newest Explosions of Terrorism*, New Horizon Press, 1998.

Guillaume, Gilbert, 'Terrorisme et droit international', 215 *Recueil des Cours de l' Académie de Droit International* (1989), 287–416.

Gunaratna, Rohan, *Inside Al Qaeda: Global Network of Terror*, Rev. Edn., Berkley Publishing Group, 2003.

Gustafson, Katarina, 'The Requirement of an` Express Agreement' for Joint Criminal Enterprise Liability: A Critique of *Brđanin*', 5 *Journal of International Criminal Justice* (2007), 134–158.

Hafner, Gerhard, 'The Definition of the Crime of Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 33–43.

Halberstam, Malvina , 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety', 82 *American Journal of International Law* (1988), 269–310.

Happold, Matthew,' Security Council Resolution 1373 and the Constitution of the United Nations', 16 *Leiden Journal of International Law* (2003), 593–610.

Von Hebel, Herman, 'Developing Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 8–18.

Von Hebel, Herman and Darryl Robinson,' Crimes within the Jurisdiction of the Court', in Roy S. Lee (ed.), *The International Criminal Court: Issues, Negotiations, Results*, Kluwer Law International, 1999, 79–126.

Heikkilä, Mikaela, *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*, Research Report, Åbo Akademi University, 2001.

Heiskanen, Veijo, *International Legal Topics*, Lakimiesliiton Kustannus, 1992.

Hellmich, Christina and Amanda J. Redig, 'The Question is When: The Ideology of Al Qaeda and the Reality of Bioterrorism', 30 *Studies in Conflict & Terrorism* (2007), 375–396.

Henckaerts, Jean-Marie and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC and Cambridge University Press, 2005.

Henkin, Louis, 'The Reports of the Death of Article 2(4) are Greatly Exaggerated', 65 *American Journal of International Law* (1971), 544–548.

Van den Herik, Larissa and Nico Schrijver, 'Human Rights Concerns in Current Targeted Sanctions Regimes from the Perspective of International and European Law', in *Strengthening Targeted Sanctions Through Fair and Clear Procedures,* White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, available at http://www.watsoninstitute.org (last visited 22 July 2006).

Van den Herik, Larissa and Elies van Sliedregt, 'Ten Years Later, the Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of the Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes', 17 *Leiden Journal of International Law* (2004), 537–557.

Higgins, Rosalyn, 'Conceptual Thinking About the Individual in International Law', in Richard Falk, Friedrich Kratochwil, and Saul H. Mendlovitz (eds.), *International Law: A Contemporary Perspective*, Westview Press, 1985, 476–494.

– *Problems and Process*, *International Law and How We Use It*, Oxford University Press, 1994.

– 'The General International Law of Terrorism', in Higgins and Maurice Flory (eds.), *Terrorism and International Law,* Routledge, 1996, 13–29.

Hmoud, Mahmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention', 4 *Journal of International Criminal Justice* (2006), 1031–1043.

Hobsbawm, Eric, *Globalisation, Democracy and Terrorism*, Little, Brown Book Group, 2007.

Hoffman, Bruce, *Inside Terrorism*, Columbia University Press, 1998.

De Hoogh, André J.J., 'Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the *Tadić* Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia', 22 *British Yearbook of International Law* (2001), 255–292.

Hossain, Kamrul, *Limits to Power? Legal and Institutional Control over the Competence of the United Nations Security Council under Chapter VII of the Charter*, Acta Universitatis Lapponiensis 119, University of Lapland Printing Center, 2007.

Husabø, Erling Johannes, 'Strafferetten og kampen mot terrorismen', 91 *Nordisk Tidsskrift for Kriminalvidenskab* (2004), 180–193.

Härkönen, Henrik, 'Terroristiryhmän oikeudellinen sääntely', *Lakimies* (2006), 216–235.

Jackson, Brian A., 'Groups, Networks, or Movements: A Command-and-Control-Driven Approach to Classifying Terrorist Organizations and Its Application to Al Qaeda', 29 *Studies in Conflict & Terrorism* (2006), 241–262.

Jacobsson, Marie, 'Vart är folkrätten på väg?', *Internationella Studier* 3: 2003, 21–31.

– 'Maritime Security: an Individual or a Collective Responsibility', in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus Nijhoff, 2003, 391–412.

Jennings, Sir Robert and Sir Arthur Watts (eds.), *Oppenheim's International Law*, Vol. I Peace, Introduction and Part 1, 9th Edn., Longman,1992.

Jinks, Derek, 'State Responsibility for the Acts of Private Armed Groups', 4 *Chicago Journal of International Law* (2003), 83–95.

Johnson, Larry D., 'Closing An International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity', 99 *American Journal of International Law* (2005), 158–174.

Johnstone, Ian, 'Security Council Deliberations: The Power of the Better Argument', 14 *European Journal of International Law* (2003), 437–480.

De Jonge Oudraat, Chantal, 'The Role of the Security Council', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 151–172.

Jurovics, Yann, 'Les controverses sur la question de la qualification du terrorisme: crime de droit commun, crime de guerre ou crime contre l'humanité?', in Karine Bannelier, Théodore Christakis, Olivier Corten and Barbara Delcourt (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 95–104.

Kamenov, Tihomir, 'The Origin of State and Entity Responsibility for Violation of International Humanitarian Law in Armed Conflicts', in Frits Kalshoven and Yves Sandoz (eds.), *Implementation of International Humanitarian Law*, Research papers by participants in the 1988 session of the Centre for Studies and Research in International Law and International Relations at the Hague Academy of International Law, Martinus Nijhoff Publishers, 1989, 169–227.

Kantor, Mark, 'Effective Enforcement of International Obligations to Suppress the Financing of Terrorism', American Society of International Law, Task Force on Terrorism, September 2002, available at http://vvv.asil.org. (last visited 18 November 2002).

Keith, Kirsten M.F., 'The *Mens Rea* of Superior Responsibility as Developed by ICTY Jurisprudence', 14 *Leiden Journal of International Law* (2001), 617–634.

Kelsen, Hans, 'Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?', 1 *International Law Quarterly*, (1947), 153–171.

Kelt, Maria and Herman von Hebel, 'General Principles of Criminal Law and the Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 19–40.

– 'What Are Elements of Crimes', in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 13–18.

Keohane, Robert O.,' The Globalization of Informal Violence, Theories of World Politics, and the "Liberalism of Fear"', *International Organization* (2002), 29–43.

Kersten, Armand, 'Financing Terrorism – A Predicate Offence to Money Laundering?', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 49–56.

Khan, Ali, 'A Legal Theory of International Terrorism', 19 *Connecticut Law Review* (1987), 945–972.

Kimpimäki, Minna, *Universaaliperiaate kansainvälisessä rikosoikeudessa*, Gummerus Kirjapaino Oy, 2005.

King Jr., Henry T., 'Robert H. Jackson and the Triumph of Justice at Nüremberg', 35 *Case Western Reserve Journal of International Law* (2003), 263–272.

Kirby, Aidan, 'The London Bombers as 'Self-starters': A Case Study in Indigenous Radicalisation and the Emergence of Autonomous Cliques', 30 *Studies in Conflict & Terrorism* (2007), 415–428.

Klabbers, Jan, 'Rebel with a Cause? Terrorists and Humanitarian Law', 14 *European Journal of International Law* (2003), 299–312.

Kolb, Robert, 'The Exercise of Criminal Jurisdiction over International Terrorists', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 227–281.

Koskenniemi, Martti, 'The Police in the Temple: Order, Justice and the UN: a Dialectical View', 6 *European Journal of International Law* (1995), 325–348.

– 'Evil intentions or vicious acts? What is prima facie evidence of genocide?', in Matti Tupamäki (ed.), *Liber Amicorum Bengt Broms celebrating his 70th birthday 16 October 1999*, Finnish Branch of the International Law Association, 1999, 180–207.

– 'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law', 65 *The Modern Law Review* (2002), 159–175.

–' Between Impunity and show trials', ICC, Guest Lecture Series of the Office of the Prosecutor, 5 August 2004, http://www.icc-cpi.int (last visited 22 November 2005).

– 'Solidarity Measures: State Responsibility as a New International Order?', 22 *British Yearbook of International Law* (2001), 337–356.

– *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.* Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, The Erik Castrén Institute Research Reports 21/2007, Hakapaino, 2007.

Koskenniemi,Martti and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002), 553–579.

Kratochwil, Friedrich, *Rules, Norms and Decisions*, Cambridge University Press, 1989.

Kress, Claus *Gewaltverbot und Selbstverteidigungsrecht nach der Satzung der Vereinten Nationen bei staatlicher Verwicklung in Gewaltakte Privater*, Schriften zum Völkerrecht, Bd. 116, Duncker & Humblot, 1995.

– 'L'organe de facto en droit international public. Reflexions sur l'imputation à l'Etat de l'acte d'un particulier à la lumière des développements recents', in CV *Revue Générale de Droit International Public* (2001), 93–143.

– ' The International Court of Justice and the Elements of Genocide', 18 *European Journal of International Law* (2007), 619–629.

Laborde, Jean-Paul, 'The United Nations and the Fight against Terrorism: Legal and Criminal Aspects', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 68–71.

Laborde, Jean-Paul and Michael De Feo, 'Problems and Prospects of Implementing UN Action against Terrorism', 4 *Journal of International Criminal Justice* (2006), 1087–1103.

Lambert, Joseph, *Terrorism and Hostages in International Law: A Commentary on the 1979 Hostages Convention*, Grotius Publishers Ltd, 1990.

Lavalle, Roberto, 'The International Convention for the Suppression of the Financing of Terrorism', 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000), 491–510.

Laqueur, Walter, 'Selbstmordattentäter', 31 *Europäische Rundschau* (2003), No.1, 123–127.

Leavitt, Noah, 'Could a "Material Support" Treaty Reduce Suicide Bombings?', http://writ.findlaw.com/commentary/20030826_leavitt.html (last visited 23 September, 2003).

Lee, Roy S., 'Introduction: The Rome Conference and its Contribution to International Law', in Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 1–39.

Lehto, Marja, 'Terrorism in International Law – an Empty Box or Pandora's Box?', in Jarna Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus Nijhoff, 2003, 290–313.

– 'Achille Laurosta Al Qaidaan – merenkulun terrorismisopimuksen muutokset', in Timo Koivurova (ed.), *Kansainvälistyvä oikeus: Juhlakirja Professori Kari Hakapää*, Lapin yliopiston oikeustieteellisiä julkaisuja C 41, Lapin yliopistopaino 2005, 285–305.

Lepage, Corinne, 'Terrorism and Weapons of Mass Destruction', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 24–27.

Levi, Michael and William Gilmore, 'Terrorist Finance, Money Laundering and the Rise and Rise of Mutual Evaluation: A New Paradigm for Crime Control?', in Mark Pieth (ed.): *Financing Terrorism*, Kluwer Academic Publishers, 2002, 87–114.

Lietzau, William K., 'Combating Terrorism: Law Enforcement or War', in *Terrorism and International Law: Challenges and Responses,* Contributions presented at the Meeting of independent experts organized by the International Institute of Humanitarian Law, San Remo, 30 May – 1 June 2002 and the Seminar on IHL and Terrorism organized by the International Institute of Humanitarian Law in cooperation with the George C. Marshall Center, San Remo 24–26 September, 2002, International Institute of Humanitarian Law, 2003, 75–84.

– 'The Role of Military Force in Foreign Relations, Humanitarian Intervention and the Security Council', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004), 281–304.

Lillich, Richard B. and John M. Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities', 26 *The American University Law Review* (1977), 217–313.

Lim, C.L., 'The Question of a Generic Definition of Terrorism Under General International Law', in Victor V. Ramraj, Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005, 37–64.

Lindstedt, Jukka, 'Vilket är förhållandet mellan EU:s rambeslut om bekämpande av terrorism och de grundläggande fri- och rättigheterna', *Tidskrift utgiven av Juridiska Föreningen i Finland* (2002), 436–449.

– 'Terrorismipuitepäätös ja suomalaiset terrorismia koskevat rangaistussäännökset', *Rikosoikeudellisia kirjoituksia VIII*, Raimo Lahdelle 12.1.2006 omistettu, Suomalaisen lakimiesyhdistyksen julkaisuja A-sarja N:o 268, 2006, 231–250.

Mahmoudi, Said, 'Self-Defence and International Terrorism', in Ove Bring – Said Mahmoudi, *Internationell våldsanvändning och folkrätt*, Norstedts Juridik, 2006, 167–180.

Malekian, Farhad, 'International Criminal Responsibility', in M. Cherif Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, Inc., 1999, 151–221.

Mani, Rama, 'The Root Causes of Terrorism and Conflict Prevention', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 219–241.

Marschik, Axel,' The Security Council's Role: Problems and Prospects in the Fight Against Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 69–80.

Mayer, Jean-François, 'Terrorism and Religion: Continuity and Change in Political Violence', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 24–27.

McAuliffe de Guzman, Margaret, 'Article 21: Applicable Law ', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 435–446.

McWhinney, Edward, *The September 11 Terrorist Attacks and the Invasion of Iraq in Contemporary International Law*, Martinus Nijhoff Publishers, Nijhoff Law Specials Vol. 61, 2004.

Mégret, Frédéric, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project', XII *Finnish Yearbook of International Law* (2001), 193–247.

– '"War"? Legal Semantics and the Move to Violence', 13 *European Journal of International Law* (2002), 361–400.

–' Justice in Times of Violence', 14 *European Journal of International Law* (2003), 327–345.

Meron, Theodor, 'The Time Has Come for the United States to Ratify Geneva Protocol I', 88 *American Journal of International Law* (1994), 678–686.

– 'Is International Law Moving Towards Criminalization?', 9 *European Journal of International Law* (1998), 18–31.

– 'Classification of Armed Conflict in the Former Yugoslavia; *Nicaragua*'s Fallout', 92 *American Journal of International Law* (1998), 236–242.

Mettraux, Guénaël, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', 43 *Harvard Journal of International Law* (2002), 237–316.

– *International Crimes and the Ad Hoc Tribunals*, Oxford University Press, 2005.

Milanović, Marko, 'State Responsibility for Genocide', 17 *European Journal of International Law* (2006), 553–604.

– 'State Responsibility for Genocide: A Follow-Up', 18 *European Journal of International Law* (2007), 669–694.

Miller, Martin A., 'The Intellectual Origins of Modern Terrorism in Europe', in Martha Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995, 27–62.

Moore, John Norton, 'Low Intensity Conflict and the International Legal System', in Moore (ed.), *Deception and Deterrence in "Wars of National Liberation", State-sponsored Terrorism, and Other Forms of Secret Warfare,* Carolina Academic Press, 1997, 135–162.

Morris, Madeline, 'Arresting Terrorism: Criminal Jurisdiction and International Relations', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 63–79.

Mundis, Daryl A., 'Prosecuting International Terrorists', in *Terrorism and International Law: Challenges and Responses,* Contributions presented at the Meeting of independent experts organized by the International Institute of Humanitarian Law, San Remo, 30 May – 1 June 2002 and the Seminar on IHL and Terrorism organized by the International Institute of Humanitarian Law in cooperation with the George C. Marshall Center, San Remo 24–26 September, 2002, International Institute of Humanitarian Law, 2003, 85–95.

– 'The Judicial Effects of the "Completion Strategies" on the *Ad Hoc* International Criminal Tribunals', in 99 *American Journal of International Law* (2005), 142–158.

Naylor, R.T., 'Predators, Parasites, or Free-Market Pioneers: Reflections on the Nature and Analysis of Profit-Driven Crime', in Margaret E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, 2003, 35–53.

– 'Follow-the-Money Methods in Crime Control Policy', in Margaret E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, University of Toronto Press, 2003, 256–290.

Neubacher, Frank, 'How Can it Happen that Horrendous State Crimes are Perpetrated?', 4 *Journal of International Criminal Justice* (2006), 787–799.

Nollkaemper, André, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', 52 *International and Comparative Law Quarterly* (2003), 615–640.

Nuotio, Kimmo, 'Transforming International Law and Obligations into Finnish Criminal Legislation – Dragon's Eggs and Criminal Law Irritants', X *Finnish Yearbook of International Law* (1999), 325–350.

– 'Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law', 4 *Journal of International Criminal Justice* (2006), 998–1016.

Nystuen, Gro, 'Terrorbekjempelse og folkerettslige normkonflikter', *Mennesker & Rettigheter* (2002), 3–31.

Ohlin, Jens David, 'Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise', 5 *Journal of International Criminal Justice* (2007), 6–90.

Ostfield, Marc L., 'Bioterrorism as a Foreign Policy Issue', XXIV *SAIS Review of International Affairs* (2004), 1–15.

Ottenhof, Reynaud, 'A Criminological and Victimological Approach to Terrorism', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 349–357.

Pejić, Jelena, 'Terrorist Acts and Groups: A Role for International Law?', in 75 *British Yearbook of International Law* (2004), 71–100.

Pellet, Alain, 'Can a State Commit a Crime? Definitely, Yes!', 10 *European Journal of International Law* (1999), 425–434.

– 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime.', XXXII *Netherlands Yearbook of International Law* (2001), 55–79.

– 'No, This is not War!', European Journal of International Law Forum, available at http://www.ejil.org/forum_WTC/ny-pellet.html (last visited 30 November 2002).

– 'The Responsibility of Government Leaders for International Crimes of the State', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 289–297.

Petman, Jarna, 'The Problem of Evil and International Law', in Petman and Jan Klabbers (eds.), *Nordic Cosmopolitanism – Essays in International Law for Martti Koskenniemi*, Martinus Nijhoff, 2003, 111–140.

Piacente, Nicola, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *Journal of International Criminal Justice* (2004), 446–454.

Pieth, Mark, 'Editorial: The Financing of Terrorism – Criminal and Regulatory Reform', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 1–3.

– 'Criminalizing the Financing of Terrorism', 5 *Journal of International Criminal Justice* (2006), 1074–1086.

Pieth, Mark (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002.

Pisillo-Mazzeschi, Riccardo, 'The Due Diligence Rule and the Nature of International Responsibility of States', 35 *German Yearbook of International Law* (1992), 9–51.

Plachta, Michael, 'The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*', 12 *European Journal of International Law* (2001), 125–140.

Plant, Glen, 'Legal Aspects of Terrorism at Sea', in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, 1996, 68–96.

Del Ponte, Carla, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', 2 *Journal of International Criminal Justice* (2004), 516–519.

Powles, Steven, 'Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?', 2 *Journal of International Criminal Justice* (2004), 606–619.

Porras, Ileana M., 'On Terrorism: Reflections on Violence and the Outlaw', 19 *Utah Law Review* (1994), 119–146.

Pritchard, R. John, 'The International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia', in M. Cherif Bassiouni, *International Criminal Law*, Vol. 3, *Enforcement*, 2nd Edn., Transnational Publishers, Inc., 1999, 109–169.

Punja, Rajiv K., *Issue: What is the Distinction Between "Joint criminal Enterprise" as Defined by the ICTY Case Law and Conspiracy in Common Law Jurisdictions?* Memorandum for the Office of the Prosecutor of the ICTR, Case Western University School of Law International War Crimes Research Lab, 2003.

Radicati di Brozolo, Luca G. and Mauro Megliani, 'Freezing the Assets of International Terrorist Organisations', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 377–413.

Ramraj,Victor V., Michael Hor and Kent Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge University Press, 2005.

Randelzhöfer, Albrecht,' Article 51', in Bruno Simma (ed.), *The Charter of the United Nation: A Commentary*, 2nd Edn., Vol. 1, Oxford University Press, 2002, 788–806.

Rao, Pemmaraju Sreenivasa, 'International Crimes and State Responsibility', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 63–80.

Ratner, Stephen, '*Jus ad bellum* and *jus in bello* after September 11', 96 *American Journal of International Law* (2002), 905–921.

Reid, Natalie, 'Bridging the Conceptual Chasm: Superior Responsibility as the Missing Link between State and Individual Responsibility under International Law', 18 *Leiden Journal of International Law* (2005), 795–828.

Reinisch, August, 'Developing Human Rights and Humanitarian Law Accountability of the Security Council for the Imposition of Sanctions', 95 *American Journal of International Law* (2001), 851–872.

– 'The Action of the European Union to Combat International Terrorism', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 119–162.

Richard, Jean-François, 'The State of the Islamist Threat', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 46–50.

Rigaux, François, 'International Responsibility and the Principle of Causality', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 81–91.

Robinson, Patrick, 'The Missing Crimes', in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002,Vol. I, Chapter 11.7., 497–525.

Ronzitti, Natalino, 'The Law of the Sea and the Use of Force Against Terrorist Activities', in Ronzitti (ed.), *Maritime Terrorism and International Law*, Martinus Nijhoff Publishers, 1990, 1–14.

Rosand, Eric, 'Security Council Resolution 1373, the Counter-terrorism Committee and the Fight against Terrorism', 97 *American Journal of International Law* (2003), 333–341.

– 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative?', 28 *Fordham International Law Journal* (2005), 542–590.

– 'Resolution 1373 and the CTC: The Security Council's Capacity-building', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 81-88.

Ruperez, Javier, 'The UN's fight against terrorism: five years after 9/11', available at http://un.org/terrorism/ruperez-article.html (last visited 15 August 2007).

Roucounas Emmanuel, 'Non-State Actors: Areas of International Responsibility in Need of Further Exploration', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 391–404.

Röling, B.V.A. and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger*, Polity Press, 1993.

Saland, Per, 'International Criminal Law Principles', in Roy S. Lee (ed.), *The International Criminal Court: Issues, Negotiations, Results*, Kluwer Law International, 1999, 189–216.

Salcedo, Juan Antonio Carrillo, 'Bilan de recherches de la section de la langue française du Centre d'étude et de recherche de l'Académie', in Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism*, Martinus Nijhoff Publishers, 19–53.

Sands, Philippe, *Lawless World: Making and Breaking Global Rules*, Penguin Books, 2006.

Sandoz, Yves , Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC and Martinus Nijhoff Publishers, 1987.

Santori, Valeria, 'The UN Security Council's (Broad) Interpretation of the Notion of the Threat to Peace in Counter-Terrorism', in Giuseppe Nesi (ed.), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006, 89-111.

Sassòli, Marco,' State Responsibility for Violation of International Humanitarian Law', 84 *International Revue of the Red Cross* (2002), No. 846, 401–433.

Sassòli, Marco and Laura M. Olson, 'New Horizons for International Humanitarian and Criminal Law?', 81 *International Review of the Red Cross* (1999), No. 839, 733–769.

– '*Prosecutor v. Tadić* (Judgement), Case No. IT-94-1-A, 38 ILM 1518 (1999). International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, July 15, 1999', 94 *American Journal of International Law* (2000), 571–578.

Saul, Ben, 'International Terrorism as a European Crime: The Policy Rationale for Criminalization', 11 *European Journal of Crime, Criminal Law and Criminal Justice* (2003), 323–349.

– 'Definition of "Terrorism" in the UN Security Council: 1985-2004', 4 *Chinese Journal of International Law* (2005), 141–166.

– *Defining Terrorism in International Law*, Oxford University Press, 2006.

– 'The Legal Response of the League of Nations to Terrorism', 4 *Journal of International Criminal Justice* (2006), 78–102.

Schabas, William A, 'Article 6, Genocide', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Nomos Verlagsgesellschaft, 1999, 107–116.

– *Genocide in International Law. The Crime of Crimes*, Cambridge University Press, 2000.

– 'Enforcing International Humanitarian Law: Catching the Accomplices', 83 *International Review of the Red Cross* (2001), No. 842, 439–459.

– '*Mens Rea* and the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* (2003), 1015–1036.

– *An Introduction to the International Criminal Court*, 2nd Edn., Cambridge University Press, 2004.

Schabas, William A. and Clémentine Olivier, 'The State of Anti-Terrorist Legislation in the Other Member States', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 219–237.

– 'Is Terrorism a Crime against Humanity?', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 270–276.

Scharf, Michael P., 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects', 36 *Case Western Reserve Journal of International Law* (2004), 359–374.

Scheinin, Martin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc.E/CN.4/2006/98, 28 December 2005.

Schmid, Alex P., *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature*, with a bibliography by the author and a world directory of "Terrorist" organizations by A.J. Jongman, North Holland Publishing Company and Transaction Books, 1984.

– *The Definition of Terrorism*, A Study in compliance with CTL/9/91/2207 for the U.N. Crime Prevention and Criminal Justice Branch, December 1992.

– 'Terrorism – the Definitional Problem', in 36 *Case Western Reserve Journal of International Law* (2004), 375–419.

– 'Why Terrorism? Root Causes, Some Empirical Findings, and the Case of 9/11', presentation at the International Conference 'Why terrorism' addressing the conditions conducive to terrorism organized by the Council of Europe on 25-26 April, 2007, available at http://www.coe.int/t/e/legal_affairs/legal_cooperation/fight_against_terrorism/8_conference (last visited 30 September 2007).

Schmitt, Michael N., 'Deconstructing October 7th: A Case Study in the Lawfulness of Counterterrorist Military Operations', in *Terrorism and International Law: Challenges and Responses,* Contributions presented at the Meeting of independent experts organized by the International Institute of Humanitarian Law, San Remo, 30 May–1 June 2002 and the Seminar on IHL and Terrorism organized by the International Institute of Humanitarian Law in cooperation with the George C. Marshall Center, San Remo 24–26 September, 2002, International Institute of Humanitarian Law, 2003, 9–39.

– 'Concluding Summary: Terrorism and International Law', in *Terrorism and International Law: Challenges and Responses,* Contributions presented at the Meeting of independent experts organized by the International Institute of Humanitarian Law, San Remo, 30 May – 1 June 2002 and the Seminar on IHL and Terrorism organized by the International Institute of Humanitarian Law in cooperation with the George C. Marshall Center, San Remo 24–26 September, International Institute of Humanitarian Law, 2003, 163–172.

Schrijver, Nico, 'Responding to International Terrorism. Moving Frontiers of International Law for "Enduring Freedom"', *Netherlands International Law Review* (2001), 271–291.

– 'September 11 and Challenges to International Law', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN Before and After September 11*, Indiana University Press, 2004, 55–73.

Schöndorff, Roy S., 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', 37 *International Law and Politics* (2004), 1–52.

Serrano, Monica, 'The Political Economy of Terrorism', in Jane Boulden and Thomas G. Weiss (eds.), *Terrorism and the UN: Before and After September 11*, Indiana University Press, 2004, 198–218.

Shahabuddeen, Mohamed, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', 2 *Journal of International Criminal Justice* (2004), 999–1006.

Shearer, I.A., *Starke's International Law*. 11th Edn., Butterworths, 1994.

Sicilianos, Linos-Alexander, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility', 13 *European Journal of International Law* (2002), 1127–1145.

Sieber, Ulrich, *Cyberterrorism and Other Use of the Internet for Terrorist Purposes*. Threat Analysis and Evaluation of International Conventions. Expert Report prepared for the Council of Europe, 2 April 2007, reproduced in *Cyberterrorism - The use of the Internet for terrorist purposes*, Council of Europe Publications, 2008.

Slaughter, Anne-Marie and William Burke-White, 'An International Constitutional Moment', 43 *Harvard Journal of International Law* (2002), No. 1, 1–22.

Van Sliedregt, Elies, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, T.M.C. Asser Press, 2003.

– 'Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide', 5 *Journal of International Criminal Justice* (2007), 184–207.

Sorel, Jean-Marc, 'Existe-t-il une définition universelle du terrorisme?', in Karine Bannelier, Théodore Christakis, Olivier Corten, and Barbara Delcourt (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 35–68.

– 'L'épilogue des affaires dites de Lockerbie devant la C.I.J.: le temps du soulagement et le temps des regrets', 107 *Revue Générale du Droit International Public* (2003), 933–944.

– 'Some Questions About the Definition of Terrorism and the Fight Against Its Financing', 14 *European Journal of International Law* (2003), 365–378.

Sossai, Mirko, 'The Internal Conflict in Colombia and the Fight against Terrorism: UN Security Council Resolution 1465(2003) and Further Developments', 3 *Journal of International Criminal Law* (2005), 243–252.

Spinedi, Marina, 'State Responsibility v. Individual Responsibility for International Crimes: *Tertium non Datur*?', 13 *European Journal of International Law* (2002), 895–899.

Stahn, Carsten, 'International Law at a Crossroads? The Impact of September 11', 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2002), 183–255.

– 'The Ambiguities of Security Council Resolution 1422(2002)', 13 *European Journal of International Law* (2003), 85–104.

– '"*Nicaragua* is dead, long live *Nicaragua*" – the Right to Self-defence under Art. 51 UN Charter and International Terrorism', in Christian Walter, Silja Vöneky, Volker Röben, Frank Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer Verlag, 2004, 827–878.

Stenhammar, Fredrik, 'UN Smart Sanctions. Political Reality and International Law', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 145–175.

Stenvall, Maija, 'An Actor or an Undefined Threat? The Role of "Terrorist" in the Discourse of International News Agencies', 2 *Journal of Language and Politics* (2003), 361–403.

Stone, Julius, *Conflict Through Consensus: United Nations Approaches to Aggression*, The John Hopkins University Press, 1977.

– 'Hopes and Loopholes in the 1974 Definition of Aggression', 71 *American Journal of International Law* (1977), 224–246.

Sunga, Lyal S., 'The Crimes within the Jurisdiction of the International Criminal Court (Part II, Article 5–10)', 6 *European Journal of Crime, Criminal Law and Criminal Justice* (1998), 377–399.

Sur, Serge, 'La résolution 1540 du conseil de sécurité (28 avril 2004): entre la proliferation des armes de destruction massive, le terrorisme et les acteurs non étatiques', 103 *Revue Générale du Droit International Public* (2004), 855–882.

Svanberg-Torpman, Katinka , 'The Security Council as a Law Enforcer and Legislator', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security. Current Challenges in International Law*, Studentlitteratur, 2004, 85–144.

Szasz, Paul C., 'The Security Council Starts Legislating', 96 *American Journal of International Law* (2002), 901–905.

Szurek, Sandra, 'Le jugement des auteurs d'actes de terrorisme: quels tribunaux après le 11 septembre?', in Karine Bannelier, Théodore Christakis, Olivier Corten, and Barbara Delcourt (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 297–319.

– 'La lutte internationale contre le terrorisme sous l'empire du chapitre VII: un laboratoire normatif', 111 *Revue Générale du Droit International Public* (2005), 5–49.

Tadros, Victor, *Criminal Responsibility*, Oxford University Press, 2007.

Tallgren, Immi, *A Study of the 'International Criminal Justice System' – What Everybody Knows?*, Yliopistopaino, 2001.

– 'The Sensibility and Sense of International Criminal Law', 13 *European Journal of International Law* (2002), 561–595.

– 'We did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court', 12 *Leiden Journal of International Law* (1999), 683–707.

– 'La Grande Illusion', XV *Canadian Journal of Law and Jurisprudence* (2002), 297-316.

Talmon, Stefan, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005), 175–193.

– 'Responsibility of International Organizations: Does the European Community Require Special Treatment?', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 405–421.

Tams, Christian J., 'Light Treatment of a Complex Problem: The Law of Self-Defence in the Wall Case', 16 *European Journal of International Law* (2005), 963–978.

Taylor, Guy, 'Algeria Bombings Contain Clues About Al-Qaida's Current, Future Strength', *World Politics Review*, 20 April 2007.

Thomas, Isabelle, 'La mise en oeuvre en droit européen des dispositions internationales de lutte contre le terrorisme', 108 *Revue Générale du Droit International Public* (2004), 463–486.

Timmermann, Wibke Kristin, 'The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?', 18 *Leiden Journal of International Law* (2005), 258–282.

Tomuschat, Christian, 'Obligations Arising for States Without or Against Their Will', 241 *Recueil des Cours de l' Académie de Droit International* (1993), 195–374.

– 'Report on the Possible "Added Value" of a Comprehensive Convention on Terrorism', Council of Europe, CODEXTER (2004)05, reprinted in 26 *Human Rights Law Journal* (2005), 287–306.

– 'The Legacy of Nuremberg', 4 *Journal of International Criminal Justice* (2006), 830–844.

Tournaye, Cécile, 'The Contribution of Ad Hoc International Tribunals to the Prosecution of Terrorism', in Ghislaine Doucet (ed.), *Terrorism, Victims and International Criminal Responsibility*, SOS Attentats, 2003, 298–308.

Travalio, Gregory M., 'Terrorism, International Law, and the Use of Military Force', 18 *Wisconsin Journal of International Law* (2000), 145–192.

Treves, Tullio, 'The Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation', in Natalino Ronzitti (ed.), *Maritime Terrorism and International Law*, Martinus Nijhoff Publishers, 1990, 69–90.

Triffterer, Otto, 'General Report, Part I: Efforts to Recognize and Codify International Crimes', Actes du Colloque préparatoire tenu à Hammamet, Tunisie 6–8 juin 1987, 60 *International Revue of Penal Law* (1989), 31–54.

– 'The Preventive and the Repressive Function of the International Criminal Court', in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court*, Ashgate, 2001, 137–175.

– 'Genocide, Its Particular Intent to Destroy in Whole or in Part the Group as Such', 14 *Leiden Journal of International Law* (2001), 399–408.

Trindade, António Augusto Cançado, 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 253–269.

Turner, Robert F., 'State Sovereignty, International Law, and the Use of Force in Countering Low-Intensity Aggression in the Modern World', in John Norton Moore (ed.), *Deception and Deterrence in "Wars of National Liberation", State-Sponsored Terrorism, and Other Forms of Secret Warfare,* Carolina Academic Press, 1997, 195–257.

Wagner, Natalie, 'The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia', 85 *International Review of the Red Cross* (2003), No. 850, 351–383.

Walter, Christian, 'Defining Terrorism in National and International Law', in Walter, Silja Vöneky, Volker Röben and Frank Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer Verlag, 2004, 23–44.

Wassgren, Hans, 'State Responsibility for Violations of International Humanitarian Law', in Matti Tupamäki (ed.), *Finnish Branch of International Law Association 1946–1996: Essays on International Law*, ILA, Finnish Branch, 1998, 303–325.

Wattad, Mohammed Saif-Alden, 'Is Terrorism a Crime or an Aggravating Factor in Sentencing?', 4 *Journal of International Criminal Justice* (2006), 1017–1030.

Watts, Sir Arthur, 'Nürnberg Principles. Introductory Note', in Watts, *The International Law Commission 1949–1958*, Vol. III: Final Draft Articles and Other Materials, Oxford University Press 1999, 1657–1658.

– 'The Importance of International Law', in Michael Byers (ed.), *The Role of Law in International Politics*, Oxford University Press, 2000, 5–16.

Wedgwood, Ruth, 'Countering Catastrophic Terrorism: An American View', in Andrea Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, 2004, 103–117.

Weigend, Thomas, 'The Universal Terrorist: The International Community Grappling with a Definition', 4 *Journal of International Criminal Justice* (2006), 912–932.

Wendt, Alexander, *Social Theory of International Politics*, Cambridge University Press, 1999.

Werle, Gerhard, *Völkerstrafrecht*, Mohr Siebeck, 2003.

Werle, Gerhard and Florian Jessberger, '' Unless Otherwise Provided': Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law', 3 *Journal of International Criminal Justice* (2005), 35–55.

Weyembergh, Anne, 'La Coopération pénale européenne face au terrorisme: rupture ou continuité?', in Karine Bannelier, Théodore Christakis, Olivier Corten and Barbara Delcourt (eds.), *Le droit international face au terrorisme*, Editions Pédone, 2002, 279–295.

Wieviorka, Michel, 'Terrorism in the Context of Academic Research', in Martha Crenshaw (ed.), *Terrorism in Context*, The Pennsylvania State University Press, 1995, 697–606.

Van der Wilt, Harmen, 'Joint Criminal Enterprise: Possibilities and Limitations', 5 *Journal of International Criminal Justice* (2007), 91–108.

Winer, Jonathan M., 'Globalization, Terrorist Finance, and Global Conflict – Time for a White List?', in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 5–40.

Wirth, Steffen,' Immunity for Core Crimes? The ICJ's Judgement in the Congo v. Belgium Case', 13 *European Journal of International Law* (2002), 877–894.

Wolf, Joachim, 'Zurechnungsfragen bei Handlungen von Privatpersonen', 45 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1985), 232–264.

Wolfrum, Rüdiger, 'The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?', 7 *Max Planck Yearbook of United Nations Law* (2003), 1–70.

– 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 423–434.

Wolfrum, Rüdiger and Christine E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law', 6 *Max Planck Yearbook of United Nations Law* (2002), 559–597.

Wu, Timothy and Yong-Sung (Jonathan) Kang, 'Criminal Liability for the Actions of Subordinates – the Doctrine of Command Responsibility and its Analogues in United States Law', 38 *Harvard International Law Journal* (1997), 272–297.

Wyler, Eric, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"', 13 *European Journal of International Law* (2002), 1147–1160.

Van den Wyngaert, Christine, 'Transformation of International Criminal Law in Response to the Challenge of Organized Crime', General Report, 70 *International Revue of Penal Law* (1999), 133–221.

Zacklin, Ralph, 'Some Major Problems in the Drafting of the ICTY Statute', 2 *Journal of International Criminal Justice* (2004), 360–367.

Zahar, Alexander, 'Command Responsibility of Civilian Superiors for Genocide', 14 *Leiden Journal of International Law* (2001), 591–616.

Zappala, Salvatore, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation', 12 *European Journal of International Law* (2001), 595–612.

Zemanek, Karl, 'Does the Prospect of Incurring Responsibility Improve the Observance of Law?', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*, Martinus Nijhoff Publishers, 2005, 125–134.

Österdahl, Inger, *Threat to the Peace: The interpretation by the Security Council of article 39 of the UN Charter*, Iustus Förlag, 1998.

– 'The Continued Relevance of Collective Security under the UN: The Council, Regional Organizations and the General Assembly', X *Finnish Yearbook of International Law* (1999), 103–140.

– 'The International Criminal Court and Collective Security', in Diana Amnéus and Katinka Svanberg-Torpman (eds.), *Peace and Security, Current Challenges in International Law*, Studentlitteratur, 2004, 291–326.

II Reports and Documents

Reports

International Law Association, *Report of the Committee on International Terrorism*, Report of the 59th Conference, Montreal, 1982.

The Commission of Inquiry into the events at the refugee camps in Beirut, *Final Report* 1983 (Kahan Commission Report), XXII ILM (1983), 473–520.

Resolution No. 7 /1984, 'International Terrorism', International Law Association, Report of the 61st Conference, Paris, 1984.

Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations, *The Legal Aspects of International Terrorism*, Martinus Nijhoff Publishers, 1989.

BBC News Report on the Statues of Bamiyan, 11 March, 2001, available at http://news.bbc.co.uk/1/hi/world/south_asia/1198379.stm. (last visited 31 July 2007).

International Crisis Group, 'Bin Laden and the Balkans: The Politics of Anti-Terrorism', ICG Balkans Report No. 119, 9 November 2001.

U.S. Department of State, *Patterns of Global Terrorism* 2001, Department of State Publication 10940, 2002.

International Crisis Group, 'Indonesia Background: How the Jemaah Islamiya Terrorist Network Operates', ICG Asia Report No. 43, 11 November 2002.

International Bar Association, *International Terrorism: Legal Challenges and Responses*. A report by the IBA Task Force on International Terrorism, 2003.

International Crisis Group, 'Yemen: Coping with Terrorism and Violence in a Fragile State', ICG Middle East Report No. 8, 8 January 2003.

Historical Review of Developments Relating to Aggression, United Nations, 2003.

The Fight against Terrorism: Council of Europe Standards, Council of Europe Publications, 2003.

"Apologie du terrorisme" and "Incitement to terrorism", Council of Europe Publications, 2004.

The 9/11 Commission Report. Final Report of the National Commission on Terrorist Attacks upon the United States, W.W. Norton, 2004.

International Crisis Group, 'Understanding Islamism', Middle East/North Africa Report No. 37, 2 March 2005.

Strengthening Targeted Sanctions Through Fair and Clear Procedures. White Paper prepared by the Watson Institute Targeted Sanctions Project, Brown University, 30 March 2006, available at http://www.watsoninstitute.org (last visited 30 August 2007).

TE-SAT, EU Terrorism Situation and Trend Report 2007, 8065/07 Annex DG H 2A, Europol, March 2007.

The ICRC Commentary to the Geneva Conventions, available at http://www.icrc.org/info resources/treaty database.html (last visited 8 March 2006).

United Nations Documents

– UNSC resolutions

UN Doc. S/RES/232(1966) of 16 November 1966 (Question concerning the situation of Rhodesia).

UN Doc. S/RES/418(1977) of 4 November 1977 (South Africa).

UN Doc. S/RES/579(1985) of 18 December 1985 (Hostage-taking).

UN Doc.S/RES/635(1989) of 14 June 1989 (Marking of explosives).

UN Doc. S/RES/638(1989) of 31 July 1989 (Hostage-taking).

UN Doc. S/RES/661 (1990) of 6 August 1990 (Iraq - Kuwait).

UN Doc. S/RES/731(1992) of 21 January 1992 (Libyan Arab Yamahiriya).

UN Doc. S/RES/ 748(1992) of 31 March 1992 (Libyan Arab Yamahiriya).

UN Doc. S/RES/757(1992) of 30 May 1992 (Bosnia and Herzegovina).

UN Doc.S/RES/794(1992) of 3 December 1992 (Somalia).

UN Doc. S/RES/827(1993) of 25 May 1993 (Establishment of the ICTY).

UN Doc. S/RES/883(1993) of 11 November 1993 (Libyan Arab Yamahiriya).

UN Doc. S/RES/929(1994) of 22 June 1994 (Establishment of a temporary multinational operation for humanitarian purposes in Rwanda).

UN Doc. S/RES/940(1994) of 21 July 1994 (Authorization to form a multinational force in Haiti and extension of the mandate of the UN Mission).

UN Doc. S/RES/955(1994) of 8 November 1994 (Establishment of the ICTR).

UN Doc. S/RES/1044(1996) of 31 January 1996 (Extradition of the suspects wanted in the assassination attempt on the life of the President of Egypt).

UN Doc. S/RES/1054(1996) of 26 April 1996 (Extradition of the suspects wanted in the assassination attempt on the life of the President of Egypt).

UN Doc. S/RES/1214(1998) of 8 December 1998 (Situation of Afghanistan).

UN Doc. S/RES1264(1999) of 15 September 1999 (Situation of East Timor).

UN Doc. S/RES/1267(1999) of 15 October 1999 (Situation of Afghanistan).

UN Doc. S/RES/1269(1999) of 19 October 1999 (Responsibility of the Security Council in the maintenance of international peace and security).

UN Doc. S/RES/1333(2000) of 19 December 2000 (Situation of Afghanistan).

UN Doc. S/RES/1368 of 12 September 2001 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1373(2001) of 28 September 2001 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1377(2001) of 12 November 2001 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1390(2002) of 28 January 2002 (Situation of Afghanistan).

UN Doc. S/RES/1422(2002) of 12 July 2002 (UN peacekeeping).

UN Doc S/RES/1438(2002) of 14 October 2002 (Threats to international peace and security caused by terrorist acts).

UN Doc S/RES/1440(2002) of 24 October 2002 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1450(2002) of 13 December 2002 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1452(2002) of 20 December 2002 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1455(2003) of 17 January 2003 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1456(2003) of 20 January 2003 (High-level meeting of the UNSC on combating terrorism).

UN Doc. S/RES/1465(2003) of 13 February 2003 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1516(2003) of 20 November 2003 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1526(2004) of 30 January 2004 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1530(2004) of 11 March 2004 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/ 1534(2004) of 26 March 2004 (ICTY and ICTR completion strategies).

UN Doc. S/RES/1535(2004) of 26 March 2004 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1540(2004) of 28 April 2004 (Non-proliferation of weapons of mass destruction).

UN Doc. S/RES/1566(2004) of 8 October 2004 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1593(2005) of 31 March 2005 (Reports of the UNSG on the Sudan).

UN Doc. S/RES/1611(2005) of 7 July 2005 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1617(2005) of 29 July 2005 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1618(2005) of 4 August 2005 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1624(2005) of 14 September 2005 (Threats to international peace and security caused by terrorist acts: UNSC Summit).

UN Doc. S/RES/1664(2006) of 29 March 2006 (Situation in the Middle East: Lebanon).

UN Doc S/RES/1727(2006) of 15 December 2006 (Côte d'Ivoire).

UN Doc. S/RES/1730(2006) of 19 December 2006 (General issues relating to sanctions).

UN Doc. S/RES/1735(2006) of 22 December 2006 (Threats to international peace and security caused by terrorist acts).

UN Doc. S/RES/1757(2007) of 30 May 2007 (Situation in the Middle East: Lebanon).

UN Doc. S/RES/1822(2008) of 30 June 2008 (Threats to international peace and security caused by terrorist acts).

– Other UNSC documents

Reports of the Committee established by resolution 1267(1999):

UN Doc. S/2000/1254, 29 December 2000.

UN Doc. S/2002/101, 5 February 2002.

UN Doc. S/2002/1423, 26 December 2002.

UN Doc. S/2004/281, 8 April 2004.

UN Doc. S/2004/1039, 31 December 2004.

UN Doc. S/2006/22, 17 January 2006.

UN Doc. S/2007/59, 7 February 2007.

UN Doc. S/2008/25, 17 January 2008.

Reports of the Analytical Support and Sanctions Monitoring Team:

UN Doc. S/2003/1070, 2 December 2003.

UN Doc. S/2004/679, 25 August 2004.

UN Doc. S/2005/83, 15 February 2005.

UN Doc. S/2005/572, 9 September 2005.

UN Doc. S/2006/154, 10 March 2006.

UN Doc. S/2006/750, 20 September 2006.

UN Doc. S/2007/677, 20 November 2007.

UN Doc. S/2008/324, 14 May 2008.

Guidelines of the Committee for the Conduct of its Work, as amended on 12 February 2007, available at http://www.un.org/security council/sanctions (last visited 31 May 2007).

Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council resolution 1373(2001), UN Doc. S/2004/70, 26 January 2004.

Report of the Counter-Terrorism Committee to the Security Council on the implementation of resolution 1624(2005), UN Doc. S/2006/737, 15 September 2006.

UN Doc. S/PRST/2000/12 of 7 April 2000.

UN Doc. S/2001/946 of 7 October 2001.

UN Doc. S/2006/947 of 7 October 2001.

UN Doc. AFG/152, SC/7167 of 8 October 2001.

UN Doc. S/2003/818 of 15 August 2003.

UN Doc. S/2004/70 of 26 January 2004.

UN Doc. S/PRST/2006/28 of 22 June 2006.

Agreement between the UN and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone of 16 January 2002, available at http://www.sc-sl.org (last visited 7 August 2007)

UN Doc. S/PV.4413 Prov. of 12 November 2001.

– UNGA resolutions

UN Doc. A/RES/96(I) of 11 December 1946 (The Crime of Genocide).

UN Doc. A/RES/177(II) of 21 November 1947 (Formulation of the principles recognized in the Charter of the IMT and in the IMT Judgement).

UN Doc. A/RES/488(V) of 12 December 1950 (Nuremberg Principles).

UN Doc. A/RES/2625(XXV) of 24 October, 1970 (Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations).

UN Doc. A/RES/ 3314(XXIX) of 14 December 1974 (Definition af Aggression).

UN Doc. A/RES/40/61 of 9 December 1985 (Measures to prevent international terrorism).

UN Doc. A/RES/49/60 of 9 December 1994 (Declaration on the Measures to Eliminate International Terrorism).

UN Doc. A/RES/51/207 of 17 December 1996 (Establishment of an International Criminal Court).

UN Doc. A/RES/51/210 of 17 December 1996 (Declaration to Supplement the 1994 Declaration on the Measures to Eliminate International Terrorism).

UN Doc. A/RES/52/165 of 15 December 1997 (Measures to eliminate international terrorism).

UN Doc. A/RES/53/108 of 8 December 1998 (Measures to eliminate international terrorism).

UN Doc. A/RES/54/110 of 9 December 1999 (Measures to eliminate international terrorism).

UN Doc.A/RES/56/1 of 12 September 2001 (Condemnation of the terrorist attacks in the

United States).

UN Doc. A/RES/56/83 of 12 December 2001(Responsibility of States for internationally wrongful acts).

UN Doc.A/RES/59/35 of 2 December 2004 (Responsibility of States for internationally wrongful acts).

UN Doc. A/RES/60/ 1 of 24 October 2005 (World Summit Outcome).

UN Doc. A/RES/60/288 of 20 September 2006 (UN Global Counter-Terrorism Strategy).

UN Doc. A/RES/62/446 of 21 November 2007 (Responsibility of States for internationally wrongful acts).

– Other UNGA documents

UN Doc A/8969 (1972) (Report of the Sixth Committee, UN GAOR, 27th session, Agenda Item 92, Annexes 2–9).

UN GAOR, 28th session, UN Doc. A/9028 (1973) (Report of the Ad Hoc Committee on International Terrorism).

UN Doc. A/C.6/51/6 (Letter dated 1 November 1996 from the Permanent Representative of India to the United Nations addressed to the Secretary-General).

UN Doc. A/AC.249/1998/L.13 (Report of the Intersessional Meeting from 19 to 30 January 1998 in Zutphen, the Netherlands).

UN Doc. A/CONF.183/13 (Vol.II) (UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records).

UN Doc. A/CONF.183/C.1/L.1 (Proposal made in the Rome Conference).

UN Doc. A/CONF.183/C.1/L.27 (Proposal made in the Rome Conference).

UN Doc. A/CONF.183/10 (Final Act of the Rome Conference).

UN Doc. A/C.6/53/9, 4 November 1998 (Letter from the Permanent Representative of France to the UNSG).

UN GAOR 54th Session, Supplement No. 37 (A/54/37) (Report of the Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, Third session (15–26 March 1999).

UN Doc. A/C.6/54/WG.1/INF/1 (Comments by the UNHCR on the draft international convention for the suppression of the financing of terrorism).

UN Doc. A/AC.252/1999/INF/2. (Statement made in the Ad Hoc Committee established by resolution 51/210 on 19 March 1999 by the observer for the ICRC).

UN Doc. A/C.6/54/L.2 (UNGA, 54th session, Sixth Committee, Agenda Item 160, Measures to Eliminate International Terrorism, Report of the Working Group).

UN Doc. PCNICC/1999/WGEC/INF/2/Add.4, 15 December 1999. (Preparatory Commission for the International Criminal Court, Paper prepared by the ICRC relating to the mental element in the common law and civil law systems and to the concepts of mistake of fact and mistake of law in national and international law).

UN Doc. PCNICC/2000/INF/3/Add.2 (ICC Elements of Crimes); reprinted in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Inc., 2001, 735–772.

UN Doc. A/C.6/55/L.2. (Report of the Sixth Committee Working Group, 25 September–6 October 2000).

UN GAOR A/56/PV.12–22 (Official records of the plenary debate on 1–5 October 2001).

UN Doc. A/57/37 (Report of the Ad Hoc Committee established by the General Assembly resolution 51/210 of 17 December 1996, Sixth session, 28 January–1 February 2002).

– Documents of the International Law Commission

Nuremberg Principles, 1950, reprinted in Sir Arthur Watts, *The International Law Commission 1949–1998*, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, 1657–1668.

Draft Code of Offences against the Peace and Security of Mankind (1951, 1954 and 1996); reprinted in Sir Arthur Watts, *The International Law Commission 1949–1998*, Oxford University Press, 1999, Vol. III: Final Draft Articles and Other Materials, at 1669–1685 and 1686–1552.

UN Doc.A/CN.4/264 and Add. 1 (State Responsibility, Fourth Report of Special Rapporteur Ago, Extract from the *YBILC* 1972, Vol.II).

Report of the International Law Commission on the work of its 42nd session, 1 May–20 July 1990, UN GAOR 45th session, Supplement No.10 (A/45/10).

Report of the International Law Commission on the work of its 45th session, 29 April–19 July 1991, UN GAOR 46th session, Supplement No. 10 (A/46/10).

ILC Final Draft Statute and Commentary (1994) for an International Criminal Court; reprinted in: Sir Arthur Watts, *The International Law Commission 1949 –1998*, Oxford University Press, 1999, Vol. II, Treaties, 1147–1765.

Report of the International Law Commission on the work of its 47th session, 2 May–21 July 1995, UN GAOR 50th session, Supplement No. 10 (A/50/10).

Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, UN GAOR, 51st session, Supplement No. 10, (A/51/10) and Corr.1.

UN Doc. A/CN.4/490/Add.1 (State Responsibility, First Report on of Special Rapporteur James Crawford), 24 April 1998.

The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts; reprinted in James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002.

UN Doc. A/CN.4/545 of 25 June 2004 (Responsibility of international organizations: comments and observations received from international organizations).

UN Doc. A/CN/4/553 of 13 May 2005 (Third Report of Special Rapporteur Gaja).

Yearbooks of the International Law Commission:

UN Doc. A/CN.4/SER.A/1950.

UN Doc. A/CN.4/SER.A/1973.

UN Doc. A/CN.4/SER.A/1975.

UN Doc. A/CN.4/SER.A/1978.

UN Doc. A/CN.4/SER.A/1986.

UN Doc. A/CN.4/SER.A/1987.

UN Doc. A/CN.4/SER.A/1991.

– Documents of the UN Secretary-General

UN Doc. S/25704 and Add.1 (Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808(1993), S/25704, 3 May 1993).

UN Doc.A/54/2000 (' We the Peoples: the Role of the United Nations in the Twenty-first Century', Report of the Secretary-General, 27 March 2000)

UN Doc. A/59/565, (`A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change, 2 December 2004).

UN Doc. A/59/2005 (`In Larger Freedom: Towards Development, Security and Human Rights for All', Report of the Secretary-General, 21 March 2005).

UN Doc. S/2006/176 (Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, 21 March 2006).

UN Doc. A/60/825 (`Uniting against Terrorism: Recommendations for a Global Counter-terrorism Strategy', Report of the Secretary-General, 27 April 2006).

– Other UN documents

G7-P8, Ministerial Conference on Terrorism (Paris, July 30 1996), Letter dated 1 August 1996 from the Permanenet Representative of France to the United Nations addressed to the Secretary-General, UN Doc. A/51/261, 1 August 1996.

Letter dated 15 August 2003 from the Chargé d'affaires a.i. of the Libyan Arab Yamahiriya to the President of the UNSC, UN Doc. S/2003/818, 15 August 2003.

Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, S/2001/946, 7 October 2001.

Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2006/947, 7 october 2001.

United Nations Office on Drugs and Crime, Legislative Guide to the Universal Anti-terrorism Conventions and Protocols, available at http://www.unodc.org (last visited 22 August 2007).

United Nations Office on Drugs and Crime, Check Lists for the 12 Universal Anti-Terrorism Conventions, available at http://www.unodc.org (last visited 22 August 2007).

Conventional Terrorist Weapons, UNODC fact sheet, available at http://www.unodc.org/unodc/terrorism_weapons_conventional.html (last visited 31 July 2007).

Briefing by Mr. Ricardo Alberto Arias, the Chair of the CTC to the Security Council on 22 May 2007, available at http://www.un.org/sc/ctc/22may07.shtml. (last visited 31 July 2007).

Documents of the International Maritime Organisation

IMO Doc. A.924(22) of 20 November 2001, Assembly resolution.

IMO Doc. LEG 85/4, 17 August 2002, Draft amendments to the SUA Convention and Protocol.

IMO Doc. LEG 86/WP.6, 1 May 2003, Draft Report of the Legal Committee, 86th session.

IMO Doc. LEG/SUA/WG.2/4, 9 February 2003, Report of the Working Group.

IMO Doc. LEG 87/5/2, 11 September 2003, Comments by the ICFTU.

IMO Doc. LEG/SUA/WG.2/2/1, 31 January 2005, Working paper.

IMO Doc. LEG 88/13, 18 May 2004, Report of the Legal Committee, 88th session.

IMO Doc. LEG/SUA/WG.13, 16 July 2004, Report of the Working Group.

IMO Doc. LEG 89/4/5, 15 September 2004, Draft amendments to the SUA Convention and Protocol.

IMO Doc. LEG 89/4/8, 24 September 2004, Comments by the ICS, ISGF and the ICFTU.

IMO Doc. LEG 89/16, 10 November 2004, Report of the Legal Committee, 89th session.

IMO Doc. LEG/SUA/WG.2/4, 9 February 2005, Report of the Working Group.

IMO Doc. LEG 90/15, 9 May 2005, Report of the Legal Committee, 90th session.

Documents of the International Civil Aviation Organisation

ICAO doc. LC/SC-NET-2, Special Sub-Committee on the preparation of one or more instruments addressing new and emerging threats, second meeting, Montréal, 19–201 February, 2008.

Documents of the European Union

Joint declaration by the heads of state and government of the European Union, the President of the European Parliament, the President of the European Commission, and the High Representative for the Common Foreign and Security Policy on 14 September 2001.

Joint EU-US Ministerial Statement on combating terrorism, 20 September 2001, available at ue.eu.int/newsroom (last visited 26 April 2002).

Conclusions and Plan of Action of the Extraordinary European Council meeting of 21 September 2001, section 1, para. 1. Also circulated as UN Doc. A/56/407 – S/2001/909.

Commission of the European Communities, Proposal for a Council Framework Decision on combating terrorism, Brussels 19 September 2001, COM(2001)521 final, 2001/0217(CNS).

Council Common Position on the application of specific measures to combat terrorism, 2001/931/CFSP of 27 December 2001, OJ L 344/93 of 28 December, 2001.

Council Regulation (EC)2580(2001) of 27 December 2001, OJ L 344/70, 28 December 2001.

European Union, Council Framework Decision of 13 June 2002 on combating terrorism, OJ L 164, 22.6.2002.

`A Secure Europe in a Better World', European Security Strategy, Brussels, 12 December 2003, available at http://www.consilium.europa.eu/uedocs (last visited 7 August 2007).

Commission of the European Communities, Report from the Commission, based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, Brussels 8 June 2004, COM(2004)409 final.

Commission of the European Communities, Report from the Commission, based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, Brussels, 6 November 2007, COM(2007)681 final.

Documents of the Financial Action Task Force

Special Recommendations in Terrorist Financing, 31 October 2001, available at http://www.oecd.org/fatf/TerFinance_en.html. (last visited 5 August 2007).

Special Recommendations I-IX, available at http://www.oecd.org/fatf/TerFinance_en.html. (last visited 5 August 2007).

Interpretative Note to Special Recommendation II, available at http://www.oecd.org/fatf/TerFinance_en.html. (last visited 5 August 2007).

Guidance Notes for the Special Recommendations on Terrorist Financing and Self-assessment Questionnaire of 27 March 2002, available at http://www.oecd.org/fatf/TerFinance_en.html. (last visited 5 August 2007).

Guidance for Financial Institutions in Detecting Terrorism, 24 April 2002, reprinted in Mark Pieth (ed.), *Financing Terrorism*, Kluwer Academic Publishers, 2002, 147–159.

Interpretative Note to Special Recommendation III: Freezing and Confiscation of Terrorist Assets, 3 October 2003, available at html://www.fatf-gafi.org/publications/standards (last visited 1 August 2007).

Interpretative Note to Special Recommendation II: Criminalising the Financing of Terrorism and Associated Money Laundering, 1 July 2004, available at html://www.fatf-gafi.org/publications/standards (last visited 1 August 2007).

Third mutual evaluation report on AML/CFT, Report on Finland, FATF/ME(2007)5, 12 September 2007, available at http://www.fatf-gafi.org/pages/0,2987,en_32250379_32235720_1_1_1_1_1,00.html (last visited 18 December 2007).

Documents of the Council of Europe

Council of Europe Parliamentary Assembly Recommendation 1550(2002).

Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism, adopted on 11 July 2002.

Council of Europe Parliamentary Assembly Recommendation 1664(2004).

Collection of relevant case-law of the European Court of Human Rights, CODEXTER (2004) 19.

Opinion of the Commissioner for Human Rights, Alvaro Gil-Robles, on the draft Convention on the Prevention of Terrorism, Strasbourg, 2 February 2005, BcommDH(2005)1.

Council of Europe, Guidelines on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers on 2 March 2005.

Parliamentary Assembly Opinion No. 255(2005) on the draft Convention on the Prevention of Terrorism. CODEXTER(2005)02.

Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, available at http://www.coe.int./gmt (last visited 15 August 2007).

Other documents

12 League of Nations O.J. 1759(1934)

Charter of the International Military Tribunal, http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm;

Charter of the International Military Tribunal for the Far East, www.yale.edu/lawweb/avalon/imtfech.htm;

Proclamation by the Supreme Commander for the Allied Powers, 19 January 1946, reprinted in M. Cherif Bassiouni (ed.), *International Criminal Law,* Vol. I *Crimes*, Transnational Publishers, 1999, at 664–671.

Nuremberg trials Final Report Appendix D: Control Council Law No. 10, available at http://www.yale.edu/lawweb/avalon/imt/imt10.htm (last visited 10 June 2007).

Presidential Address to a Joint Session of Congress and the American People, 20 September, 2001, available at http://www.whitehousegov/news/releases/2001/09/20010920-8.html (last visited 10 June 2007).

Statement of the President in his Address to the Nation, 11 September 2001, available at http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html (last visited 10 June 2007).

Statement by President George W. Bush before the 56th regular Session of the UN General Assembly on 10 November 2001, available at http://www.state.gov/documents/organization/16967.pdf (last visited 12 August 2007).

North Atlantic Council, NATO Press Release (2001)124, http://www.nato.int/docu/pr/2001/p01-124e.htm (last visited 10 June 2007).

Twenty-fourth meeting of consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24, RC.24/RES.1/01, September 21, 2001.

Hallituksen esitys Eduskunnalle terrorismia koskeviksi rikoslain ja pakkokeinolain säännöksiksi, HE 188/2002 vp., http://www.eduskunta.fi (last visited 12 May 2007).

Perustuslakivaliokunnan lausunto PeVL 48/2002 vp., http://www.eduskunta.fi (last visited 12 May 2007).

Lakivaliokunnan mietintö LaVM 24/2002 vp., http://www.eduskunta.fi (last visited 12 May 2007).

Rikoslaki (Penal Code), (19 December 1889/39); Chapter 34a (24 January 2003/17); Chapter 46 (24 August 1990), http://www.finlex.fi.htm (last visited 22 August 2007).

ICC, 'Paper on some policy issues before the Office of the Prosecutor', September 2003, http://www.icc-cpi.int>office of the prosecutor (last visited on 5 August 2007).

G8 Justice and Home Affairs Ministers, statement issued at the Sea Island Summit in May 2004 (on file with the author).

Special Working Group on the Crime of Aggression, report of the meeting on 29 January–1 February, 2007, ICC-ASP/5/35.

OECD Check-List of Criteria to Define Terrorism for the Purpose of Compensation, Appendix II, http://www.oecd.org/dataoecd/55/2734065606.pdf. (last visited 30 April 2007).

Executive Order: Interpretation of the Geneva Convention Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency, George W. Bush, White House, 20 July 2007, available at http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html (last visited 31 October 2007).

Hallituksen esitys eduskunnalle terrorismin ennaltaehkäisyä koskevan Euroopan neuvoston yleissopimuksen hyväksymisestä sekä laeiksi sopimuksen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta ja rikoslain 34 a luvun muuttamisesta. HE 81/2007 vp, EV 107/2007 vp, available at http//www.eduskunta.fi (last visited 15 December 2007).

III Treaties

Universal Instruments

Convention for the Prevention and Punishment of Terrorism, adopted on 16 November 1937, 19 League of Nations OJ 23 (1938).

Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) of 8 August, 1945, UNTS 279.

Convention on the Prevention and Punishment of the Crime of Genocide, adopted on 9 December 1948, UNTS Vol. 78 , p. 277.

Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (I Convention), UNTS Vol. 75, p. 31.

Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (II Convention), UNTS Vol. 75, p. 85.

Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949 (III Convention), UNTS Vol. 75, p.135.

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (IV Convention), UNTS Vol. 75, p. 287.

Convention Relating to the Status of Refugees, 28 July 1951, UNTS Vol. 189, p. 137.

Treaty on the Non-Proliferation of Nuclear Weapons, 1 July, 1968, UNTS Vol. 729, p. 123.

International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, UNTS Vol. 1015, p. 243.

Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, UNTS vol. 704, No. 10106.

International Covenant on the Elimination of All Forms of Racial Discrimination, 7 March 1966, UNTS Vol. 660, p. 195.

Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, UNTS Vol. 860, No.12325

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal 23 September 1971, UNTS Vol. 974, No. 14118.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 10 April 1972, UNTS Vol. 1015, p. 163.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December, 1973, UNTS Vol. 1035, No. 15410.

Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, UNTS Vol. 1125. p. 3.

Protocol Additional to the 1949 Geneva Conventions relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), UNTS Vol. 1125, p. 609.

International Convention Against the Taking of Hostages, New York, 19 December 1979, UNTS vol. 1316, p. 205, No. 21931.

Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979, UNTS vol. 1456, No. 24631.

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS Vol. 1249, p.13.

United Nations Convention on the Law of the Sea, 10 December 1982, UNTS Vol.1833, p. 396.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS Vol. 1460, p. 112.

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, done at Montreal on 23 September 1971, Montreal, 24 February 1988, ICAO Doc. 9518.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, UNTS Vol. 1678, No. 29004.

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome 10 March 1988, UNTS Vol. 1678, p. 294.

United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotrophic Substances, 19 December 1988, UN Doc.E/CONF.82/15 Corr.1 and Corr.2.

Convention on the Rights of the Child, 20 November 1989, UNTS Vol. 1577, p. 3.

International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989, UN Doc. A/RES/44/34, UNTS 2163, p. 96.

Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991, U.N.Doc. S/22393, UNTS Vol. 2122, p. 359.

Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction, 13 January 1993, UNTS Vol. 1974, p. 45.

Convention on the Safety of the United Nations and Associated Personnel, 9 December 1994, UNTS Vol. 2051, No. 35457.

Agreement for the Implementation of the Provisions of the UN Convention on the Law of the Sea of 10 December 1982 related to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, UNTS Vol. 2167, p. 3.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction, 18 September 1997, UNTS Vol. 2056, p. 211.

International Convention for the Suppression of Terrorist Bombings, 15 December 1997, UN Doc. A/RES/52/164, Annex, UNTS Vol. 2149, p. 256.

Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9, UNTS No. 38544.

Kyoto Protocol to the United Nations Convention on Climate Change, 11 December 1997, FCCC/CP/1997/L.7/Add.1, 37 ILM (1998), at 22 *et seq.*

International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Doc. A/RES/54/109, UNTS Vol. 2178, p. 229.

United Nations Convention against Transnational Organized Crime, 15 November 2000, UN Doc. A/55/383.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime, 15 November 2000, UN Doc. A/55/383.

International Convention on the Suppression of Acts of Nuclear Terrorism, 13 April 2005, UN Doc. A/RES/59/290, UNTS No. 44004.

Amendment to the Convention on the Physical Protection of Nuclear Material, 8 July 2005, IAEA Doc. GOV/INF/2005/IO-GC(49)/INF 16 of 6 September 2005.

Protocol to amend the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 14 October 2005, IMO Doc. LEG/CONF.15/DC/1 of 13 October 2005.

Protocol to amend the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 14 October 2005, IMO Doc. LEG/CONF.15/DC/1 of 13 October, 2005.

Regional Instruments

European Convention on the Suppression of Terrorism, CETS No. 90, 27 January 1977, UNTS Vol. 1137, No.17828.

Convention relating to extradition between the Member States of the European Union, OJ C 313, 23 October 1996.

Arab Convention on the Suppression of Terrorism, 22 April, 1998, reproduced in, *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, New York 2004, 158–174.

Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 175–187.

Convention of the Organisation of the Islamic Conference on Combating International Terrorism, adopted on 1 July 1999, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 188–209.

OAU Convention on the Prevention and Combating of Terrorism, 14 July, 1999, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 210–225.

Inter-American Convention Against Terrorism, 3 June 2002, reproduced in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations, 2004, 239–250.

Additional Protocol to the European Convention on Cybercrime, concerning the criminalisation of acts of racist and xenophobic nature committed through computer systems, 28 January 2003, CETS No. 189.

Protocol amending the European Convention on the Suppression of Terrorism, 15 May 2003, CETS No. 190.

Council of Europe Convention on the Prevention of Terrorism, 16 May 2005, CETS 196.

IV Cases

International Military Tribunal

IMT, Indictment in I Trial of Major War Criminals before the International Military Tribunal, Count i, III Statement of the Offence, available at http://www.yale.edu/lawweb/avalon/imt/proc/count1/htm (last visited 7 August 2007).

IMT Judgement, The Common Plan or Conspiracy and Aggressive War, available at http://www.yale.edu/lawweb/avalon/imt/proc/judnazi.htm#common (last visited 5 August 2007).

IMT Judgement: The Law as to the Common Plan or Conspiracy, available at http://www.yale.edu/lawweb/avalon/imt/proc/judlawco.htm (last visited 5 August 2007).

IMT Judgement, http://www.yale.edu/lawweb/avalon/imt/proc/judorg.htm (last visited 5 August 2007).

Goering et al. Judgement, http://www.yale.edu/lawweb/avalon/imt/proc/judgoeri.htm (last visited 5 August 2007).

Streicher Judgement, http://www.yale.edu/lawweb/avalon/imt/proc./judstreich.htm (last visited 5 August 2007).

Fritsche Judgement, http://www.yale.edu/lawweb/avalon/imt/proc./judfritz.htm (last visited 5 August 2007).

Other Post-World War II Cases

Re Yamashita, Supreme Court of the US, No. 61 Misc., 327 U.S. 1, 4 February 1946, Federal legal information through electronics, http://www.ess.uwe.ac.uk/WCC/inreyamashita.htm (last visited 5 June 2007).

USA v. Karl Brandt et al (Medical case), available at http://nuremberg.law.harvard.edu/php/docs_swi.php?DI=1&text=medical (last visited 5 August 2007).

Kōki Hirota, Judgement, Record of Proceedings of the International Military Tribunal for the Far East (1946–1949), Vol. 20, at 49, paras. 788–792, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 20, Judgement and Annexes, Garland Publishing, Inc., 1981.

Hideki Tojo, Judgement, Record of Proceedings of the International Military Tribunal for the Far East (1946–1949), Vol. 20, at 49, paras. 843–848, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), *The Tokyo War Crimes Trial*, Vol. 20, Judgement and Annexes, Garland Publishing, Inc., 1981.

International Court of Justice

Corfu Channel Case, (Albania v. the United Kingdom of Great Britain and Northern Ireland), Judgement of 9 April 1949, ICJ Reports (1949), p. 4.

Case concerning United States Diplomatic and Consular Staff in Tehran, (United States of America v. Iran), Judgement of 24 May 1980, ICJ Reports (1980), p. 3.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States of America), Judgement (Merits), ICJ Reports (1986), p.14.

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Yamahiriya v. United States of America), Provisional Measures, Order of 14 April 1992, ICJ Reports (1992), p.114.

Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Yamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, ICJ Reports (1992), p. 3.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro), Further Requests for the Indication of Provisional Measures, Order of 13 September 1993, ICJ Reports (1993), p. 3.

Case Concerning Oil Platforms (Islamic Republic of Iran v. the United States of America) Judgement of 12 December 1996, ICJ Reports (1996), p. 161.

Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, ICJ Reports (1996-1), p. 266.

Gabcíkovo – Nagymaros Project Case, (Hungary v. Slovakia), Judgement of 25 September 1997, ICJ Reports (1997), p. 7.

Legality of Use of Force (Serbia and Montenegro vs. Spain), Request for the Indication of Provisional Measures, Order of 2 June 1999 (Removal from List), ICJ Reports (1999), p. 761.

Legality of Use of Force (Serbia and Montenegro vs. United States of America), Request for the Indication of Provisional Measures, Order of 2 June 1999 (Removal from List), ICJ Reports (1999), p. 916.

Case Concerning the Arrest Warrant of 11 April, 2000 (Democratic Republic of the Congo v. Belgium), Judgement of 14 February 2002, ICJ Reports (2002), p. 3.

Legality of Use of Force (Serbia and Montenegro vs. Belgium), Request for the Indication of Provisional Measures, Order of 2 June 1999, ICJ Reports (1999), p. 124.

Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 279.

Legality of Use of Force (Serbia and Montenegro vs. Canada), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 429.

Legality of Use of Force (Serbia and Montenegro vs. France), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 575.

Legality of Use of Force (Serbia and Montenegro vs.Germany), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 720.

Legality of Use of Force (Serbia and Montenegro vs. Italy), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 865.

Legality of Use of Force (Serbia and Montenegro vs.the Netherlands), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 1011.

Legality of Use of Force (Serbia and Montenegro vs. Portugal), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 1060.

Legality of Use of Force (Serbia and Montenegro vs.United Kingdom), Preliminary Objections, Judgement of 15 December 2004, ICJ Reports (2004), p. 1307.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, ICJ Reports (2004), p. 136.

Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement of 26 February, 2007, General List No. 91.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia-Montenegro) (pending), General List No. 118.

International Criminal Tribunal for the former Yugoslavia

Prosecutor v. Dragan Nikolić, Case No. IT-94-2, Review of Indictement pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October, 1995.

Prosecutor v. Radovan Karadžić and Ratko Mladić, Cases No. IT-95-5-R61 and IT-95-18-R61, Consideration of the Indictment within the Framework of Rule 61 of the Rules of Procedure and Evidence, 11 July 1996.

Prosecutor v. Duško Tadić, Case No. IT-94-1-AR 72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1996.

Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Opinion and Judgement of 7 May 1997.

Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement of 15 July 1999.

Prosecutor v. Drazen Erdemović, Case No. IT-96-22-A, Judgement of 7 October 1997.

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-T, Judgement of 16 November 1998.

Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-A, Judgement of 20 February 2001.

Prosecutor v. Anto Furundzija, Case No. IT-95-17/1-T, Judgement of 10 December 1998.

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-T, Judgement of 25 June 1999.

Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement of 24 March 2000.

Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Judgement of 3 March 2000.

Prosecutor v. Tihomir Blaskić, Case No. IT-95-14-PT, Decision on Defence Motion to dismiss the Indictment and upon defects in the form thereof (vagueness/lack of adequate notice of charges), 4 April 1997.

Prosecutor v. Tihomir Blaskić, Case No. IT-95-14-A, Judgement of 29 July 2004.

Prosecutor v. Dario Kordić and Mario Cerkez, Case No. IT-95-14-PT/2-T, Judgement of 26 February 2001.

Prosecutor v. Dario Kordić and Mario Cerkez, Case No. IT-95-14-PT/2-A, Judgement of 17 December 2004.

Prosecutor v. Radoslav Brđanin and Momir Talić, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Case No. IT-99-36, Trial Chamber, 26 June 2001.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Decision on Interlocutory Appeals, 19 March 2004.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement of 1 September 2004.

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement of 3 April 2007.

Prosecutor v. Radovan Krstić, Case No. IT-98-33-T, Judgement of 2 August 2001.

Prosecutor v. Radovan Krstić, Case No. IT-98-33-A, Judgement of 19 April 2004.

Prosecutor v. Slobodan Milošević et al, Case No. IT-99-37-PT, Second Amended Indictment, 29 October 2001.

Prosecutor v. Slobodan Milošević, Case No. IT-01-51-I, Initial Indictment (' Bosnia Herzegovina') of 22 November 2001.

Prosecutor v. Slobodan Milošević et al, Case No. IT-02-54-T, First Amended Indictment (' Croatia') of 23 October 2002.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, Judgement of 2 November 2001.

Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, Judgement of 28 February 2005.

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement of 15 March 2002.

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement of 17 September 2003.

Prosecutor v. Milan Milutinović, Nikola Šainović and Dragoljub Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction, 21 May 2003.

Prosecutor v. Milomir Stakić, Case No. IT-97-24-T, Judgement of 31 July 2003.

Prosecutor v. Milomir Stakić, Case No. IT-97-24-A, Judgement of 22 March 2006.

Prosecutor v. Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-T, Judgement and Opinion of 5 December 2003.

Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement of 30 November 2006.

Prosecutor v. Ljube Boškoski and Johan Tarčulovski , Case No. IT-04-82-PT, Decision on Prosecution's Motion to Amend the Indictment, 26 May 2006.

Prosecutor v. Naser Orić, Case No. IT-03-68-T, Judgement of 30 June 2006.

Prosecutor v. Naser Orić, Case No. IT-03-68-A, Judgement of 3 July 2008.

Prosecutor v. Momčilo Krajišnik, Case No. IT-00-39-T, Judgement of 27 September 2006.

Prosecutor v.Ramush Haradinaj et al., Case No. IT-04-84-1, Initial Indictment of 24 February 2005, Revised Second Amended Indictment of 11 January 2007.

International Criminal Tribunal for Rwanda

Prosecutor vs. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement of 2 September 1998.

Prosecutor v. Joseph Kanyabashi, Case No. ICTR-96-15-T, Decision of 18 June 1997 on the Defence Motion on Jurisdiction.

Prosecutor v. André Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal regarding application of joint criminal enterprise to the crime of genocide of 22 October 2004.

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement of 27 June 2000.

Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T, Judgement and Sentence of 3 December 2003.

Prosecutor v. Eliézer Niyitegeka, Case No. ICTR-96-19-T, Judgement of 16 May 2003.

Special Court for Sierra Leone

Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, SCSL-2004-16-PT, Judgement of 20 June 2007.

European Court of Human Rights

Loizidou vs. Turkey, Merits, (40/1993/435/514), Judgement of 28 November 1996, ECHR 1996-VI.

Ceylan v. Turkey, (23556/94), Judgement of 8 July 1999, ECHR 1999-IV.

Sürek v. Turkey, (26682/95), Judgement of 8 July 1999, ECHR 1999-IV.

Zana v. Turkey,(69/1996/688/880), Judgement of 25 November 1997, ECHR 1997-VII.

Segi and Others v. Germany, Austria, Belgium, Denmark, Spain, Finland, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, the United Kingdom and Sweden, (6422/02), Decision of 23 May 2002, ECHR 2002-V.

European Court of First Instance

Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission, Case T 306/01, Judgement of 21 September 2005.

Yassin Abdullah Kadi v. Council and Commission, Case T 315/01, Judgement of 21 September 2005.

Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union, joined cases C-402/05 P and C-415/05 P, Judgement of 3 September 2008.

Organisation des Modjahedins du Peuple d'Iran v. Council of the European Union, Case T-228/02, Judgement of 12 December 2006.

Iran – United States Claims Tribunal

Yeager vs. Islamic Republic of Iran, (1987) 17 Iran–US Cl Trib Rep 92.

Rankin v. Islamic Republic of Iran (1987) 17 Iran–US Cl Trib Rep 135.

Short v. Islamic Republic of Iran (1987) 16 Iran–US Cl Trib Rep 76.

Other Courts and Tribunals

Geneva Arbitration Tribunal*, The Alabama Claims (US v. Great Britain*), 1872. reprinted in J.B. Moore, 1 *History and Digest of International Arbitrations to which the United States has been a Party* (1998), 495 *et seq*.

Permanent Court of Arbitration, *Island of Palmas Case (Netherlands v United States of America)*, 1928, 2 UNRIAA 829.

United Kingdom House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and others – Ex Parte Pinochet*, 38 ILM, 3 May 1999.

Inter-American Court of Human Rights, *Velásquez-Rodriguez* Case, IACHR Decisions and Judgements, (Ser.c) No.5 (1989).

CASE INDEX

INDEX