INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING APPLICATION OF THE INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM AND OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

(UKRAINE *V.* RUSSIAN FEDERATION)

VOLUME XV OF THE ANNEXES TO THE MEMORIAL

SUBMITTED BY UKRAINE

12 JUNE 2018

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UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-98-29/1-A
		Date:	12 November 2009
		Original:	English

IN THE APPEAL CHAMBER

Before:	**Judge Fausto Pocar, Presiding** **Judge Mehmet Güney** **Judge Liu Daqun** **Judge Andrésia Vaz** **Judge Theodor Meron**
Registrar:	**Mr John Hocking**
Judgement of:	**12 November 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

JUDGEMENT

The Office of the Prosecutor:

Mr Paul Rogers

Counsel for the Accused:

Mr Branislav Tapušković
Ms Branislava Isailović

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "Tribunal", respectively) is seized of the appeals filed by the Office of the Prosecutor ("Prosecution")[1] and Counsel for Dragomir Milošević ("Milošević")[2] against the Judgement rendered by Trial Chamber III ("Trial Chamber") on 12 December 2007 in the case of *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T ("Trial Judgement").

A. Background

2. Milošević was born on 4 February 1942, in the village of Murgas, Ub municipality, Serbia.[3] He was an officer in the Yugoslav People's Army ("JNA") and after the proclamation of the Bosnian-Serb Republic (later renamed "Republika Srpska"), he became an officer of the newly-formed Army of the Republika Srpska ("VRS"). From on or about 6 July 1993, Milošević served as Chief of Staff and Deputy Commander in the Sarajevo Romanija Corps ("SRK") of the VRS under General Stanislav Galić ("Galić"). Milošević became Commander of the SRK on or about 10 August 1994 and retained that position until on or about 21 November 1995 ("Indictment period").[4]

3. The events giving rise to these appeals relate to the siege of Sarajevo. The Prosecution charged Milošević with terror, a violation of the laws or customs of war (count 1); murder, a crime against humanity (counts 2 and 5); inhumane acts, a crime against humanity (counts 3 and 6); and

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[3] See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Prosecution's Catalogue of Facts Agreed Between the Prosecution and Defence, with Annex A thereto, 28 February 2007, Annex A ("Agreed Facts"), para. 1. The list of the Agreed Facts was admitted by the Trial Chamber on 10 April 2007 (*Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Motion for Judicial Notice of Adjudicated Facts and Prosecution's Catalogue of Agreed Facts With Dissenting Opinion of Judge Harhoff, 10 April 2007, p. 12).
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unlawful attacks against civilians, a violation of the laws or customs of war (counts 4 and 7).[5] These crimes were charged under both Article 7(1) (planning and ordering, as well as aiding and abetting the planning, preparation, and/or execution) and Article 7(3) of the Statute (for crimes committed by his subordinates which he knew or had reason to know about and failed to take reasonable and necessary measures to prevent or punish).[6]

4. The Trial Chamber found that during the Indictment period the SRK troops under Milošević's command were responsible for continuously sniping and shelling the area of Sarajevo, resulting in the killing and serious injury of many civilians.[7] It noted that throughout the siege, the civilian population was subjected to conditions of extreme fear and insecurity, which, combined with the inability to leave the city, resulted in "deep and irremovable mental scars on that population as a whole".[8] The Trial Chamber concluded that in these circumstances, every incident of sniping and shelling for which the SRK was found responsible was deliberately conducted with the intent to terrorise the civilian population of Sarajevo.[9] It found that these acts also qualified as unlawful attacks against civilians and civilian population under Article 3 of the Tribunal's Statute ("Statute").[10] Further, the Trial Chamber found that the SRK's military campaign in Sarajevo was a "classical illustration of a large-scale and organised attack, that is, a widespread and systematic attack" constitutive of crimes against humanity.[11]

5. The Trial Chamber also concluded that Milošević's orders to target civilians in Sarajevo formed part of the continuous strategy of sniping and shelling of civilians commenced under Galić's command. It was satisfied that he planned and ordered those attacks with the intent to spread terror among the population.[12] It thus found Milošević guilty pursuant to Article 7(1) of the Statute of the crimes of terror (count 1), murder (counts 2 and 5), and inhumane acts (counts 3 and 6).[13] As a consequence of the conviction entered under count 1, the Trial Chamber dismissed the charges of unlawful attacks against civilians under counts 4 and 7, as impermissibly cumulative on the ground that the elements of the crime of unlawful attack against civilians are fully encompassed

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[5] *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, Amended Indictment, 18 December 2006 ("Indictment"), paras 22-25.
[6] Indictment, paras 19-21.
[7] Trial Judgement, para. 905.
[8] Trial Judgement, para. 910.
[9] Trial Judgement, paras 910-913.
[10] Trial Judgement, para. 953.
[11] Trial Judgement, para. 928.
[12] Trial Judgement, para. 978.
[13] Trial Judgement, para. 1006.

by the crime of terror.[14] The Trial Chamber imposed a single sentence of 33 years of imprisonment.[15]

1. The Appeals

(a) Prosecution's Appeal

6. The Prosecution puts forth a single ground of appeal, in which it alleges that the Trial Chamber erred in imposing a manifestly inadequate sentence in light of the gravity of the crimes for which Milošević was convicted[16] and his role in the crimes.[17] The Prosecution seeks a life sentence, which it deems justified irrespective of any mitigating circumstances applicable to the case, especially in view of the life imprisonment imposed on Galić on appeal.[18]

7. In response, Milošević argues that the facts underlying his convictions were not established beyond reasonable doubt, rendering the sentencing matters moot.[19] In the alternative, he insists that all relevant mitigating circumstances taken into account by the Trial Chamber should be maintained.[20]

(b) Milošević's Appeal

8. Milošević seeks an acquittal of all charges.[21] He sets forth twelve grounds of appeal. First, he argues that the Trial Chamber misapplied the law on the crime of terror and the crimes against humanity of murder and inhumane acts, violated the presumption of innocence and failed to establish beyond reasonable doubt the essential elements of the crimes he was convicted of.[22] Milošević further contends that the Trial Chamber violated Rule 89 of the Rules of Procedure and Evidence ("Rules") by making findings not supported by evidence on the record and failing to consider the evidence as a whole.[23] Milošević alleges that the Trial Chamber erroneously set out and applied the law with respect to the civilian status of the trams targeted in sniping incidents, the

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[14] Trial Judgement, paras 981, 1007.
[15] Trial Judgement, para. 1008.
[16] Prosecution Appeal Brief, paras 5-21.
[17] Prosecution Appeal Brief, paras 22-31.
[18] Prosecution Appeal Brief, paras 32-43. See also Prosecution Reply Brief, 12 August 2008 ("Prosecution Reply Brief"), paras 2-3.
[19] Defence Respondent's Brief with Annex 1, French original filed on 6 August 2008; English translation filed on 13 August 2008 ("Defence Response Brief"), para. 5.
[20] Defence Response Brief, para. 6.
[21] Defence Appeal Brief, p. 94.
[22] Defence Appeal Brief, paras 6-145 (Ground 1).
[23] Defence Appeal Brief, paras 146-150 (Grounds 2 and 3).

36. Consequently, the Appeals Chamber finds that the Trial Chamber's legal error regarding the *actus reus* of the crime of terror is without impact on its analysis of the evidence of the case and eventually on the findings of guilt.

(b) Establishing the required *mens rea*

37. The Appeals Chamber notes that the *mens rea* of the crime of terror consists of the intent to make the civilian population or individual civilians not taking direct part in hostilities the object of the acts of violence or threats thereof, and of the specific intent to spread terror among the civilian population.[110] While spreading terror must be the *primary* purpose of the acts or threats of violence, it need not be the only one.[111] The *Galić* Appeal Judgement suggests that such intent can be inferred from the "nature, manner, timing and duration" of the acts or threats.[112] However, this is not an exhaustive list of mandatory considerations but an indication of some factors that *may* be taken into account according to the circumstances of the case. Contrary to Milošević's assertion, in the instant case the Trial Chamber did explicitly state and consider these factors.[113] Furthermore, the Appeals Chamber rejects Milošević's argument that the Trial Chamber could not take into account the evidence relative to the *actus reus* of the crime when establishing the *mens rea.* In this regard, the Appeals Chamber finds that both the actual infliction of terror and the indiscriminate nature of the attack were reasonable factors for the Trial Chamber to consider in determining the specific intent of the accused in this case.

38. Concerning Milošević's allegation that the Trial Chamber failed to establish beyond reasonable doubt that the primary purpose of the attacks was to spread terror, the Appeals Chamber notes that he fails to support his allegation with any specific arguments. In fact, the Trial Chamber based its relevant conclusions on facts that it established beyond reasonable doubt, such as (i) the SRK was responsible for the sniping and shelling resulting in death or serious injuries within the civilian population of the affected areas; (ii) the shelling was either directly aimed at the civilian population and objects (mortar fire) or carried out in an indiscriminate manner, including the use by the SRK of such "highly inaccurate and indiscriminate weapon" as the modified air bomb; (iii) the very role of snipers requires deliberate shots intended to kill or injure the victim; and (iv) the fact that the campaign of shelling and sniping the civilian population by the troops under Milošević's

[110] *Galić* Appeal Judgement, para. 104.
[111] *Galić* Appeal Judgement, para. 104.
[112] *Galić* Appeal Judgement, para. 104.
[113] Trial Judgement, para. 881.

command continued for a period of over 14 months.[114] Subject to its analysis of Milošević's particular challenges to the underlying evidence, the Appeals Chamber cannot discern any error in the Trial Chamber's approach.

(c) Cumulative convictions

39. In light of the Appeals Chamber's conclusions above with respect to the Trial Chamber's error in defining the *actus reus* of the crime of terror, the Appeals Chamber finds it necessary to provide guidance with respect to the applicable law on cumulative convictions in relation to the crime of terror and unlawful attacks against civilians. In this respect, the Appeals Chamber recalls the two-pronged test articulated in the *Čelebići* Appeal Judgement[115] and emphasizes that the focus of the analysis is to be placed on the legal elements of each crime, rather than on the underlying conduct of the accused.[116] With respect to the offence of unlawful attacks against civilians, the Appeals Chamber recalls that it requires proof of death or serious injury to body or health, which, as explained in paragraph 33 above, is not *per se* an element of the crime of terror. Conversely, the offence of terror requires proof of an intent to spread terror among the civilian population which is not an element of the crime of unlawful attacks against civilians. Therefore, the Appeals Chamber finds that each offence has an element requiring proof of a fact not required by the other, thus allowing cumulative convictions. The Trial Chamber's conclusion to the contrary was, accordingly, erroneous.

40. Having clarified the applicable law, the Appeals Chamber notes that the matter of cumulative convictions was not appealed by the Prosecution.[117] Accordingly, the Appeals Chamber declines to consider the matter any further.

3. Conclusion

41. In light of the foregoing, the Appeals Chamber dismisses this sub-ground of appeal, Judge Liu Daqun dissenting with respect to the Tribunal's jurisdiction over the crime of terror and the elements of the offence.

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[114] Trial Judgement, paras 905-913.
[115] *Čelebići* Appeal Judgement, paras 412-413.
[116] *Stakić* Appeal Judgement, para. 356.
[117] Although arguing that the crime of terror has distinct material elements when compared to the unlawful attacks against civilians (AT. 106-109), the Prosecution has not appealed the Trial Chamber's findings regarding the cumulation of the convictions for these two crimes. Milošević, on the other hand, appears to concur with the erroneous approach of the Trial Chamber with respect to both the elements of the crime of terror and the issue of cumulation (AT. 127).

C. Acts directed against a civilian population

42. The targeting of the civilian population underlies Milošević's convictions for both the crime of terror and the crimes against humanity (murder and inhumane acts).[118] Milošević notes that the unlawful acts of violence attributed to him consist of a campaign of shelling and sniping against civilians.[119] He submits that the Trial Chamber failed to establish beyond reasonable doubt that the attacks carried out by the SRK were directed against civilians or that civilians were the victims of these attacks.[120] The Appeals Chamber will first consider Milošević's challenges related to the definition of a civilian population and the manner of determining its existence, including the presence of the military and the onus of proof. It will then discuss Milošević's arguments on the factors to be considered when determining whether an attack was directed against civilians. Finally, it will deal with Milošević's arguments on the factual findings for particular incidents.[121]

1. The definition of "civilian population"

(a) Arguments of the parties

43. Milošević alleges that the Trial Chamber erred by failing to state specifically the law applied in its determination of the civilian status of the population in certain areas of Sarajevo.[122] Emphasising that the Prosecution bears the burden of proof as to the civilian status of a person,[123] Milošević contends that the Trial Chamber erred in law by failing to specify that the presumption of a person's civilian status, as embodied in Article 50(1) of Additional Protocol I, does not apply when members of the armed forces are tried before a criminal jurisdiction.[124]

44. Milošević submits that the Trial Chamber erred with respect to the factors it considered in determining the civilian status of the population and areas. Notwithstanding Article 50(3) of Additional Protocol I, he argues that the number of soldiers present within the civilian population should be considered in determining whether the population retains its civilian status.[125] He

[118] Trial Judgement, paras 875, 882, 921-924.
[119] Defence Appeal Brief, para. 23.
[120] Defence Appeal Brief, paras 22, 24.
[121] Defence Appeal Brief, para. 24, referring to Defence Notice of Appeal, para. 11.
[122] Defence Appeal Brief, para. 27. In this context, Milošević refers to Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 ("Third Geneva Convention"); Article 50, para. 2 of Additional protocol I; *Blaškić* Appeal Judgement, para. 114 (Defence Appeal Brief, paras 28, 29).
[123] Defence Appeal Brief, para. 30, referring to *Blaškić* Appeal Judgement, para. 111.
[124] Defence Appeal Brief, para. 30.
[125] Defence Appeal Brief, para. 31, referring to *Blaškić* Appeal Judgement, para. 115.

Annex 468

Prosecutor. v. Dragomir Milošević, Case No. IT-02-54, Appeals Chamber Judgment, p. 18, para. 37 (19 November 2009)

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-98-29/1-A
		Date:	12 November 2009
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IN THE APPEAL CHAMBER

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[115] *Čelebići* Appeal Judgement, paras 412-413.
[116] *Stakić* Appeal Judgement, para. 356.
[117] Although arguing that the crime of terror has distinct material elements when compared to the unlawful attacks against civilians (AT. 106-109), the Prosecution has not appealed the Trial Chamber's findings regarding the cumulation of the convictions for these two crimes. Milošević, on the other hand, appears to concur with the erroneous approach of the Trial Chamber with respect to both the elements of the crime of terror and the issue of cumulation (AT. 127).

C. Acts directed against a civilian population

42. The targeting of the civilian population underlies Milošević's convictions for both the crime of terror and the crimes against humanity (murder and inhumane acts).[118] Milošević notes that the unlawful acts of violence attributed to him consist of a campaign of shelling and sniping against civilians.[119] He submits that the Trial Chamber failed to establish beyond reasonable doubt that the attacks carried out by the SRK were directed against civilians or that civilians were the victims of these attacks.[120] The Appeals Chamber will first consider Milošević's challenges related to the definition of a civilian population and the manner of determining its existence, including the presence of the military and the onus of proof. It will then discuss Milošević's arguments on the factors to be considered when determining whether an attack was directed against civilians. Finally, it will deal with Milošević's arguments on the factual findings for particular incidents.[121]

1. The definition of "civilian population"

(a) Arguments of the parties

43. Milošević alleges that the Trial Chamber erred by failing to state specifically the law applied in its determination of the civilian status of the population in certain areas of Sarajevo.[122] Emphasising that the Prosecution bears the burden of proof as to the civilian status of a person,[123] Milošević contends that the Trial Chamber erred in law by failing to specify that the presumption of a person's civilian status, as embodied in Article 50(1) of Additional Protocol I, does not apply when members of the armed forces are tried before a criminal jurisdiction.[124]

44. Milošević submits that the Trial Chamber erred with respect to the factors it considered in determining the civilian status of the population and areas. Notwithstanding Article 50(3) of Additional Protocol I, he argues that the number of soldiers present within the civilian population should be considered in determining whether the population retains its civilian status.[125] He

[118] Trial Judgement, paras 875, 882, 921-924.
[119] Defence Appeal Brief, para. 23.
[120] Defence Appeal Brief, paras 22, 24.
[121] Defence Appeal Brief, para. 24, referring to Defence Notice of Appeal, para. 11.
[122] Defence Appeal Brief, para. 27. In this context, Milošević refers to Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 ("Third Geneva Convention"); Article 50, para. 2 of Additional protocol I; *Blaškić* Appeal Judgement, para. 114 (Defence Appeal Brief, paras 28, 29).
[123] Defence Appeal Brief, para. 30, referring to *Blaškić* Appeal Judgement, para. 111.
[124] Defence Appeal Brief, para. 30.
[125] Defence Appeal Brief, para. 31, referring to *Blaškić* Appeal Judgement, para. 115.

Annex 469

Prosecutor v. Ayyash et al., Case No. STL-11-01, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, pp. 70–71, para. 108 (Special Trib. for Lebanon 16 February 2011)

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

BEFORE THE APPEALS CHAMBER

Case No.:	**STL-11-01/I**
Before:	**Judge Antonio Cassese, Presiding, and Judge Rapporteur** **Judge Ralph Riachy** **Judge Sir David Baragwanath** **Judge Afif Chamsedinne** **Judge Kjell Erik Björnberg**
Registrar:	**Mr Herman von Hebel**
Date:	**16 February 2011**
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INTERLOCUTORY DECISION ON THE APPLICABLE LAW: TERRORISM, CONSPIRACY, HOMICIDE, PERPETRATION, CUMULATIVE CHARGING
with corrected front page

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SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

HEADNOTE[1]

I. The Questions of Law Submitted by the Pre-Trial Judge

Pursuant to Rule 68(G) of the Special Tribunal for Lebanon's Rules of Evidence and Procedure, the Pre-Trial Judge has submitted to the Appeals Chamber 15 questions of law that require resolution before the Pre-Trial Judge can determine whether to confirm the indictment currently before him. Those questions can be grouped into five categories:

1. *Whether the Tribunal should apply international law in defining the crime of terrorism; if so, how the international law of terrorism should be reconciled with any differences in the Lebanese domestic crime of terrorism; and in either case, what are the objective and subjective elements of the crime of terrorism to be applied by the Tribunal.*
2. *Whether the Tribunal should interpret the elements of the crimes of intentional homicide and attempted homicide under both Lebanese domestic and international law; if so, whether there are any differences between the international and Lebanese definitions of intentional homicide and attempted homicide and how those differences should be reconciled; and what are the elements of intentional homicide and attempted homicide to be applied by the Tribunal.*
3. *Whether the Tribunal should interpret the elements of conspiracy (*complot*) under both Lebanese domestic and international law; if so, whether there are any differences between the international and Lebanese definitions of conspiracy and how those differences should be reconciled; what are the elements of the crime of conspiracy to be applied by the Tribunal; and to the extent that the notion of conspiracy overlaps with that of joint criminal enterprise (a mode of liability), how to distinguish between them.*
4. *Regarding modes of liability for crimes prosecuted before the Tribunal (in particular perpetration and co-perpetration), whether the Tribunal should apply Lebanese domestic or international law or both; how and on what basis to resolve any contradictions between Lebanese and international legal notions of such modes of liability; and whether accused before the Tribunal can be convicted on the basis of advertent recklessness or constructive intent (*dolus eventualis*) for terrorism (which requires a special intent (*dolus specialis*) to spread terror among the population) or for intentional homicide (when the accused did not intend particular victims as the result of an act of terrorism).*
5. *Whether the Tribunal should apply Lebanese or international law to the regulation of cumulative charging and plurality of offences; how any differences between Lebanese and international law on this point should be reconciled and on what basis; and whether different criminal offences regarding the same conduct should be charged cumulatively or alternatively and under what conditions.*

[1] This Headnote does not constitute part of the decision of the Appeals Chamber. It has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision. Only the text of the decision itself is authoritative.

II. The Decision of the Appeals Chamber

A. Interpretation of the STL Statute

In interpreting the Statute, the task of the Tribunal is to establish the proper meaning of the text so as to give effect to the intent of its drafters as fully and fairly as possible; in particular the Tribunal must give consistency to seemingly inconsistent legal provisions. This task shall be discharged based on the general principle of construction enshrined in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties (and the corresponding customary rule of international law) whereby a treaty must be construed "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context in light of its object and purpose." With specific regard to the Tribunal's Statute, this principle requires an interpretation that better enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner. If however this yardstick does not prove helpful, one should choose that interpretation which is more favourable to the rights of the suspect or the accused, utilising the general principle of criminal law of favor rei *(in favour of the accused) as a standard of construction.*

Unlike other international criminal tribunals, which apply international law (or, in some limited instances, both international law and national law) to the crimes within their jurisdiction, under the Tribunal's Statute the Judges are called upon primarily to apply Lebanese law to the facts coming within the purview of the Tribunal's jurisdiction. Thus, the Tribunal is mandated to apply domestic law in the exercise of its primary *jurisdiction, and not, as is common for most international tribunals, only when exercising its* incidental *jurisdiction. In consonance with international case law, generally speaking, the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts, unless such interpretation or application appears to be unreasonable, might result in manifest injustice, or appears not to be consonant with international principles and rules binding upon Lebanon. Also, when Lebanese courts take different or conflicting views of the relevant legislation, the Tribunal may place on that legislation the interpretation which it deems to be more appropriate and attuned to international legal standards.*

B. The Notion of Terrorism To Be Applied by the Tribunal

The Tribunal shall apply the Lebanese domestic crime of terrorism, interpreted in consonance with international conventional and customary law that is binding on Lebanon.

Under Lebanese law the objective elements of terrorism are as follows: (i) an act whether constituting an offence under other provisions of the Criminal Code or not; and (ii) the use of a means "liable to create a public danger". These means are indicated in an illustrative enumeration: explosive devices, inflammable materials, poisonous or incendiary products, or infectious or microbial agents. According to Lebanese case law, these means do not include such non-enumerated implements as a gun, a machine-gun, a revolver, a letter bomb or a knife. The subjective element of terrorism is the special intent to cause a state of terror.

Although Article 2 of the Statute enjoins the Tribunal to apply Lebanese law, the Tribunal may nevertheless take into account international law for the purpose of interpreting Lebanese law. In this

respect, two sets of rules may be taken into account: the Arab Convention against Terrorism, which has been ratified by Lebanon, and customary international law on terrorism in time of peace.

The Arab Convention enjoins the States Parties to cooperate in the prevention and suppression of terrorism and defines terrorism for that purpose, while leaving each contracting party freedom to simultaneously pursue the suppression of terrorism on the basis of its own national legislation.

A comparison between Lebanese law and the Convention shows that the two notions of terrorism have in common two elements: (i) they both embrace acts; and (ii) they require the intent of spreading terror or fear. However, the Convention's definition is broader than that of Lebanese law in that it does not require the underlying act to be carried out by specific means, instrumentalities or devices. In other respects the Arab Convention's notion of terrorism is narrower: it requires the underlying act to be violent, and it excludes acts performed in the course of a war of national liberation (as long as such war is not conducted against an Arab country).

On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, *requiring the following elements: (i) the intent* (dolus) *of the underlying crime and (ii) the special intent* (dolus specialis) *to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational. The very few States still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is* broader *with regard to the means of carrying out the terrorist act, which are not limited under international law, and* narrower *in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element.*

While fully respecting the Lebanese jurisprudence relating to cases of terrorism brought before Lebanese courts, the Tribunal cannot but take into account the unique gravity and transnational dimension of the crimes at issue and the Security Council's consideration of them as particularly grave international acts of terrorism justifying the establishment of an international court. As a result, for the purpose of adjudicating these facts, the Tribunal is justified in applying, at least in one respect, a construction of the Lebanese Criminal Code's definition of terrorism more extensive that than suggested by Lebanese case law. While Lebanese courts have held that a terrorist attack must be carried out through one of the means enumerated in the Criminal Code, the Code itself suggests that its list of implements is illustrative, not exhaustive, and might therefore include also such implements as handguns, machine-guns and so on, depending on the circumstances of each case. The only firm requirement is that the means used to carry out the terrorist attack also be liable to create a common danger, either by exposing bystanders or onlookers to harm or by instigating further violence in the form of retaliation or political instability. This interpretation of Lebanese law better addresses contemporary forms of terrorism and also aligns Lebanese law more closely with the relevant international law that is binding on Lebanon.

This interpretation does not run counter to the principle of legality (nullum crimen sine lege) *because (i) this interpretation is consistent with the offence as explicitly defined under Lebanese law; (ii) it was accessible to the accused, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the Official Gazette (none of which limits the*

means or implements by which terrorist acts may be performed); (iii) hence, it was reasonably foreseeable by the accused.

In sum, and in light of the principles enunciated above, the notion of terrorism to be applied by the Tribunal consists of the following elements: (i) the volitional commission of an act; (ii) through means that are liable to create a public danger; and (iii) the intent of the perpetrator to cause a state of terror. Considering that the elements of the notion of terrorism do not require an underlying crime, the perpetrator of an act of terrorism that results in deaths would be liable for terrorism, with the deaths being an aggravating circumstance; additionally, the perpetrator may also, and independently, *be liable for the underlying crime if he had the requisite criminal intent for that crime.*

C. Other Crimes Falling under the Jurisdiction of the STL

The Tribunal shall apply the Lebanese law on intentional homicide, attempted homicide and conspiracy As these are primarily domestic crimes without equivalents under international criminal law (conspiracy in international law being only a mode of liability in the case of genocide), the Appeals Chamber does not evaluate these crimes in light of international criminal law.

Under Lebanese law the elements of intentional homicide are as follows: (i) an act, or culpable omission, aimed at impairing the life of a person; (ii) resulting in the death of a person; (iii) a casual connection between the act and the result of death; (iv) knowledge (including that the act is aimed at a living person and conducted through means that may cause death); and (v) intent, whether direct or dolus eventualis. *Premeditation is an aggravating circumstance, not an element of the crime, and can apply to an intentional homicide committed with* dolus eventualis.

Under Lebanese law the elements of attempted homicide are as follows: (i) preliminary action aimed at committing the crime (beginning the execution of the crime); (ii) the subjective intent required to commit the crime; and (iii) absence of a voluntary abandonment of the offence before it is committed.

Under Lebanese law the elements of conspiracy are as follows: (i) two or more individuals; (ii) who conclude or join an agreement; (iii) aimed at committing crimes against State security (for the purposes of this Tribunal, the aim of the conspiracy must be a terrorist act); (iv) with an agreement on the means to be used to commit the crime (which for conspiracy to commit terrorism must satisfy the "means" element of Article 314); and (v) the existence of criminal intent.

D. Modes of Criminal Responsibility

Article 2 of the Statute requires the Tribunal to apply Lebanese law regarding "criminal participation" (as a mode of responsibility) and "conspiracy", "illicit association" and "failure to report crimes and offences" (as crimes per se*). Article 3 specifies various modes of criminal liability utilised in international criminal law: commission, complicity, organising or directing others to commit a crime, contribution to crimes by a multitude of persons or an organized group, superior responsibility, and criminal liability for the execution of superior orders.*

Either Lebanese or international criminal law (as contained in Article 3 of the Statute) could apply to modes of liability. The Pre-Trial Judge and the Trial Chamber must (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of international criminal law; (ii) if there is no conflict, then Lebanese law should apply; and (iii) if there is a conflict, then the body of law that would lead to a result more favourable to the accused should apply.

1. **Perpetration and Co-Perpetration**

Under both international criminal law and Lebanese law, the perpetrator physically carries out the prohibited conduct, with the requisite mental element. When a crime is committed by a plurality of persons, all persons performing the same act and sharing the same mens rea *are termed co-perpetrators. To the extent that Lebanese law recognises a broader definition of co-perpetration, that concept is treated here as "participation in a group with common purpose."*

2. **Complicity (Aiding and Abetting)**

To a large extent the Lebanese notion of complicity and the international notion of aiding and abetting overlap, with two important exceptions. First, Lebanese law explicitly lists the objective means by which an accomplice can provide support, while international law only requires "substantial assistance" without any restriction on what form that assistance can take. Second, under Lebanese law accomplice liability requires the accused know *of the crime to be committed, join with the perpetrator in an* agreement *to commit the crime and share the* intent *to further that particular crime; instead, international law only requires the intent to further the general illegality of the principal's conduct. Generally speaking, the Lebanese concept of complicity should be applied as it is more protective of the rights of the accused, including the principle of legality (*nullum crimen sine lege*).*

3. **Participation in a Group with Common Purpose**

The main question that arises here is whether and to what extent the various modes of responsibility contemplated in Lebanese law (co-perpetration, complicity, instigation) overlap or can be harmonised with the notion of joint criminal enterprise (JCE) provided for in customary international law (reference should be made to JCE I and III, namely the "basic" and the "extended" notion of such enterprise)

*The two bodies of law coincide in requiring a subjective element: both rely on intent or advertent recklessness (*dolus eventualis*). Thus, Lebanese law and international criminal law overlap in punishing the execution of a criminal agreement, where all the participants share the same criminal intent although each of them may play a different role in the execution of the crime.*

The two bodies of law also overlap in punishing those participants in a criminal enterprise who, although they had not agreed upon the perpetration of an "extra" crime, could be expected to know and did know of the reasonable possibility that such crime may be committed and willingly took the risk of its occurrence (so-called JCE III). However, under international criminal law, this notion cannot apply to "extra" crimes requiring special intent (as is the case with terrorism).

The Pre-Trial Judge and the Trial Chamber will have to evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese and that of international criminal notions of joint criminality. If there is no conflict, then Lebanese law should apply. Where there is a conflict, the body of law that would lead to a result more favourable to the accused should apply. In particular, as Lebanese law would allow conviction of an individual for a terrorist act effectuated by another person, even if the individual only had dolus eventualis *as to that terrorist act, the international criminal concept of JCE should be applied to this particular circumstance because it would not allow the conviction of an individual under JCE III for terrorist acts.*

E. Multiple Offences and Multiple Charging

These matters are largely regulated along the same lines by Lebanese law and international criminal law. Both provide for multiple offences and also allow multiple charging and thus there is no cause—at least as can be foreseen before the presentation of any particular facts—to envisage, let alone reconcile any conflict between the two bodies of law.

There is no clear general rule under either Lebanese or international criminal law as to whether cumulative or alternative charging are to be preferred. Notwithstanding, the Pre-Trial Judge, in confirming the indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct. In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provision. Additionally, modes of liability for the same *offence should always be charged in the alternative.*

The Pre-Trial Judge should also be guided by the goal of providing the greatest clarity possible to the defence. Thus, additional charges should be discouraged unless the offences are aimed at protecting substantially different values. This general approach should enable more efficient proceedings while avoiding unnecessary burdens on the defence, thus furthering the overall purpose of the Tribunal to achieve justice in a fair and efficient manner.

With regards to the hypothetical posed by the Pre-Trial Judge, we make the following observations: under Lebanese law, the crimes of terrorist conspiracy, terrorism and intentional homicide can be charged cumulatively even if based on the same underlying conduct because they do not entail incompatible legal characterisations, and because the purpose behind criminalising such conducts is the protection of substantially different values. Therefore, it would in most circumstances be more appropriate to charge those crimes cumulatively rather than alternatively.

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INTRODUCTION

1. The Pre-Trial Judge of the Special Tribunal for Lebanon ("Tribunal") is currently seized with an indictment filed by the Tribunal's Prosecutor on 17 January 2011. On 21 January 2011, the Pre-Trial Judge submitted to the Appeals Chamber 15 questions of law raised by this indictment, pursuant to Article 68(G) of the Tribunal's Rules of Procedure and Evidence ("Rules").[2] The Pre-Trial Judge has asked the Appeals Chamber to resolve these questions *ab initio* (from the outset) to ensure that this and any future indictments are confirmed—if they are confirmed—on sound and well-founded grounds.[3] On the basis of the President's Scheduling Order of the same day,[4] the Office of the Prosecutor ("Prosecution") and the Head of the Defence Office ("Defence Office") filed written submissions on these questions on 31 January 2011[5] and 4 February 2011[6] and presented oral arguments at a public hearing on 7 February 2011.

2. On 7 February 2011, the Appeals Chamber further announced its intention to allow intergovernmental organisations, national governments, non-governmental organisations and academic institutions to file *amici curiae* briefs by 11 February on specific issues related to the 15 questions.[7] The parties did not object to this in principle, simply announcing that they might wish to respond to such briefs, should they be presented.[8] On 11 February, the War Crimes Research Office at American University Washington College of Law (USA) filed a brief on "The Practice of Cumulative Charging before International Criminal Bodies" ("War Crimes Research Office Brief"). On the same day, the Institute for Criminal Law and Justice of Georg-August Göttingen University (Germany) filed an "*Amicus Curiae* brief on the question of the applicable terrorism offence in the

[2] Order on Preliminary Questions Addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G), of the Rules of Procedure and Evidence, STL-11-01/I, 21 January 2011 ("Pre-Trial Order pursuant to Rule 68(G)"). Rule 68(G) provides: "The Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law that he deems necessary in order to examine and rule on the indictment."

[3] Pre-Trial Order pursuant to Rule 68(G), para. 2.

[4] "Scheduling Order", STL-11-01/I, 21 January 2011.

[5] "Prosecutor's Brief Filed Pursuant to the President's Order of 21 January 2011 Responding to the Questions Submitted by the Pre-Trial Judge (Rule 176 *bis*)", STL-11-01/I, 31 January 2011 ("Prosecution Submission"); "Defence Office's Submissions Pursuant to Rule 176*bis*(B)", STL-11-01/I, 31 January 2011 ("Defence Office Submission").

[6] "Prosecutor's Skeleton Brief in Response to 'Defence Office Submissions Pursuant to Rule 176*bis*(B)' and Corrigendum to Prosecutor's Brief STL-11-01/I/AC-R176*bis* of 21 [*sic*] January 2011", STL-11-01/I, 4 February 2011; « Résumé des arguments du bureau de la defense », STL-11-01/I, 4 February 2011.

[7] Hearing of 7 February 2011, T. 6. All references to a transcript page in this decision are to the unrevised English version.

[8] Hearing of 7 February 2011, T. 159.

proceedings before the Special Tribunal for Lebanon, with a particular focus on a *"special" special intent* and/or a *special motive* as additional subjective requirements" ("Institute for Criminal Law and Justice Brief"). On 14 February 2011, the Registry received another *amicus curiae* brief on "The Notion of Terrorist Acts", submitted by Professor Ben Saul of the Sydney Centre of International Law at the University of Sydney. Since this *amicus* brief was submitted outside time, the Appeals Chamber was unable to take it into account.

3. There is a threshold question whether the Appeals Chamber should exercise jurisdiction to answer the questions posed. Although the course proposed is supported by both the Office of the Prosecutor and counsel for the Defence Office, the potential accused (if the indictment which we have not seen is confirmed) have not been heard.

4. For reasons that follow, the Appeals Chamber has decided to answer these 15 questions of law and does so in this decision.

5. These questions can be grouped into three general categories: the substantive criminal law of terrorism, homicide, and conspiracy; modes of criminal responsibility; and the concurrence of offences. In Section I of this opinion, we will address questions 1-12, regarding the elements of the crimes of terrorism, intentional homicide, attempted homicide, and conspiracy to be applied by the Tribunal. In Section II, we will address question 13, regarding the modes of responsibility to be applied by the Tribunal, in particular perpetration, co-perpetration, complicity (aiding and abetting), joint criminal enterprise, and liability based on *dolus eventualis* (a notion roughly equivalent to constructive intent, also at times defined as advertent recklessness). Finally, in Section III, we will address questions 14-15, regarding how the Tribunal should handle conduct that may be categorised under multiple criminal headings, including whether such multiple offences should be charged cumulatively or alternatively.

6. First, however, we pause to consider three overarching matters that will inform the remainder of this opinion: (i) the provenance and purpose of the Rule 68(G) power and its exercise in this case; (ii) the scope of the Tribunal's jurisdiction and its exercise in this case; and (iii) the general principles of interpretation that the Appeals Chamber will apply in addressing the questions of the Pre-Trial Judge.

I. The Provenance and Purpose of the Rule 68(G) Power and Its Exercise in This Case

7. The Tribunal's Judges adopted Rules 68(G) and 176*bis*(A)[9] to enable the Appeals Chamber to clarify in advance the law to be applied by the Pre-Trial Judge and the Trial Chamber, thereby expediting the justice process in a manner supported by both the Prosecutor and the Head of the Defence Office. In establishing these Rules, the Judges were guided by Articles 21 and 28 of the Tribunal's Statute, which require the Tribunal to avoid unreasonable delay in its proceedings and to adopt rules of procedure and evidence "with a view to ensuring a fair and expeditious trial."[10]

8. Thus the present function of the Appeals Chamber is not to apply the law to some specific set of facts. Rather, it is requested only to set out the law applicable to any future case on the specific issues raised, without encroaching on the right of future defendants to seek reconsideration of these matters in light of the particular facts of a case. It is important to emphasise that neither the Appeals Chamber nor the Defence Office has seen the indictment (which is currently under seal), much less the evidence submitted by the Prosecutor to the Pre-Trial Judge to support the indictment's confirmation. In other words, the Appeals Chamber is invited to make legal findings *in abstracto* (in the abstract), without any reference to facts. This procedure, sometimes encountered in civil proceedings of some countries, is less common in the context of criminal proceedings.

9. There are significant reasons for the normal practice of refraining from giving judgment, even on interpretation of a statute, in the absence of a specific factual context. The experience of the law is that general observations frequently require modification in the light of particular facts, which can provide a sharper focus and trigger a more nuanced response. But the decision whether to adopt Rule 176*bis*(C) required election between two alternatives: (i) to accept the risk that the Pre-Trial Judge or

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[9] "The Appeals Chamber shall issue an interlocutory decision on any question raised by the Pre-Trial Judge under Rule 68(G), without prejudging the rights of any accused."

[10] Article 21 ("Powers of the Chambers") provides in part: "The Special Tribunal shall confine the trial, appellate and review proceedings strictly to an expeditious hearing of the issues raised by the charges, or the grounds for appeal or review, respectively. It shall take strict measures to prevent any action that may cause unreasonable delay.[…]"
Article 28 ("Rules of Procedure and Evidence") further states:

> 1. *The judges of the Special Tribunal shall* [ ] *adopt Rules of Procedure and Evidence* for the conduct of the pre-trial, trial and appellate proceedings, the admission of evidence, the participation of victims, the protection of victims and witnesses and other appropriate matters and may amend them, as appropriate.
>
> 2. In so doing, the judges shall be guided, as appropriate, by the Lebanese Code of Criminal Procedure, as well as by other reference materials reflecting the highest standards of international criminal procedure, *with a view to ensuring a fair and expeditious trial.*

(Emphasis added.)

the Trial Chamber might adopt an interpretation of the law with which this Appeals Chamber ultimately disagrees, unnecessarily delaying the resolution of cases and thereby causing an injustice to the parties and to the people of Lebanon; or (ii) to authorise the Appeals Chamber to pronounce on the applicable law in the abstract, with a view to expediting proceedings in the interests both of potential defendants and the good administration of justice.

10. In this case we are conscious of the advantage we would enjoy as an appellate court of having as our starting point a reasoned decision of the lower court reached in the light of arguments based on specific facts, which we do not possess. We are however satisfied that that advantage is outweighed by three considerations. We have mentioned the first: the need for expedition. The second is that the questions asked by the Pre-Trial Judge have been the subject of careful written submissions and oral arguments of counsel at a reasonable level of specificity. The third is that no prejudice will arise against any future accused. If an accused were to challenge any of our conclusions, in the light of specific evidence, the fact that he was not heard at this stage will be a major factor in deciding whether to revisit any of the issues decided herein, pursuant to Rule 176*bis*(C).[11]

11. The function of the Appeals Chamber is to decide the issues raised by the Pre-Trial Judge in the light of the arguments of counsel. We endorse what a great international authority, Hersch Lauterpacht, wrote in 1933: "[T]he function of the judge to pronounce in each case *quid est juris* [what is the law?] is pre-eminently a practical one. He is neither compelled nor permitted to resign himself to the *ignorabimus* [it shall be ignored] which besets the perennial quest of the philosopher and the investigator in the domain of natural science."[12] It is the responsibility of the Appeals Chamber to accomplish this task by stating the applicable law in the clearest and most coherent way possible.

II. The Jurisdiction Conferred

12. The crimes which are the subject of any indictment must, in terms of the Statute of the Tribunal, be confined to certain particularly serious offences against the criminal law of Lebanon.

[11] "The accused has the right to request the reconsideration of the interlocutory decision under paragraph A, pursuant to Rule 140 without the need for leave from the presiding Judge. The request for reconsideration shall be submitted to the Appeals Chamber no later than thirty days after disclosure by the Prosecutor to the Defence of all material and statements referred to in Rule 110(A)(i)."

[12] H. Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press, 1933), at 64.

One of the purposes of this judgment is to identify with some precision both what the law of Lebanon requires and to what extent, if at all, its application is modified by the Statute. Among the questions we must discuss is the extent to which the relevant criminal law of Lebanon is to be construed in the light of international developments.

13. It would be wrong to assume that this Tribunal's jurisdiction is closely comparable to that of other criminal tribunals with an international composition. Compared to them, one of the several novelties of the Tribunal relates to the scope of offences over which it has jurisdiction. The statutes of other international criminal courts and tribunals do not confine their subject-matter except by reference to one or more categories of crimes: it is for the prosecutor of each court or tribunal to select cases whose facts he regards as falling under one or more of those categories and to identify the persons suspected of criminal conduct within those categories. In contrast, this Tribunal's Statute submits to the Tribunal's jurisdiction a set of specific allegations: the killing of the former Prime Minister Hariri and 22 other persons, which occurred in Beirut on 14 February 2005, as well as additional attacks connected with that killing (if the Tribunal finds that the connection meets the standards enumerated in Article 1[13]). The Statute then requires the Tribunal to determine whether those allegations are made out and can be characterised, under Lebanese law, as (i) "acts of terrorism", (ii) "crimes and offences against life and personal integrity", (iii) the crime of "illicit association", (iv) a crime of conspiracy (*complot*), or as (v) the crime of "failure to report crimes and offences."[14] Thus, the Tribunal's Statute reverses the approach to jurisdiction taken in other statutes of international criminal courts and tribunals: instead of starting with the categories of criminalities to be prosecuted and punished (war crimes, crimes against humanity, genocide, and so on), it starts with the allegations of facts to be investigated and then enjoins the Tribunal to prosecute those responsible under one or more specific heads of criminality, set out in the Statute. The Tribunal's Prosecutor cannot therefore "choose" the facts to prosecute on his own or turn to other facts. Once through independent investigation he has identified the persons believed responsible for specified attacks, his task is to bring before the Tribunal's Judges charges authorised by the Statute which he

[13] "If the Tribunal finds that other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005, or any later date decided by the Parties and with the consent of the Security Council, are connected in accordance with the principles of criminal justice and are of a nature and gravity similar to the attack of 14 February 2005, it shall also have jurisdiction over persons responsible for such attacks."

[14] Article 2(a) STLSt.

believes can be established. The Tribunal's only province at that point is to legally characterise those facts.

14. Even though the Preamble of the Statute defines the assassination of Rafik Hariri and others as a "terrorist crime", and Article 1, at least in the French version, defines the other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 as "*attentats terroristes*", the Tribunal cannot assume to be proved what is an essential element of any charge that alleges terrorism. It will be for the Tribunal's Judges, and for them alone, to determine whether allegations of a kind identified by the Statute are proved on the basis of the evidence. The Tribunal is not bound by the definitions or classifications set out in the Statute, which reflect the political perspectives of the Statute's framers. The finding of relevant facts and the determination of their legal significance can only be the result of the judicial process of the Tribunal.

15. Also novel is the Tribunal's mandate to apply solely the substantive criminal law of a particular country.[15] Except where overridden by other provisions of the Tribunal's Statute, the substantive criminal law which the Tribunal must apply is the domestic criminal law of Lebanon.[16] It is necessary first to determine what are the terms of that Lebanese law. Once we have done that, we will have to consider whether, and if so, to what extent and with what effect, the Lebanese law may be held to have been overridden. As to who are complicit in an offence or liable for conduct related to it, the Statute sets out specific provisions which are based not on the domestic law of Lebanon but on principles of international criminal law.[17] The Tribunal, being international in character, is fully

[15] While other internationalised tribunals, such as the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, have been charged in part with prosecuting crimes defined under domestic law, this Tribunal is the first to be charged with applying predominantly domestic law, at least in terms of substantive criminal law.

[16] Article 2 of the Statute, entitled "Applicable criminal law", provides that:

The following shall be applicable to the prosecution and punishment of the crimes referred to in article 1, subject to the provisions of this Statute:

(a) The provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy, and

(b) Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".

[17] Article 3 of the Statute, entitled "Individual criminal responsibility", provides that:

1. A person shall be individually responsible for crimes within the jurisdiction of the Special Tribunal if that person:

(a) Committed, participated as accomplice, organized or directed others to commit the crime set forth in article 2 of this Statute; or

(b) Contributed in any other way to the commission of the crime set forth in article 2 of this Statute by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of

empowered to apply any provision of its Statute which refers to international criminal law. In this connection, it is worth noting that the Secretary-General has emphasised the international nature of the Tribunal:

> [T]he constitutive instruments of the special tribunal in both form and substance evidence its international character. The legal basis for the establishment of the special tribunal is an international agreement between the United Nations and a Member State; its composition is mixed with a substantial international component; its standards of justice, including principles of due process of law, are those applicable in all international or United Nations-based criminal jurisdictions; its rules of procedure and evidence are to be inspired, in part, by reference materials reflecting the highest standards of international criminal procedure; and its success may rely considerably on the cooperation of third States.[18]

16. Thus we have a tribunal that must apply the substantive criminal law of a particular country, yet it is nonetheless an international tribunal in provenance, composition, and regulation,[19] it must abide by "the highest international standards of criminal justice",[20] and its statute incorporates certain aspects of international criminal law. It is this tension, best exemplified by the contrast between Articles 2 and 3 of the Statute, that animates many of the questions posed by the Pre-Trial Judge: when and whether international law, based on the international nature and mandate of this Tribunal, should inform the Tribunal's application of Lebanese criminal law.

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furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime.

2. With respect to superior and subordinate relationships, a superior shall be criminally responsible for any of the crimes set forth in article 2 of this Statute 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:

(a) The superior either knew, or consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) 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.

3. The fact that the person acted pursuant to an order of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Tribunal determines that justice so requires.

See paragraph 206 below regarding how Article 3 incorporates norms of international criminal law.

[18] *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), at para. 7. The Secretary-General also noted, however, that "[w]hile in all of these respects the special tribunal has international characteristics, its subject matter jurisdiction or the applicable law remain national in character". *Id.*

For example, both the Prosecutor and the Defence Office argued in part on the basis of international law, and this Chamber relied in part on that international law, when considering questions of jurisdiction and standing. See STL, *In re Application of El Sayed*, "Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing", CH/AC/2010/02, 10 November 2010.

[19] See Order of the Pre-Trial Judge pursuant to Rule 68(G), para. 7(b).

[20] S/RES/1757 (2007), preamble, at para. 2.

III. General Principles on the Interpretation of the Lebanese Criminal Law and the STL Statute

A. Principles on the Interpretation of the Provisions of the Statute

17. According to the Prosecutor, the Tribunal must essentially apply Lebanese law to the crimes set out in Article 2 of the Statute.[21] Any time the Tribunal finds that there is an inconsistency or a gap in that law, the Prosecutor asserts, the Tribunal must rely on general rules and principles of Lebanese criminal law and Lebanese case law. Only if the relevant Lebanese jurisprudence is uncertain or divided or based on a manifestly incorrect interpretation of Lebanese law may the Tribunal turn to international treaty law and customary international law to construe domestic Lebanese law.[22] Under the Prosecutor's approach, the Tribunal may do so only if there are gaps in Lebanese law on the elements of the crimes and then only subject to the following strict and cumulative conditions:

> (a) [a]n examination of the Statute, relevant provisions of the LCC [Lebanese Criminal Code], Lebanese legal principles and jurisprudence, shows that the Tribunal's legislation is not definitive on a specific issue related to the definition of any of these crimes; and (b) [t]he application of relevant international rules and principles (including customary international law) would offer further elucidation of such issue; and (c) [t]he relevant international rules and principles (including customary international law) are not inconsistent with the spirit, object and purpose of the Statute.[23]

The Prosecutor, however, hastens to add that "[w]ith respect to terrorist acts [...] no lacuna in the applicable Lebanese law arises".[24]

18. According to the Defence Office, the Tribunal should apply the following principles of interpretation: "[S]trict interpretation of criminal law including the prohibition of interpretation of a clear text [...], the prohibition against extension of the text beyond the intention of the legislator, and prohibition of interpretation by analogy."[25] In addition, when interpreting the relevant resolution of the Security Council, the Defence Office submits that the Tribunal should adhere to the principle of construction that "limitations of sovereignty may not be lightly assumed" and to the principle of

[21] Hearing of 7 February 2011, T. 11.
[22] Prosecution Submission, paras 5-12.
[23] Prosecution Submission, para. 13.
[24] Prosecution Submission, para. 15.
[25] Defence Office Submission, para. 30. See also Hearing of 7 February 2011, T. 48.

interpretation *in dubio mitius* (in case of doubt, one should prefer the interpretation more favourable to a sovereign state), "which call for deference to the sovereignty of a state when interpreting a text that is binding on it".[26] More generally the Defence Office argues that the Tribunal should base itself exclusively on Lebanese law both with regard to the crimes falling under its jurisdiction and with regard to the modes of responsibility envisaged in Article 3 of the Statute: "[T]he Tribunal is not permitted and has not been jurisdictionally enabled to import into the interpretative process methods or means of interpretation that are not recognised as applicable to the interpretation of Lebanese criminal law in the Lebanese legal order."[27] Under the Defence Office's approach, the modes of liability provided for in Article 3 of the Statute and seemingly based on international law must be applied only to the extent they coincide with Lebanese law: "[A] combined reading of these provisions [of Articles 2 and 3 of the Statute] makes clear that Lebanese criminal law is the body of law ultimately relevant to determining the applicability and definition of both crimes and forms of liability applicable before this Tribunal."[28] On this point the Defence Office concludes that "[a]ssessed against that standard, neither of the 'modes of liability' provided in Articles 3(2) and 3(1)(b) of the statute are applicable to proceedings before the Tribunal".[29] In short, according to the Defence Office, the only body of law that the Tribunal may apply is Lebanese law: as repeatedly stated by the Defence Office in its oral submissions,[30] resort to international law may be made only to the extent that such law expands the rights of the suspects or accused. Otherwise, according to the Defence Office, international law must not be applied by the Tribunal when dealing with the legal issues currently before the Appeals Chamber.

19. Interpretation is an operation that always proves necessary when applying a legal rule. One must always start with a statute's language. But that must be read within the statute's legal and factual contexts. Indeed, the old maxim *in claris non fit interpretatio* (when a text is clear there is no need for interpretation) is in truth fallacious, as has been rightly emphasised by distinguished scholars.[31] It overlooks the spectrum of meanings that words, and especially a collection of words,

[26] Defence Office Submission, paras 40-41.

[27] Defence Office Submission, para. 59.

[28] Defence Office Submission, para. 155.

[29] Defence Office Submission, para. 165.

[30] Hearing of 7 February 2011, T. 42-43 and 49-50.

[31] R. Dworkin rightly notes that the "description 'unclear' is the *result* rather than the *occasion* of [...] [a] method of interpreting statutory texts". *Law's Empire* (Oxford: Hart Publishing, 1998), at 352; see also *id* at 350-354. P.M. Dupuy

may have and misses the truth that context can determine meaning. That is particularly so when what is at stake is the construction not of one single provision but of many legal rules contained in a national statute or in a piece of international legislation. The process is not to construe the text initially to determine whether there is a gap and, if there is, to construe it a second time to deal with the problem created by the gap.[32] Rather, the court performs a simple exercise of construction, referring to whatever is the relevant context.

20. The *internal* context—that of the statute—is of obvious importance:

> [W]ords derive colour from those which surround them.[...] Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words.[33]

But so too is the *external* context. It has been stated that:

> Judges [...] sometimes use the word 'context' in a narrow sense. At other times they use it with a meaning so wide that embraces virtually all the interpretative criteria. The widest meaning is best.[34]

We agree, but would delete "virtually". Context must embrace all legitimate aids to interpretation. Important among them are the international obligations undertaken by Lebanon with which, in the absence of very clear language, it is presumed any legislation complies.

21. Also relevant are the conditions of the day, a topic to which we return at paragraph 135. The tenet of construction that a statute is presumed to be "always speaking" recognises the reality that society alters over time and interpretation of a law may evolve to keep pace.[35]

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points out that: « l'appréciation de la clarté de l'acte constitue elle-même le résultat d'une interprétation par le juge». *Droit International Public*, 9th edn. (Paris: Dalloz, 2008), at 448.

[32] Compare the narrow approach of English law (P. Sales and J. Clement, "International Law in Domestic Courts: The Developing Framework", 124 *Law Quarterly Review* (2008) 388, at 402) with that taken in New Zealand (*Ye v Minister of Immigration*, [2010] 1 NZLR 104 at [24-25]).

[33] U.K., Chancery Division, *Bourne (Inspector of Taxes) v Norwich Crematorium Ltd* [1967] 1 WLR 691 at 696, [1967] 2 All ER 576 at 578, Stamp J. See also J. F. Burrows and R. I. Carter, *Statute Law in New Zealand*, 4th edn. (Wellington: LexisNexis, 2009), at 232.

[34] F. Bennion, *Bennion on Statutory Interpretation*, 5th edn. (London: LexisNexis, 2008), at 589

[35] See U.K., House of Lords, *R v Ireland* [1998] AC 147, 158 (Lord Steyn), applied in U.K., Supreme Court, *Yemschaw v London Borough of Hounslow* [2011] UKSC 3, 26 (referencing the principle "that statutes will generally be found to be [...] 'always speaking' [...]").

22. Who are the lawmakers whose presumed intent we must harmonise and effectuate? Here there are three. One is the Parliament of Lebanon in respect to the substantive criminal law referenced in Article 2 of the Tribunal's Statute. The United Nations and the Government of Lebanon are the makers of the second law: that of the Statute, which as indicated in particular by Article 3 as well as by the general context of the Tribunal incorporates some norms of international criminal law.[36] The Judges of the Tribunal, exercising powers under Article 29 of the Statute, and the authors of the Lebanon Code of Criminal Procedure, to which reference may be made under Rule 3(A) of the Tribunal's Rules of Procedure and Evidence, are the makers of the third law: the adjectival rules of procedure and evidence.

23. Lawmakers, both national and international, may seek to protect and turn into legally binding standards interests and concerns that are conflicting, or which are not necessarily shared by all legislators. As a result, statutes and international treaties (as well as other binding international instruments) not infrequently contain varying or diverging formulations of interests and concerns without amalgamating them and reducing them into a logically well-structured and coherent body of rules. Some concerns or demands may be reflected in one provision, while others, not necessarily reconcilable, may be articulated in other provisions. In some instances they may even be embedded in the same provision. Where provisions are inconsistent, the dominant provision must be identified. In all these cases as well as in those areas that H.L.A. Hart termed 'penumbral situations',[37] it falls to the interpreter as far as practicable to give consistency, homogeneity and due weighting to the different elements of a diverging or heterogeneous set of provisions. Judges are not permitted to resort to a *non liquet* (that is, to declare that it is impossible for them to reach a decision because the point at issue "is not clear" in default of any rule applicable to the case).[38]

24. This operation must of course be undertaken by way of construction and without the judges arrogating to themselves the role of lawmakers beyond that inherent in interpretation, that is, without permitting the will of the interpreter to override that of the standard-setting body.

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[36] See paragraph 206 below regarding Article 3's incorporation of standards of international criminal law.

[37] H.L.A. Hart, *Essay in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), at 64–65, 71–72 (referencing those cases that fall outside the core of clearly defined legal principles).

[38] See for example Article 4 of the Lebanese Code of Civil Procedure: "A judge shall be liable for a denial of justice if he [...] refrains from ruling on the pretext of obscurity or lacunae in the law [...]. If the law is obscure, the judge shall interpret it in a manner consistent with its purpose and with other texts. In the absence of a law, the judge shall apply the general principles of law, customs, and the principles of justice."

25. The starting point is the criminal law of Lebanon. That is made clear by Article 2 of the Statute. It is also to be presumed in terms of the principle of legality, according to which any conduct alleged to be criminal is to be measured against the law in effect at the time it was committed.[39]

26. For the purpose of interpretation, we consider it appropriate, save to the extent that the Lebanese law adopted by Article 2 may clearly otherwise provide, to apply to the Statute of the Tribunal international law on the interpretation of treaty provisions. That is so whether the Statute is held to be part of an international agreement between Lebanon and the United Nations or is regarded instead as part of a binding resolution adopted by the Security Council under Chapter VII of the UN Charter, an issue we need not decide upon at this juncture. Indeed, in the latter case, the customary rules on interpretation would undoubtedly apply, in accordance with the consistent practice of other international criminal tribunals, to which there has been no objection by States or other international subjects.[40] It is true that the rules of interpretation that evolved in international custom and were codified or developed in the 1969 Vienna Convention on the Law of Treaties referred only to treaties between States, because at that stage the development of new forms of binding international instruments (such as agreements between States and rebels, or binding resolutions of the UN Security Council regulating matters normatively) had not yet taken a solid foothold in the world community. Those rules of interpretation must, however, be held to be applicable to any internationally binding instrument, whatever its normative source. This is because such rules translate into the international realm general principles of judicial interpretation that are at the basis of any serious attempt to interpret and apply legal norms consistently.[41]

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[39] See paras 131-142 below for further discussion of this principle.

[40] ICTR, *Nsengiyumva*, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 3 June 1999 ("*Nsengiyumva* Concurrence"), para. 14: "In interpreting the Statute and the Rules which implement the Statute, the Trial Chambers of both the [ICTR] and the [ICTY], as well as the Appeals Chamber have consistently resorted to the Vienna Convention , for the interpretation of the Statute." See also ICTR, *Kanyabashi*, Joint and Separate Opinion of Judge Wang and Judge Nieto-Navia, 3 June 1999 ("*Kanyabashi* Concurrence"), para. 11; ICTY, *Erdemović*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para 3; ICTY, *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 19 August 1995, para. 18.

[41] See *Nsengiyumva* Concurrence, para. 14: "Because the Vienna Convention codifies logical and practical norms which are consistent with domestic law, it is applicable under customary international law to international instruments which are not treaties."; *Kanyabashi* Concurrence, para. 11: "The rules of the Vienna Convention, and Article 31 in particular, reflect customary rules of interpretation which originate from principles found in systems of municipal law 'expressive of common sense and of normal grammatical usage '" (quoting R. Jennings and A. Watts (eds), *Oppenheim's International Law*, vol. 1, 9th edn. (London: Longman, 1996), at 1270); see also ICTY, *Delalić*, Appeal Judgment, 20 February 2001, para. 67 (noting the Vienna Convention "reflect[s] customary rules" of interpretation and citing *Case Concerning the Territorial Dispute (Libyan Aram Jamahiriya/Chad)*, Judgment, I.C.J. Reports (1994), at 21, para. 41, for the customary status of Article 31 of the Vienna Convention).

27. However, we will also take account of the apposite remarks made by the International Court of Justice in its Advisory Opinion on *Kosovo*. There the Court emphasised that, although the rules of the Vienna Convention can be used to interpret acts of the Security Council, one should be mindful of the specific features of Security Council acts:

> While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States [...], irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[42]

Accordingly, in so far as the provisions of this Tribunal's Statute have entered into force on the basis of Security Council Resolution 1757 (2007), the Appeals Chamber will also take into account such statements made by members of the Security Council in relation to the adoption of the relevant resolutions, the *Report of the UN Secretary-General on the Establishment of the Tribunal* of 15 November 2006 (S/2006/893), and the object and purpose of those resolutions (in keeping with the *Kosovo* Opinion of the ICJ),[43] as well as the practice of the Security Council.

28. Subject to the caveat suggested by the *Kosovo* Advisory Opinion, under international law seeming inconsistencies in a text must be resolved by reference to the general principle of construction enshrined in Article 31(1) of the Vienna Convention (and the corresponding customary rule of international law): rules must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The latter portion of this clause embodies the principle of teleological interpretation, which

[42] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, para. 94, *available at* http://www.icj-cij.org/docket/files/141/15987.pdf.

[43] See *id* at para. 96, where the Court pinpointed three distinct features of Security Council Resolution 1244 (1999) as "relevant for discerning its object and purpose".

emphasises the need to construe the provisions of a treaty in such a manner as to render them effective and operational with a view to attaining the purpose for which they were agreed upon.

29. Let it be emphasised that, in the present context, contrary to what has been argued by the Defence Office,[44] the principle of teleological interpretation, based on the search for the purpose and the object of a rule with a view to bringing to fruition as much as possible the potential of the rule, has overridden the principle *in dubio mitius* (in case of doubt, the more favourable construction should be chosen), a principle that—when applied to the interpretation of treaties and other international rules addressing themselves to States—calls for deference to state sovereignty. The principle *in dubio mitius* is emblematic of the old international community, which consisted only of sovereign states, where individuals did not play any role and there did not yet exist intergovernmental organisations such as the United Nations tasked to safeguard such universal values as peace, human rights, self-determination of peoples and justice. It is indeed no coincidence that, although this canon of interpretation was repeatedly relied upon by the Permanent Court of International Justice in its heyday, it is no longer or only scantily invoked by modern international courts. Today the interests of the world community tend to prevail over those of individual sovereign states; universal values take pride of place restraining reciprocity and bilateralism in international dealings; and the doctrine of human rights has acquired paramountcy throughout the world community.

30. An element of teleological interpretation is the principle of effectiveness, also expressed in the maxim *ut res magis valeat quam pereat* (in order that a rule be effective rather than ineffectual): as enunciated by the UN International Law Commission, this principle requires that "[w]hen a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purpose of the treaty demand that the former interpretation should be adopted".[45] One must assume that the lawmaker intended to pursue an objective through the set of norms he created; hence, whenever a literal interpretation of the text would set a norm at odds with other provisions, an effort must be made to harmonise the various provisions in light of the goal pursued by the legislature.

[44] Defence Office Submission, paras 40-41. See also Hearing of 7 February 2011, T. 45.

[45] *Report of the International Law Commission to the General Assembly*, A/6309/Rev.1, *reprinted in* [1966] 2 *Y B Int'l L Comm'n* 169, at 219.

31. An example of this notion, in the case of conflicting languages, is Article 33(4) of the Vienna Convention, dealing with the case of "a treaty authenticated in two or more languages, when a comparison of the authentic text discloses a difference of meaning" that cannot be resolved by other means of interpretation. In such a case, that Article requires that "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted". This provision, which to a large extent codifies existing law,[46] particularises the general principle of effectiveness with regard to conflicts between texts drafted in different languages. Indeed, instead of leaving a treaty clause inoperative on account of discrepancies of expression in texts employing two or more authoritative languages, the court will adopt such content as is common to both (as expression of the shared will of the parties) provided it is consonant with the object and purpose of the treaty.[47]

32. With regard to the Tribunal's Statute, the principles of teleological interpretation just referred to require an interpretation that best enables the Tribunal to achieve its goal to administer justice in a fair and efficient manner.[48] If however this yardstick does not prove helpful, one should choose that

[46] In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice held: "Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the parties." *Mavrommatis Palestine Concessions*, 1924 PCIJ Series A, No. 2, at 19.

[47] In terms of practical operation, this interpretive approach is also found in the domestic laws of states. For example, in the United Kingdom (and other common law countries), absent an unambiguous contrary expression of the lawmakers' will, the judges will construe statutes in accordance with the settled presumptions of the law. See R. Cross, J. Bell and G. Engle, *Cross Statutory Interpretation*, 3rd edn. (Oxford: Oxford University Press, 1995), at 165-166:

> Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules[..] Long-standing principles of constitutional and administrative law are likewise taken for granted, or assumed by the courts to have been taken for granted, by Parliament [...] These presumptions apply although there is no question of linguistic ambiguity in the statutory wording under construction, and they may be described as 'presumptions of general application'[...] These presumptions of general application not only supplement the text, they also operate at a higher level as expressions of fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts. They operate here as constitutional principles which are not easily displaced by a statutory text [...]'

See also U.K., House of Lords, *R v Secretary of State for the Home Department*, ex parte *Pierson* [1998] AC 539 at 573-575; U.K., House of Lords, *R v Secretary of State for the Home Department*, ex parte *Simms* [2000] 2 AC 115 at 130; U.K., House of Lords, *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 534

[48] See in particular S/RES/1757 (2007), preamble: "*Mindful* of the demand of the Lebanese people that all those responsible for the terrorist bombing that killed former Lebanese Prime Minister Rafiq Hariri and others be identified and brought to justice"; S/RES/1664 (2006), at para. 1, requesting the Secretary General "negotiate an agreement with the Government of Lebanon aimed at establishing a tribunal of an international character based on the highest international standards of criminal justice"; Article 21(1) STLSt: "The Special Tribunal [...] shall take strict measures to prevent any action that may cause unreasonable delay."; Article 28(2) STLSt, directing the judges in adopting Rules of Procedure and Evidence to "be guided [...] by other reference materials reflecting the highest standards of international criminal procedure, with a view to ensuring a fair and expeditious trial"; *Report of the Secretary-General on the Establishment of*

interpretation which is more favourable to the rights of the suspect or the accused, in keeping with the general principle of criminal law of *favor rei* (to be understood as "in favour of the accused"). This principle, a corollary of the overarching principle of fair trial and in particular of the presumption of innocence, has been upheld by international criminal tribunals[49] and is codified in Article 22(2) of the ICC Statute ("[i]n case of ambiguity, the definition [of a crime] shall be interpreted in favour of the person being investigated, prosecuted or convicted"). The same principle, in its more trial-orientated facet, when it is referred to as the *in dubio pro reo* standard (in case of doubt one should hold for the accused) or *in dubio mitius* (as a principle applying to conviction and sentencing of individuals: in case of doubt one should apply the more lenient penalty), normally guides the trial judge when appraising the evidence and assessing the culpability of the accused or determining the penalty to be inflicted.[50] As we shall see, in the field of criminal law one has also to take into account a particular facet of the principle of legality (*nullum crimen sine lege*), namely the ban on retroactive application of criminal law.[51] These principles, *favor rei* and *nullum crimen sine lege*, are general principles of law applicable in both the domestic and the international legal contexts. The Appeals Chamber is therefore authorised to resort to these principles as a standard of

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a Special Tribunal for Lebanon, S/2006/893 (2006), at para. 17, noting balance struck "between fairness, objectivity and impartiality of the trial process, and its efficiency and cost-effectiveness".

The Appeals Chamber further notes, pursuant to the ICJ *Kosovo* Opinion mentioned above, not just various statements of UN Security Council Members casting their votes in favour of Resolution 1757 (see, for instance, Peru: "Peru decided to support this resolution because of its commitment to the fight against impunity and its firm position on combating terrorism and because it is of the view that this resolution is the only way to overcome the legislative impasse regarding the establishment of the Special Tribunal for Lebanon, given the need to ensure that justice prevails, which is essential in promoting peace and security"; and Slovakia: "impunity should not be allowed and tolerated. The perpetrators of any crime have to be brought to justice. The rule of law must be respected everywhere and by everybody. The establishment of the Tribunal is necessary for a thorough investigation of the cases of politically motivated violence — in fact, terrorism — and for bringing perpetrators of these outrageous crimes to justice"), but also the statements of the Members abstaining (see Qatar: "advocating the need to establish justice and oppose impunity, in line with the objective set out in the United Nations Charter of creating conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"; South Africa: "South Africa [..] expects [the STL] to operate with impartiality and in accordance with Lebanese law and the highest international standards of criminal justice"; China: "[The Tribunal should] help to establish the truth as soon as possible, hold the perpetrators accountable and ensure justice for the victims"; Russia: "We fully share with the sponsors of the draft resolution their primary objective of preventing impunity and political violence in Lebanon"). For the record of the debate, see S/PV.5685 (30 May 2007).

[49] See ICTR, *Akayesu*, Trial Judgment, 2 September 1998, paras 500-501; ICTY, *Krstić*, Trial Judgment, 2 August 2001, para. 502; ICTY, *Galić*, Appeals Judgment, 30 November 2006, paras 76-78; ICTY, *Limaj et al*, Appeals Judgment, 27 September 2007, paras 21-22; ICC, *Situation in the Democratic Republic of Congo*, Decision on the OPCD's Request for Leave to Appeal the 3 July 2008 Decision on Applications for Participation, 4 September 2008, para. 23; ICC, *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 31.

[50] Military Tribunal IV, *United States of America v Friedrich Flick et al* ("The Flick Case"), Case No. 5, 19 April 1947 – 22 December 1947, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. VI, p. 1189.

[51] See below, Section I(I)(B)(3)(b).

construction when the Statute or the Lebanese Criminal Code is unclear and when other rules of interpretation have not yielded satisfactory results.

B. Principles on the Interpretation of Lebanese Law

33. Applying these principles to the Statute of the Tribunal, it is indisputable that under Article 2 of the Statute, the Tribunal is to apply Lebanese law as the *substantive law* governing the crimes prosecuted before it.[52] In this regard, our Tribunal is different from most international tribunals. These tribunals apply international law when exercising their primary jurisdiction (namely their jurisdiction over the inter-state disputes or the crimes which they are called upon to adjudicate) but may need to have recourse to national law incidentally (*incidenter tantum*),[53] in order to decide whether the precondition for the applicability of an international rule has been satisfied (*e.g.*, to establish whether an individual has the nationality of the State which has engaged in his judicial protection).[54] In contrast, under our Statute we are called upon primarily to apply *national* law to the facts coming within our jurisdiction. In other words, we are mandated to apply national law—in particular, Lebanon's—*principaliter* (that is, in the exercise of our primary jurisdiction over particular allegations).

34. The need to apply Lebanese law when pronouncing on crimes falling under our jurisdiction raises the question of how to interpret that law.

35. In consonance with the case law of international tribunals, such as the Permanent Court of International Justice (which admittedly relates to interstate disputes and not to criminal

[52] See Prosecution Submission, para 3; Defence Office Submission, para. 33; Hearing of 7 February 2011, T. 11-31 (Prosecution) and 44 (Defence Office)

[53] Cf. STL, *In re Application of El Sayed*, Decision on Appeal of Pre-Trial Judge's Order Regarding Jurisdiction and Standing, CH/AC/2010/02, 10 November 2010, paras 45-46 (discussing the distinction between primary and incidental jurisdiction).

[54] As the Permanent Court of International Justice stated in *Exchange of Greek and Turkish Populations*, "the national status of a person belonging to a State can only be based on the law of that State, and [...] therefore any convention dealing with this status must implicitly refer to the national legislation". 1925 PCIJ Series B, No. 10, at 19; see also *id* at 22. There are many precedents where international courts have applied national laws to this effect. See for instance *Nottebohm Case (second phase)*, Judgment, I.C.J. Reports (1955) 4, at 20-21; *Esteves Case* (Spanish-Venezuelan Comm'n), R.I.A.A., Vol. X, 739 (1903), at 740; *Tellech (United States) v Austria and Hungary*, R.I.A.A., Vol. VI, 248 (1928), at 249; *Parker (United States) v United Mexican States*, R.I.A.A., Vol. IV, 35 (1926), at 38; *Mackenzie (United States) v Germany*, R.I.A.A., Vol. VII, 288 (1925), at 289; *Flegenheimer Claim*, 25 I.L.R. 92 (It.-U.S. Concil. Comm'n 1958).

proceedings),[55] and as urged by both the Prosecutor and the Defence Office,[56] generally speaking the Tribunal will apply Lebanese law as interpreted and applied by Lebanese courts.[57] In doing so, we have the distinct advantage not only of the assistance of members of the bar of Lebanon, but also of the experience of two of our members, including the Vice President.

36. To apply Lebanese law requires more than a narrow examination of specific past decisions. It requires us to stand back and identify the principles that express the state of the art in Lebanese jurisprudence.

37. We have rejected the Prosecution's submission that one may not look beyond the text of a statute unless there is a gap. We reiterate that to find there is a gap presupposes a construction to that effect; in fact construction is the end result after all legitimate considerations have been employed. The question is what those legitimate considerations are.

38. One begins with the words, but in context not in isolation. Whereas the context for an ultimate verdict will be both legal and factual, we are confined on interpretation to the former. One must look to the interpretation which best fits the task the words are to perform.

39. As an international court, we may depart from the application and interpretation of national law by national courts under certain conditions: when such interpretation or application appears to be

[55] Back in 1895, a Great Britain-Republic of South Africa Tribunal in *Affaire des protégés britanniques au Transvaal* held that a national law "was subject to the sole and exclusive interpretation in the ordinary course by the tribunals of the country", thus implying that an international tribunal was obliged to comply with such interpretation. La Fontaine (ed.), *Pasicrisie international Histoire documentaire des arbitrages internationaux 1794-1900* (Berne 1902), at 460. The same principle had already been set out in *Dominguez (United States) v Spain* (1879), *reprinted in* J.B. Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, Vol. III (Washington: GPO, 1898), at 2596-2597.

The principle was specified in greater detail by the Permanent Court of International Justice in 1929 in the *Serbian Loans* case. The Court stated that "The Court, having in these circumstances to decide as to the meaning and scope of a municipal law, makes the following observations: For the Court itself to undertake its own construction of municipal law, leaving on one side existing judicial decisions, with the ensuing danger of contradicting the construction which has been placed on such law by the highest national tribunal *and which, in its results, seems to the Court reasonable,* would not be in conformity with the task for which the Court has been established [...]." 1929 PCIJ Series A, No. 20, at 46-47 (emphasis added). The PCIJ reverted to the same question in *Brazilian Loans*, 1929 PCIJ Series A, No. 21, at 124.

[56] See Prosecution Submission, paras 7-8; Defence Office Submission, para. 58.

[57] In assessing domestic law, international tribunals should "consider the very terms of the law, in their proper context, and complemented, whenever necessary, with additional sources, which may include proof of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars." WTO, Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, Case No. WT/DS392/R (29 September 2010), at para. 7.104. In this context, a certain level of deference to the application and interpretation of domestic law by national judicial authorities is warranted. See generally ICSID, *Siag and Vecchi v Egypt*, Case No. ARB/05/15, 1 June 2009, at para 463; *Etezadi v Iran*, 30 Iran-U.S. C.T.R. 22 (23 March 1994), at 42

unreasonable,[58] or may result in a *manifest injustice*,[59] or is *not consonant with international principles and rules* binding upon Lebanon.[60] That is indeed what other international tribunals have effectively held.

40. In this regard, we reject in three respects the Defence Office's emphasis that the Tribunal may apply only Lebanese law as blind to the international nature of this Tribunal. First, as stated above, international law binding upon Lebanon is part of the legal context in which its legislation is construed. Secondly, we agree with the Prosecution that the application of national law by an international court is subject to some limitations by international law.[61] An obvious example of

[58] See in particular *Serbian Loans*, 1929 PCIJ Series A, No. 20, at 46-47. The Prosecution cites the International Court of Justice's recent decision in the *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment, 30 November 2010, para. 70, *available at* http://www.icj-cij.org/docket/files/103/16244.pdf. See Prosecution Submission, para. 7, fn.4. That citation is not to the point, however. In that case the Court, after restating the previous well-known holdings of the Permanent Court of International Justice on the application of national law, went on to say that nevertheless the Court might depart from the national interpretation of a law when a State appearing before the Court relied on a manifestly incorrect interpretation of its domestic law. In other words, the Court did not deal with the permissibility of departing from the national interpretation of a domestic law propounded by *domestic courts*, but rather with a departure from a wrong interpretation suggested by a State appearing before the Court.

[59] See *Solomon (United States) v Panama*, R.I.A.A., Vol. VI, 370 (1933), at 371-373; *Putnam (United States) v United Mexican States*, R.I.A.A., Vol. IV, 151 (1927), at 153: "Only a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunals of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law."

In *Sewell (United States) v United Mexican States*, the General US-Mexico Claims Commission found that Mexico had committed a denial of justice in that the penalty inflicted on the murderers of US nationals was not, under Mexican law, commensurate with the offence. R.I.A.A., Vol. IV, 626 (1930), at 630-632. In *Davies et al (United States) v United Mexican States*, the same Commission held that there is a denial of justice when "there existing a failure or omission punishable by law, the authorities of a country refuse to comply with their own legal provisions as interpreted by the courts." R.I.A.A., Vol. IV, 650 (1930), at 652. Lord Asquith of Bishopstone – Umpire, in *Petroleum Development Ltd v Sheikh of Abu Dhabi*, 18 I.L.R. 144 (1951), said that international tribunals shall disregard the content or effects of national laws if national law administers discretionary or arbitrary justice. *Id* at 149.

[60] See, for instance, ICTY, *Krnojelac*, Trial Judgment, 15 March 2002, para. 114 (stating that, if national law is relied upon as justification, the relevant provisions must not violate international law and that, in particular, the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily); ICTR, *Ntagerura et al*, Trial Judgment, 25 February 2004, para. 702 (holding that, when a national law is relied upon to justify imprisonment, the national law must not violate international law). More generally, see ICTY, *Kupreškić*, Trial Judgment, 14 January 2000, paras 539 and 542, according to which international criminal courts must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgments. In other fields, the Italian-United States Conciliation Commission held in 1958 in the *Flegenheimer Claim* that international tribunals should disregard the content or effects of national laws where they sanction fraud, serious errors or run counter to the general principles of the laws of nations or applicable treaties. 25 I.L.R. 92 (It.-U S Concil. Comm'n 1958), at 112. Similarly, the ICSID Tribunal in *Liberian Eastern Timber Corporation (LETCO) v Republic of Liberia*, Case No. ARB/83/2, Award, 31 March 1986, *reprinted in* 26 I.L.M. 647 (1987), at 658, stated that "'[t]he law of the contracting state is recognized as paramount within its territory, but is nevertheless subjected to control by international law".

At least to a limited degree, the Defence Office acknowledges that domestic law should be interpreted in a manner that does not violate international law. See Defence Office Submission, para. 70(i).

[61] See the sources cited in footnote 4 of the Prosecution Submission.

substantive law is the entitlement of diplomats under public international law to immunity from suit. That rule is imposed upon all States and for an international tribunal overrides any inconsistent domestic law. Thirdly, when Lebanese courts take different or conflicting views of the relevant legislation, the Tribunal may place on that legislation the interpretation which it deems to be more appropriate and consistent with international legal standards.[62]

41. In the following analysis, we find no need to depart from Lebanese law for any of these reasons. However, we must still interpret provisions of the Lebanese Criminal Code as they would be interpreted by Lebanese courts, and thus for this purpose we take into account international law that is binding on Lebanon. This is in accord with a general principle of interpretation common to most States of the world: the principle that one should construe the national legislation of a State in such a manner as to align it as much as possible to international legal standards binding upon the State.[63]

[62] See *Brazilian Loans*, 1929 PCIJ Series A, No. 21, at 124: "Of course, the Court will endeavour to make a just appreciation of the jurisprudence of municipal courts. If this is uncertain or divided, it will rest with the Court to select the interpretation which it considers most in conformity with the law."

[63] The reason for this rule is that, in the words of Lord Denning, "Parliament does not intend to act in breach of international law, including therein specific treaty obligations". U.K., Court of Appeal, *Salomon v Commissioners of Customs and Excise*, [1967] 2 Q.B. 139, at 143, *reprinted in* 41 I.L.R. 1 at 7. See also U.K., Court of Appeal, *Post Office v Estuary Radio Ltd*, [1968] 2 Q.B. 752 at 756 (Lord Diplock), *reprinted in* 43 I.L.R. 114, at 121; U.K., House of Lords, *Garland v British Rail Engineering Ltd*, [1983] 2 A.C. 751, at 771 (Lord Diplock). According to J.L. Brierly, *The Law of Nations*, 6th edn. (H. Waldock, ed.) (Oxford: Clarendon Press, 1963), at 89, "there is [...] a presumption that neither Parliament nor Congress will intend to violate international law, and a statute will not be interpreted as doing so if that conclusion can be avoided".

Or, as Oppenheim put it, "[a]s international law is based on the common consent of the different states, it is improbable that a state would intentionally enact a rule conflicting with international law. A rule of national law which ostensibly seems to conflict with international law must, therefore, if possible always be interpreted so as to avoid such conflict." R. Jennings and A. Watts (eds), *Oppenheims' International Law*, Vol. 1, 9th edn. (Oxford: Oxford University Press, 2008), at 81-82.

SECTION I: CRIMES FALLING UNDER THE TRIBUNAL'S JURISDICTION

I. Terrorism

42. We turn first to this Tribunal's principal *raison d'être*: the crime of terrorism. The Pre-Trial Judge has asked:

i) Taking into account the fact that Article 2 of the Statute refers exclusively to the relevant provisions of the Lebanese Criminal Code in order to define the notion of terrorist acts, should the Tribunal also take into account the relevant applicable international law?

ii) Should the question raised in paragraph i) receive a positive response, how, and according to which principles, may the definition of the notion of terrorist acts set out in Article 2 of the Statute be reconciled with international law? In this case, what are the constituent elements, intentional and material, of this offence?

iii) Should the question raised in paragraph i) receive a negative response, what are the constituent elements, material and intentional, of the terrorist acts that must be taken into consideration by the Tribunal, in the light of Lebanese law and case law pertaining thereto?

iv) If the perpetrator of terrorist acts aimed at creating a state of terror by the use of explosives intended to commit those acts to kill a particular person, how is his criminal responsibility to be defined in the event of death of or injury caused to persons who may be considered not to have been personally or directly targeted by such acts?

43. The first three questions are best addressed together. Article 2 of the Tribunal's Statute is explicit: in prosecuting the allegations falling under the Tribunal's jurisdiction by virtue of Article 1, the Tribunal shall apply the provisions on terrorism (and other crimes) set forth in the Lebanese Criminal Code as well as in Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle".[64] Article 2 does not make general reference to the Lebanese law as a whole, which would allow us to construe it as also embracing a reference to any other rule on terrorism existing in Lebanese law, including rules of international origin, even beyond the narrow confines of the Criminal Code. Although the Article adds that the specified set of rules shall be applied "subject to the provisions of this Statute", the Statute does not contain any other provision defining terrorism or directly impinging upon the notion of terrorism;

[64] An English version of the Lebanese Criminal Code is to be found on the Tribunal's website. While the original Criminal Code applicable to Lebanon was issued in French (1 March 1943, before Lebanon's independence on 22 November 1943), the Arabic version is of course now the authoritative one.

this qualifying clause must thus be held to refer primarily to the modes of responsibility set out in Article 3 ("Individual criminal responsibility"), as well as, more generally, to the spirit and purpose of the Statute (to administer justice in a fair and efficient manner[65]). The conclusion is therefore inescapable that Article 2 imposes application of the specified provisions of Lebanese law.[66] It would seem that the drafters of the Tribunal's Statute resolved that no international substantive rule on terrorism, either conventional or customary, shall be applied as such by the Tribunal when called upon to adjudicate the crimes within its jurisdiction. The Prosecution and the Defence Office agree entirely with this conclusion.[67]

44. The clear language of Article 2, which is unaffected by other contextual factors, therefore leads us to conclude that the Tribunal must apply the provisions of the Lebanese Criminal Code, and not those of international treaties ratified by Lebanon or customary international law to define the crime of terrorism.

45. We note, however, that international conventional and customary law can provide guidance to the Tribunal's interpretation of the Lebanese Criminal Code. It is not a question of untethering the Tribunal's law from the Lebanese provisions referred to in Article 2. It is rather that as domestic law those Lebanese provisions may be *construed* in the light and on the basis of the relevant international rules. Thus when applying the law of terrorism, the Tribunal may "take into account the relevant applicable international law", but only as an aid to interpreting the relevant provisions of the Lebanese Criminal Code.

46. To answer questions (i)-(iii) in greater detail, we first consider the elements of the crime of terrorism under the Lebanese Criminal Code. We then consider the crime of terrorism under treaty conventions binding on Lebanon and under customary international law, and note there are some differences between the domestic and various of the international definitions of terrorism. We

[65] See above note 48 (collecting evidence of the general purpose of the Statute).

[66] Article 2 of the Statute only mentions the objective element of the crime, omitting the subjective or intentional one. However, this is only a material error which the Judge should remedy in accordance with the principles guiding interpretation, such as the obligation to insure coherence between the provisions of a rule. It is therefore clear from the wording of Article 2 of the Statute, as well as from the Secretary-General's Report (see *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), at para. 22) that the initial will of the drafters of the Statute was to apply substantive Lebanese law. Thus, Article 2, while clearly stating that the Tribunal is to apply the objective elements of the crime as provided for under Lebanese law, it implicitly refers to the subjective elements as well; any other interpretation would lead to a lack of coherence in the interpretation process.

[67] Prosecution Submission, paras 2-3; Defence Office Submission, para. 75.

evaluate how conventional and customary international law are generally incorporated into Lebanese law; from this, we conclude that the international conventional and customary definitions of terrorism do have legal import under Lebanese law, even if they are not specifically embodied in the Lebanese Criminal Code. In particular, as we shall see, Lebanese courts look to international law binding on Lebanon when interpreting Lebanese laws. In interpreting the Lebanese Criminal Code in light of international law binding on Lebanon, we then conclude that one element of the Lebanese domestic crime of terrorism—namely, the objective element of the means used to perpetrate the terrorist act—should be interpreted by this Tribunal in a way that reflects the legal developments in the sixty-eight years since the Lebanese Criminal Code was adopted. As a result of this interpretation, before this Tribunal the means used to perpetrate a terrorist act might include those so far recognised by Lebanese courts. This conclusion does not violate the principle of legality, in particular the non-retroactivity of criminal prohibitions, because it is consistent with the statutory definition of terrorism under Lebanese law and is in accord with international law that was accessible to the accused at the time of the alleged offending; thus it is a reasonably foreseeable application of existing law. For all other elements of the crime, the Tribunal will apply Lebanese law as it has been interpreted and applied by the Lebanese courts.

A. The Notion of Terrorism under the Lebanese Criminal Code

47. Article 314 of the Lebanese Criminal Code states:

> Terrorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents.[68]

48. In addition, the Law of 11 January 1958 provides as follows:

> Article 6: Any act of terrorism shall be punishable by hard labour for life. Where the act results in the death of one or more individuals, the total or partial destruction of a building having one or more individuals inside it, the total or partial destruction of a public building,

[68] Article 315 of the Lebanese Criminal Code, criminalising conspiracy to commit terrorist acts, was superseded by the Law of 11 January 1958, which provides a supplementary criminalisation of conspiracy, and in addition increases the penalties applicable to terrorist crimes. Article 316 of the Lebanese Criminal Code criminalises organisations (and their founders and members) set up with a view to changing the economic, social or other fundamental institutions of society, through the perpetration of terrorist acts pursuant to Article 314. The funding of terrorism or terrorist activities or terrorist organisations was recently criminalised by Article 316*bis* added to the Criminal Code by Act No. 553 of 20 November 2003.

an industrial plant, a ship or other facilities, or disrupts the functioning of telecommunication or transport services, it shall be punishable by death.

Article 7: Every person who enters into a conspiracy with a view to the commission of any of the offences contemplated in the preceding articles shall be liable to the death penalty

49. It is clear from these provisions, as all parties agree, that the elements of terrorism under Lebanese law are as follows: (i) an *act*, whether constituting an offence under other provisions of the Criminal Code or not, which is (ii) intended "to cause a state of terror"; and (iii) the use of a means "liable to create a public danger (*un danger commun*)".[69]

50. These relevant means are indicated in an illustrative enumeration preceded by the expression "such as" (in French: *tels que*): explosive devices, inflammable materials, poisonous or incendiary products, or infectious or microbial agents. In listing these concrete examples (although not as an exhaustive enumeration), the Lebanese legislature appears to have adopted a physical connotation to the term "means", as further demonstrated by the use of the Arabic word "*wassila*".

51. Some Lebanese courts have propounded a strict interpretation of Article 314. According to the Lebanese Military Court of cassation in *Case no. 125/1964*, decision of 17 September 1964, it is not the conduct, but the *means or instrument or device used* that must be such as to create a public danger. If the means used is apt to create a public danger, then the act can be defined as terrorism. Thus, for instance, in the *Karami* case,[70] the Court of Justice held that the use of explosive devices in a flying helicopter created a public danger and was therefore to be considered as a terrorist act.

52. Lebanese courts appear to have further concluded that the definition of (terrorist) "means" is limited to those means which *as such* are likely to create a public danger, namely a danger to the general population. It would follow that the definition does not embrace any non-enumerated means referred to in Article 314 ("means such as…") unless these means are similar to those enumerated in their effect of creating a public danger *per se*. The means or implements which under this approach are not envisaged in Article 314 include a gun, a semi-automatic or automatic machine gun, a revolver, or a knife and perhaps even a letter-bomb. This construction was applied by the Court of

[69] See Prosecution Submission, para. 27; Defence Office Submission, para 77; Hearing of 7 February 2011, T. 14-17 and 58-59 (Defence Office's opposition to the application of *international* law to the issue in question).

[70] Court of Justice, *Rachid Karami case*, decision n° 2/1999, 25 June 1999, available on the STL website. (Although the English translation of the Lebanese Criminal Code on the STL's website refers to the Court of Justice as the "Judicial Council", for consistency with the French ("*Cour de justice*") and Arabic ("*Al-majless al-adli*") versions of the Code, we will refer to the "Court of Justice" throughout this opinion.)

Justice in the *Assassination of Sheikh Nizar Al-Halabi* case[71], in which an act that would be considered terrorism under most national legislation and international treaties was instead categorised as simple murder. In this case, Sheikh Nizar al-Halabi was killed (on 31 August 1995) by means of Kalashnikov assault rifles by masked men in broad daylight and in a crowded street, as he was leaving his home to go to his offices in Beirut. The Sheikh was murdered because he was the leader of the Al-Ahbash movement, regarded by the killers, who belonged to another Islamic movement (Wahabi), as deviating from the precepts of Islam and perverting the verse of the Quran.[72] Nevertheless, according to the Court the murder in question did *not* amount to a terrorist act because the materials or devices used were not those required by Article 314. The Court stated:

> Article 314 of the Criminal Code defines terrorist acts as all acts aimed at creating a state of panic and committed by such means as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents that are liable to cause a public threat. While it is true that the actions of the defendants Hamid, Aboud, Al-Kasm, Nabah and Abd al-Mo'ti pertaining to the homicide of Sheikh Nizar al-Halabi were liable to cause a state of panic in view of the Sheikh's religious and social standing and the fact that the offence was committed in broad daylight in a street full of residents, shopkeepers and pedestrians, the offence was not committed by any of the means listed in Article 314. [Hence] the said defendants must be acquitted of the offence defined in Article 6 of the Act of 11 January 1958 [namely terrorist acts] inasmuch as its elements have not been fulfilled.[73]

53. In the *Homicide of Engineer Dany Chamoun and others* case[74], the same Court also held that the murder of Mr Chamoun, his wife and his two sons was not a terrorist act, but "simply" murder, because of the means used:

> While it may be true that the crime that is being prosecuted was intended and succeeded in creating panic, *it was not perpetrated by any of the means referred to* in the Article [314 of the Criminal Code], *and the means used* (handguns and submachine guns), the place in which they were used, a private and closed apartment, and the persons targeted *were not designed to bring about a public emergency.*[75]

[71] Court of Justice, *Assassination of Sheikh Nizar Al-Halabi*, decision n° 1/1997, 17 January 1997, available on the STL website.

[72] *Id.* at 26-27 of the English translation available on the STL website.

[73] *Id.* at 55-56 of the English translation available on the STL website.

[74] Court of Justice, *Homicide of Engineer Dany Chamoun and others*, decision n° 5/1995, 24 June 1995, available on the STL website.

[75] *Id* at 70 of the English translation available on the STL website (emphasis added).

Thus, according to Lebanese courts the means that may cause a "public danger" include only those means which may harm innocent victims who are not specifically targeted but are injured by mere chance, for they happen to be on the place where the terrorist means is used.

54. From these interpretations of Article 314, it would follow among other things that—under Lebanese legislation as applied by Lebanese courts—attacks on a Head of State or Prime Ministers, or on persons enjoying diplomatic immunity, including ambassadors and diplomats serving in or accredited to the State, as well as on their spouses and families, would not be considered "terrorist acts" if such attacks were carried out by means (for instance, rifles or handguns) which are not likely *per se* to cause a danger to the general population or, more precisely, to third parties falling victim to the terrorist act without being intended in any way to be involved in the actions leading to it (such as passers-by, onlookers, and so on).

55. It can be argued that this narrow interpretation of the "means" element of Article 314 balances and constrains the otherwise broad definition of terrorism under Lebanese law. Suffice it to mention the *Fathieh* case, where the Lebanese Court of cassation, in a decision of 16 November 1953, held that a young man who harassed and scared the father of his potential bride for the purpose of coercing him to allow his daughter to marry him had engaged in a "terrorist act" (according to the Court, "the fact of throwing on two occasions explosives onto the house of X. [...] is a terrorist act envisaged and punished by Articles 314 and 315 of the Criminal Code, even though the motive of the act is to influence the father of Fathieh so that he accepts Y. as his son-in-law, or for any other cause, and this is so because Article 314 provides that [...]").[76] Here the purpose of the "terrorist act" was plainly to seek a personal advantage, namely to marry the young woman the "terrorist" yearned for.

56. Likewise, as Lebanese courts have applied Article 314, a terrorist act is punishable even if it does not achieve its intended physical goal (for instance, a person plants a bomb under the car of a political leader but the bomb explodes prematurely, before any person gets into or even approaches the car). Lebanese legislation is grounded in the notion that terrorist conduct is so reprehensible that it must be punished regardless of whether or not the intended consequences of the criminal conduct

[76] Court of cassation, decision n° 334, 16 November 1953, in S. Alia (ed.), *Mawsouat al-ijtihadat al-jaza'iya li kararat wa ahkam mahkamat al tamyiz fi ishrin aman mounzou iadat insha'iha 1950-1970* [Encyclopedia of the criminal judgments and decisions of the court of cassation in the twenty years since its re-creation 1950-1970], 2nd ed., (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi', 1993), at 114. Since the *Fathieh* case was issued, Article 315 of the Lebanese Criminal Code has been superseded by Article 7 of the Law of 11 January 1958.

actually materialise—it is in other terms a *crime of danger* (as opposed to a "crime of harm").[77] The act in question is punishable not because and insofar as it creates actual damage, but because it puts in jeopardy the protected value. Terrorist acts are thus punished by Lebanese law on account of their social relevance, even when they exhibit the features and the nature of an *inchoate* crime.

57. As for the *subjective elements* of the crime or mens rea, the Prosecution and the Defence Office are likewise in agreement, as are we, that, since the Lebanese Criminal Code (unlike other national legislation or international treaties[78]) does not require the act in question to amount to an offence punished by other statutory provisions, the mens rea of the underlying offence is not a requisite element of the crime of terrorism. What is required is a deliberate act (throwing a bomb, spreading toxic substances, and so on) intended to cause a state of terror. Thus, if the terrorist act consists of killing one or more persons, Lebanese law does not require the mens rea of murder for the act to amount to terrorism, as long as the act which resulted in death was intentional. However, the perpetrator may be responsible both for terrorism and murder—two distinct crimes—if it is proved that he had the intent both to cause terror and to bring about the death of the victim. The essential subjective element required under Article 314 for the crime of terrorism is the special intent (*dolus specialis*) of spreading terror or panic among the population.[79]

58. We will state our understanding of the elements of the Lebanese crime of terrorism, in particular the meaning of "means liable to cause a public danger", at paragraph 147 below.

59. In the meantime, however, our discussion brings us to a preliminary answer to question (iv): "if the perpetrator of terrorist acts aimed at creating a state of terror by the use of explosives intended to commit those acts to kill a particular person, how is his criminal responsibility to be defined in the event of death of or injury caused to persons who may be considered not to have been personally or

[77] According to E.S. Binavince ("Crimes of Danger", 15 *Wayne L Rev* (1969) 683, at 683), "European criminal law literature makes a distinction between 'crimes of danger' (*Gefahrdungsdelikte*) and 'crimes of harm' (*Verletzungsdelikte*). The distinction lies in the nature of the undesirable consequences of these crimes[…]" According to J. Hurtado Pozo, *Droit Pénal – Partie générale*, (Genève: Shulthess 2008), at 161: « [s]ur la base des effets de l'acte incriminé, les infractions peuvent être classées en deux groupes distincts : les infractions de lésion (*Verletzungsdelikte*) et les infractions de mise en danger (*Gefahrdungsdelikte*). Si les premières supposent un dommage causé à l'objet de l'infraction […] les secondes, comme leur dénomination l'indique, impliquent que l'auteur crée un risque pour l'objet de l'infraction ou, du moins, contribue à le mettre en danger ».

[78] See below paras 93-96 and accompanying footnotes (collecting national legislation regarding terrorism).

[79] See Prosecution Submission, para. 28; Defence Office Submission, para. 81; Hearing of 7 February 2011, T. 14. This special intent might be characterised as "general" special intent. See the discussion in Institute for Criminal Law and Justice Brief, para. 2.

directly targeted by such acts?" Taking into account that the intended result in the crime of terrorism is to spread terror, and not necessarily to cause death or injury, deaths caused by terrorism become aggravating circumstances, pursuant to Article 6 of the Law of 11 January1958.[80] That is, the incidental result has no bearing on the legal characterisation of the act as "terrorism". The perpetrator would be liable for terrorism, as he would have had the requisite special intent to create a state of terror, and the additional deaths would be an aggravating factor in his sentencing.[81] (Injury, however, is not included in Article 6 of the Law of 11 January 1958 as an aggravating factor for acts of terrorism). He would *also* be liable for intentional homicide (the specific elements of which are discussed further below[82]) based on a direct intent, if he intended to kill the victim who died, and/or based on *dolus eventualis*, if he had foreseen the possibility of the additional deaths and accepted the risk of their occurrence. Likewise, for injuries resulting from the act of terrorism, the accused may also be liable for attempted homicide, either on the basis of direct intent or *dolus eventualis*. We will discuss the application of *dolus eventualis* under Lebanese criminal law, in particular as applied to intentional homicide and attempted homicide, in much greater detail below.[83]

60. As to how the requisite special intent to spread terror may be proved, the Court of Justice held in *Attempted Assassination of Minister Michel Murr* in 1997 that the existence of the special intent could be inferred because the murder attempt had been conducted by means of explosive devices causing a public danger.[84] On the other hand, the special intent to spread terror will not suffice, by itself, to make an offence terrorist in nature, if the means used are not those required by Article 314. Thus, in the aforementioned *Assassination of Sheikh Nizar Al-Halabi* case, the Court of Justice held that the convicted had intended to bring about a state of panic and terror, yet their crimes could not amount to a terrorist act because the means used did not meet the requirements of Article

[80] Article 6 of the Law of 11 January 1958 does not create a new offence but only aggravates the sentence of the individual convicted for a terrorist act when it results in the death of human beings and the destruction of property.

[81] Court of Justice, *Attempted Assassination of Minister Michel Murr*, decision n° 2/97, 9 May 1997, available on the STL website. The Court of Justice referred explicitly to the rule in Article 6.

[82] See paras 153-166.

[83] See paras 165, 169 and 231-234.

[84] The Court said that "the attempted assassination of Minister Michel Murr on 20 March 1991 and the second car-bomb operation on 29 March 1991 involved the use of explosives, created panic among the population, killed and injured a number of persons, and destroyed residential and commercial buildings, they constituted terrorist acts within the meaning of article 314 of the Criminal Code, entailing the penalty prescribed in article 6 of the Law of 11 January 1958." (at 53 of the English translation, available on the STL website). But see Judgment No. 85/98, 16 April 1998, cited by the Prosecution (para. 29, footnote. 28), that the use of explosives did not *per se* demonstrate an intent to cause a state of terror.

314. As the Prosecution has summarised, Lebanese courts have considered the following factors as relevant to establishing this special intent to spread terror: "the social or religious status of the principal target; the commission of the attack in daylight in a street full of people; the collateral killing of bystanders; the use of explosives; and the destruction of residential and commercial buildings".[85] In general, this determination will have to be made on a case-by-case basis.[86]

B. The Notion of Terrorism in International Rules Binding Upon Lebanon

61. The Appeals Chamber will now consider the definition of terrorism under treaties and customary international law binding on Lebanon. We have noted that both the Prosecutor and the Defence Office hold the view that international law, either conventional in nature or (assuming it exists, which both deny) customary is not material to the interpretation or application of the Lebanese law on terrorism. According to the Prosecutor, in principle reliance on international law may be had when national legislation contains gaps; however, in the case at issue no such gaps exist.[87] The Defence Office takes a more radical view. In its opinion international law must not be taken into account, for Lebanese law is sufficiently clear and would better guarantee the rights of potential defendants.[88] Nevertheless, the Defence Office argues, international rules could exceptionally be taken into consideration to the extent, and to such extent only, that they grant or ensure broader rights to the defendants.[89]

62. We conclude instead that although the Tribunal may not apply those international sources of law directly because of the clear instructions of Article 2 of the Tribunal's Statute, it may refer to them to assist in *interpreting* and *applying* Lebanese law.

[85] Prosecution Submission, para. 30 (footnotes omitted).

[86] Thus we decline to adopt the Prosecutor's limiting proposal to equate the spread of fear with the intent for the act "to have a substantial impact upon the population or a significant group thereof" as unnecessary. Prosecution Submission, para. 29; Hearing of 7 February 2011, T. 15.

[87] Prosecution Submission, paras 4-5.

[88] Defence Office Submission, paras 58, 70, 88-89.

[89] Defence Office Submission, paras 68 and 74.

1. Treaty Law

a) The Arab Convention for the Suppression of Terrorism

63. The only international treaty *ratified by Lebanon* that provides a general definition of terrorism is the Arab Convention for the Suppression of Terrorism of 22 April 1998 ("Arab Convention").[90] The Arab Convention provides for cooperation among Arab countries in their fight against terrorism. It is a multilateral treaty on judicial cooperation among the contracting parties. It shows some unique features which need to be stressed.

64. The Arab Convention is different from other conventions on judicial cooperation such as the 1948 Convention on Genocide or the 1984 Convention against Torture, which impose on the Contracting Parties an obligation to adopt in their domestic legal systems the definition of the crime laid down in the Convention. In contrast, the Arab Convention defines terrorism for the purposes of judicial cooperation, while carefully stressing that it does not intend to replace the contracting parties' national laws of terrorism.[91] The Arab Convention rather enjoins States to cooperate in their fight against the forms of terrorism defined by the Convention, leaving each contracting party freedom to simultaneously pursue the suppression of terrorism on the basis of its own national legislation. Perusal of the relevant provisions of the Convention will show how the Convention operates.

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[90] League of Arab States, Arab Convention for the Suppression of Terrorism ("Arab Convention"), 22 April 1998 (entered into force on 7 May 1999) (*available in English at* https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf). Eighteen "Arab States" have so far ratified the Arab Convention: Palestine, Bahrain, United Arab Emirates, Egypt, Saudi Arabia, Algeria, Jordan, Tunisia, Sudan, Libya, Yemen, Oman, Lebanon, Syria, Morocco, Djibouti, Qatar, Iraq. (Source: Arab League Secretariat).

[91] Article 1 (3) defines "terrorist offence" as "Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their *domestic law*. The offences stipulated in the following conventions, *except where conventions have not been ratified by Contracting States or where offences have been excluded by their legislation*, shall also be regarded as terrorist offences". Article 3 II (1) provides that Contracting States shall "1. [...] arrest the perpetrators of terrorist offences and to *prosecute them in accordance with national law* or extradite them in accordance with the provisions of this Convention or of any bilateral treaty between the requesting State and the requested State." Article 4 provides that "Contracting States shall cooperate for the prevention and suppression of terrorist offences, *in accordance with the domestic laws and regulations of each State*, as set forth hereunder." Article 14 provides that "Where one of the Contracting States has jurisdiction to prosecute a person suspected of a terrorist offence, it may request the State in which the suspect is present to take proceedings against him for that offence, subject to the agreement of that State and provided that the offence is punishable in the prosecuting State by deprivation of liberty for a period of at least one year or more. The requesting state shall, in this event, provide the requested state with all the investigation documents and evidence relating to the offence. (b) The investigation or prosecution shall be conducted on the basis of the charge or charges made by the requesting state against the suspect, *in accordance with the provisions and procedures of the law of the prosecuting state*." (Emphasis added.)

65. In Article 1(2) the Arab Convention defines terrorist acts as follows:

> Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resource.

66. Article 1(3) adds that States parties shall also consider as terrorism any act provided for in a host of listed international conventions,[92] to the extent that the States in question have ratified such conventions. Furthermore, Article 2(a) excludes from the category of terrorist acts some acts performed in the course of conflicts for national liberation, unless the armed conflict is designed to jeopardise the territorial integrity of an Arab country. It provides that:

> [a]ll cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.

67. In addition, Article 2(b) provides that some offences shall be considered as terrorist acts and not as political acts (clearly, with a view to allowing the extradition of alleged terrorists, given that normally treaties on judicial cooperation ban the extradition of persons accused of political offences):

1. Attacks on the kings, Heads of State or rulers of the contracting States or on their spouses and families;
2. Attacks on crown princes, vice-presidents, prime ministers or ministers in any of the Contracting States;
3. Attacks on persons enjoying diplomatic immunity, including ambassadors and diplomats serving in or accredited to the Contracting States;
4. Premeditated murder or theft accompanied by the use of force directed against individuals, the authorities or means of transport and communications;
5. Acts of sabotage and destruction of public property and property assigned to a public service, even if owned by another Contracting State;

[92] The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 14 September 1963, 704 U.N.T.S. 219; The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 U.N.T.S. 106; The Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 178, and the Protocol thereto of 10 May 1984; The New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 14 December 1973, 1035 U.N.T.S. 168; The International Convention against the Taking of Hostages, 17 December 1979, 1316 U.N.T.S. 206; the provisions of the United Nations Convention on the Law of the Sea of 1982, relating to piracy on the high seas.

6. The manufacture, illicit trade in or possession of weapons, munitions or explosives, or other items that may be used to commit terrorist offences.

68. It is clear from these provisions that the two notions of terrorism, one contained in the Lebanese Criminal Code, the other enshrined in the Arab Convention, have in common some elements, in particular that they both require a special intent which may be to spread terror or fear (although the Convention also envisages other possible purposes, namely "seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardise a national resources").

69. In some respects, the Convention's definition is broader than that of Lebanese law. The Arab Convention requires that the act be intended to sow panic and fear (or to damage the environment, or property or natural resources), without mention of particular means as Article 314 does. It follows that, *inter alia*, under the Arab Convention, any attack on a Head of State, Prime Minister, or persons enjoying diplomatic immunity (including ambassadors and diplomats serving in or accredited to the State, as well as on their spouses and families), can be defined as "terrorism" whatever the means by which the attack is carried out, provided that the intent be that required by the Convention.

70. In other respects the Arab Convention's notion of terrorism is narrower: it requires the terrorist act to be actually (rather that only potentially) violent in nature.[93] Further it excludes acts performed in the course of a *war of national liberation* (as long as such war is not conducted against an Arab country). The provisions of Article 314 of the Lebanese Criminal Code do not distinguish between times of peace and *times of war or armed conflict*. On the face of these articles, anybody engaging in acts of terrorism, as defined by Article 314, may be found guilty and punished, whatever his status (civilian or military), and regardless of whether, in the event of an armed conflict, he is engaged in a war of national liberation or in any other armed conflict involving so-called "freedom fighters".[94]

[93] This requirement of violence might reflect the Arab Convention's early provenance in the long line of regional and universal anti-terrorism treaties. More recently, States and conventions have moved away from a requirement of violence in order to include within the crime of terrorism, for example, attacks on societal infrastructure (particularly technological attacks) that could create widespread disorder and insecurity.

[94] The only reference to humanitarian law norms potentially applicable to terrorism and other crimes under the Tribunal's jurisdiction is contained in Article 197 of the Lebanese Criminal Code, which reads: "Complex offences or offences closely connected with political offences are deemed to be political offences, unless they constitute the most serious felonies in terms of morals and ordinary law, such as homicide, grievous bodily harm, attacks on property by arson, explosives or flooding, and aggravated theft, particularly when involving the use of weapons and violence, as well as

b) Implementation of Treaties under Lebanese Law

71. States are duty bound by international law to adopt the necessary implementing legislation once they become parties to international treaties (that is, when such legislation is needed to give effect to international rules at the domestic level).[95] Paying only lip service to international treaties is contrary to the principle of good faith, a cardinal legal principle governing international relations incorporated in the Vienna Convention on the Law of Treaties[96] and frequently proclaimed by international courts.[97] If the State's Constitution, consistent national case-law or other relevant sources explicitly require that the provisions of the treaty, in order to become operational at the domestic level, must be implemented through national law other than the law authorising ratification of or accession to the treaty, then the State is internationally bound to pass that law. In certain States, including Lebanon, the mere publication of the treaty in the *Official Gazette* renders the treaty provisions applicable within the Lebanese legal system. While other Arab countries lay down this principle in their constitutions,[98] in Lebanon the principle, although not explicit, has been recognised by the Lebanese Governmental authorities in their initial report to the UN Human Rights Committee:

> All treaties duly ratified by Lebanon acquire mandatory force of law within the country simply [...] upon the deposit of the instruments of ratification or accession [...] *No further procedure is required for their incorporation into internal legislation. The provisions of those treaties which are sufficiently specific and concrete will therefore be immediately applied.*

attempts to commit those felonies. At times of civil war or insurrection, complex or closely related offences shall not be deemed to be political unless they constitute non-prohibited *customs of war* and they do not constitute acts of barbarity or vandalism." (Emphasis added).

[95] Pursuant to this duty, in a *note verbale* to the UN Security Council's Counter-Terrorism Committee, Lebanon stated that it "is committed to implementing the conventions and protocols to which it has acceded or to which it is in the process of acceding in the knowledge that international cooperation can assist in the proper implementation of these conventions." *Report to the Counter-Terrorism Committee* (Lebanon), 13 December 2001, S/2001/1201, at 7.

[96] See Article 26, stating inter alia that "every treaty [...] must be performed [by States] in good faith".

[97] See for instance *Nuclear Tests (Australia v France)*, Judgment, I.C.J. Reports (1974) 253, at 268, para. 46: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."

[98] This for instance applies to Bahrain In its initial Report to the UN Committee Against Torture, this country stated that "The Convention against Torture has acquired the force of law, since, according to article 37 of the Constitution, a convention acquires the force of law after its conclusion, ratification and publication in the *Official Gazette*. Thus, any failure to comply therewith constitutes a breach of the law and entails criminal responsibility if a criminal offence has been committed. It also entails legal liability for any damage caused." CAT/C/47/Add 4., 27 October 2004, para. 50; see also *id*, para. 54.

Provisions which call for legislative or statutory measures are binding on the State of Lebanon, which must then introduce such measures.[99]

72. Lebanese case law corroborates this view of the law. Thus, for instance, the Single Judge of Beirut, Civil Section, in the decision no. 818 of 2 June 1950 stated that:

> [T]he purpose of the publication of a law is to disseminate it and to make the public aware of it. This purpose has been achieved through the publication of the law on ratification of the Convention [the French-Lebanese Convention of 24 January 1948 on monetary matters] in issue 29 September 1948 of the *Journal Officiel* and there is no more any interest in publishing the entire text of the Convention in the issue in question because the Convention has already been published in the *Journal Officiel* relating to parliamentary sessions; the Convention has entered into force after ratification in keeping with the law, after publication; its provisions prevail over those of the domestic law which may be inconsistent with them, on the strength of the principle: the external law trumps the domestic law.[100]

73. The Court of Appeals of Beirut, Civil Section, in its decision no. 684 of 10 July 1952 said that:

> Considering that an international agreement it is not but a law that one must apply in the territory of the Contracting States immediately and directly to individuals, and this notwithstanding the existence of another domestic law which expressly conflicts with it, this Tribunal is of the view that it belongs to ordinary courts, which are designed to protect the rights and freedoms of individuals, to interpret the text of the international convention while handling a case relating to these rights when the dispute hinges on the scope of such rights; in contrast it does not belong to domestic ordinary courts to pronounce upon the international relations stemming from the aforementioned Convention [the French-Lebanese Convention of 24 January 1948 on monetary matters] and to place its interpretation on the text of this

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[99] HRI/CORE/1/Add.27 ("Core Document Forming the First Part of the Reports of the States Parties: Lebanon"), 12 October 1993 (emphasis added). See also *Report to the Counter-Terrorism Committee* (Lebanon), 31 March 2003, S/2003/451, at 9, in which Lebanon explained:

> When Lebanon becomes a party to international conventions and the protocols thereto pursuant to the authorization issued by the Chamber of Deputies, these provisions become an integral part of Lebanese legislation, without there being any need to amend it. Where its international commitments are incompatible with its internal legislation, the former takes precedence over the latter.

See also G.J Assaf, "The Application of International Human Rights Instruments by the Judiciary in Lebanon", in E. Cotran et al. (eds), *The Role of the Judiciary in the Protection of Human Rights* (London: Kluwer, 1995), at 85-86 (footnotes omitted):

> [T]he publication of an international treaty, whatever the means of publication, is enough to incorporate it in the national body of legislation and therefore to make it enforceable in the national legal system, as long as the ratification law is published in the *Journal Officiel*. When the treaty norms are so incorporated, the courts may apply them to effectively realize the rights of the individuals as per Art. 2 par (2) of the Code of Civil Procedure. [...] Lebanese civil courts have rules that the provisions of international treaties have precedence over the provisions of internal legislation pertaining to the same subject, that is, even if there isn't any contradiction *per se* between the said provisions.

[100] Single Judge of Beirut, Civil Section, decision n°. 818, 2 June 1950 in *Al-nashra al-kada'iya* [Revue Judiciaire], 1950, at 650-654.

> Convention to the extent that such interpretation revolves around state sovereignty and governmental acts.[101]

74. We thus disagree with the Defence Office that under Lebanese law generally speaking a treaty must be not only ratified but also implemented through additional domestic legislation before it can take effect.[102] Rather, once an international treaty has been duly ratified by the Head of State after authorisation or approval by the legislature, the provisions of the treaty that are *self-executing* (namely capable of being implemented without any domestic legislative addition) automatically become binding upon all individuals and officials of the State. That a treaty, once ratified, can directly create rights and obligations for individuals and state officials, without any need for implementing legislation, if such was the manifest intention of the contracting parties and the text of the treaty reflects that intention, was stated back in 1928 by the Permanent Court of International Justice in the celebrated Advisory Opinion in *Jurisdiction of the Court of Danzig*.[103] Recent case law, notably in countries of Romano-Germanic tradition, bears out this proposition.[104] This holds true in particular in countries such as Lebanon that attach to treaties duly ratified a rank higher than that of the domestic law,[105] thereby signifying that they intend to set greater store by treaties than by

[101] Court of Appeals of Beirut, Civil Section, decision n°. 684, 10 July 1952, in *Al-nashra al-kada'iya* [Revue Judiciaire] 1955, at 537-539.

[102] See Defence Office Submission, para. 65.

[103] The Court said that "[A]ccording to a well-established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts." The Court went on to say that "[t]he wording and general tenor of the *Beamtenabkommen* show that its provisions are directly applicable as between the officials and the Administration." *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15, at 17-18.

[104] See for instance the decision of the French *Conseil d'État* in the *Madame Elser* case, where the Council held that Article 15 of the 1984 Convention Against Torture (requiring contracting States to ensure that confessions made under torture not be utilised in court) was directly applicable in the French legal system Text in *Revue générale de droit international public*, 2002, at 462-463.

[105] See Article 2 of the new Lebanese Code of Civil Procedure of 1983, which provides: "In the event of conflict between the provisions of international treaties and those of ordinary law, the former shall take precedence over the latter. Courts shall not declare null the legislative authority's activities on the grounds of inconsistency of ordinary laws with the Constitution or international treaties." (STL translation) This provision, while located in the Code of Civil Procedure, applies as a general principle of law to all Lebanese legislation.

The same view has been maintained by Lebanese courts in a number of cases. The Court of cassation, in a decision of 9 December 1973, held that:

> [...] the doctrine of general international law establishes that if the provisions of an international convention are inconsistent with the provisions of a domestic law, the provisions of the Convention are the only ones that must be applied, regardless of the entry into force of the domestic law (before or after ratification of the Convention), because the Convention is an agreement between two States that is not affected by the domestic legislation of the States, whether such domestic legislation is passed before or after the Convention, except if a domestic text expressly provides for the "nullity" of the Convention.

legislation enacted by the national legislature, in the event of conflict. In recognition of this effect, Lebanon stated in a *note verbale* addressed to the Security Council's Counter-Terrorism Committee that "the international protocols and conventions to which Lebanon has acceded have come to have the force of law in the country and take precedence over the provisions of national law." Thus, as "the National Assembly authorised the Government to ratify the Arab Convention on the Suppression of Terrorism," "the provisions of this convention have come to take precedence over the application of the provisions of national law."[106]

75. It is notable that in the *Rachid* case the Single criminal Judge in Beirut, in a decision of 10 September 2009, applied the 1984 Convention against Torture to the case of an Iraqi refugee who had entered Lebanon illegally. The Court held that the Convention Against Torture is an integral part of the Lebanese legal system since the passing of the Law of 24 May 2000, authorising ratification of the Convention. As the Prosecution had submitted that the entry of the Iraqi was contrary to Article 32 of the Law of 10 July 1962 on entering, residing in and exiting Lebanon,[107] the Court noted that this Article provides for three distinct penalties, one of which is expulsion of the foreigner. However, according to the Court, expulsion could not be imposed because, although no explicit legislation had been adopted to modify the Law of 1962, it was contrary to the 1984 Convention to expel a person to a country where he or she risked being tortured. Accordingly, the Court inflicted the other two penalties.[108] Although this position held by the single Judge in Beirut is inconsistent with a decision from the Court of Appeal of Mount Lebanon,[109] both of those cases relate to circumstances in which

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Court of cassation, 1st Civil Chamber, decision n° 59, 9 December 1973, in *Al-Adel* [Journal of the Beirut Bar], 1974, at 277-79. Likewise, the Beirut Court of Appeal stated that "with regard to the hierarchy of norms, international Conventions prevail over domestic laws, in case of conflict." Beirut Court of Appeal, 1st Civil Chamber, decision n° 121, 26 April 1988, *Al-nashra al-kada'iya* [Revue Judiciaire], 1988, at 692-95. See also the Council of State (*Conseil d'État*) in *Kettaneh v State*, decision n° 315, 28 May 1973, in RJAL, 1973 (confirming the superiority of treaties to Lebanese law).

[106] *Report to the Counter-Terrorism Committee* (Lebanon), 13 December 2001, S/2001/1201, at 7. See also *Report to the Counter-Terrorism Committee* (Lebanon), 26 October 2004, S/2004/877, at 13, in which Lebanon informed the Chairman of the Security Council's Counter-Terrorism Committee that Lebanon considers itself "bound" by the Arab Convention.

[107] This law was later amended by Law n° 173 of 14 February 2000.

[108] Single criminal Judge in Beirut, *Prosecution v Louay Majid Rachid*, decision of 10 September 2009, unpublished, original on file with the Tribunal.

[109] Civil Court of Appeal, Mount Lebanon, 13th Chamber, decision n° 398, 18 May 2010 (unpublished, on file with the Tribunal). The court held that judicial tribunals may not refer to the conventions that may be applied *ex officio* in Lebanon such as the Covenant of 1966, the international jurisprudence, the general principles of international law and customary international law, when these instruments contradict domestic legislation. The court first compared the French constitution, which gives primacy to treaties over domestic legislation, to the Lebanese constitution, which does not contain a similar provision. From this the court reasoned that the conventions and treaties to which Lebanon has adhered

domestic legislation directly conflicts with a treaty. That is not the case here, because the Arab Convention relates to the separate topic of State cooperation and does not directly conflict with Article 314. The general idea behind the *Rachid* case, that Lebanese law should be interpreted in the light of binding international treaties, still holds true for the situation before us.

76. The sole exception allowed to the automatic incorporation into Lebanese law of treaties duly ratified after approval of Parliament is *when a treaty provision is "non-self-executing"*, in that it requires the specific designation, by Parliament, of a domestic organ for the implementation of some of its provisions, or the passing by Parliament of legal provisions implementing the rules of the treaty. As a general rule, international norms criminalising conduct are non-self-executing, for their implementation requires national legislation defining the crime and the relevant penalty. In this regard, we do agree with the Defence Office.[110] The principle of legality (*nullum crimen sine lege*), whereby individuals may not be punished if their conduct had not been previously criminalised by law, has been so extensively proclaimed in international human rights treaties with regard to domestic legal systems[111] and so frequently upheld by international criminal courts with regard to international prosecution of crimes,[112] that it is warranted to hold that by now it has the status of a peremptory norm (*jus cogens*), imposing its observance both within domestic legal orders and at the

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have, in the domestic system, the same position as its accession law, and therefore do not have primacy over the legislative law. According to that court, Article 2 of the Code of Civil Procedure has been implicitly repealed by Article 18 of the law on the establishment of the Constitutional council, which prohibits civil tribunals from determining whether a law is constitutional or consonant with an international treaty; therefore, civil tribunals may not expand their jurisdiction by interpreting domestic laws by analogy so as to render the law in keeping with the constitution or an international treaty.

[110] See Defence Office Submission, para. 65.

[111] See the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171, art. 15; Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 222, art. 7; Organization of American States, American Convention on Human Rights, 22 November 1969, 1144 U.N.T.S. 123, art. 9; Organisation of African Unity, African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, *reprinted in* 21 I.L.M. 58 (1982), art. 7(2); League of Arab States, Arab Charter on Human Rights, 22 May 2004, art. 6.

[112] The *nullum crimen* principle has been laid down in the international criminal tribunals' Statutes (*Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Res 808*, S/25704 (1993), para. 34; Article 22 ICCSt; *Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone*, S/2000/915, 4 October 2000, para. 12) and in the relevant case law (ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 139, 141, 143; ICTY, *Jelisić*, Trial Judgment, 14 December 1999, para. 61; ICTY, *Delalić et al*, Appeals Judgment, 20 February 2001, para. 170; ICTY, *Erdemović*, Appeals Judgment, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, para. 11; ICTY, *Krstić*, Trial Judgment, 2 August 2001, para. 580; ICTY, *Vasiljević* Trial Judgment, 29 November 2002 ("*Vasiljević* TJ"), paras 193, 196, 201; ICTY, *Hadzihasanović et al*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, paras 32-36; ICTY, *Galić*, Trial Judgment, 5 December 2003, paras 90, 93, 98, 132; ICTR, *Akayesu*, Trial Judgment, 2 September 2008, para. 605).

international level. It follows that, if a treaty provides for the punishment of conduct that previously did not amount to a crime, the relevant provision of the treaty must be held to be non-self-executing, because—absent domestic law criminalising the conduct and setting out the relevant penalty—its implementation would not ensure that all guarantees of precision and foreseeability are afforded to any person accused of crimes deriving from the international treaty.[113] Thus under Lebanese law, if the legislature does not criminalise particular conduct and specify the penalty as provided for in a ratified international treaty, judges may not apply those provisions of international origin, on account of the *nullum crimen sine lege* principle, enshrined in Article 1 of the Lebanese Criminal Code,[114] although Lebanon would find itself in breach of an international treaty, thereby incurring international State responsibility.

77. The Defence Office rightly refers to the case of the *Minor house servant*, decided on 9 November 1999 by the Criminal Chamber of the Court of cassation.[115] In that case, the Court held that a father who had allowed his daughter (who was under ten years of age) to work as a house servant could not be punished because the 1989 UN Convention on the Rights of the Child, ratified by Lebanon on 14 May 1991, had not been implemented through a law criminalising the relevant conduct. A specific additional statute was thought necessary to make the conduct in question a crime and to set the appropriate sentence—failing this, no tribunal could convict on the sole basis of a law authorising ratification.

78. Unlike the Arab Convention, however, the UN Convention on the Rights of the Child did not contain a provision defining the crime: it merely required Contracting States to pass legislation on the matter, with a view to criminalising the employment of a child below a certain age (to be specified by each Contracting State with regard to such State) and providing for the penalty attached to the crime.[116] The Lebanese authorities having failed to enact that legislation, domestic courts were

[113] See, e g., Australia, Federal Court, *Buzzacott v Hill*, [1999] FCA 1192 (S23 of 1999); Senegal, Court of cassation, *Hissène Habré*, 20 March 2001, available online at http://www.icrc.org/ihl-nat nsf, and reprinted in part at 125 I.L.R. 569.

[114] Article 1 reads: "No penalty may be imposed and no preventive or corrective measure may be taken in respect of an offence that was not defined by statute at the time of its commission. An accused person shall not be charged for acts constituting an offence or for acts of principal or accessory participation, committed before the offence in question has been defined by statute."

[115] See Defence Office Submission, para. 65 and footnote 70. Court of cassation, 6th Chamber, decision n° 142, 9 November 1999, *Sader fil-tamyiz* [Sader in the cassation], 2001.

[116] Article 32 of this Convention stipulates that:

not in a position to enter convictions on the matter. The Arab Convention, on the other hand, *does* include a clear definition intended to complement Lebanon's national legislation and to take precedence in instances of judicial cooperation with other Arab States that have ratified the Convention. It does not create a new crime in Lebanon but expands in some foreseeable ways the definition of an existing crime, although solely with regard to and in the area of judicial cooperation with other Arab countries.

79. Thus the question arises: does this distinction matter, that a treaty (the Arab Convention) defines differently conduct (terrorism) *already criminalised* within Lebanon? In other words, can the Arab Convention's definition of terrorism be used by the Tribunal when ascertaining the notion of terrorism for the purpose of its cases, since the Arab Convention does not purport to define a new crime in Lebanese law, but merely to *add* to the already existing definition in Article 314?

80. We first note that the Convention itself clearly indicates that it does not intend to substitute its own definition of terrorism for those contained in the national law of each contracting party. The Convention simply creates a system of suppression that *runs parallel* to that of national legislation: in the area of judicial cooperation among Arab countries, the prevention and suppression of terrorism shall be conducted along the lines indicated by the Convention and based on the definition of "terrorism" and "terrorist offences" set out or referred to in the Convention. Each contracting State remains free to prosecute and punish terrorism in its own legal system based on its own definition of terrorism. Thus, while killing with a dagger a foreign dignitary, for instance, has not been generally regarded by Lebanese courts as "terrorism" even if the act was intended to spread terror, Lebanon agreed to treat such act as terrorism for the purpose of judicial cooperation with other parties to the Arab Convention. In this sense, we agree with the Defence Office that the purpose of the Arab

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Convention's definition of terrorism is to enable prosecution, not to change domestic criminal codes.[117]

81. The Appeals Chamber thus finds that the Tribunal cannot apply the Convention directly, as an independent source of law. The Statute is clear that the Tribunal is to apply the definition of terrorism found in the Lebanese Criminal Code, and the definition used in the Arab Convention does not automatically replace that enshrined in Article 314. Deference to the will of the Lebanese legislature, which has never chosen to modify the definition used in the Lebanese Criminal Code, and to the letter of the Statute mandates this outcome. In addition and *ad abundantiam*,[118] as the Defence Office noted,[119] since the initial reference to the Arab Convention was deleted in the course of the drafting process of the Statute,[120] the argument can also be made that the preparatory work confirms this literal interpretation.

82. Nevertheless, while not overriding inconsistent provisions of the Lebanese Criminal Code, the definition of the Arab Convention undoubtedly forms part of the domestic legal system of Lebanon. The Defence Office urges us not to use the Arab Convention as an aid to interpretation,[121] but we believe its definition can nonetheless be used to help identify a persuasive interpretation of the Lebanese Criminal Code as part of the overall context relevant to its interpretation. As the Defence Office acknowledges, Lebanese courts do look to ratified treaties to interpret Lebanese law.[122] Further, we disagree that the Arab Convention's definition lacks clarity,[123] or that such an absolute distinction can be drawn between the realm of judicial cooperation and that of criminal prohibitions[124]: while the Arab Convention does not directly change the Lebanese Criminal Code, Lebanon has agreed to allow other countries to prosecute people found within its borders for crimes within the Arab Convention's definition. Further, as noted above, it is a well-known principle of

[117] See Defence Office Submission, paras 114, 118-119.

[118] Under Article 32 of the Vienna Convention on the Law of Treaties resort to preparatory works is only a "supplementary" or subsidiary means of interpretation, applicable when there is a doubt about the meaning of a provision.

[119] Defence Office Submission, para. 116.

[120] N. N. Jurdi, "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon", 5 *J Int'l Crim Justice* (2007) 1125, at 1128.

[121] Defence Office Submission, para. 121.

[122] Defence Office Submission, paras 66-67.

[123] Defence Office Submission, para. 120.

[124] Defence Office Submission, para. 114.

international law that, as much as possible, a national law shall be so construed as to make it consistent with a State's international obligations.[125]

2. Customary Law

a) Customary International Law on Terrorism

83. The Defence Office and the Prosecutor both forcefully assert that there is currently no settled definition of terrorism under customary international law.[126] However, although it is held by many scholars and other legal experts that no widely accepted definition of terrorism has evolved in the world society because of the marked difference of views on some issues,[127] closer scrutiny demonstrates that in fact such a definition has gradually emerged.

84. The Institute for Criminal Law and Justice Brief, prepared by Prof Dr Ambos, has helpfully reviewed universal and regional instruments.

85. As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least *in time of peace*, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or

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[125] See sources cited in footnote 63, above; see also *French State v Établissements Monmousseau*, 15 I L.R 596 (Fr Ct. App. Orleans 1948), at 597; *Yugoslav Refugee (Germany) Case*, 23 I.L R. 386 (F.R G. Fed. Admin. Sup. Ct. 1956), at 387-388; *Interpretation of Customs Valuation Statute (Austria) Case*, 40 I.L.R. 1 (Aust Admin. Ct. 1962), at 2-3. For some older British cases taking the same view, see C.K Allen, *Law in the Making*, 6th edn. (Oxford: Clarendon Press, 1958), at 445-446.

[126] Defence Office Submission, para. 90; Prosecution Submission, para. 17; Hearing of 7 February 2011, T. 11-13 and 55.

[127] For example, see Y. Dinstein, "Terrorism as an International Crime", 19 *Israel Y B on Human Rights* (1989), at 55; A. Schmid, "Terrorism: The Definitional Problem", 36 *Case W Res J Int'l L* 375 (2004); B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press, 2008), at 270; R. Barnidge, "Terrorism: Arriving at an Understanding of a Term", in *Terrorisme et droit international* (Leiden: Nijhoff 2008), 157-193; M. Williamson, *Terrorism, War and International Law The Legality of the Use of Force Against Afghanistan in 2001* (Surrey: Ashgate Publishing 2009), at 49. See further: U.S., Federal Court of Appeal, *United States v Yousef*, 337 F.3d 56, 106-108 (2d Cir. 2003); India, Supreme Court, *Singh v State of Bihar* (2004) 3 SCR 692; France, Court of cassation, *Gaddafi Case*, [cass. crim.], 13 March 2001, *reprinted in English in* 125 I.L.R. 490. See also Institute for Criminal Law and Justice Brief, para 7. For the reasons, authorities and national and international instruments set out in this decision, we cannot subscribe to this view.

directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.[128]

86. As a preliminary matter, there is no doubt that there is a commonly shared agreement on the need to "fight international terrorism in *all its forms* and *irrespective of its motivation, perpetrators and victims, on the basis of international law*".[129] Furthermore, that there exists a crime of terrorism under customary international law has already been recognised by some national courts, including the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*;[130] the Italian Supreme Court of cassation in *Bouyahia Maher Ben Abdelaziz et al.*, which stated that "a rule of customary international law [is] embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of *Terrorist* Bombings";[131] and the First "Judge of Amparo" on Criminal Matters in the Federal District of Mexico, who noted that "the multiple conventions to which reference has been made, provide that the crimes of genocide, torture and *terrorism* are internationally wrongful in nature and impose on member States of the world

[128] Coincidentally, although the Prosecution asserts there is no customary international law of terrorism, it identifies the first two of these elements as components of a potential customary norm. See Prosecution Submission, para. 25.

[129] *Report to the Counter-Terrorism Committee* (Iran), 27 December 2011, S/2001/1332, at 1 (emphasis added). Similar comments by States are widespread; for example, see statements collected in footnotes 156 ff., below.

[130] The Court said:

> We are not persuaded [...] that the term 'terrorism' is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated International Convention for the Suppression on the Financing of Terrorism, G.A Res. 54/109, December 9 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(a), defining 'terrorism' as '[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex' [...] Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2 (1) (b) defines 'terrorism' as 'Any [...] 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.' [...] This definition catches the essence of what we understand by 'terrorism'.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] S.C.R. 3, at paras 96 and 98. It should be noted that, at the time, Canada had not yet ratified the Convention for the Suppression on the Financing of Terrorism. The Convention was ratified by Canada on 19 February 2002, while the decision in *Suresh* was delivered on 11 January 2002. Likewise, in *Zrig v Canada (Minister of Citizenship and Immigration)*, 2003 FCA 178, 229 D.L.R. (4th) 235, it was noted that, in light of mounting international conventions, UN resolutions, and international case law, the international consensus at least as to certain forms of terrorism may have emerged as early as 1997. *Id* at paras 178-180, Décary JA (concurring).

[131] Cass. crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (unofficial STL translation). Under Italian domestic law, the purpose of terrorism is understood to be the creation of terror in the public through indiscriminate criminal conduct against the general public or against certain individuals because of the function they represent. See for instance Supreme Court of cassation, sez. I, 5 November 1987, n. 11382; see also Article 270-*bis* of the Italian Penal Code (amended 15 December 2001) (setting penalties for participating in terrorist associations).

community the obligation to prevent, prosecute and punish those culpable of their commission".[132] Reference to customary law regulating terrorism was also made by Judge Antonio Boggiano in his Concurring Opinion in the *Enrique Lautaro Arancibia Clavel* Case decided on 24 August 2004 by the Argentinean Supreme Court (*Corte Suprema de Justicia de la Nación*),[133] as well as by a U.S. federal court in *Almog v. Arab Bank*.[134]

87. However significant these judicial pronouncements may be as an expression of the legal view of the courts of different States, to establish beyond any shadow of doubt whether a customary rule of international law has crystallised one must also delve into other elements. In particular, one must look to the behaviour of States, as it takes shape through agreement upon international treaties that have an import going beyond their conventional scope or the adoption of resolutions by important intergovernmental bodies such as the United Nations, as well as the enactment by States of specific domestic laws and decisions by national courts. This examination will be undertaken in the following paragraphs.

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[132] Mexico, Supreme Court, *Cavallo* Case, No. 140/2002, 10 June 2003 (at p. 392 of the version on file with the STL) (unofficial STL translation) (emphasis added). The Mexican Supreme Court quoted the lower court at length in affirming the result but for different reasons.

[133] Argentina, Supreme Court, *Enrique Lautaro Arancibia Clavel* Case, No. 259 (2004), 24 August 2004 (Boggiano, J., concurring). Judge Boggiano, after defining terrorism as "a crime *juris gentium*", wrote:

> [T]errorism involves the commission of cruelties upon innocent and defenceless people causing unnecessary suffering and danger against the lives of the civilian population. It is a system of subversion of order and public security that, although the commission of certain isolated events could be fixed to a particular State, has recently been characterized by ignoring the territorial limits of the affected State, constituting in this way a serious threat to the peace and security of the international community. This is why its prosecution is not the exclusive interest of the State directly injured by it, but rather it is an aim whose achievement benefits, ultimately, all civilized nations, who are thereby obligated to cooperate in the global fight against terrorism, both through international treaties and through the coordination of national law aimed at the greater efficiency of the said struggle. ... [O]n the other hand, customary international law and conventional law echo the need for international cooperation for the repression of terrorism, as well as any indiscriminate attack against a defenceless civilian population.

(at pp. 51-52, paras 21-22 of version on file with STL) (unofficial STL translation).

[134] While the court avoided the label of "terrorism", it held that "in light of the universal condemnation of organized and systematic suicide bombings and other murderous acts intended to intimidate or coerce a civilian population, this court finds that *such conduct violates an established norm of international law.*" *Almog v Arab Bank*, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007) (emphasis added). See also *United States v Yunis*, 924 F.2d 1086 (D.C. Cir. 1991), in which the Court of Appeals for the D.C. Circuit noted:

> Nor is jurisdiction precluded by norms of customary international law. [...] Under the universal principle, states may prescribe and prosecute "*certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism,*" even absent any special connection between the state and the offense.

Id at 1091 (emphasis added) (quoting *Restatement (Third) of the Foreign Relations Law of the United States* §§ 404, 423 (1987)).

88. Let us first consider international and multilateral instruments that include a definition of the crime of international terrorism. Numerous regional treaties have defined terrorism as *criminal* acts intended to *terrorise populations* or *coerce an authority*.[135] By the same token, UN General Assembly resolutions have, since 1994, insisted that "*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[.]"[136] Likewise, in 2004 the Security Council, by a *unanimous* decision taken under Chapter VII of the UN Charter, "recall[ed]" in Resolution 1566 that:

> *criminal 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 person, intimidate a population *or compel a government or an international organization to do or to abstain from doing any act*, which

[135] **Council of the European Union**, Council Framework Decision 2002/475/JHA, On Combating Terrorism, arts 1-4, 2002 O.J. (L 164) 3, 4-5; **Organization of African Unity**, Convention on the Prevention and Combating of Terrorism, 14 July 1999, 2219 U.N.T.S. 179, arts 1 & 3; **Organisation of the Islamic Conference**, Convention of the Organisation of the Islamic Conference on Combating International Terrorism ("*Islamic Conference Convention*"), 1 July 1999, Res. 59/26-P, Annex, art. 1 (*available at* http://www.oic-oci.org/english/convenion/terrorism_convention.htm); **Commonwealth of Independent States**, Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 4 June 1999, art. 1 (*available at* http://treaties.un.org/doc/db/Terrorism/csi-english.pdf), **League of Arab States**, Arab Convention for the Suppression of Terrorism ("*Arab Convention*"), 22 April 1998, arts 2-3 (*available in English at* https://www.unodc.org/tldb/pdf/conv_arab_terrorism.en.pdf); **Communauté Economique et Monétaire de l'Afrique Centrale**, Convention relataive à la lute contre le terrorism en Afrique Centrale ("*CEMAC Convention*"), 5 February 2005, Règlement N° 08/05-OEAC-057-CM-13, art. 1(2) (*available in French at* https://www.unodc.org/tldb/pdf/cemac_regl_lutte_terr_2005.doc); **Cooperation Council for the Arab States of the Gulf**, Convention of the Cooperation Council for the Arab States of the Gulf on Combating Terrorism ("*CCASG Convention*"), 4 May 2004, art. 1 (*available in French at* https://www.unodc.org/tldb/pdf/conv_gcc_fr.doc); **Shanghai Cooperation Organization**, Shanghai Convention on Combating Terrorism, Separatism and Extremism ("*Shanghai Convention*"), 15 June 2001, art. 1 (*available at* http://www.sectsco.org/EN/show.asp?id=68). See also **Council of Europe**, Convention on the Prevention of Terrorism ("*Council of Europe Convention*"), 15 May 2005, art. 1 (*available at* http://conventions.coe.int/Treaty/en/treaties/html/196.htm), which notes in the preamble 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 organization to perform or abstain from performing any act or seriously destablise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization."

The South Asian Association for Regional Cooperation's Regional Convention on Suppression of Terrorism includes a definition of terrorism that differs somewhat from these standard elements, in that it is limited to certain violent criminal acts "when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property". **SAARC**, Regional Convention on Suppression of Terrorism, 4 November 1987, art. 1 (*available at* http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf). However, the Additional Protocol to this Convention (which entered into force on 12 January 2006) more closely follows the definition used in other conventions and requires a special intent to intimidate a population or coerce an authority. **SAARC**, Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism, 6 January 200, art. 3 (*available at* https://www.unodc.org/tldb/pdf/SAARC_ADDITIONAL_PROTOCOL_2004.pdf).

[136] A/RES/49/60 Annex (1994), at para. 3 (emphasis added); see also A/RES/64/118 (2009), at para. 4; A/RES/63/129 (2008), at para. 4; A/RES/62/71 (2007), at para. 4; A/RES/61/40 (2006), at para. 4; A/RES/60/43 (2005), at para. 2; A/RES/59/46 (2004), at para. 2; A/RES/58/81 (2003), at para. 2; A/RES/57/27 (2002), at para. 2; A/RES/56/88 (2001), at para. 2; A/RES/55/158 (2000), at para. 2; A/RES/54/110 (1999), at para. 2, A/RES/53/108 (1998), at para. 2; A/RES/52/165 (1997), at para. 2; A/RES/51/210 (1996), at para. 2; A/RES/50/53 (1995), at para. 2.

> constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are *under no circumstances* justifiable[...][137]

A similar definition has found a large measure of approval in the Ad Hoc Committee tasked to draft a Comprehensive Convention on Terrorism.[138] For now, the 1999 International Convention for the Suppression of the Financing of Terrorism ("Financing Convention") provides the UN's clearest definition of terrorism, which includes the elements of (i) a criminal act (ii) intended to intimidate a population or compel an authority, and is limited to those crimes containing (iii) a transnational aspect.[139]

89. The Financing Convention and most of the regional and multilateral conventions regarding terrorism incorporate into their definition of terrorism the specific offences criminalised in a long line of terrorism-related conventions.[140] Among the terrorist offences so criminalised are the taking

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[137] S/RES/1566 (2004), at para. 3 (emphasis added). The fact that the Security Council used the verb "recall" suggests that this definition is already found elsewhere in international law. However, the Security Council restricted this particular reference to those acts already criminalised under the international conventions listed below (see footnotes 141-143).

[138] In 2002, the Coordinator of the Comprehensive Convention on Terrorism proposed the following definition of terrorism (which was considered "acceptable" by those delegates who took a position on the matter the following year, namely in 2003; see *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210*, A/58/37 (2003), at 10):

> 1 Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
>
> (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 the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.*
>
> 2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

See *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210*, A/57/37 (2002), at 6 (emphasis added).

[139] International Convention for the Suppression of the Financing of Terrorism ("*Financing Convention*"), 9 December 1999, 2178 U.N.T.S. 197, arts 2(1)(b) and 3. See also *Bouyahia Maher Ben Abdelaziz et al.*, in which the Italian Supreme Court of cassation noted:

> Due to the decades-long disagreements among UN member states on terrorist acts perpetrated during liberation wars and armed struggles for self-determination, a global convention on terrorism does not exist. Having said that, it should be noted that the wording of the 1999 Convention [for the Suppression of the Financing of Terrorism] ... is so broad that it can be considered a general definition, capable of being applied in both times of peace and times of war.

Cass. crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (STL unofficial translation).

[140] See, for example, *Financing Convention*, art. 2(1)(a); **Black Sea Economic Cooperation Organization**, Additional Protocol on Combating Terrorism to Agreement Among the Governments of the Black Sea Economic Cooperation Participating States on Cooperation in Combating Crime, in Particular in its Organized Form ("*BSEC Terrorism Convention*"), 3 December 2004, art. 1 (*available at* http://www.bsec-

of hostages,[141] the hijacking of planes,[142] and the harming of diplomatic representatives.[143] For political expediency at the time of their drafting, the earliest of these conventions focus solely on particular conduct that is universally condemned and do not require a particular intent (*e.g.*, to terrorise or to coerce).[144] Such an intent element, however, has been specified in the most recent conventions.[145] Further, all of these conventions also require—through the definition of the *actus reus* (the material element of a crime) or by additional provision—a transnational element to the crime.[146] Indeed, the three most recent universal conventions share a nearly identical Article 3, which states:

> This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in

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organization.org/documents/LegalDocuments/agreementmous/agr3/Pages/agr3.aspx); *Council of Europe Convention*, art. 1; *CEMAC Convention*, art. 2; *CCASG Convention*, art. 1; *Shanghai Convention*, art. 1; **Organization of American States**, Inter-American Convention Against Terrorism, 3 June 2002, art. 2 (*available at* http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGres1840_02.htm); *Islamic Conference Convention*, art. 1(4); *Arab Convention*, art. 3; see also **Association of Southeast Asian Nations**, Convention on Counter Terrorism, 30 January 2007, art. II (*available at* http://www.aseansec.org/19250.htm) (not yet in force).

[141] International Convention Against the Taking of Hostages ("*Hostage Convention*"), 17 December 1979, 1316 U.N.T.S. 206.

[142] Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("*Montreal Convention*"), 23 September 1971, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft ("*Hague Convention*"), 16 December 1970, 860 U.N.T.S. 106; Convention on Offenses and Certain Other Acts Committed on Board Aircraft ("*Tokyo Convention*"), 14 September 1963, 704 U.N.T.S. 219. On 10 September 2010, the International Civil Aviation Organization adopted two new conventions related to the hijacking of planes: the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, which will replace the *Montreal Convention*, and the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, which will amend the *Hague Convention*. The 2010 Convention and Protocol are currently open for signature and have not yet entered into force. The new treaties, as well as additional documents related to the Beijing conference during which they were adopted (available at http://www.icao.int/DCAS2010/), provide for new offences, expanded jurisdiction, and more efficient regimes in areas of extradition and mutual assistance.

[143] Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Personnel ("*New York Convention*"), 14 December 1973, 1035 U.N.T.S. 168.

Other such conventions include the International Convention for the Suppression of Acts of Nuclear Terrorism ("*Nuclear Terrorism Convention*"), 14 September 2005, 2445 U.N.T.S. 89; UN Convention for the Suppression of Terrorist Bombings ("*Terrorist Bombing Convention*"), 12 January 1998, 2149 U.N.T.S. 256; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("*SUA Maritime Convention*"), 10 March 1988, 1678 U.N.T.S. 222; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 10 March 1988, 1678 U.N.T.S. 304; and Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, 1489 U.N.T.S. 474.

[144] But see the *Hostage Convention*, where the offence of hostage taking is defined as the seizure or detainment of a person "*in order to compel* a third party, namely a State, an international organization, a natural or judicial 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." *Hostage Convention*, art. 1(1) (emphasis added).

[145] *Nuclear Terrorism Convention*, art. 2; *Financing Convention*, art. 2(b).

[146] For examples, see the *Tokyo Convention*, art. 1(2); *Montreal Convention*, art. 4; *New York Convention*, arts 1 and 2; *Hostage Convention*, art. 13; *SUA Maritime Convention*, art. 4; *Terrorist Bombing Convention*, art. 3.

> the territory of that State and no other State has a basis [under subsequent articles of the Convention] to exercise jurisdiction [...][147]

It is to be emphasised that the requirement of a cross-border element goes not to the definition of terrorism but to its character as *international* rather than *domestic*. The two elements of (i) criminal act and (ii) intention to intimidate a population or compel an authority are common to both domestic and international terrorism.

90. Regarding this transnational element, it will typically be a connection of perpetrators, victims, or means used across two or more countries, but it may also be a significant impact that a terrorist act in one country has on another—in other words, when it is foreseeable that a terrorist attack that is planned and executed in one country will threaten international peace and security, at least for neighbouring countries.[148] The requirement of a transnational element serves to exclude from the definition of *international* terrorism those crimes that are purely domestic, in planning, execution, and direct impact.[149] However, such purely domestic crimes may be equally serious in terms of human loss and social destruction. The exclusion of the transnational element from the *domestic* crime of terrorism, as defined by most countries' criminal codes, does not detract from the essential communality of the concept of terrorism in international and domestic criminal law. The exclusion allows those countries to apply the heightened investigative powers, deterrence mechanisms, punishment, and public condemnation that attach with the label "terrorism" to serious crimes that may not have international connections or a direct "spill over" effect in other countries.

91. Other than the exclusion of this transnational element, however, the national legislation of countries around the world consistently defines terrorism in similar if not identical terms to those used in the international instruments just surveyed. Consistent national legislation can be another important source of law indicative of the emergence of a customary rule. The ICTY, in determining the definition of rape to be applied by the tribunal, concluded that "it is necessary to look for principles of criminal law common to the major legal systems of the world," which "may be derived,

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[147] *Terrorist Bombing Convention*, art. 3; see also *Nuclear Terrorism Convention*, art. 3; *Financing Convention*, art 3.

[148] See, for example, U.K., Court of Appeal, *Al-Sirri v Secretary of State for the Home Department*, [2009] EWCA Civ 364, para. 51, where the court found the transnational element to be "the use of a safe haven in one state to destabilise the government of another by the use of violence".

[149] For example, the Oklahoma City bombing of 1995, various ETA bombings in Spain, and the Red Brigades (*Brigate Rosse*) in Italy in the 1980s.

with all due caution, from national laws."[150] The appropriate process to be followed is illustrated in the *Furundžija* and *Kunarac* Trial Judgments of the ICTY: Reference must not be made to one national legal system only—for example, either common law or civil law to the exclusion of the other[151]—although the distillation of a shared norm does not require a comprehensive survey of all legal systems of the world.[152] It is important to avoid "mechanical importation or transposition" from national law into international criminal proceedings.[153] As was rightly noted by a great authority in international law, Dionisio Anzilotti, "laws that ensure a certain conduct of a State towards other States and which are not motivated by special interests of that State (for as a rule no State does for the other States, without gaining any advantage, more than it believes it must do)" constitute "very important indicia about the existence of a customary rule". However, the mere existence of concordant laws does not prove the existence of a customary rule, "for it may simply result from an identical view that States freely take and can change at any moment".[154] Thus, for instance, the fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime. To turn into an international crime, a domestic offence needs to be regarded by the world community as an attack on universal values (such as peace or human rights) or on values held to be of paramount importance in that community; in addition, it is necessary that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime.

92. In this instance, there is more than a mere concordance of laws. The Security Council, acting under Chapter VII of the UN Charter, has instructed member States to adopt laws outlawing

[150] ICTY, *Furundžija*, Trial Judgment, 10 December 1998 ("*Furundžija* TJ"), para. 177.

[151] ICTY, *Furundžija* TJ, para. 178; ICTY, *Kunarac et al*, Trial Judgment, 22 February 2001, para. 439.

[152] See ICTY, *Erdemović*, Appeals Judgment, Separate Opinion of Judges McDonald and Vohrah, 7 October 1997, para. 57 ("[I]t is generally accepted that [a] comprehensive survey of all legal systems of the world [is not required,] as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute."); *id*, Separate Opinion of Judge Stephen, para. 25 ("[N]o universal acceptance of a particular principle by every nation within the main systems of law is necessary before lacunae can be filled[.]").

[153] *Furundžija* TJ, para. 178; see also ICTY, *Erdemović*, Appeals Judgment, Separate and Dissenting Opinion of Judge Cassese, 7 October 1997, paras 2-6.

[154] D. Anzilotti, *Corso di diritto internazionale*, Vol. I, 4th edn. (Padova: CEDAM 1955), at 100, for the French translation, see D. Anzilotti, *Cours de Droit International*, Vol. I, 3rd edn. (trans. G. Gidel) (Paris: Recueil Sirey, 1929), at 108. As another great master of international law put it : « Le droit international coutumier se concrétise souvent sous forme de normes du droit interne. Le droit de la haute mer, celui de la mer territoriale et en particulier celui des ports maritimes a ses origines dans des règles de droit interne ». P. Guggenheim, *Traité de droit international public*, Tome I, Genève, Librairie de l'Université, Georg & Cie S. A., 1953, p. 51.

terrorism and related crimes (such as the financing or incitement of terrorism), to ratify the recent anti-terrorism conventions, and to report periodically to the Council's Counter-Terrorism Committee on steps taken to bring national law into conformity with international standards in this field.[155] In the last ten years, many States have reported back to the Counter-Terrorism Committee not only their success in doing so, but also their understanding that terrorism is an international crime and/or that their laws increasingly align with a global standard.[156] That the attitude taken in these laws is concordant and not subject to transient national interests evinces a widespread stand on and a shared view of terrorism.

93. Elements common across national legislation defining terrorism include the use of criminal acts to terrorise or intimidate populations, to coerce government authorities, or to disrupt or destabilise social or political structures. Among countries that have ratified the Arab Convention for the Suppression of Terrorism, for example, national laws criminalise (i) criminal acts that (ii) endanger social order and (iii) spread fear or harm among the population or damage property or

[155] See S/RES/1373 (2001), para. 6, in which the Security Council called on States "to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism" and instructing States to "[t]ake the necessary steps to prevent the commission of terrorist acts" and "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts." See also S/RES/1624 (2005), para. 5.

[156] **Egypt** has suggested that it considers terrorism, at least as defined in international agreements binding on it, as a crime akin to war crimes and genocide, *i e* , an international crime. See *Report to the Counter-Terrorism Committee* (Egypt), 23 May 2006, S/2006/351, at 5. **Jordan** explicitly stated that its definition of terrorism was amended in 2001 in order to comply with Security Council Resolution 1373 (2001). See *Report to the Counter-Terrorism Committee* (Jordan), 24 March 2006, S/2006/212, at 11. **Tunisia** has referenced its efforts "to become involved in the *global system* against terrorism and [has] supported international efforts in this regard." *Report to the Counter-Terrorism Committee* (Tunisia), 4 February 2005, S/2005/194, at 3. **Iran** announced that "the Islamic Republic of Iran attaches great importance to the implementation of the United Nations Security Council Resolutions, particularly resolution 1373 (2001)" *Report to the Counter-Terrorism Committee* (Iran), 27 December 2001, S/2001/1332, at 1. **Brazil** has "always sought to comply with United Nations General Assembly and Security Council Resolutions on terrorism" and "has been taking the domestic steps necessary to link the country to all international agreements on terrorism" *Report to the Counter-Terrorism Committee* (Brazil), 26 December 2001, S/2001/1285, at 1.

South Africa explicitly sought to align its national legislation with international conventions and obligations binding on the community of nations when it adopted a new terrorism law in 2004. Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 preamble ("[W]hereas our national laws do not meet all the international requirements relating to the prevention and combating of terrorist and related activities [...] and realizing the importance to enact appropriate domestic legislation necessary to implement the provisions of relevant international instruments dealing with terrorist activities[...]"). Likewise, in adopting its Terrorism Suppression Act of 2002, **New Zealand** intended to align its terrorism law more closely with international standards, particularly the UN conventions and Resolution 1373. See R. Young, "Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation", 29 *Boston College Int'l & Comp L Rev* (2006) 23, at 83-85.

infrastructure in a way that endangers society. These countries include Jordan,[157] Iraq,[158] the United Arab Emirates,[159] Egypt,[160] and Tunisia.[161] Members of the European Union have incorporated the

[157] **Jordan:** Terrorism, criminalised in Article 148 of the Criminal Code, is defined in Article 147(1) as follows:

> [T]he use of violence or threat of violence, regardless of its motives or purposes, to carry out an individual or collective act aimed at disturbing public order or endangering public safety and security where such is liable to spread alarm or terror among the public or jeopardize their lives and security or cause damage to the environment, public facilities or property, private property, international facilities or diplomatic missions, or where it is aimed at occupying or taking over such premises, endangering national resources or obstructing the application of the provisions of the Constitution and laws.

In addition, Anti-Terrorism Law No. 55 of 2006, Official Gazette No. 4790, at 4264, 1 November 2006, criminalises terrorism as defined as:

> [E]very intentional act, committed by any means and causing death or physical harm to a person or damage to public or private properties, or to means of transport, infrastructure, international facilities or diplomatic missions and intended to disturb public order, endanger public safety and security, cause suspension of the application of the provisions of the Constitution and laws, affect the policy of the State or the government or force them to carry out an act or refrain from the same, or disturb national security by means of threat, intimidation or violence.

Id at arts 2-3. (English translations from UN Office on Drugs and Crime, Counter-Terrorism Legislation Database, https://www.unodc.org/tldb/laws_legislative_database.html ("UNODC Database")).

[158] **Iraq:** Article 1 of Anti-Terrorism Act No. 13 of 2005 defines terrorism as "any criminal act undertaken by an individual or group of individuals or by official or unofficial groups or organizations that causes damage to public or private property with the aim of upsetting the security situation or stability and national unity or of producing terror, fear and alarm among the populace or of provoking chaos in the pursuit of terrorist aims". Article 2 considers the following to be terrorist acts:

> (i) Violence or threats designed to strike terror among the populace or to expose their lives, freedoms and security to danger and their property and possessions to damage, for whatever motive or purpose, in execution of a systematic terrorist design by an individual or group; (ii) The use of violence and threats with the intent to destroy, demolish, ruin or damage public buildings or property, government offices, institutions or bodies, State agencies, private sector organizations, public utilities, public places intended for public use or public gatherings frequented by crowds, or public assets, or the attempt to occupy or take control thereof, to expose to risk or to prevent their proper use with the aim of undermining security and stability; (iii) The organization, direction or control of the leadership of an armed terrorist group that engages in, plans, participates or collaborates in such activity; (iv) The use of violence and threats to instigate sectarian strife, civil war or sectarian fighting by arming civilians or encouraging them to bear arms against one another by incitement or funding; (v) Aggression by means of arms, biological agents or similar substances, radioactive materials or toxins, (vi) Kidnapping, restriction of the freedom of individuals or holding them to [*sic*] ransom for purposes of gain of [*sic*] a political, sectarian, ethnic, religious or racial nature in such a way as to threaten security and national unity and to promote terrorism.

Report to the Counter-Terrorism Committee (Iraq), 19 April 2006, S/2006/280, at 5.

[159] **The United Arab Emirates:** Decree by Federal Law No. 1 of 2004 on Combating Terrorist Offences defines (in article 2) terrorism as:

> [E]very act or omission, the offender commits himself to execute a criminal design, individually or collectively, with intention to cause terror between people or terrifying them, if the same causes breach of the public order or endangering the safety and security of the society or injuring persons or exposing their lives, liberties, security to danger including Kings, Heads of States and Governments, Ministers and members of their families, or any representative or official of a State or an international organization of an inter-governmental character and members of their families forming part of their household entitled pursuant to international law to protection or causes damage to environment, any of the public, private utilities or domain, occupying, seizing the same or exposing any of the natural resources to danger.

(English translation from UNODC Database.)

[160] **Egypt:** Article 86 of the Penal Code defines "terrorism" as:

> [A]ll use of force, violence, threatening, or frightening, to which a felon resorts in execution of an individual or collective criminal scheme, with the aim of disturbing public order or exposing the safety and security of society to

definition included in the Council Framework Decision of 13 June 2002 on combating terrorism, which specifies that certain criminal acts are deemed to be terrorist offences when "they may seriously damage a country or an international organisation" and were "committed with the aim of [i] seriously intimidating a population, or [ii] unduly compelling a Government or international organisation to perform or abstain from performing any act, or [iii] seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation". As noted in the Institute for Criminal Law and Justice Brief, Sweden,[162] Belgium,[163] Germany,[164] Austria,[165] and the Netherlands,[166] among others, have incorporated this definition almost verbatim into their laws; France's criminal code more succinctly labels as terrorist offences particular criminal acts intended to seriously disturb public order through intimidation or terror.[167] Similarly, Finland added in 1993 the criminalisation of certain listed criminal acts when

danger, if this is liable to harm the persons, or throw horror among them, expose their life, freedom or security to danger, damage the environment, causes detriment to communications, transport, property and funds, buildings, public or private properties, occupying or taking possession of them, preventing or impeding the work of public authorities, worship houses, or educational institutions, interrupting the application of the constitution, laws or statutes.

(English translation from UNODC Database.) Reportedly, Egyptian law does not concern itself solely with the criminalisation of terrorist acts committed in Egypt or directed against Egyptian nationals, but also extends the scope of criminality to terrorist acts committed anywhere in the world, irrespective of the nationality of the injured party or parties.

[161] **Tunisia:** Article 4 of Law 2003-75 against Terrorism and Money-Laundering, 10 December 2003, provides:

Est qualifiée de terroriste, toute infraction quels qu'en soient les mobiles, en relation avec une entreprise individuelle ou collective susceptible de terroriser une personne ou un groupe de personnes, de semer la terreur parmi la population, dans le dessein d'influencer la politique de l'État et de le contraindre à faire ce qu'il n'est pas tenu de faire ou à s'abstenir de faire ce qu'il est tenu de faire, de troubler l'ordre public, la paix ou la sécurité internationale, de porter atteinte aux personnes ou aux biens, de causer un dommage aux édifices abritant des missions diplomatiques, consulaires ou des organisations internationales, de causer un préjudice grave à l'environnement, de nature à mettre en danger la vie des habitants ou leur santé, ou de porter préjudice aux ressources vitales, aux infrastructures, aux moyens de transport et de communication, aux systèmes informatiques ou aux services publics."

On Tunisia's commitments vis-à-vis international obligations to update its terrorism legislation, see also *Report to the Counter-Terrorism Committee* (Tunisia), 26 December 2001, S/2001/1316, at 10.

[162] **Sweden:** Law (2003:148) on the crime of terrorism.

[163] **Belgium:** See Article 137 para 1 of the Criminal Code.

[164] **Germany:** *Strafgesetzbuch* [StGB] [Criminal Code] 4 July 2009, *Bundesgesetzblatt* [Federal Law Gazette] I 3322, *as amended*, s. 129(a), para. 2.

[165] **Austria:** See Section 278c of the Criminal Code.

[166] **The Netherlands:** Crimes of Terrorism Act, 24 June 2004, Bulletin of Acts and Decrees [Stb.] 2004, 290, art. I(D), codified at *Wetboek van Strafrecht* [Sr] [Criminal Code], arts 83 and 83a.

[167] **France :** « Constituent des actes de terrorisme, lorsqu'elles sont intentionellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur, les infractions suivantes : 1) les atteintes volontaires à la vie [etc.]. » Code Pénal art. 421-1.

committed by a person "with terrorist intent and in a manner that is likely to cause serious harm to a State or to an international organization".[168]

94. The United Kingdom's definition includes the subjective element of intent to coerce a governmental authority or intimidate a population, but it also requires a political, religious, racial or ideological purpose.[169] The national laws of Australia,[170] New Zealand,[171] Canada,[172] and Pakistan[173] adopt a very similar definition. South Africa likewise identifies specific categories of serious crimes and labels them as "terrorist activity" when they are intended to threaten the country's security, spread fear, or coerce authorities or the public, and when they are committed at least in part for a political, religious, ideological or philosophical cause.[174]

95. Latin American countries such as Colombia,[175] Peru,[176] Chile,[177] and Panama[178] require the intent to spread fear and the use of means capable of causing havoc or public danger. Mexico requires the use of violent means that spread fear and an intent to threaten national security or

[168] **Finland:** Section 34a of the Criminal Code.

[169] **The United Kingdom:** Section 1 of the Terrorism Act 2000, as amended by the Terrorism Act 2006 and Counter-Terrorism Act 2008, provides:

> (1) In this Act "terrorism" means the use or threat of action where—(a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.
>
> (2) Action falls within this subsection if it— (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

[170] **Australia:** Criminal Code Act 1995 (Cth), s 100.1.

[171] **New Zealand:** Terrorism Suppression Act 2002, 2002 S.N.Z. No. 34, s. 5.

[172] **Canada :** Criminal Code, R S C., ch. C-46, s. 83.01

[173] Pakistan's inclusion of a political or ideological purpose appears not to be a distinct element, but rather an alternative to the intent to coerce an authority or terrorise the population. See **Pakistan,** Anti-Terrorism Act 1997, s. 6, *as amended by* Ordinance No. XXXIX of 2001, Act II of 2005, and Ordinance No. XXI of 2009; see also National Public Safety Commission, *Anti-Terrorism Manual* (Islamabad: National Police Bureau 2008), which traces the recent development of Pakistan's terrorism laws (*available at* https://www.unodc.org/tldb/pdf/Pakistan_Anti-terrorism_Manual_2008.pdf).

[174] **South Africa:** Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 s. 1(xxv).

[175] **Colombia:** Article 343 of the Criminal Code.

[176] **Peru:** Decree Law No. 25475, art. 2. See also *Polay Campo* case, Sala Penal Nacional, Judgment of 21 March 2006 (cited in Institute for Criminal Law and Justice Brief, fn. 65), which holds that the special intent of subverting the constitutional order and the political order in its general meaning is a facet of the crime in question.

[177] **Chile:** Law No. 18314, arts 1 and 2. Chile also requires the terrorist act to be intended to coerce or impel government action.

[178] **Panama:** Article 287 of the Criminal Code.

pressure government authorities.[179] Argentina adds to these elements the requirement that the criminal act be based on an ethnic, religious or political ideology; and using military weapons, explosives, or other means that endanger human life.[180] Ecuador requires the purpose of creating public alarm and a motivation based on patriotic, social, economic, political, religious, revolutionary, racial, or local vindication.[181]

96. The common themes of (i) criminal acts, (ii) the spread of fear, and (iii) unlawful coercion of the government can also be found in the laws of countries as different as the United States,[182] the Russian Federation,[183] India,[184] the Philippines,[185] Uzbekistan,[186] and the Seychelles.[187] Mention

[179] **Mexico:** *Código Penal Federal* [C.P.F.], *as amended, Diario Oficial de la Federación* [D.O.], 20 August 2009, art. 139.

[180] **Argentina:** *Código Penal*, art. 213*ter*.

[181] **Ecuador:** Articles 158, 159, and 160.1 of the Criminal Code.

[182] **United States:** 18 U.S.C. § 2331 defines *international terrorism* as:

> [A]ctivities that [...] involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; [and] appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and [which] occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

(The definition of *domestic terrorism* is largely the same, except that it applies to crimes that "occur primarily within the territorial jurisdiction of the United States".) Title 22 of the United States Code provides another definition, in relation to the annual terrorism reports created by the State Department: "the term 'terrorism' means premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents". 22 U.S.C. § 2656f(d)(2).

[183] **The Russian Federation:** Article 3 of the Federal Law no 35-FZ of 6 March 2006 on Counteraction against Terrorism provides in part:

> 1) terrorism shall mean the ideology of violence and the practice of influencing the adoption of a decision by public authorities, local self-government bodies or international organizations connected with frightening the population and (or) other forms of unlawful violent actions;
>
> 2) terrorist activity shall mean activity including the following: a) arranging, planning, preparing, financing and implementing an act of terrorism; b) instigation of an act of terrorism; c) establishment of an unlawful armed unit, criminal association (criminal organization) or an organized group for the implementation of an act of terrorism, as well as participation in such a structure; d) recruiting, arming, training and using terrorists; e) informational or other assistance to planning, preparing or implementing an act of terrorism; f) popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity;
>
> 3) terrorist act shall mean making an explosion, arson or other actions connected with frightening the population and posing the risk of loss of life, of causing considerable damage to property or the onset of an ecological catastrophe, as well as other especially grave consequences, for the purpose of unlawful influence upon the adoption of a decision by public authorities, local self-government bodies or international organizations, as well as the threat of committing the said actions for the same purpose [...]

See also Article 205 of the Criminal Code (as of 2004): "Terrorism, that is, the perpetration of an explosion, arson, or any other action endangering the lives of people, causing sizable property damage, or entailing other socially dangerous consequences, if these actions have been committed for the purpose of violating public security, frightening

must also be made of the prohibition against terrorism under *Chari'a* law, for example as incorporated into the laws of Saudi Arabia.[188]

97. It is indeed not startling that these laws, despite peripheral variations normally motivated by national exigencies, share a core concept: terrorism is a criminal action that aims at spreading terror or coercing governmental authorities and is a threat to the stability of society or the State. This notion is so deeply embedded in the legislation of so many diverse countries, that one is warranted to

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the population, or exerting influence on decision-making by governmental bodies, and also the threat of committing said actions for the same ends [...]". (English translations from UNODC Database.)

[184] **India:** Under section 4 of the Unlawful Activities (Prevention) Amendment Act 2008, No. 35:

> Whoever, [...] with intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country (a) by using [...] any other means of whatever nature to cause or likely to cause (i) death of, or injuries to, any person or persons; or (ii) loss of, or damage to, or destruction of, property; or (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or (b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or (c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

[185] **The Philippines:** "Any person who commits an act punishable under any of the following provisions of the Revised Penal Code [...] thereby sowing and creating a condition of widespread and extraordinary fear and panic among the populace, in order to coerce the government to give in to an unlawful demand shall be guilty of the crime of terrorism [...]." Human Security Act of 2007, Rep. Act No. 9372, s. 3.

[186] **Uzbekistan:** Article 155 of the Criminal Code, as amended by the Law of the Ruz. No. 254-II, 29 August 2001, defines terrorism as:

> [V]iolence, use of force, or other acts, which pose a threat to an individual or property, or the threat to undertake such acts in order to force a state body, international organization, or officials thereof, or individual or legal entity, to commit or to restrain from some activity in order to complicate international relations, infringe upon sovereignty and territorial integrity, undermine security of a state, provoke war, armed conflict, destabilize sociopolitical situation, intimidate population, as well as activity carried out in order to support operation of and to finance a terrorist organization, preparation and commission of terrorist acts, direct or indirect provision or collection of any resources and other services to terrorist organizations, or to persons assisting to or participating in terrorist activities [...].

(English translation from UNODC Database.)

[187] **The Seychelles:** Prevention of Terrorism Act 2004, 25 June 2004, s. 2. In *Republic v Dahir* (26 July 2010), the Supreme Court of Seychelles succinctly summarised this definition: "Terrorism usually involves indiscriminate violence with the *objective of influencing governments or international organizations* for *political ends*." *Id*, para. 37 (emphasis in original).

[188] **Saudi Arabia:** See *Report to the Counter-Terrorism Committee* (Saudi Arabia), 26 December 2001, S/2001/1294, at 5. According to an Interpol document, "The Kingdom's Council of Senior Religious Scholars issued a statement on terrorism in which it declared that 'bloodshed, the violation of honour, the theft of private and public property, the bombing of dwellings and vehicles and the destruction of installations are, by the consensus of Muslims, legally forbidden because they violate the sanctity of the innocent, destroy property, security and stability and take the lives of peaceable human beings in their homes and at their work.' Under the Islamic Shariah, crimes of terrorism are included in crimes of hirabah. Such crimes warrant the highest penalties as set forth by the Koran." (*available at* www.interpol.int/public/bioterrorism/nationallaws/SaudiArabia).

conclude that those countries share the same basic view of terrorism and are not in the least likely to depart from it.

98. We have mentioned the requirement, in the legislation of a number of common law states and civil law states, as well as in some of the UN Terrorism Conventions and the draft Comprehensive Convention, for a political, religious, racial or ideological purpose. However, the overwhelming weight of state opinion, reinforced by the international and multilateral instruments, to which these states are party, does not yet contain that element.[189]

99. Finally, *national court decisions* must also be taken into account to prove the existence of a customary rule. It is notable that even the Permanent Court of International Justice, in the celebrated *Lotus* case where it still took a voluntarist view of custom, attached importance to national decisions, although it concluded that in the case at bar those decisions did not show consistency.[190] According to authoritative teaching based on a strictly positivist construction of custom, one can rely on "national decisions that constantly apply certain principles which aim to safeguard international exigencies, and which are therefore predicated on the incorporation of international rules into national legal systems for the purpose of rendering possible the fulfilment of international obligations."[191]

100. In recent years courts have reached concordant conclusions about the elements of an international crime of terrorism. They have either explicitly referred to a customary international rule on the matter[192], as noted above, or have advanced or upheld a general definition of terrorism that is

[189] For further discussion, see para. 106.

[190] *Case of the S S Lotus (Turkey v France)*, 1927 PCIJ Series A, No. 10, at 28-29.

[191] D. Anzilotti, *Corso di diritto internazionale*, Vol. I, 4th edn. (Padova: CEDAM, 1955), at 100; see also *id*, at 74. For the French, see *Cours de Droit International*, Vol. I, 3rd edn. (trans. G. Gidel) (Paris: Recueil Sirey, 1929), at 107-108.

[192] See the cases discussed in para. 86, above. In the *Abdelaziz* case in particular, the **Italian** Supreme Court of cassation held that:

> Due to the decades-long disagreements among UN member states on terrorist acts perpetrated during liberation wars and armed struggles for self-determination, a global convention on terrorism does not exist. Having said that, it should be noted that the wording of the 1999 Convention, which was implemented in Italy through law No. 7 of 27 January 2003, is so broad that it can be considered a general definition, capable of being applied in both times of peace and times of war. This definition includes all conduct intended to cause death or serious bodily harm to a civilian or, in wartime, 'to any other person not taking an active part in the hostilities in a situation of armed conflict' with the aim of spreading terror among the population or to compel a government or an international organization to do or to abstain from doing any act. In order for conduct to be qualified as a 'terrorist act', it must be characterized not only by the actus reus and the mens rea, as well as by the identity of victims (civilians or persons not engaged in war operations), but it is generally understood that it must also include a political, religious, or ideological purpose. *This is pursuant to the rule of customary international law* embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of *Terrorist* Bombings.

broadly accepted.[193] Judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminishes each year.[194] Furthermore, those courts that have upheld a shared definition of terrorism have done so with consistency. They have therefore met and exceeded the test propounded by the International Court of Justice, in the *Nicaragua* case, where the Court did not consider discrepancies to be fatal to the formation of a rule of customary law,[195] but that practice instead "should, in general, be consistent with such rules".[196] We are satisfied that the additional requirement of political, religious, racial or ideological purpose found in legislation of some states and UN instruments is a discrepancy covered by the *Nicaragua* principle. Indeed, those national courts dealing with terrorism have shown more than a mere consistent tendency to take the same view of terrorism. In other words we are not faced simply with a concordance of views, a judicial practice of courts constantly manifested through identical or similar judgments in similar legal controversies (the *auctoritas rerum perpetuo similiter judictarum*, to cite the well-known tag from Justinian's *Digest*[197]). It is notable that those decisions that have upheld a shared definition of terrorism, whenever they dealt with a foreigner, have never been contested or objected to by the national State of the accused. These judgments were not delivered out of "considerations of convenience or simple political expediency"[198] or simply to meet transient

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Cass. Crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (STL unofficial translation) (second emphasis added).

[193] For instance, in the *E H L* case (judgment of 15 February 2006), the **Belgian** Court of cassation stated that terrorist acts involve « la mise en danger intentionnelle de vies humaines par violences, destructions ou enlèvements, dans le but d'intimider gravement une population ou de contraindre indûment des pouvoirs publics ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte» (unpublished, on file with the STL, at p.4).

In **U.K.**, Court of Appeal, *Al-Sirri v Secretary of State for the Home Department*, [2009] EWCA Civ 364, Lord Justice Sedley defined international terrorism, relying in part from UN resolutions, as "the use for political ends of fear induced by violence"; that is, the use of (i) violent acts (ii) to spread fear (iii) for a political purpose. He also noted that *international* terrorism (iv) "must have an international character or aspect". *Id*, paras 31-32.

[194] Mention can be made of the old case of *Tel Oren v Libyan Arab Republic*, where a U.S. Federal Court of Appeal denied in 1984 the existence of a customary rule. Judge Bork in his concurring opinion said.

> Appellants' principal claim, that appellees violated customary principles of international law against terrorism, concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues that are especially prominent in the foreign relations problems of the Middle East. Some aspects of terrorism have been the subject of several international conventions [..]. But no consensus has developed on how properly to define "terrorism" generally.

Tel-Oren v Libyan Arab Republic, 726 F.2d 774, 806-807 (D.C. Cir. 1984) (Bork, J., concurring). See also cases cited in footnote 127, above.

[195] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment, I.C.J. Reports (1986) 14, at 98, para. 186: "The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."

[196] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Judgment, I.C.J. Reports (1986) 14, at 98, para. 186.

[197] Digest, 1.3.38.

[198] *Asylum (Colombia v Peru)*, Judgment, I.C.J. Reports (1950) 266, at 286.

national exigencies. In sum, those judgments, viewed in combination with national legislation and the international attitude of States as taken in international fora, evince that the courts thereby intend to apply at the domestic level a notion that is commonly accepted at the international level. In other words, those decisions reflect a legal opinion (*opinio juris*) as to the fundamental elements of the crime of terrorism. Those decisions aim to safeguard national and international exigencies, and are therefore predicated on the notion that there exists an international obligation to prosecute and punish terrorism as a crime based on commonly accepted legal ingredients.

101. We shall add *ad abundantiam* another argument to support the Appeals Chamber's finding based on convergent national judgments. Even if the view were taken that those national judgments do not advert, not even implicitly, to a customary international rule nor explicitly note that they reflect an international obligation of the State nor express a feeling of international legal obligation, nevertheless our conclusion stands. It is supported by the legal criteria suggested on the basis of careful scrutiny of international case law by a distinguished international lawyer, Max Sørensen. According to him one should assume as a starting point the *presumption* of the existence of *opinio juris* whenever a finding is made of a consistent practice; it would follow that if one sought to deny in such instances the existence of a customary rule, one must point to the reasons of expediency or those based on comity or political convenience that support the denial of the customary rule.[199]

102. The conclusion is therefore warranted that a customary rule has evolved in the international community concerning terrorism, the elements of which we outlined in paragraph 85. Relying on the notion of international custom as set out by the International Court of Justice in the *Continental Shelf* case,[200] it can be said that there is a settled practice concerning the punishment of acts of terrorism, as commonly defined, at least when committed in time of peace; in addition, this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*). Pursuant to the aforementioned notion expressed in the *Nicaragua* case, such a rule must be

[199] M. Sørensen, 'Principes de droit international public', in *Recueil des Cours de l'Académie de La Haye*, 19760-III, at 51: « Cela [the perusal of international case law] nous permet peut-être de prendre comme point de départ une présomption pour l'existence de l'*opinio juris* dans tous les cas où une pratique constante a été constatée, de sorte qu'il faut démontrer les motifs d'opportunité, de courtoisie, etc. pour nier l'existence d'une coutume. »

[200] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*), Judgment, I.C.J. Reports (1969) 4, at 43-44, paras 76-77: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

expressed in terms of international rights and obligations. In our case the customary rule can be held (i) to impose on any State (as well as other international subjects such as rebels and other non-State entities participating in international dealings) the obligation to refrain from engaging through their officials and agents in acts of terrorism, as defined in the rule; (ii) to impose on any State (and other international subjects and entities endowed with the necessary structures and judicial machinery) the obligation to prevent and repress terrorism, and in particular to prosecute and try persons on its territory or in territory under its control who are allegedly involved in terrorism, as defined in the rule; (iii) to confer on any State (and other international subjects endowed with the necessary structures and judicial machinery) the right to prosecute and repress the crime of terrorism, as defined in the rule, perpetrated on its territory (or in territory under its control) by nationals or foreigners, and an obligation on any other State to refrain from opposing or objecting to such prosecution and repression against their own nationals (unless they are high-level state agents enjoying personal immunities under international law). It would seem that this customary rule does not yet impose an obligation to cooperate with other States in such repression. However, a rule with such a tenor is plausibly nascent in the international community.[201]

103. The Appeals Chamber acknowledges that the existence of a customary rule outlawing terrorism does not automatically mean that terrorism is a criminal offence under international law. According to the legal parameters suggested by the ICTY Appeals Chamber in the *Tadić* Interlocutory Decision with regard to war crimes, to give rise to individual criminal liability at the international level it is necessary for a violation of the international rule to entail the individual criminal responsibility of the person breaching the rule.[202] The criteria for determining this issue were again suggested by the ICTY in that seminal decision: the intention to criminalise the prohibition must be evidenced by statements of government officials and international organisations, as well as by punishment for such violations by national courts. Perusal of these elements of practice will establish whether States intend to criminalise breaches of the international rule.[203]

[201] Consider for instance the binding obligations created by UN Security Council Resolution 1373 and the near-universal adoption of such treaties as the Convention for the Suppression of the Financing of Terrorism (which currently has 173 States Parties), which require States to take preventative measures and to cooperate with other States in investigations and extraditions.

[202] ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 94.

[203] *Id.*, paras 128-137.

104. In the case of terrorism, demonstrating the requisite practice and *opinio juris seu necessitatis*, namely the legal view that it is necessary and indeed obligatory to bring to trial and punish the perpetrators of terrorist acts, is relatively easy. Indeed, the formation process of the international criminalisation of terrorism is similar to that of war crimes. This latter category of criminal offences was originally born at the domestic level: States began to prosecute and punish members of the enemy military (then gradually also of their own military) who had performed acts that were termed either as criminal offences perpetrated in time of war (killing of innocent civilians, wanton destruction of private property, serious ill-treatment of prisoners of war, and so on), or as breaches of the laws and customs of war. Gradually this domestic practice received international sanction, first through the Versailles Treaty (1919) and the following trials before the German Supreme Court at Leipzig (1921), then through the London Agreement of 1945 and the trials at Nuremberg. Thus, the domestic criminalisation of breaches of international humanitarian law led to the international criminalisation of those breaches and the formation of rules of customary international law authorising or even imposing their punishment. Similarly, criminalisation of terrorism has begun at the domestic level, with many countries of the world legislating against terrorist acts and bringing to court those allegedly responsible for such acts. This trend was internationally strengthened by the passing of robust resolutions by the UN General Assembly and Security Council condemning terrorism, and the conclusion of a host of international treaties banning various manifestations of terrorism and enjoining the contracting parties to cooperate for the repression of those manifestations. As a result, those States which had not already criminalised terrorism at the domestic level have increasingly incorporated the emerging criminal norm into domestic penal legislation and case-law, often acting out of a sense of international obligation. The characterisation of terrorism as a threat to international peace and security through UN Security Council "legislation" strengthens this conclusion. It is notable that the Security Council has generally refrained from characterising other national and transnational criminal offences (such as money laundering, drug trafficking, international exploitation of prostitution) as "threats to peace and security". The difference in treatment of these various classes of criminal offences, and the perceived seriousness of terrorism, bears out that terrorism is an international crime classified as such by international law, including customary international law, and also involves the criminal liability of individuals.

105. Thus, the customary rule in question has a twofold dimension: it addresses itself to international subjects, including rebels and other non-State entities (whenever they exhibit such

features as to enjoy international legal personality), by imposing or conferring on them rights and obligations to be fulfilled in the international arena; at the same time, it addresses itself to individuals by imposing on them the strict obligation to refrain from engaging in terrorism, an obligation to which corresponds as correlative the right of any State (or competent international subject) to enforce such obligation at the domestic level.

106. We make two further observations about the continuing and prospective evolution of this customary norm. First, regarding the element of intent, we note that the terrorist's intent to coerce an authority or to terrorise a population will often derive from or be grounded in an underlying political or ideological purpose, which thus differentiates terrorism from criminal acts similarly designed to spread fear among the civilian population but pursuing merely private purposes (such as personal gain, revenge, and so on). This political or ideological aspect of the intent element of terrorism has been increasingly noted by the UN General Assembly in its many resolutions concerning terrorism,[204] in judicial and commissional analyses,[205] and in national legislation.[206] As the Report of the Policy Working Group on the United Nations and Terrorism summarised in 2002:

> [W]ithout attempting a comprehensive definition of terrorism, it would be useful to delineate some broad characteristics of the phenomenon. Terrorism is, in most cases, essentially *a political act*. It is meant to inflict dramatic and deadly injury on civilians and to create an

[204] See resolutions cited in footnote 136, above.

[205] In *Bouyahia Maher Ben Abdelaziz et al.* case, the Italian Supreme Court of cassation concluded:

> In order for conduct to be qualified as a 'terrorist act', it must be characterized not only by the actus reus and the mens rea, as well as by the identity of victims (civilians or persons not engaged in war operations), but *it is generally understood that it must also include a political, religious, or ideological purpose*. This is pursuant to the rule of customary international law embodied in various resolutions by the UNGA and the UNSC, as well as in the 1997 Convention for the Suppression of *Terrorist* Bombings

Cass. crim., sez. I, 17 January 2007, n. 1072, at para. 2.1 (STL unofficial translation) (first emphasis added). Likewise, the Genova Assize Appeal Court in the notorious *Achille Lauro* case inferred the terrorist nature of an attack from the fact that it involved indiscriminate violent means affecting the State as guarantor of the safety of persons and property within its jurisdiction: "even though no explicit request was made to the Italian State, the State was objectively involved due to [inter alia] the inevitable domestic political consequences" of the terrorist act in question. *Abul Abbas et al*, Genova Assize Appeal Court, No. 22/87, 23 May 1987 (at pp. 46-47 of the typed judgment on file with the STL) (unofficial STL translation).

In its 2002 Report on Terrorism and Human Rights, the Inter-American Commission on Human Rights noted that no comprehensive international legal definition of terrorism had so far been codified through a universal convention (as noted by the Defence Office in its submission at fn. 123), yet it identified several "characteristics" of international terrorism based on coalescing international consensus, including that "the motivations driving the perpetrators of terrorism tend to be ideological or political in nature". IACHR, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr, paras 15-17 (2002).

[206] See, for example, the laws of the United Kingdom, Australia, New Zealand, Pakistan, Canada, South Africa, Argentina, and Ecuador, cited above.

atmosphere of fear, *generally for a political or ideological (whether secular or religious) purpose*. Terrorism is a criminal act, but it is more than mere criminality.[207]

Making this purpose requirement explicit has an additional benefit: it clarifies the scope of conduct that can be charged as an international crime of terrorism, thereby furthering the principle of legality by preventing its over-expansive application. However, this aspect of the crime of terrorism has not yet been so broadly and consistently spelled out and accepted as to rise to the level of customary law. Thus it remains to be seen whether one day it will emerge as an *additional element* of the international crime of terrorism.

107. Second, the Appeals Chamber takes the view that, while the customary rule of an international crime of terrorism that has evolved so far only extends to terrorist acts *in times of peace*, a broader norm that would outlaw terrorist acts *during times of armed conflict* may also be emerging. As the ICTY and the SCSL have found, acts of terrorism can constitute war crimes,[208] but States have disagreed over whether a distinct crime of terrorism should apply during armed conflict. Indeed, both within the drafting committee of the Comprehensive Convention on Terrorism and in reservations to the UN Convention for the Suppression of the Financing of Terrorism,[209] some members of the Islamic Conference have expressed strong disagreement with the notion of considering as terrorist those acts of "freedom fighters" in time of armed conflict (including belligerent occupation and internal armed conflict) which are directed against innocent civilians. They have insisted both on the need to safeguard the right of peoples to self-determination and on the necessity to also punish "State terrorism".[210]

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[207] A/57/273 (2002), Annex, at para. 13 (emphasis added)

[208] The crime of "acts or threats of violence the primary purpose of which is to spread terror", see for instance ICTY, *Galić*, Trial Judgment, 5 December 2003, paras 91-138; ICTY, *Galić*, Appeals Judgment, 30 November 2006, paras 81-104; SCSL, *Brima et al* , Trial Judgment, 20 June 2007, paras 660-671.

[209] Egypt, Jordan and Syria made reservations concerning Article 2(1)(b) of the Convention. As for the definitions of terrorism contained in the criminal legislations of these countries, see above, notes 157 and 160. While some residual doubts could therefore be raised as to terrorism in times of armed conflict, there is no doubt that Egyptian and Jordanian legislation is in consonance with the developing international law norm discussed here. The definition in Article 304 of Syrian Criminal Code, instead, follows very closely the definition in Article 314 of the Lebanese Criminal Code, with the only notable difference that the former adds "weapons of war" among the means that can be used to commit a terrorist act. See *Report to the Counter-Terrorism Committee* (Syrian Arab Republic), 2 August 2006, S/2006/612, at 4; M. Yacoub, *The Legal Concept of Terrorism – an Analytical and Comparative Study* [in Arabic] (Beirut: Zein Legal Publications, 2011), at 227-228.

[210] See for example the summary of discussions regarding a comprehensive convention in *Report of the Ad Hoc Committee established by GA resolution 51/210*, A/65/37 (2010), at 5-8; *Report of the Ad Hoc Committee established by GA resolution 51/210*, A/64/37 (2009), at 5-6.

108. Nevertheless, it is necessary to emphasise three circumstances. First, the very high number of States that have not only ratified the Convention for the Suppression of the Financing of Terrorism (currently numbering 173), but also refrained from making any reservation with regard to its definition of terrorism, a definition that refers to armed conflicts without any reference to a "freedom fighters" exception (these States currently number 170).[211] Second, the unique content of this Convention, namely the fact that unlike other Conventions on terrorism it deals with conduct that is not criminal *per se*, and in addition is conduct preliminary or prodromic to violent terrorist acts; it follows that criminalising such conduct as terrorism is crucial in time of armed conflict, because the financing of attacks on civilians not taking an active part in hostilities is not per se forbidden under the laws of war. In other words, the Convention, more than any other treaty on the matter, is a turning point in the fight against terrorism, for it reaches out to activities that otherwise would go unpunished (either by criminal law or by international humanitarian law). Since it covers such a wide range of activities, the Convention is a veritable litmus test for the attitude of States towards criminalising terrorism. Third, the 170 States that have undertaken by ratification or accession to comply with the Convention and have not made any reservation to the provision on armed conflict are widely representative of the world community: they include not only the five permanent members of the Security Council but also such major countries as Brazil, India, Pakistan,[212] Indonesia, Saudi Arabia, Turkey and Nigeria. Furthermore, and strikingly, eleven Arab countries that are parties to the Arab Convention on Terrorism (a Convention that, as noted above, excepts from the category of terrorists the class of "freedom fighters") have ratified the Convention for the Suppression of the Financing of Terrorism without making any reservation, thereby accepting the notion that the financing of persons or groups attacking innocent civilians in time of armed conflict,

[211] Article 2(1) b of the Convention provides that "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:[...] (b) Any [...] 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." (emphasis added).

[212] While Pakistan is one of the few remaining countries often mentioned as opposing the definition of terrorism in the Comprehensive Convention and registered a declaration regarding "freedom fighters" upon its accession to the Convention for the Suppression of Terrorist Bombings in 2002, it should be noted that it has (i) ratified the Convention for the Suppression of the Financing of Terrorism in 2009, adhering to its definition of terrorism, and (ii) committed itself "to combating terrorism in all its forms and manifestations" and to implementing fully Security Council Resolution 1373. *Report to the Counter-Terrorism Committee* (Pakistan), 27 December 2001, S/2001/1310, at 3.

as well as, in consequence, the perpetration of such attacks, may be categorised as "terrorism".[213] These three circumstances warrant the proposition that an overwhelming majority of States currently takes the view that acts of terrorism may be repressed even in time of armed conflicts to the extent that such acts target civilians who do not take an active part in armed hostilities; these acts, in addition, could also be classified as war crimes (whereas the same acts, if they are directed against combatants or civilians participating in hostilities, may *not* be defined as either terrorist acts or war crimes, unless the requisite conditions for war crimes were met). It is notable that Canadian legislation[214] as well as case-law[215] have explicitly taken the same stand as the Convention in terms of the applicability of the international crime of terrorism in times of conflict. To grasp the role that the Convention for the Suppression of the Financing of Terrorism (a convention implicitly going beyond the issue of financing terrorism and actually hinging on a new notion of terrorism in time of armed conflict) as well as the attitude of the contracting parties to the Convention may play in the development of a customary rule on the matter, it is worth recalling the important remarks made by Judge Sørensen in the *North Sea Continental Shelf* case (*Federal Republic of Germany v. Denmark*) on the possibility for the provisions of a treaty to turn into customary law. He noted that:

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[213] The countries are: Algeria, Bahrain, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, Sudan, Tunisia, United Arab Emirates, Yemen. Of note, the Ad Hoc Committee drafting the comprehensive convention on terrorism has looked to the approach taken by the Convention for the Suppression of Terrorist Bombings and the Convention for the Suppression of Acts of Nuclear Terrorism as a means for resolving any remaining concerns about the scope of the comprehensive convention. See *Report of the Ad Hoc Committee established by GA resolution 51/210*, A/62/37 (2007), at 7-8.

[214] See Criminal Code, R.S.C., ch. C-46, s. 83.01(B)(II).

[215] In *R. v Khawaja*, 2010 ONCA 862, the appellant argued that the armed conflict exception applied to exempt his actions from the ambit of "terrorist activity" as defined under the Canadian Criminal Code. He submitted that the exception applied at trial because the Crown conceded on the directed verdicts motion that the war in Afghanistan was a form of "armed conflict" and that the insurgent fighting in that country constituted "terrorist activity". Given these concessions, the appellant argued that it was incumbent on the Crown to establish that the exception was inapplicable based on evidence that his impugned acts did not comply with international law governing the conflict in Afghanistan. The Ontario Court of Appeals rejected the argument. It stated that:

> The exception is concerned with armed conflict in the context of the rules of war established by international law. It is designed to exclude activities sanctioned by international law from the reach of terrorist activity as defined in the *Criminal Code*. We agree with Sproat J.'s observation in *R v N Y*, 2008 CanLII 24543 (ON S.C.), at para. 12, that, "[t]he armed conflict exception reflects the well recognized principle ... that combatants in an armed conflict, who act in accordance with international law, do not commit any offence." The parties accept that, where shown to apply, the exception operates much like a traditional defence.

Id at paras 159-160. The Court went on to say that: "all that is required to trigger the exception is some evidence that: (1) an accused's acts or omissions were committed "during" an armed conflict; and (2) those acts or omissions, at the time and at the place of their commission, accorded with international law applicable to the armed conflict at issue. " *Id* at para. 165. It concluded that "There was simply no evidence in this case that the appellant acted in accordance with international law, or that the hostilities by the insurgents in Afghanistan were undertaken in compliance with international law." *Id* at para. 166.

> It is generally recognized that the rules set forth in a treaty or convention may become binding upon a non-contracting State as customary rules of international law or as rules which have otherwise been generally accepted as legally binding international norms. It is against this particular background that regard should be had to the history of the drafting and adoption of the Convention, to the subsequent attitudes of States, and to the relation of its provisions to the rules of international law in other, but connected, fields.[216]

109. Thus, the conclusion is warranted that a customary rule is incipient (*in statu nascendi*) which also covers terrorism in time of armed conflict (or rather, the contention can be made that the current customary rule on terrorism is being gradually amended). It is plausible to envisage that state practice (consisting of statements, national legislation, judicial decisions and so on), in particular acts with the same value and importance as Security Council Resolution 1566 (2004) previously noted,[217] may gradually solidify the view taken by so many States through Article 2(1)(b) of the Convention for the Suppression of Financing of Terrorism. If this occurs and State practice in addition extends such view to other manifestations of terrorism, one day the conclusion will be warranted that the customary rule currently in force has broadened so as to also embrace terrorism in time of armed conflict.

110. At present we can at least state the following about a customary rule defining an international crime of terrorism in a time of peace. We have shown how international conventions, regional treaties, UN Security Council and General Assembly resolutions,[218] as well as national legislation and case law have increasingly coalesced around a common definition of the crime of international terrorism. Such definition is the product of a law-making process in the course of which the UN Security Council, through a resolution adopted pursuant to Chapter VII of the UN Charter, has stated that "terrorism in all its forms and manifestations constitutes one of the most serious threats to peace

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[216] *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark*; *Federal Republic of Germany v Netherlands*), Judgment, I C.J. Reports (1969) 4, at 242 (Sørensen, J., dissenting).

[217] See above, para. 88.

[218] As for the norm-creating powers of the United Nations, consider the statement of the Government of Indonesia that "[t]he United Nations' universality of membership endows it with *Charter-based legitimacy* to overcome the threat of international terrorism in a manner which is inclusive; wherein states and peoples [..] unite in solidarity against this common scourge. Moreover, it is to the United Nations that Member States must turn to ensure that instruments for combating international terrorism are multi-dimensional in nature." Moreover, "the importance of the work within the different organs and committees of United Nations, including the General Assembly in particular through the Sixth Committee (Legal), and the Security Council in *norm setting and in laying the legal framework* for combating international terrorism is without question." *Report to the Counter-Terrorism Committee* (Indonesia), 21 December 2001, S/2001/1245, at 1 and 10 (emphasis added). Again, similar statements are routinely made by many governments in considering their obligations stemming from international law instruments (see, among others, *Report to the Counter-Terrorism Committee* (Brazil), 26 December 2001, S/2001/1245, at 4).

and security".[219] The very few States still insisting on an exception for "freedom fighters" and therefore objecting to the coalescing international definition of terrorism could, at most, be considered persistent objectors thereof, and possibly in breach of the call by the Security Council for "all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature".[220]

111. In sum, the subjective element of the crime under discussion is twofold, (i) the intent or *dolus* of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce an authority. The objective element is the commission of an act that is criminalised by other norms (murder, causing grievous bodily harm, hostage taking, etc.). The crime of terrorism at international law of course requires as well that (ii) the terrorist act be transnational.

112. It must be added, with regard to the notion of fear, terror or panic, that those who are victim of such state of mind need not necessarily make up the whole population. In this respect the Appeals Chamber agrees with the broad interpretation of the victims of fear that the German High Federal Court (*Bundesgerichsthof*) propounded, although while applying the German Criminal Code, in the *H.A., S. E. and B.* case, also called the *Freikorps* case (Judgment 3 STR 263/05 of 10 January 2006). The accused had formed an association for the purpose of carrying out arson attacks against businesses run by foreigners in their region, with the aim of forcing those foreigners to leave. In upholding the trial court's finding that the association was a "terrorist association", the Court held, among other things,[221] that the requirement that terrorist activities should be aimed at (and capable of) intimidating a population is fulfilled also where it is only a part of the overall population that is targeted and intimidated, e.g. an ethnic or religious minority.[222] The Appeals Chamber holds that the

[219] See S/RES/1566 (2004).

[220] See S/RES/1566 (2004). "Such acts" refers to "criminal 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". *Ibid*

[221] The Court also stated that members of a terrorist association often pursue their objectives through a large number of small attacks (*Nadelstichtaktik*). According to the Court, the notion of terrorism does not require an individual attack which on its own is capable of terrorising a population or coercing a government (paras 6 and 7).

[222] *Id* at para 8. The Court said the following: "In assessing whether the arsonist acts were intended to 'significantly intimidate the population', the Superior Regional Court correctly considered it sufficient that the acts were aimed at the intimidation of the foreign population, and thus of a part of the overall population. It is true that article 129(a)(2) of the Criminal Code uses the term 'population', which could be understood to refer to the overall population, as if in contrast to 'parts of the population' in article 130 of the Criminal Code. Such considerations, inspired by the notion of consistent

same broad construction is warranted in international criminal law, in the light of the object and purpose of the relevant international rule.

113. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is much *broader* with regard to the means of carrying out the terrorist act, which are not limited under customary international law, whereas it is *narrower* in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act,[223] and (iii) it involves a transnational element.

b) Applicability of Customary International Law in the Lebanese Legal Order

114. In the following paragraphs we conclude that (i) customary international law can be and normally is applied by Lebanese courts; (ii) however, this body of international law may not be applied in penal matters absent a piece of national legislation incorporating international rules into Lebanese criminal provisions; (iii) nevertheless, the Tribunal can still take into account customary law in construing Lebanese criminal law.

115. Unlike many national systems, which provide for the implementation of customary international law in their Constitution, in their ordinary law, or in case law, Lebanese law does not expressly and specifically advert to the application of customary rules or principles of international law—although such reference can be deduced from the general purport of Article 4 of the Lebanese Code of Civil Procedure.[224]

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use of terminology, however, carry little weight because in this respect the new text of 129(a)(2) of the Criminal Code merely took over the wording of the [European Council] Framework Decision [of 13 June 2002]. Moreover, and this is the decisive point, such a narrow interpretation would not do justice to the purpose of the provision. [..] Furthermore, considering that terrorist activities are often directed against ethnically, religiously, nationally or racially defined parts of the population, a literal interpretation would leave out a very significant portion of typical terrorist criminal acts. Therefore, an interpretation of the provision in accordance with its purpose is required, whereby it is sufficient for the acts of the association to be intended to significantly intimidate at least a noteworthy part of the population." (Unofficial STL translation.)

[223] Further, under the customary definition of terrorism, the requisite special intent may be to coerce an authority instead of to terrorise a population (as required by Lebanese law), but since a terrorist generally coerces *by spreading fear*, these two articulations of the special intent required for the crime of terrorism, in practical terms, largely overlap with each other. The additional basis for finding special intent under international law (*e.g.*, the intent to coerce an authority) is thus not a critical distinction.

[224] Article 4 reads, in part: "If the law is obscure, the judge shall interpret it in a manner consistent with its purpose and with other texts. In the absence of a law, the judge shall apply the general principles of law, customs, and the principles of justice."

116. To be sure, Lebanese courts have occasionally disregarded customary rules. This is illustrated, for instance, by the indictment issued on 21 August 2008 by the investigating judge of the Court of Justice in the *Gaddafi* case: the Judge issued an arrest warrant against the Libyan leader Gaddafi for the alleged kidnapping and detention of a Lebanese Shiite imam. He did not mention, let alone take into account the customary rule of international law granting personal immunity to incumbent Heads of State,[225] a rule that had been relied upon, with regard to the same Libyan leader, considered as Libyan head of state ("*chef d'État en exercice*"), by the French Court of cassation.[226] This decision is however contradicted by others, appropriately applying international customary law directly in relation to immunity.[227]

117. In spite of this negative attitude by some Lebanese authorities towards customary international law, most Lebanese courts do advert to customary international rules. In this respect mention should be made of the *Rachid* case, in which the Beirut Single Judge, in a decision of 10 September 2009, did refer to international customary law. The prosecution had asserted that the entry of an Iraqi national into Lebanon via Syria and his gaining of refugee status was contrary to Article 32 of the Lebanese law on entering, residing in and exiting Lebanon. The Beirut Court held that the right to asylum accruing to those whose life is in peril or who risk being subjected to torture is laid down in various international treaties and derives from a general principle of law and customary international law providing that everybody is entitled to life and to not forfeit life. In the Judge's view, this principle may even restrain the application of criminal law in Lebanon ("this court sees no objection to the general principle standing in the way of the application of the penal law in limited cases, as mentioned in the defendant's brief"); as discussed above, the Judge applied the Convention against Torture in refusing to impose the Lebanese penalty of exclusion. The Judge also stated that both treaty law and international customary law impose on refugees an obligation to comply with the law applicable in the asylum State; he went on to note that the illegal entry into a territory is justified

[225] See however P. W. Nasr, *Droit pénal général* (Liban: Imprimerie Saint-Paul, 1997), at 89, a Lebanese criminal law scholar according to whom international customary law does recognise the immunity of Heads of State.

[226] See Court of cassation, 13 March 2001, 107 *Revue générale de droit international public* (2001), 474, *reprinted in English in* 125 I.L.R. 490. In fact Gadaffi is the "Leader of the 1st September Great Revolution of the Socialist People's Libyan Arab Jamahiriya"; he is generally considered and treated by foreign countries as the Head of State, for he exercises those functions *de facto*.

[227] See the Judgment of 29 March 2001 by the single judge in Metn, in which the judge applied the international law of sovereign immunity to dismiss a suit brought against the United States: Single civil Judge in Metn, decision n°0, 29 March 2001, in *Al-moustashar- majmou'at al-moussannafat lil Kadi Afif Chamseddine* [Judge Afif Chamseddine's collection].

by the right to asylum only with regard to the first country of asylum.[228] The Lebanese Court of cassation (Civil Chamber) allowed lower judges to refer to international customary law in commercial matters since at least 1968, when it stated that "these customs constitute an unwritten law which the judge is assumed to know in the same way as he knows other laws".[229] The Council of State also referred to international customary law in two rulings regarding displaced children.[230]

118. This is the correct approach. Customary international law must perforce play a role within the Lebanese legal system. All States and other international legal subjects are under the obligation at international law to comply with international rules: in modern times the old rule *pacta sunt servanda* (treaties must be complied with) goes hand in hand with the rule *consuetudo est servanda* (customary rules must be respected), a principle that in the past boiled down to restating the former principle, since customary rules were held to be *pacta tacita*, namely tacit agreements among a plurality of States. Consequently no State is allowed to disregard generally accepted rules of customary international law.[231] International custom embraces not only rules enshrining universal values such as peace, human rights, self-determination and justice, but also rules hinging on reciprocity and establishing bilateral relationships (for instance, rules on the treatment of foreigners, on diplomatic protection, on non-interference into domestic affairs, on the rights and obligations of States in territorial waters, and on the fair conduct of war), rules where therefore the interest of other States—and the international community as a whole—in strict compliance is very strong.

119. Since Lebanese statutory law does not expressly provide for the implementation of customary rules and in addition fails to specify the rank that such rules enjoy within the Lebanese legal system, it falls to courts to establish how these rules become applicable in Lebanon and what rank they enjoy within the hierarchy of Lebanese sources of law.

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[228] The Court said that "the treaties that the Defendant mentioned himself, as well as international custom and general principles of law, all emphasize the duty of the refugee to abide by the domestic laws of the State where he seeks refuge; Additionally, the more recent treaties, and the principles and customs he himself invokes distinguish between the first country of asylum and other States; in this respect what is allowed to a refugee in a first country of asylum is not always allowed in another state."

[229] Court of cassation, civil Chamber, decision n° 39, 4 April 1968. in *Al-moustashar- majmou'at al-moussannafat lil Kadi Afif Chamseddine* [Judge Afif Chamseddine's collection].

[230] See M.-D. Méouchy Torbey, *L'internationalisation du droit pénal* (Beirut: Delta, 2007), at 155.

[231] "[I]nternational law requires that states fulfill their obligations and they will be held responsible if they do not." R. Jennings and A. Watts (eds), *Oppenheim's International Law*, Vol. I, 9th edn. (Oxford: Oxford University Press, 2008), sec. 21; see also I. Brownlie, *Principles of Public International Law*, 7th edn. (Oxford: Oxford University Press, 2008), at 35: "[T]here is a general duty to bring internal law into conformity with obligations under international law".

120. Based on the aforementioned Lebanese case law, one can take the view that international customary rules which are self-executing, in addition to binding Lebanon in interstate relations, also take effect within Lebanese domestic law and are binding on State officials and individuals. By the same token their scope and content changes or they cease to apply as soon as the corresponding rule applicable in the world community is amended or is nullified. In other words, the incorporation of customary international rules into Lebanese law is automatic, and any change in international law automatically produces its legal effects in the Lebanese legal system.

121. Within the Lebanese legal system, legal rules emanating from an external legal system may not logically possess a rank higher than that of laws passed by the Lebanese Parliament, namely the rank of constitutional norms, because only the Constitution itself could provide international customary rules with such a privileged position overriding the will of the lawmaker.[232]

122. However, the obligation for the whole Lebanese State to comply with international law makes it necessary to grant customary international rules, *other than those which have evolved from the texts referred to in the Preamble of the Lebanese Constitution*[233] and which therefore possess constitutional rank, at least the same status as legislation passed by the Lebanese Parliament. Indeed, it is only in this manner that compliance by Lebanon with international custom can be ensured. Thus, the inference is warranted that, in Lebanon, international customary rules have the rank of ordinary legislation, with the consequence that they can implicitly amend contrary legislative provisions previously adopted by the Lebanese Parliament, but can in turn be amended or repealed by explicit

[232] This has occurred, for example, with the Universal Declaration of Human Rights to the extent that it reflects customary law, as it is explicitly incorporated in paragraph b) of the Preamble of the Constitution. From the case law of the Lebanese Constitutional Council, it appears that the Preamble is considered an integral part of the Constitution and therefore holds the same legal status as other constitutional provisions (see following footnote). It follows that the Preamble and all the texts to which it refers—including the Universal Declaration on Human Rights—have constitutional status. All these principles become therefore *constitutional* principles on the basis of the Lebanese Constitution itself, trumping conflicting ordinary laws. See, for instance, the ruling of the Constitutional Council of 12 September 1997, declaring unconstitutional a law contrary to the ICCPR (Decision No. 1/97), quoted in M.-D. Méouchy Torbey, *L'internationalisation du droit pénal* (Beirut: Delta, 2007), at 145, as well as Constitutional Council, decision n° 2/2001, 10 May 2001, in *Al-majless al-doustouri [2001-2005]* [Constitutional Council review [2001-2005]], at 155, and Constitutional Council, decision n° 4/2001, 29 September 2001, in *id*, at 165-167.

[233] The preamble of the Lebanese Constitution provides that : « Le Liban est arabe dans son identité et son appartenance. Il est membre fondateur et actif de la Ligue des Etats Arabes et engagé par ses pactes ; de même qu'il est membre fondateur et actif de l'organisation des Nations-Unies, engagé par ses pactes et par la Déclaration Universelle des Droits de l'Homme. L'Etat concrétise ces principes dans tous les champs et domaines sans exception ». The Lebanese Constitutional Council has held that "[i]t is established that these international conventions which are expressly mentioned in the Preamble of the Constitution form an integral part along with said Preamble and Constitution, and enjoy constitutional authority". Constitutional Council, decision n° 2/2001, 10 May 2001, published in *Al-majless al-doustouri [2001-2005]* [Constitutional Council review [2001-2005]], at 150.

subsequent Lebanese legislation on the strength of the principles *lex posterior derogate priori* [subsequent law may derogate from previous law], *lex specialis derogat generali* [a special law prevails over a general law], and *lex posterior generalis non derogat priori speciali* [a subsequent general law does not derogate from a prior special law]. It is notable that this approach is also taken in other countries of Romano-Germanic tradition such as France, even though no constitutional provision imposes respect for customary international law nor a fortiori elevates customary rules to the rank of constitutional or quasi-constitutional provisions.[234]

123. However, despite the existence of a customary international law definition of the crime of terrorism in time of peace, and its binding force on Lebanon, it cannot be *directly* applied by this Tribunal to the crimes of terrorism perpetrated in Lebanon and falling under our jurisdiction. As we have previously noted, the text of Article 2 of the Tribunal's Statute makes clear that codified Lebanese law, not customary international law, should be applied to the substantive crimes that will be prosecuted by the Tribunal.

3. Reliance on International Law for the Interpretation of Lebanese law

124. The above conclusion does not, however, mean that the Tribunal will completely disregard international law when construing the relevant provisions of Lebanese law mentioned in the Statute. That domestic legislation deals with terrorist acts occurring in Lebanon regardless of whether or not they have a transnational dimension—that is, whether or not they are acts of national or international terrorism. But the allegations falling under the jurisdiction of the Tribunal have been uniquely regarded by the UN Security Council as a "threat to international peace and security" and have also justified the establishment of an international Tribunal entrusted with the task of prosecuting and trying the alleged authors of those facts. This patently proves that those terrorist attacks were considered by the Security Council as particularly grave acts of terrorism with international implications. Thus, faced with this criminal conduct and the Security Council's response to it, the Tribunal, while fully respecting Lebanese jurisprudence relating to cases of terrorism brought before Lebanese courts, cannot but take into account the unique gravity and transnational dimension of the facts at issue, which by no coincidence have been brought before an international court. The Tribunal

[234] In the well-known *Aquarone* case the French *Conseil d'État* held that « ni cet article [55 of the Constitution, relating to treaties] ni aucune disposition de valeur constitutionnelle ne prescrit ni n'implique que le juge administratif fasse prévaloir la coutume internationale sur la loi en cas de conflit entre ces deux normes. » Conseil d'État, *Aquarone*, 6 June 1997, *Revue générale de droit international public*, 1997 at 838.

therefore holds that it is justified in interpreting and applying Lebanese law on terrorism in light of international legal standards on terrorism, given that these standards specifically address transnational terrorism and are also binding on Lebanon. The issue under this score that the Appeals Chamber will address in particular is that of the instrumentalities used to carry out a terrorist act.

a) The Question of the Means or Instrumentalities Used for Carrying out a Terrorist Act

125. We have seen above that Lebanese courts have interpreted the expression "means liable to create a public danger" (*danger commun*) in Article 314 as covering those means or instrumentalities listed therein and that produce conspicuous and vast effects (such as bombs), thus excluding those means (such as guns or rifles) which are not listed in Article 314 and which produce modest outside effects, although they may imperil the life of many persons other than the target victim or otherwise create widespread panic. This, however, is not the only possible interpretation of the text of Article 314, nor is it the most persuasive. The Appeals Chamber believes that a more congruous construction of the expression used by Article 314 is warranted, on the basis of the assessment of the relevant facts, in circumstances such as those in the *al-Halabi* and *Chamoun* cases, at least when Article 314 is applied by the Tribunal.

126. What Article 314 requires is that the means used to carry out a terrorist act be capable of causing a "public danger", namely that the means, in addition to injuring the physical target of the act, be such as to expose other persons to adverse consequences. This may occur even when a terrorist shoots at a person in a public road, thereby imperilling a large number of other persons simply because they are present at the same location.

127. Moreover, a "public danger" may also occur when a prominent political or military leader is killed or wounded, even if this occurs in a house or in any other closed place with no other persons present. In such cases, the danger may consist in other leaders belonging to that same faction or group being assassinated or in causing a violent reaction by other factions. These consequences are undoubtedly capable of causing a common or "public danger", as required by Article 314 of the Lebanese Criminal Code, regardless of the weapon used.

128. Furthermore, it is difficult not to see the close link between the aim of the crime (to "cause a state of terror") and the result of the terrorist act (to create a "public danger"). Clearly, the two concepts are closely intertwined: often a terrorist can be said to aim at causing panic and terror

because he uses means that endanger the broader population;[235] or, a terrorist act may create a public danger by spreading terror, for instance by killing a political leader and thereby alarming a portion of the population that will foreseeably respond with violent protests, riots, or retaliations against opposing factions—all of which, especially in the context of political instability, may create a public danger. In particular, in contemporary societies—where media are swift to bring attention to the smallest act of violence against political targets around the globe, thus arousing passions and tensions—the expression "liable to create a public danger" has to be interpreted differently than in the 1940s.

129. This interpretation of the "means" element, in addition to appearing better suited to address contemporary forms of terrorism than the more restrictive approach employed by some Lebanese courts, is also warranted by the need to interpret national legislation as much as possible in such a manner as to bring it into line with binding relevant international law. We have seen above that both the Arab Convention and the customary international rule on terrorism do not envisage any restriction based on the kind of weapons or means used to carry out a terrorist attack. To construe Article 314 in this way would render this provision more consonant with the international rules just mentioned, rules that are binding on Lebanon at the international level even if not yet explicitly implemented through domestic legislation.

130. However, this interpretation may *broaden* one of the objective elements of the crime as it has been applied in prior Lebanese cases. We must therefore consider whether this is permissible under the principle of legality (*nullum crimen sine lege*).

b) Nullum Crimen Sine Lege *and Non-Retroactivity*

131. The Appeals Chamber will therefore discuss the principle of legality (*nullum crimen sine lege*) as enshrined in Article 8 of the Lebanese Constitution and Article 1 of the Lebanese Criminal Code, as well as the scope and import of Article 15 of the International Covenant on Civil and Political Rights ("ICCPR"), which has been ratified by Lebanon and enjoys constitutional rank and value in the Lebanese legal system through the Constitution's preamble. Those rules state:

[235] This was the inference made in the *Michel Murr* case, as discussed above in paragraph 60 and footnote 84.

Constitution of Lebanon

Preamble: *Le Liban est arabe dans son identité et son appartenance. Il est membre fondateur et actif de la Ligue des Etats Arabes et engagé par ses pactes ; de même qu'il est membre fondateur et actif de l'organisation des Nations-Unies, engagé par ses pactes et par la Déclaration Universelle des Droits de l'Homme. L'Etat concrétise ces principes dans tous les champs et domaines sans exception.*

Article 8 [Personal Liberty, *nullum crimen nulla poena sine lege*]: Individual liberty is guaranteed and protected by law. No one may be arrested, imprisoned, or kept in custody except according to the provisions of the law. No may be established or penalty imposed except by law.

Lebanese Criminal Code

Section I (Temporal scope of application of criminal law), Subsection 1 (Legality of offences)

Article 1: No penalty may be imposed and no preventive or corrective measure may be taken in respect of an offence that was not defined by statute at the time of its commission.
An accused person shall not be charged for acts constituting an offence or for acts of principal or accessory participation, committed before the offence in question has been defined by statute.

International Covenant on Civil and Political Rights

Article 15 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

132. According to the principle of legality, everybody must know in advance whether specific conduct is consonant with, or a violation of, penal law. In addition to Article 8 of the Lebanese Constitution, the preamble of the Constitution incorporates the principle of legality as set out in the ICCPR, according to Article 15 of which no breach of the *nullum crimen* principle exists when the act was criminal "under national or *international* law, at the time when it was committed".[236]

[236] ICCPR, Article 15 (emphasis added).

133. This provision does not necessarily entail, however, that the authorities of a State party to the ICCPR may try and convict a person for a crime that is provided for in international law but not yet codified in the domestic legal order: in criminal matters, international law cannot substitute itself for national legislation; in other words, international criminalisation alone is not sufficient for domestic legal orders to punish that conduct. Nevertheless, Article 15 of the ICCPR allows at the very least that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed *before* its enactment without breaching the *nullum crimen* principle. This implies that individuals are *expected and required to know* that a certain conduct is criminalised in international law: at least from the time that the same conduct is criminalised also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation.[237]

134. The import of Article 15 as set out here has been upheld by the UN Human Rights Committee[238] and various national courts.[239] More recently, it has been restated by the Court of

[237] Of course, if the elements and scope of the crime contemplated in national legislation is broader than that previously envisaged in international law, then conduct taken prior to the passing of national legislation can only be prosecuted under that national legislation if the conduct falls within the more narrow international criminalisation.

[238] For example, in *Baumgarten*, in considering a complaint of an alleged retrospective application of German law, the HRC stated that it would "limit itself to the question of whether the author's acts, at the material time of commission, constituted sufficiently defined criminal offences under the criminal law of the GDR *or* under international law" (emphasis added). HRC, *Baumgarten v Germany*, Communication No. 960/2000, UN Doc. CCPR/C/78/D/960/2000 (2003), para. 9.3. In considering a similar complaint in *Nicholas v Australia*, the HRC did not depart from this view: "If a necessary element of the offence, as described in national (*or* international) law, cannot be proven to have existed, then it follows that a conviction of a person for the act of omission in question would violate the principle of nullum crimen sine lege" (emphasis added) HRC, *Nicholas v Australia*, Communication No 1080/2002, UN Doc. CCPR/C/80/D/1080/2002 (2004), para. 7.5.

[239] In *Re Extradition of Demjanjuk* an Israeli extradition request of an alleged guard at the Treblinka concentration camp during World War II was challenged in the United States District Court of North Dakota. The appellant argued that, *inter alia*, the criminal statute under which the accused was sought was *ex post facto*, given that Israel did not come into existence until 1948. The Court stated that: "The Israeli statute does not declare unlawful what had been lawful before; rather, it provides a new forum in which to bring to trial persons for conduct previously recognized as criminal. [...] Respondent is charged with offenses that were criminal at the time they were carried out. At the time in question, the murder of defenseless civilians during wartime was illegal under international law [citing the Hague Conventions of 1899 and 1907 and sources from World War II]. Furthermore, it is absurd to argue that operating gas chambers, and torturing and killing unarmed prisoners were not illegal acts under the laws and standards of every civilized nation in 1942-43. [...] The statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the ex post facto application of criminal laws which may exist in international law." U.S., Federal Trial Court, *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 567 (D.N.D. 1985).

Another is the case of *Polyukhovich v Commonwealth* of the Australian High Court. There, the court was faced with the question of whether the *War Crimes Act 1945* (Cth) could be used to prosecute an individual for events that took place in the Ukraine between 1942-1943. The question, according to the Court, was whether: "the statutory offence created by s. 9 of the [*War Crimes*] Act corresponds with the international law definition of international crimes existing at the relevant time. If it does, the Act vests jurisdiction to try alleged war criminals for crimes which were crimes under the applicable (international) law when they were committed; its apparent retrospectivity in municipal law is no bar to the

Justice of the Economic Community of the West African States in the *Habré v. Republic of Senegal* case.[240] Likewise, in the *Ojdanić* case, when determining the question of "foreseeability" of a criminal offence, the ICTY Appeals Chamber held that non-codified international customary law could give an individual "reasonable notice" of conduct that could entail criminal liability.[241] This facet of the *nullum crimen* principle should not be surprising: international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules. Individuals are therefore required and expected to know that, as soon as national authorities take all the necessary legislative (or judicial) measures necessary to punish those crimes at the national level, they may be brought to trial even if their breach is prior to national legislation (or judicial pronouncements).[242] The same applies to crimes punished at the international level by way of bilateral or multilateral treaties.

135. Furthermore, the principle of legality does not preclude "the progressive development of the law by the court".[243] Such "progressive development" is necessary because, as Jeremy Bentham

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exercise of a universal jurisdiction recognized by international law and that is sufficient to enliven the external affairs power to support the Act which vests that jurisdiction." The Court went on to find, by a majority, that the *War Crimes Act 1945* (Cth) did not breach the Australian Constitution by virtue of its retroactive application. Australia, High Court, *Polyukhovich v Commonwealth*, (1991) 172 CLR 501, at 576.

[240] ECOWAS, *Habré v Sénégal*, No. ECW/CCJ/JUD/06/10, 18 November 2010. Hissène Habré had argued that the passing in Senegal, where he resided, of a law criminalizing torture committed abroad, and his subsequent prosecution there for such crimes as allegedly committed many years earlier (1984-1990), was contrary to the *nullum crimen* principle. Senegal invoked Article 15 of the ICCPR. It argued that « la compétence rétroactive de ses juridictions pour les faits de génocide, de crimes contre l'humanité, de crimes de guerre n'institute pas une nouvelle incrimination avec effet rétroactif dans la mesure ou ces faits sont tenus pour criminels par les règles du droit international à la date de leur commission. » (at para 47). The Court agreed with the defendant State. After quoting Article 15, it said:

> Du premier paragraphe de ce texte [Article 15], la Cour note que si les faits à la base de l'intention de juger le requérant ne constituaient pas des *actes délictueux d'après le droit national* sénégalais (d'où le Sénégal viole le principe de non rétroactivité consacré dans le texte), ils sont au regard du *droit international*, tenus comme tels. Or, c'est pour éviter l'impunité des actes considérés, *d'après le droit international comme délictueux* que le paragraphe 2 de L'article 15 du Pacte prévoit la possibilité de juger ou de condamner *« tout individu en raison d'actes ou omissions qui, au moment où ils ont été commis, étaient tenus pour criminels, d'après les principes généraux de droit reconnus par l'ensemble des nations »*. La Cour partage donc, les nobles objectifs contenus dans le mandat de l'Union Africaine et qui traduit l'adhésion de cette Haute Organisation aux principes de l'impunité de violations graves des droits humains et de la protection des droits des victimes.

(at para. 58; emphasis in original). However, later on the Court stated that this retroactive application of the Senegalese law was only admissible if carried out by an international tribunal – a conclusion that does not appear to be logically and legally justified.

[241] ICTY, *Milutinović et al*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 ("*Milutinović* JCE Decision"), para. 41.

[242] At least in common law jurisdictions (which does not include Lebanon), courts can also interpret existing crimes to include elements or aspects of the crime as it is defined under customary international law—in other words, they may interpret national laws in new ways to bring domestic law into conformity with customary international law.

[243] ICTY, *Vasiljević* Trial Judgment, 29 November 2002 ("*Vasiljević* TJ"), para. 196. See also ECHR, *Kokkinakis v Greece*, Judgment of 25 May 1993, Series A, No. 260-A, paras 36 and 40; ECHR, *E K v Turkey*, 7 February 2002,

explained, "the legislator, who cannot pass judgment in particular cases, will give directions to the Tribunal in the form of general rules, and leave them with a certain amount of latitude in order that they may adjust their decision to the special circumstances".[244] Thus the ICTY Appeals Chamber has held that the principle of legality does not prevent a court from interpreting and clarifying the elements of a particular crime.[245] Further, the application of these elements to new circumstances may in some instances better align domestic practice with a nation's international obligations. At times, domestic and international courts have even come to the conclusion that conduct previously considered legal can be construed as embraced within an existing offence, for instance if it relates to "an area where the law has been subject to progressive development and there are strong indications that still wider interpretation by the courts of the inroads on the immunity was probable"[246]—that is, as long as the circumstances made this criminalisation foreseeable. This principle would be better expressed by saying that the *application* of the law may be subject to development as social conditions change, as long as this application was foreseeable.

136. What matters is that an accused must, at the time he committed the act, have been able to understand that what he did was criminal, even if "without reference to any specific provision".[247] Similarly, "[a]lthough the immorality or appalling character of an act is *not* a sufficient factor to warrant its criminalisation under customary international law," it may nevertheless be used to "refute any claim by the Defence that it did not know of the criminal nature of the acts".[248]

Application No. 28496/95, para. 52; ECHR, *S W v United Kingdom*, 22 November 1995, Series A, No. 335-B, paras 35-36. Outside of criminal law, courts often have to interpret domestic law or treaties anew in light of significant social developments. See, e.g., U.K., Exchequer Division, *Attorney-General v Edison Telephone Co of London* (1880) 6 QBD 244 (holding that the policies underlying the *Telegraph Act* (1869) apply equally to the telephone, which had not been invented at the time the legislation was adopted); *Belgium v The Netherlands (The Iron Rhine "Ijzeren Rijn" Railway)*, R.I.A.A., Vol. XXVII, 35 (2005), at 66-67 (noting the evolution of a general principle of law regarding the importance of environmental considerations in the context of economic development).

[244] J. Bentham, *Theory of Legislation* (Etienne Dumont ed. 1914), at p. 62.

[245] ICTY, *Aleksovski*, Appeals Judgment, 24 March 2000, para. 127; ICTY, *Delalić et al*, Appeals Judgment, 20 February 2001, para. 173.

[246] ECHR, *C R. v United Kingdom*, 22 November 1995, Series A, No. 335-C, para. 38 (with reference to the arguments of the UK Government and the Commission), finding that a conviction for attempted rape could be legitimately entered against a husband even though English law at the time stated that "[...] the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract" (at para. 11). See also para. 42 for the relevance of the evolution of previously held conception in assessing whether arbitrary prosecution, conviction or punishment occurred.

[247] ICTY, *Hadžihasanović et al*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 34.

[248] ICTY, *Milutinović* JCE Decision, para. 42 (emphasis added).

137. However, there are important limits to the general principle that the law is always speaking. As the ICTY has correctly held:

> [f]rom the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was insufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[249]

138. With these principles in mind, we conclude that it was foreseeable for a Lebanese national or for anybody living in Lebanon that any act designed to spread terror would be punishable, regardless of the kind of instrumentalities used as long as such instrumentalities were likely to cause a public danger.

139. This proposition is borne out by the fact that neither the Arab Convention nor customary international law, both applicable within the Lebanese legal order, restrict the means used to perpetrate terrorism, and both of these sources of law are binding on Lebanon.[250] Furthermore, Lebanon's legislature has gradually authorised or approved ratification of or accession to a number of international treaties against terrorist action, which likewise do *not* contain any such limitation as to the means to be used for a terrorist act. The instruments in question are: the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (ratified on 11 June 1974); the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (acceded to on 10 August 1973); the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (ratified on 23 December 1977); the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (acceded to by Lebanon on 3 June 1997), Article 2 of which does not envisage any limitation as to the means of attacking a protected person; the 1979 International Convention against the Taking of Hostages (acceded to on 4 December 1997), which criminalises the taking of hostages without envisaging any restriction on the ways a hostage may be taken; the 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Montreal Convention (ratified on 27 May 1996); the Rome 1988 Convention for the Suppression of Unlawful Acts against the

[249] *Vasiljević* TJ, para. 193.

[250] See above, Section I(I)(B)(1)(b) and Section I(I)(B)(2)(b).

Safety of Maritime Navigation (acceded to on 16 December 1994); that Convention's supplementary Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (acceded to on 11 November 1997); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ratified on 13 November 2006).

140. All these international treaties were integrated into the Lebanese legal system by means of authorisation or approval by ratification or accession by Parliament, i.e., by an act having the force of (ordinary) law. According to the Lebanese system for implementing international treaties referred to above (see paragraphs 71-76) the provisions of those treaties automatically produce their effects in Lebanese law (except for those cases where the passing of further implementing legislation is needed). All this entails that any Lebanese citisen or any person living in Lebanon was required and expected to be aware of the bans following from those international treaties.

141. Admittedly, the broad range of acts prohibited by those treaties always referred to or revolved around the *specific conduct* envisaged in each treaty: offences on board aircraft, attacks against civil aircraft, attacks on internationally protected persons, hostage-taking, and attacks against or onboard ships on the high seas. In authorising or approving ratification or accession of these treaties through legislative instruments, however, the Lebanese parliament effectively enlarged the range of acts that can fall under the ban on terrorism, so that all persons living in Lebanon were to know that, by the 1990s, a much broader range of acts than those envisaged in 1943 could fall under the prohibition of terrorism. An individual subject to Lebanese criminal jurisdiction, knowing that shooting (or threatening to shoot) passengers onboard an aircraft for the purpose of hijacking the plane was a prohibited terrorist act, can safely be expected to conclude that the same behaviour with the same intent to spread fear in other circumstances (for instance, in a crowded road) would also be regarded as terrorism.

142. Finally, Lebanon is not a country where a formal doctrine of binding precedent (*stare decisis*) is adopted. Thus, there is no general expectation that individuals will rely definitively on the prior interpretations of Article 314 by Lebanese courts. Different circumstances could lead Lebanese courts in the future to different conclusions regarding the scope of Article 314. This is something to be taken into account by the Tribunal when interpreting the Lebanese Criminal Code.

143. On the basis of the considerations above, the Appeals Chamber concludes that the aforementioned interpretation of Article 314 by the Tribunal is permissible because it meets the requisite conditions: (i) it is consistent with the offence as explicitly defined under Lebanese law; (ii) it was accessible to the accused, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the *Official Gazette*; (iii) hence, it was reasonably foreseeable by the accused.[251]

144. Thus, the approach taken here—to provide a modern interpretation to the "means" element—does not amount to adding a new crime to the Lebanese Criminal Code or a new element to an existing crime. The Appeals Chamber simply allows a reasonable interpretation of the existing crime that takes into account significant legal developments within the international community (as well as in Lebanon). This interpretation is not binding *per se* on courts other than the Special Tribunal for Lebanon, although it may of course be used as an interpretation of the applicable legal provisions in other cases where terrorism is charged.

C. The Notion of Terrorism Applicable before the Tribunal

145. To sum up, we hold that the Tribunal must apply the crime of terrorism as defined by Lebanese law. There are two significant differences between the crime of terrorism under international customary law and under the Lebanese Criminal Code. First, under the former but not the latter, the underlying conduct must be a crime, which means the perpetrator must also harbour the *mens rea* required for that crime in addition to the special intent required for the crime of terrorism. Instead, under Lebanese law the results of terrorist acts such as deaths, destruction of property and other impacts designated in Article 6 of the Law of 11 January 1958 constitute an aggravating circumstance of the terrorist act (*not* a material element); thus in the cases submitted to the Tribunal, the Prosecutor will have to prove only that the underlying act was volitional, in addition to the special intent to "cause a state of terror". Second, under the latter but not the former, the means used for perpetrating the terrorist act must be of a type that will endanger the public. The type of means that can create a public danger has been interpreted rather narrowly by some Lebanese courts in the past. We have explained why this Tribunal will instead apply a less narrow interpretation to the

[251] Apart from the ICTY judgments cited above, see in this respect also: ECHR, *S W v United Kingdom*, 27 October 1995, Series A, No. 335-B; ECHR, *Cantoni v France*, 15 November 1996, Application No. 17862/91. On the need for a criminal offence to be foreseeable, see ICTY, *Tadić*, Decision on the Defence Motion on Jurisdiction, 10 August 1995, paras 72-73.

phrase "means liable to create a public danger", in light of international law binding on Lebanon and depending on the particular circumstances of the cases brought before it.

146. In light of the foregoing, the answers to the questions posed by the Pre-Trial Judge in relation to terrorism are as follows:

147. (i), (ii) and (iii): The Statute clearly refers to provisions of the Lebanese Criminal Code only, and not to Lebanese law in general or to international law. **The Tribunal, when applying the notion of terrorist acts, should therefore look at Article 314 of the Lebanese Criminal Code.** However, a proper construction of Lebanese law leads to the conclusion that, when interpreting Article 314 and other relevant provisions of the Lebanese Criminal Code, international law binding upon Lebanon may not be disregarded. **Article 314 of the Lebanese Criminal Code shall be interpreted in consonance with international law,[252] thus enshrining the following elements:**

a. the volitional commission of an act;

b. through means that are liable to create a public danger;[253] and

c. the intent of the perpetrator to cause a state of terror.

148. (iv) Considering that the elements of the notion of terrorism applicable before the Tribunal do not require an underlying crime, such as intentional homicide, the perpetrator of an act of terrorism that resulted in deaths would be liable for terrorism (assuming that all other elements discussed above are met), and the deaths would be an aggravating circumstance, according to Article 6 of the Law of 11 January 1958. Additionally, the perpetrator may also, and *independently*, be liable for the underlying crime, for example homicide or attempted homicide. His or her liability for the underlying crime must be examined in light of the elements for that crime, in particular to ensure he or she had the requisite intent, whether direct or indirect. In short, the accused's liability for the crime of terrorism and for any underlying crime, such as the crime of intentional homicide or attempted homicide, must be evaluated *separately*. The following section will deal with the elements of these two crimes to be applied before this Tribunal.

[252] On the international customary definition of terrorism, see paragraph 85; on the definition of terrorism contained in the Arab Convention, see paragraphs 65-67.

[253] In particular, the Appeals Chamber notes that whether certain means are liable to create a public danger within the meaning of Article 314 should always be assessed on a case-by-case basis, having regard to the non-exhaustive list in Article 314 as well as to the context and the circumstances in which the conduct occurs. This way, Article 314 is more likely to be interpreted in consonance with international obligations binding upon Lebanon.

II. Crimes and Offences Against Life and Personal Integrity

A. Intentional Homicide

149. The Pre-Trial Judge has asked:

> ix) In order to interpret the constituent elements of the notions of intentional homicide with premeditation and attempted intentional homicide with premeditation, should the Tribunal take into account not only Lebanese law, but also conventional or customary international law?
>
> x) Should the question raised in paragraph ix) receive a positive response, is there any conflict between the definitions of the notions of intentional homicide with premeditation and attempted intentional homicide with premeditation as recognised by Lebanese law and those arising out of international law and, if so, how should it be resolved?
>
> xi) Should the question raised in paragraph ix) receive a negative response, what are the constituent elements of these notions in Lebanese law in the light of case law pertaining thereto?
>
> xii) Can an individual be prosecuted before the Tribunal for intentional homicide with premeditation for an act which he is alleged to have perpetrated against victims who might be considered not to have been personally or directly targeted by the alleged criminal act?

150. As explained above (see paragraphs 33 and 43) and as urged by the Prosecution and Defence Office,[254] the Tribunal is bound by Article 2 of its Statute to apply the Lebanese Criminal Code to the crime of intentional homicide. Further, unlike our foregoing discussion of terrorism, it will suffice to consider the elements of intentional homicide only under Lebanese law, since international criminal law does not rely on an autonomous definition of murder as such and as the underlying crime of war crimes, crimes against humanity, or genocide. We therefore focus our analysis on the definition of intentional homicide under the Lebanese Criminal Code in order to address question (xi), which also leads us to answer question (xii) in the affirmative.

151. In Lebanon murder is punished primarily under Articles 547 to 549 of the Lebanese Criminal Code. The elements of intentional homicide are determined in Article 547, whereas Articles 548 and 549 provide only for aggravating circumstances to the crime mentioned in Article 547.

> **Article 547** – Anyone who intentionally kills another person shall be punishable by hard labour for a term of between 15 and 20 years.

[254] See Prosecution Submission, para. 53; Defence Office Submission, para. 142.

Article 548 – Article 548 was amended by Article 3 of the Act of 24 May 1949 and Legislative Decree No. 110 of 30 June 1977, as follows:

Intentional homicide shall be punished by hard labour for life if it was committed:

1. For a base motive;
2. To obtain a benefit resulting from a misdemeanour;
3. This paragraph was revoked by Legislative Decree No. 110 of 30 June 1977 and replaced with the following text by Article 32 of Legislative Decree No. 112 of 16 September 1983; Through mistreatment of the corpse by the criminal after the homicide.
4. Against a minor under 15 years of age;
5. Against two or more persons.

Article 549 - Article 549 was amended by Articles 3 and 4 of the Act of 24 May 1949; Article 1 of the Act of 9 January 1951 modified Article 4 of the Act of 24 May 1949:

Intentional homicide shall entail the death penalty if it was committed in the following circumstances:

1. With premeditation;
2. To prepare for, facilitate or execute a felony or misdemeanour, to facilitate the escape of instigators or perpetrators of, or accomplices to, such a felony or to preclude their punishment;
3. Against an ascendant or descendant of the offender;
4. If the offender committed acts of torture or cruelty against persons;

The following paragraph was added to Article 549 by Legislative Decree No. 110 of 30 September 1983:

5. Against a public official during, in connection with or on account of the performance of his duties;

The following paragraphs were added to Article 549 by Legislative Decree No. 112 of 16 June 1977:

6. Against a person on account of his religious affiliation or as an act of revenge for a felony committed by another member of his religious community, his relatives or members of his party;
7. Using explosive materials;
8. To conceal the commission of a felony or misdemeanour or traces thereof.

152. We examine first the objective and subjective elements of the crime before considering the aggravating factor of premeditation.

1. Actus reus

153. The actus reus of intentional homicide under Lebanese law is composed of the following elements: (i) conduct; (ii) result; (iii) a nexus between the conduct and the result.

a) Conduct

154. The conduct is defined as an *act or culpable omission*[255] aimed at *impairing the life* of another human being. There is a distinction between the behaviour aiming at committing the crime (which consists of a series of movements) and the means used to commit it (in other words, the tool used to perpetrate the crime).

155. The means may be physical, such as the perpetrator's hands, a gun or a knife. These physical means can be lethal or non-lethal by nature, connected or not connected to the body of the perpetrator, and may lead directly to death or be only an indirect cause of death. Alternatively, the means may as well be non-physical, for example creating fear that leads to death, such as by giving bad news to an individual with a heart disease, resulting in his death. However, if the means do not lead to the death of the individual, the crime in itself does not exist (for example, the use of sorcery to commit a murder cannot be considered a means of achieving death). Indeed, Lebanese courts always refer to the type of tool used to achieve the criminal conduct.[256]

b) Result

156. The criminal result is the *death of the victim*. This death has to be a direct result of the criminal activity, even though it might not occur immediately. If the death does not occur for reasons falling outside the perpetrator's will (such as medical intervention), the perpetrator is prosecuted for attempted homicide.[257] The absence of proof relating to the physical existence of the victim's corpse or dead body is not an impediment to the existence of the criminal result. Therefore it is sufficient to

[255] See Article 204 of the Lebanese Criminal Code which provides that:
A causal link between an act and *omission* on the one hand, and the criminal consequence on the other, shall not be precluded by the concurrent existence of other previous, simultaneous or subsequent causes, even if they were unknown to the perpetrator or independent of his act.
If, however, the subsequent cause is independent and sufficient in itself to bring about the criminal consequence, the perpetrator shall incur the penalty only for the act that he committed.
(emphasis added).

[256] See *inter alia*: Court of cassation, 6th Chamber, decision n°47/99, 9 March 1999, in *Cassandre* 3-1999, at 265. Court of Cassation, 6th Chamber, decision n°37/99, in *Cassandre* 2-1999, at 220.

[257] Attempted homicide is discussed below, see paras 176-183.

rely on facts such as the timing when the victim was last seen, the person he or she was seen with (the accused), etc.[258]

157. Finally, if the murder is committed by multiple individuals, they are all considered as co-perpetrators if all of them share the same intention, without distinction between those who administered the fatal blow and those who did not (e.g., a victim being beaten to death by three or four persons).[259] The actions of each are said to have resulted in the death of the victim. However, if no intention of co-perpetration is proved, the perpetrators are held responsible for different crimes. One must distinguish between perpetrators (*auteurs*) of the crime who participate in all the objective elements of the crime, where the activity of each individual is by itself likely to realise the crime (such as two persons shooting at a single victim), and co-perpetrators (*co-auteurs*) who directly cooperate to achieve the objective elements of the crime (for example a person holds the victim so that another person can kill him or her). Both scenarios are provided for under Article 212 of the Lebanese Criminal Code.

c) Nexus

158. The last element of the actus reus of murder under Lebanese law is the *nexus* between the activity and the result. If the result is due to different activities or reasons,[260] such as in the case of a death occurring not only after the commission of the criminal act but also after a medical mistake made by a doctor while treating the injury sustained by the victim, two theories have been propounded: that of the equivalence of causes, and the theory of the adequate or sufficient cause. Article 204 of the Lebanese Criminal Code provides for both theories in an ambiguous manner. The Article sets the theory of equivalence of causes as a general rule, but adds an important exception in the form of the theory of adequate or sufficient cause.

[258] According to the Court of cassation "Death is a factual matter which can be proven by any possible means": Court of cassation, 6th Chamber, decision n° 38, 23 March 1999, in *Sader fil-tamyiz* [Sader in the cassation], 1999, at 304.

[259] This was held for instance in a case of a fight between individuals from two families where two persons from one family shot the victim without a definite proof as to who administered the fatal struck. The intent was inferred from the fight, and both perpetrators were convicted of murder: Court of Cassation, 1st Chamber, decision n° 75, 25 October 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, p. 76.

[260] The theory of causation, see G. Fletcher, *Basic Concepts of Criminal Law* (Oxford: Oxford University Press, 1998); Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998. See also Moustapha El-Awji, *Al-kanoun al-jinai al-am, al-jizi' al-awal, al-nazariya al-ama lil jarima* [General Criminal Law, first part, The General Theory of the Crime], (Beirut: Nawfal publishing), 1988.

159. Indeed, and as the Defence Office notes,[261] when the additional cause leading to death is independent and sufficient by itself to achieve such a result, and when it is subsequent (*ultérieur*) to the conduct of the accused, courts cannot hold the accused responsible for the result. For example, the victim of a murder attempt dies as a result of a car accident while he was being taken to the hospital: the accident is subsequent to the murder attempt and suffices by itself to cause the death.

160. However, Article 568 of the Lebanese Criminal Code provides that if the author had no knowledge of the reasons and facts which led, together with his criminal activity, to the death or the injury of the victim, this amounts to a mitigating circumstance leading to a reduced sentence. In other words, the author is considered responsible for the death of the victim, but the sentence is mitigated. This reasoning is more in line with the theory of equivalence of causes. Nonetheless, it can be inferred from a comprehensive reading of the Code together with the jurisprudence that Lebanese law applies mainly the theory of the adequate or sufficient cause. In other words, the perpetrator is held liable for his criminal act coupled with criminal intent even if he ignored other reasons which, combined with his act, led to the victim's death. This analysis is also in line with the origins of the Lebanese Criminal Code. Indeed, the Lebanese text in this respect is originally taken from the Italian criminal code of 1930, which in turn adopts the theory of the adequate or sufficient cause.[262]

2. Mens rea

161. The *subjective elements* encompass (i) knowledge and (ii) intent.

162. In order to convict an individual for intentional homicide, the Lebanese Criminal Code requires first that the perpetrator have knowledge of the circumstances of the offence. In other words, the perpetrator has to know that he is aiming his act at a living person; he has to know as well that the tool he is using may cause the death of the victim.

163. Knowledge alone, however, is insufficient. Intentional homicide also requires *intent*, for the perpetrator is seeking not only to behave in a certain manner, but also to achieve the criminal result: the death of the victim. For instance, the individual who suddenly faints or who is pushed violently

[261] Defence Office Submission, para. 146.

[262] Moustapha El-Awji, *Al-kanoun al-jinai al-am, al-jizi' al-awal, al-nazariya al-ama lil jarima* [General Criminal Law, first part, The General Theory of the Crime], (Beirut: Nawfal publishing), 1988, at 501.Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 214-215.

by another person, leading him to fall on a child, thereby causing the child's death, had no intent to behave in such a manner.

164. Therefore, the perpetrator must have the intent, as defined by Articles 188[263] or 189[264] of the Lebanese Criminal Code, vis-à-vis the death of the victim as a result of his behaviour. With regard to Article 188 of the Lebanese Criminal Code, it is not enough for the perpetrator to foresee the result of his actions or behaviour or to know that his behaviour is prohibited by law; he should be aiming at it as a direct result of his behaviour.[265] Lebanese courts have held that since the perpetrator's intent is usually hidden in his mind, it can be inferred from outward criteria such as the circumstances of the crime, the means used by the perpetrator, the part of the body where the victim was hit, or where the perpetrator was aiming, etc.[266] In a case where the homicide was committed during a fight by a perpetrator who picked up a rock and hit the victim repeatedly on the head, causing his or her death, the Court of cassation held that the conduct in itself was a strong indicator as to the perpetrator's intent.[267]

165. Under Article 189, if both knowledge and intent can be found, the mens rea exists, even though the criminal intent (*dol*) is indirect, meaning that it is *dolus eventualis*.[268] The mens rea still exists even though the victim is not predetermined (such as in the case of an individual wishing to kill anyone, and not a specific person), and despite an error on the identity of the victim (*erreur sur la personne*), or an error in the nexus (such as in the case of an individual throwing a victim over a bridge, with the purpose to see his victim drown: he is still held responsible for the crime of

[263] Article 188 of the Lebanese Criminal Code provides: "Intent consists of the will to commit an offence as defined by law".

[264] Article 189 of the Lebanese Criminal Code provides: "An offence shall be deemed to be intentional, even if the criminal consequence of the act or omission exceeds the intent of the perpetrator, if he had foreseen its occurence and thus [*sic*] accepted the risk". The word "thus" in the English translation is wrong in as much as it infers the acceptance of the risk from the forseeability, whereas the original French and official Arabic versions phrase the acceptance of the risk as an independent condition.

[265] See Court of Appeal of North Lebanon, decision n°1, 12 January 1952, in *Al-Mouhami* [The Lawyer], 1952, at 82.

[266] See *id*, and Court of cassation, 6th Chamber, decision n°127, 30 June 1998, in *Sader fil-tamyiz* [Sader in the cassation], 1998, at 563 where the Court held that "the fact that many bullets hit the victim in dangerous places in the body is a presumption of the existence of the intent to commit murder". See as well Court of cassation, 7th Chamber, decision n°8, 22 January 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, at 906; Court of cassation, 7th Chamber, decision n° 24, 26 February 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, at 919; Court of cassation, 6th Chamber, decision n°275, 19 October 2004, in *Sader fil-tamyiz* [Sader in the cassation], 2004, at 797.

[267] Court of cassation, 3rd Chamber, decision n°458, 27 November2002, in *Cassandre* 11-2002, at 1242.

[268] *Id.*, and Court of cassation, 3rd Chamber, decision n° 318, 10 July 2002, in *Cassandre* 7-2002, at 874. As noted above, the notion of *dolus eventualis* is provided for under Lebanese law in Article 189 of the criminal code. A perpetrator can be held responsible for a murder he did not intend to commit, if he however has foreseen the result of his conduct and accepted the risk of its occurrence.

intentional homicide, even though the victim dies because he or she hit the stones beneath the bridge and not because of drowning). We return to a more extended discussion of *dolus eventualis* below.[269]

166. The mens rea is not affected by the *motive* of the author to commit the crime. The motive plays a role in aggravating or mitigating the sentence only.[270] In addition, the criminal intent has to be contemporary to the criminal activity, and not necessarily to the criminal result, such as an individual who shoots a gun at the victim, then taken by regret, tries to medically assist her. In that case, even though the individual regrets his initial act (*repentir*), he nonetheless is held responsible for his criminal activity.

3. Premeditation

167. The Pre-Trial Judge asks specifically about *premeditated* intentional homicide. Both parties have agreed that under Lebanese law, premeditation is not an element of the crime, but an aggravating circumstance relevant to sentencing.[271] In this respect, the Pre-Trial Judge's question may be misleading in as much as it suggests premeditated homicide is a separate crime. This renders the question as written moot; however, for purposes of fairness, an overview of the Lebanese law on premeditation is necessary to ensure that an accused is fully informed of the charges against him, if these charges include premeditation.

168. The criterion required to prove premeditation is an initial plan to commit the crime, conceived and developed by the perpetrator.[272] As Lebanese courts have held, a premeditated murder is a well-conceived and designed crime, prepared with a clear and calm mind, and where the perpetrator's intent is revealed by a firm and lasting determination to commit the crime.[273] Premeditation is based on two elements: (i) a calm and clear mind while planning and executing the

[269] See paras 169, 175, 181-183, and 231-234.

[270] See Articles 192 to 195 of the Lebanese Criminal Code, and Court of cassation, 6th Chamber, decision n°88, 1st June1999, in *Cassandre* 6-1999, at 775.

[271] Article 549 of the Lebanese Criminal Code provides that a death penalty sentence is to be given to perpetrators of premeditated homicides.

[272] Criminal Court of Mount Lebanon, Judgment of 15 February 1975, in *Al-Adel* [Journal of the Beirut Bar], 1986, vol. 2, at 218.

[273] Court of Appeal of North Lebanon, decision n°1, 12 January 1952, in *Al-Mouhami* [The Lawyer], 1952, at 82; Court of cassation 7th Chamber, decision n°74, 31 March 1999, in *Cassandre* 3-1999, at 364. The Court held that the planning to commit the crime has to be accomplished with extreme care, and the execution has to follow the plan with the same care. Court of cassation, 6th Chamber, decision n°47, 9 March 1999, in *Cassandre* 3-1999, at 365: "The murder was the result of a rational mind, has been executed in cold blood and for selfish reasons and was previously planned and conceived".

crime,[274] so that the perpetrator is shown to be emotionally detached, not acting upon rage or anger,[275] and is therefore considered to be a dangerous criminal justifying the aggravating circumstance; (ii) the lapse of a period of time before the commission of the crime, which should allow the perpetrator to think, and plan, and regain calmness.[276] However, this second element is not predetermined. Instead, it is to be evaluated by the Judge according to the circumstances of each case.[277]

169. In light of the Pre-Trial Judge's twelfth question, it is necessary to examine more thoroughly the notion of *dolus eventualis* under Article 189 of the Lebanese Criminal Code. According to this Article, a crime is to be considered intentional even though the result exceeds the initial intent of the author, when this result is foreseeable by the author and when he accepted the risk his activity entails. Therefore, under Lebanese law, *dolus eventualis* involves two elements: the foreseeability of the criminal result, and the acceptance by the perpetrator of the potential risk his activity might produce. Indeed, it is the unwavering will of the perpetrator to proceed with his activity despite the risk of a potential criminal result which testifies to his desire to carry out the crime and renders the crime itself intentional.[278] Lebanese courts have often convicted individuals on the basis of *dolus eventualis*, when, in committing the initial crime against the intended victim, the perpetrator has caused the death of other victims. As noted by the Prosecutor,[279] this has been held in the *Karami* case, where the perpetrators were convicted of the murder of the passengers of the helicopter in which the intended victim was flying when the explosion occurred, on the basis of *dolus eventualis*.[280]

170. The Pre-Trial Judge's question (xii) refers to the case of a premeditated crime leading to the death of individuals other than the intended victim (that is, intentional homicide based on *dolus*

[274] Court of Cassation, 3rd Chamber, decision n°154, 15 April 1998, in *Cassandre* 4-1998, at 425.
[275] Court of Cassation, 3rd Chamber, decision n°11, 22 February 1994, in *Al-nashra al-kada'iya* [Revue Judiciaire] 1994, vol. 3, at 263
[276] Criminal Court of Mount Lebanon, Judgment of 28 February 1991, in *Al-Adel* [Journal of the Beirut Bar], 1992, vol. 1-4, at 432.
[277] Court of Cassation, 6th Chamber, decision n°37, 23 February 1999, in *Cassandre* 2-1999, at 217.
[278] Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 247.
[279] Prosecution Submission, para. 64.
[280] The Court has held that the perpetrator insisted on committing the crime, although he was perfectly aware that that would lead to the death of the helicopter's crew and passengers who were not the intended victim of the assassination, and in that respect he is to be held responsible of those murders on the basis of *dolus eventualis*. See p. 161 of the English translation.

eventualis). The important point in this case is that there is a single underlying act. Assuming the perpetrator premeditated that act, then his premeditation applies as an aggravating factor to all the criminal results. This is because, as Lebanese courts have held, what matters in assessing the degree of culpability of an accused for a premeditated homicide is the seriousness of the criminal intent even more than the result itself. For example, if the perpetrator committed an act with the premeditated and direct intent to kill a particular person, but he instead kills others (as a foreseeable result of his conduct), the crime remains a premeditated homicide even though the criminal activity led to the death of individuals other that the intended victim. Therefore, giving two legal characterisations to a single intentional act based merely on its result is wrong.[281] This reasoning stems from the fact that premeditation, provided for in Article 549 of the Lebanese Criminal Code, is not an element of the crime but an aggravating circumstance of the sentence. Therefore it does not enter in the evaluation of the crime but becomes relevant at a later stage, in the determination of the sentence.

171. Thus it is wrong to suggest, as the Pre-Trial Judge's question might, that premeditation *applies to dolus eventualis*.[282] Rather, the crime committed by the perpetrator is an intentional homicide, committed with a *dolus eventualis*, and the sentence is to be aggravated due to the existence of a well-prepared and planned crime. This was held by the Court of Justice in a case of armed robbery in a jewellery store which resulted in the killing of the owners. The court asserted that "whereas the accused had foreseen the possibility of some resistance from the victims during the robbery, they both armed themselves with a military firearm, and, despite a potentially lethal result, planned to use this firearm. Therefore, all the elements of premeditation are fulfilled, because pursuant to Article 189 of the Lebanese Criminal Code, the Lebanese legislature made *dolus eventualis* equivalent in result to a direct intent".[283]

172. Thus if the base offence was premeditated—if the accused plotted his murder of a particular person—and the fact of premeditation led to additional deaths that were reasonably foreseeable, then under Article 549 of the Lebanese Criminal Code the premeditation of the base offence is an aggravating factor both of the targeted homicide and of the additional homicides. The accused should

[281] Criminal court of Beirut, 8th Chamber, Decision n° 1469, 5 March 1998, in *Al-nashra al-kada'iya* [Revue Judiciaire], 1998, vol. 3, at 304.

[282] In this respect, premeditation does not alter the elements of the crime, because applying premeditation to the subjective element of the crime leads to a distinction in the characterisation of the crime, between a summary offence, a misdemeanor or a felony.

[283] Court of Justice, decision n°1, 12 April 1994, in *Al-nashra al-kada'iya* [Revue Judiciaire], 1995, vol.1 at 3.

thus receive a more severe penalty when the homicides for which he is convicted on the basis of *dolus eventualis* resulted from a base offence that was premeditated.

173. This result is logical and just. In effect, if the accused carefully planned an intentional homicide which he knew might result in the deaths of additional persons, he should be held to greater account for those resulting incidental deaths than if the base offence were of a more spontaneous nature: he had the opportunity to reflect on the likely destructive consequences of his plan of action yet nonetheless coldly calculated to take the risk that others beyond his intended victim would also be harmed.[284]

174. Moreover, pursuant to Article 216 of the Lebanese Criminal Code,[285] material aggravating circumstances are applicable to perpetrators, co-perpetrators and accomplices alike. "Material" circumstances are those linked to the objective element of the crime; for example, breaking and entering is a material circumstance that aggravates the crime of theft. "Personal" circumstances, which are circumstances like premeditation that are linked to the subjective element of the crime, are also applicable to all participants in the crime, but only when these circumstances facilitated the commission of the crime; otherwise, "personal" circumstances are only applicable to the individuals to whom they relate. Therefore, premeditation on the part of the perpetrator is only applicable to accomplices if it facilitated the commission of the additional crime, or if the accomplices share the perpetrator's plan and calmness of mind.[286]

175. To sum up, intentional homicide based on a direct intent leading to the death of the targeted victim falls under Articles 547 and 188 of the Lebanese Criminal Code. Intentional homicide based on *dolus eventualis* leading to the death of unintended victims falls under Articles 547 and 189 of the Code. Premeditation as an aggravating circumstance is applicable to both forms of the crime (with

[284] Court of Justice, *Rachid Karami case*, decision n° 2/1999, 25 June 1999, available on the STL website.

[285] Article 216 provides that: "The effects of material circumstances entailing aggravation or mitigation of or exemption from the penalty shall be applicable to all co-perpetrators and accomplices to an offence. The effects of personal or mixed aggravating circumstances that facilitated the commission of the offence shall also be applicable to them. The effect of any other circumstance shall be applicable only to the person to whom it relates".

[286] Ali Abed El-Kader Kahwaji, *Kanoun al-oukoubat, al-kism al-khass, jara'im al-itida'ala al-masslaha al-aama, wa ala al-insan wal-mal* [Criminal Law, Special section, Crimes against public interest, the human being and property], (Beirut, Al-Halabi publishers, 2002), at 269-270, where the author criticizes a Lebanese judgment which held that premeditation was a material aggravating circumstance. In the same line, Samir Alia. *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998.

direct intent or *dolus eventualis*) and to all perpetrators and accomplices who share the premeditation. If accomplices do not share the premeditation, the premeditation cannot be applied as an aggravating circumstance as to their culpability unless it facilitated the crime. The remaining aspect of the Pre-Trial Judge's questions regarding homicide is how to characterise the result of injury when the perpetrator acted with intent to cause death. This leads us to the treatment of attempt under Lebanese law.

B. Attempted Homicide

176. Under Lebanese law, the attempt to commit specific crimes is provided for in four Articles of the Lebanese Criminal Code:

> **Article 200:** Article 200 was amended by Article 21 of the Act of 5 February 1948, as follows:
>
> Any attempt to commit a felony that began with acts aimed directly at its commission shall be deemed to constitute the felony itself if its completion was prevented solely by circumstances beyond the control of the perpetrator.
> The penalties prescribed by law may, however, be commuted as follows:
> The death penalty may be replaced with hard labour for life or fixed-term hard labour for 7 to 20 years;
> Hard labour for life may be replaced with fixed-term hard labour for at least five years; life imprisonment may be replaced with fixed-term imprisonment for at least five years;
> Any other penalty may be commuted by one half to two thirds.
> Any person who begins to commit an act and then voluntarily desists shall be punished only for acts that he committed which constituted offences *per se*.
>
> **Article 201:** Article 201 was amended by Article 22 of the Act of 5 February 1948, as follows:
>
> If all acts aimed at the commission of a felony were completed but produced no effect owing to circumstances beyond the control of the perpetrator, the penalties may be commuted as follows:
> The death penalty may be replaced with hard labour for life or by fixed-term hard labour for 10 to 20 years;
> Hard labour for life may be replaced with fixed-term hard labour for 7 to 20 years.
> Life imprisonment may be replaced with fixed-term imprisonment for 7 to 20 years, and any other penalty may be commuted by up to one half.
> The penalties mentioned in this Article may be commuted by up to two thirds if the perpetrator voluntarily prevented his act from producing its consequence.
>
> **Article 202:** Article 202 was amended by paragraph 18 of Article 51 of Legislative Decree No. 112 of 16 September 1983, as follows:

Neither an attempted nor an abortive misdemeanour shall be punished except in cases explicitly provided for by law.
The penalty incurred for a completed misdemeanour may be commuted by up to one half in the case of an attempted misdemeanour and by up to one third in the case of an abortive misdemeanour.

Article 203: An attempt shall be punished, even if its aim was unattainable owing to a factual circumstance unknown to the perpetrator. The perpetrator shall not be punished, however, if his act stemmed from a lack of understanding.
Furthermore, a person who commits an act in the mistaken belief that it constitutes an offence shall not be punished.

177. According to Article 200 of the Lebanese Criminal Code, three elements constitute attempt under Lebanese law: (i) an objective element defined as the beginning of the execution of the crime, which consists in a preliminary action aimed at committing the crime[287]; (ii) a subjective element defined as the intent to commit the crime, namely the intent required for the completed offence; and (iii) the absence of a voluntary abandonment of the offence before it is committed.

178. Lebanese law requires a preliminary physical action that marks the beginning of the execution of the crime and should lead, within the normal course of events, to achieving the criminal purpose.[288] This physical act reveals also that the perpetrator's intent is aimed at committing the crime. Therefore a mere preparatory act is insufficient to establish the existence of an attempt.[289] In that respect, Lebanese law requires the preliminary action to reveal both the *actus reus* and the *mens rea* in order to criminalise the attempt.[290] As the Prosecutor notes, the court in the *Al-Halabi* case identified "the planning of an attack, the preparation of weapons, the surveillance of the target, and

[287] Court of cassation, 7th Chamber, decision n°81, 25 March 1997, in *Al-nashra al-kada'iya* [Revue Judiciaire], 1997, vol. 2, at 882 : «Toute tentative de crime manifestée par des actes tendant directement à le commettre».

[288] See Defence Office Submission, para. 150.

[289] Lebanese courts have often discussed the distinction between the beginning of the execution of a crime and a preparatory act. See the Indictment Court (*Chambre d'accusation*) in North Lebanon, decision n°175, 27 November 1995, *Al-Adel* [Journal of the Beirut Bar], 1995, vol. 1, at 429, where the Court held that: "distinguishing between a preparatory act, and the beginning of execution is a relative matter amounting to an evaluation of the nature and the circumstances surrounding the crime intended by the perpetrator [...]. The Lebanese judiciary considers that acts aiming at the commission of the crime are the ones directly connected to the desired result of the crime [...]. The mere preparatory act cannot be punished due to the absence of an objective element to the crime". Compare New Zealand, Court of Appeal, *R v Harpur*, [2010] NZCA 319 (23 July 2010), where the Court held the defendant liable for attempt where his conduct demonstrated a clear intent to complete the offence; he performed a number of acts that, taken together, demonstrated that he had "moved beyond mere preparation"; and his conduct "was proximately connected with the intended offence".

[290] Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 224-225.

the division of roles among the perpetrators" as acts that were aimed directly at the commission of the crime, as required by Article 200.[291]

179. In addition, the beginning of the execution of the crime must be suspended or must have failed due to circumstances independent of the perpetrator's will or beyond his control.[292] On the other hand, the abandonment is considered to be voluntary when it is taken by the perpetrator himself. In that respect, the various reasons motivating the voluntary abandonment, such as pity or remorse, are not pertinent; either way, the attempt to commit the crime ceases to exist. The abandonment can also be partial, such as in the case of a thief who, while breaking into a house, hears some noise and abandons his crime out of fear. Some have said that this is a voluntary abandonment. Others have gone against it. The solution that might be given to such a controversial situation is to leave it to the Judge's evaluation, who decides on a case-by-case basis. Be that as it may, if the abandonment occurs after the commission of the crime, it is no longer a valid abandonment, but a repentance (*repentir actif*) which has no effect on the legal consequences of the criminal act, and does not erase its criminal nature.

180. An additional note should be made to a specific kind of attempt: the abortive offence. Article 201 of the Lebanese Criminal Code provides that these offences occur when all acts aimed at the commission of the crime were completed but produced no effect owing to circumstances beyond the control of the perpetrator.[293] In this respect, the distinction between an attempt to commit a certain crime and an aborted offence is mainly relevant with regard to the sentence to be imposed: Article 202 of the Lebanese Criminal Code provides that the penalty incurred for a completed offence may be commuted by up to one half in the case of attempt but only up to one third in the case of abortive offences.

181. Finally, the situation where a perpetrator commits an intentional homicide against an intended victim and in doing so injures other victims draws some controversy. A first opinion would be to consider that the perpetrator is responsible for personal injury, committed with *dolus eventualis*, based on the assumption that since the perpetrator did not plan a criminal action against the other victims, he should be held responsible only for the actual result of his crime. However, this

[291] Prosecution Submission, para. 61

[292] Court of Cassation, 7th Chamber, decision n° 102, 19 March 2002, in *Cassandre* 3-2002, at 321.

[293] Beirut Criminal Court, decision n° 135, 10 October 1996, *Al-nashra al-kada'iya* [Revue Judiciaire], 1996, vol. I, at 214.

line of thought artificially separates the crime from the perpetrator's intent. The perpetrator's mind is orientated towards the commission of the homicide. Therefore it would seem more logical to hold him responsible for an attempted murder, rather than for personal injury, but this might depend on the specific circumstances of the case.

182. According to all that is mentioned above, an attempt to commit an intentional homicide has occurred, pursuant to Articles 547 and 200 of the Lebanese Criminal Code, when the perpetrator has direct intent to commit homicide and began executing the elements of the crime but did not reach the intended result due to circumstances beyond his control. Where the perpetrator has *dolus eventualis* for intentional homicide against unspecified victims, and where all the elements of the crime have been executed but have not attained the expected result due to circumstances beyond the control of the perpetrator, leading to personal injury instead of death, there has been an aborted offence, pursuant to Articles 547 and 201 of the Lebanese Criminal Code. Finally, if the intended crime was premeditated, the attempt or aborted offence to achieve that crime warrants an aggravated sentence under Article 549 and pursuant to Article 200, which provides that the attempt shall be deemed to constitute the crime itself if its completion was prevented solely by circumstances beyond the control of the perpetrator.

183. In answering the Pre-Trial Judge's question (iv) above regarding the death and injury of unintended victims of a terrorist act,[294] we asserted that the perpetrator might be separately liable for the underlying crime and deferred further discussion until we had discussed the specifics of those crimes. Returning to this question, we can now add that, with regard to the death of unintended victims, the perpetrator is responsible for an intentional homicide on the basis of *dolus eventualis* if he had foreseen the possibility of the additional deaths and accepted the risk of their occurrence. With regard to unintended victims who were injured, the perpetrator is responsible for an aborted intentional homicide, because although the perpetrator has executed all the elements of the crime of intentional homicide with *dolus eventualis*, he did not achieve the expected result for reasons beyond his control.

[294] See above, para. 59.

C. Summary

184. To repeat our answers more concisely to the Pre-Trial Judge's questions, the Tribunal should apply the Lebanese law of intentional homicide (question (ix)). This renders question (x) moot.

185. The elements of the Lebanese crime of intentional homicide (question (xi)) are:

a. An act or a culpable omission aimed at impairing the life of another person;

b. The result of the death of a person;

c. A causal connection between the act and the result of death;

d. Knowledge of the circumstances of the offence (including that the act is aimed at a living person and conducted through means that may cause death); and

e. Intent, whether direct or *dolus eventualis*.

186. Premeditation is an aggravating circumstance, not an element of the crime of intentional homicide. It is a well-conceived and designed plan, prepared with a clear and calm mind and demonstrating a firm and lasting commitment to perpetrate the crime.

187. The elements of attempted homicide under Lebanese law are:

a. A preliminary act aimed at committing the crime (the beginning of the execution of the crime);

b. The subjective intent required to commit the crime; and

c. The absence of a voluntary abandonment of the offence before it is committed.

188. As for question (xii), premeditation can be, in the case discussed above at paragraph 171, an aggravating circumstance for an intentional homicide committed with *dolus eventualis*.

III. Conspiracy (*Complot*)

189. Regarding conspiracy, the Pre-Trial Judge has asked:

> v) In order to interpret the constituent elements of the notion of conspiracy, should the Tribunal take into account, not only Lebanese law, but also conventional or customary international law?
>
> vi) Should the question raised in paragraph v) receive a positive response, is there any conflict between the definition of the notion of conspiracy as recognised by Lebanese law and that arising out of international law, and if so, how should it be resolved?
>
> vii) Should the question raised in paragraph v) receive a negative response, what are the constituent elements of the conspiracy that must be taken into consideration by the Tribunal, from the point of view of Lebanese law and case law pertaining thereto?
>
> viii) As the notions of conspiracy and joint criminal enterprise might, at first sight, share some common elements, what are their respective distinguishing features?

190. Under Lebanese law, conspiracy is provided for in two articles:

> **Article 270 of the Lebanese Criminal Code:** "Any agreement concluded between two or more persons to commit a felony by specific means shall be qualified as a conspiracy".
>
> **Article 7 of the Law of 11 January 1958:** "Every person who enters into a conspiracy with a view to the commission of any of the offences contemplated in the preceding articles shall be liable to the death penalty".

191. We answer question (viii) first, as this will clarify the remainder of the discussion: Lebanese criminal law treats conspiracy as a (fairly particular) substantive crime and not as a mode of liability. On the other hand, the doctrine of joint criminal enterprise relates to modes of criminal responsibility for participating in a group with a common purpose.[295] Although, as the Prosecutor and Defence Office point out, both conspiracy and joint criminal enterprise are based on the existence of an agreement or common purpose, they are entirely distinct concepts.[296]

192. Turning to question (v), we agree with the Prosecution[297] and the Defence Office[298] that the Tribunal must apply Lebanese law, pursuant to Article 2 of the Statute. As with intentional homicide,

[295] See below, paras 236-262.

[296] Prosecution Submission, para. 45; Defence Office Submission, paras 136 and 139.

[297] Prosecution Submission, para. 37.

[298] Defence Office Submission, para. 126.

and also in accord with the positions of the Prosecution and Defence Office,[299] we find no need to interpret the Lebanese law of conspiracy in light of international customary or conventional law, as international criminal law includes no equivalent crime.[300] Thus question (vi) is moot, and we focus our attention on question (vii): identifying the elements of the crime of conspiracy under Lebanese law.

193. Conspiracy in Lebanese law is considered as a form of "criminal agreement", i.e. an agreement between two or more individuals to commit a crime. While Articles 335 to 339 of the Lebanese Criminal Code prohibit other, more inclusive forms of criminal agreement such as "criminal associations" and "secret societies", the crime of conspiracy must involve a criminal plan that threatens security and public order in a State.[301] The intent of the Lebanese legislature to restrict the crime of conspiracy to crimes that threaten State security is revealed by the positioning of the articles related to conspiracy in the Criminal Code. Article 270 is found in Book II, Chapter I of the Criminal Code, titled: "Offences against State security", whereas Article 7 of the Law of 11 January 1958 is found under Chapter II of Title I: "Offences against internal State security" (as it replaces Article 315 of the Criminal Code).

194. Based on the provisions mentioned above, it is possible to identify five elements of the crime of conspiracy[302]: (i) two or more individuals; (ii) concluding or joining an agreement; (iii) aiming at committing crimes against the security of a State; (iv) with a predetermination of the means to be used to commit the crime; and finally (v) a criminal intent.[303]

195. (i) *Two or more individuals:* Conspiracy is a bilateral or multilateral agreement. But there is no requirement concerning the identification of all the participants. This means that a single person

[299] Prosecution Submission, para. 38; Defence Office Submission, para. 129.

[300] As the Defence Office notes (paras 129-130), the only substantive crime of conspiracy that has developed in international criminal law is the conspiracy to commit genocide, which is materially distinct from the crime referred to as "conspiracy" under the Lebanese Criminal Code, namely the conspiracy to commit a crime that will threaten State security.

[301] See para. 198.

[302] Court of Justice, *Ballamand Monastry case,* decision n° 124/1994, 26 October 1994, cited in Elias Abou Eid, *Al-qararat al-kubra fi al-ijtihad al-loubnani wal-moukaran* [The major decisions in Lebanese and comparative jurisprudence], vol. 22, at 98. It should however be noted that the Lebanese case law on conspiracy is very sparse. In the aforementioned case, although the Court did not convict the accused of conspiracy, it however identified all the constituent elements of the crime.

[303] Mohammed El-Fadel, *Jara'im amen al dawla,* [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 83.

can be tried for conspiracy, when it is proved that he agreed with others to commit the relevant crime, even though these "others" remain unknown.[304]

196. (ii) *An agreement:* Seen as a merger of wills, the agreement is reached when the conspirators agree completely, and their agreement is final. It falls to the prosecution to prove these elements and that the conspirators' wills were consolidated and united towards committing the crime. Furthermore, no specific form for the agreement is required. The simple combination or fusion of wills is enough. Even though it is unlikely for a conspiracy agreement to be created otherwise, no secrecy in the process is required. The agreement can be conditional, depending on a foreseeable particular circumstance or a likely future event. In other words, the conspirators can agree on the commission of the crime if the circumstance or the event occurs. For conspirators joining the conspiracy later, they must also meet this merger of wills requirement. Finally, no explicit time-line is required for the validity of the agreement. The agreement stands, even though it is a long-term one or has no predefined or foreseen term.

197. (iii) *The aim of the agreement is to commit a crime against the security of the State:* As mentioned above, the agreement has to be geared to the commission of a particular type of crime. The word "crime" is used here *stricto sensu*, to indicate a felony. Therefore, no conspiracy is possible for misdemeanours, unless provided separately by the law. Furthermore, a specific type of crime is designated, as opposed to all crimes: those committed against State security. The need for a specific aim is justified by the fact that conspiracy draws its criminal characterisation from the criminal classification of the purpose that the conspirators aim to achieve. Therefore, if an agreement between two or more individuals was not directed at committing a crime against State security, but was aimed at committing a different crime, it cannot be considered a "conspiracy". It may, however, be characterised as a "criminal association" under Article 335 of the Lebanese Criminal Code. In a conspiracy to commit terrorism, the purpose of the conspirators must therefore be the commission of an act of terrorism. Conspiracy to commit terrorism is expressly penalised under Article 7 of the Law of 11 January 1958.

198. The crimes against State security are listed in articles 273 to 320 of the Lebanese Criminal Code. In addition to terrorism, they include: treason, espionage, illegal relations with the enemy,

[304] Mohammed El-Fadel, *Jara'im amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at. 89.

violations of international law, the infringement of the State's prestige and of the "national sentiment" (*sentiment national*), crimes committed by suppliers (during war time), crimes against the Constitution, the illegal exercise (*usurpation*) of a civil or political power or of a military command, sedition, terrorism, crimes against national unity, or crimes disturbing the harmony between the people, the infringement of the State credit, or financial position (*le crédit de l'Etat*). However, the jurisdiction of this Tribunal only extends to conspiracy to commit acts of terrorism.[305]

199. (iv) *The means used to commit the crime:* The agreement has also to contemplate the means and tools that the conspirators want to use to commit the crime. The agreement would be incomplete, and the conspiracy would not stand, if the conspirators did not agree on the means to achieve their aim.[306] However, a precise determination of the means is not required. If the conspirators agree that they will use a means described as terrorist, it is sufficient to say that they agree on the means to execute the agreement. In this respect, the conspiracy to commit a terrorist act must include agreement on means meeting the requirements of Article 314, in other words, means liable to create a public danger.

200. (v) *The criminal intent:* Conspiracy is an intentional crime. The intent must relate to the object of the conspiracy: the perpetrators are aware that the purpose of conspiracy is to engage in criminal conduct against State security. Further, the mere existence of the agreement fulfils the criminal intent.[307] Criminal intent does not materialise if a co-conspirator believed that the conspiracy, which afterwards turned out to be unlawful, was instead lawful. As with all intentional crimes, the motive is not taken into consideration, unless to mitigate or aggravate the sentence. With regard to attempt, it does not exist in conspiracy. Before the merger of wills, there is no crime; after the merger of wills, the crime of conspiracy has already been executed. As the Prosecutor notes, "Under Article 270 of the [Lebanese Criminal Code], the agreement '*is the crime itself*'. Conspirators are punishable even though they did not materialise their agreement to commit felonies

[305] See Article 2 STLSt.

[306] Mohammed El-Fadel, *Jara'im amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 94.

[307] Samir Alia, *Al-wajiz fi chareh al-jara'im al-wakiaa aala amen al-dawla – Dirassa moukarana* [Explanation of the Crimes committed against State security – Comparative study], 1st edn. (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1999, at 88.

against state security."[308] Thus there can be no "attempted conspiracy". All conduct preceding this merger is but a mere preparatory act.[309]

201. In addition, without entering into details with regard to modes of liability, which will be examined below, special attention should be paid to complicity to commit conspiracy. Complicity is admissible in conspiracy, since an accomplice can in fact bring his support to the crime without adhering to the agreement itself, such as in the case of an individual offering his residence as a meeting point for the conspirators, or acting as an intermediary to bring together the conspirators. The accomplice must rely on the means provided for in Article 219 of the Lebanese Criminal Code,[310] without entering the agreement and without participating in establishing the plans or deciding on the means. He however should be *aware* of his participation in the commission of conspiracy.[311]

202. To summarise our answers to the Pre-Trial Judge's questions: The Tribunal should apply the Lebanese law of conspiracy (question (v)). This renders question (vi) moot. The elements of conspiracy under Lebanese law (question (vii)) are:

a. Two or more individuals;

b. Who conclude or join an agreement;

c. Aimed at committing crimes against State security (for purposes of this Tribunal, the aim of the conspiracy must be a terrorist act);

d. With an agreement on the means to be used to commit the crime (which for conspiracy to commit terrorism must satisfy the "means" element of Article 314);

e. The existence of a criminal intent.

[308] Prosecution Submission, para. 51 (quoting Judgment No3/1994, 26 October 1994) (footnote omitted).

[309] Mohammed El-Fadel, *Jara'im amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 97.

[310] We discuss Article 219 further below, see paras 218-224.

[311] Mohammed El-Fadel, *Jara'im amen al dawla*, [Crimes against State security], 2nd ed., (Damascus: Damascus University publishings,1963), at 98-99, Samir Alia, *Al-wajiz fi chareh al-jara'im al-wakiaa aala amen al-dawla – Dirassa moukarana* [Explanation of the Crimes committed against State security – Comparative study], 1st edn. (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1999, at 80-81.

203. Finally, as for question (viii), the notions of conspiracy (under Lebanese law) and joint criminal enterprise are distinct: the former is a substantive crime, the latter is a mode of criminal responsibility.

SECTION II: MODES OF RESPONSIBILITY

I. Harmonising Articles 2 and 3 of the Tribunal's Statute

204. Close scrutiny of Articles 2 and 3 of the Tribunal's Statute shows that, in some respects, these two provisions may overlap, because they both deal with modes of responsibility (although Article 2 also contemplates the crimes subject to the Tribunal's jurisdiction). It is this ambiguity that motivates the Pre-Trial Judge's thirteenth question:

> xiii) In order to apply modes of criminal responsibility before the Tribunal, should reference be made to Lebanese law, to international law or to both Lebanese and international law? In this last case, how, and on the basis of which principles, should any conflict between these laws be resolved, with specific reference to commission and co-perpetration?

In answering this question, we will also discuss in greater depth questions (iv) and (xii), which relate to the characterisation of offences in the presence of *dolus eventualis*.

205. Article 2 states that the Tribunal shall apply provisions of the Lebanese Criminal Code relating to "criminal participation" (as a mode of responsibility) and "conspiracy", "illicit association" and "failure to report crimes and offences" (as crimes *per se*).

206. Article 3 incorporates principles of international criminal law regarding various modes of criminal liability, including commission, complicity, organising or directing others to commit a crime, and contribution to the commission of crimes by a multitude of persons or an organised group. The language of Article 3 draws verbatim from the Statutes of the ICC, the ICTY, the Nuremberg International Military Tribunal, and the more recent international conventions against terrorism; it reflects the status of customary international law as articulated in the case law of the ad hoc tribunals.[312] It thus implicitly incorporates into the Tribunal's Statute the body of international law setting out and applying these principles of individual criminal responsibility. However, as the Secretary General noted in his report to the Security Council on the establishment of this tribunal,

[312] Compare Article 3(1)(b) of the STL Statute to Article 25(3)(d) of the Rome Statute of the ICC, Article 2(3) of the International Convention for the Suppression of Terrorist Bombing, and Article 2(4) of the International Convention for the Suppression of Acts of Nuclear Terrorism; Article 3(2) of the STL Statute to Article 28(b) of the Rome Statute of the ICC; and Article 3(3) of the STL Statute with Article 7(4) of the ICTY Statute and Article 8 of the Charter of the IMT. See also Article 7(3) ICTYSt; Article 33 ICCSt; *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, S/2006/893 (2006), para. 26. See also cases cited below in footnotes 355-362.

Article 3(1)(a) also "reflect[s]" the Lebanese Criminal Code,[313] presumably the provisions on criminal participation referenced in Article 2.

207. Since the matters covered by Article 2 are regulated by Lebanese law, whereas the concepts envisaged in Article 3 are governed by international criminal law, the question before us is how to harmonise the two bodies of law whenever there appears to be inconsistencies or differences in legal regulation.

208. According to the Prosecutor, while the Statute does not provide any express rule on the hierarchy applicable to the modes of criminal responsibility set out in Articles 2 and 3 of the Statute, the sentence in Article 2 "subject to the provisions of the Statute" "could be interpreted to mean that Article 3 modes of responsibility take precedence over any conflicting provision of the Lebanese law made applicable under Article 2, thereby indicating a preference for Article 3 modes of criminal responsibility over those in Lebanese law".[314] However, according to the Prosecutor, the better interpretation is that the Statute "allows for the application of modes of criminal responsibility from both Lebanese law and international criminal law",[315] with the consequence that "there exists no actual conflict between Articles 2 and 3" of the Statute.[316] The Prosecutor goes on to say that "no issue relating to conflicting modes of criminal responsibility arises so long as the Prosecutor has specified the meaning and elements of any mode of criminal responsibility it [*sic*] alleges in an indictment".[317] Insisting on the practical side of the application of the two provisions in question, the Prosecutor notes that "in any case, any potential unfairness or legal difficulty arising out of charges based on provisions from both Articles 2 and 3 may be resolved prior to trial and in any case would not result in any prejudice or unfairness to an accused".[318] In the Prosecutor's view, "[c]onsistent with the aims of uncovering the truth and ensuring the highest international standards of justice, the mode [of criminal responsibility] that most accurately captures the conduct of an accused may be applied".[319]

[313] S/2006/893 (2006), para. 26.
[314] Prosecution Submission, para. 71.
[315] Prosecution Submission, para. 85.
[316] Prosecution Submission, para. 107.
[317] Prosecution Submission, para. 89.
[318] Prosecution Submission, para. 107.
[319] Prosecution Submission, para. 107.

209. The Defence Office takes a radically different view. In its opinion Lebanese criminal law is "the controlling law" for the Tribunal with regard both to the definition of crimes and to modes of responsibility, since one may not disentangle one "segment" of law from the other: as both areas of criminal law are subjected to and safeguarded by the principle of legality, the exclusive application of Lebanese criminal law to crimes under the Tribunal's jurisdiction perforce entails that also modes of responsibility must be exclusively regulated by Lebanese criminal law. In consequence:

> If the Tribunal's Statute provides for a particular mode of liability but that [*sic*] this particular mode of liability did not exist in Lebanese criminal law (the *controlling* body of criminal law) at the relevant time, the Tribunal would have no authority to apply it. The same would be true where an international tribunal applies a form of liability that does not exist in the *controlling* legal order (Lebanese criminal law for the STL; customary international law for the ICTY). In *Stakic*, for instance, the ICTY Appeals Chamber found that the Trial Chamber had erred when relying upon a doctrine of liability ("co-perpetratorship") that did not exist in its *controlling* legal order (i.e., customary international law). Where a mode of liability is either absent from the text of the Statute or is provided for in the Statute but did not exist under Lebanese criminal law at the relevant time, the Tribunal would have to refuse to apply that particular mode of liability as it would fall beyond the realm of its permissible statutory framework (as is set by a combination of the text of the Statute and a *renvoi* to Lebanese criminal law) and would violate the principle of legality.[320]

According to the Defence Office this approach would mean that, should the Prosecution seek to indict any individual on the basis of Article 3(1)(b), "the Pre-Trial Judge would [...] be required to decline to do so with a view to remain[ing] within the permissible boundaries of his jurisdiction and to protect the principle of legality".[321] Another consequence that the Defence Office draws from its general approach to modes of responsibility in the Statute, is that "neither of the 'modes of liability' provided in Article 3(2) and 3(1)(b) of the Statute are applicable to proceedings before this Tribunal."[322]

210. In the end, we agree with neither the Prosecution nor the Defence Office. Several principles guide our analysis, and should also guide the Pre-Trial Judge and the Trial Chamber when they consider specific cases before them. The Tribunal must reconcile any inconsistencies between Articles 2 and 3 in light of the general principles of interpretation enunciated above. First, as discussed above regarding the definition of terrorism, the drafters of the Statute favoured Lebanese law over international criminal law in terms of substantive crimes, as set out in Article 2. However,

[320] Defence Office Submission, para. 153.
[321] Defence Office Submission, para. 163.
[322] Defence Office Submission, para. 165.

and this is our second remark, Article 2 also includes the proviso that Lebanese law, including the regulation of "criminal participation", should apply "subject to the provisions of this Statute", and it is clear that the drafters of the Statute intended to incorporate through Article 3 modes of criminal responsibility recognised in international criminal law. The Appeals Chamber cannot just assume that Article 3 was a mistake and should not be considered part and parcel of the Statute. Third, the principle of *nullum crimen* (in particular, its non-retroactivity requirement) applies not only to substantive crimes, but also to modes of criminal responsibility.

211. Applying these three principles, we conclude that generally speaking the appropriate approach is to (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of the international criminal law embodied in Article 3; (ii) if there is no conflict, apply Lebanese law; and (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused.

212. We do not undertake here a comprehensive survey of the modes of criminal responsibility that may be charged and prosecuted before this Tribunal. Instead we consider two particular modes: (i) perpetration and co-perpetration, under Lebanese and international law (including joint criminal enterprise as a mode of perpetration and co-perpetration under international law), as specifically mentioned by the Pre-Trial Judge in question (xiii); and (ii) complicity (or aiding and abetting), which shows how a conflict between Lebanese and international criminal law could result in the application, in this particular instance, of Lebanese law.[323]

[323] We do not, for example, consider "instigation", a significant mode of criminal responsibility under Lebanese law.

II. Modes of Liability

A. Perpetration and Co-Perpetration

1. Lebanese Law

213. Pursuant to Article 212 of the Lebanese Criminal Code, "[t]he perpetrator [*auteur*] of an offence is anyone who brings into being the constitutive elements of an offence or who participates directly in its commission". Thus, the perpetrator must have accomplished the objective and subjective elements of the crime. A co-perpetrator (*co-auteur*) is anybody who has cooperated in the execution of those elements. Under Article 213 of the Lebanese Criminal Code, "[e]ach of the co-perpetrators of an offence shall be liable to the penalty prescribed by law for the offence".

214. In what we will term "core" co-perpetration, a co-perpetrator is a person who executes the same action as the perpetrator. For instance, according to the Lebanese Court of cassation, the second defendant who, sharing the same mens rea, had fired on the victim who had remained alive after being shot at by the first defendant must be considered as co-perpetrator.[324]

215. Lebanese law also recognises cases where the co-perpetrator might commit some but not all of the objective elements of the crime, or even provide a supporting or instigative role in the crime without himself committing it. For example, a co-perpetrator may participate in a crime that requires multiple actions (thus, the forgery of a document may be committed by two persons, one forging the content of the document, the other the signature). Under the second form of perpetration mentioned in Article 212 of the Lebanese Criminal Code, namely a direct contribution to the commission of the crime, the agent who plays a principal and direct role in the commission of the crime can also be a co-perpetrator, even though his role does not fulfil all the objective elements of the crime (for example, in the event of a theft, one person knocks down the door of a house while another steals the money inside).[325] In the *Attempted Assassination of Minister Michel Murr* case, the Court of Justice noted that two defendants who helped plan a car bombing—by devising the plan, supervising its implementation, arranging for surveillance of the target, and making preparations for the execution

[324] Court of Cassation, decision n° 170, 24 May 2000, in *Cassandre* 2002 See also Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 301.

[325] *Id* at 301-302 and footnote 73, where the author cites relevant Lebanese cases.

of the crime—"participated in bringing about elements of the crimes of intentional homicide and attempted homicide" and thus were guilty as co-perpetrators of those crimes under Article 213 of those Lebanese Criminal Code.[326] Further, under Article 213, such a co-perpetrator would receive a heavier penalty if he "organizes the participation in the offence or directs the action of the persons taking part in it". These additional concepts of co-perpetration, however, will be considered in greater depth below, under "Participation in a Group with a Common Purpose."

2. International Criminal Law

216. The essential concepts of international criminal law on this subject are not dissimilar from the core concept described above. The perpetrator, according to international criminal law, includes whoever physically carries out the prohibited conduct, with the requisite mental element. When a crime is committed by a plurality of persons, all persons performing the same act (as for instance in the case of a military unit firing on civilians) are termed co-perpetrators, namely persons who take part in the actual commission of the crime, with the same mens rea.[327]

3. Comparison between Lebanese and International Criminal Law

217. The above examination shows that the two sets of rules in fact overlap in terms of perpetration and the core concept of co-perpetration (where all actors engage in the objective and subjective elements of the crime). Thus both international and Lebanese case law may be considered in applying the notion of core co-perpetration. Although Lebanese law includes additional concepts of co-perpetration, such concepts are more akin to the notion of Joint Criminal Enterprise ("JCE") in international criminal law and will be considered below under "Participation in a Group with a Common Purpose."

B. Complicity (Aiding and Abetting)

1. Lebanese Law

218. Article 219 of the Lebanese Criminal Code provides as follows:

[326] See *Murr case* at p. 54 of the English translation, available on the STL website.

[327] United States Military Commission, *Trial of Rear-Admiral Nisuke Masuda and Four Others of the Imperial Japanese Navy* ("The Jaluit Atoll Case"), Case No. 6, 7 December 1945 – 13 December 1945, United Nations War Crimes Commission – Law Reports of War Criminals, Vol. I, p. 71.

Article 219 was amended by Article 11 of Legislative Decree No. 112 of 16 September 1983, as follows.

The following shall be deemed to be accomplices to a felony or misdemeanour:

1 Anyone who issues instructions for its commission, even if such instructions did not facilitate the act;
2 Anyone who hardens the perpetrator's resolve by any means;
3 Anyone who, for material or moral gain, accepts the perpetrator's proposal to commit the offence;
4 Anyone who aids or abets the perpetrator in acts that are preparatory to the offence
5 Anyone who, having so agreed with the perpetrator or an accomplice before commission of the offence, helped to eliminate the traces, to conceal or dispose of items resulting therefrom, or to shield one or more of the participants from justice;
6 Anyone who, having knowledge of the criminal conduct of offenders responsible for highway robbery or acts of violence against state security, public safety, persons or property, provides them with food, shelter, a refuge or a meeting place.

219. The *objective* elements of complicity are (i) an understanding (whether immediate or long-standing),[328] (ii) assistance in a form specified in Article 219,[329] and (iii) conduct by the perpetrator amounting to a crime. As to the second element, Lebanese case law has insisted on the notion that no conduct other than that enumerated exhaustively in the six subheadings of Article 219 may amount to complicity.[330] As these six forms of accomplice liability make clear, however, the assistance can be provided (i) before the crime, such as in the examples mentioned under subparagraphs 1, 2 and 3, (ii) during the perpetration of the crime, amounting to the sole example under subparagraph 4, or (iii) thereafter, as in subparagraphs 5 and 6.

220. The *subjective* elements are: (i) *knowledge* of the intent of the perpetrator to commit a crime; and (ii) *intent* to assist the perpetrator in his commission of the crime.[331] Thus, the fact of indicating

[328] Court of cassation, 3rd Chamber, decision n° 457, 17 November 2002, in *Al-Adel* [Journal of the Beirut Bar] 2003, at 261; 3rd Chamber, decision n° 30, 29 January 2003, in *Cassandre*, 1-2003, at 87; 3rd Chamber, decision n° 171, 2 July 2003, in *Cassandre*, 7-2003, at 120.

[329] Beirut Court of Appeal, criminal Chamber, decision n° 277, 18/12/2007, *Al-Adel* [Journal of the Beirut Bar], 2008, vol. 2, at 886.

[330] See Court of cassation, 5th Chamber, decision n°112, 25 March 1974, in S. Alia (ed). *majmouat ijtihadat mahkamat al-tamyiz* [Samir Alia's collection of the Court of cassation decisions], at 188; Court of cassation, 7th Chamber, decision n°8, 11 January 2000, *Sader fil-tamyiz* [Sader in the cassation], 2000 at 849. See also Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 319.

[331] See Court of cassation, 7th Chamber, decision n° 8, 11 January 2000, in *Cassandre* 1-2000, at 94; Court of Cassation, 3rd Chamber, decision n° 457, 27 November 2002, in *Al-Adel* [Journal of the Beirut Bar], 2003, vol. 2-3, at 261; Beirut Criminal court, decision n°29, 18 December 2007, in *Al-Adel* [Journal of the Beirut Bar], 2008, at 886. Court of cassation 3rd Chamber, decision n° 171, 2 July 2008, in *Cassandre* 7-2008, at 120

to the perpetrator the house of the victim and ascertaining the victim's schedule to assist in the commission of the crime would amount to complicity.[332] Instead, bare knowledge that a crime will be committed or its perpetration is being prepared but without any conduct by way of assistance; or, by contrast, the provision of assistance without awareness that such assistance is designed to help commit a crime, do not amount to complicity.[333]

221. If the crime actually committed is less serious than that for which the accomplice had provided his assistance (for instance, he had provided a weapon to kill the victim, whereas the perpetrator, at the moment of committing the crime, decided to use the weapon not to kill the victim but only the wound him or her), then the accomplice is responsible for the crime actually committed, even if less serious than the one he had intended. If the crime committed is more serious than that for which the accomplice had given his assistance (for instance, the accomplice had intended to provide his assistance for the execution of robbery, whereas the perpetrator killed a person), the accomplice is only guilty for the less serious crime, unless the prosecutor can prove that he had foreseen the possibility of perpetration of the more serious crime and willingly took the risk of its commission (*dolus eventualis*).[334] A third scenario is to be envisaged as well, such as if the intended offence was altered by aggravating circumstances. In this case, the provisions of Article 216 of the Lebanese Criminal Code as explained under paragraph 174 above apply.

222. Article 220 further provides: "An accomplice without whose assistance the offence would not have been committed shall be punished as if he himself were the perpetrator." Whenever the accomplice plays a minor role with respect to that of the principal perpetrator, his penalty will be less heavy. If instead his role is crucial, in that, under Article 220, the perpetration is impossible without his participation, his guilt is equal to that of the principal perpetrator and the penalty is the same.[335]

223. Lebanese case law has specified that (i) complicity may consist of an omission, in which case the accomplice is punished if he was duty bound to prevent commission of the crime and has

[332] Court of cassation, 5th Chamber, decision n° 41, 22 July 1972, in in S. Alia (ed). *majmouat ijtihadat mahkamat al-tamyiz* [Samir Alia's collection of the Court of cassation decisions], vol. 3, at 172).

[333] Court of cassation, criminal Chamber, decision n° 112, 25 March 1974, in S. Alia (ed) *majmouat ijtihadat mahkamat al-tamyiz* [Samir Alia's collection of the Court of cassation decisions], vol. 4, at 188; Court of cassation, criminal Chamber, decision n° 135, 28 June 1995, in *Cassandre* 6-1995, at 97.

[334] Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 330-331.

[335] Court of cassation, 7th Chamber, decision n° 123, 21 June 2004, in *Cassandre* 6-2004, at 1028.

refrained from accomplishing his duty (this for instance applies to police officers), or where the passive conduct of the accomplice amounts to strengthening the resolve of the perpetrator to commit a crime;[336] (ii) complicity is punished even if the primary author of the crime is not punishable (for instance, he is a minor or is mentally incapacitated); (iii) where the perpetrator is guilty of an attempted crime, complicity is punished if the perpetrator has commenced the execution of the crime; (iv) complicity is punished even if the crime was committed abroad and falls under foreign jurisdiction; (v) conversely, if the crime is committed in Lebanon but the action by an accomplice took place abroad, complicity shall nevertheless be punished in Lebanon.

224. A case of complicity in terrorism is *Bombing of the Church of our Lady of Deliverance in Zouk Mikayel* (decision of 13 July 1996, no. 4/1996). The Court of Justice found that a defendant was an accomplice to terrorism where his acts:

> were confined to aiding and abetting the perpetrators in their preparation for the bombing by attending the meetings that were held to plan the operation, by helping to assemble one of the explosive devices, and by providing guidelines for the execution of the bombing operation, in the form of a sketch of the interior and exterior of the church, which enabled the perpetrators to determine the manner in which they should enter the church and the time and place at which they should plant the two explosive devices therein. He did that in full awareness of the perpetrators' intent.[337]

2. International Criminal Law

225. Aiding and abetting an international crime involves participating in the crime by assisting the principal in the commission of the criminal offence in the knowledge that the conduct of the principal perpetrator is criminal, even if the accomplice does not share the precise criminal intent of the principal perpetrator.

226. The *objective element* of accomplice liability is the accomplice's practical assistance, encouragement, or moral support to the principal perpetrator. In addition, such assistance or support

[336] See Mount-Lebanon Indictment Chamber (*Chambre d'accusation*), decision n° 304/1993, 21 October 1995, in R. Riachi (ed.), *Majmouat ijtihadat al-hay'a al-ittihamiy - tatbikat amaliya lil kaida al-kanouniya* [Collection of the decisions of the indictment Chamber - application of legal concepts], 3rd ed. (Beirut: Sader publishings, 2010), at 217. This would be the case of a husband who drives his wife to rob a bank, and waits for her outside in the car, or the example of a man who accompanies his mistress to the clinic where she is scheduled for an abortion (in the countries where abortion is prohibited), in which case he has provided the doctor, perpetrator of the abortion, with the necessary moral support or moral incentive to proceed with the said abortion. See also Samir Alia, *Shareh kanoun al-oukoubat, al-kism al-3am* [Explanation of the Criminal Code, General section], (Beirut: Al-mou'assassa al-jami'iya lil dirassat wal nasher wal tawzi'), 1998, at 320-321, and footnote 130 where the author cites relevant Lebanese cases.

[337] English translation, at p. 101.

must have a *substantial effect* on the perpetration of the crime. This assistance may be provided in the form of positive action or omission, and it may be provided before, during or after perpetration of the crime.[338] Furthermore, the assistance may be physical (or tangible) or moral and psychological.[339]

227. The *subjective element* of aiding and abetting resides in the accessory having *knowledge* that "his actions will assist the perpetrator in the commission of the crime".[340] Thus, this subjective element consists of two requirements: (i) awareness that the principal perpetrator will use the assistance for the purpose of engaging in criminal conduct, and (ii) intent to help or encourage the principal perpetrator to commit a crime. It is not required that the accessory be fully cognizant of the specificities of the crime that will be committed by the perpetrator.[341] Indeed, aiding and abetting does not presuppose that the accomplice shares a common plan or purpose with the principal perpetrator or his criminal intent; as stated by the ICTY Appeals Chamber in *Tadić*, at "the principal may not even know about the accomplice's contribution".[342] Instead, the aider and abettor is required to be aware either of the criminal intent of the perpetrator or at least of the *substantial likelihood* that the perpetrator will commit a crime.[343] In other words, it may suffice for the accomplice to entertain what in certain legal systems is defined as "advertent recklessness" (*dolus eventualis*) with regard to the specific conduct of the principal perpetrator,[344] if there is also an intent to encourage or enable

[338] See, e.g., ICTY, *Aleksovski*, Trial Judgment, 25 June 1999 ("*Aleksovski* TJ"), para. 62; ICTY, *Blaškić*, Appeal Judgment, 29 July 2004 ("*Blaškić* AJ"), para. 48.

[339] See ICTY, *Furundžija*, Trial Judgment, 10 December 1998 ("*Furundžija* TJ"), para. 231.

[340] See *Furundžija* TJ, para. 245; ICTY, *Kunarac et al*, Trial Judgment, 22 February 2001, para. 392; *Vasiljević* TJ, para. 71; ICTY, *Delalić*, Appeal Judgment, 20 February 2001, para. 352; ICTY, *Tadić*, Appeal Judgment, 15 July 1999 ("*Tadić* AJ"), para. 229; *Blaškić* AJ, para. 46; ICTY, *Krnojelac*, Appeal Judgment, 17 September 2003, para. 52; see also ICTR, *Ntakirutimana*, Trial Judgment, 21 February 2003, para. 787; ICTR, *Kajelijeli*, Trial Judgment, 1 December 2003, para. 766; ICTR, *Kamuhanda*, Trial Judgment, 22 January 2004, para. 597. In the ICC Statute aiding and abetting is envisaged in Article 25(3)(c), whereby a person is responsible if he, 'For the purpose of facilitating the commission of such a crime [i.e. a crime within the jurisdiction of the Court], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.'

[341] *Furundžija* TJ, para 246; *Blaškić* AJ, para. 50

[342] *Tadić* AJ, para. 229.

[343] In *Furundžija* an ICTY Trial Chamber held that 'it is not necessary that the aider and abettor should know the precise crime that was intended and which in the event was 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 that crime, and is guilty as an aider and abettor.' *Furundžija* TJ, para. 246. Another ICTY Trial Chamber supported this proposition in *Blaskić* (Trial Judgment, 3 March 2000, para. 287), and the Appeals Chamber concurred in it in its judgment in *Blaškić* AJ, para. 50. However, when the principal crime requires specific intent, such as genocide or persecution, the accused must have known that the person or persons he is aiding or abetting possessed that specific intent—*i e*, the genocidal or discriminatory intent. ICTY, *Popović et al*, Trial Judgment, 10 June 2010, para. 1017.

[344] As an SCSL Trial Chamber put it, "[t]he *mens rea* required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator" *Brima et al*, Trial Judgment, 20 June 2007, para. 776.

the principal's criminal conduct. This accords with fundamental principles of criminal law: if someone provides a gun to a well-known thug with the knowledge that it will be used (or is reasonably likely to be used) to commit a crime, he is liable for aiding and abetting whatever that crime is, regardless of whether he was fully aware of the specific crime the thug intended to perpetrate.[345]

3. Comparison between Lebanese and International Criminal Law

228. It is apparent from the above that to a large extent the Lebanese notion of complicity and the international notion of aiding and abetting overlap, with two important exceptions. First, Lebanese law limits the objective element to the discrete list of means of support included in Article 219: accomplice liability only attaches if support is provided through one of the enumerated means. Second, Lebanese law generally requires an accomplice to *know* of the crime to be committed, to join with the perpetrator in an *understanding*, whether immediate or long-standing, to commit the crime, and to share in the intent to further that particular crime. Thus the Lebanese Criminal Code's concept of complicity should be applied as it is more protective of the rights of the accused..

C. *Other Modes of Participation in Criminal Conduct*

1. Lebanese Law

229. We shall now examine how Lebanese law and international criminal law regulate other modes of participation in criminality, that is, modes of participation in collective crimes (crimes committed by a multiplicity of persons) other than co-perpetration or complicity.

As stated by the ICC in another context, "[t]he concept of [simple] recklessness requires only that the perpetrator be aware of the existence of a risk that the objective elements of the crime may result from his or her actions or omissions, but does not require that he or she reconcile himself or herself with the result [which is instead required by *dolus eventualis*]. In so far as recklessness does not require the suspect to reconcile himself or herself with the causation of the objective elements of the crime as a result of his or her actions or omissions, is it not part of the concept of intention." ICC, *Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, fn. 438.

[345] As an example of this general principle of law applied in national courts, consider the *van Anraat* Case before the Hague Court of Appeal (Judgment of 9 May 2007). The accused had provided to Iraq, between 1980 and 1988, the chemical raw material TDG (Thiodiglycol) necessary for the manufacture of the mustard gas that the Iraqi Government had then used against the Kurds in 1987-88. The Court applied Dutch law, which does not require that the assistance provided by the accessory be indispensable or make a "causal contribution" to the main offence; it simply requires that "the assistance offered by the accessory [should] promote the offence or [make] it easier to commit that offence" (at para. 12.4). The Court first found that the accused *knew* that the quantity of TDG he provided could only be used to produce mustard gas (at para. 11.10) and then found that the accused *was aware of the high risk of use of the mustard gas in war*, particularly given the "unscrupulous character of the then Iraqi regime." (at para. 11.16).

230. We have seen above (paragraph 215) that Lebanese law provides not only for crimes committed by two or three persons performing the same act (*co-auteurs*), but also for co-perpetration of collective crimes where each member of a group plays a *different role* in the commission of the crime. In this case all the members of the group are held responsible for the same crime if they had previously agreed upon its perpetration (common intent).

231. Lebanese law also provides for the situation where one of the co-perpetrators commits an act that had not been agreed upon or envisaged by other co-perpetrators. For such situations, Lebanese law relies upon the notion of *dolus eventualis*: the co-perpetrators are responsible for the offence not agreed upon if they had envisaged that the additional crime might be committed and had willingly run the risk that it be committed. If instead they had not been aware of the possibility that the additional crime might be committed, they are responsible only for the agreed upon crime, whereas the perpetrator of the extra crime alone bears responsibility for that crime (in addition of course to shared responsibility for the agreed upon crime).

232. As stated above under the terrorism and other offences sections, *dolus eventualis*, as provided for under Article 189 of the Lebanese Criminal Code, is considered to be equivalent to direct intent (*dol direct*). This was held by the Court of cassation in its decision of 22 February 1995,[346] where the Court asserted that "the predictability of the criminal outcome and its acceptance by the author constitutes *dolus eventualis*, which, in its legal value, can be equated with criminal intent (*dol direct*)."

233. The relevance of *dolus eventualis* is confirmed by Lebanese jurisprudence. A case related to burglary can be mentioned. The common intent of the burglars was simply to steal goods in a house expected to be empty, for the owners were to be elsewhere. But all the offenders who entered the house carried loaded firearms. In fact, some of the owners were at home and forcefully resisted the robbery. As a result, one of the two burglars who had entered the house shot and killed one of the owners. The question arose whether the three robbers who had remained outside the house to act as look-outs were also responsible for the murder. In a decision of 8 February 1994, the *Chambre d'accusation* of Mount Lebanon held that the co-perpetrators (*co-auteurs*) who had remained outside also bore responsibility for the murder, for they should have expected that the other co-perpetrators,

[346] Court of cassation, criminal Chamber, decision n° 52, 22 February 1995, *Cassandre* 2-1995, at 92.

being armed, would use their weapons if need be.[347] Another case illustrating the role of *dolus eventualis* is *Aailan v. Al-Saka*, brought before the 6th Criminal Chamber of the Court of cassation.[348] A person had given a weapon to another person to rob a jeweller. The latter person, during the armed robbery, killed two persons. The Court held that the former person was guilty as an "instigator" for the crime of robbery. He was also guilty as "accomplice" for the crime of armed robbery and murder. According to the Court "the accomplice" "had foreseen the possibility of the perpetration of murder and had accepted its result or risk."

234. Another case of *dolus eventualis* relates to terrorism. In the Karami case, the Court of Justice found that the accused had instigated the assassination of Mr Karami, a former prime minister and a political adversary. The Court found that, in organising the assassination of Mr Karami by blowing up the helicopter in which he was a passenger, there was no evidence that the accused had "also instigated [the perpetrator] to kill the persons who were accompanying Karami on board the helicopter, whether the passengers or the pilot." There was also no evidence "that the executed assassination plan was drawn up by [the accused], or that [the accused] chose the means of execution."[349] The Court concluded that "there is no way to consider [the accused] as an instigator for the killing of the helicopter's passengers and pilots."[350] The Court then underlined that the accused had predicted the crime, had anticipated its consequences and accepted the risk; however, through complex reasoning,[351] the Court concluded that the accused was guilty as an "accomplice" under Article 219 paras 2 and 3 of the Lebanese Criminal Code for the wounding of the persons accompanying Karami, in that he had "hardened the resolve of the perpetrator" and had accepted "for material or moral gain, the perpetrator's proposal that he should commit the offence".[352]

235. As we have already discussed, other provisions of the Lebanese Criminal Code that also deal with crimes perpetrated by a group of persons consider the various forms of participation in collective criminality *not as a mode of criminal liability, but as crimes per se*. This applies not only

[347] Mount Lebanon Indictment Chamber (*Chambre d'accusation*), decision n°37/94, 8 February 1994, unpublished, original on file with the Tribunal, translation on file with the STL.
[348] Court of cassation, 6th Chamber, *Aalian v Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [Sader in the cassation], 2000, at 541.
[349] The *Rachid Karami* case, English translation, at p. 161.
[350] *Ibid*
[351] *Ibid.*
[352] *Id*, at p. 163.

to "conspiracy" but also to "criminal association", "armed band", and "assistance for evading justice".[353]

2. International Criminal Law

a) Joint Criminal Enterprise

236. This Chamber will now address the notion of joint criminal enterprise (JCE), a mode of criminal responsibility under customary international law. This is relevant to question (xiii) of the Pre-Trial Judge's Order because JCE is a mode of co-perpetration. We only trace the contours of the notion here, and do not take a position as to whether it should be applicable to particular cases before this Tribunal, for this is a determination the Pre-Trial Judge and, in due course, the Trial Chamber will have to make in accordance with the test outlined in paragraph 211.

237. There exist in international criminal law three forms of JCE. The first and more widespread category of liability (also called "JCE I" or JCE in its "basic" form) covers responsibility for acts agreed and acted upon[354] pursuant to a common plan or design where all the participants share the intent to commit the concerted crime, although only some of them physically perpetrate the crime.[355]

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[353] See Lebanese Criminal Code, Articles 335 to 339 and 398 to 400.

[354] It must be emphasised that it is *action* pursuant to a common plan or design that serves to distinguish joint criminal enterprise liability from the common-law based notion of conspiracy. See ICTY, *Milutinović et al*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003, para. 23; ICTY, *Krajišnik*, Appeal Judgment – Separate Opinion of Judge Shahabuddeen, 17 March 2009, para. 22.

[355] Individual criminal liability on the basis of a common plan or design finds its origins from World War II era jurisprudence. See United States Military Tribunal – Nuremberg, *Trial of Carl Krauch and Twenty-Two Others* ("The I.G. Farben Trial"), Case No. 57, 14 August 1947 – 29 July 1948, United Nations War Crimes Commission – Law Reports of Trials of War Criminals, Vol. X, at pp. 39-40; Supreme National Tribunal of Poland, *Trial of Dr Joseph Buhler*, Case No. 85, 17 June 1948 – 10 July 1948, United Nations War Crimes Commission – Law Reports of Trials of War Criminals, Vol. XIV, p. 45; Military Tribunal III, *United States of America v Alfried Felix Alwyn Krupp von Bohlen und Halbach et al* ("The Krupp Case"), Case No. 10, 8 December 1947 – 31 July 1948, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. IX, pp. 391-393; Military Tribunal III – *United States of America v Josef Altstotter et al* ("The Justice Case"), Case No. 3, 5 March 1947 – 4 December 1947, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. III, pp. 1195-1199. See also ICTY, *Tadić*, Appeal Judgment, 15 July 1999 ("*Tadić* AJ"), paras. 185-229, with the case law and national/international instruments cited therein. JCE III as a mode of liability in particular finds support from World War II cases and reviews. Military Tribunal I, *United States of America v Ulrich Greifelt et al* ("The *RuSHA* Case"), Case No. 8, 20 October 1947-10 March 1948, Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Vol. V, pp. 117-120; Review of Proceedings of General Military Court in the case of *US v Martin Gottfried Weiss and thirty-nine others*, p. 141 of the typescript (on file with the Special Tribunal), p. 141. Individual criminal responsibility for additional foreseeable crimes in the context of group criminality was also considered in various JCE II-type cases, such as . *United States v Hans Ulrich and Otto Merkle*, Case No. 000-50-2-17, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 12 June 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, United States National Archive Microfilm Publications No. M1217, Roll 3, p. 3 (on file with the Special Tribunal); *United States v Hans Wuelfert et al*, Case No.

In such instances all the participants are criminally responsible for the agreed upon crime, so long as their contribution in the furtherance of the common criminal plan or design is significant.[356] Where different actors are culpable under this form of liability they can be said to have acted as "cogs in a machine" whose overall object and purpose is to commit criminal offences, personally or through other individuals.[357] The international community must defend itself from such collective criminality by reacting in a repressive manner against those who take part in the criminal enterprise. The differing degrees of guilt will be taken into account at the sentencing stage.[358]

238. The second modality of JCE—which essentially amounts to a different articulation of the first—is that of responsibility for carrying out a criminal design implemented within the context of an institutional framework such as an internment or concentration camp (also known as "JCE II" or JCE in its "systemic" form).[359]

239. The third mode of responsibility arises in the context of JCE I or JCE II, when participants in a criminal enterprise agree and act according to the main goal of the common criminal plan or design (for instance, the forcible expulsion of civilians from an occupied territory), but, as a consequence of such agreement and its execution, incidental crimes are committed by one or more participants (for instance, killing or wounding some of the civilians in the process of their expulsion). It is notable that in this category of JCE the participants other than the authors of the extra crime do not share the intent to *also* commit crimes incidental to the main concerted crime. This mode of liability (so-called

000-50-2-72, Deputy Judge Advocate's Office, 7708 War Crimes Group – European Command, Review and Recommendations, 19 September 1947, Reviews of United States Army War Crimes Trials in Europe 1945-1948, United States National Archive Microfilm Publications No. M1217, Roll 4, p. 8 (on file with the Special Tribunal); *Tashiro Toranosuke et al* Judgment, 14 October 1946, Case No. WO235/905, Hong Kong Military Court for the Trial of War Criminals No. 5 (available through http://hkwctc.lib.hku.hk/exhibits/show/hkwctc/home, on file with the Special Tribunal) (three accused acquitted on the evidence for the killing of prisoners of war as a foreseeable consequence of their concerted action to mistreat them).

[356] ICTY, *Krajišnik*, Appeal Judgment, 17 March 2009 (*Krajišnik* AJ), para 675; ICTY, *Brđanin*, Appeal Judgment, 3 April 2007 ("*Brđanin* AJ"), para 430.

[357] Principal perpetrators of crimes need not be members of the JCE. See *Brđanin* AJ, paras 410-414; *Krajišnik* AJ, paras 225-226.

[358] See ICTY *Brđanin* AJ, para. 432. We do not ascribe with the view that there is no distinction in degree of guilt under JCE III for sentencing purposes as suggested in, for example, ICTY, *Babić*, Judgment on Sentencing Appeal, 18 July 2005, paras 26-28.

[359] However, note ICTY, *Kvočka*, Appeals Judgment, 28 February 2005 ("*Kvočka* AJ"), para. 182: "reference to [...] concentration camps is circumstantial and in no way limits the application of this mode of responsibility to those detention camps similar to concentration camps."

"JCE III", or extended form of JCE)[360] only arises if a participant who did not have the direct intent to commit the 'incidental' offence nevertheless *could and did foresee*[361] *the possibility of its commission and willingly took the risk of its occurrence*.[362]

240. A clear example in domestic criminal law of this mode of liability is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members (primary offender) secretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan (secondary offender) sees this gang member stealthily carrying those real weapons. If the primary offender then kills a teller during the robbery, the secondary offender may be held liable for robbery and murder, like the killer and unlike the other robbers, who would only be liable for armed robbery. As a result of the information the secondary offender possessed (that the primary offender was carrying real weapons and not a toy weapon) he could and did foresee that they would be used to kill, if something went wrong during the robbery. Although he did not share the mens rea of the murderer, the event was foreseeable and the risk that it might come about was willingly taken. Plainly, he could have told the other robbers that there was a serious danger of a murder being committed, or he might have taken the real weapons away from the primary offender; or he might even have withdrawn from the specific robbing enterprise or dropped out of the gang completely.

241. Thus, for criminal liability under the third category of JCE to arise it is necessary that the un-concerted crime be generally in line with the agreed upon criminal offence. In addition, it is essential that the secondary offender had a chance of predicting the commission of the un-concerted crime by the primary offender. In this context, the *Tadić* Appeal Judgment identified *two* requirements, one

[360] The Appeals Chamber takes notice of the recent decision of the Pre-Trial Chamber of the Extraordinary Chambers of the Courts of Cambodia (ECCC) that the authorities relied upon by the ICTY Appeals Chamber in *Tadić* do not "constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law at the time relevant to Case 002" (ECCC, *Ieng et al*, Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), 20 May 2010, para. 83). Suffice to say that the Tribunal's current jurisdiction *ratione temporis* necessarily entails consideration of jurisprudence and legal developments unavailable to the ECCC, starting from the early 1990s.

[361] What is foreseeable will depend on the circumstances of the case. See for example ICTY, *Milutinović et al*, Trial Judgment, 26 February 2009, Vol. III, paras 472, 1135; ICTY, *Popović et al*, Trial Judgment – Dissenting and Separate Opinion of Judge Kwon, 10 June 2010, vol. I, paras 21-27.

[362] ICTY, *Brđanin and Talić*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001 ("*Brđanin and Talić* Decision"), para. 30.

objective and the other subjective.[363] The objective element is the conduct of the primary offender that was not agreed upon with all the other participants in the joint criminal enterprise. It is to be distinguished from the subjective state of mind to be proved by the Prosecution, namely that the secondary offender (i) was aware that the resulting crime was foreseeable as a *possible*[364] consequence of the execution of the JCE, and nonetheless (ii) willingly took the risk that the incidental crime might be committed and continued to participate in the enterprise with that subjective awareness.

242. For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, depending on the exact circumstances a rape perpetrated by one of them can be the foreseeable corollary of enslavement, since treating other human beings as objects can easily lead to their rape. It would, however, also be necessary for the secondary offender to have specifically foreseen the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case) or, at least, to be in a position, under the 'person of reasonable prudence' test, to predict the rape.

243. Let it be emphasised once again that this mode of incidental criminal liability based on foresight and risk is a mode of liability that is contingent on (and incidental to) a common criminal plan, that is, an agreement or plan by a multitude of persons to engage in illegal conduct as described above. The 'additional crime' is the outgrowth of previously agreed or planned criminal conduct for which each participant in the common plan is already responsible. The 'additional crime' is thus rendered possible by the prior joint plan to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated.

244. This third category of JCE has been objected to, for fear that it might breach the principle of culpability (*nullum crimen sine culpa*). The contention has been made that under this category of JCE the culpability of the "secondary offender" (who joined the criminal plan or agreement, acted

[363] See ICTY, *Tadić* AJ, paras 204, 220 and the objective and subjective requirements articulated in ICTY, *Brđanin and Talić* Decision, paras 28-30. See also ICTY, *Vasiljević*, Appeal Judgment, 25 February 2004, paras 99-101; ICTY, *Kvočka* AJ, para. 83.

[364] "In many common law national jurisdictions, where the crime charged goes beyond what was agreed in the joint criminal enterprise, the prosecution must establish that the participant who did not himself commit that crime nevertheless participated in that enterprise with the contemplation of the crime charged as a *possible* incident in the execution of that enterprise. This is very similar to the civil law notion of dolus eventualis." ICTY, *Brđanin and Talić* Decision, para. 29. See also ICTY, *Stakić*, Appeal Judgment, 22 March 2006 ("*Stakić* AJ"), paras 100-101; ICTY *Brđanin* AJ, para. 431.

upon it, and foresaw the additional, but un-concerted offence) is wrongly equated with that of the "primary offender" (who commits the agreed upon crime plus the additional, un-concerted offence). In this way, it is argued, one could find guilty of murder somebody (the "secondary offender") who did not have the intent to kill, an intent that was instead entertained by the "primary offender", who perpetrated the murder.

245. In this regard, the Appeals Chamber notes the following: (i) As for the degree of culpability, the "secondary offender", although he did not have the intention (*dolus*) to commit the un-concerted crime, was nonetheless a willing party to an enterprise to commit an agreed upon crime, and the extra crime was rendered possible both by his participation in the criminal enterprise (which must include a significant contribution to the achievements of the enterprise's criminal plan[365]) and by his failure to drop out or stop the extra crime once he was able to foresee it. (ii) With regard to the need to modulate or graduate punishment, admittedly the culpability and blameworthiness of the "secondary offender" is less than that of the "primary offender"; this lesser degree should, however, be taken into account at the sentencing stage. (iii) With regard to the very *raison d'être* of JCE III, this mode of responsibility is founded on considerations of public policy: that is, the need to protect society against persons who band together to take part in criminal enterprises and, whilst not sharing the criminal intent of those participants who intend to commit *more serious crimes* outside the common enterprise, nevertheless are aware that such objectively foreseeable crimes may be committed and do nothing to oppose or prevent them, but rather continue in the pursuit of the enterprise's other criminal goals.[366]

246. Moreover, as the ICTY Appeals Chamber confirmed, the criminal means of achieving the common objective of the JCE can evolve over time. While, originally, the participants in a common enterprise may agree on only a few, 'core' crimes, what were foreseeable crimes in the early stages of a JCE may well become accepted criminal objectives of an increasing number of JCE members. In other words, the JCE is not static or restrained by the criminal objectives envisaged at the time of its creation. It can expand to embrace other criminal offences that were not agreed to at the beginning of the enterprise, as long as the evidence shows that the JCE members agreed on this expansion,

[365] *Brđanin* AJ, paras. 427, 430; *Krajišnik* AJ, para. 675.

[366] These policy considerations were aptly spelled out by the Supreme Court of the United States in *Tison v Arizona* 481 U.S. 137 (1987) as well as the U. K. House of Lords in *Regina v Powell and another, Regina v English* [1999] 1 AC 1, with regard to crimes committed at the domestic level.

whether explicitly or extemporaneously (which can be inferred from circumstantial evidence).[367] Thus, alleged authors of crimes can originally incur individual criminal responsibility via JCE III but, depending on the circumstances and the evidence presented, their liability can instead result in a conviction via JCE I. One of the main differences between JCE I and JCE III, while theoretically important, may not thus be so pivotal when it comes to actual evidence and allowed inferences: often, when a participant in a JCE foresees an additional crime he originally had not subscribed to and nevertheless agrees to continue providing his significant contribution to the JCE, the only reasonable inference might be that he has come to agree to that additional crime, therefore bringing his liability back into the fold of JCE I.

247. In any event, the stringent requirements for a conviction under JCE III help explain why, at the ICTY (the Tribunal that used this mode of responsibility as of its first case), very few individuals have been found responsible under this mode of liability.[368]

248. One final remark is in order. JCE III is predicated, as discussed above, on the foreseeability of crimes, and on the acceptance of such foreseeable crimes by the 'secondary offender'. This is why when other tribunals have discussed it, they have often referred to the notion of *dolus eventualis*. However, this notion does not easily tally with *special intent* crimes, such as terrorism.[369] Under international law, when a crime requires special intent (*dolus specialis*), its constitutive elements can only be met, and the accused consequently be found guilty, if it is shown beyond reasonable doubt that he specifically intended to reach the result in question, that is, he entertained the required *special intent*. A problem arises from the fact that for a conviction under JCE III, the accused need not share the intent of the primary offender. This leads to a serious legal anomaly: if JCE III liability were to apply, a person could be convicted as a (co)perpetrator for a *dolus specialis* crime without possessing the requisite *dolus specialis*.

[367] See, for instance, *Krajišnik* AJ, para. 163.

[368] Contrary to what is generally assumed, for instance, only four JCE III convictions have ever been affirmed on appeal (or entered on appeal) after full trial proceedings at the ICTY to date: *Tadić* AJ, paras 230-234; *Krstić*, Appeal Judgment, 19 April 2004, paras 147-151; *Stakić* AJ, paras 91-98; *Martić* AJ, paras 187, 195, 205-206, 210.

[369] See above paras 59, 68, 111, and 147.

249. Thus, while the case law of the ICTY allows for convictions under JCE III for genocide and persecution as a crime against humanity even though those crimes require special intent,[370] and contrary to what the Prosecution pleads,[371] the better approach under international criminal law is not to allow convictions under JCE III for special intent crimes like terrorism. In other words, it would be insufficient for a finding of guilt for an accused charged as a participant in a JCE (directed, for instance, to the commission of robbery or murder) to have foreseen the possibility that the crimes within the common purpose would eventually give rise to a terrorist act by another participant in the criminal enterprise. He must have the required special intent for terrorism; he must specifically intend to cause panic or to coerce a national or international authority. In such a case, the 'secondary offender' should not be charged with the commission of terrorism, but at the utmost only with a form of accomplice liability, in that he foresaw the possibility that another participant in the criminal enterprise might commit a terrorist act, willingly accepted that risk and did not drop out of the enterprise or prevent the perpetration of the terrorist offence. This person's attitude should therefore be assessed as a form of *assistance* to the terrorist act, not as a form of *perpetration*—and provided of course that all other necessary conditions are met. The difference between the two classifications of the mode of responsibility should be clear. JCE III makes the 'secondary offender' a perpetrator, while aiding and abetting is evidently a lower mode of liability: one can be liable for less than direct intent because the system does not intend to pin on him the stigma of full perpetratorship, but rather that of a less serious participatory modality.

b) Article 3(1)(b) of the STL Statute

250. Article 3(1)(b) of the Statute provides that a person will be individually responsible for crimes within the jurisdiction of the Tribunal if that person "[c]ontributed in any other way to the commission of the crime [...] by a group of persons acting with a common purpose, where such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or in the knowledge of the intention of the group to commit the crime."

251. The reference to "common purpose" hints at the common purpose doctrine, another name for JCE. This provision is broad enough to incorporate all three forms of JCE (though JCE II will

[370] See ICTY, *Brđanin*, Decision on Interlocutory Appeal, 19 March 2004, paras 5-10; ICTY, *Stakić* AJ , para. 38; ICTY, *Milošević*, Decision on Motion for Judgement of Acquittal, 16 June 2004, para. 291; ICTY, *Popović et al* , Trial Judgment, 10 June 2010, Vol. I, paras 1195, 1332, 1427, 1733-1735.
[371] Hearing of 7 February 2011, T. 68-69.

generally not be applicable to the factual allegations submitted under Article 1). We pause, however, to clarify how the intent requirements of Article 3(1)(b) are reconcilable with JCE, and in particular with JCE III.[372]

252. The provision in question may be construed as requiring that the intent referenced be to further the common criminal plan, which may also embrace acts performed by one of the participants outside that criminal plan, provided that the defendant-participant had a certain degree of awareness and foresight of the commission of such acts. In particular, Article 3(1)(b) speaks of an intentional contribution to the common criminal purpose and states that such contribution may be made "in the knowledge of the intention of the group to commit the crime." The notion of "knowledge" could well cover that of "foresight" and "voluntary taking of the risk" of a criminal action by one or more members of the group. Further, the phrase "general criminal activity or purpose of the group" refers to the criminal activities of the group more broadly than that of the particular crime. That is, the accused may intend to further the "general" criminality of the group, without having an intent to further the specific crime in question. This interpretation also avoids redundancy with the alternative form of mens rea under Article 3(1)(b), "the knowledge of the intention of the group to commit the crime"; otherwise, knowledge of the intent to commit the specific crime would be subsumed within "the aim of furthering" the specific crime. Of course, the specific crime must have been foreseeable in light of the "general criminal activity or purpose" of the group.

c) Perpetration by Means

253. In addition to JCE, the ICC in its early decisions has adopted the notion of "perpetration by means" or indirect perpetration to designate some forms or categories of collective criminality, in particular the criminal liability of high-level participants who are removed from the physical or material perpetration of international crimes. However, we conclude that perpetration by means, as applied by the ICC, is neither a form of liability under customary international law, nor is it recognised by Article 3(1) of the Statute. Hence, it should not be applied before this Tribunal.

254. Article 25(3)(a) of the ICC Statute explicitly includes perpetration by means: "[A] person shall be criminally responsible [...] for a crime within the jurisdiction of the Court if that person

[372] See also Hearing of 7 February 2011, T. 72-73 (Prosecution submissions that JCE could arguably be encompassed by Article 3(1)(b) of the Statute, which is broader). Contra, see Hearing of 7 February 2011, T. 91-96 (Defence objections to the applicability of JCE III).

[c]ommits such a crime [...] through another person, regardless of whether that other person is criminally responsible." It has been deduced from this provision[373] that the notion of 'perpetration by means' covers two different categories of "indirect perpetration". The first category includes the traditional notion of perpetration by means upheld in most countries of Romano-Germanic tradition, as well as the fairly similar doctrine recognised in common law countries and designated as "innocent agency". Under this notion a person, to perpetrate a crime, may use an intermediary who is not himself criminally liable and thus cannot be considered to have any culpable part in the crime (either because he is a minor, or mentally incompetent, or because he acted under coercion). This form of responsibility is also recognised in Lebanese law.[374]

255. The second category of perpetration by means covers those cases in which the intermediary is used by the "person in the background" for the commission of the crime but is also independently criminally responsible for his conduct. In this case the indirect perpetrator is called the "perpetrator behind the perpetrator." This second category of perpetration by means, developed in German legal literature,[375] was relied upon by the ICC Pre-Trial Chamber in *Lubanga*. The Chamber held that Article 25(3)(a) of the ICC Statute applies to the commission of a crime through another person who is himself fully criminally responsible.[376] In its application for an arrest warrant the Prosecutor had initially charged Lubanga as a joint perpetrator. The Pre-Trial Chamber found instead that indirect perpetration was potentially a viable theory of criminal responsibility: "In the Chamber's view, there are reasonable grounds to believe that, given the alleged hierarchical relationship between Mr Thomas Lubanga Dyilo and the other members of the [rebel group], the concept of indirect perpetration [...] could be applicable to Mr Thomas Lubanga Dyilo's alleged role in the commission

[373] See A. Eser, "Individual Criminal Responsibility", in A. Cassese, P. Gaeta and J. Jones (eds) *The Rome Statute of the International Criminal Court A Commentary* vol. 1 (Oxford: Oxford University Press, 2002), at 793; G Werle, "Individual Criminal Responsibility in Article 25 ICC Statute", 5(4) *J Int'l Crim Justice* (2007) 953, at 963; F. Jessberger and J. Geneuss, "On the Application of a Theory of Indirect Perpetration in *Al Bashir*: German Doctrine at The Hague?", 6(5) *J Int'l Crim Justice* (2008) 583, at 855 ff.

[374] Under Lebanese law a distinction is made between the "material" perpetrator and the "intellectual" perpetrator of a crime. The former physically undertakes the prohibited conduct. The latter instead induces a mentally incompetent person to execute a crime (for instance he gives a bomb to a mentally handicapped person to be used against other persons), or uses a person unaware of the perpetrator's criminal intent so that the other person physically commits the crime (for instance, a perpetrator asks another person to administer a medicine to an ailing person, and the second person does so without knowing that in fact the medicine is a poison).

[375] The doctrine was developed by the distinguished German criminal lawyer Claus Roxin. See C. Kress, 'Claus Roxins Lehre von der Organisationsherrschaft und das Völkerstrafrecht' 153 *Goltdammer's Archiv für Strafrecht* (2006), 307 ff.

[376] ICC, *Lubanga*, Decision on the Confirmation of Charges, 29 January 2007, para. 318.

of the crimes".[377] In a decision on *Katanga and Chui*, the ICC Pre-Trial Chamber I restated and expanded its findings in *Lubanga*: it based criminal responsibility on the concept of "joint commission through another person".[378] The Chamber noted the reasoning of the ICTY Appeals Chamber in *Stakić, where that Tribunal* rejected the concept of indirect co-perpetration as falling outside of customary international law, but concluded that the *Stakić* holding was not relevant for the ICC because perpetration by means is expressly provided for in the ICC Statute.[379] However, no final judgment has to date been issued by the ICC to validate this interpretation of the provision in question.

256. The problem with the doctrine of perpetration by means is that it is not recognised in customary international law, as rightly noted by the ICTY Appeals Chamber in *Stakić*,[380] and in addition is not contemplated by this Tribunal's Statute. While Article 25(3)(a) of the ICC Statute provides for the punishment of a co-perpetrator who "[c]ommits [...] a crime, whether as an individual, jointly with another or through another person", the drafters of Article 3(1)(a) of our Statute simply referred to anybody who "[c]ommitted [...] the crime set forth in article 2 of this Statute", a wording akin to that of Article 7 of the ICTY Statute (and Article 6 of the ICTR Statute), which have been interpreted as referring to the notion of JCE, a notion that without any doubt has a firm customary basis. This difference between the wording of the ICC Statute, on the one hand, and that of this Tribunal's Statute, on the other, together with the fact that perpetration by means, as noted above, has not yet reached customary international law status, leads the Appeals Chamber to conclude that perpetration by means may not be resorted to by this Tribunal.

3. Comparison between Lebanese and International Criminal Law

257. The criminalisation of collective participation in crimes, as envisaged in Lebanese criminal law, to a large extent overlaps with that provided for in customary international law and in Article 3(1) of the Tribunal's Statute. However, in some respects it is stricter than that of international criminal law.

[377] ICC, *Lubanga*, Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr Thomas Lubanga Dyilo, 24 February 2006, para. 96.
[378] ICC, *Katanga and Chui*, Decision on Confirmation of Charges, 30 September 2008 ("*Katanga* Confirmation of Charges Decision"), para. 489.
[379] *Katanga* Confirmation of Charges Decision, para. 506-508.
[380] ICTY, *Stakić*, Appeal Judgment, 22 March 2006, para. 62.

258. When a crime is committed by a plurality of persons, under Lebanese law the notion of co-perpetration (*co-action*) or, depending on the circumstances of the case, those of complicity or instigation may apply. Instead, international criminal law only criminalises the specific crime committed (except for genocide, where it also criminalises conspiracy and instigation). However, international criminal law contemplates a mode of participation, joint criminal enterprise, which, as such, is unknown to Lebanese law.

259. However, the two bodies of law largely coincide in application. Under Lebanese law, a person who takes part in a group set up to engage in terrorism and contributes to executing terrorist crime by killing one or more persons, may be charged with participating in a "conspiracy" as well as perpetrating "terrorism" and "murder", if all necessary requirements are met. Under international criminal law, his form of participation in the terrorist crime, including the resulting murders, may be classified as JCE.[381] Thus, Lebanese law and international criminal law overlap in punishing the execution of a criminal agreement, where all the participants share the same criminal intent although each of them may play a different role in the execution of the crime (what under international criminal law falls under JCE I).

260. The two bodies of law also overlap in punishing those participants in a criminal enterprise who, although they had not agreed upon the perpetration of a crime, could be expected to know of the possibility that such a crime would be committed and willingly took the risk that it would be committed (so-called JCE III). This is shown by the reasoning followed in the *Aalian* case,[382] which the Appeals Chamber accepts as being indicative of the application of Lebanese law on the matter.

261. In sum, while the legal label of the mode of liability applied under Lebanese law and under international criminal law may differ, the practical effect is the same: both bodies of law punish participants in group criminality for crimes that were foreseeable, and the gravity of the participant's individual conduct will be evaluated and distinguished at sentencing, which pursuant to Article 24 of the Statute is left to the Tribunal's discretion no matter which set of laws are applied. Where there is

[381] This would generally be JCE I, for the reasons discussed above excluding JCE III for specific intent crimes such as terrorism.

[382] Court of cassation, 6th Chamber, *Aalian v Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [Sader in the cassation], 2000, at 541. See also Court of Justice, decision n°1, 12 April 1994, *Al-nashra al-kada'iya* [Revue Judiciaire], 1995, vol. 1, at 3.

no conflict between the two sources of law, the Tribunal should apply the Lebanese law of co-perpetration (including through *dolus eventualis*), complicity and, where applicable, instigation.

262. Should there be a conflict, however, the Pre-Trial Judge and (in due course) the Trial Chamber will have to consider which source of law leads to the greatest protection for the rights of the accused. One such situation has already presented itself in the course of our theoretical analysis: under JCE III as applied by the Tribunal, the extra foreseeable (but un-concerted) offence may not be a terrorist act (or other criminal offence that requires special intent), but only another offence requiring general intent such as homicide. On the other hand, under Lebanese law, one could be convicted of a terrorist act for which one harbours only *dolus eventualis* (that is, it was foreseeable that the terrorist act would occur, but the person accused did not specifically intend to spread terror). If such a case were to be presented to the Pre-Trial Judge, depending on the circumstances, the mode of responsibility under international criminal law—JCE III—might be applied as it is more protective of the rights of the accused.

III. Summary

263. The answer to question (xiii) is that either Lebanese law or international criminal law (as contained in Article 3 of the Statute) could apply. The Pre-Trial Judge and Trial Chamber must (i) evaluate on a case-by-case basis whether there is any actual conflict between the application of Lebanese law and that of the international criminal law embodied in Article 3; (ii) if there is no conflict, apply Lebanese law; and (iii) if there is a conflict, apply the law that would lead to a result more favourable to the rights of the accused.

264. As for co-perpetration, if the accused directly participated in the crime, there is no conflict, and Lebanese law should be applied. In more complicated instances of co-perpetration, the Pre-Trial Judge and Trial Chamber will have to consider on a case-by-case basis whether Lebanese law or international criminal law is more protective of the rights of the accused; in particular, an individual should not be charged as a co-perpetrator for an act of terrorism if he did not have the special intent to commit the act of terrorism. Finally, the Lebanese law of complicity should apply as it is more favourable to the rights of the accused.

SECTION III: MULTIPLE OFFENCES AND MULTIPLE CHARGING

265. The Pre-Trial Judge has submitted two questions regarding plurality of offences and cumulative charging:

> xiv) Should cumulative charging and plurality of offences applicable before the Tribunal be regulated by Lebanese criminal law, by international law or by both Lebanese criminal law and international law? In this last case, how, and on the basis of which principles, are these two laws to be reconciled in the event of conflict between them?
>
> xv) Can one and the same act be defined in several different ways, namely, for example, at the same time as terrorist conspiracy, terrorist acts and intentional homicide with premeditation or attempted intentional homicide with premeditation. If so can these classifications be used cumulatively or as alternatives? Under what conditions?

266. While the Pre-Trial Judge has, properly, expressed as questions of law the enquiry as to what combination of charges is permissible, a practical response requires brief mention of the context in which the issues arise. The parties have competing responsibilities:

- That of the Prosecution is to ensure that the charges laid at the onset of the case cover:

  (1) whatever may be the real options as to what the evidence may establish at the conclusion of the trial, depending on how the facts are found by the Trial Chamber;

  (2) the essential types of criminality which should be the subject of ultimate sentence and the denunciation that entails.

- That of the Defence is to ensure that it is not overborne by either an unnecessary number and type of charges or by over-detailed evidence required to establish them.

- That of alleged victims granted leave to present their views and concerns (Rules 86-87) is to ensure that justice is done in relation to their interests.

Crucial to the specific discussion that follows is the judicial obligation to balance wisely and justly the competing responsibilities of the parties as well as the dictates of a trial that is both fair and expeditious.

267. According to the Prosecution, "[c]umulative charging is permissible under both Lebanese criminal law and international criminal law."[383] In the opinion of the Prosecutor, the Tribunal should not adopt the test advanced by the ICC Pre-Trial Chamber II in the *Bemba* case, where the Pre-Trial Chamber held that "the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence, since it places an undue burden on the Defence". The Prosecutor argues that this ICC decision "is not indicative of settled jurisprudence or international practice."[384] As to the question of whether the same act can be defined under different criminal categories (for instance, terrorist conspiracy, terrorist act, intentional homicide and so on), the Prosecutor contends that this is admissible under both Lebanese and international criminal law practice.[385]

268. The Defence Office asserts that there is no rule or general practice regulating cumulative charging in either Lebanese law or international criminal law. One should therefore turn to the practice of international tribunals to find the right solution. Careful consideration of such practice shows, in the contention of the Defence Office, that (i) the "practice of *ad hoc* Tribunals shows an increasing awareness of the potentially prejudicial effect of the 'overloading' of the indictment with multiple layers of cumulative charges. This practice is regarded as having a negative impact on a whole range of fundamental rights of the accused (in particular, his right to adequate time/facilities to prepare [his defence], his right to adequate notice of the charges, his right to equality of arms, his right to a trial without undue delay and his right to a fair trial). This practice may also complicate the task, responsibility and ability of the Tribunal to guarantee a fair and expeditious process as it is required to";[386] (ii) other international courts such as the ICC and the Extraordinary Chambers in the Courts of Cambodia have adopted a restrictive approach to cumulative charging;[387] (iii) "current practice is moving towards a more restrictive approach that excludes any cumulation of charges where each offence (or form of liability) charged does not encompass a definitional or material element not included in the other";[388] (iv) more generally, "[i]nternational practice recognizes and sanctions a prohibition against 'overloading' of the indictment by the Prosecution".[389] The Defence Office concludes that in deciding on these matters the Tribunal should heavily rely on human rights:

[383] Prosecution Submission, para. 109; see also *id*, para. 119.
[384] Prosecution Submission, para. 117. See also War Crimes Research Office Brief, paras 3, 10-15 and 17-18.
[385] Prosecution Submission, paras 121-132.
[386] Defence Office Submission, para. 169.
[387] Defence Office Submission, paras 172-173.
[388] Defence Office Submission, para. 174.
[389] Defence Office Submission, para. 177(iii).

"Regardless of the regime that is adopted by the Tribunal in regard to this matter, it would have to ensure that this regime protects and guarantees the effectiveness of, *inter alia*, the following rights of the defendant: his right to adequate time/facilities to prepare, his right to adequate notice of the charges, his right to equality of arms, his right to a trial without undue delay and his right to a fair trial."[390] In addition, the Defence Office takes the view that there should be a preference for "alternative charging" rather than "cumulative charging."[391]

269. As for the question of whether the same act can be legally classified under several headings of criminal law, the Defence Office is of the view that this is indeed admissible, subject however to a set of safeguards aimed at protecting the rights of the accused and avoiding in particular that the charging be "oppressive" for the accused.[392]

270. Regarding question (xiv), the Appeals Chamber holds the view that Lebanese law and international criminal law regulate these matters along the same lines. We consider below the approaches taken by Lebanese courts and by international criminal courts and conclude there is no need to reconcile conflicts between them.

271. As for question (xv), both Lebanese law and international criminal law allow multiple charging when one act may constitute multiple crimes. However, for an accused to be convicted of two crimes on the basis of a single act or omission, each crime must an element that the other crime does not. For example, the crimes of conspiracy, terrorism, and intentional homicide under Lebanese law—as described above—each aims at achieving a distinct result (such as spreading terror or causing death). In other words, a person could be convicted of all three crimes on the basis of a single course of conduct. We discuss this principle, known in some common law countries as the *Blockburger* test and in civil law countries as the "rule of speciality", in greater detail below before concluding that it should be applied whenever possible at the charging stage, allowing multiple (cumulative) charging—and ultimately conviction, if all elements of each crime are proved—only when each crime requires the proof of distinct elements. Crimes that do *not* meet this test may be charged in the alternative. Care should also be taken to ensure that any accused is provided with detailed and clear notice of charges, both through the indictment itself and through the Pre-Trial

[390] Defence Office Submission, para. 176.
[391] Defence Office Submission, para. 177(v).
[392] Defence Office Submission, para. 182(xv); see also *id*, paras 178-181.

Judge's reasoned decision, as required by Rule 68(I). This approach has the advantage of (i) increasing the expeditiousness of the proceedings and (ii) avoiding unnecessary and heavy burdens on the defence in preparing and presenting its case.

I. Lebanese Law

A. Multiple Offences

272. All criminal legal systems make provision for instances of multiple offences by the same person (for instance, rape followed by murder of the same victim), of offences that simultaneously affect more than one victim (for example, bombing a house with a family inside), or of offences consisting of the simultaneous breach, by the same person, of more than one rule (for example, arson and murder when both are caused by the same fire).

273. Lebanese law, like most civil law systems, draws a distinction between "*concours réel ou matériel d'infractions*" and "*concours idéal d'infractions ou concours de qualification*". The first category embraces the cases where a person by a set of separate actions perpetrates several crimes against one or more victims. In this case the perpetrator is accountable for breaches of different rules of criminal law. Pursuant to Article 205 of the Lebanese Criminal Code:

> [i]f multiple felonies or misdemeanours are found to have been committed, a penalty shall be imposed for each offence and only the severest penalty shall be enforced.
>
> The penalties imposed may, however, be consecutive. However, the sum of fixed-term penalties shall not exceed the maximum penalty prescribed for the most serious offence by more than one half.
>
> If no ruling has been issued on whether the penalties imposed should run concurrently or consecutively, the matter shall be referred to the judge for a decision.

274. No particular problem arises with regard to the charging of the offender and his sentencing by a court: he will be accused of various crimes; if found guilty, he will be sentenced for each of these crimes, with the highest penalty being enforced.

275. A person may instead breach the same rule against various persons: for instance, he murders the members of a whole family. In this case only one rule is breached, that prohibiting unlawful killing, but the offence is committed against several victims. In sum, "*concours réel d'infractions*" does not pose any major problem of charging: the accused will be charged with different crimes, in

the first case, and with as many crimes in the form of murder as there are victims, in the second. The Judges will then be called upon to assess the evidence and decide what the prosecution has been able to prove for each charge.

276. "*Concours idéal d'infractions*" covers instead cases where a person, by a *single* act or transaction, simultaneously violates more than one rule. Article 181 of the Lebanese Criminal Code provides that:

> [i]f an act has several qualifications, they shall all be mentioned in the judgment, and the Judge shall impose the heaviest penalty.
>
> However, if both a general provision of criminal law and a special provision are applicable to the act, the special provision shall be applied.

277. Here, again, one ought to distinguish among various categories of breaches. First, it may happen that the same act in some respects violates one rule and in other respects violates another rule, the two rules covering different matters. In such cases the same criminal conduct simultaneously breaches two different rules and amounts to two different crimes. Clearly, when faced with these cases, the Prosecution must charge the defendant with two different crimes. Similarly, if it is satisfied that the accused is guilty of the breach of both rules, the court ought to sentence him for both breaches. However, this is subject to the "rule of specialty". If both rules are general provisions of law ("*texte général*"), Lebanese law considers that the perpetrator is to be convicted of both crimes, with the most severe penalty to be applied. If however one of the rules is a special provision ("*texte spécial*"), this provision should be applied, and the Judges should enforce the penalty mentioned in the said provision rather than the more general provision. This rule of specialty will be further discussed below, under international law.

278. When one is faced with a single conduct or transaction that successively breaches two different rules vis-à-vis the same victim and may thus amount in theory to two offences, but *one is lesser than (i.e., contained in) the other*, the "principle of consumption" applies: the more serious offence prevails over and "absorbs" (or subsumes), as it were, the other. Thus, for instance, if a person is shot to death, charges will only be brought for homicide and not also for personal injuries. Hence, the charge (and perhaps a conviction) may be issued only for the more serious offence, which encompasses the less serious one.

279. In this respect, we should note that contemporary French decisions, followed by Lebanese case law, have held that a single conduct amounting to different characterisations can be considered as a "*concours matériel*", rather than a "*concours idéal*" when those offences are not incompatible (homicide and personal injuries in the example above) and when the relevant rules aim at prohibiting violations of substantially different values. An example would be in the case of an individual throwing a grenade at a house. He is liable for attempted homicide as well as attempt to destroy a house with the use of an explosive device.[393] If the subjective element is not rigorously identical in the potential characterisations, the Judges may decide to uphold all of them, leading therefore to considering the case as a "*concours matériel d'infractions*".[394] Therefore, since the prohibition of homicide, terrorism, and conspiracy under Lebanese law aims at protecting substantially different values, and since they are not incompatible, Judges might consider them under a "*concours matériel d'infractions*".

B. Multiple Charging

280. As mentioned above, Lebanese law allows for the cumulative charging of one single conduct, when this conduct amounts to two or more different offences. In this respect, the Prosecutor can, for example, charge a person with both terrorism and homicide. However, this does not apply to modes of responsibility. A person cannot be cumulatively charged with two different modes of responsibility for the same offence: one cannot be an accomplice as well as a perpetrator in murdering one single victim. He is either one or the other. Therefore, for modes of responsibility, in the case of a single offence alternative charging is required. This does not, however, impede cumulative charging of modes of responsibility for different offences, even if they stem from the same underlying conduct.[395]

281. Additionally, under Lebanese law, both the investigating Judge and the trial court are empowered to re-classify criminal conduct originally charged by the Prosecution. In other words, they are not bound by the legal characterisation of a crime propounded by the Prosecutor.[396] The

[393] See G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, 16th edn. (Paris, Dalloz), at 490, citing a decision of the French Court of cassation, 3 March 1960, published in the *Bulletin* at n°138. See as well the *Rachid Karami* case.

[394] G. Stefani, G. Levasseur, B. Bouloc, *Droit pénal général*, 16th edn. (Paris, Dalloz), at 490.

[395] Court of cassation, 6th Chamber, *Aalian v Al-Saka*, decision n° 48, 16 May 2000 *Sader fil-tamyiz* [Sader in the cassation], 2000, at 541.

[396] The principle *jura novit curia* (it is for the court to apply the law, whereas it is for the Prosecution to submit the facts in support of its allegations) applies throughout.

relevant provision relating to the powers of all judges can be found in Article 370 of the Code of Civil Procedure, whereby a Judge is not bound by the legal characterisation of the facts propounded by the parties. A Judge is empowered to give the correct legal classification of these facts.[397] The general rule contained in Article 370 is specified in two provisions of the Lebanese Code of Criminal Procedure: Article 176 with regard to the single Judge[398] and Article 233 with regard to the criminal court.[399]

II. International Criminal Law

A. Multiple Offences

282. Under international criminal law, instances of "*concours réel d'infractions*"[400] and "*concours idéal d'infractions*"[401] are treated in the same manner as in Lebanese law.

283. Nevertheless, in the realm of international criminal law, "*concours idéal d'infractions*" poses particular difficulties. This is because numerous "core crimes" in international criminal law can—depending on their requisite elements—be classified as different crimes simultaneously. For example, the rape of a civilian woman by a soldier may—if carried out within the context of an armed conflict and as part of a widespread or systematic attack against the civilian population –be classified both as a war crime and as a crime against humanity. On the basis of which principles or criteria should one decide under which of these two classes a specific rape falls? The answer to this query is important not only for judges, but also for prosecutors, when they decide how to charge a person suspected of international crimes.

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[397] This is also applicable to matters pertaining to criminal procedure, pursuant to Article 6 of the Code of civil procedure which provides that the provisions contained in the Code may be applied whenever other Codes of Procedure lack such provisions.

[398] Article 176(2) of the Lebanese Code of Criminal procedure provides that "[t]he single Judge is not bound by the legal definition of the offence charged".

[399] Article 233(2) of the Lebanese Code of Criminal procedure provides that "It [the Criminal Court] may amend the legal definition of the act described in the indictment."

[400] As an ICTY Trial Chamber stated in *Kupreškić et al*, there is a "real concurrence" of offences when there is "an accumulation of separate acts, each violative of a different provision" *Kupreškić et al*, Trial Judgment, 14 January 2000 ("*Kupreškić* TJ"), para. 678c. As Judge Dolenc of the ICTR described a "real concurrence" of offences, "the accused commits more than one crime, either by violating the same criminalisation a number of times, or by violating a number of different criminalisations by separate acts." ICTR, *Semanza*, Trial Judgment – Separate and Dissenting Opinion of Judge Pavel Dolenc, 15 May 2003, para. 4.

[401] The ICTY Trial Chamber in *Kupreškić et al* provided the example of "the shelling of a religious group of enemy civilians by means of prohibited weapons (e.g. chemical weapons) in an international armed conflict, with the intent to destroy in whole or in part the group to which those civilians belong". Here this "single act contains an element particular to [genocide] to the extent that it intends to destroy a religious group, while the element particular to Article 3 [of the ICTY Statute on war crimes] lies in the use of unlawful weapons". *Kupreškić* TJ, para. 679a.

284. Criteria for settling these last issues can be deduced from the principles of criminal law common to the major legal systems of the world as well as international case law. The test which commends itself to us is known in common law countries as the *Blockburger* test (based on a famous decision by the US Supreme Court delivered in 1932 in *Blockburger* and confirmed by the US Supreme Court in *Rutledge* (1996)). This test requires a comparison of the crimes' respective constitutive elements as described by the statute or other applicable law, to determine whether each crime contains an element that is distinct from the elements required by the other crimes. It substantially coincides with the "principle of reciprocal speciality" upheld in civil law countries, namely that a defendant can only be convicted of two crimes for the same conduct if each crime requires an element that the other does not.

285. When such a comparison is undertaken, there are two possibilities. First, it may happen that each of the two crimes contains different elements relative to *each other*. Where this is the case, then reciprocal speciality between the two offences exists.[402] Provided that the act of the accused satisfy *all* the elements of both crimes, then the conduct can be said to amount to two different offences.[403] Secondly, it may happen that only one of the two crimes covering the same conduct requires a different element that the other crime does not. In such instances, reciprocal speciality cannot be said to exist and thus it is irrelevant if the acts of the accused satisfies all the elements of both crimes—he can be found guilty only of one crime: the crime with the additional element.[404] In other words, the more specific crime (the crime with the different/additional element) prevails over a more general

[402] As the ICTY Appeals Chamber pithily put it in *Delalić et al*: "[R]easons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other." *Delalić et al*, Appeals Judgment, 20 February 2001 ("*Delalić* AJ"), para. 412. See also ICTY, *Kupreškić* TJ, para. 685; ICTY, *Jelisić*, Appeals Judgment, 5 July 2001, para. 82.

[403] For instance, the rule on rape of civilians as a crime against humanity requires an objective element (the act must be part of a widespread or systematic practice) that the rule on rape as a war crime does not require. This last rule, in its turn, requires an objective element (that the rape be connected with an international or an internal armed conflict) that the other rule does not require (at least under customary international law). Hence, if the rape has been perpetrated within an internal armed conflict as part of a systematic practice, the offence may be regarded as both a war crime and a crime against humanity.

[404] As was stated in *Kupreškić et al*, "The rationale behind the principle of speciality is that if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action. Particularly in case of discrepancy between the two provisions, it would be logical to assume that the law-making body intended to give pride of place to the provision governing the action more directly and in greater detail." ICTY, *Kupreškić* TJ, para. 684. This principle has been at times interpreted differently in practice (see ICTY, *Kordić and Čerkez*, Appeals Judgment, 17 December 2004, paras 1039-1044) but has always been followed in principle by international criminal tribunals.

crime (the crime that does not have a different/additional element). An illustration of this principle can be found in *Delalić et al.*[405]

B. Multiple Charging

286. In the light of the above, international criminal jurisprudence provides prosecutors with two options in instances of multiple offences: cumulative charging and alternative charging. The former refers to the practice of charging an accused with several crimes based on the same factual matrix, whilst the latter refers to charging an accused with several crimes which are relied upon "in the alternative", so that in the event that the primary charge is unsuccessful, prosecutors can then rely on secondary (alternate) charges.

287. In the earlier years of the international criminal tribunals there was a lack of uniformity in the law with respect to cumulative charging: the practice was permissible and it could be challenged, with a number of Chambers taking seemingly different approaches[406] and failing to provide a comprehensive analysis. The first developed decision on charging practice was that in *Kupreškić* by

[405] The Prosecutor had charged, for the same facts, some defendants with both murder as a war crime (covered by Article 3 of the ICTY Statute) and wilful killing as a grave breach of the Geneva Conventions (pursuant to Article 2 of the same Statute). The Appeals Chamber held that since only the provision on grave breaches provided for an element not envisaged in the provision on war crimes, the defendants could only be convicted of a grave breach. ICTY, *Delalić* AJ, 20 February 2001, paras 422-423. ("The definition of willful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of willful killing under Article 2 [...] Because willful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.")

[406] For example: In ICTY, *Tadić*, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995, para. 17, the Chamber determined that cumulative charges issues are "best dealt with if and when matter of penalty fall for consideration"; in ICTR, *Akayesu*, Trial Judgment, 2 September 1998, para. 468, the Chamber held that accumulation was acceptable where (1) offences had different elements, (2) where the crimes protect different interests and (3) where more than one conviction was necessary to fully describe the accused's conduct; in ICTY, *Krstić*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Count 7-8, 28 January 2000, at 5-7, the Chamber favoured cumulative charging except for "clear cut" cases of unduly cumulative charging; in ICTR, *Niyitegeka*, Decision on Defence Motion on Matters Arising from Trial Chamber Decisions and Preliminary Motion Based on Defects in the Form of the Indictment and Lack of Jurisdiction, 20 November 2000, para. 43, the Chamber determined that challenges to cumulative charges can only be raised at trial and not in earlier phases of the proceedings; in ICTY, *Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 February 2000, para. 12, the Chamber determined that an accused would not be prejudiced if issues of cumulative charges were decided after the evidence had been presented.

an ICTY Trial Chamber.[407] After reviewing national and international jurisprudence, the Trial Chamber stated that:

> the issue must be settled in the light of two basic but seemingly conflicting requirements. There is first the requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor be granted all the powers consistent with the Statute to enable her to fulfil her mission efficiently and in the interests of justice.[408]

288. One of the underlying rights of the accused to which the Chamber referred is the fundamental *non bis in idem* (double jeopardy) principle and its compatibility with cumulative charging. An accused may make the argument that he or she is being charged and will potentially be punished twice for the same acts. The *non bis in idem* principle is triggered not at the *charging* stage, but rather when *guilt* is determined. In order to avoid injustice, the Chamber outlined the following principle:

> [i]f [...] a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. [...] On the other hand, if a Trial Chamber finds [...] that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only.[409]

In other words, it is the existence of an additional, unique element between one charge and another for the same underlying facts that eliminates any breach of the *non bis in idem* principle. This proposition has become accepted as the correct statement of the law, as noted above.

289. The Chamber in *Kupreškić* then went on to provide guidance on when cumulative or alternative charges are to be laid. In essence, the Chamber took the view that the Prosecutor could include cumulative charges in the indictment when the facts charged violate two or more provisions of the relevant Statute and when (i) the offence requires proof of an element that the other does not and (ii) each offence substantially protects different values.[410] On the other hand, alternative charges are to be preferred when an offence appears to be in breach of more than one provision but where

[407] ICTY, *Kupreškić* TJ, paras 668-699; 720-727.
[408] ICTY, *Kupreškić* TJ, para. 724.
[409] ICTY, *Kupreškić* TJ, paras 718-719. See also, ICTY, *Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999 ("*Krnojelac* Indictment Decision"), para. 10.
[410] ICTY, *Kupreškić* TJ, para. 727(a).

multiple convictions would not be possible due to the principle of speciality.[411] In addition, the Chamber opined that restraint should be exercised when seeking to charge individuals based on the same facts but under excessive multiple criminal heads when those facts cannot sustain multiple convictions under the relevant Statute.[412]

290. These holdings were however persuasively disapproved, in as much as they restrict the Prosecutor's ability to bring cumulative charges, in one sweeping paragraph of the Appeals Chamber's judgment in *Delalić*. The basis for this conclusion was that (i) before the presentation of all the evidence it was impossible for the Prosecutor to evaluate and determine which of the charges will be proved and that (ii) the Chamber was better positioned to evaluate the sufficiency of the evidence and decide which charges would be retained.[413] Cumulative charging has been subsequently endorsed by the ICTR,[414] the SCSL[415] and, more recently, by the ECCC.[416]

291. This jurisprudence is to be contrasted with what may appear to be a different emerging practice at the ICC. In its decision on the confirmation of charges in the *Bemba* case, the Pre-Trial Chamber held that:

> the prosecutorial practice of cumulative charging is detrimental to the rights of the Defence since it places an undue burden on the Defence. The Chamber considers that, as a matter of fairness and expeditiousness of the proceedings, only distinct crimes may justify a cumulative charging approach and, ultimately, be confirmed as charges. This is only possible if each statutory provision allegedly breached in relation to one and the same conduct requires at least one additional material element not contained in the other. [...] [t]he Chamber further recalls that the ICC legal framework differs from that of the *ad hoc* tribunals, since under regulation 55 of the Regulations, the Trial Chamber may re-characterise a crime to give it the most appropriate legal characterisation. Therefore, before the ICC, there is no need for the Prosecutor to adopt a cumulative charging approach and present all possible characterisations in order to ensure that at least one will be retained by the Chamber.[417]

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[411] ICTY, *Kupreškić* TJ, para. 727(b).

[412] ICTY, *Kupreškić* TJ, para. 727(c).

[413] ICTY, *Delalić* AJ, para. 400; *id*, Separate and Dissenting Opinion of Judge Hunt and Judge Bennouna, para. 12. See also ICTY, *Brđanin and Talić*, Decision on Objections by Momir Talić to the Form of the Amended Indictment, 20 February 2001, paras 29-43.

[414] ICTR, *Musema*, Appeals Judgment, 16 November 2001, para. 369.

[415] SCSL, *Brima et al*, Appeals Judgment, 22 February 2008, para. 212, n. 327.

[416] ECCC, Decision on Appeal Against Closing Order Indicting Kaing Guek Eav alias "Duch", 5 December 2008, para. 87.

[417] ICC, *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009 ("*Bemba* Confirmation of Charges Decision"), paras 202-203.

292. Leave to appeal this decision was rejected.[418] It must be noted at this juncture that none of the *ad hoc* tribunals has a comparable regulation as that referred to by the ICC Chamber.[419] At present, it would appear that in one case at the ICC cumulative charging has been frowned upon, whilst at the *ad hoc* tribunals the practice has found more favour.[420]

293. As for alternative charging, the ICTY Appeals Chamber's reasoning in *Delalić*, although very brief and yet simultaneously sweeping, does nothing to prevent alternative charging by prosecutors. Indeed, such practice has been explicitly approved.[421] Furthermore, nothing prevents prosecutors from pleading alternative modes of liability.[422]

III. Comparison between Lebanese and International Criminal Law

294. Cumulative charging and the plurality of offences are regulated largely along the same lines by Lebanese law and international criminal law. Thus, as foreshadowed above, the answer to question (xiv) is straightforward: there is no cause—at least as can be foreseen before the presentation of any particular facts—to envisage, let alone reconcile, any conflict between the two bodies of law.

295. In relation to question (xv), as the Defence Office has correctly summarised,[423] there is no clear, general rule under either Lebanese or international criminal law as to whether cumulative or alternative charges are to be preferred. Both forms of charges have their strengths and weaknesses. On the one hand, cumulative charges can ensure that the full scope of the accused's conduct is properly punished, and in this sense, provide victims with the full justice they deserve. As the ICTY in *Delalić* pointed out, at the early stages of a case the Prosecutor may not be in the position to offer

[418] ICC, *Bemba*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 September 2009 ("*Bemba* Leave to Appeal Decision").

[419] Notwithstanding, findings of guilt have been entered for the first time at the appellate stage but only in instances where the relevant charges have been included in the indictment. For one of the most recent examples of this practice see ICTY, *Mrškić and Šljivančanin*, Appeals Judgment, 5 May 2009, paras 61-63, 76-103; but see Partially Dissenting Opinion of Judge Pocar, paras 2-13.

[420] See, generally, War Crimes Research Office Brief.

[421] ICTY, *Naletilić and Martinović*, Trial Judgment, 31 March 2003, para. 510; ICTY, *Naletilić and Martinović*, Appeals Judgment, 3 May 2006, para. 102. See also ICTY, *Kvočka et al* , Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999, para. 25; ICTR, *Mpambara*, Decision on the Defence Motion Challenging the Amended Indictment, 30 May 2005, para. 4. See also the reasoning offered in War Crimes Research Office Brief, especially paras 19-22.

[422] ICTY, *Stanišić*, Decision on Defence Preliminary Motion in the Form of the Indictment, 19 July 2005, para. 6.

[423] Defence Office Submission, paras 167 and 175.

the clarity and narrowness that would be advantageous for expeditious proceedings.[424] Yet on the other hand, as one author correctly observed, "[c]umulative charging has certainly lengthened [...] trials considerably."[425] Indeed, this was one on the main concerns that motivated the decision of the ICC in *Bemba*,[426] perhaps being conscious of the constant criticisms directed at the length of trials at international tribunals. Clarifying and narrowing charges at the beginning "may help in making the proceedings, which have heretofore lasted months and even years, more focused and efficient. In addition, it may aid the defendant in the preparation of his case to know which charges will ultimately be considered to cover the same 'offence' for purposes of conviction and sentencing."[427]

296. Not surprisingly, in the light of these policy considerations, the Prosecution has emphasised the permissibility of cumulative charges and the difficulty faced by the Prosecution at the start of a trial as to which facts will ultimately be proved to the satisfaction of the Trial Chamber.[428] Also not surprisingly, the Defence Office asserts that international criminal tribunals have increasingly frowned upon unnecessary cumulative charging;[429] it has also emphasised the difficulties that excessively cumulative charges impose on defendants.[430]

297. To provide the Pre-Trial Judge with guidance, we draw the following conclusions based on the underlying purpose of the Statute to ensure fair and efficient trials in accordance with the highest standards of justice.

298. First, the Pre-Trial Judge, in confirming the indictment, should be particularly careful to allow cumulative charging only when separate elements of the charged offences make these offences truly distinct. In particular, when one offence encompasses another, the Judge should always choose the former and reject pleading of the latter. Likewise, if the offences are provided for under a general provision and a special provision, the Judge should always favour the special provisions. Additionally, modes of liability for the *same* offence should always be charged in the alternative.

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[424] ICTY, *Delalić* AJ, para. 400. See also the (more convincing) reasoning by Judges Hunt and Bennouna, in their Separate and Dissenting Opinion, in which they concurred with the majority on this point (para. 12).

[425] W. Schabas, *The UN International Criminal Tribunals The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), at 368.

[426] ICC, *Bemba* Leave to Appeal Decision, para. 60.

[427] ICTY, *Krstić*, Decision on Defence Preliminary Motion on the Form of the Amended Indictment, Count 7-8, 28 January 2000, at 5.

[428] Prosecution Submission, paras 133-135.

[429] Defence Office Submission, paras 172-174 and 177.

[430] Defence Office Submission, paras 179-181.

299. Second, the Pre-Trial Judge should be guided by the goal of providing the greatest clarity possible to the defence. For example, Rule 68(I) requires the Pre-Trial Judge to provide a reasoned decision for confirming or rejecting charges in the indictment. The Defence Office has suggested that if the Pre-Trial Judge confirms the indictment in whole or in part, he could use this reasoned decision as an opportunity to set out his understanding of the charges and to clarify any ambiguities that might remain in the indictment.[431] The Pre-Trial Judge may also request that the Prosecutor reconsider the submission of formally distinct offences which nonetheless do not in practical terms further the achievement of truth and justice through the criminal process. That is, additional charges should be discouraged unless the rules contemplating the offences are aimed at protecting substantially different values. This general approach should enable more efficient proceedings while avoiding unnecessary burdens on the defence, thus furthering the overall purpose of the Tribunal to achieve justice in a fair and efficient manner.

300. Third, we emphasise the evaluative role of the judiciary.

301. Finally, we turn to the specific hypothetical posed in question (xv). We do so with hesitation, however, as we are wary of addressing specific situations before the presentation of facts, which would better inform and clarify our analysis. Nonetheless, the following observation can be made based purely on the law. Under Lebanese law, the crimes of terrorist conspiracy, terrorism, and intentional homicide can be charged cumulatively even if based on the same underlying conduct, because they do not entail incompatible legal characterisations, and because the purpose behind criminalising such conduct is the protection of substantially different values (preventing extremely dangerous but inchoate offences, widespread fear in the population, and death, respectively). Therefore, in most circumstances it would be more appropriate to charge those crimes cumulatively rather than alternatively.

[431] Hearing of 7 February 2011, T. 139.

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

DISPOSITION

FOR THESE REASONS;

THE APPEALS CHAMBER, deciding unanimously;

PURSUANT TO Article 21(1) of the Statute and Rules 68(G) and 176 *bis* of the Rules;

NOTING the Pre-Trial Judge's preliminary questions contained in his order dated 21 January 2011;

NOTING the respective written submissions of the Prosecutor and the Defence Office dated 31 January 2011 and the arguments they presented at the public hearing on 7 February 2011 as well as the other filings in this case;

DETERMINES that;

With regard to the notion of **terrorist acts**:

1) The Tribunal shall apply domestic Lebanese law on terrorism and not the relevant rules of international treaty or customary law (see above paragraph 43);

2) Since the Tribunal shall apply Lebanese law on terrorism, there is no need to reconcile Article 2 of the Statute with international law (see above paragraph 44);

3) Article 314 of the Lebanese Criminal Code and Article 6 of the Law of 1958, interpreted in the light of international rules binding upon Lebanon, provided such interpretation does not run counter to the principle of legality, require the following elements for the crime of terrorism (see above paras 47-60, 124-30):

   a. the volitional commission of an act or the credible threat of an act;

b. through means that are likely to pose a public danger;[432] and

c. with the special intent to cause a state of terror;

4) If the perpetrator of a terrorist act uses for example explosives intending to kill a particular person but in the process kills or injures persons not directly targeted, then that perpetrator may be liable for terrorism *and* intentional homicide (or attempted homicide) if he had foreseen the possibility of those additional deaths and injuries but nonetheless willingly took the risk of their occurrence (*dolus eventualis*, namely advertent recklessness or constructive intent) (see above paragraphs 59 and 183);

With regard to the notion of conspiracy:

5) The Tribunal must apply domestic Lebanese law on conspiracy, not the rules of international treaty or customary law (see above paragraph 192);

6) Since the Tribunal must apply Lebanese law on conspiracy there is no need to reconcile Article 2 of the Statute with international law (see above paragraph 192);

7) Article 270 of the Lebanese Criminal Code and Article 7 of the Law of 11 January 1958 provide the following elements for the crime of conspiracy (see above paragraphs 193-201):

a. two or more individuals;

b. who conclude or join an agreement of the type described in paragraph 196;

c. aiming at committing crimes against State security (for purposes of this Tribunal, the aim of the conspiracy must be a terrorist act);

d. with an agreement on the means to be used to commit the crime (which for conspiracy to commit terrorism must satisfy the "means" element of Article 314); and

e. criminal intent relating to the object of the conspiracy;

[432] In particular, the Appeals Chamber notes that whether certain means are liable to create a public danger within the meaning of Article 314 should always be assessed on a case-by-case basis, having regard to the non-exhaustive list in Article 314 as well as to the context and the circumstances in which the conduct occurs. This way, Article 314 is more likely to be interpreted in consonance with international obligations binding upon Lebanon.

8) Conspiracy and joint criminal enterprise can be distinguished in that Lebanese criminal law treats conspiracy as a substantive crime and not as a mode of liability, whereas the doctrine of joint criminal enterprise relates to modes of criminal responsibility for participating in a group with a common criminal purpose (see above paragraph 191);

With regard to intentional homicide and attempted homicide:

9) The Tribunal must apply domestic Lebanese law on intentional homicide and attempted homicide, not the rules of international treaty or customary law (see above paragraph 150);

10) Since the Tribunal must apply Lebanese law on intentional homicide and attempted homicide, there is no need to reconcile Article 2 of the Statute with international law (see above paragraph 150);

11) Articles 547-549 of the Lebanese Criminal Code require the following elements for the crime of intentional homicide (see above paragraphs 151-166):

a. an act or culpable omission aimed at impairing the life of a person;
b. the result of the death of a person;
c. a causal connection between the act and the result of death;
d. knowledge of the circumstances of the offence (including that the act is aimed at a living person and conducted through means that may cause death); and
e. Intent to cause death, whether direct or *dolus eventualis*;

Articles 200-203 of the Lebanese Criminal Code require the following elements for the crime of attempted homicide (see above paragraphs 176-181):

(a) a preliminary action aimed at committing the crime (beginning the execution of the crime);
(b) the subjective intent required to commit the crime; and

(c) the absence of a voluntary abandonment of the offence before it is committed;

12) An individual can be prosecuted by the Tribunal for intentional homicide for an act perpetrated against persons not directly targeted if that individual had foreseen the possibility of those deaths but nonetheless took the risk of their occurrence (*dolus eventualis*) (see above paragraphs 169-175);

With regard to modes of responsibility:

13) An evaluation is to be made between international criminal law and domestic Lebanese law when the Tribunal applies modes of criminal responsibility. Should no conflicts arise, Lebanese law should be applied. However, if conflicts do arise, then, taking account of the circumstances of the case, the legal regime that most favours the accused shall be applied (see above paragraphs 210-211);

With regard to cumulative charging and plurality of offences:

14) Cumulative charging and plurality of offences applicable before the Tribunal are regulated in largely the same manner by both international law and domestic Lebanese law. Lebanese law should be applied, and care should be taken to provide utmost clarity to the accused in respect to the content of the charges against them (see above paragraphs 270-301);

15) Cumulative charging should only be allowed when separate elements of the charged offences make those offences truly distinct and where the rules envisaging each offence relate to substantially different values. The Tribunal should prefer alternative charging where a conduct would not permit multiple convictions. Modes of liability for the same offence should always be charged in the alternative (see above paragraphs 277-301);

SPECIAL TRIBUNAL FOR LEBANON المحكمة الخاصة بلبنان TRIBUNAL SPÉCIAL POUR LE LIBAN

Done in English, Arabic and French, the English version being authoritative.

Dated this sixteenth day of February 2011,
Leidschendam, The Netherlands

Judge Antonio Cassese
President

Annex 470

Prosecutor v. Perišić, Case No. IT-04-81, Trial Chamber Judgment, p. 26, para. 97 (6 September 2011)

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.	IT-04-81-T
		Date:	6 September 2011
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Bakone Justice Moloto, Presiding**
Judge Pedro David
Judge Michèle Picard

Registrar: **Mr. John Hocking**

PROSECUTOR

v.

MOMČILO PERIŠIĆ

JUDGEMENT

PUBLIC WITH CONFIDENTIAL ANNEX C

The Office of the Prosecutor:

Mark Harmon
Daniel Saxon

Counsel for the Accused:

Novak Lukić
Gregor Guy-Smith

XV. CONFIDENTIAL ANNEX C

I. INTRODUCTION

A. The Accused Momčilo Perišić

1. Momčilo Perišić, son of Srećko, was born on 22 May 1944 in Koštunići, Serbia, in the Socialist Federal Republic of Yugoslavia ("SFRY"). After joining the Yugoslav People's Army ("JNA"), he graduated from the Ground Forces Military Academy in 1966.[1]

2. When the conflict in the former Yugoslavia began, Perišić was Commander of the JNA Artillery School Centre in Zadar, Croatia.[2] In January 1992, he was appointed the Commander of the newly established 13th Corps of the JNA in the Mostar region, Bosnia and Herzegovina ("BiH"). After the JNA's formal withdrawal from BiH in May 1992, Perišić became the Chief of Staff and then Commander of the 3rd Army within the Yugoslav Army ("VJ") based in Niš, Serbia.[3]

3. On 26 August 1993, the President of the Federal Republic of Yugoslavia ("FRY") appointed Perišić as Chief of the VJ General Staff, a position which made him the most senior officer in the VJ.[4] He held this position until 24 November 1998, when the FRY President appointed him as government advisor for defence issues.[5]

B. The Case Against Momčilo Perišić

4. An initial indictment against Perišić was confirmed on 24 February 2005 and unsealed on 7 March 2005.[6] Perišić expressed his intention to voluntarily surrender and on 7 March 2005, he was transferred into the custody of the Tribunal.[7] Amended indictments were filed on 26 September 2005, 13 September 2007 and 5 February 2008, the last being the operative indictment in this case ("Indictment").[8]

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1 Ex. P196, Decree of the President of the FRY, 26 August 1993, p. 2; Ex. P812, Transcript of Interview with Perišić, 24 January 2004, p. 1.

2 Jožef Poje, T. 3089-3090; Ex. P706, Perišić's Written Response to a Question from Trial Attorney, 19 October 2003, p. 2.

3 Ex. P706, Perišić's Written Response to a Question from Trial Attorney, 19 October 2003, p. 2; Ex. P810, Transcript of Interview with Perišić, 23 January 2004, p. 6; Ex. P815, Transcript of Interview with Perišić, 25 January 2004, p. 15.

4 Ex. P196, Decree of the President of the FRY, 26 August 1993, p. 2; Ex. P375, Expert Report of Patrick Treanor Entitled: Belgrade Leadership and Serbs in Croatia and Bosnia, 1 September 2008, p. 26.

5 Ex. P703, Presidential Decree on Deployment and Appointment of General Perišić, 24 November 1998.

6 Confirmation of Indictment (under seal), 24 February 2005; Order to Disclose Indictment and Warrant of Arrest Against Momčilo Perišić, 14 March 2005.

7 Order for Detention on Remand, 8 March 2005.

8 Prosecution's Filing of Amended Indictment in Compliance with Trial Chamber Order of 29 August 2005, 26 September 2005; Prosecution Filing of Second Amended Indictment, 13 September 2007; Prosecution Filing of Revised Second Amended Indictment with Annex A, 5 February 2008.

B. General Requirements of Article 5 of the Statute

79. Momčilo Perišić is charged with crimes against humanity under Article 5 of the Statute, namely three counts of murder,[149] three counts of inhumane acts,[150] one count of persecution on political, racial or religious grounds[151] and one count of extermination.[152]

1. Requirements of Article 5 of the Statute

80. In order to constitute a crime against humanity under Article 5 of the Statute, it is required that (i) there was an armed conflict, and (ii) the acts of the perpetrator were geographically and temporally linked with the armed conflict.[153]

81. Moreover, it is required that the acts of the perpetrator be part of a widespread or systematic attack "directed against any civilian population".[154] This requirement encompasses the five elements listed below.

82. *There must have been an "attack"*.[155] An "attack" may be defined as a course of conduct involving the commission of acts of violence.[156] In the context of crimes against humanity, an "attack" is distinct from the concept of "armed conflict" and not limited to the use of armed force. Rather, it may encompass any mistreatment of the civilian population.[157] The attack may precede, outlast or continue during the armed conflict and need not be part of it.[158]

83. *The attack must have been directed against the civilian population*.[159] This means that the civilian population must be the *primary* object of attack.[160] It is not a requirement that the attack be against the *whole* civilian population. However, a Trial Chamber must be satisfied that the attack

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149 Indictment, Counts 1, 5, 9.
150 Indictment, Counts 3, 7, 11.
151 Indictment, Count 12.
152 Indictment, Count 13.
153 *Kunarac et al.* Appeal Judgement, para. 83; *Tadić* Appeal Judgement, paras 249, 251. This is a jurisdictional limitation on the Tribunal which is not part of the customary law definition of crimes against humanity, *Tadić* October 1995 Appeal Jurisdiction Decision, para. 141; *Tadić* Appeal Judgement, para. 251.
154 *Blaškić* Appeal Judgement, para. 98; *Kunarac et al.* Appeal Judgement, para. 85.
155 *Kunarac et al.* Appeal Judgement, para. 85.
156 *Krnojelac* Trial Judgement, para. 54; *Kunarac et al.* Appeal Judgement, para. 89, affirming *Kunarac et al.* Trial Judgement, para. 415.
157 *Kunarac et al.* Appeal Judgement, paras 86, 89, affirming *Kunarac et al.* Trial Judgement, para. 416.
158 *See Kunarac et al.* Appeal Judgement, para. 86; *Tadić* Appeal Judgement, para. 251.
159 *Kunarac et al.* Appeal Judgement, para. 85.
160 *Martić* Appeal Judgement, para. 305; *Kunarac et al.* Appeal Judgement, para. 91, affirming *Kunarac et al.* Trial Judgement, para. 421. The Appeals Chamber in *Kunarac et al.* indicated that the relevant factors to be considered in this regard include: "the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war", *Kunarac et al.* Appeal Judgement, para. 91.

was in fact directed against a civilian *population*, rather than against a limited and randomly selected number of individuals.[161]

84. A population may qualify as "civilian" even if individuals who do not fall within the definition of civilians are among it.[162] In order to determine whether the presence of non-civilians deprives the population of its civilian character, the number of non-civilians, as well as whether they are on leave or laid down their arms, must be examined.[163]

85. The requirement under Article 5 that an attack be directed against a civilian population does not mean that the individual victims of criminal acts committed within the attack must be civilians only.[164] The jurisprudence of the Tribunal does not suggest that a Trial Chamber is required to determine whether every single individual victim of the alleged crimes against humanity is a "civilian" under international humanitarian law.[165] As a consequence, persons *hors de combat* may also fall under the protection of Article 5 of the Statute.[166]

86. *The attack must also be widespread or systematic*.[167] "Widespread" means that the attack is large in scale with a large number of victims, while "systematic" refers to the organised nature of the attack.[168] It is settled jurisprudence that the existence of a plan need not be proven.[169]

87. *The acts of the perpetrator must form part of the attack.*[170] However, they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack for the purpose of Article 5.[171]

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161 *Martić* Appeal Judgement, para. 305; *Kunarac et al.* Appeal Judgement, para. 90.

162 *See* Article 50(3) of Additional Protocol I; *Galić* Appeal Judgement, paras 136-137, 144; *Kordić and Čerkez* Appeal Judgement, paras 50, 97; *Blaškić* Appeal Judgement, paras 113, 115. The Appeals Chamber held "that the definition of civilian contained in Article 50 of Additional Protocol I reflects the definition of civilian for the purpose of applying Article 5 of the Statute", *Martić* Appeal Judgement, para. 302. *See also Galić* Appeal Judgement, para. 144, fn. 437; *Kordić and Čerkez* Appeal Judgement, para. 97; *Blaškić* Appeal Judgement, paras 110-114. As regards the definition of civilians, *see also infra* para. 92.

163 *See Galić* Appeal Judgement, paras 136-137, 144; *Blaškić* Appeal Judgement, paras 113, 115.

164 *Martić* Appeal Judgement, paras 305, 307.

165 *Martić* Appeal Judgement, para. 308.

166 *Martić* Appeal Judgement, para. 311.

167 *Kunarac et al.* Appeal Judgement, para. 85.

168 *Galić* Trial Judgement, para. 146; *Kunarac et al.* Appeal Judgement, para. 94. Whether the attack was widespread or systematic must be ascertained in light of the means, methods, patterns, resources, participation of officials or authorities, and result of the attack upon that population, *Kunarac et al.* Appeal Judgement, para. 95.

169 *See Kunarac et al.* Appeal Judgement, para. 98; *Blaškić* Appeal Judgement, para. 120, also holding that the existence of a plan "may be evidentially relevant in proving that an attack was directed against a civilian population and that it was widespread or systematic".

170 *Mrkšić and Šljivančanin* Appeal Judgement, para. 41; *Kunarac et al.* Appeal Judgement, paras 85, 99-100; *Tadić* Appeal Judgement, paras 248, 255.

171 *Kunarac et al.* Appeal Judgement, para. 100.

88. *The perpetrator must know that there is an attack directed against the civilian population and that his acts are part of that attack*, or at least he must take the risk that his acts form part thereof.[172] However, knowledge of the details of the attack is not necessary.[173] Neither is it required that the perpetrator share the purpose or goal behind the attack.[174]

C. Attacks on Civilians

89. Perišić is charged with two counts of attacks on civilians, a violation of the laws or customs of war pursuant to Article 3 of the Statute (Counts 4 and 8). The crime of attacks on civilians is based upon Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II both of which provide, in their relevant parts, that "[t]he civilian population as such, as well as individual civilians, shall not be made the object of attack".[175]

1. *Actus Reus*

90. The *actus reus* of the crime of attacks on civilians is conducting an attack directed against the civilian population or individual civilians causing death or serious injury to body or health.[176]

91. The term "attack" is defined under Article 49 of Additional Protocol I as "acts of violence against the adversary, whether in offence or in defence".[177]

92. Article 50 of Additional Protocol I[178] defines a "civilian" as "any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Geneva Convention and in Article 43 of Additional Protocol I". The term "civilian" is defined negatively as anyone who is not a member of the armed forces or of an organised military group belonging to a party to the conflict.[179] Members of the armed forces and members of militias or

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172 *Blaškić* Appeal Judgement, para. 124; *Kordić and Čerkez* Appeal Judgement, para. 99; *Kunarac et al.* Appeal Judgement, paras 99, 102; *Tadić* Appeal Judgement, para. 248.

173 *Kunarac et al.* Appeal Judgement, para. 102.

174 *Kunarac et al.* Appeal Judgement, para. 103, also providing that it is the attack, not the acts of the perpetrator, which must be directed against the target population.

175 *See* Article 51(2) of Additional Protocol I; Article 13(2) of Additional Protocol II.

176 *D. Milošević* Trial Judgement, para. 942; *Galić* Trial Judgement, paras 53, 56.

177 *Kordić and Čerkez* Appeal Judgement, para. 47; *Martić* Trial Judgement, para. 68; *Galić* Trial Judgement, para. 52.

178 In interpreting Article 50 of Additional Protocol I in the context of Article 3 of the Statute, the Trial Chamber has referred to the jurisprudence concerning the definitions of a "civilian" and a "civilian population" in the context of Article 5 of the Statute and in light of the following Appeals Chamber holdings: *Blaškić* Appeal Judgement, para. 110 (stating that "Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law"); *Martić* Appeal Judgement, para. 299 (holding that "while certain terms have been defined differently in international humanitarian law and in the context of crimes against humanity, the fundamental character of the notion of civilian in international humanitarian law and international criminal law militates against giving it differing meanings under Article 3 and Article 5 of the Statute").

179 *Galić* Trial Judgement, para. 47; *D. Milošević* Trial Judgement, para. 945.

volunteer corps forming part of such armed forces cannot claim civilian status. Neither can members of organised resistance groups.[180] The Appeals Chamber has held that:

> [T]he specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.[181]

93. The protection from attack afforded to civilians is suspended when and for such time they directly take part in hostilities.[182] In such cases, they become a legitimate target. Taking "direct" part in the hostilities entails engaging in acts of war that by their nature or purpose are likely to cause actual harm to the personnel or matériel of the enemy armed forces.[183]

94. The presence of individual combatants within the population being attacked does not necessarily deprive the population of its characterisation as civilian.[184] The Appeals Chamber has held that "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined".[185]

95. In determining whether the attack was directed against civilians or the civilian population, the Trial Chamber is entitled to base itself on a case-by-case analysis, taking into account various factors, including:

> [T]he means and method used in the course of the attack, the status of the victims, their number, […] the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[186]

In addition, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of

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180 *Blaškić* Appeal Judgement, para. 113; *Martić* Appeal Judgement, para. 292. *See also* Article 4(A) of the Third Geneva Convention.

181 *Martić* Appeal Judgement, para. 295; *Galić* Appeal Judgement, fn. 437; *Blaškić* Appeal Judgement, para. 114. *See also* ICRC Commentary on Additional Protocols, para. 1676 (with respect to Article 43(2) of Additional Protocol I).

182 Article 51(3) of Additional Protocol I; Article 13(3) of Additional Protocol II; *D. Milošević* Trial Judgement, para. 947; *Galić* Trial Judgement, para. 48.

183 *D. Milošević* Trial Judgement, para. 947; *Galić* Trial Judgement, para. 48; ICRC Commentary on Additional Protocols, para. 1944 (with respect to Article 51(3) of Additional Protocol I).

184 *Galić* Appeal Judgement, para. 136; *Blaškić* Appeal Judgement, paras 113, 115; *Kordić and Čerkez* Appeal Judgement, para. 50.

185 *Galić* Appeal Judgement, para. 137; *Blaškić* Appeal Judgement, para. 115; ICRC Commentary on Additional Protocols, para. 1922 (with respect to Article 50(2) and (3) of Additional Protocol I).

186 *Galić* Appeal Judgement, para. 132; *Blaškić* Appeal Judgement, para. 106; *Kunarac et al.* Appeal Judgement, para. 91.

the incident, the victims' appearance, including their age, gender, clothing and activity may also be relevant.[187]

96. In customary international law, there is an absolute prohibition against targeting of civilians which may not be derogated from due to military necessity.[188] However, this does not exclude the possibility of civilian casualties incidental to an attack aimed at legitimate military targets provided they are proportionate to the concrete and direct military advantage anticipated prior to the attack.[189]

97. Indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks on civilians.[190] In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used.[191] An attack which may cause civilian casualties disproportionate to the concrete and direct military advantage anticipated is to be considered as indiscriminate.[192] Such an attack may also give rise to the inference that civilians were the object of attack.[193]

98. The parties to a conflict have an obligation "to remove civilians, to the maximum extent feasible from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas".[194] However, "the failure of a party to abide by this obligation does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack".[195]

99. Finally, the attack in question must have resulted in death or serious injury to body or health within the civilian population.[196]

2. *Mens Rea*

100. In order to satisfy the *mens rea* required for the crime of attacks on civilians, the Prosecution must establish that the perpetrator wilfully made the civilian population or individual civilians the

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187 *Strugar* Appeal Judgement, para. 271; *Galić* Appeal Judgement, para. 133.

188 *Galić* Appeal Judgement, para. 130; *Kordić and Čerkez* Appeal Judgement, para. 54 (as revised by the *Kordić and Čerkez* Appeal Judgement Corrigendum of 26 January 2005); *Blaškić* Appeal Judgement, para. 109.

189 *Galić* Appeal Judgement, para. 190; *Martić* Trial Judgement, para. 69. *See also Strugar* Appeal Judgement, para. 179. Military objectives that may be lawfully attacked are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage", Article 52(2) of Additional Protocol I; *Kordić and Čerkez* Appeal Judgement, para. 53.

190 *Galić* Appeal Judgement, para. 132, affirming *Galić* Trial Judgement, para. 57. *See also Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion, para. 78.

191 *Galić* Appeal Judgement, para. 132; *Galić* Trial Judgement, fn. 101.

192 *See Galić* Trial Judgement, para. 58; Article 51(5)(b) of Additional Protocol I.

193 *Galić* Appeal Judgement, para. 132, affirming *Galić* Trial Judgement, para. 60.

194 *Galić* Appeal Judgement, para. 194.

195 *Galić* Appeal Judgement, para. 194, affirming *Galić* Trial Judgement, para. 61.

196 *Kordić and Čerkez* Appeal Judgement, paras 55-67; *D. Milošević* Trial Judgement, para. 942; *Galić* Trial Judgement, paras 43, 56; *Blaškić* Trial Judgement, para. 180; Article 85(3) of Additional Protocol I.

object of attack.[197] The concept of "wilfulness" encompasses both the notions of direct intent and indirect intent, that is, the concept of recklessness, excluding mere negligence.[198]

101. It must also be proven that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.[199] International humanitarian law dictates that if there is doubt about a person's status, he shall be considered a civilian.[200] In the context of a criminal trial, it is the Prosecution that must prove that "in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant".[201] The intent to target civilians can be proved through inferences from direct or circumstantial evidence.[202] The Appeals Chamber further held that "[t]here is no requirement of the intent to attack *particular* civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack".[203]

D. Murder

102. In addition to the general requirements of Articles 3 and 5 of the Statute set out above, the elements of the crime of murder are the following:

i. the death of a victim;

ii. the death was the result of an act or omission of the perpetrator; and

iii. the perpetrator intended to kill the victim or wilfully harm or inflict serious injury with the reasonable knowledge that the attack was likely to result in death.[204]

103. The *actus reus* of murder requires that the victim died as a result of an act or omission of the perpetrator.[205] Proof beyond reasonable doubt that the person was murdered does not require

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197 *Strugar* Appeal Judgement, para. 270; *Galić* Appeal Judgement, para. 140; Article 85(3)(a) of Additional Protocol I.

198 *Martić* Trial Judgement, para. 72. *See also Strugar* Appeal Judgement, para. 270; *Galić* Appeal Judgement, para. 140, affirming to *Galić* Trial Judgement, para. 54; *D. Milošević* Trial Judgement, para. 951; ICRC Commentary on Additional Protocols, para. 3474 (with respect to Article 85(3) of Additional Protocol I).

199 *Galić* Appeal Judgement, para. 140, affirming *Galić* Trial Judgement, para. 55.

200 Article 50(1) of Additional Protocol I. ICRC Commentary on Additional Protocols, para. 1920 stating that the presumption of civilian status applies to "persons who have not committed hostile acts, but whose status seems doubtful because of the circumstances. They should be considered to be civilians until further information is available, and should therefore not be attacked". *See also D. Milošević* Appeal Judgement, para. 60.

201 *Galić* Appeal Judgement, para. 140, affirming *Galić* Trial Judgement, para. 55. *See also Blaškić* Appeal Judgement, para. 111; *Kordić and Čerkez* Appeal Judgement, para. 48.

202 *D. Milošević* Appeal Judgement, paras 66-67; *Strugar* Appeal Judgement, para. 271.

203 *Strugar* Appeal Judgement, para. 271.

204 *Kvočka et al.* Appeal Judgement, para. 261. *See also Kordić and Čerkez* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, para. 423.

205 *See Kvočka et al.* Appeal Judgement, para. 259.

retrieval of the victim's dead body.[206] The death may be established by circumstantial evidence, provided it is the only reasonable inference that can be drawn from the evidence.[207]

104. The *mens rea* for murder includes both direct and indirect intent. Direct intent requires the perpetrator's desire to cause the death of the victim as a result of his act or omission, whereas indirect intent comprises the perpetrator's knowledge that the death of the victim was the probable consequence of his act or omission.[208] Negligence and gross negligence cannot be construed as indirect intent.[209]

E. Extermination

105. Perišić is charged with extermination, as a crime against humanity under Article 5(b) of the Statute (Count 13).

106. Extermination is the act of killing on a large scale.[210] The jurisprudence of the Tribunal has consistently held that, apart from the question of scale, the core elements of murder and extermination are the same.[211] The *actus reus* consists of "any act, omission or combination thereof that contributes directly or indirectly to the killing of a large number of individuals".[212] It also includes subjecting "a widespread number of people, or the systematic subjection of a number of people, to conditions of living that would lead to their deaths".[213]

107. The requirement of killings on a large scale does not suggest a numerical minimum,[214] nor a precise identification of certain named or described persons; it suffices to establish that killings occurred on a mass scale.[215] An assessment of whether this requirement has been met must be made

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206 *See Kvočka et al.* Appeal Judgement, para. 260; *Martić* Trial Judgement, para. 59; *Krnojelac* Trial Judgement, para. 326; *Tadić* Trial Judgement, para. 240.

207 *Kvočka et al.* Appeal Judgement, para. 260. *See also Delić* Trial Judgement, para. 47; *Martić* Trial Judgement, para. 59; *Brđanin* Trial Judgement, paras 383-385; *Krnojelac* Trial Judgement, paras 326-327; *Tadić* Trial Judgement, para. 240; *Halilović* Trial Judgement, para. 37.

208 *See Kvočka et al.* Appeal Judgement, para. 259; *Delić* Trial Judgement, para. 48; *Strugar* Trial Judgement, para. 235; *Krstić* Trial Judgement, para. 495; *Čelebići* Trial Judgement, para. 435.

209 *Delić* Trial Judgement, para. 48; *Martić* Trial Judgement, para. 60; *Orić* Trial Judgement, para. 348; *Stakić* Trial Judgement, para. 587. *See also Strugar* Trial Judgement, paras 235-236; *Brđanin* Trial Judgement, para. 386.

210 *Stakić* Appeal Judgement, para. 259, citing *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 516. *See also Seromba* Appeal Judgement, para. 190.

211 *Krajišnik* Trial Judgement, para. 716; *Blagojević and Jokić* Trial Judgement, para. 571; *Brđanin* Trial Judgement, para. 388. *See also Martić* Trial Judgement, para. 62. For the elements of murder, *see supra* paras 102-104.

212 *Seromba* Appeal Judgement, para. 189, citing *Brđanin* Trial Judgement, para. 389; *Vasiljević* Trial Judgement, para. 229.

213 *Stakić* Appeal Judgement, para. 259; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 522.

214 *Brđanin* Appeal Judgement, para. 471; *Stakić* Appeal Judgement, para. 260; *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 516. By way of illustration, the Trial Chamber in *Krajišnik* found that incidents involving less than thirty killings fulfilled the element of mass scale, considering the surrounding circumstances, *Krajišnik* Trial Judgement, para. 720.

215 *Stakić* Appeal Judgement, para. 260 citing *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 521; *Brđanin* Appeal Judgement, para. 471.

on the basis of a case-by-case analysis of all relevant factors.[216] It is not necessary that a large number of killings occurred during a single incident in a concentrated place over a short period. It may also be found "on an accumulation of separate and unrelated incidents, meaning on an aggregated basis".[217] The Trial Chamber further notes that the elements of the crime of extermination neither require the existence of a "vast scheme of collective murder".[218]

108. The *mens rea* for extermination is that "the accused intended, by his acts or omissions, either killing on a large scale, or the subjection of a widespread number of people, or systematic subjection of a number of people, to conditions of living that would lead to their deaths".[219]

F. Other Inhumane Acts

109. Perišić is charged with inhumane acts, as crimes against humanity punishable under Article 5(i) of the Statute. These include injuring and wounding civilians (Counts 3 and 7) and inflicting serious injuries, wounding and forcible transfer (Count 11).

110. "Other inhumane acts" is a category of crimes against humanity recognised as forming part of customary international law.[220] It functions as a residual category for serious crimes that are not otherwise enumerated in Article 5 of the Statute, but which require proof of the same *chapeau* elements.[221]

111. According to the Appeals Chamber, serious physical and mental injury or wounding is an "inhumane act" within the meaning of Article 5 of the Statute.[222] To establish the *actus reus* "the victim must have suffered serious bodily or mental harm" and the suffering must be the result of an act of the perpetrator.[223] The degree of severity must be assessed on a case by case basis with due regard for the individual circumstances.[224]

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216 *Martić* Trial Judgement, para. 63; *Stakić* Trial Judgement, para. 640; *Brdanin* Trial Judgement, para. 391; *Blagojević and Jokić* Trial Judgement, para. 573. The relevant factors include "the time and place of the killings, the selection of the victims, and the manner in which they were targeted", *Krajišnik* Trial Judgement, para. 716. *See also Nahimana et al.* Trial Judgement, para. 1061.

217 *Martić* Trial Judgement, para. 63; *Brdanin* Trial Judgement, para. 391. *See also Stakić* Trial Judgement, para. 640.

218 *Stakić* Appeal Judgement, paras 258-259. *See also Krstić* Appeal Judgement, para. 225.

219 *Stakić* Appeal Judgement, para. 259, citing *Ntakirutimana and Ntakirutimana* Appeal Judgement, para. 522.

220 *Stakić* Appeal Judgement, para. 315. The crime of other inhumane acts has been included in the following international legal instruments: Article 6(c) of the Nuremberg Charter; Article 5(c) of the Tokyo Charter; Article II(c) of Control Council Law No. 10. Convictions have been entered on this ground. The Appeals Chamber also noted "that numerous human rights treaties also prohibit inhuman and degrading treatment", including the ICCPR and the ECHR, *Stakić* Appeal Judgement, fn. 649. *See also Kordić and Čerkez* Appeal Judgement, para. 117.

221 *Galić* Trial Judgement, para. 152. *See also Kordić and Čerkez* Appeal Judgement, para. 117.

222 *Blaškić* Trial Judgement, para. 239. *See also Kordić and Čerkez* Appeal Judgement, para. 117.

223 *Kordić and Čerkez* Appeal Judgement, para. 117.

224 *Ibid.*

112. The *mens rea* for the crime of inhumane acts is satisfied if, at the time of the act or omission, the perpetrator had direct or indirect intent to inflict, by act or omission, serious physical or mental suffering or to commit a serious attack on the victim's human dignity.[225] Indirect intent requires that the perpetrator knew that his or her act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.[226]

113. Forcible transfer is considered in the jurisprudence of the Tribunal to constitute "other inhumane acts".[227] Forcible transfer entails the forcible displacement of persons from the area in which they are lawfully present, without grounds permitted under international law.[228]

114. The *actus reus* of forcible transfer is the forced displacement of persons within national boundaries.[229] The element that the displacement be forced requires that the victims had no genuine choice in their displacement.[230] Fear of violence, duress, detention, psychological oppression, and other such circumstances may create an environment where there is no choice but to leave, thus amounting to the forced displacement of persons.[231] In situations where the victims have consented, or even requested, their removal, that consent "must be real in the sense that it is given voluntarily and as a result of the individual's free will, assessed in the light of surrounding circumstances".[232] Consequently, the trier of fact must consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims' vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave.[233]

115. International law recognises limited circumstances under which involuntary displacements are permitted on humanitarian grounds.[234] Thus, in cases where displacements are permitted on humanitarian grounds, the act of displacement cannot constitute the *actus reus* of forcible

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225 *Krnojelac* Trial Judgement, para. 132; *Vasiljević* Trial Judgement, para. 236; *Kayishema and Ruzindana* Trial Judgement, para. 153. *See also Kordić and Čerkez* Appeal Judgement, para. 117.

226 *D. Milošević* Trial Judgement, para. 935; *Blagojević and Jokić* Trial Judgement, para. 628; *Krnojelac* Trial Judgement, para. 132; *Vasiljević* Trial Judgement, para. 236; *Galić* Trial Judgement, para. 154; *Kayishema and Ruzindana* Trial Judgement, para. 153.

227 *Stakić* Appeal Judgement, para. 317; *Kupreškić et al.* Trial Judgement, para. 566; *Kordić and Čerkez* Trial Judgement, para. 270.

228 *Krajišnik* Trial Judgement, para. 723.

229 *Stakić* Appeal Judgement, para. 317.

230 *Stakić* Appeal Judgement, para. 279; *Krnojelac* Appeal Judgement, para. 229.

231 *Stakić* Appeal Judgement, para. 281.

232 *Stakić* Appeal Judgement, para. 279. *See also Krnojelac* Appeal Judgement para. 229.

233 *Blagojević and Jokić* Trial Judgement, para. 596.

234 Article 49(2) of Geneva Convention IV, which is applicable to international armed conflict, provides that "the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand". Similarly, Article 17 of Additional Protocol II, which is applicable to non-international armed conflict, provides that "[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand". *See also* Martić Trial Judgement, para. 109.

transfer.[235] However, displacements for humanitarian reasons are not justifiable where the humanitarian crisis that caused the displacement is itself the result of the accused's own unlawful activity.[236]

116. The *mens rea* of forcible transfer is that the perpetrator must intend to displace the victims within the relevant national border.[237] It is not necessary that the perpetrator intends the displacement to be permanent.[238]

G. Persecutions

117. Perišić is charged with persecutions on political, racial or religious grounds, as a crime against humanity under Article 5(h) of the Statute (Count 12), including murder, cruel and inhumane treatment and forcible transfer.

118. The crime of persecutions consists of an act or omission which:

(a) discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (*actus reus*); and

(b) was carried out deliberately with the intention to discriminate on political, racial or religious grounds (*mens rea*).[239]

119. The acts underlying the crime of persecutions can include those listed under the other sub-headings of Article 5 of the Statute or provided for elsewhere in the Statute,[240] as well as other acts that are not explicitly mentioned in the Statute.[241] The Trial Chamber notes in this respect that the underlying act itself need not constitute a crime in international law.[242] However, not any denial or infringement of a fundamental right, committed with the requisite discriminatory intent, is serious enough to constitute the crime of persecution as a crime against humanity.[243] In order to amount to persecutions, acts not enumerated as a crime under the Statute must be of equal gravity to the crimes listed in Article 5 of the Statute, whether considered in isolation or in conjunction with other

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235 *Stakić* Appeal Judgement, paras 286-287.
236 *Stakić* Appeal Judgement, para. 287.
237 *Stakić* Appeal Judgement, para. 317.
238 *Stakić* Appeal Judgement, paras 278, 317.
239 *Stakić* Appeal Judgement, para. 327; *Kvočka et al.* Appeal Judgement, para. 320; *Kordić and Čerkez* Appeal Judgement, para. 101; *Blaškić* Appeal Judgement, para. 131; *Vasiljević* Appeal Judgement, para. 113; *Krnojelac* Appeal Judgement, para. 185. Notwithstanding the conjunctive "and" in the text of Article 5(h) of the Statute, it is well established in the jurisprudence of the Tribunal that each of the three grounds listed (political, racial or religious) is in itself sufficient to qualify an act as persecution, *Tadić* Trial Judgement, para. 713. *See also Blaškić* Appeal Judgement, para. 164; *Krnojelac* Appeal Judgement, para. 184.
240 *Brđanin* Appeal Judgement, para. 296; *Krnojelac* Appeal Judgement, para. 219.
241 *Brđanin* Appeal Judgement, para. 296. *See also Kvočka et al.* Appeal Judgement, paras 321-323.
242 *Brđanin* Appeal Judgement, para. 296; *Kvočka et al.* Appeal Judgement, para. 323.
243 *Kordić and Čerkez* Appeal Judgement, para. 103; *Blaškić* Appeal Judgement, para. 139.

acts.[244] In order to apply the standard of gravity, these acts should be examined in their context and with consideration of their cumulative effect.[245]

120. According to the jurisprudence of the Tribunal, the act of murder, cruel and inhumane treatment as well as forcible transfer, charged by the Prosecution under Count 12 of the Indictment, may constitute underlying acts of the crime of persecution.[246]

121. The *mens rea* for persecutions requires a specific intent to discriminate on political, racial or religious grounds.[247] This intent must be aimed at a group, rather than an individual; thus, the *mens rea* "is the specific intent to cause injury to a human being because he belongs to a particular community or group".[248] It is the requirement that the underlying act be committed on discriminatory grounds that distinguishes persecution from other crimes against humanity.[249] There is no requirement that the perpetrator possess a "persecutory intent" over and above a discriminatory intent.[250]

122. The discriminatory intent may, for example, be inferred from the discriminatory nature of an attack characterised as a crime against humanity, provided that the circumstances surrounding the commission of the alleged acts substantiate the existence of such a specific intent.[251] Circumstances that may be taken into consideration when inferring discriminatory intent include "the systematic nature of the crimes committed against a racial or religious group and the general attitude of the alleged perpetrator as demonstrated by his behaviour".[252] Generally, such "specific intent in general can only be inferred from objective facts and the general conduct of an accused seen in its entirety".[253]

123. The Prosecution charges Perišić with the crime of murder as a crime against humanity under Counts 1, 5 and 9, and as a violation of the laws or customs of war under Counts 2, 6 and 10

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244 *Brdanin* Appeal Judgement, para. 296. *See also Simić* Appeal Judgement, para. 177; *Naletilić and Martinović* Appeal Judgement, para. 574; *Kvočka et al.* Appeal Judgement, paras 321-323.

245 *Naletilić and Martinović* Appeal Judgement, para. 574; *Kvočka et al.* Appeal Judgement, para. 321. For examples of acts not listed in Article 5 of the Statute which were still found to amount to sufficient gravity to constitute persecution, considering their context and cumulative effect, *see Kvočka et al.* Appeal Judgement, paras 322-325; *Krnojelac* Appeal Judgement, para. 199.

246 *See e.g. Kordić and Čerkez* Appeal Judgement, para. 106; *Blaškić* Appeal Judgement, paras 143, 151-153, 155; *Vasiljević* Appeal Judgement, para. 143; *Krnojelac* Appeal Judgement, para. 188.

247 *Stakić* Appeal Judgement, para. 328; *Kvočka et al.* Appeal Judgement, para. 460; *Blaškić* Appeal Judgement, para. 164; *Kordić and Čerkez* Appeal Judgement, para. 110; *Vasiljević* Appeal Judgement, para. 113; *Krnojelac* Appeal Judgement, para. 184.

248 *Kordić and Čerkez* Appeal Judgement, para. 111; *Blaškić* Appeal Judgement, para. 165.

249 *Martić* Trial Judgement, para. 115; *Kupreškić et al.* Trial Judgement, para. 607.

250 *Kordić and Čerkez* Appeal Judgement, para. 111; *Blaškić* Appeal Judgement, para. 165.

251 *See Naletilić and Martinović* Appeal Judgement, paras 131, 146; *Kvočka et al.* Appeal Judgement, para. 366; *Kordić and Čerkez* Appeal Judgement, para. 110; *Blaškić* Appeal Judgement, para. 164; *Krnojelac* Appeal Judgement, 184.

252 *Kvočka et al.* Appeal Judgement, para. 460; *Krnojelac* Appeal Judgement, para. 184.

253 *Kordić and Čerkez* Appeal Judgement, para. 715.

Annex 471

Liberation Tigers of Tamil Eelam (LTTE) v. Council of the European Union, Judgment of the General Court (Sixth Chamber, Extended Composition), T-208/11, p. 5 (16 October 2014)

JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)
16 October 2014(*)

(Common foreign and security policy — Restrictive measures against certain persons and entities with a view to combating terrorism — Freezing of funds — Applicability of Regulation (EC) No 2580/2001 to situations of armed conflict — Possibility for an authority of a third State to be classified as a competent authority within the meaning of Common Position 2001/931/CFSP — Factual basis of the decisions to freeze funds — Reference to terrorist acts — Need for a decision of a competent authority for the purpose of Common Position 2001/931)

In Joined Cases T-208/11 and T-508/11,

Liberation Tigers of Tamil Eelam (LTTE), established in Herning (Denmark), represented by V. Koppe, A. M. van Eik and T. Buruma, lawyers,

applicant,

v

Council of the European Union, represented by G. Étienne and E. Finnegan, acting as Agents,

defendant,

supported by

Kingdom of the Netherlands, represented, in Case T-208/11, initially by M. Bulterman, N. Noort and C. Schillemans, and subsequently, as well as in Case T-508/11, by C. Wissels, M. Bulterman and J. Langer, acting as Agents,

intervener in Cases T-208/11 and T-508/11,

by

United Kingdom of Great Britain and Northern Ireland, represented initially by S. Behzadi-Spencer, H. Walker and S. Brighouse, and subsequently by S. Behzadi-Spencer, H. Walker and E. Jenkinson, acting as Agents, assisted by M. Gray, Barrister,

intervener in Case T-208/11,

and by

European Commission, represented initially by F. Castillo de la Torre and S. Boelaert, and subsequently by Castillo de la Torre and É. Cujo, acting as Agents,

intervener in Cases T-208/11 and T-508/11,

APPLICATION, initially, in Case T-208/11, for annulment of Council Implementing Regulation (EU) No 83/2011 of 31 January 2011 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 610/2010 (OJ 2011 L 28, p. 14), and, in Case T-508/11, for annulment of Council Implementing Regulation (EU) No 687/2011 of 18 July 2011 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulations (EU) No 610/2010 and No 83/2011 (OJ 2011 L 188, p. 2), in so far as those measures apply to the applicant,

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of F. Dehousse (Rapporteur), acting as President, I. Wiszniewska-Białecka, E. Buttigieg, A. M. Collins and I. Ulloa Rubio, Judges,

Registrar: S. Spyropoulos, Administrator,

further to the hearing on 26 February 2014,

gives the following

Judgment

Facts and procedure

On 27 December 2001, the Council of the European Union adopted Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93), Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Decision 2001/927/EC establishing the list provided for in Article 2(3) of Regulation No 2580/2001 (OJ 2001 L 344, p. 83).

On 29 May 2006, the Council adopted Decision 2006/379/EC implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2005/930/EC (OJ 2006 L 144, p. 21). By Decision 2006/379, the Council placed the applicant, the Liberation Tigers of Tamil Eelam (LTTE), on the list relating to frozen funds provided for in Article 2(3) of Regulation No 2580/2001 (‘the list relating to frozen funds’). Its name has remained on that list ever since.

On 31 January 2011, the Council adopted Implementing Regulation (EU) No 83/2011 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation (EU) No 610/2010 (OJ 2011 L 28, p. 14). The LTTE was maintained on the list annexed to Implementing Regulation No 83/2011.

By document lodged at the Court Registry on 11 April 2011, the LTTE brought an action, registered as Case T-208/11, for annulment of Implementing Regulation No 83/2011 in so far as that measure concerned it.

By letter of 30 May 2011, the Council sent the LTTE the reasons why it intended to maintain LTTE's name on that list when the list relating to frozen funds next came up for review.

By documents lodged at the Court Registry on 28 July, 2 and 3 August 2011 respectively, the Kingdom of the Netherlands, the European Commission and the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the form of order sought by the Council in Case T-208/11. After hearing the parties, the President of the Second Chamber of the Court granted those applications by order of 16 September 2011.

On 18 July 2011, the Council adopted Implementing Regulation (EU) No 687/2011 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulations (EU) No 610/2010 and No 83/2011 (OJ 2011 L 188, p. 2). The LTTE was maintained on the list annexed to Implementing Regulation No 687/2011.

By letter of 19 July 2011, the Council sent the LTTE the reasons for maintaining it on that list.

By document lodged at the Court Registry on 28 September 2011 and rectified on 19 October 2011, the LTTE brought an action, registered as Case T-508/11, for annulment of Implementing Regulation No 687/2011 in so far as that measure concerned it.

By documents lodged at the Court Registry on 9 and 17 January 2012 respectively, the Kingdom of the Netherlands and the Commission applied for leave to intervene in support of the form of order sought by the Council in Case T-508/11. After hearing the parties, the President of the Second Chamber of the Court granted those applications by orders of 9 March 2012.

By letter of 18 November 2011, the Council sent the LTTE the reasons why it intended to maintain its name on the list relating to frozen funds when it next came up for review.

On 22 December 2011, the Council adopted Implementing Regulation (EU) No 1375/2011 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 687/2011 (OJ 2011 L 343, p. 10). The LTTE was maintained on the list annexed to Implementing Regulation No 1375/2011.

By letter of 3 January 2012, the Council sent the LTTE the reasons for maintaining it on that list.

By letter lodged at the Court Registry on 27 February 2012, the LTTE requested that Cases T-208/11 and T-508/11 be joined and sought leave to amend the forms of order sought in the present actions so that they would apply to Implementing Regulation No 1375/2011; it also lodged offers of evidence.

By documents of 24 and 25 May 2012, the Commission, the Council and the Kingdom of the Netherlands submitted their observations on the offers of evidence and the request for leave to amend the forms of order sought.

After hearing the parties, the President of the Second Chamber of the Court joined Cases T-208/11 and T-508/11 by order of 15 June 2012.

On 25 June 2012, the Council adopted Implementing Regulation (EU) No 542/2012 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 1375/2011 (OJ 2012 L 165, p. 12). The LTTE was maintained on the list annexed to Implementing Regulation No 542/2012.

By letter of 26 June 2012, the Council sent the LTTE the reasons for maintaining it on that list.

By letter lodged at the Court Registry on 19 July 2012, the LTTE sought leave to amend the forms of order sought in the present actions so that they would apply to Implementing Regulation No 542/2012.

Since the letters of 27 February and 19 July 2012 had been added to the file as requests for leave to amend the forms of order sought, the LTTE lodged on 2 August 2012, at the request of the Court, a document amending the forms of order sought in the present actions so that they applied to Implementing Regulations No 1375/2011 and No 542/2012.

By documents lodged at the Court Registry on 5 and 6 September 2012, the United Kingdom, the Commission and the Council submitted their observations on that amendment of the forms of order sought.

On 10 December 2012, the Council adopted Implementing Regulation (EU) No 1169/2012 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 542/2011 (OJ 2012 L 337, p. 2). The LTTE was maintained on the list annexed to Implementing Regulation No 1169/2012.

On 7 February 2013, the LTTE lodged a document amending the forms of order sought in the present actions so that they applied to Implementing Regulation No 1169/2012.

By documents lodged at the Court Registry on 21 February, 12 and 13 March 2013, the Commission, the Council and the United Kingdom submitted their observations on that amendment of the forms of order sought.

On 25 July 2013, the Council adopted Implementing Regulation (EU) No 714/2013 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 1169/2012 (OJ 2013 L 201, p. 10). The LTTE was maintained on the list annexed to Implementing Regulation No 714/2013.

On 22 August 2013, the LTTE lodged a document amending the forms of order sought in the present actions so that they applied to Implementing Regulation No 714/2013.

By documents lodged at the Court Registry on 9, 17 and 25 September 2013, the Commission, the Kingdom of the Netherlands, the United Kingdom and the Council submitted their observations on that amendment of the forms of order sought.

Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Sixth Chamber, to which the present cases were accordingly allocated.

By decision of 13 November 2013, the Court referred the present cases to the Sixth Chamber, Extended Composition.

By letter of 15 January 2014, the Court requested the parties to reply to certain questions. The parties complied with that request by documents lodged at the Court Registry on 6 February 2014.

On 10 February 2014, the Council adopted Implementing Regulation (EU) No 125/2014 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation No 714/2013 (OJ 2014 L 40, p. 9). The LTTE was maintained on the list annexed to Implementing Regulation No 125/2014.

On 18 February 2014, the LTTE lodged a document amending the forms of order sought in the present actions so that they applied to Implementing Regulation No 125/2014.

On 25 February 2014, as a member of the Chamber was unable to sit, the President of the General Court designated another Judge to complete the Chamber pursuant to Article 32(3) of the Rules of Procedure of the Court.

At the hearing of 26 February 2014, the Kingdom of the Netherlands, the United Kingdom, the Council and the Commission stated that they did not have any objections to the amendment of the forms of order sought on 18 February 2014.

On 22 July 2014, the Council adopted Implementing Regulation (EU) No 790/2014 implementing Article 2(3) of Regulation No 2580/2001 and repealing Implementing Regulation (EU) No 125/2014 (OJ 2014 L 217, p. 1). The LTTE was maintained on the list annexed to Implementing Regulation No 790/2014, on the basis of modified reasons.

On 20 August 2014, the LTTE lodged a document amending the forms of order sought in the present actions so that they applied to Implementing Regulation No 790/2014.

By documents lodged at the Court Registry on 23 and 25 September 2014, the Council and the Kingdom of the Netherlands submitted their observations on that amendment of the forms of order sought.

Forms of order sought

The LTTE claims that the Court should:

annul Implementing Regulations No 83/2011, No 687/2011, No 1375/2011, No 542/2012, No 1169/2012, No 714/2013, No 125/2014 and No 790/2014 ('the contested regulations') in so far as they concern the LTTE;

order the Council to pay the costs.

The Council — supported, in Case T-208/11, by the Kingdom of the Netherlands, the United Kingdom and the Commission and, in Case T-508/11, by the Kingdom of the Netherlands and the Commission — contends that the Court should:

dismiss the actions as unfounded;

order the LTTE to pay the costs.

Law

The LTTE raises, in essence, seven pleas in law, six of which apply both in Case T-208/11 and in Case T-508/11, and one of which applies only in Case T-508/11.

The six pleas common to both actions allege (i) inapplicability of Regulation No 2580/2001 to the conflict between the LTTE and the Government of Sri-Lanka; (ii) wrongful categorisation of the LTTE as a terrorist organisation for the purposes of Article 1(3) of Common Position 2001/931; (iii) lack of any decision taken by a competent authority; (iv) failure to undertake the review required under Article 1(6) of Common Position 2001/931; (v) breach of the obligation to state reasons; and (vi) infringement of the rights of defence and the right to effective judicial protection. Solely in Case T-508/11 it alleges (vii) infringement of the principles of proportionality and subsidiarity.

The first plea in law: inapplicability of Regulation No 2580/2001 to the conflict between the LTTE and the Government of Sri-Lanka

Arguments of the parties

The LTTE submits that Regulation No 2580/2001 is not applicable to situations of armed conflict, since those conflicts — and therefore the acts committed in that context — can, in its opinion, only be governed by international humanitarian law.

However, the historical facts show that the LTTE was involved in armed conflict against the armed forces of the Government of Sri-Lanka, seeking self-determination for the Tamil people and their 'liberation from the oppression' of that government. Given the way in which the LTTE's armed forces were organised and their manner of conducting operations, the members of those forces meet all the requirements laid down by international law for recognition as 'combatants'. That status gave them immunity in respect of acts of war that were lawful under the terms of the law on armed conflict and meant that, in the case of unlawful acts, the LTTE would be subject only to that law, and not to any anti-terrorism legislation. Since legitimate acts of war cannot be categorised as unlawful under national law, they fall outside the scope of Common Position 2001/931, which, as provided under Article 1(3) thereof, does not apply to acts which are not offences under national law.

The placing of the LTTE on the list relating to frozen funds accordingly constitutes interference by a third country in an armed conflict, contrary to the principle of non-interference under international humanitarian law.

In its replies, the LTTE claims that a clear distinction should be made between armed conflict and terrorism. The first question is not whether an event has the characteristics of a terrorist act, but whether there is an ongoing armed conflict, in which case the only law that applies is humanitarian law. Humanitarian law does not preclude armed conflicts; homicides committed in the context of war, but not in breach of the law on armed conflict, are excusable. It follows that to categorise a suicide attack against enemy headquarters as a terrorist act — as the Council did in the circumstances of these cases — is to criminalise an act of war which is nevertheless acceptable under international humanitarian law.

In support of its arguments, the LTTE relies moreover on a judgment of the Rechtbank's-Gravenhague (District Court of The Hague (Netherlands)) of 21 October 2011 and a judgment of the Tribunale di Napoli (Court of Naples (Italy)) of

23 June 2011, which held that the LTTE was involved in an 'internal armed conflict' within the meaning of international law and refused to accept that the LTTE could properly be categorised as a 'terrorist' organisation.

The Council, supported by the interveners, disputes the LTTE's arguments. It states that, under international law, categorisation as 'armed conflict' does not preclude the application — where terrorist acts are committed — of the international law rules relating to the fight against terrorism, a fight in which the European Union actively participates in support of the measures adopted by the Security Council of the United Nations ('the Security Council'). International humanitarian law does not preclude the application of specific conventions relating to the fight against terrorism. The definition of 'terrorist acts' in Common Position 2001/931 remains valid whatever the circumstances in which such acts are committed. The Council disputes the argument that the LTTE's categorisation of the situation in Sri-Lanka can exempt it from the application of the international legislation relating to the fight against terrorism.

In its rejoinders, the Council maintains its position. With regard to the judgment of the Rechtbank's-Gravenhague, it observes that that judgment is under appeal and argues that the General Court cannot attach to that judgment the consequences that the LTTE wishes to attribute to it with regard to the interpretation of international humanitarian law and European law.

The Commission argues that the LTTE is mistaken in asserting an incompatibility between armed conflicts and terrorist acts. There are no principles of immunity for combatants in respect of terrorist acts perpetrated during armed conflict. The LTTE does not substantiate its claim that the acts of which it is accused in the grounds for the contested regulations are lawful acts of war. The LTTE is wrong to claim that terrorist acts committed in the context of an armed conflict are subject only to humanitarian law. The institutions of the European Union enjoy a broad discretion as regards the European Union's external relations and the factors to be taken into consideration for the purposes of adopting measures to freeze funds. The European Union compiles a list of terrorist organisations in order to deprive them of their sources of income, and it does this whether or not they are participants in an armed conflict. That approach is consistent with the European Union's view — broadly shared, moreover, by the rest of the world — that all terrorist acts are reprehensible and must be eradicated, whether committed in times of peace or of armed conflict.

It is not necessary, therefore, to determine the exact nature of the conflict — whether armed or not, whether internal or international, whether a war of liberation or not — between the LTTE and the Government of Sri-Lanka.

With regard to the alleged breach of the principle of non-interference, the Commission notes that that principle is established for the benefit of States and, accordingly, can be invoked only by them, and not by 'rebel groups'. The fact that only the LTTE — and not the Government of Sri-Lanka — is on the list relating to frozen funds is an argument of opportunity which cannot be considered by the Court. The reference to Article 6(5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), of 8 June 1977 is not relevant.

The Commission disputes, as do the other interveners, the relevance or the substance of the references made by the LTTE to the judgments of the Rechtbank's-Gravenhague and the Tribunale di Napoli.

It is clear that the question whether a particular attack is of a terrorist nature is not dependent upon the political cause in the name of which the attack was launched, but rather on the means and methods used. The law on armed conflicts does not allow any exception to the prohibition of acts of terror and there is no rule of humanitarian law that precludes the adoption of measures, such as the freezing of funds, designed to stop the financing of terrorism, wherever it is committed.

Findings of the Court

By the present plea, the LTTE maintains, in essence, that, in a case of armed conflict within the meaning of international humanitarian law — which, in its view, is the case here — only that law is applicable to any unlawful acts committed within the context of that conflict, and not the law organising the prevention and suppression of terrorism. LTTE is, it claims, a liberation movement which led an armed conflict against an 'oppressive government'. The placing of the LTTE on the list relating to frozen funds constitutes an infringement of the principle of non-interference under international humanitarian law and the Council was wrong to apply to the LTTE the provisions of EU law on terrorism.

In support of its arguments, the LTTE puts forward various references to provisions of international law and EU law.

However, contrary to what the LTTE claims, the applicability of international humanitarian law to a situation of armed conflict and to acts committed in that context does not imply that legislation on terrorism does not apply to those acts. That is true both of the provisions of EU law applied in the present case, in particular Common Position 2001/931 and Regulation No 2580/2001, and of international law invoked by the LTTE.

As regards, in the first place, EU law, it should be noted that the existence of an armed conflict within the meaning of international humanitarian law does not exclude the application of provisions of EU law concerning terrorism to any acts of terrorism committed in that context.

In fact, Common Position 2001/931 makes no distinction as regards its scope according to whether or not the act in question is committed in the context of an armed conflict within the meaning of international humanitarian law. Moreover, as the Council rightly points out, the objectives of the European Union and its Member States are to combat terrorism, whatever form it may take, in accordance with the objectives of current international law.

It is notably to implement, at EU level, Security Council Resolution 1373 (2001) of 28 September 2001, which 'reaffirm[s] the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts' and 'calls on Member States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism', that the Council adopted Common Position 2001/931 (see recitals 5 to 7 to that common position) and then, in accordance with that common position, Regulation No 2580/2001 (see recitals 3, 5 and 6 to that regulation).

As regards, in the second place, the international law invoked by the LTTE, it should be noted that, apart from the fact that an armed conflict may undeniably give rise to acts corresponding, by their nature, to terrorist acts, international humanitarian law expressly classifies such acts as 'terrorist acts' that are contrary to that law.

The Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Time of War expressly provides, in Article 33, that all measures of terrorism are prohibited. Similarly, Additional Protocols I and II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International and Non-International Armed Conflicts, of 8 June 1977, which seek to ensure better protection of those victims, provide that acts of terrorism are prohibited at any time and in any place whatsoever (Article 4(2) of Additional Protocol II) and that acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited (Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II).

It follows from the foregoing considerations that the perpetration of terrorist acts by participants in an armed conflict is expressly covered and condemned as such by international humanitarian law.

Further, the existence of an armed conflict within the meaning of international humanitarian law does not appear to preclude, in the case of a terrorist act committed in the context of that conflict, the application not only of provisions of that humanitarian law on breaches of the laws of war, but also of provisions of international law specifically relating to terrorism.

Thus, the International Convention for the Suppression of the Financing of Terrorism, signed in New York on 9 December 1999 ('the 1999 New York Convention'), expressly envisages the commission of terrorist acts in the context of an armed conflict within the meaning of international law. In Article 2(1)(b) thereof, it renders unlawful 'any act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'.

That convention confirms that, even in an armed conflict within the meaning of international humanitarian law, there may be terrorist acts liable to be punished as such and not only as war crimes. Those acts include those intended to cause death or serious bodily injury to civilians.

The LTTE's *a contrario* argument that Article 2(1)(b) of the 1999 New York Convention excludes from the scope of that convention any act directed against persons 'taking an active part in the hostilities in a situation of armed conflict' in no way calls into question that finding.

The LTTE is therefore wrong to claim that, in international law, the notions of armed conflict and of terrorism are incompatible.

It is also apparent from the foregoing considerations that the fact that terrorist acts emanate from 'freedom fighters' or liberation movements engaged in an armed conflict against an 'oppressive government' is irrelevant. Such an exception to the prohibition of terrorist acts in armed conflicts has no basis in European law or even in international law. In their condemnation of terrorist acts, European law and international law do not distinguish between the status of the author of the act and the objectives he pursues.

As for the LTTE's reference to the principle of non-interference which, in its opinion, the Council infringed by placing it on the list relating to frozen funds, it should be noted that that customary international law principle, also called the principle of non-intervention, concerns the right of any sovereign State to conduct its affairs without external interference and constitutes a corollary of the principle of sovereign equality of States (judgment of the International Court of Justice of 26 November 1984 in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), on competence and admissibility, ICJ Reports 1984, p. 392, paragraph 73, and of 27 June 1986, on the substance, ICJ Reports 1986, p. 96, paragraph 202). As the Council points out, that principle of international law is set out for the benefit of sovereign States, and not for the benefit of groups or movements. Contrary to the LTTE's submissions, the placing on the list relating to frozen funds of a movement — even if it is a liberation movement — in a situation of armed conflict with a sovereign State, on account of the involvement of that movement in terrorism, does not therefore constitute an infringement of the principle of non-interference.

In addition, the LTTE's argument that the interference by the European Union stems from the discriminatory nature of the European Union's position, consisting in adopting restrictive measures only against the LTTE and not against the Democratic Socialist Republic of Sri-Lanka, cannot succeed.

The lawfulness of measures taken by the Council against a group, on the basis of Common Position 2001/931, depends on whether that institution complied, in its decision, with the conditions and requirements defined in that common position, and not on whether other parties could possibly be subject to restrictive measures. Common Position 2001/931 and its implementation by the Council do not seek to determine who, in a conflict between a State and a group, is right or wrong, but to combat terrorism. In that context, having regard to the broad discretion conferred on the EU institutions as regards the European Union's external relations (see, to that effect, judgments of 28 October 1982 in *Faust* v *Commission*, 52/81, ECR, EU:C:1982:369, paragraph 27; of 16 June 1998 in *Racke*, C-162/96, ECR, EU:C:1998:293, paragraph 52, and of 27 September 2007 in *Ikea Wholesale*, C-351/04, ECR, EU:C:2007:547, paragraph 40; order of 6 September 2011 in *Mugraby* v *Council and Commission*, T-292/09, EU:T:2011:418, paragraph 60), there is no need, for the purposes of the present dispute, to examine whether restrictive measures under EU law could have been adopted with regard to the Democratic Socialist Republic of Sri-Lanka. In any event, even if the Democratic Socialist Republic of Sri-Lanka were to have committed acts which are liable to give rise to criticism and be the basis for an action of the European Union, it should be noted that the principle of equal treatment must be reconciled with the principle of legality, according to which no one may rely, to his own benefit, on an unlawful act committed in favour of another (judgments of 9 July 2009 in *Melli Bank* v *Council*, T-246/08 and T-332/08, ECR,

EU:T:2009:266, paragraph 75, and of 14 October 2009 in *Bank Melli Iran* v *Council*, T-390/08, ECR, EU:T:2009:401, paragraphs 56 and 59).

In order to contest the applicability of Regulation No 2580/2001 to terrorist acts committed in the context of an armed conflict, the LTTE is also wrong to rely on Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (OJ 2002 L 164, p. 3) and, in particular, recital 11 to that Framework Decision, according to which '[a]ctions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed' by that Framework Decision. The LTTE adds that Framework Decision 2002/475 was accompanied by a statement by the Council explicitly excluding from its scope armed resistance such as that conducted by the various European resistance movements during World War II.

Regulation No 2580/2001 was not adopted pursuant to Framework Decision 2002/475, which concerns criminal law, but pursuant to Common Position 2001/931. Framework Decision 2002/475 cannot therefore determine the scope of Regulation No 2580/2001.

Moreover, Common Position 2001/931, just like Security Council Resolution 1373 (2001) which it implements at EU level, does not contain any provision comparable to recital 11 to Framework Decision 2002/475.

It follows that the LTTE's reference to Framework Decision 2002/475 and to a statement of the Council accompanying that Framework Decision is irrelevant.

Moreover, the Court considers, like the Commission, that the absence, in Common Position 2001/931, of a recital comparable to recital 11 to Framework Decision 2002/475 must, at best, be interpreted as expressing the Council's intention not to provide for any exception to the application of EU provisions when it comes to preventing terrorism by combating its financing. That lack of any exception is in accordance with the 1999 New York Convention which also contains no provision of the type contained in recital 11 to Framework Decision 2002/475.

As for the LTTE's reference to the European Parliament recommendation on the role of the European Union in combating terrorism [2001/2016 (INI)] (OJ 2002 C 72 E, p. 135), it should be noted that it refers to a non-binding document. Moreover, that recommendation does not legitimise the commission of terrorist acts by liberation movements. In a recital to that recommendation, the Parliament merely draws a distinction between terrorist acts committed within the European Union — the Member States of which are governed by the rule of law — and 'acts of resistance in third countries against state structures which themselves employ terrorist methods'.

The LTTE's reference to Article 6(5) of Additional Protocol II to the Geneva Conventions of 12 August 1949 (see paragraph 61 above) is irrelevant. That provision, according to which, '[a]t the end of [the internal] hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict', concerns the criminal proceedings that may be brought by the government concerned against, inter alia, members of armed groups having taken up arms against it, whereas Regulation No 2580/2001 does not concern the imposition of such criminal proceedings and sanctions, but the adoption by the European Union of preventive measures on terrorism.

As for the expression 'as defined as an offence under national law' found in Article 1(3) of Common Position 2001/931 — an expression from which the LTTE deduces the recognition by the European Union, in its Common Position, of an immunity from the application of measures to freeze funds in cases of lawful acts of war — it should be stated that that expression actually relates to the immunity of combatants in armed conflicts for lawful acts of war, an immunity which Additional Protocols I and II (see paragraph 61 above) express in the following similar terms: no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed (Article 75(4)(c) of Additional Protocol I and Article 6(2)(c) of Additional Protocol II).

The presence of that expression in Common Position 2001/931 therefore does not alter the fact that Regulation No 2580/2001 is applicable to terrorist acts, which still constitute unlawful acts of war when committed within the context of armed conflicts.

It follows from all of the foregoing considerations that, contrary to what the LTTE claims, Regulation No 2580/2001 is applicable to terrorist acts committed within the context of armed conflicts.

The LTTE cannot therefore invoke the existence of an alleged armed conflict between it and the Government of Sri-Lanka in order to exclude itself from the application of Common Position 2001/931 for any terrorist acts which it committed in that context.

This plea in law must therefore be rejected.

The third plea in law: lack of any decision taken by a competent authority

Arguments of the parties

The LTTE maintains that the grounds for the contested regulations contain, after a list of attacks imputed to it, references to British and Indian decisions. It claims that none of those grounds can amount to a decision by a competent authority for the purposes of Common Position 2001/931.

With regard, first, to the list of attacks imputed to the LTTE, it is clear that this is not a decision by a competent authority. None the less, that does not preclude the observation that that list and the alleged attacks therein are unsubstantiated and they cannot therefore serve as a basis for maintaining the LTTE's name on the list relating to frozen funds.

Second, the United Kingdom ('UK') decisions invoked in the grounds for the contested regulations are not decisions taken by competent authorities. Since those decisions do not condemn any acts that are relevant in the context of Common Position 2001/931, they cannot serve as a lawful basis unless they concern the instigation of investigations or

prosecutions and if they are based on serious and credible evidence or indicia. That is not the position in the case of the UK decisions, which are administrative — rather than criminal — decisions categorising the LTTE as a terrorist group and freezing its funds. Only decisions taken within the context of criminal procedures can be used as a basis for a decision placing a body on the list relating to frozen funds. The only case of non-criminal decisions accepted as a basis for listing are decisions of the Security Council, as referred to in Article 1(4) of Common Position 2001/931.

The LTTE adds that the UK authorities at issue are not competent authorities, in so far as none of them are judicial authorities, despite the fact that there are judicial authorities in the United Kingdom with competence in the field covered by Article 1(4) of Common Position 2001/931.

Alternatively, in the event that the Court should hold that the UK decisions amount to the instigation of investigations or prosecutions, or condemnation for a terrorist act, the LTTE submits that those decisions are not based on serious and credible evidence or indicia. In that regard, the grounds for the contested regulations do not identify the bases for those UK decisions. The LTTE notes that its categorisation by the UK authorities was not made individually, but 'collectively' with 20 other groups.

With regard, third, to the Indian decisions, the LTTE submits, in essence, that, in the light of the principle of sincere cooperation, only decisions of a national authority of a Member State — with the exception of those of the Security Council — may be considered to be decisions of competent authorities. To hold otherwise would thwart the EU system of sanctions by 'undermining' the leading role of the Member States in that respect and leading the Council to rely on information from third countries which are not bound by the principle of sincere cooperation and whose decisions the Council cannot assume to be consistent with European Union standards in terms of protection of the rights of defence and the right to effective judicial protection.

Alternatively, in the event that the Court should hold that the Council could rely on a decision taken by an authority of a third country, the LTTE submits that the Indian decisions at issue cannot be considered to be decisions of competent authorities. As in the case of the UK decisions, they do not amount to the instigation of investigations or prosecutions, or to condemnations, and there are Indian courts with jurisdiction to deal with terrorist matters.

Furthermore, although provision is made under Indian law for any association declared unlawful to have a right of referral to a tribunal, so that that body can decide whether the declaration is well founded, the LTTE has never been so referred and the statements of reasons for the decisions maintaining its name on the list relating to frozen funds adopted by the European Union make no mention of that fact; nor is there anything in those statements to show that the decisions made by the Indian Government are indeed decisions adopted by a competent authority for the purposes of Common Position 2001/931.

In the further alternative, in the event that the Court should hold that the Indian decisions amount to the instigation of investigations or prosecutions, or to condemnation for a terrorist act, the LTTE submits that those decisions are not based on serious and credible evidence or indicia. In that regard, the grounds for the contested regulations in no way identify the bases for those Indian decisions. The Council cannot simply rely on decisions taken by national authorities without ensuring that they are decisions for the purposes of Article 1(4) of Common Position 2001/931. That is all the more so in the case of a decision taken by a State which is not a Member State of the European Union.

Lastly, the Indian authorities cannot be regarded as a reliable source of information since they have adopted a 'biased position' in the conflict between the LTTE and the Government of Sri-Lanka.

The LTTE submits that the Council's argument, according to which it is for the LTTE to challenge before the national courts the facts set out in the statements of reasons for the decisions maintaining its name on the list relating to frozen funds, fails to have regard to the fact that the Council itself offers no evidence as to how the national decisions on which it relied examined and imputed those facts to the LTTE. The argument that the Council need not provide additional evidence because the European Union measure is administrative and not of a penal nature is unfounded. Furthermore, the LTTE cannot be obliged to bring actions in each of the national legal systems where the decisions on which the Council bases its decision have been taken.

The Council, supported by the interveners, disputes the LTTE's arguments.

With regard to the list of attacks set out in the statements of reasons for the decisions maintaining the LTTE's name on the list, the Council denies that it is required to provide additional evidence concerning the imputation of those acts to the LTTE. The Council contends that if the LTTE wishes to contest the accuracy of the facts imputed to it, it should do so before the national courts of the States that initially adopted measures against it.

With regard to the UK decisions, the Council contests the argument that they are not decisions of competent authorities because they did not instigate any investigation or prosecution and are not based on serious and credible evidence or indicia. It also contests the argument that the UK authorities in question are not judicial authorities. It contends that Common Position 2001/931 does not require the national decision to be a criminal decision. As regards the assessment of evidence and indicia on which the national decision was based, the principle of sincere cooperation entails an obligation for the Council to rely as much as possible on the assessment made by the competent national authority, since the prime consideration for the Council is its perception or evaluation of the danger that, in the absence of a measure to freeze funds, the funds at issue could be used to finance terrorism. The fact that the national authority is an administrative authority and not a judicial authority is not decisive.

More specifically, with regard to the decision of the UK Secretary of State for the Home Department ('the Home Secretary') of 29 March 2001, the Council notes that the Court has already held that this was a decision of a competent authority for the purposes of Common Position 2001/931. The Council notes that that decision was adopted by the Home Secretary under Section 3(3)(a) of the UK Terrorism Act 2000, under which, after receiving the approval of Parliament, the Home Secretary has competence to ban any organisation which he considers to be 'involved in terrorism'.

That decision of the Home Secretary is sufficient, in itself, to be a basis for the Council decisions, without it even being necessary to examine the decision of the UK Treasury of 6 December 2001 on the freezing of funds, a decision referred to in the statement of reasons of 15 November 2010 on which Implementing Regulation No 83/2011 was based, and then omitted because there was no longer any separate fund-freezing decision in force in the United Kingdom. The Council notes that the content of that decision was then reproduced in a subsequent decision of 7 October 2009 of the same nature and with the same effect in terms of freezing funds, and contends that, like the decision of the Home Secretary, it constitutes a decision of a competent authority for the purposes of Common Position 2001/931.

As regards the decision adopted by the Indian Government in 1992 under the Unlawful Activities Act of 1967, as amended in 2004, the Council contends that it is entitled to adopt fund-freezing measures based on decisions adopted by the competent authorities of a third country, either on a proposal from a Member State submitted to that end following an initial examination of the case concerned or at the request of the relevant third country itself. The Council states that it must then ensure that the decisions concerned have been adopted with due regard for the fundamental principles governing the protection of human rights, the rule of law, the principle of the presumption of innocence, the right to a fair trial and the right not to be judged or convicted twice for the same crime or offence. That was the case in this instance.

In the rejoinder, the Council, while maintaining its position in essence, refers, as regards the UK decisions, to information provided in the United Kingdom's statement in intervention. It adds that it took cognisance of the following information, according to which the LTTE has continued without interruption to be the subject of proscription measures adopted by the Indian authorities: the most recent decision entered into force on 14 May 2010 for two years and was confirmed on 12 November 2010 in the context of a judicial review. The LTTE therefore continues to be listed as a terrorist organisation in India.

The United Kingdom contends, in its statement in intervention, that the decisions of the Home Secretary and the UK Treasury satisfy the necessary requirements to be classified as decisions of competent authorities. As regards the Indian decision, the United Kingdom agrees with the Council's position, according to which that decision falls to be categorised as a decision of a competent authority.

Findings of the Court

The LTTE states, correctly, that the list of facts placed at the top of the grounds for the contested regulations does not constitute a competent authority; it also claims that the UK and Indian decisions invoked in the grounds for the contested regulations are not decisions of competent authorities for the purposes of the second subparagraph of Article 1(4) of Common Position 2001/931.

As for the general objection that the UK and Indian authorities at issue are not competent authorities because they are not judicial authorities and there are judicial authorities with jurisdiction to deal with terrorist matters in those countries, it should be rejected for the following reasons.

The Court has already held, in the case of a decision of a Dutch administrative authority (a regulation on sanctions ('Sanctieregeling') for the suppression of terrorism adopted by the Netherlands Ministers for Foreign Affairs and for Finance), that the fact that that decision constituted an administrative decision and not a judicial decision was not in itself decisive, since the actual wording of Article 1(4) of Common Position 2001/931 expressly provided that a non-judicial authority might also be classified as a competent authority for the purposes of that provision (judgment of 9 September 2010 in *Al-Aqsa* v *Council*, T-348/07, ECR, EU:T:2010:373, paragraph 88, 'the judgment in *Al-Aqsa* T-348/07'). In its judgment on appeal against the judgment in *Al-Aqsa* T-348/07, the Court of Justice confirmed, in essence, that the Sanctieregeling could be regarded as a decision of a competent authority (judgment of 15 November 2012 in *Al-Aqsa* v *Council*, C-539/10 P and C-550/10 P, ECR, EU:C:2012:711, paragraphs 66 to 77, 'the judgment in *Al-Aqsa* C-539/10 P').

In a previous judgment concerning a decision of the Home Secretary, the Court held that that decision did indeed appear, in the light of the relevant national legislation, to be a decision of a competent national authority meeting the definition in Article 1(4) of Common Position 2001/931 (judgment of 23 October 2008 in *People's Mojahedin Organization of Iran* v *Council*, T-256/07, ECR, EU:T:2008:461, paragraphs 144 and 145, last sentence, 'the judgment in *PMOI* T-256/07'; see also, to that effect, the judgment in *Al-Aqsa* T-348/07, paragraph 105 above, EU:T:2010:373, end of paragraph 89).

Thus, even if the second subparagraph of Article 1(4) of Common Position 2001/931 contains a preference for decisions from judicial authorities, it in no way excludes the taking into account of decisions from administrative authorities where (i) those authorities are actually vested, in national law, with the power to adopt restrictive decisions against groups involved in terrorism and (ii) where those authorities, although only administrative, may nevertheless be regarded as 'equivalent' to judicial authorities.

The fact alleged by the LTTE that UK and Indian courts have powers concerning the suppression of terrorism does not therefore imply that the Council was not able to take account of the decisions of the national administrative authority entrusted with the adoption of restrictive measures on terrorism.

In that regard, it should be noted that the LTTE does not claim that the decisions adopted by the UK and Indian authorities in question were adopted by authorities unauthorised for this purpose under the national laws of the States concerned.

It follows from the foregoing considerations that the LTTE's general objection (see paragraph 104 above) must be rejected.

Furthermore, the LTTE claims that, since the national decisions mentioned in the grounds for the contested regulations do not contain any condemnation of the LTTE, they can serve as a lawful basis only if they concern the instigation of

investigations or prosecutions and if they are based on serious and credible evidence or indicia. That is not the case for national decisions, which are administrative — rather than criminal — determinations categorising the LTTE as a terrorist group and freezing its funds. Only decisions taken within the context of criminal procedures can be used as a basis for a decision placing a body on the list relating to frozen funds. The only case of a non-criminal decision accepted as a basis for such listing are decisions of the Security Council, as referred to in Article 1(4) of Common Position 2001/931.

By those arguments, the LTTE argues, in essence, that only criminal decisions can constitute decisions of competent authorities for the purposes of Common Position 2001/931. The LTTE also suggests that mere listing decisions are not sufficient.

It should be remembered that Common Position 2001/931 does not require that the decision of the competent authority should be taken in the context of criminal proceedings *stricto sensu*, even if that is more often the case. However, in the light of the objectives of Common Position 2001/931, in the context of the implementation of Security Council Resolution 1373 (2001), the purpose of the national proceedings in question must none the less be to combat terrorism in the broad sense. Those assessments made by the General Court in the judgment in *Al-Aqsa* T-348/07, paragraph 105 above (EU:T:2010:373, paragraphs 98 and 100) were, in essence, confirmed in the judgment in *Al-Aqsa* C-539/10 P, paragraph 105 above (EU:C:2012:711, paragraph 70), since the Court of Justice held that the protection of the persons concerned was not called into question if the decision taken by the national authority did not form part of a procedure seeking to impose criminal sanctions, but of a procedure aimed at the adoption of preventive measures.

The General Court has also held that a decision to 'instigat[e] … investigations or prosecut[e]' must, if the Council is to be able validly to invoke it, form part of national proceedings seeking, directly and primarily, the imposition on the person concerned of measures of a preventive or punitive nature, in connection with the combating of terrorism and by reason of that person's involvement in terrorism. The Court held that that requirement is not satisfied by a decision of a national judicial authority ruling only incidentally and indirectly on the possible involvement of the person concerned in such activity in relation to a dispute concerning, for example, rights and duties of a civil nature (judgment of 30 September 2009 in *Sison* v *Council*, T-341/07, ECR, EU:T:2009:372, paragraph 111, 'the judgment in *Sison* T-341/07').

In the present case, it should be noted that, although the decisions adopted by the UK authorities (namely the Home Secretary and the UK Treasury) and Indian authorities do not in fact constitute, strictly speaking, decisions for the 'instigation of investigations or prosecutions for an act of terrorism' or 'condemnation for such deeds', within the strict criminal sense of the term, the fact remains that those decisions lead to the ban on the LTTE in the United Kingdom and the freezing of its funds, and also the proscription of the LTTE in India, and that they therefore clearly form part of national proceedings seeking, primarily, the imposition on the LTTE of measures of a preventive or punitive nature, in connection with the fight against terrorism.

To that extent, and contrary to what LTTE suggests, the fact that the national decisions at issue in the present case do not correspond exactly to the wording of Article 1(4) of Common Position 2001/931 in no way leads, in itself, to the conclusion that they could not be taken into account by the Council.

Therefore, the LTTE is incorrect to claim that the only case of a non-criminal decision accepted as a basis for listing are decisions of the Security Council, as mentioned in Article 1(4) of Common Position 2001/931. The purpose of the last sentence of the first subparagraph of Article 1(4) of that common position is only to afford the Council an additional listing possibility alongside the listings which it can make on the basis of decisions of competent national authorities.

It is true that the activity of the administrative authorities in question leads, in the end, to classification in a list. None the less, that fact does not mean, in itself, that those authorities did not carry out an individual appraisal of each of the groups concerned prior to their insertion in those lists, or that those appraisals should necessarily be arbitrary or unfounded. Thus, what matters is not that the activity of the authority in question leads to classification in a list of persons, groups or entities involved in terrorism, but that that activity is carried out with sufficient safeguards to allow the Council to rely on it to found its own listing decision.

That said and beyond the general objections examined above, it must be determined whether, specifically, the administrative authorities in question in the present case, namely (i) the Home Secretary and the UK Treasury and (ii) the Indian Government, could have been considered competent authorities within the meaning of Common Position 2001/931.

As regards, first, the Home Secretary, it should be noted that the Court has already held, in the light of the relevant national law, that that authority was a competent authority within the meaning of Article 1(4) of Common Position 2001/931 (judgment in *PMOI*, T-256/07, paragraph 106 above, EU:T:2008:461, paragraph 144).

Beyond the general arguments already mentioned and rejected by the Court (see paragraphs 104 to 118 above), the LTTE puts forward no argument to the contrary other than that alleging that its classification as a terrorist organisation in the United Kingdom took place simultaneously with 20 other groups and that the House of Commons of the United Kingdom allegedly had no other option than to wholly accept or refuse the list that was submitted to it by the Home Secretary, without being able to treat each organisation individually.

However, it is not apparent from the extract, produced by the LTTE, of the debates of the House of Commons of 13 March 2001 relating to the draft order submitted for its approval by the Home Secretary on 28 February 2001 that the House of Commons was deprived of the possibility of individually examining the situation of each of the organisations included in that draft order. First, all the members of the House of Commons received a summary of the facts concerning each of the organisations included in the list of the draft order, which implied the possibility of an individual examination by the House of Commons. Secondly, the debates of the House of Commons were in fact able to

cover individual organisations, in particular so far as concerns the 'Revolutionary Organisation 17 November'. Finally, the fact that the measures submitted for the approval of the House of Commons were submitted to it in the form of a single order and not in the form of as many orders as organisations concerned did not imply that an actual individual examination was impossible, since the House of Commons remained free, in any event, to refuse to approve the draft order.

It follows from the foregoing considerations that the capacity of the Home Secretary as a competent authority is not called into question by the LTTE's arguments.

The same applies to the UK Treasury, to which the Council only refers in the grounds of Implementing Regulation No 83/2011 but not in the grounds of subsequent regulations. In the present actions, the LTTE, however, makes no particular challenge to the capacity of the UK Treasury as a competent authority beyond the general arguments mentioned in paragraphs 104 to 118 above, which have already been rejected by the Court.

As regards, lastly, the Indian government, the LTTE, by contrast, puts forward detailed arguments. It considers, primarily, that, having regard to the principle of sincere cooperation, which, it claims, exists only between the European Union and the Member States, an authority of a third State cannot be recognised as a competent authority within the meaning of Common Position 2001/931.

That argument of principle, according to which an authority of a third State cannot be recognised as a competent authority within the meaning of Common Position 2001/931, must be rejected for the following reasons.

In the first place, it is apparent from recitals 5 and 7 to Common Position 2001/931 that that common position was adopted within the context and for the purposes of the implementation of Security Council Resolution 1373 (2001), a resolution in which the Security Council decided that 'all States [were to] take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information' (paragraph 2(b) of Security Council Resolution 1373 (2001)) and 'afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings' (paragraph 2(f) of Security Council Resolution 1373 (2001)). In its resolution, the Security Council also called upon 'all States … to exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts' (paragraph 3(b) of Security Council Resolution 1373 (2001)).

It should be observed that, as the Court of Justice has held, although, because of the adoption of a common position, the European Union is obliged to take, under the Treaty, the measures necessitated by that common position, that obligation means, when the object is to implement a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations, that in drawing up those measures the European Union is to take due account of the terms and objectives of the resolution concerned and of the relevant obligations under the Charter of the United Nations relating to such implementation (judgment of 3 September 2008 in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, C-402/05 P and C-415/05 P, ECR, EU:C:2008:461, paragraph 296; see also judgment of 13 March 2012 in *Melli Bank* v *Council*, C-380/09 P, ECR, EU:C:2012:137, paragraph 55).

Having regard both to the objectives of Security Council Resolution 1373 (2001), aimed at the intensification of the fight against terrorism at global level by the systematic and close cooperation of all States, and to the fact that Common Position 2001/931 was adopted in order to implement that resolution, the LTTE's argument, put forward even though that common position does not contain any a priori limitation as regards the nationality of competent authorities, disregards both the wording and the objective of that Common Position and is thus incompatible with the implementation, at EU level, of the Security Council resolution.

In addition, it should be noted that recital 6 to Regulation No 2580/2001 states that '[that] Regulation is a measure needed at Community level and complementary to administrative and judicial procedures regarding terrorist organisations in the European Union and third countries'.

In the second place, it must be held that the LTTE's argument is based on an incorrect perception of the function of the principle of sincere cooperation within the framework of the scheme created by Common Position 2001/931 and the adoption by the Council of restrictive measures.

Under Article 4(3) TEU, relations between the Member States and the EU institutions are governed by reciprocal duties to cooperate in good faith (judgment in *Sison*, T-341/07, paragraph 114 above, EU:T:2009:372, paragraph 94).

As established by the case-law, the principle of sincere cooperation entails for the Council, in the context of the application of Article 1(4) of Common Position 2001/931 and Article 2(3) of Regulation No 2580/2001, the obligation to defer as far as possible to the assessment by the competent national authority of the Member State concerned, at least where it is a judicial authority, in particular in respect of the existence of 'serious and credible evidence or clues' on which the decision is based (judgment in *Sison*, T-341/07, paragraph 114 above, EU:T:2009:372, paragraph 95).

Contrary to what the LTTE suggests, that principle therefore does not concern the question of the classification of a national authority as a competent authority within the meaning of Common Position 2001/931, but only the scope of the Council's obligations with regard to the decisions of such an authority, where the latter is an authority of a Member State.

The fact that the principle of sincere cooperation applies only in relations between the European Union and Member States therefore does not mean that an authority of a third country cannot be classified as a competent authority within the meaning of Common Position 2001/931 and that the Council cannot, if necessary, rely on the assessments of that authority.

It follows from the foregoing considerations that the LTTE's main argument that the inapplicability of the principle of sincere cooperation in the relations between the Union and third States precludes, as a matter of principle, an

authority of a third State being classified as a competent authority must be dismissed. The aim pursued by Common Position 2001/931 leads to the opposite conclusion.

None the less, the fact remains that, as the Court inferred from the provisions of Common Position 2001/931, since the mechanism established by that common position has the effect of allowing the Council to include a person on a list relating to frozen funds on the basis of a decision taken by a national authority, verification that there is a decision of a national authority fulfilling the definition of Article 1(4) of Common Position 2001/931 is an essential precondition for the adoption, by the Council, of its own decision to freeze funds (see, to that effect, judgment in *Sison*, T-341/07, paragraph 114 above, EU:T:2009:372, paragraph 93).

That condition, laid down by the Court in the context of decisions adopted by authorities of EU Member States, is all the more important in the case of decisions adopted by authorities of a third State. Unlike Member States, many third States are not bound by the requirements stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and none of them is subject to the provisions of the Charter of Fundamental Rights of the European Union.

Therefore the Council must, before acting on the basis of a decision of an authority of a third State, carefully verify that the relevant legislation of that State ensures protection of the rights of defence and a right to effective judicial protection equivalent to that guaranteed at EU level. In addition, there cannot be evidence showing that the third State in practice fails to apply that legislation. In that case, the existence of legislation formally satisfying the conditions set out above would not allow the conclusion that the decision was one of a competent authority within the meaning of Common Position 2001/931.

It should be added that, in the absence of equivalence between the level of protection ensured by the legislation of a third State and that ensured at EU level, a finding that a national authority of a third State had the status of a competent authority within the meaning of Common Position 2001/931 would entail a difference in treatment between the persons covered by EU fund-freezing measures, according to whether the national decisions underlying those measures emanated from authorities of third States or authorities of Member States.

However, the Court finds, as the LTTE has submitted, that the grounds for the contested regulations do not contain any evidence to suggest that the Council carried out such a thorough verification of the extent to which the rights of defence and the right to effective judicial protection were safeguarded under the Indian legislation. Those grounds are limited to the following considerations in Implementing Regulations Nos 83/2011 through to 125/2014:

'Having regard to the commission and participation in acts of terrorism by the [LTTE], the Government of India proscribed LTTE in 1992 under the Unlawful Activities Act 1967 and subsequently included it in the list of terrorist organisations in the Schedule to the Unlawful Activities Prevention (Amendment) Act 2004.

Decisions in respect of the [LTTE] have thus been taken by competent authorities within the meaning of Article 1(4) of Common Position 2001/931.'

By contrast, in the case of the UK authorities which are authorities of an EU Member State, the Council was at pains to state, after the reference to the applicable legislation, that the decisions of those authorities were subject to periodic review by a Governmental Commission (fifth paragraph of the grounds for the various contested regulations) or to judicial review (sixth paragraph of the grounds of 25 August and 15 November 2010). However, for the Indian authorities (a third State), the Council does not provide any assessment of the levels of protection of the rights of defence and to judicial protection provided by the Indian legislation.

In that regard, the Council unconvincingly suggested at the hearing that the failure to assess the protection levels in the case of the Indian authorities resulted from the fact that the contested regulations concerned reviews and not the initial listing, which would have given rise to a more detailed statement of reasons reflecting a more detailed initial assessment of the Indian legislation.

First, that suggestion is contradicted by the repeated specific statement of reasons as regards the UK authorities in all of the various successive contested regulations. Secondly, the Council does not produce, in support of its suggestion, the allegedly more detailed grounds for the initial listing regulation and does not claim, still less prove, that it communicated them to the LTTE. If the Council's suggestion were proved, it would follow at the very least, owing to the transmission to the LTTE of the resulting incomplete statement of reasons, that there was an infringement of the rights of defence. Thirdly, it should be noted that fund-freezing measures, notwithstanding their preventive nature, are measures which may have a very substantial negative impact on the persons and groups concerned (see, to that effect, judgment of 18 July 2013 in *Commission* v *Kadi*, C-584/10 P, C-593/10 P and C-595/10 P, ECR, EU:C:2013:518, paragraph 132 and the case-law cited). Therefore, both the adoption and the extension of those measures must be based on a sufficiently sound and express statement of reasons.

As regards Implementing Regulation No 790/2014, the grounds for maintenance are supplemented by the indications that Sections 36 and 37 of the Unlawful Activities Act 1967 include provisions for the review and revision of the list and that the decision proscribing the LTTE as an unlawful association is periodically reviewed by the Home Affairs Minister of India. The Council adds that the last revision took place on 14 May 2012 and that, following the revision made by the tribunal established under the Unlawful Activities Act 1967, the designation of the LTTE was confirmed by the Home Affairs Minister of India on 11 December 2012. The Council states that those decisions were published by notification in the Official Journal of India.

As regards a third State, in the light of the considerations set out in paragraphs 138 to 140 above, the Council must, inter alia, carefully verify that the relevant legislation of the third State ensures protection of the rights of defence and a right to effective judicial protection equivalent to that guaranteed at EU level. In that context, the mere reference to sections of legislative provisions and to a periodical revision by the Home Affairs Minister is insufficient to support a

conclusion as to the existence of a thorough examination of the guarantees provided by the third State at issue as to the protection of the rights of defence and the right to effective judicial protection.

It follows from the foregoing considerations that, in the light of the grounds for the contested regulations, the Council cannot be considered to have carried out, prior to maintaining the LTTE on the list relating to frozen funds, a thorough verification that the third State in question had legislation ensuring compliance with the rights of defence and the right to effective judicial protection to an extent equivalent to that guaranteed at EU level.

That is particularly so because the grounds for the contested regulations make no mention of Indian provisions, in particular the Prevention of Terrorism Act (POTA). The defence indicates, but *a posteriori* before the Court, that they were relevant since they determined the procedure applicable to the proscription of groups regarded as infringing the Indian laws on illegal activities. That lacuna in the statement of reasons for the contested regulations confirms the lack of a thorough examination, which is particularly important in the case of decisions of authorities of third States.

That lack of thorough examination at the stage of the adoption of the contested regulations, and the resulting infringement of the obligation to state reasons, cannot be remedied by the Council's references and explanations made for the first time before the Court.

Finally, it should be noted, in connection with the considerations expressed in the second sentence of paragraph 139 above, that neither the Council nor any intervener in its support responds to the arguments in the application, which are reproduced in the reply, that the repeal of the POTA in 2004 arose from the fact that it had led to arbitrary detentions, acts of torture, disappearances and extrajudicial executions, and that the legislative amendments made after that repeal did not solve the problems.

Consequently, whereas the Council was entitled to classify the UK authorities mentioned in the grounds for the contested regulations as competent authorities, that could not, at the very least as the grounds for the contested regulations are formulated, be the case for the Indian authorities.

It is therefore appropriate to uphold the present plea in so far as it concerns the Indian authorities and to reject it in so far as it concerns the UK authorities.

The Court will continue its examination of the actions by considering the LTTE's criticisms of the approach followed by the Council and the reasons given by the Council for maintaining the LTTE's name on the list relating to frozen funds and, in particular, by considering the criticism that the imputation to the LTTE of the violent acts mentioned in the grounds for the contested regulations has no sufficient factual or legal basis.

For this purpose, it is appropriate to examine the fourth to sixth pleas, taken together with the second plea.

The fourth to sixth pleas, taken together with the second plea

Arguments of the parties

The LTTE claims that, far from having carried out a serious examination of the developments in procedures at national level, as required by Article 1(6) of Common Position 2001/931, the Council based the contested regulations not so much on decisions of competent authorities but on a list of acts directly attributed by the Council to the LTTE. That list does not constitute a decision of a competent authority. The imputation in it has no sufficient factual or legal basis (second and fourth pleas). In addition, there are too many gaps in the grounds for the contested regulations to enable the LTTE to mount an effective defence and to allow judicial review (fifth and sixth pleas).

The Council, supported by the interveners, disputes the LTTE's arguments and contends that it undertook a detailed review before deciding, by the contested regulations, to maintain the LTTE's name on the list relating to frozen funds. The outcome of that review is a political question to be decided only by the legislator. The Council enjoys a wide discretion. With regard to its consideration of developments in procedures at national level, the Council refers to two applications for removal from the list made by LTTE to the Home Secretary in 2007 and 2009, which were rejected. The Council denies not having duly taken into consideration developments in the situation in Sri-Lanka since the military defeat of the LTTE in 2009. It considers that it fully complied with its obligation to state reasons and disputes that the LTTE's rights of defence were infringed. It was for the LTTE to challenge the facts attributed to it, if necessary, at national level. Moreover, those facts constitute contextual material of public knowledge, of which the LTTE had been aware for a long time, but which it challenges only before the Court.

Findings of the Court

First, it should be noted that following the adoption, on the basis of decisions of competent national authorities, of a decision placing a person or group on the list relating to frozen funds, the Council must, at regular intervals, and at least once every six months, be satisfied that there are grounds for continuing to include the party concerned in the list at issue.

While verification that there is a decision of a national authority as defined in Article 1(4) of Common Position 2001/931 is an essential precondition for the adoption by the Council of an initial decision to freeze funds, verification of the consequences of that decision at national level is essential for the adoption of a subsequent decision to freeze funds (judgments of 12 December 2006 in *Organisation des Modjahedines du peuple d'Iran* v *Council*, T-228/02, ECR, EU:T:2006:384, paragraph 117, 'the judgment in *OMPI* T-228/02', and of 11 July 2007 in *Sison* v *Council*, T-47/03, EU:T:2007:207, paragraph 164). The essential question when reviewing whether to continue to include a person on the list at issue is whether, since the inclusion of that person in that list or since the last review, the factual situation has changed in such a way that it is no longer possible to draw the same conclusion concerning the involvement of that person in terrorist activities (judgment in *Al-Aqsa* C-539/10, paragraph 105 above, EU:C:2012:711, paragraph 82).

Secondly, the Court has consistently held that the statement of reasons required by Article 296 TFEU, which must be appropriate to the measure at issue and the context in which it was adopted, must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power to

review its lawfulness. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see judgment in *OMPI* T-228/02, paragraph 158 above, EU:T:2006:384, paragraph 141 and the case-law cited).

In the context of the adoption of a decision to freeze funds under Regulation No 2580/2001, the statement of reasons for that decision must be assessed primarily in the light of the legal conditions for the application of that regulation to a particular case, as laid down in Article 2(3) thereof and, by reference, to either Article 1(4) or Article 1(6) of Common Position 2001/931, depending on whether it is an initial decision or a subsequent decision to freeze funds (judgment in *OMPI* T-228/02, paragraph 158 above, EU:T:2006:384, paragraph 142).

The Court cannot accept that the statement of reasons may consist merely of a general, stereotypical formulation modelled on the wording of Article 2(3) of Regulation No 2580/2001 and Article 1(4) or (6) of Common Position 2001/931. In accordance with the principles referred to above, the Council is required to state the matters of fact and law that constitute the legal basis of its decision and the considerations which led it to adopt that decision. The grounds for such a measure must therefore indicate the actual and specific reasons why the Council considers that the relevant rules are applicable to the party concerned (see judgment in *OMPI* T-228/02, paragraph 158 above, EU:T:2006:384, paragraph 143 and the case-law cited).

Therefore, both the statement of reasons for an initial decision to freeze funds and the statement of reasons for subsequent decisions must refer not only to the legal conditions for the application of Regulation No 2580/2001, in particular the existence of a national decision taken by a competent authority, but also to the actual and specific reasons why the Council considers, in the exercise of its discretion, that the party concerned must be made the subject of a fund-freezing measure (judgment in *Sison* T-341/07, paragraph 114 above, EU:T:2009:372, paragraph 60).

Thirdly, with regard to the review carried out by the Court, the latter has recognised that the Council has broad discretion as to what matters to take into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 75 TFEU, 215 TFEU and 352 TFEU, consistent with a common position adopted on the basis of the common foreign and security policy. This discretion concerns, in particular, the assessment of the considerations of appropriateness on which such decisions are based (see judgment in *Sison* T-341/07, paragraph 114 above, EU:T:2009:372, paragraph 97 and the case-law cited). However, although the Court acknowledges that the Council has a broad discretion in that sphere, that does not mean that the Court will refrain from reviewing the Council's interpretation of the relevant facts. The European Union judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising the situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, it must not substitute its own assessment of what is appropriate for that of the Council (see judgment in *Sison* T-341/07, paragraph 114 above, EU:T:2009:372, paragraph 98 and the case-law cited).

Fourthly, as regards the factual or legal grounds of a fund-freezing decision concerning terrorism, it should be noted that, according to Article 1(4) of Common Position 2001/931, the list relating to frozen funds is to be drawn up on the basis of precise information or material in the relevant file which indicates that a decision was taken by a competent authority in respect of that person, group or entity, irrespective of whether it concerns the instigation of investigations or prosecutions for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or indicia, or condemnation for such deeds.

In its judgment in *Al-Aqsa* C-539/10 P, paragraph 105 above, (EU:C:2012:711), the Court of Justice noted that it is apparent from the references, in Article 1(4) of Common Position 2001/931, to a decision of a 'competent authority', 'precise information' and 'serious and credible evidence or [indicia]' that that provision aims to protect the persons concerned by ensuring that they are included on the list at issue only on a sufficiently solid factual basis, and that the common position seeks to attain that objective by requiring a decision taken by a national authority (paragraph 68 of the judgment). The Court of Justice observed that the European Union does not have the means to carry out its own investigations regarding the involvement of a person in terrorist acts (paragraph 69 of the judgment).

The grounds put forward by the Council to found the contested regulations should be examined in the light of the foregoing considerations.

Those grounds begin with a paragraph in which the Council (i) describes the LTTE as a 'terrorist group' formed in 1976 which fights for a separate Tamil State in the north and east of Sri-Lanka, (ii) states that the LTTE has carried out 'a number of terrorist acts including repeated attacks on and intimidation of civilians, frequent attacks against government targets, disruption of political processes and kidnappings and political assassinations' and (iii) submits that 'while the recent military defeat of the LTTE has significantly weakened its structure, the likely intention of the organisation is to continue terrorist attacks in Sri-Lanka' (first paragraphs of the grounds for the contested regulations).

Next the Council draws up a list of the 'terrorist attacks' which it claims that the LTTE carried out from August 2005 until April 2009 or — according to the contested regulations — until June 2010 (second paragraphs of the grounds for the contested regulations).

After stating that 'those acts fall within the provision of Article 1(3), subpoints (a), (b), (c), (f) and (g) of Common Position 2001/931, and were committed with the aims set out in Article 1(3), points (i) and (iii) thereof' and that '[the LTTE] falls within Article 2(3)(ii) of Regulation No 2580/2001' (third and fourth paragraphs of the grounds for the contested regulations), the Council refers to decisions that the UK and Indian authorities adopted in 1992, 2001 and

2004 against the LTTE (fifth and sixth paragraphs of the grounds for Implementing Regulations Nos 83/2011 through to 125/2014), as well as in 2012 (sixth and seventh paragraphs of the grounds for Implementing Regulation No 790/2014).

As regards the UK decisions and — solely in the grounds for Implementing Regulation No 790/2014 — the Indian decisions, the Council refers to the fact that they are reviewed regularly or are subject to review or appeal.

The Council deduces from those considerations that '[d]ecisions in respect of the [LTTE] have thus been taken by competent authorities within the meaning of Article 1(4) of Common Position 2001/931' (seventh paragraphs of the grounds for the contested regulations).

Finally, the Council 'notes that the above decisions … still remain in force, and is satisfied that the reasons for including [the LTTE] on the list [relating to frozen funds] remain valid' (eighth paragraphs of the grounds for the contested regulations). The Council concludes from this that the LTTE must continue to appear on that list (ninth paragraphs of the grounds for the contested regulations).

It should be noted, first of all, that, even though the list of acts drawn up by the Council in the second paragraphs of the grounds for the contested regulations plays a decisive role in the assessment of the appropriateness of continuing the freezing of the LTTE's funds, since that list is the basis for the finding by the Council of the existence of terrorist acts committed by the LTTE, none of those acts were examined in the national decisions invoked in the fifth and sixth paragraphs of the grounds for Implementing Regulations Nos 83/2011 through to 125/2014 and in the sixth and seventh paragraphs of the grounds for Implementing Regulation No 790/2014.

Regarding Implementing Regulations Nos 83/2011 through to 125/2014, all those acts are subsequent to the national decisions relied on in the grounds for those regulations. Accordingly, they cannot have been examined in those decisions.

Although the grounds for Implementing Regulations Nos 83/2011 through to 125/2014 state that the national decisions to which they refer have remained in force, they still do not contain any reference to more recent national decisions and, still less, to the grounds of such decisions.

In response to the LTTE's criticisms in this regard, the Council does not produce any more recent decision of the UK or Indian authorities which it proves that it had at its disposal at the time of the adoption of Implementing Regulation Nos 83/2011 through to 125/2014 and from which it is apparent, in concrete terms, that the acts listed in the grounds had actually been examined and confirmed by those authorities.

As for the UK procedure, the Council produces only the 2001 decisions referred to in the grounds for the contested regulations. The Council does not produce any subsequent UK decision and, still less, the grounds of such a decision. At most, the Council refers to a decision of the UK Treasury of 7 December 2009 and to the rejections of two applications submitted by the LTTE in 2007 and 2009 seeking its removal from the UK list relating to frozen funds, but does not produce them or give any precise indication as to their specific statement of reasons.

In the light of the considerations in paragraphs 138 to 140 above, the Indian judicial decision of 12 November 2010 produced by the Council at the stage of its rejoinders and an Indian judicial decision of 7 November 2012, produced in the Council's reply of 6 February 2014 to questions put by the General Court, are irrelevant. Furthermore, and for the sake of completeness, it should be noted that those decisions fail to mention, still less rule on, any of the 24, subsequently 21, acts specifically listed in the grounds for Implementing Regulations Nos 83/2011 through to 125/2014.

As regards Implementing Regulation No 790/2014, the same considerations as those set out in paragraph 178 above apply with regard to the Indian decisions of 2012 (including the judicial decision of 7 November 2012) mentioned, for the first time, in the seventh paragraph of the grounds for that regulation.

As regards the two French decisions of 23 November 2009 and 22 February 2012 (one at first instance and the other on appeal) referred to by the Council in its rejoinder in Case T-508/11, and which in its view took account of a number of acts listed in the grounds for the contested regulations, the following points should be noted.

First, those decisions are not mentioned in the grounds for the contested regulations adopted before the rejoinder. They therefore constitute an attempt to provide a belated statement of reasons, which is inadmissible (see, to that effect, judgments of 12 November 2013 in *North Drilling* v *Council*, T-552/12, EU:T:2013:590, paragraph 26, and of 12 December 2013 in *Nabipour and Others* v *Council*, T-58/12, EU:T:2013:640, paragraphs 36 to 39).

Secondly, and more fundamentally, those French decisions are not even mentioned in the contested regulations adopted subsequently to the rejoinder (Implementing Regulations Nos 542/2012, 1169/2012, 714/2013, 125/2014 and 790/2014). The Council cannot claim, as 'grounds' for its restrictive measures, national decisions which it does not invoke in the grounds for the contested regulations after it has become aware of those decisions.

The considerations set out in paragraphs 180 to 182 above apply equally with regard to a German decision referred to by the Council for the first time at the hearing.

In its rejoinder, the Council submits, however, that the acts listed in the statements of reasons 'fall within a context that all parties have been aware of … the context of the conflict in Sri-Lanka in which the applicant was one of the parties' and that 'the aim of this contextual material, based on well-publicised events, was to inform the party against which preventive measures were adopted of the Council's reasons for its assessment of the terrorist threat the applicant represents'. In order to support its reference to 'contextual material', the Council refers to the judgment in *PMOI* T-256/07, paragraph 106 above (EU:T:2008:461, paragraph 90). In support of its argument regarding the public knowledge of the acts which it imputes to the LTTE, the Council provides references to press articles from the internet.

The Council adds that 'those factual grounds were not intended to replace any judicial assessment, with the force of *res judicata*, of the civil or criminal liability of the perpetrators of those acts or of the allegation that those acts were

committed by them; that was not their purpose'. It states that 'these elements were not only public but also perfectly well known to the [LTTE] at the date of the adoption of the [contested regulations]'.

Those arguments, combined with the lack of any reference in the grounds for the contested regulations to decisions of competent authorities which are more recent than the imputed acts and referring to such acts, clearly show that the Council based the contested regulations not on assessments contained in the decisions of competent authorities, but on information which it derived from the press and the internet.

However, as is apparent from the considerations set out in paragraphs 164 and 165 above, Common Position 2001/931 requires, for the protection of the persons concerned and having regard to the lack of the European Union's own means of investigation, that the factual basis of a decision of the European Union to freeze funds concerning terrorism be based not on information that the Council derived from the press or the internet, but on information which has been specifically examined and upheld in decisions of competent national authorities within the meaning of Common Position 2001/931.

It is only on such a reliable factual basis that the Council can then exercise its broad discretion in the context of the adoption of decisions to freeze funds at EU level, in particular as regards the considerations of appropriateness on which such decisions are based.

It is apparent from the foregoing considerations that the Council has failed to comply with those requirements of Common Position 2001/931.

The statement of reasons for the contested regulations reveals, moreover, that the Council's line of reasoning is contrary to the requirements of that common position.

Thus, instead of taking, for the factual basis of its assessment, decisions adopted by competent authorities that have taken into consideration the specific acts and acted on the basis of those acts, and then verifying that those acts are indeed 'terrorist acts' and that the group concerned is indeed 'a group', as defined in Common Position 2001/931, in order to decide, on that basis and in exercising its broad discretion, whether to adopt a decision at EU level, the Council does the reverse in the grounds for the contested regulations.

It begins with assessments which are, in actual fact, its own assessments, classifying the LTTE as a terrorist from the first sentence of the grounds — which determines the question which those grounds are supposed to resolve — and imputing to it a series of acts of violence which the Council took from the press and the internet (first and second paragraphs of the grounds for the contested regulations).

It should be noted in this respect that the fact that it is a case of a review of the list relating to frozen funds, which therefore takes place after previous examinations, cannot justify that a priori classification. Without ignoring the past, a review of a fund-freezing measure is by definition open to the possibility that the person or group concerned is no longer terrorist at the time of the Council's decision. It is therefore only at the end of that review that the Council can reach its conclusion.

The Council then states that the acts which it imputes to the LTTE fall within the definition of terrorist act within the meaning of Common Position 2001/931 and that the LTTE is a group within the meaning of that position (third and fourth paragraphs of the grounds for the contested regulations).

It is only after those remarks that the Council refers to decisions of national authorities (fifth to eighth paragraphs of the grounds for the contested regulations), which, however, at least for Implementing Regulations Nos 83/2011 through to 125/2014, predate the imputed acts.

The Council does not seek to show, in the grounds for the latter implementing regulations, that subsequent national review decisions, or other decisions of competent authorities, actually examined and upheld the specific acts set out at the beginning of those grounds. In the grounds for Implementing Regulations Nos 83/2011 through to 125/2014, the Council merely cites the initial national decisions and states, without more, that they remain in force. It is only in the grounds for Implementing Regulation No 790/2014 that the Council mentions national decisions subsequent to the acts specifically imputed to the LTTE, but, once again, fails to show that those decisions — which are moreover irrelevant in the light of the considerations in paragraphs 138 to 140 above — actually examined and upheld the specific acts set out at the beginning of those grounds.

The present case is therefore clearly different from the first cases before the Court relating to fund-freezing measures concerning terrorism after the adoption of Common Position 2001/931 (*Al-Aqsa* v *Council*, *Sison* v *Council* and *People's Mojahedin Organization of Iran* v *Council*).

Whereas, in those first cases concerning terrorism, the factual basis of the Council regulations had its origin in decisions of competent national authorities, in the present case, the Council no longer relies on facts which were first of all assessed by national authorities, but itself makes its own independent imputations of fact on the basis of the press or the internet. In so doing, the Council exercises the functions of the 'competent authority' within the meaning of Article 1(4) of Common Position 2001/931, which, as the Court of Justice has essentially observed, is neither within its competence according to that common position nor within its means.

It is thus to no avail that the Council (see paragraph 184 above) refers in particular to the judgment in *PMOI* T-256/07, paragraph 106 above (EU:T:2008:461, paragraph 90). In that case, the acts listed in the grounds for freezing its funds which the Council sent to the People's Mojahedin Organization of Iran ('the PMOI') were not based on independent assessments of the Council, but on assessments of the competent national authority. As is apparent from paragraph 90 of the judgment in *PMOI* T-256/07, paragraph 106 above (EU:T:2008:461), the statement of reasons of 30 January 2007 sent to the group concerned (the PMOI) referred to acts of terrorism for which the PMOI was said to be responsible and stated that 'because of those acts, a decision had been taken by a competent national authority'. The acts listed in the Council's statement of reasons of 30 January 2007 sent to the PMOI had therefore been

examined and upheld against that group by the competent national authority. Unlike the present case, their compilation did not stem from the Council's own independent assessments.

In the same way, in Case T-348/07, *Al-Aqsa* v *Council*, the Court had available to it the text of the decisions of competent authorities relied upon in the grounds for the contested regulations and analysed them in detail. It concluded that the Council had not made any manifest error of assessment in finding that the applicant knew that the funds which it was gathering would be used for the purposes of terrorism (judgment in *Al-Aqsa* T-348/07, paragraph 105 above, EU:T:2010:373, paragraphs 121 to 133). According to the findings of the Court, the factual basis on which the Council was working was therefore a fully sound factual basis arising directly from the findings made by the competent national authorities. In the judgment of 11 July 2007 in *Al-Aqsa* v *Council* (T-327/03, EU:T:2007:211) it is also clear from the grounds (paragraphs 17 to 20 of the judgment) that the assessments on which the EU fund-freezing measure was based derived from factual findings which were not specific to the Council but which came from decisions of competent national authorities.

Likewise, in Case T-341/07, *Sison* v *Council*, the assessments on which the fund-freezing measure was based derived from factual findings which were not specific to the Council but which came from decisions which had the force of *res judicata* and had been adopted by competent national authorities (Raad van State (Council of State, Netherlands) and Rechtbank (District Court, Netherlands)) (judgment in *Sison* T-341/07, paragraph 114 above, EU:T:2009:372, paragraphs 1, 88 and 100 to 105).

It is true that the factual statement of reasons for the contested regulations — the list of acts imputed by the Council to the LTTE in the present case — does indeed not constitute, to repeat the Council's argument (see paragraph 185 above), a 'judicial assessment with the force of *res judicata*'. Nevertheless that factual statement of reasons for the contested regulations played a decisive role in the Council's assessment of the appropriateness of maintaining the LTTE on the list relating to frozen funds and the Council, far from establishing that it derived that statement of reasons from decisions of competent authorities, in fact attests to having relied on information derived from the press and the internet.

The Court considers that that approach contravenes the two-tier system established by Common Position 2001/931 on terrorism.

Although, as the Court of Justice has observed, the essential question during a review is whether, since the inclusion of the person concerned in the list relating to frozen funds or since the last review, the factual situation has changed in such a way that it is no longer possible to draw the same conclusion concerning the involvement of that person in terrorist activities (judgment in *Al-Aqsa* C-539/10, paragraph 105 above, EU:C:2012:711, paragraph 82) — with the consequence that the Council may, if necessary and within the context of its broad discretion, decide to maintain a person on the list relating to frozen funds in the absence of a change in the factual situation — the fact remains that any new terrorist act which the Council inserts in its statement of reasons during that review for the purposes of justifying maintaining the person concerned on the list relating to frozen funds must, in the two-tier decision-making system of Common Position 2001/931 and because of the Council's lack of means of investigation, have been the subject of an examination and a decision by a competent authority within the meaning of that common position.

The Council and the Commission suggest to no avail that the lack of reference in the grounds for the contested regulations to specific decisions of competent authorities which specifically examined and upheld the acts set out at the top of those grounds is attributable to the LTTE, which, according to the Council and the Commission, could and should have challenged the restrictive measures concerning it at national level.

Firstly, the obligation upon the Council to base its fund-freezing decisions as far as concerns terrorism on a factual basis deriving from decisions of competent authorities arises directly from the two-tier system established by Common Position 2001/931, as confirmed by the judgment in *Al-Aqsa* C-539/10, paragraph 105 above (EU:C:2012:711, paragraphs 68 and 69). That obligation is not therefore subject to the action by the person or group concerned. On the basis of its duty to state reasons, which is an essential procedural requirement, the Council must state, in the grounds for its fund-freezing decisions, the decisions of competent national authorities which specifically examined and found the terrorist acts which it uses as a factual basis for its own decisions.

Secondly, the argument advanced by the Council and Commission ultimately merely confirms the finding, which has already been made in paragraph 186 above, that the Council in fact relied not on assessments contained in decisions of competent authorities, but on information which it derived from the press and the internet. In this respect, it is paradoxical that the Council complains that the LTTE did not challenge at national level factual imputations which it does not itself manage to link to any specific decision of a competent authority.

Finally, that argument is problematic to say the least, inasmuch as it suggests that the national fund-freezing decisions on which the Council decides to rely in its specific practice under Common Position 2001/931, might themselves, if no dispute has been raised by the party concerned at national level, not be based on any specific act of terrorism.

It is also to no avail that the Council and the Commission dispute the obligation to derive the factual basis of the fund-freezing regulations from decisions of competent authorities on the ground that that could lead, in the absence of such decisions, to unjustified removals of persons or groups from the list relating to frozen funds. The Council and the Commission refer in particular to the fact that the timing of review in the Member States may differ from the biannual review applicable at EU level.

Firstly, once again, that dispute is inconsistent with Common Position 2001/931 (Article 1(4) of Common Position 2001/931), as confirmed by the judgment in *Al-Aqsa* C-539/10, paragraph 105 above (EU:C:2012:711, paragraphs 68 and 69), which requires, for the protection of the persons concerned and having regard to the lack of the European

Union's own means of investigation, that the factual basis of a decision of the European Union to freeze funds concerning terrorism be based on information which has been specifically examined and upheld in decisions of competent national authorities within the meaning of Common Position 2001/931. Secondly, it should be noted that, in the two-tier system of that Common Position and for the purposes of ensuring the effectiveness of the fight against terrorism, it is for the Member States to regularly transmit to the Council, and for the Council to collect, the decisions of competent authorities adopted within those Member States, as well as the grounds for those decisions.

Moreover, that necessary transmission and collection of decisions of competent authorities corresponds exactly to the circulation of information provided for, inter alia, in paragraphs 2, 3, 8 and 24 of the document entitled 'Working methods of the Working Party on implementation of Common Position 2001/931 on the application of specific measures to combat terrorism' which is set out in Annex II to Council document 10826/1/07 REV 1 of 28 June 2007.

If, despite that transmission of information, a decision of a competent authority concerning a specific act capable of constituting a terrorist act is not available to the Council, the Council, in the absence of its own means of investigation, must ask a competent national authority to assess that act, with a view to a decision being taken by that authority.

For this purpose, the Council may contact the 28 EU Member States and in particular the Member States which have already examined the situation of the person or group concerned. It may also contact a third State which satisfies the conditions required with regard to protection of the rights of defence and of the right to effective judicial protection. The decision in question, which must, in the words of Common Position 2001/931, be an 'instigation of investigations or prosecution … or [a] condemnation', does not necessarily have to be the national decision periodically reviewing the placement of the person or group concerned on the national list relating to frozen funds. Even in the latter case, however, the existence at national level of a timing of periodic review which is different from that in force at EU level cannot justify the deferral by the Member State concerned of the examination of the act in question which the Council has requested. Having regard both to the two-tier structure of the system established by Common Position 2001/931 and to the mutual duties of sincere cooperation existing between the Member States and the European Union, the Member States must respond without delay to the Council's requests to them for an assessment and, where appropriate, a decision of a competent authority within the meaning of Common Position 2001/931 of an act capable of constituting a terrorist act.

It follows from the foregoing considerations that the argument that the requirement of a decision by a competent authority might lead to unjustified removals from the list relating to frozen funds is unconvincing.

It should be added, moreover, that the absence of any new terrorist act in respect of a given six month period does not in any way mean that the Council should withdraw the person or group concerned from the list relating to frozen funds. As the Court has already found, nothing in the provisions of Regulation No 2580/2011 and of Common Position 2001/931 precludes the imposition or maintenance of restrictive measures on persons or entities that have in the past committed acts of terrorism, despite the lack of evidence to show that they are at present committing or participating in such acts, if the circumstances warrant it (see, to that effect, the judgment in *PMOI* T-256/07, paragraph 106 above, EU:T:2008:461, paragraphs 107 to 113). Thus, the obligation to make new imputations of terrorist acts only on the basis of decisions of competent authorities does not in any way preclude the Council's right to maintain the person concerned on the list relating to frozen funds, even after the cessation of the terrorist activity in the strict sense, if the circumstances warrant it.

The possibility, also mentioned by the Council and the Commission, that decisions of competent authorities which are incompatible with decisions of the European Union might be adopted cannot constitute a valid reason for challenging the obligation to derive, in the interest of the protection of the persons and groups concerned, the factual basis of the decisions of the European Union from decisions of competent authorities.

Finally, contrary to what by the Council and the Commission suggest, such an obligation to derive the factual basis of the fund-freezing regulations from decisions of competent authorities is not such as to give rise to a risk of unjustifiably maintaining a person or group on the list relating to frozen funds.

Although Article 1(1) to (4) and (6) of Common Position 2001/931 precludes the Council from including, in the statement of reasons for its decision to place or maintain a person or group on the list relating to frozen funds, terrorist acts (including attempts, participation in or facilitation of such acts) which have not been the subject of a decision of a competent authority (instigation of investigations or prosecutions, or condemnation), Common Position 2001/931 does not contain any comparable obligation as regards the non-maintenance by the Council of a person or group in the list relating to frozen funds. That decision not to maintain them on the list, which is favourable to the person or group concerned, is not subject to the same procedural requirements, even though, in the majority of cases, it will take place in the light of favourable decisions adopted at national level, such as an abandonment or discontinuance of investigations or prosecutions for terrorist acts, an acquittal in criminal proceedings or indeed the withdrawal of the person or group concerned from the national classification list.

It follows from the considerations set out in paragraphs 209 to 218 above that the Council and the Commission are wrong in claiming that the obligation on the Council to derive the factual basis of its fund-freezing decisions from decisions of competent authorities is such as to undermine the European Union's policy of combating terrorism.

It should be added that the Court's overall findings made above do not exceed the scope of the limited review which it is to carry out, whereby it is to check that the procedure has been complied with and that the facts are materially accurate, but without thereby calling in question the Council's broad discretion. In fact, in the judgment in *Sison* T-341/07, paragraph 114 above (EU:T:2009:372), the Court was prompted to check — and was able to find — that the factual allegations made against Mr Sison set out in the grounds for maintaining his name on the list relating to frozen funds were duly substantiated by the findings of fact made in the decisions of the Netherlands authorities (Raad van

State and Rechtbank) on which the Council relied in those grounds (judgment in *Sison* T-341/07, paragraph 114 above, EU:T:2009:372, paragraphs 87 and 88).

By contrast, in the present case, in the grounds for the contested regulations there are no references to any decision of a competent authority to whose grounds the Court could link the factual evidence upheld by the Council against the LTTE.

Furthermore, and once more with regard to the judgment in *Sison* T-341/07, paragraph 114 above, (EU:T:2009:372), it should be noted that, while finding that the facts set out in the grounds for the Council's regulations did indeed come from the two Dutch decisions relied on in those same grounds, the Court none the less then held that those Dutch decisions were not decisions of competent authorities, on the ground that they did not concern the imposition on the person concerned of measures of a preventive or punitive nature in connection with the combating of terrorism (judgment in *Sison* T-341/07, paragraph 114 above, EU:T:2009:372, paragraphs 107 to 115).

If the Court was thus able dismiss the findings of fact nevertheless stemming from competent authorities on the ground that the decisions of those authorities were not 'condemnations or instigations of investigations or prosecutions', that implies that it cannot, in the present case, grant press articles — which are in any event not mentioned in the grounds for the contested regulations — the procedural and probative status reserved by Common Position 2001/931 only for decisions of competent authorities.

Finally, the Court considers it appropriate to underline the importance of the guarantees provided by fundamental rights in that context (see Opinion in *France* v *People's Mojahedin Organization of Iran*, C-27/09 P, ECR, EU:C:2011:482, paragraphs 235 to 238).

In the light of all the foregoing considerations, from which it is apparent that Regulation No 2580/2001 is applicable in the case of armed conflict and, moreover, that the Council infringed both Article 1 of Common Position 2001/931 and — in the absence of a reference in the statement of reasons to decisions of competent authorities relating to the acts imputed to the LTTE — the obligation to state reasons, the contested regulations should be annulled in so far as they concern the LTTE.

The Court stresses that those annulments, on fundamental procedural grounds, do not imply any substantive assessment of the question of the classification of the LTTE as a terrorist group within the meaning of Common Position 2001/931.

So far as concerns the temporal effects of those annulments, it must be borne in mind that, under the second paragraph of Article 60 of the Statute of the Court of Justice of the European Union, by way of derogation from Article 280 TFEU, decisions of the General Court declaring a regulation to be void are to take effect only as from the date of expiry of the appeal period referred to in the first paragraph of Article 56 of that statute or, if an appeal has been brought within that period, as from the date of dismissal of the appeal. In any event, the Council therefore has a minimum period of two months, extended on account of distance by 10 days, as from the notification of this judgment, to remedy the infringements established by adopting, if appropriate, a new restrictive measure with respect to the LTTE.

However, and on the basis of the second paragraph of Article 264 TFEU, the General Court may provisionally maintain the effects of the annulled decision (see, to that effect, the judgment in *Kadi and Al Barakaat International Foundation* v *Council and Commission*, paragraph 128 above, EU:C:2008:461, paragraphs 373 to 376, and the judgment of 16 September 2011 in *Kadio Morokro* v *Council*, T-316/11, EU:T:2011:484, paragraph 39).

In the circumstances of the present case, the Court finds that, to avoid the risk of a serious and irreversible impairment of the effectiveness of the restrictive measures, while taking account of the major impact of the restrictive measures in question on the rights and freedoms of the LTTE, the effects of Implementing Regulation No 790/2014 must, by virtue of Article 264 TFEU, be maintained for a period of three months following delivery of this judgment.

Costs

Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the LTTE.

Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Kingdom of the Netherlands, the United Kingdom and the Commission are to bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

Annuls Council Implementing Regulation (EU) No 83/2011 of 31 January 2011, No 687/2011 of 18 July 2011, No 1375/2011 of 22 December 2011, No 542/2012 of 25 June 2012, No 1169/2012 of 10 December 2012, No 714/2013 of 25 July 2013, No 125/2014 of 10 February 2014 and No 790/2014 of 22 July 2014 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulations (EU) Nos 610/2010, 83/2011, 687/2011, 1375/2011, 542/2012, 1169/2012, 714/2013 and 125/2014 in so far as those measures concern the Liberation Tigers of Tamil Eelam (LTTE);

Maintains the effects of Implementing Regulation No 790/2014 for three months following delivery of this judgment;

Orders the Council of the European Union to pay, in addition to its own costs, the costs of the LTTE;

Orders the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the European Commission to bear their own respective costs.

Dehousse Wiszniewska-Białecka Buttigieg

Collins Ulloa Rubio

Delivered in open court in Luxembourg on 16 October 2014.

[Signatures]

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* Language of the case: English.

Annex 472

French Cour de cassation, Judgement of April 12th, 2005, No. 04-84264

N° Z 04-84.264 FS-P+F N° 2295

028281

SH 12 AVRIL 2005

M. COTTE président,

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, CHAMBRE CRIMINELLE, en son audience publique tenue au Palais de Justice à PARIS, le douze avril deux mille cinq, a rendu l'arrêt suivant :

Sur le rapport de Mme le conseiller ANZANI et les conclusions de Mme l'avocat général COMMARET ;

Statuant sur le pourvoi formé par :

- GOROSTIAGA Koldo,

contre l'arrêt de la chambre de l'instruction de la cour d'appel de PARIS, 2ème section, en date du 11 juin 2004, qui, dans l'information suivie contre Mikel CORCUERA-RETEGUI et Jon GORROTXATEGI-GORROTXATEGI des chefs d'association de malfaiteurs, financement d'une entreprise terroriste, manquement à l'obligation déclarative des sommes, en relation avec une entreprise terroriste, a confirmé l'ordonnance du juge d'instruction rejetant sa demande de restitution ;

Sur la recevabilité du pourvoi ;

Attendu que, le demandeur à la restitution n'étant pas partie à la procédure, son pourvoi est immédiatement recevable ;

Vu le mémoire personnel produit et les observations complémentaires formulées après communication du sens des conclusions de l'avocat général, le demandeur au pourvoi ayant consulté le rapport du conseiller rapporteur ;

Attendu qu'il résulte de l'arrêt attaqué et des pièces de la procédure que, le 22 mars 2002, des agents de l'administration des douanes ont contrôlé, à Onnaing (département du Nord), deux personnes circulant à bord d'un véhicule immatriculé en Espagne, dans lequel ils ont découvert une somme de 200 304 euros ainsi qu'un relevé concernant une somme de 210 354 euros retirée, la veille, d'un compte détenu dans une banque bruxelloise ; que les sommes ont été saisies, les investigations ayant permis de présumer que, si les fonds provenaient des indemnités versées au député européen Koldo Gorostiaga, ils avaient été remis à l'un des occupants de la voiture, Jon Gorrotxategi pour financer, de façon occulte, les activités d'une organisation soupçonnée d'activités terroristes :

Attendu que Koldo Gorostiaga a formé une demande de restitution en faisant valoir que les fonds saisis provenaient bien de ses indemnités parlementaires et qu'il bénéficiait de l'immunité d'exécution ;

En cet état ;

Sur le premier moyen de cassation, pris de la violation des articles 80 et suivants du Code de procédure pénale, 9 du protocole du 8 avril 1965 sur les privilèges et immunités des Communautés européennes, 6-1, 2 et 3 de la Convention européenne des droits de l'homme ;

Attendu que le moyen, qui invoque une erreur matérielle contenue dans l'arrêt attaqué, ne pouvant donner lieu à ouverture à cassation, est irrecevable ;

Sur le deuxième moyen de cassation, pris de la violation de l'article 6.1 de la Convention européenne des droits de l'homme ;

Attendu que le demandeur ne précise pas en quoi sa cause n'aurait pas été entendue équitablement ;

Qu'ainsi le moyen ne saurait être accueilli ;

Sur le troisième moyen de cassation, pris de la violation de l'article 6.1 de la Convention européenne des droits de l'homme et de l'article 592 du Code de procédure pénale ;

Attendu qu'en prononçant l'arrêt en chambre du conseil la chambre de l'instruction a appliqué l'article 199, alinéa 1, du Code de procédure pénale, qui n'est pas contraire aux dispositions conventionnelles invoquées ; que le moyen ne peut qu'être écarté ;

Sur le quatrième moyen de cassation, pris de la violation de l'article 6.1 de la Convention européenne des droits de l'homme ;

Attendu qu'ayant régulièrement formé pourvoi contre l'arrêt, le demandeur ne saurait se faire un grief de ce que son avocat n'ait pu connaître immédiatement les motifs de la décision ;

D'où il suit que le moyen doit être écarté ;

Sur les cinquième et sixième moyens de cassation réunis, pris de la violation des articles 6.1 de la Convention européenne des droits de l'homme et 593 du Code de procédure pénale ;

Attendu que, d'une part, contrairement aux allégations du demandeur, l'arrêt a répondu aux chefs péremptoires du mémoire produit ; que, d'autre part, la chambre de l'instruction tient de l'effet dévolutif de l'appel, le pouvoir de substituer ses motifs à ceux du juge d'instruction ;

Que les moyens ne sauraient être admis ;

Sur le neuvième moyen de cassation, pris de la violation de l'article 6.1 de le Convention européenne des droits de l'homme ;

Attendu que la violation alléguée du droit à ce que sa cause soit entendue dans un délai raisonnable ne saurait entraîner la nullité de la procédure ;

Que ce moyen ne peut qu'être écarté ;

Sur les huitième, dixième et onzième moyens de cassation réunis, pris de la violation de l'article 9 du protocole du 8 avril 1965 sur les privilèges et immunités, du principe constitutionnel de séparation des pouvoirs et de prérogatives du Parlement européen, des articles 10 et 1 du protocole 1 de la Convention européenne des droits de l'homme ;

Attendu que, pour refuser de faire droit à la demande de restitution présentée par Koldo Gorostiaga, l'arrêt retient qu'il existe des indices concordants laissant présumer que ce député européen s'est dessaisi des fonds pour une affectation pouvant apparaître comme étrangère à son activité parlementaire, et que le maintien de la saisie est nécessaire à la manifestation de la vérité ;

Attendu qu'en prononçant ainsi, la chambre de l'instruction a justifié sa décision ;

D'où il suit que les moyens doivent être écartés ;

Et attendu que l'arrêt est régulier en la forme ;

REJETTE le pourvoi ;

Ainsi jugé et prononcé par la Cour de cassation, chambre criminelle, en son audience publique, les jour, mois et an que dessus ;

Etaient présents aux débats et au délibéré : M. Cotte président, Mme Anzani conseiller rapporteur, M. Joly, Mme Chanet, MM. Beyer, Pometan, Mmes Palisse, Guirimand conseillers de la chambre, M. Valat, Mme Ménotti conseillers référendaires ;

Avocat général : Mme Commaret ;

Greffier de chambre : Mme Krawiec ;

En foi de quoi le présent arrêt a été signé par le président, le rapporteur et le greffier de chambre ;

Annex 473

Italy v. Abdelaziz and ors, Final Appeal Judgment, No. 1072, 2007, 17 Guida al Diritto 90, ILDC 559, Supreme Court of Cassation, Italy, 17 January 2007, para. 4.1

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. The translated passages are highlighted in the original-language document. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Memorial, but stands ready to provide additional translations should the Court so require.

OXFORD PUBLIC INTERNATIONAL LAW
Oxford Reports on International Law

Italy v Abdelaziz and ors, Final Appeal Judgment, No 1072, (2007) 17 Guida al Diritto 90, ILDC 559 (IT 2007), 17th January 2007, Italy; Supreme Court of Cassation; 1st Criminal Section

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Parties: Italy
Bouyahia Maher Ben Abdelaziz, Toumi Alì Ben Sassi, Daki Mohammed

Judges/Arbitrators: T Gemelli (President); P Bardovagni; G Silvestri; G Corradini; M Cassano

Procedural Stage: Final Appeal Judgment

Previous Procedural Stage(s):
Milan Tribunal, Office of the Judge for Preliminary Hearings Decision; *Italy v Abdelaziz and ors*, No 5774; (27 April 2005) Diritto & Giustizia (in Italian), 24 January 2005
Milan Court of Appeal of Assizes Decision; *Italy v Abdelaziz and ors*, Foro Italiano II-343 (2006) (in Italian), 28 November 2005

Subject(s):

Combatants — Terrorism — Armed conflict — Military objectives — Paramilitary groups — Torture — Universal international organizations — Customary international law — Armed forces — Ius in bello

Core Issue(s):

Whether international law distinguished between terrorism and guerrilla warfare.

Whether an armed attack against a mixed military and civil objective constituted a terrorist act.

Whether participation in a fundamentalist Islamic organization was punishable as 'association with the aim of international terrorism'.

Decision – full text

Law

1.— As a preliminary matter, the Court must address the admissibility of the appeal brought by the public prosecutor of the decision of the Judge for Preliminary Hearings acquitting the defendants of the crime of participation and association with the aim of international terrorism charged in count 1, determining whether the acquittal is subject to the law introduced by Arts. 1 and 10 of Italian Law no. 46 of February 20, 2006. The first of the two articles replaced Art. 593, making acquittal judgments unappealable except in the case of new decisive evidence under Art. 603, paragraph 2 of the Italian Code of Criminal Procedure, while the second provided rules of transitional law, establishing that the new law applies also to pending proceedings (paragraph 1), that an appeal of a judgment of acquittal by the defendant or the public prosecutor before the date the law took effect is held inadmissible in an unappealable order (paragraph 2) and that such rule applies even where a judgment of conviction by an assize court of appeal or court of appeal that reformed a judgment of acquittal is reversed on points other than the punishment or the security measure (paragraph 4). In this procedural matter, the appeal brought by the public prosecutor against the trial decision cannot be ruled inadmissible, since the appeal was exhausted even before Law no. 46 of 2006 took effect with the conformation of the judgment of acquittal. This latter fact makes it clear that, in this case, the provision in Art. 10, paragraph 4 cannot apply; that provision requires the Court of Cassation to rule an appeal inadmissible only when a judgment of conviction by the court of appeal that reformed a judgment of acquittal on points other than the punishment or security measure must be reversed, and not also the completely different case where both trials on the merits led to a judgment of acquittal ("two concordant decisions"). Consequently, according to well-settled opinion, we must hold that the transitional rules of law are only applicable to the cases addressed in them and are thus – like all transitional rules – subject to analogous application pursuant to Art. 14 of the Provisions on law in general (Cassation, Section 1, September 29, 1997, Cascino, in Foro it., 1997, 2nd, 665; Civil Cass., Section 1, no. 14348, December 21, 1999; Joined Sections, no. 12966, December 7, 1992): with the further consequence that the rules under Art. 10, paragraph 4 of Law no. 46 of 2006 cannot be extended to the different situation of the dual acquittals handed down by the trial and appeal courts. It is also worthwhile observing that a ruling that the Public Prosecutor's appeal is inadmissible would be prevented by Art. 7 of that same Law no. 46 of 2006 which, modifying Art. 580 of the Code of Criminal Procedure, provided that when different appeals are made of the same judgment, if the appeals are connected as stated in Art. 12, the petition for cassation converts into the appeal, for the obvious purpose of keeping the *regiudicanda* from being fragmented for reasons of economy and procedural concentration and to prevent the possibility of conflicting decisions (Cass., Section 6, October 4, 1999, Artuso, journal no. 214895). However, to keep the appeal from being inadmissible, it is not even necessary to cite the conversion rules, since the Public Prosecutor's appeal was admissible both at the time it was filed and when the appeal proceeding was pending, for its entire duration until the judgment confirming the acquittal was handed down. It follows that, applying the principle of "*tempus regit actum,*" the appeal process must be conducted according to the procedural law in effect at the time, thus a final appeal can certainly not be converted.

2.— Criminalizing conduct linked to associations with the aim of international terrorism was introduced by Art. 1, paragraph 1 of Italian Decree Law no. 374 of October 18, 2001, converted into Italian Law no. 438 of December 15, 2001, by extending the scope of application of the crime of association set forth in Art. 270 *bis* of the Italian Criminal Code which, before that change, was considered not applicable to

terrorist organizations whose program of violent actions was directed against a foreign State or an international institution, given the principle of certainty of criminal law (Cass., Section 6, February 24, 1999, Public Prosecutor in Abdaoui *et al.*, journal no. 214311; Section 5, May 26, 1998, Avari, journal no. 212161; Section 6, March 1, 1996, Public Prosecutor in Ferdjoni et al., journal no. 204785). The use of the pre-existing association model and the extension of the criminalizing scope by adding Art. 270 *bis,* paragraph 3 of the Criminal Code ("for purposes of the criminal law, the aim of terrorism is also present when the violent acts are directed against a foreign State, institution or international body") imply specific consequences from a standpoint of analyzing the language of the criminalizing law, because, firstly, they make the same conceptual frameworks created by legal commentary and case law in regard to the previous crime and, in general, the category of crimes of association practicable, and, secondly, present the need to identify the phenomenon of terrorism from the perspective of international relationships and its impact within organizations other than the Italian State. The terms "terrorism" and "aim of terrorism" were not new to our legal system, since several provisions of the Criminal Code made explicit reference to them: Art. 270 bis of the Criminal Code ("associations with the aim of terrorism and subversion of the democratic order"), Art. 280, introduced by Art. 2 of Law no. 15 of 1980 ("attack for terrorism or subversion purposes"), Art. 289 bis, added by Art. 2 of Law no. 191 of 1978 ("kidnapping for purposes of terrorism or subversion"), and Art. 1 of Law no. 15 of 1980 concerning the aggravating factor with special effect applicable to crimes with the aim of terrorism. In that specific context, reference was primarily made to the semantic value of the expression based on a common cultural heritage, and a descriptive definition of terrorism was coined to include any action for the purposes of engaging in acts intended to cause panic in the population (see Cass., Joined Sections, November 23, 1995, Attorney General in Fachini et al., journal no. 203769, relating to terrorism purposes as an aggravating factor), in the sense that terrorism purposes exist where there is violent conduct intended to generate fear and panic and elicit terror in society with indiscriminate criminal actions, *i.e.,* those directed not at individual persons but against what they represent or, if directed against a person regardless of his/her function in society, intended to incite terror to diminish trust in the legal system and weaken its structures (Cass., Section 1, July 11, 1987, Benacchio, journal no. 176946). Once the scope of the criminalizing law under Art. 270 bis of the Criminal Code was broadened as a result of Art. 1 of Decree Law no. 374 of 2001, converted into Law no. 438 of 2001, the inadequacy of such a concept to describe the specific attributes of international terrorism was immediately perceived and a need was felt to create a legal definition that would reflect the specific transnational characteristics of the criminal conduct by analyzing the many international sources aimed at preventing terrorism activity.

2.1.— To begin with, to create a general category, the various international conventions ratified by Italy which concern prevention of terrorist acts in specific areas (such as, among others, the Tokyo Conventions of 1963, the Hague Convention of 1970 and the Montreal Convention of 1971 concerning air transport, the Rome Convention of 1988 concerning the safety of navigation at sea and the Vienna Convention of 1980 concerning the physical protection of nuclear material), are of limited importance; it must be stressed that from the start, the search for a general definition hinged above all on two international sources, namely, first, the New York Convention of 1999, passed by the General Assembly of the United Nations to inhibit the funding of terrorism, and, second, by the Framework Decision 2002/475/GAI of the European Union. In the absence of global agreement concerning terrorism, consensus on which has been obstructed for decades by disagreement between the Member States of the UN on the question of terrorism committed in the course of wars of liberation and armed struggle to establish self-determination of peoples, it should be noted that the wording of the Convention of 1999, implemented by Law no. 7 of January 27, 2003, has sufficiently wide scope to be regarded as a general definition applicable both in peacetime and in wartime and including any kind of behavior directed against civilian life or integrity or, in case of war, against "any other person not taking an active part in

hostilities in a situation of armed conflict" in order to spread terror among the population or to force a State or an international organization to take or refrain from action. In addition to being characterized by such objective and subjective elements and by the identity of the victims (civilians or persons not involved in military operations), it is generally held that in order to be regarded as terrorism, acts must at the psychological level meet a further requirement as to political, religious or ideological motivation in accordance with generally accepted international standards reflected in various resolutions of the UN General Assembly and Security Council, and in the Convention of 1997 against terrorist acts committed with the use of explosives. The definition of acts of terrorism under Art. 1 of the European Union's Framework Decision is for its part based on a list of specific crimes considered as such under national law, which can cause serious damage to a country or an international organization and which are committed to seriously intimidate the population or force the public authorities or an international organization to take or abstain from taking certain action, or to seriously destabilize or destroy fundamental, economic or social structures of a country or of an international organization. The defining formula set out in the Framework Decision of 2002 is different from that under the UN Convention of 1999, although it follows the general thrust in regard to the following two aspects. Firstly, the area of application of crimes of terrorism is more limited, relating only to acts committed in peacetime, as is made clear by introductory "consideration" number 11, which excludes from its scope "activities of the armed forces in times of armed conflict," in accordance with the definitions given to these terms in international humanitarian law: thus the definition under consideration excludes acts committed in wartime, which are governed by international humanitarian law and, in the first instance, by the Geneva Conventions and related Additional Protocols. Secondly, the Framework Decision has extended the concept of acts of terrorism by providing that these can also be characterized by destructive purposes, namely the purpose of "seriously destabilizing or destroying the fundamental, constitutional, economic or social political structures of a country or of an international organization," absent from the wording of the 1999 Convention. Both definitions therefore include the typical characteristic of acts of terrorism described by the most authoritative commentators as "depersonalization of the victim," meaning the general anonymous nature of persons affected by violent action, the true purpose of which is to spread fear indiscriminately among the general public and to force a government or international organization to take or abstain from pursuing specific action. Finally, the reference to situations of armed conflict—present in the 1999 Convention and absent from the Framework Decision—shows the two-sided nature of the laws on acts of terrorism and the need to differentiate it from the legal provisions concerning the identity of the persons actually concerned and the victims, in the sense that whether the rules of international humanitarian law or ordinary law apply depends on whether the acts are committed by persons who may be regarded as "combatants" and are aimed at civilians or against persons not actively engaged in hostilities. It follows from this that, reframing these subjective requirements, acts of terrorism must fall within the category of war crimes or crimes against humanity.

2.1.— Whereas, to identify a general category, the various international conventions ratified by Italy which concern prevention of terrorist acts in specific areas (such as, amongst others, the Tokyo Conventions of 1963, the Hague Convention of 1970 and the Montreal Convention of 1971 concerning air transport, the Rome Convention of 1988 concerning the safety of navigation at sea and the Vienna Convention of 1980 concerning the physical protection of nuclear material), are of limited importance, it must be stressed that from the start, the search for a general definition hinged above all on two international sources namely, firstly, the New York Convention of 1999, passed by the General Assembly of the United Nations to inhibit the funding of terrorism, and, secondly, by the Framework Decision 2002/475/GAI of the European Union. In the absence of global agreement concerning terrorism, consensus on which has been obstructed for decades by disagreement between the Member States of the UN on the question of terrorism committed in the course of wars

of liberation and armed struggle to establish self-determination of people, it should be noted that the wording of the Convention of 1999, implemented by the Act of 27 January 2003, No. 7, has sufficiently wide scope to be regarded as a general definition applicable both in peacetime and in wartime and including any kind of behaviour directed against civilian life or security or, in case of war, against "any other person not taking an active part in hostilities in a situation of armed conflict" in order to spread terror amongst the population or to force a state or an international organisation to undertake or refrain from action. In addition to being characterised by such objective and subjective elements and by the identity of the victims (civilians or persons not involved in military operations), it is generally held that in order to be regarded as terrorism, acts must at the psychological level meet further requirements as to political, religious or ideological motivation in accordance with generally accepted international standards as set out in various resolution of the UN General Assembly and Security Council, and in the Convention of 1997 against terrorist acts committed with the use of explosives. The definition of acts of terrorism under Art. 1 of the European Union's Framework Decision is for its part based on a list of specific crimes considered such under national law, which can cause serious damage to a country or an international organisation and which are committed to seriously intimidate the population or force the public authorities or an international organisation to undertake or abstain from undertaking certain action, or to seriously destabilise or destroy fundamental, economic or social structures of a country or of an international organisation. The defining formula set out in the Framework Decision of 2002 is different from that under the UN Convention of 1999, from which it adopts only the general thrust in respect of the following two aspects. On the one hand, the area of application of crimes of terrorism is more limited, relating only to acts committed in peacetime, as is made clear by introductory "consideration" number 11, which excludes from its scope "activities of the armed forces in times of armed conflict", in accordance with the definitions given to these terms in international humanitarian law: to such a degree that the definition under consideration excludes acts committed in wartime, which are governed by international humanitarian law and, in first instance, by the Geneva Conventions and related Additional Protocols. On the other hand, the Framework Decision has extended the concept of acts of terrorism by providing that these can also be characterised by destructive aims, namely the object of "seriously destabilising or destroying the fundamental, constitutional, economic or social political structures of a country or of an international organisation", absent from the wording of the 1999 Convention. Both definitions therefore include the typical characteristic of acts of terrorism described by the most authoritative commentators as "depersonalisation of the victim", meaning the general anonymous nature of persons affected by violent action, the true purpose of which is to spread fear indiscriminately amongst the general public and to force a government or international organisation to take or abstain from pursuing specific action. Finally, the reference to situations of armed conflict — present in the Convention of 1999 and, absent from the Framework Decision — shows the two-sided nature of the provisions on acts of terrorism and the need to differentiate it from the legal provisions concerning the identity of the persons actually concerned and the victims, insofar as the rules of international humanitarian law or ordinary law apply depending on whether the acts are committed by persons who may be regarded as "combatants" and are aimed at civilians or against persons not actively engaged in hostilities. It follows from this that, reframing these subjective requirements, acts of terrorism must fall within the category of war crimes or crimes against humanity.

2.2.— In accordance with the obligation to amend domestic law so as to enable them to conform to the Community's legal provisions, Art. 15, para. 1 of Decree Law no. 144 of July 27, 2005, converted into Law no. 155 of July 31, 2005, upholds the concept contained in the Framework Decision and defines "acts with terrorist aims" as those "which, by their nature or context may cause serious damage to a country or to an international organization and which are committed with the purpose of intimidating the population or forcing the public authorities or an international organization to take or refrain from taking specific action or destabilizing or destroying the fundamental, constitutional, economic or social political

structures of a country or of an international organization, and other conduct defined as terrorism or committed with terrorist purposes under conventions or other provisions of international law binding upon Italy." The explicit reference to international sources means that the definition adopted by Art. 270 *sexies* of the Criminal Code is an open definition intended to be extended or restricted as a result not only of the international conventions already ratified but also of future conventions that may be adopted. In this way, provision is made by law for a dynamic, formal mechanism that should automatically ensure harmonization of the laws of the States of the international community in order to ensure that tools are available for joint action in combating transnational terrorist crime. It must be inferred from the above consideration that the definition under Art. 270 *sexies* of the Criminal Code must be read together with that of the 1999 Convention, implemented by Law no. 7 of 2003, and that, by analogy, the elements constituting terrorist acts, set forth in national law in the wake of the European Union's Framework Decision, must be supplemented by reference also to the provisions of that Convention. From this, the conclusion must be drawn that supplementing domestic law with the aforementioned international law means that terrorist aims can thus be found if acts are committed in the context of armed conflict—described as such in international law even in the case of internal civil war—and are committed not only against civilians but also against persons not actively engaged in hostilities, consequently excluding only acts aimed at combatants, which remain subject to the rules of international humanitarian law.

2.2.— In accordance with the obligation to amend domestic rules so as to enable them to conform to the Community's legal provisions, Art. 15 (1) of the Legislative Decree of 27 July 2005, No. 144, adopted by the Act of 31 July 2005, No. 155, upholds the concept contained in the Framework Decision and defines "acts with terrorist aims" as those "which, by their nature or context" may cause serious damage to a country or to an international organisation and which are committed with the purpose of intimidating the population or forcing the public authorities or an international organisation to take or refrain from taking specific action or destabilising or destroying the fundamental, constitutional, economic or social political structures of a country or of an international organisation, and other conduct defined as terrorism or committed with terrorist aims under conventions or other provisions of international law binding upon Italy". The explicit reference to international sources means that adopting the provisions of Art. 270 (e) of the Code of Procedure equals an open definition intended to be extended or restricted as a result not only of the international conventions already ratified but also of future conventions that may be adopted. In this way, provision is made by law for a mechanism that should automatically ensure harmonisation of the laws of the States of the international community in order to ensure that instruments are available for joint action in combating transnational terrorist crime. It must be inferred from the above consideration that the definition under Art. 270 (e) of the Code of Procedure must be read together with that of the Convention of 1999, implemented by Act No. 7 of 2003, and that, by analogy, the elements constituting terrorist acts, referred to in national provisions in the wake of the European Union's Framework Decision, must be incorporated by reference also to the provisions of the said Convention. From this, the conclusion must be drawn that inclusion in the domestic law means that terrorist aims can be thus defined if acts are committed in the context of armed conflict — described as such in international law even in the case of internal civil war — and are committed not only against civilians but also against persons not actively engaged in hostilities, consequently excluding only acts aimed at combatants, which remain subject to the rules of international humanitarian law.

3.— Having identified the essential characteristics of conduct with the aim of terrorism, the structure of the crime of association set forth in Art. 270 *bis* of the Criminal Code must be examined. That crime is placed by case law in the category of crimes of presumed danger, or crimes prior to commission, characterized by bringing the threshold of punishability forward to the moment when an organization of

persons or resources is created with the goal of achieving a program consisting of violence and attacks for the aim of international terrorism, where the punishment relates to activities that are merely preparatory prior to carrying out the planned violent conduct (Cass., Sec. 2, no. 24994, May 25, 2006, Bouhrama; Section 1, no. 35427, June 21, 2005, Drissi). However, it must be said that while it is true that the criminalizing law punishes the mere establishment of the association, regardless of whether the criminal actions comprising the program and instrumental to the particular goal pursued are achieved, it is also undeniable that the organizational structure must evidence a degree of effectiveness that makes implementation of the criminal plan at least possible, so as to justify a legal finding of danger that is associated with the likelihood that the structure will commit a series of crimes for the accomplishment of which the association was established. Otherwise, *i.e.,* if the association's structure was conceived of in generic, fleeting and evanescent terms, moving up the criminal repression would, in the guise of a crime of association, end up punishing the mere fact of adhering to an abstract ideology which, although it is aberrant because it glorifies indiscriminate violence and spreading of terror, it is not accompanied by any possibility of carrying out the program: in short, the result would be repressing ideas, not actions, which, at the most, could constitute—in the case of an agreement that does not constitute an organization to carry out a terroristic plan—a political conspiracy by agreement under Art. 304 of the Criminal Code, which cites, in Art. 302, also Art. 270 *bis* of the Criminal Code (see Cass., Section 1, February 27, 2002, Marra, journal no. 221834).

3.1— The crime set forth in Art. 270 *bis* of the Criminal Code can be classified as a crime with multiple victims, with complex legal subject matter, because it injures or endangers the life and integrity of the victims and, at the same time, the freedom of self-determination of States and international organizations (or, according to others, the worldwide public order). The objective element of the crime is characterized by a multiplicity of actions that contemplate the insertion of the subject into the structure in relation to the various roles played within the association. In that regard, it must be emphasized that the criminalizing law is not limited to reproducing the provisions of every crime of association by listing the positions of those who promote, establish, organize, direct or participate, but adds to that list the persons who finance terroristic associations, encompassing the specific role of the person who provides the financial resources necessary to carry out the criminal program. In regard to, in particular, the conduct of participating in terroristic associations, we must cite the principles articulated by the Joined Sections of this Court about the crime of association set forth in Art. 416 bis of the Criminal Code. On this point, it was clarified that "a participant is someone who, having been included continuously and organically in the organizational structure of the Mafia association, not only is but comprises a part of (even better; takes part in) the same; this expression is not to be interpreted in a static sense, as the mere acquisition of a status, but in a dynamic and functional sense, in regard to the actual role in which he/she is immersed and the tasks he/she is charged with performing for the association to achieve its goals, at the ready for the activities organized by the association" (Cass., Joined Sections, July 12, 2005, Mannino, journal no. 231673). A recent decision of this Court must be interpreted in this sense. That case held that proof of participation in terroristic associations cannot be inferred solely from psychological or ideological adherence to the criminal program, but a conviction presupposes that there was a demonstration of actual insertion into the organized structure through unequivocally symptomatic conduct consisting of carrying out activities in preparation of the execution of the program or assuming a tangible role in the criminal structure (Cass., Sec. 1, no. 30824, June 15, 2006, Tartag). It follows that an individual's participation in a terroristic group can also take the form of instrumental conduct and logistical support for the activities of the association that unequivocally evidence his/her insertion in the organization, provided that a portion of that conduct takes place in Italy. On the subjective level, the crime under Art. 270 *bis* of the Criminal Code is a typical crime of specific intent, in which the awareness of and intent to commit the crime must be directed at pursuing the specific aim of terrorism that connotes the activity of the entire association,

which that law identifies, alternatively, as the objective of spreading terror among the population or forcing States or international organizations to take or refrain from taking a specified action.

3.2— In the view of the Panel, the structure of the subject matter set forth in Art. 270 *bis* of the Criminal Code is compatible with applying the principles established by well-settled case law regarding possible complicity in the crime of association. The most recent and lucid contribution clarifying and conceptually organizing that delicate topic was offered by the Joined Sections of this Court, which held that external complicity in the crime of Mafia-type association can exist even in the case of a "political-Mafia exchange agreement," pursuant to which a politician who is not participating in the criminal association (and thus not inserted continuously in the organization's fabric and lacking "*affectio societatis*") agrees, in exchange for support requested from a Mafia association in an election, to support the group's interests: with the clarification that, to constitute the crime, it is necessary that: a) the promises made by the politician to the Mafia association must be serious and concrete, based on the reliability and character of the parties to the agreement, the structural characteristics of the criminal association, the applicable historical context and the specificity of the terms; and b) at the conclusion of the "ex post" probative review of their causal efficacy, it is determined, based on principles of experience along with empirical plausibility, that the promises made by the politician actually and significantly had an effect, in and of themselves and apart from any subsequent actions implementing the agreement, of conserving or reinforcing the operational capabilities of the entire criminal organization or its industry divisions (Cass., Joined Sections, July 12, 2005, Marinino [sic], journal no. 231673). In the decision of the highest assembly of the Supreme Court, of particular interest are the arguments supporting the existence of external complicity in the crime of association, which stated that "not even an extensive and widespread legislative fragmentation of the various cases of Mafia proximity into independent and typical crimes (as occurred, for example, in the case of the distinct terroristic phenomenon by the introduction of the new concepts of "financing" associations with the aim of terrorism—Art. 270 *bis* of the Criminal Code, paragraph 1, added by Art. 1, paragraph 1 of Decree Law no. 374 of 2001, converted into Law no. 438 of 2001—or the "enrollment" and "training" of individuals to carry out activities with the aim of terrorism, which may be international—Arts. 270 *quater* and 270 *quinquies* of the Criminal Code, added by Art. 15, paragraph 1 of Decree Law no. 144 of 2005, converted into Law no. 155 of 2005) would be able to paralyze the operational expansion of the general clause extending responsibility for atypical and external contributions other than those listed in detail, according to the model dictated by Art. 110 of the Criminal Code on individuals' complicity in the crime, except by introducing a provision of derogation excluding that clause's application to crimes of association." The application of those principles to the crime under Art. 270 *bis* of the Criminal Code highlights that applying the complicity framework outlined in Art. 110 of the Criminal Code makes the concept of external complicity also applicable to crimes of association with the aim of international terrorism in regard to those persons who, although they remain outside the organizational structure, make a concrete and knowing contribution that is causally relevant to maintaining, reinforcing and achieving the purposes of the criminal organization or its industry divisions, provided, obviously, that there is an awareness of the objective pursued by the organization for the benefit of which the contribution was provided.

4.— The analysis reconstructing the laws regarding associations with the aim of international terrorism must be followed by a review of the outline of the arguments developed in the reasoning for the appealed judgment to verify—in light of the criticisms made in the Attorney General of Milan's appeal—the correctness of the interpretation of Art. 270 *bis* of the Criminal Code and the proper use of the paradigms for assessing the evidence underlying the logical and legal coherence of the determination of the facts to which the criminalizing law on which the charge described in count 1 is based must be applied. The approach of the investigation conducted by the Court of Appeal was substantively appropriate, as stated in the recitals relating to the need to define the concept of terrorism underlying the law set forth in the

international sources, mainly the UN Convention of 1999 and the Framework Decision adopted by the European Union in 2002. In its abstract and generalizing scope, however, we cannot subscribe to the conclusion that the appealed judgment reached regarding the definition of conduct with the aim of terrorism set forth in Art. 270 *sexies* of the Criminal Code, which was deemed to apply "to interpret the legal meaning of the term terrorism, even though it was added to our legal system after the events in question (Decree Law no. 144 of July 27, 2005, converted into Law no. 155 of July 31, 2005), because it does not contain sanctioning language and, in fact, by clarifying the concept in question, limits its scope of application." In the first place, we must highlight the incorrectness of the stated lack of sanctioning language in the provisions introduced by Art. 270 *sexies* of the Criminal Code, since it is clear that it contains a defining rule with direct impact on the actual scope of the criminalizing provision of Art. 270 *bis* of the Criminal Code and, thus, on the scope of applicability of the criminal sanction. In addition, as to the alleged restriction of the scope of application, the arguments made previously (see 2.1.) allow us to hold that the new definition, taken from the Framework Decision of 2002, on the one hand is broader because it added a subversive aim to the terroristic aim (contrary to the positions in case law: Cass., Section 6, July 1, 2003, Public Prosecutor in Nerozzi, journal no. 226049), and, on the other hand, that the concept set forth in Art. 270 *sexies* of the Criminal Code contains a precise delimitation for the reason that it does not include terroristic activities carried out in the context of armed conflicts and includes as the victims of the acts of violence only the population and not also military personnel not taking an active part in the hostilities. Hence, in relation to the changes to, either expanding or restricting, the legal definition of conduct with the aim of terrorism, it must be recognized that the rules are subject to the principle of the effectiveness of criminal law over time and application of the provisions of Art. 2, paragraphs 2 and 4 of the Criminal Code. The error in law we found in the reasoning for the challenged judgment did not, however, have any tangible impact on the decision rendered by the Assize Court of Appeal, since the principles of law actually applied to verify the existence of the aim of terrorism were taken primarily from the law established by the UN Convention of 1999, made effective with Law no. 7 of 2003, regarding both the identity of the victims of the acts of violence (distinguished between civilians, persons not actively involved in the hostilities and combatants) and the war context in which those acts were engaged in. It follows that, taking into account the role played by the aforementioned 1999 Convention in adding to the definition set forth in Art. 270 *sexies* of the Criminal Code and the "open" character that the latter took on as a result of the reference to international sources that are binding upon Italy (see 2.2.), the rationale justifying the decision, notwithstanding the error in law cited, cannot legitimize reversing the judgment and must be amended by correcting the reasoning pursuant to Art. 619, paragraph 1 of the Code of Criminal Procedure.

4.1.— The Attorney General's appeal, in which he complained, in accordance with Art. 606, paragraph 1, letter b) of the Code of Criminal Procedure, of misapplication of criminal law where the District Court held that "only acts directed exclusively against the civilian population" are terrorism, consequently ruling that in a situation of armed conflict, "Kamikaze" suicide actions, when committed against military objectives, cannot be regarded as terrorism, even if they cause serious damage and spread fear among the civil population. A statement of this kind, with its broad scope, cannot be accepted and must be further specified and explained. Above all, the statement is clearly at odds with the explicit provision of the 1999 Convention, although the latter was repeatedly cited in the appealed judgment, since that international source describes terrorism as "any 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." Consequently, attacks directed against military personnel engaged in tasks completely unconnected with war operations and not in any way attributable thereto, such as, for example, the providing of humanitarian aid, must therefore be included in this class. However, this view cannot be entirely accepted even under a further perspective, since situations may well arise in a context of armed conflict (between States or in civil war) where acts of violence are directed both against military persons and against the civil population, at a time when—due to the nature of such acts, the means employed and the specific conditions in which they are

engaged in—they will undoubtedly produce serious injury not only to military persons but also to civilians. It must therefore be said that the wording and the "reasoning" of the international law, which are aimed at defining the objectives of terrorism in an armed conflict, provide unambiguous interpretative arguments for saying that an action against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and integrity of the civilian population are inevitable, creating fear and panic among the local people. A simple example is an attack using explosives against a military vehicle in a crowded market. In a situation of this kind, an interpretative approach that would see the joint presence of military and civilian victims as an element sufficient in itself to deny the terrorist nature of the act undoubtedly lacks coherence and rationality, as it is clear that the certainty (and not mere possibility or probability) of serious harm inflicted on civilians shows unequivocally that the committing of an intentional and specific act marked by an intent to engage in the action and achieve the particular results that constitute terrorist purposes. The relevance to the outcome of the trial of the obvious discrepancy on this point, between the letter of the law and the wrong interpretation of it by the Trial Court must be re-examined upon a review of the reconstruction of the facts made by evaluating the probative evidence.

4.1.— The submissions by the Attorney General, in which he complained, in accordance with Art. 606 (1) b. of the Code of Criminal Procedure, of the misapplication of criminal law whereby the District Court held that "only acts directed exclusively against the civilian population" are terrorism, consequently indicating that in a situation of armed conflict, so-called Kamikaze suicide actions, when committed against military objectives, cannot be regarded as terrorism, even if causing serious damage and spreading fear amongst the civil population. A statement of this kind cannot be accepted and must be further specified and explained. Above all, the statement is clearly at odds with the explicit provision of the 1999 Convention, even though repeatedly referred to in the impugned judgment, that describes terrorism as "any act aimed at causing death or serious personal injury to a civilian or any other person not actively engaged in hostilities in a situation of armed conflict". Consequently, attacks directed against military personnel engaged in tasks unconnected with hostilities and not in any way attributable thereto, such as, for example, the providing of humanitarian aid, must therefore be included in this class. However, this view cannot be entirely accepted even from this further aspect, since situations may well arise in an atmosphere of armed conflict (between States or in civil war) where acts of violence are directed both against military persons and against the civil population, at a time when — due to the nature of such acts, the means employed and the specific conditions on which they are pursued — they will undoubtedly produce serious injury not only to military persons but also to civilians. It must therefore be said that the wording and the "reasoning" of the international rules, which are aimed at defining the objectives of terrorism in an armed conflict, provide unambiguous interpretative arguments for saying that an act against a military objective must also be regarded as terrorism if the particular circumstances show beyond any doubt that serious harm to the life and physical well-being of the civilian population are inevitable, creating fear and panic amongst the local people. A simple example is an attack using explosives against a military vehicle in a crowded market. In a situation of this kind, an interpretative approach that regards the joint presence of military and civilian victims as an element that is sufficient in itself to deny the terrorist nature of the act undoubtedly lacks consistency and rationality, as it is clear that the certainty (and not simply the possibility or probability) of serious harm inflicted on civilians shows unequivocally that the committing of an intentional and specific act was prompted by a desire to cause the harm and to achieve the particular results that constitute terrorist aims. The relevance of the obvious discrepancy on this point, between the letter of the law and the wrong interpretation of the Court concerned in its the judgment must be re-examined when a reconstruction of the facts is undertaken following a reassessment of the elements of proof.

5.— After acknowledging that count 1 of the charge delineates a cross-border structure operating in Italy and abroad under the auspices of various causes which share an adherence to fundamentalist Islamic ideology, the Territorial Court stated that the investigation must focus on the specific acts with which the defendants in this trial were accused of committing, in furtherance of the program they shared, and evidence collected against other persons who acted at different places and times cannot be used. The Court's ruling was criticized by the Attorney General, who argued that the principles governing the crime of association with the aim of terrorism (which is a crime because of presumed danger) were distorted, and criticized the fragmentary evaluation of the evidence, adding that the erroneous evaluation method ignored the demonstrated connections of the groups operating in Italy with the Ansar Al Islam organization, which was added to the terrorist organizations with ties to Al Qaeda in the UN Security Council's Resolution no. 1267/99. We uphold the grounds for the appeal within the limits specified above. It must be said first of all that the arguments of the Trial Court can be fully upheld insofar as it denied that simply belonging to the religious area of Islamic fundamentalism and even statements made in support of forms of political and military struggle can in themselves justify the conclusion that organizational links exist aimed at the pursuit of terrorist activities, as long as they remain simply ideas, since in our legal system—which includes freedom of expression among fundamental human rights—simply advocating an ideology, even if subversive, cannot amount to a criminal act until it results in achieving an organizational structure or actual acts of violence (Cass., Section 1, May 11, 2000, Attorney General in Paiano et al., journal no. 216253). On the other hand, the appealed judgment, like that of the trial court, is open to the criticisms made in the Attorney-General's appeal to the extent that it completely failed to examine the relationships between the group formed by the defendants and the transnational organization referred to in the charge's count. An approach of this kind in assessing the evidence should necessarily have included mandatory examination of the approach and development of the available results, since it was obvious that the investigation should have focused on verifying, in order, the existence of the Milanese cell which the three defendants are said to have belonged to, the actions it took, the true independence of the other cells operating in Italy (confirmed by the preliminary hearing judge of the Court of Milan, which rejected territorial jurisdiction over the activities of other Islamic groups existing in other parts of Italy) and, finally, the links among those groups and links with organizations active abroad dedicated to terrorism.

5.— […] It must be said first of all that the arguments of the Court concerned can be fully upheld insofar as it has denied that simply belonging to the religious area of Islamic Brotherhood and fundamentalism and even the statements made in support of forms of political and military struggle can in themselves justify the conclusion that organisational links exist aimed at the pursuit of terrorist activities, as long as they remain simply ideas, since in our legal system — which includes amongst its fundamental human rights that of the freedom of expression — simply advocating an ideology, even if subversive, cannot amount to a criminal act until it results in the achieving of an organisational structure or actual acts of violence (Cass., Section 1, 11 May 2000, Attorney General in Paiano et al., rev. 216253). On the other hand, the impugned judgment, upholding that at first instance, is open to the criticisms made in the Attorney-General's submissions in that he completely failed to examine the relationship between the group formed by the accused and the transnational organisation referred to in the body of the charges. An approach of this kind towards assessing the elements of proof should necessarily have included mandatory examination and further consideration of the available results, since it was evident that the existence of the Milanese cell to which the three accused are said to have belonged, the actions undertaken by it, the actual independence of the other cells operating in Italy (confirmed by the examining judge at the Court of Milan, which rejected territorial jurisdiction in respect of the activities of other Islamic groups existing in other parts of Italy) and, finally, the links between the latter and those with organisations

active abroad and dedicated to terrorism, should have been scrutinized.

In that regard, it is worth keeping in mind that, in regard to the crime of Mafia-type association, case law has analyzed the different types of relationships that can arise among distinct criminal groups, holding that, depending on the individual situations, they can be classified into different organizational forms, connoted by continuing or occasional functional connections or federation-type independence (Cass., Section 6, September 20, 2005, Attorney General in Gionta et al, journal no. 233488). It should further be noted that once these aspects have been clarified after examining the evidence, the trial court should have determined whether the logistic support activities for the benefit of the organization operating abroad—achieved by gathering funds, supplying forged documents and assisting with unlawful entry to Italy of persons intending to fight in foreign countries—could constitute an adequate basis to justify the holding relating to participation in a transnational organization and the existence of a deliberate intention to commit terrorist activities. Hence, the fact that the Milanese group was not directly involved in terrorist activities but rather engaged in actions in support of militants who were conducting such activities abroad is insufficient to rule out commission of the crime under Art. 272 *bis* Criminal Code, given the undeniable functional relationship existing between the groups. Moreover, even if such inquiries had been made, the same could not be considered the end of the investigation, because, if no structural and organizational connections were found to exist between the Milanese cell and the broader organization operating abroad, the courts deciding on the merits should also have determined whether the evidence warranted holding the defendants responsible for terroristic activities as external complicity in the crime of association, pursuant to Arts. 272 *bis* and 110 of the Criminal Code, on the specific terms indicated previously (see 3.2.). The prior findings show that the evaluation made by the District Court is lacking and spotty due to the failure to examine certain essential aspects of the evidentiary investigation and failure to examine certain aspects of decisive relevance in greater depth.

[…] It should further be noted that once these aspects have been clarified after examining the evidence, the court concerned should have established whether the activities of logistic support in favour of the organisation operating abroad — achieved by gathering funds, supplying forged documents and assisting with unlawful entry to Italy of persons whose intention was to continue to fight in foreign countries — can constitute an adequate basis for justifying the charge of participation in a transnational organisation and the existence of a deliberate aim to commit terrorist activities. Consequently, the fact that the Milanese group was not directly involved in terrorist activities but pursued a campaign in support of militants who were undertaking such activities abroad is insufficient to exclude responsibility for an offence under Art. 272(a) of the Criminal Code, given the undeniable functional relationship existing between the groups.

5.1.— Having indicated the *thema probandum* as indicated above, this Court must now review the evidentiary reasoning set forth in the rationale for the appealed judgment by determining, above all, whether the evaluation by the courts deciding on the merits involved probatory evidence obtained in accordance with the requirements of procedural law and in conformity with the epistemological criteria set forth in Art. 192 of the Code of Criminal Procedure. It must be noted first of all that in the fight against international terrorism, the position of the Italian legal system has been that of respecting the guarantees, both substantive and procedural, that essentially reflect the principles of the Constitutional Charter, and refraining from repressive action undertaken through forms of true denial of jurisdiction, the result of which is to deny the constitutional bases and procedural functions which are an irreplaceable instrument of civilized society resulting from its liberal-democratic traditions. Consequently, it is not by chance that in commenting on the choices made by other legal systems when examining terrorism of the Islamic mold that the expression “the enemy’s criminal law” has been used to designate systems of law that do not offer the usual guarantees (starting with habeas corpus) to persons who, merely because they are suspected of terrorism, are deprived of civil and political rights to which any person is entitled. Under our legal system, therefore, proceedings involving acts of international terrorism remain subject to a legal

approach which is no different from that of ordinary law, apart from a few explicit points subject to different laws, *i.e.*, the provisions of a series of laws (starting with Decree Law no. 374 of 2001, converted into Law no. 438 of 2001), which introduced special provisions modelled on the approach taken with regard to organized Mafia-type crime and which primarily relates to the preliminary investigation stage, without, however, contravening the fundamental principles of the procedural system stated in Art. 111 of the Constitution within the framework of proper process.

The appealed judgment properly observed the procedural rules stated above where it held that information obtained from "intelligence" sources regarding connections with the transnational organization Ansar Al Islam cannot be used in the trial, since it is knowledge obtained without adhering to any of the prescribed forms by authorities that were not given investigative powers within the proceeding and, therefore, is vitiated by a *vulnus* in the legality of the evidentiary process that is so drastic that it can be categorized as being fundamentally inadmissible. (see Cass., Joined Sections, June 21, 2000, Tamarro, journal no. 216246). The appellant Attorney General argued in his brief that the Trial Court failed to take account of the fact that the Ansar Al Islam organization appears on the lists of terrorist organizations in Resolution no. 1267/99 of the UN Security Council, and thus the purposes pursued by this group, with which the defendants had repeated contacts, cannot be ignored. The criticism is groundless; the argument that inclusion in the lists prepared by international bodies should in itself be sufficient to demonstrate the terrorist nature of that association cannot be upheld, as if the mere categorization made by such bodies could bind the determination that is left to the court's unfettered discretion at trial. The lists of "terrorist suspects" or of "prohibited persons" were introduced following a UN resolution in 1999, cited by the Attorney General in Milan, to sanction the Taliban government in Afghanistan for its support of Islamic terrorism, by imposing an embargo and freezing financial resources. The European Union quickly followed this proceeding by issuing further regulations, binding on all Member States, which imposed the obligation to freeze assets destined for individuals or legal entities included in the list of "prohibited persons," the composition of which is updated by the Commission based on Resolutions passed by the UN Security Council. In Italy, the Financial Security Committee set up within the Ministry of the Economy was given the task of providing the European Union with information for drawing up lists based on evidence taken from criminal proceedings and judicial measures issued in the course of preliminary investigations. With this understanding, it must be stressed that, according to the almost unanimous views in legal commentary, inclusion of a group in these lists has purely administrative value and justifies imposition of the sanctions indicated, but the effects thereof cannot extend to becoming evidence. It has been clearly stated in legal commentary that to do otherwise would "introduce an item of legal proof into the system, transforming Art. 270 *bis* Criminal Code into a blank check criminal law" and this view has been adopted in the case law of this Court which, in denying that appearance on lists of "prohibited persons" has evidentiary value, itself referred to the inadmissibility of creating a kind of legal proof that would clearly violate the principles of legality and separation of powers (Cass., Section 1, no. 30824, June 15, 2006, Tartag). In conclusion, it must be said that placing an association on those lists represents an element with value only as an investigatory starting point and that proof of terrorist purposes must necessarily be adduced according to the rules of admissibility and evidentiary assessment set forth in procedural law.

5.1.— […] It must be noted first of all that in dealing with international terrorism, the position of the Italian legal system has been that of respecting the guarantees, both substantive and procedural, that essentially reflect the principles of the Constitutional Charter, and of refraining from repressive action undertaken through forms of true and proper denial of jurisdiction, the result of which is to deny the constitutional bases and procedural functions which are an inseparable instrument of civilised society resulting from its liberal-democratic traditions. Consequently, it is not by chance

6.— The ruling on which the appealed decision is based not only exhibits the logical and legal flaws cited previously, which relate to the inaccurate reconstruction of the legal concept of terrorism and the failure to consider potential external complicity in the association pursuant to Art. 270 *bis* Criminal Code, but also the clear discrepancy between the criteria for evidentiary evaluation imposed by the first and second paragraphs of Art. 192 of the Code of Criminal Procedure, since the Trial Court reviewed the evidence in a fragmentary manner and without in any way scrutinizing the interactions to be found among the various probative results. This Court's case law has clarified that the logical process of evaluating circumstantial evidence consists of two distinct steps: the first is focused on determining the greater or lesser level of seriousness and precision of the circumstantial evidence, each piece considered in isolation, keeping in

mind that that level is directly proportional to the force of logical necessity with which the circumstantial elements lead to the fact to be demonstrated and is inversely proportional to the multiplicity of events that can be inferred from them based on the rules of experience; the second stage of evaluating circumstantial evidence consists of an overall and unitary examination that tends to dispel its relative ambiguity ("*quae singula non probant, simul unita probant*") given that "in the overall evaluation, each piece of circumstantial evidence (as everyone knows) adds up and, moreover, combines with the others, so that the extent of the value of each is exceeded and the positive probative impact is heightened by the combination, such that all the evidence taken together can take on weighty and unequivocal demonstrative meaning, and hence the logical proof of the fact can be deemed to have occurred … which—it is worth keeping in mind—does not constitute a less worthy tool compared to direct (or historical) evidence when it is obtained with the methodological rigor that justifies and substantiates the principle of the 'judge's inner conviction'" (Cass., Joined Sections, February 4, 1992, Ballan). The outline of the paradigms for evaluating circumstantial evidence was recently reiterated by the Joined Sections, according to which the method for unitarily and comprehensively reading the entire body of evidence does not end with merely summing the pieces of circumstantial evidence and, therefore, cannot fail to include the preparatory process which consists of evaluating each piece of circumstantial evidence individually, each with respect to its qualitative value and degree of precision and seriousness, to then assess it, if the prerequisites are satisfied, from a global and unitary perspective focused on highlighting the connections and convergence into a single demonstrative context (Cass., Joined Sections, July 12, 2005, Mannino, journal no. 231678). The structure and framing of the rationale for the appealed decision are lacking from the perspective described above, because the Trial Court evaluated the defendants' positions by analyzing the individual pieces of evidence without placing them in a context that undoubtedly could have contributed to clarifying their actual demonstrative weight and their true consistency in regard to the investigative theme advanced by the prosecution in the charge, which—it must be emphasized—was based on the connections with the other cells operating in Italy and with the larger Ansar Al Islam organization that is active abroad.

6.1— After indicating the importance of the role played by M., who had been the principal operative of the activities with which the defendants are charged, the District Court examined the content of the wiretaps, emphasizing that such recorded conversations unequivocally showed M.'s repeated contacts not only with all the defendants but with senior representatives of associations professing fundamentalist Islamic ideology which, in Syria and Afghanistan, managed training camps for volunteers seeking to fight the "holy war" in Iraq against the Americans in contemplation of the imminent invasion of that country. The appealed judgment also acknowledged that M. declared himself to be a combatant who intended to die as a martyr for the "jihad," that he was in constant connection with mullah F., the director of the Ansar Al Islam association, that his positions were close to those of that organization and that, when recruiting volunteers to fight abroad, that he was seeking suicide bombers. Moving to an examination of B.M.'s position, the Trial Court reconstructed the defendant's movements in Italy and Turkey in the years 2002-2003 and contacts maintained with known proponents of Islamic fundamentalism, stating that, following a search of his residence, a manual entitled "Basic Elements for Preparing Jihad for the Cause of Allah," a French residence permit in his brother H.'s name, numerous passport photos, 8,625.00 euros in cash and numerous cassette tapes containing Arabic prayers were seized. At the conclusion of the examination, the Court held that it had been proven that B.M., at least since early February 2003, had participated, along with mullah F. and M., in recruiting Muslim volunteers and forging documents necessary for the aspiring martyrs to reach the Middle East from Europe. The conclusions from the examination of T.A.'s position were identical, with the Territorial Court holding—based on adequate and thorough reasoning—that the activities collaborating with M., in connection with mullah F., in forging documents and residence permits to be delivered to the volunteers destined for the training camps in Syria had been demonstrated. As to D.M.'s position, the Trial Court found that he was not involved in the activities of the group of which B.M. and T.A. were a part, observing that the evidence relating to the first

defendant related only to the hospitality provided to C., a Somali, and the fact that he took steps, unsuccessfully, to obtain forged documents for the latter to reach Syria: hence the challenged decision classified D.'s conduct as merely occasional. The rationale justifying the decision to acquit D was criticized by the appellant Attorney General, who criticized the Court's holding that the evidence obtained was illogical and contradictory. We share that criticism. Truthfully, the devaluation of D.'s role seems to lack a plausible logical basis, if one considers that the contents of the wiretaps show that he made contact with C. at M.'s behest, following a request from mullah F, and that on the occasion of that episode he was in telephone contact with Syria, speaking with M.A., another leader of Ansar Al Islam, about the assistance to be provided to C., who intended to go there to fight the holy war, even to the extent of martyrdom. In addition, the probative relevance of that information becomes decisive if it is kept in mind that—as was carefully emphasized in the appeal—the intercepted conversations show that M. and A., prominent figures in the organization, judged D. to be a completely reliable person who was ready to help the "brothers," which circumstance is extremely significant since the help requested of the defendant consisted of illegal activities for which the surveillance of the police authorities had to be avoided. It follows that the argumentative framework of the reasoning must be considered flawed by manifest gaps in logic and is in total conflict with trial evidence of significant probative weight.

6.2— The appealed decision is also subject to criticism in the part where the evidence was examined regarding the activities of the Ansar Al Islam group, which managed the camps where the volunteers coming from Europe were trained. It has already been seen that—contrary to the Attorney General's assertions in his appeal—a finding of an aim of terrorism cannot be based solely on the fact that the association was added to the lists of "suspects" or "prohibited persons" used to combat terrorist organizations on the financial level (see 5.1.). The Territorial Court properly ruled the evidence obtained through the Norwegian letter rogatory was admissible, and examined the statements made by persons who had joined Ansar Al Islam, founded by mullah K. in December 2001, holding that the association "officially had the structure of a true Islamic combatant organization, with its own training camps where volunteers were instructed in the use of arms and to fight, but it is highly probable that there were significant fringe elements within that organization that were also inclined, at least in certain situations, to engage in terrorism to reach the political results that the organization favored." Given such eloquent probative information, which should have become the subject of an in-depth and properly reasoned investigation, it is difficult to understand the reasons that led to minimizing that information's importance because it "relates to episodes that occurred in contexts and at times that are completely different from the events in this trial, involving episodes that occurred in the internal war that Ansar Al Islam carried out in Kurdistan against the P.U.K. and not what happened in the training camps, when volunteers who had arrived from various parts of the world prepared to repel what they considered to be an invasion of an Arab State." The rationale for the appealed decision are, on the point, not plausible and in no way convincing, given that the Trial Court never asked itself whether it was reasonable to rule that Ansar Al Islam did not intend to follow the same terrorism method extensively applied in other situations of conflict also in the fight against the invasion of Iraq.

6.3— After describing the political background for the United States' and its allies' intervention in Iraq, the Territorial Court held that there was no aim of international terrorism, which is necessary to constitute the crime under Art. 270 *bis* of the Criminal Code, stating that "during the entire period of the true war operations (March 20 – May 1, 2003) and until early August 2003, no terroristic attack (in the sense indicated above) de facto occurred in Iraq, although from the first days of the war suicide bombers were active against military objectives and the Iraqi authorities had warned the Americans to stay away from

Baghdad or four thousand suicide bombers would be ready." Those facts—deemed to be notorious and thus "admissible without the need for specific proof"—in the appealed decision led to the consequence that the defendants engaged in no actions punishable under Art. 270 *bis* of the Criminal Code because their conduct facilitating the transfer of Muslim volunteers to Syria and, then, to Iraq was engaged in primarily in February and March 2003, while the terroristic attacks began starting in August 2003. We disagree with those assertions for several reasons. To begin with, we note an inappropriate use of the concept of a notorious fact. The use of that category, for evidentiary purposes regarding international terrorism, is also present in the case law of this Court, which has had occasion to clarify that facts are notorious if, because they are known to citizens generally, must also be considered as known also by the court without the need for a specific determination, holding—in relation to the specifics of the situation examined—that the recent history of Algeria and the actions of a terroristic group in that country must be considered notorious facts, to be considered, in modern society, no longer limited to a narrow local context but including sensational events occurring in foreign countries, which, due to their importance, must be considered common knowledge (Cass., Section 2, February 9, 2005, Public Prosecutor in Gasry et al., journal no. 231258). However, on the topic of a notorious fact, and particular that relating to events of international terrorism, it is appropriate to point out that the court has the duty, with rigorous caution and prudence, to make sure that the event falls within the established heritage of knowledge common to all of society, thus ensuring that there is no possibility of admitting evidence outside of due process at trial. In fact, failure to carry out that necessary check gives rise to a risk that inadmissible evidentiary "shortcuts" will be introduced at trial through which—without the filter of normal trial dialectics—uncontrolled and uncontrollable factual circumstances can be deemed to have been demonstrated merely by dint of having been repeatedly spread by means of mass communication. And for events of terrorism, the danger that improper use of notorious fact can result in an alteration of the rules of the trial and contamination of sources of judicial knowledge seems even more significant if one considers the undeniable effect that, in a situation of war, the propaganda of the warring forces has and their influence on the flows and substance of the information based on criteria of political and military benefit. The appealed decision shows that there was no review conducted to see if the facts relating to the absence of terroristic acts in the early months of the military operations in Iraq were truly notorious: therefore, apart from the discussion to follow about the non-decisive relevance of terroristic conduct engaged in during the period stated in the charges, we hold that the schematic and rigid chronological dating of the beginning of the attacks that also struck the civilian population cannot be considered to have been demonstrated without the need for any investigation.

6.4.— The *ratio decidendi* behind the Trial Court's decision is also vitiated by the error of law of having stated that whether the defendants had purposes of international terrorism would decisively depend on whether attacks directed at the civilian population had begun. In this respect, it has already been made clear that an act against a military objective constitutes a terroristic act if the particulars and specific factual circumstances of the event show that serious harm to life and the physical integrity of civilians is certain and unavoidable, thus contributing to spreading fear and panic among the population (see 4.1.). It follows from this that an investigation of international terrorism purposes could not end with the confirmation of the military nature of the objective of the violent conduct, but should have been extended to examining the causation at the same time of serious damage to life and physical integrity of civilians occurring in such situations such that the same becomes a certain and inevitable result of the conduct concerned, due to the means employed and the specific circumstances. A further logical and legal flaw in the reasoning of the appealed decision can be found where the Territorial Court held that excluding the defendants' responsibility was justified by the fact that the conduct involved in this trial was carried out before the terroristic attacks using car bombs and suicide bombers began in Iraq. A similar opinion is reflected in the erroneous conception of the nature and elements constituting the crime of association set forth by Art. 270 *bis* of the Criminal Code, because it infers that commission of the end crimes are

essential to that crime, and does not consider that, to constitute the former crime, the creation of a suitable association structure with a program with the aim of international terrorism is sufficient, regardless of whether the planned criminal activities are actually carried out. Therefore, based on the evidentiary results to be used to determine the defendants' relationships with Ansar Al Islam, the Territorial Court should have determined whether they were in direct connection with that association or whether they were externally complicit in the crime of association: with the latter inquiry, in either case, focused on determining whether they had knowledge that Ansar Al Islam was pursuing a program that also included recourse to terroristic attacks, also keeping in mind that actions of that kind had already been carried out in Kurdistan even before the Iraqi war operations. Under this latter perspective, which relates to the psychological element of the crime charged in count 1, we note the lack of adequate arguments in support of the Court's ruling, because the Court apodictically ruled that the defendants acted without intent, without investigating the question relating to their knowledge of the fighting methods and the objectives of the association for whose benefit they engaged in the conduct charged in counts 2 and 3.

6.4.— The reasoning behind the Court's decisions in this question is wrong, due to an error of law in having found that establishing objectives of international terrorism of the accused persons would decisively depend on the committing of a criminal action against the civil population. In this respect, it has already been made clear that an act against a military objective constitutes terrorism if the particulars and the specific circumstances of the event show that serious harm to life and the physical integrity of civilians are certain and unavoidable, spreading fear and panic amongst the population (see 4.1). It follows from this that an investigation into the objectives of international terrorism could not end with the confirmation of the military nature of the objective of the violence committed, but should have been extended to verifying the underlying causes at the same time, of the harm to civilians and the serious damage to life and physical integrity occuring in situations where this is shown to be the certain and inevitable result of the conduct concerned, through the means employed and the specific circumstances.

7.— In conclusion, in light of all the above considerations, the appealed judgment must be set aside and the case referred to another section of the Assize Court of Appeal of Milan which, in a new trial, must reassess the evidence and, applying the principles of law mentioned above, must decide whether the three defendants should be convicted of the crime of association as provided by Art. 270 *bis* of the Criminal Code due to participation or external complicity. The decision to reverse must be limited only to the crime charged in count 1, since the Attorney General of Milan, although he initially stated that his appeal involved all the counts of the decision, he did not then provide any grounds for appeal relating to the remaining charges and points regarding the failure to apply the aggravating factor under Art. 1 of Law no. 15 of 1980. As a result of that reversal, if there is a conviction in the trial following remand in the charge under count 1, the penalties imposed for the crimes in counts 2 and 3 must be redetermined if they are deemed to be in continuation with the most serious crime of association.

7.— In conclusion, in light of all the above considerations, the impugned judgment must be set aside and the case referred to another section of the Assize Court of Appeal of Milan which, in a new judgment, must reassess the probatory background and, applying the principles of law mentioned above, will decide whether the three accused should be held responsible for the offence of association as provided by Art. 270(a) of the Criminal Code by way of participation or external complicity.

For Which Reasons

The Supreme Court of Cassation, First Criminal Section, reverses the appealed decision and remands for

a new trial to another Section of the Assize Court of Appeals of Milan, solely in regard to the crime under count 1. So decided in Rome on October 11, 2006. Filed with the Court Clerk's Office on January 17, 2007.

Annex 474

Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 698 (7th Cir. 2008)

Government's petition for rehearing. The judgment of the district court is affirmed.

AFFIRMED

Stanley BOIM, individually and as administrator of the Estate of David Boim, deceased; and Joyce Boim, Plaintiffs–Appellees,

v.

HOLY LAND FOUNDATION FOR RELIEF AND DEVELOPMENT, et al., Defendants–Appellants.

Nos. 05–1815, 05–1816, 05–1821, 05–1822.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 10, 2008.

Decided Dec. 3, 2008.

Background: Parents of United States national, who had been fatally shot in Israel by gunmen allegedly acting on behalf of terrorist organization, sued array of individuals and organizations in United States with alleged connections to terrorist organization. The United States District Court for the Northern District of Illinois, Arlander Keys, United States Magistrate Judge, 340 F.Supp.2d 885, entered partial summary judgment as to liability against some organizations, and United States-based alleged military leader of terrorist organization, and entered judgment on jury verdict against remaining organization. The Court of Appeals, 511 F.3d 707, vacated and remanded.

Holdings: On rehearing en banc, the Court of Appeals, Posner, Circuit Judge, held that:

(1) statute providing civil cause of action for those injured by act of international terrorism does not impose secondary liability;

(2) donation to terrorist group that targets Americans outside United States is within statute's scope;

(3) individual who had been in custody between effective date of "material support" statute and date of murder could not be liable;

(4) donor's liability requires showing of knowledge or deliberate indifference;

(5) causation element of civil liability statute could be satisfied by defendants' having donated money to terrorist organization;

(6) organization was not collaterally estopped from contesting its knowledge of terrorist organization's activities; and

(7) District Court did not abuse its discretion by admitting expert's opinion that terrorist organization had been responsible for murder.

Affirmed in part and reversed and remanded in part.

Rovner, Circuit Judge, filed opinion concurring in part and dissenting in part, joined by Circuit Judge Williams and joined in part by Circuit Judge Wood.

Wood, Circuit Judge, filed opinion concurring in part and dissenting in part, joined in part by Circuit Judges Rovner and Williams.

1. War and National Emergency ⚿50

Statute providing civil cause of action for those injured by act of international terrorism does not impose secondary liability, e.g. aiding and abetting. 18 U.S.C.A. § 2333(a).

2. Statutes ⚿240

Statutory silence on subject of secondary liability means there is none.

3. International Law ⚿7

Congress has power to impose liability for acts that occur abroad but have effects within United States, but it must make extraterritorial scope of statute clear.

4. War and National Emergency ⚿50

Donation to terrorist group that targets Americans outside United States is within scope of statute providing civil cause of action for those injured by act of international terrorism; donation qualifies as "act dangerous to human life" within applicable statutory definition of international terrorism, and violates federal statute criminalizing "provid[ing] material support or resources --- knowing or intending that they are to be used in preparation for, or in carrying out" the killing, conspiring to kill, or inflicting bodily injury on any American citizen outside United States. 18 U.S.C.A. §§ 2331(1), 2332, 2333(a), 2339A.

5. War and National Emergency ⚿50

In civil suit brought by parents of victim killed by terrorists outside United States, against individual who allegedly had provided material support to terrorist organization responsible for murder, fact that individual had been in custody between effective date of "material support" statute and date of murder precluded liability, since individual could not have rendered material support to organization during that period. 18 U.S.C.A. §§ 2333(a), 2339A.

6. War and National Emergency ⚿50

Donor to terrorist organization, to be liable under statute providing civil cause of action for those injured by act of international terrorism, must have known that organization engages in such acts or have been deliberately indifferent, i.e. reckless, to whether it does or not. 18 U.S.C.A. §§ 2332, 2333(a), 2339A.

7. War and National Emergency ⚿50

In civil suit brought by parents of victim killed by terrorists outside United States, causation element of statute providing civil cause of action for those injured by act of international terrorism could be satisfied by defendants' having donated money to organization allegedly responsible for murder, even though defendants had earmarked money for organization's ongoing social welfare activities; donations of money were fungible, and organization's social welfare activities reinforced its terrorist activities. 18 U.S.C.A. § 2333(a).

8. Judgment ⚿725(1)

In civil suit brought against domestic organization by parents of victim killed by terrorists outside United States, alleging that domestic organization knowingly had provided material support to terrorist organization, domestic organization was not collaterally estopped from contesting its knowledge of terrorist organization's activities by virtue of unrelated prior litigation involving freezing of domestic organization's assets by Treasury Secretary; any finding in previous case as to domestic organization's knowledge concerning terrorist organization had not been necessary to court's affirmance of Secretary's action, which required only fact of material support, not knowledge. 18 U.S.C.A. § 2333(a).

9. War and National Emergency ⚿50

Domestic organization that donated money to second domestic organization, while knowing or being reckless in failing to discover that second organization would refer donation to terrorist organization, was liable under statute providing civil

cause of action for those injured by act of international terrorism, based on terrorist organization's murder abroad of American citizen, regardless of whether intermediate organization had same awareness of terrorist organization's nature. 18 U.S.C.A. § 2333(a).

10. Evidence ⚿555.4(1)

In civil suit brought against domestic organization by parents of victim killed by terrorists outside United States, alleging defendant's providing material support to terrorist organization, federal district court did not abuse its discretion by admitting terrorism expert's opinion that murderers had been members of terrorist organization and that terrorist organization had acknowledged its responsibility, even though expert had relied in part on evidence lacking in proper foundation, including Internet sites attributed to terrorist organization. 18 U.S.C.A. § 2333(a); Fed. Rules Evid.Rule 703, 28 U.S.C.A.

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John W. Boyd (argued), Freedman, Boyd, Daniels, Peifer, Hollander, Guttman & Goldbe, Albuquerque, NM, for Defendant–Appellant Holy Land Foundation for Relief and Development in No. 05-1815.

Matthew J. Piers (argued), Mary M. Rowland, Hughes Socol Piers Resnick & Dym, for Defendant-Appellant Mohammad Abdul Hamid Khalil Salah in No. 05-1816.

John M. Beal, Chicago, IL, for Defendant-Appellant Quaranic Literacy Institute in No. 05-1821.

James R. Fennerty, Brendan Shiller, Chicago, IL, for Defendant-Appellant American Muslim Society in No. 05-1822.

Joseph A. Morris, Morris & De La Rosa, Chicago, IL, for Jewish Community Relations Council of the Jewish United Fund of Metropolitan Chicago.

Daniel Elbaum, Anti-Defamation League, Jonathan K. Baum, Katten Muchin Rosenman, Chicago, IL, for Anti-Defamation League.

Thomas P. Walsh, Office of United States Attorney, Chicago, IL for U.S.

Leon F. DeJulius, Jr., Jones Day, Pittsburgh, PA, for OMB Watch.

Andrea Bierstein, Hanly Conroy Bierstein Sheridan Fisher & Hayes, New York, NY, for 9/11 Families United to Bankrupt Terrorism.

David Yerushalmi, Washington, DC, Center for Security Policy.

Richard A. Samp, Washington Legal Foundation, Washington, DC, for Washington Legal Foundation, Jewish Institute for National Security Affairs and Allied Educational Foundation.

Before EASTERBROOK, Chief Judge, and POSNER, FLAUM, KANNE, ROVNER, WOOD, EVANS, WILLIAMS, SYKES, and TINDER, Circuit Judges.

POSNER, Circuit Judge.

In 1996 David Boim, a Jewish teenager who was both an Israeli citizen and an American citizen, living in Israel, was shot to death by two men at a bus stop near Jerusalem. His parents filed this suit four years later, alleging that his killers had been Hamas gunmen and naming as defendants Muhammad Salah plus three organizations: the Holy Land Foundation for Relief and Development, the American Muslim Society, and the Quranic Literacy Institute. (A fourth, the Islamic Associa-

tion of Palestine–National, appears to be either an alter ego of the American Muslim Society or just an alternative name for it, and need not be discussed separately. There are other defendants as well but they are not involved in the appeals.) The complaint accused the defendants of having provided financial support to Hamas before David Boim's death and by doing so of having violated 18 U.S.C. § 2333(a), which provides that "any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."

The district court denied the defendants' motion to dismiss the complaint for failure to state a claim, 127 F.Supp.2d 1002 (N.D.Ill.2001); the defendants had argued that providing financial assistance to a terrorist group is not an act of international terrorism and therefore is not within the scope of section 2333. We authorized an interlocutory appeal, 28 U.S.C. § 1292(b), and the panel that heard the appeal affirmed the district court. *Boim v. Quranic Literacy Institute*, 291 F.3d 1000 (7th Cir.2002). The case then resumed in that court. The court granted summary judgment in favor of the plaintiffs with respect to the liability of the three defendants other than the Quranic Literacy Institute. 340 F.Supp.2d 885 (N.D.Ill.2004). A jury was convened and, after a trial lasting a week, found the Institute—which having filed a statement of "nonparticipation" attended but did not participate in the trial—liable. The jury then assessed damages of $52 million against all the defendants (including the ones not before us) jointly and severally. The amount was then trebled and attorneys' fees added.

These defendants again appealed, this time from a final judgment. The panel vacated the judgment and directed the district court to redetermine liability. 511 F.3d 707 (7th Cir.2007). Judge Evans agreed with the reversal as to the Holy Land Foundation but otherwise dissented.

The plaintiffs petitioned for rehearing en banc, and the full court granted the petition, primarily to consider the elements of a suit under 18 U.S.C. § 2333 against financial supporters of terrorism. The parties have filed supplemental briefs. A number of amici curiae have weighed in as well, including the Department of Justice, which has taken the side of the plaintiffs.

The first panel opinion rejected the argument that the statute does not impose liability on donors to groups that sponsor or engage in terrorism. The supplemental briefs do not revisit the issue, and at oral argument counsel for Salah and the Holy Land Foundation disclaimed reliance on their former position concerning the liability of donors. But in a letter to the court after oral argument, Salah's counsel indicated that the disclaimer had been based solely on a belief that the doctrine of law of the case foreclosed any further consideration of the statutory issue in this court. That was a mistake. The full court can revisit any ruling by a panel. All arguments that the defendants have presented in their appeals are open today—and will be open in the Supreme Court. It is better to decide the question than to leave it hanging; why bother to address the elements of a legal claim that may not exist? Before deciding what a plaintiff must prove in order to recover from a donor under section 2333, we should decide whether the statute applies. *United States National Bank of Oregon v. Insurance Agents of America, Inc.*, 508 U.S.

439, 445–48, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993).

[1] Section 2333 does not say that someone who assists in an act of international terrorism is liable; that is, it does not mention "secondary" liability, the kind that 18 U.S.C. § 2 creates by imposing criminal liability on "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States." See also 18 U.S.C. § 3 (accessory after the fact). The Supreme Court in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), held that section 10(b) of the Securities and Exchange Act of 1934, which prohibits securities fraud, does not reach aiding and abetting because it makes no reference to secondary liability, the kind of liability that statutes such as 18 U.S.C. §§ 2 and 3 create in criminal cases. The Court discussed the securities laws at length, but nothing in its holding turns on particular features of those laws.

[2] So statutory silence on the subject of secondary liability means there is none; and section 2333(a) authorizes awards of damages to private parties but does not mention aiders and abettors or other secondary actors. Nevertheless the first panel opinion concluded that section 2333 does create secondary liability. It distinguished *Central Bank of Denver* as having involved an implied private right of action (for it was a private suit, yet section 10(b) does not purport to authorize such suits), while section 2333(a) expressly creates a private right. But as the dissenting Justices in *Central Bank of Denver* had pointed out, the majority's holding was not limited to private actions. 511 U.S. at 200, 114 S.Ct. 1439. It encompassed suits by the SEC, which section 10(b) authorizes expressly.

Congress agreed with this understanding of *Central Bank of Denver,* for the next year it enacted 15 U.S.C. § 78t(e) to allow the SEC in section 10(b) suits to obtain relief against aiders, abettors, and others who facilitate primary violations. *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.,* —— U.S. ——, 128 S.Ct. 761, 771–72, 169 L.Ed.2d 627 (2008). The enactment of section 78t(e) would have been pointless had *Central Bank of Denver* allowed secondary liability to be imposed in suits, such as suits by the SEC under section 10(b), that the statute expressly authorizes. Years later, reaffirming *Central Bank of Denver,* the Supreme Court repeated that the earlier decision had not been limited to private suits under section 10(b). *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc., supra,* 128 S.Ct. at 768–69.

The first panel opinion relied on *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.,* 530 U.S. 238, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000), an ERISA case involving an application of trust law. Trust law permits trust beneficiaries to maintain actions against third parties who have received trust assets improperly. ERISA not only does not upset this principle of trust law; it authorizes the Secretary of Labor to penalize third parties who "knowing[ly] participat[e]" in a fiduciary's misconduct. 29 U.S.C. §§ 1106(a), 1132(*l*)(1)(B). *Harris Trust* did not cite *Central Bank of Denver* and did not purport to limit its holding. *Stoneridge,* decided eight years after *Harris Trust,* also did not treat *Harris Trust* as circumscribing *Central Bank of Denver*—it did not even cite *Harris Trust.*

[3] To read secondary liability into section 2333(a), moreover, would enlarge the

federal courts' extraterritorial jurisdiction. The defendants are accused of promoting terrorist activities abroad. Congress has the power to impose liability for acts that occur abroad but have effects within the United States, *F. Hoffmann–La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 165, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004), but it must make the extraterritorial scope of a statute clear. *Small v. United States,* 544 U.S. 385, 388–89, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005); *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).

[4] The first panel opinion discussed approvingly an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333. The ground involves a chain of explicit statutory incorporations by reference. The first link in the chain is the statutory definition of "international terrorism" as "activities that ... involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States," that "appear to be intended ... to intimidate or coerce a civilian population" or "affect the conduct of a government by ... assassination," and that "transcend national boundaries in terms of the means by which they are accomplished" or "the persons they appear intended to intimidate or coerce." 18 U.S.C. § 2331(1). Section 2331 was enacted as part of the Federal Courts Administration Act of 1992, Pub.L. No. 102–572, § 1003(a)(3), 106 Stat. 4506, 4521. Section 2333 (having been originally enacted in 1990 and repealed for a technical reason the next year) was reenacted in 1992 as part of that same Federal Courts Administration Act. So the two sections are part of the same statutory scheme and are to be read together. Nicholas J. Perry, "The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails," 30 *J. Legis.* 249, 257 (2004).

Section 2331(1)'s definition of international terrorism (amended in 2001 by the PATRIOT Act, Pub.L. No. 107–56, § 802(a)(1), 115 Stat. 272, 376, but in respects irrelevant to this case) includes not only violent acts but also "acts dangerous to human life that are a violation of the criminal laws of the United States." Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an "act dangerous to human life." And it violates a federal criminal statute enacted in 1994 and thus before the murder of David Boim—18 U.S.C. § 2339A(a), which provides that "whoever provides material support or resources ..., knowing or intending that they are to be used in preparation for, or in carrying out, a violation of [18 U.S.C. § 2332]," shall be guilty of a federal crime. So we go to 18 U.S.C. § 2332 and discover that it criminalizes the killing (whether classified as homicide, voluntary manslaughter, or involuntary manslaughter), conspiring to kill, or inflicting bodily injury on, any American citizen outside the United States.

By this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332), we see that a donation to a terrorist group that targets Americans outside the United States may violate section 2333. Which makes good sense as a counterterrorism measure. Damages are a less effective remedy against terrorists and their organizations than against their financial angels. Terrorist organizations have been sued under section 2333, e.g., *Ungar v. Palestine Liberation Organization,* 402 F.3d 274 (1st Cir.2005); *Biton v. Palestinian Interim Self–Government Authority,* 252 F.R.D. 1 (D.D.C.2008); *Knox v. Palestine Liberation Organization,* 248 F.R.D. 420 (S.D.N.Y.2008), but to *collect* a damages

judgment against such an organization, let alone a judgment against the terrorists themselves (if they can even be identified and thus sued), is, as the first panel opinion pointed out, 291 F.3d at 1021, well-nigh impossible. These are foreign organizations and individuals, operating abroad and often covertly, and they are often impecunious as well. So difficult is it to obtain monetary relief against covert foreign organizations like these that Congress has taken to passing legislation authorizing the payment of judgments against them from U.S. Treasury funds. E.g., Victims of Trafficking and Violence Protection Act of 2000, Pub.L. No. 106–386, § 2002, 114 Stat. 1464. But that can have no deterrent or incapacitative effect, whereas suits against financiers of terrorism can cut the terrorists' lifeline.

And whether it makes good sense or not, the imposition of civil liability through the chain of incorporations is compelled by the statutory texts—as the panel determined in its first opinion. 291 F.3d at 1012–16. But in addition the panel placed a common law aiding and abetting gloss on section 2333. The panel was worried about a timing problem: section 2339A was not passed until 1994, and the defendants' contributions to Hamas began earlier. But that is not a serious problem on the view we take of the standard for proving causation under section 2333; we shall see that the fact of contributing to a terrorist organization rather than the amount of the contribution is the keystone of liability.

[5] Only because this is a very old case—David Boim was killed 12 years ago—does the 1994 effective date of section 2339A, two years before his killing, present an obstacle to liability, though only with respect to Salah and possibly the Holy Land Foundation (but we are vacating the judgment against the latter anyway, as we shall explain). For there is no doubt that the other defendants made contributions after section 2339A's effective date. Salah, however, having been arrested by Israeli authorities in 1993 and not released until 1997, did not render material support to Hamas between the effective date of section 2339A and Boim's killing, so the judgment against him must be reversed. Few future cases will be affected by the timing issue, because few such cases will involve donations that were made after section 2333 was enacted in 1990 or re-enacted in 1992 but that ceased before 1994.

[6] In addition to providing material support after the effective date of section 2339A, a donor to terrorism, to be liable under section 2333, must have known that the money would be used in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad. We know that Hamas kills Israeli Jews; and Boim was an Israeli citizen, Jewish, living in Israel, and therefore a natural target for Hamas. But we must consider the knowledge that the donor to a terrorist organization must be shown to possess in order to be liable under section 2333 and the proof required to link the donor's act to the injury sustained by the victim. The parties have discussed both issues mainly under the rubrics of "conspiracy" and "aiding and abetting." Although those labels are significant primarily in criminal cases, they can be used to establish tort liability, see, e.g., *Halberstam v. Welch*, 705 F.2d 472 (D.C.Cir.1983); *Restatement (Second) of Torts* §§ 876(a), (b) (1979), and there is no impropriety in discussing them in reference to the liability of donors to terrorism under section 2333 just because that liability is primary. Primary liability in the form of material support to terrorism has the character of secondary liability.

Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors.

When a federal tort statute does not create secondary liability, so that the only defendants are primary violators, the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability must be satisfied for the plaintiff to obtain a judgment. See, e.g., *Bridge v. Phoenix Bond & Indemnity Co.*, —— U.S. ——, 128 S.Ct. 2131, 2141–44, 170 L.Ed.2d 1012 (2008); *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc., supra*, 128 S.Ct. at 769; *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268–69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). But when the primary liability is that of someone who aids someone else, so that functionally the primary violator is an aider and abettor or other secondary actor, a different set of principles comes into play. Those principles are most fully developed in the criminal context, but we must be careful in borrowing from criminal law because the state-of-mind and causation requirements in criminal cases often differ from those in civil cases. For example, because the criminal law focuses on the dangerousness of a defendant's conduct, the requirement of proving that a criminal act caused an injury is often attenuated and sometimes dispensed with altogether, as in the statutes that impose criminal liability on providers of material support to terrorism (18 U.S.C. §§ 2339A, B, and C), which do not require proof that the material support resulted in an actual terrorist act, or that punish an attempt (e.g., 18 U.S.C. § 1113) that the intended victim may not even have noticed, so that there is no injury. The law of attempt has no counterpart in tort law, *United States v. Gladish*, 536 F.3d 646, 648 (7th Cir.2008), because there is no tort without an injury. E.g., *Rozenfeld v. Medical Protective Co.*, 73 F.3d 154, 155–56 (7th Cir.1996); *Winskunas v. Birnbaum*, 23 F.3d 1264, 1267 (7th Cir.1994).

So prudence counsels us not to halt our analysis with aiding and abetting but to go on and analyze the tort liability of providers of material support to terrorism under general principles of tort law. We begin by noting that knowledge and intent have lesser roles in tort law than in criminal law. A volitional act that causes an injury gives rise to tort liability for negligence if the injurer failed to exercise due care, period. But more is required in the case of intentional torts, and we can assume that since section 2333 provides for an automatic trebling of damages it would require proof of intentional misconduct even if the plaintiffs in this case did not have to satisfy the state-of-mind requirements of sections 2339A and 2332 (but they do).

Punitive damages are rarely if ever imposed unless the defendant is found to have engaged in deliberate wrongdoing. "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 2, pp. 9–10 (5th ed.1984); see, e.g., *Molzof v. United States*, 502 U.S. 301, 305–07, 112 S.Ct. 711, 116 L.Ed.2d 731 (1992); *Kemezy v. Peters*, 79 F.3d 33, 35 (7th Cir.1996). Treble damages too, not being compensatory, tend to have a punitive aim. "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct." *Texas*

Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); see also *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784–86, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000); *Zelinski v. Columbia 300, Inc.*, 335 F.3d 633, 642 (7th Cir.2003); *Gorenstein Enterprises, Inc. v. Quality Care–USA, Inc.*, 874 F.2d 431, 435–36 (7th Cir.1989); *United States v. Mackby*, 261 F.3d 821, 830–31 (9th Cir.2001).

To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care. "When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk." *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 704 (7th Cir. 2008). That is recklessness and equivalent to recklessness is "wantonness," which "has been defined as the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty injury will likely or probably result." *Graves v. Wildsmith*, 278 Ala. 228, 177 So.2d 448, 451 (1965); see also *Landers v. School District No. 203, O'Fallon*, 66 Ill.App.3d 78, 22 Ill.Dec. 837, 383 N.E.2d 645 (1978). "[I]n one case we read that 'willful and wanton misconduct approaches the degree of moral blame attached to intentional harm, since the defendant deliberately inflicts a highly unreasonable risk of harm upon others in conscious disregard of it.' Similarly, [another case] defines 'willful and wanton' as exhibiting 'an utter indifference to or conscious disregard for' safety." *Fagocki v. Algonquin/Lake–in–the–Hills Fire Protection District*, 496 F.3d 623, 627 (7th Cir. 2007) (citations omitted).

So it would not be enough to impose liability on a donor for violating section 2333, even if there were no state-of-mind requirements in sections 2339A and 2332, that the average person or a reasonable person would realize that the organization he was supporting was a terrorist organization, if the actual defendant did not realize it. That would just be negligence. But if you give a gun you know is loaded to a child, you know you are creating a substantial risk of injury and therefore your doing so is reckless and if the child shoots someone you will be liable to the victim. See *Pratt v. Martineau*, 69 Mass.App.Ct. 670, 870 N.E.2d 1122 (2007); *Bowen v. Florida*, 791 So.2d 44, 48–49 (Fla.App. 2001). That case should be distinguished from one in which the gun is given to an adult without adequately explaining the dangers—a case of negligent entrustment. To give a small child a loaded gun would be a case of *criminal* recklessness and therefore satisfy the state of mind requirement for liability under section 2333 and the statutes that it incorporates by reference. For the giver would know he was doing something extremely dangerous and without justification. "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Restatement, supra*, § 8A, comment b. That you did not desire the child to shoot anyone would thus be irrelevant, not only in a tort case, see *EEOC v. Illinois*, 69 F.3d 167, 170 (7th Cir.1995), but in a criminal case. *United States v. Fountain*, 768 F.2d 790, 798 (7th Cir.1985); cf. *United States v. Ortega*, 44 F.3d 505, 508 (7th Cir.1995).

A knowing donor to Hamas—that is, a donor who knew the aims and activities of

the organization—would know that Hamas was gunning for Israelis (unlike some other terrorist groups, Hamas's terrorism is limited to the territory of Palestine, including Israel; see Council on Foreign Relations, "Hamas," www.cfr.org/publication/8968/, visited Nov. 16, 2008), that Americans are frequent visitors to and sojourners in Israel, that many U.S. citizens live in Israel (American Citizens Abroad, an advocacy group for expatriates, reports on the basis of State Department data that in 1999 there were about 184,000 American citizens living in Israel, accounting for about 3.1 percent of the country's population, www.aca.ch/amabroad.pdf, visited Nov. 16, 2008), and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel. And given such foreseeable consequences, such donations would "appear to be intended . . . to intimidate or coerce a civilian population" or to "affect the conduct of a government by . . . assassination," as required by section 2331(1) in order to distinguish terrorist acts from other violent crimes, though it is not a state-of-mind requirement; it is a matter of external appearance rather than subjective intent, which is internal to the intender.

It is true that "the word 'recklessness' in law covers a spectrum of meaning, ranging from gross negligence in an accident case to the conduct of a robber in shooting at a pursuing policeman without aiming carefully." *Wright v. United States,* 809 F.2d 425, 427 (7th Cir.1987). In tort law it sometimes connotes merely gross negligence and at other times requires only that the defendant have acted in the face of an unreasonable risk that he should have been aware of even if he wasn't. But when, as in the passages we have quoted both from judicial opinions and from the *Restatement,* recklessness entails actual knowledge of the risk, the tort concept merges with the criminal concept, which likewise "generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware." *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); see also *Desnick v. American Broadcasting Cos.,* 233 F.3d 514, 517–518 (7th Cir.2000); American Law Institute, *Model Penal Code* § 2.02(2)(c) (1962) (defining recklessness as "consciously disregard[ing] a substantial and unjustifiable risk that the material element exists or will result from his conduct").

Critically, the criminal (like the tort) concept of recklessness is more concerned with the nature and knowledge of the risk that the defendant creates than with its magnitude. The Court in *Farmer v. Brennan* spoke of an "excessive" risk, a "significant" risk, a "substantial" risk, and an "intolerable" risk, 511 U.S. at 837–38, 842–43, 846, 114 S.Ct. 1970, the *Model Penal Code* of a "substantial and unjustifiable" risk, and the *Restatement* of an "unreasonable" risk, *Restatement, supra,* § 500, rather than assigning a minimum probability to the risk. These are *relative* terms; what is excessive, intolerable, etc., depends on the nature of the defendant's conduct. Ordinarily, it is true, the risk *is* great in a probabilistic sense; for the greater it is, the more likely it is to materialize and so give rise to a lawsuit or a prosecution and thus be mentioned in a judicial opinion. The greater the risk, moreover, the more obvious it will be to the risk taker, enabling the trier of fact to infer the risk taker's knowledge of the risk with greater confidence, see, e.g., *Farmer v. Brennan, supra,* 511 U.S. at 842, 114 S.Ct. 1970; *Duckworth v. Franzen,* 780 F.2d 645, 652 (7th Cir.1985), though, as the *Farmer* decision emphasizes, subject to rebuttal. 511 U.S. at 837–42, 114 S.Ct. 1970.

But probability isn't everything. The risk that one of the workers on a project to build a bridge or a skyscraper will be killed may be greater than the risk that a driver will be killed by someone who flings rocks from an overpass at the cars traveling on the highway beneath. But only the second risk, though smaller, is deemed excessive and therefore reckless. *McNabb v. State*, 887 So.2d 929, 974–75 (Ala.Crim. App.2001). (The first risk might not even be negligent.) As we explained in *United States v. Boyd*, 475 F.3d 875, 877 (7th Cir.2007) (emphasis added), "firing multiple shots from a powerful gun ... in the downtown of a large city at a time when pedestrians ... are known to be in the vicinity creates a risk of harm that, *while not large in probabilistic terms*, is 'substantial' relative to the gratuitousness of the defendant's actions.... An activity is reckless when the potential harm that it creates ... is wildly disproportionate to any benefits that the activity might be expected to confer.... The emotional gratification that defendant Boyd derived from shooting into the night, though perhaps great, is not the kind of benefit that has weight in the scales when on the other side is danger to life and limb, even if the danger is limited, as it was here." *Lennon v. Metropolitan Life Ins. Co.*, 504 F.3d 617, 623 (6th Cir.2007), says that the risk must be "weighed against the lack of social utility of the activity" in adjudging its reasonableness. See also *Orban v. Vaughn*, 123 F.3d 727, 733 (3d Cir.1997).

So if you give a person rocks who has told you he would like to kill drivers by dropping them on cars from an overpass, and he succeeds against the odds in killing someone by this means, you are guilty of providing material support to a murderer, or equivalently of aiding and abetting—for remember that when the primary violator of a statute is someone who provides assistance to another he is functionally an aider and abettor. The mental element required to fix liability on a donor to Hamas is therefore present if the donor knows the character of that organization.

The Court also said in *Farmer v. Brennan* that it was no defense that "he [a particular prison official] did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." 511 U.S. at 843, 114 S.Ct. 1970. That brings us to our next question—the standard of causation in a suit under section 2333.

It is "black letter" law that tort liability requires proof of causation. But like much legal shorthand, the black letter is inaccurate if treated as exceptionless. We made that point explicitly, with the aid of an example, in *Maxwell v. KPMG LLP*, 520 F.3d 713, 716 (7th Cir.2008): "when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself *and so was not a necessary condition* ... each of the firemakers (if negligent) is [nevertheless] liable to the plaintiff for having 'caused' the injury. *Kingston v. Chicago & N.W. Ry.*, 191 Wis. 610, 211 N.W. 913 (Wis.1927)" (emphasis added); see also *United States v. Feliciano*, 45 F.3d 1070, 1075 (7th Cir.1995). (A "necessary condition" is another term for a "but for" cause. *Maxwell v. KPMG LLP, supra*, 520 F.3d at 716.)

The multiple-fire example and the principle that subtends it were explained at greater length in *United States v. Johnson*, 380 F.3d 1013, 1016 (7th Cir.2004): "[T]wo defendants each start a fire, and the fires join and destroy the plaintiff's house; either fire, however, would have destroyed his house. Each defendant could therefore argue that he should not be liable for the damage because it would have occurred even if he had not set his fire; but the law rejects the argument....

[I]n the famous old case of *Cook v. Minneapolis, St. Paul & Sault Ste. Marie Ry.,* 98 Wis. 624, 74 N.W. 561, 564 (1898), we read that 'it is no defense for a person against whom negligence which causes damages is established, to prove that without fault on his part the same damage would have resulted from the negligent act of the other, but each is responsible for the entire damage.' See also *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.,* 146 Minn. 430, 179 N.W. 45, 49 (1920); *Collins v. American Optometric Ass'n,* 693 F.2d 636, 640 n. 4 (7th Cir.1982); *Housing 21, L.L.C. v. Atlantic Home Builders Co.,* 289 F.3d 1050, 1056–57 (8th Cir.2002); *Sanders v. American Body Armor & Equipment, Inc.,* 652 So.2d 883, 884–85 (Fla.App. 1995); *Garrett v. Grant School Dist. No. 124,* 139 Ill.App.3d 569, 93 Ill.Dec. 874, 487 N.E.2d 699, 706 (1985); *Hart v. Browne,* 103 Cal.App.3d 947, 163 Cal.Rptr. 356, 363–64 (1980); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, pp. 266–67 (5th ed.1984). The tortfeasor cannot avoid liability by pointing to an alternative *unlawful* cause of the damage that he inflicted.... [S]ince neither fire was a sine qua non of the plaintiff's injury, it could be argued that neither fire maker had committed a tort. Tort law rejects this conclusion for the practical reason that tortious activity that produces harm would go unsanctioned otherwise." The Prosser treatise also recognizes the multiple-fire case as one in which the plaintiff is not required to prove "but for" causation. Keeton et al., *supra,* § 41, pp. 266–68; cf. Edward J. Schwartzbauer and Sidney Shindell, "Cancer and The Adjudicative Process: The Interface of Environmental Protection and Toxic Tort Law," 14 *Am. J.L. & Med.* 1, 31–32 (1988).

In the fire cases the acts of each defendant are sufficient conditions of the resulting injury, though they are not necessary conditions (that is, they are not but-for causes). But in *Summers v. Tice,* 33 Cal.2d 80, 199 P.2d 1 (1948), where two hunters negligently shot their rifles at the same time and a third hunter was hit by one of the bullets, it could not be determined which hunter's gun the bullet had come from and so it could not be proved by a preponderance of the evidence that either of the shooters was the injurer in either a sufficient-condition or a necessary-condition sense; for each hunter, the probability that he had caused the injury was only 50 percent, since one of the shots had missed. Nevertheless both defendants were held jointly and severally liable to the injured person. See *Restatement, supra,* § 433B(3) and comment f; *Smith v. Cutter Biological,* 72 Haw. 416, 823 P.2d 717, 725 (1991); *In re "Agent Orange" Product Liability Litigation,* 597 F.Supp. 740, 822–23 (E.D.N.Y.1984).

Similarly, if several firms spill toxic waste that finds its way into groundwater and causes damage to property but it is impossible to determine which firm's spill caused the damage, all are liable. See, e.g., *Chem–Nuclear Systems, Inc. v. Bush,* 292 F.3d 254, 259–60 (D.C.Cir.2002); *United States v. Alcan Aluminum Corp.,* 964 F.2d 252, 267–69 (3d Cir.1992); *Michie v. Great Lakes Steel Division,* 495 F.2d 213, 217–18 (6th Cir.1974); *Landers v. East Texas Salt Water Disposal Co.,* 151 Tex. 251, 248 S.W.2d 731, 734 (1952); *Phillips Petroleum Co. v. Hardee,* 189 F.2d 205, 211–12 (5th Cir.1951); 2 Frank P. Grad, *Treatise on Environmental Law* § 3.02 (2007); Kenneth S. Abraham, "The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview," 41 *Washburn L.J.* 379, 386–87 (2002). Even if the amount of pollution caused by each party would be too slight to warrant a finding that any one of them had created a nuisance (the common law basis for treating pollution as a tort), "pol-

lution of a stream to even a slight extent becomes unreasonable [and therefore a nuisance] when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because it is done in the context of what others are doing." Keeton et al., *supra*, § 52, p. 354.

In all these cases the requirement of proving causation is relaxed because otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury. If "each [defendant] bears a like relationship to the event" and "each seeks to escape liability for a reason that, if recognized, would likewise protect each other defendant in the group, thus leaving the plaintiff without a remedy," the attempt at escape fails; each is liable. *Id.*, § 41, p. 268.

But we must consider the situation in which there is uncertainty about the causal connection between the wrongful conduct of all potential tortfeasors and the injury. Suppose in our first case that there was a third fire, of natural origin (the result of a lightning strike, perhaps), and it alone might have sufficed to destroy the plaintiff's house. One might think the law would require the plaintiff to prove that it was more likely than not that had it not been for the defendants' negligence, his house would not have burned down—the fire of natural origin would have petered out before reaching it. Instead the law requires proof only that there was a substantial probability that the defendants' fires (or rather either of them) were the cause. See, e.g., *Anderson v. Minneapolis, St. Paul & Sault Ste. Marie Ry.*, *supra*, 179 N.W. at 46; *Restatement*, *supra*, § 432(2) ("if two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about"); see also *id.*, illustration 3.

Our final example is *Keel v. Hainline*, 331 P.2d 397 (Okla.1958). Thirty to forty junior high school students showed up one day for their music class, but the instructor failed to show so the kids began throwing wooden erasers, chalk, and even a Coke bottle at each other. One of the students was struck in the eye by an eraser, and sued. One of the defendants, Keel, apparently had not thrown anything. But he had retrieved some of the erasers after they had been thrown and had handed them back to the throwers. There was no indication that Keel had handed the eraser to the kid who threw it at the plaintiff and injured her, but the court deemed that immaterial. It was enough that Keel had participated in the wrongful activity as a whole. He thus was liable even though there was no proven, or even likely, causal connection between anything he did and the injury. " 'One who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a wrongful act by another has been regarded as being as responsible as the one who commits the act so as to impose liability upon the former to the same extent as if he had performed the act himself.' " *Id.* at 401. The court did not use the term "material support," but in handing erasers to the throwers Keel was providing them with material support in a literal sense. It was enough to make him liable that he had helped to create a danger; it was immaterial that the effect of his help could not be determined—that his acts could not be found to be either a necessary or a sufficient condition of the injury.

[7] The cases that we have discussed do not involve monetary contributions to a wrongdoer. But then criminals and other

intentional tortfeasors do not usually solicit voluntary contributions. Terrorist organizations do. But this is just to say that terrorism is *sui generis.* So consider an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes $1,000 to it, for a total of $100,000. The organization has additional resources from other, unknown contributors of $200,000 and it uses its total resources of $300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of $1,000. The tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death could not be traced to any of the contributors (as in the example the Supreme Court gave in *Farmer v. Brennan*) and that some of them may have been ignorant of the mission of the organization (and therefore not liable under a statute requiring proof of intentional or reckless misconduct) would be irrelevant. The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts and thus the probability that the plaintiff's decedent would be a victim, and this would be true even if Hamas had incurred a cost of more than $1,000 to kill the American, so that no defendant's contribution was a sufficient condition of his death.

This case is only a little more difficult because Hamas is (and was at the time of David Boim's death) engaged not only in terrorism but also in providing health, educational, and other social welfare services. The defendants other than Salah directed their support exclusively to those services. But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook, as we noted in a related context in *Hussain v. Mukasey,* 518 F.3d 534, 538–39 (7th Cir.2008); see also *Singh–Kaur v. Ashcroft,* 385 F.3d 293, 301 (3d Cir.2004). The reasons are twofold. The first is the fungibility of money. If Hamas budgets $2 million for terrorism and $2 million for social services and receives a donation of $100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking $100,000 out of its social services "account" and depositing it in its terrorism "account." *Kilburn v. Socialist People's Libyan Arab Jamahiriya,* 376 F.3d 1123, 1130 (D.C.Cir.2004).

Second, Hamas's social welfare activities reinforce its terrorist activities both directly by providing economic assistance to the families of killed, wounded, and captured Hamas fighters and making it more costly for them to defect (they would lose the material benefits that Hamas provides them), and indirectly by enhancing Hamas's popularity among the Palestinian population and providing funds for indoctrinating schoolchildren. See, e.g., Justin Magouirk, "The Nefarious Helping Hand: Anti–Corruption Campaigns, Social Service Provision, and Terrorism," 20 *Terrorism & Political Violence* 356 (2008); Eli Berman & David D. Laitin, "Religion, Terrorism, and Public Goods: Testing the Club Model" 7–10 (National Bureau of Econ. Research Working Paper No. 13725, 2008). Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor *intended* that his contribution be used for terrorism—to make a benign intent a defense—would as

a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent. It would also create a First Amendment Catch–22, as the only basis for inferring intent would in the usual case be a defendant's public declarations of support for the use of violence to achieve political ends.

Although liability under section 2333 is broad, to maintain perspective we note two cases that fall on the other side of the liability line. One is the easy case of a donation to an Islamic charity by an individual who does not know (and is not reckless, in the sense of strongly suspecting the truth but not caring about it) that the charity gives money to Hamas or some other terrorist organization.

The other case is that of medical (or other innocent) assistance by nongovernmental organizations such as the Red Cross and Doctors Without Borders that provide such assistance without regard to the circumstances giving rise to the need for it. Suppose an Israeli retaliatory strike at Hamas causes so many casualties that the local medical services cannot treat all of them, and Doctors Without Borders offers to assist. And suppose that many of the casualties that the doctors treat are Hamas fighters, so that Doctors Without Borders might know in advance that it would be providing medical assistance to terrorists.

However, section 2339A(b)(1) excludes "medicine" from the definition of "material resources." And even if the word should be limited (an issue on which we take no position) to drugs and other medicines, an organization like Doctors Without Borders would not be in violation of section 2333. It would be helping not a terrorist group but individual patients, and, consistent with the Hippocratic Oath, with no questions asked about the patients' moral virtue. It would be like a doctor who treats a person with a gunshot wound whom he knows to be a criminal. If doctors refused to treat criminals, there would be less crime. But the doctor is not himself a criminal unless, besides treating the criminal, he conceals him from the police (like Dr. Samuel Mudd, sentenced to prison for trying to help John Wilkes Booth, Lincoln's assassin, elude capture) or violates a law requiring doctors to report wounded criminals. The same thing would be true if a hospital unaffiliated with Hamas but located in Gaza City solicited donations.

Nor would the rendering of medical assistance by the Red Cross or Doctors Without Borders to individual terrorists "appear to be intended . . . to intimidate or coerce a civilian population" or "affect the conduct of a government by . . . assassination," and without such appearance there is no international terrorist act within the meaning of section 2331(1) and hence no violation of section 2333. Nor is this point limited to the rendering of *medical* assistance. For example, UNRWA (the United Nations Relief and Works Agency for Palestine Refugees in the Near East) renders aid to Palestinian refugees that is not limited to medical assistance to individual refugees, www.un.org/unrwa/english.html (visited Nov. 16, 2008). But so far as one can glean from its website (see *id.* and www.un.org/unrwa/allegations/index.html, also visited Nov. 16, 2008), it does not give money to organizations, which might be affiliates of Hamas or other terrorist groups; it claims to be very careful not to employ members of Hamas or otherwise render any direct or indirect aid to it. *Id.*

To the objection that the logic of our analysis would allow the imposition of liability on someone who with the requisite state of mind contributed to a terrorist organization in 1995 that killed an American abroad in 2045, we respond first that

that is not this case—the interval here was at most two years (1994, when section 2339A was enacted, to 1996, when Boim was killed)—and second that the imposition of liability in the hypothetical case would not be as outlandish, given the character of terrorism, as one might think. (There would of course be no defense of statute of limitations, since the limitations period would not begin to run until the tort was committed, and that would not occur until the injury on which suit was based was inflicted.) Terrorism campaigns often last for many decades. Think of Ireland, Sri Lanka, the Philippines, Colombia, Kashmir—and Palestine, where Arab terrorism has been more or less continuous since 1920. Seed money for terrorism can sprout acts of violence long after the investment. In any event, whether considerations of temporal remoteness might at some point cut off liability is not an issue we need try to resolve in this case.

An issue to which the first panel opinion gave much attention (see 291 F.3d at 1021–27), but which received little attention from the parties afterward, is brought into focus by our analysis of the elements of a section 2333 violation. That is whether the First Amendment insulates financiers of terrorism from liability if they do not intend to further the illegal goals of an organization like Hamas that engages in political advocacy as well as in violence. If the financier knew that the organization to which it was giving money engaged in terrorism, penalizing him would not violate the First Amendment. Otherwise someone who during World War II gave money to the government of Nazi Germany solely in order to support its anti-smoking campaign could not have been punished for supporting a foreign enemy.

But it is true that "an organization is not a terrorist organization just because one of its members commits an act of armed violence without direct or indirect authorization, even if his objective was to advance the organization's goals, though the organization might be held liable to the victim of his violent act." *Hussain v. Mukasey, supra,* 518 F.3d at 538. That is the principle of *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 920, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). The defendants in the present case could not be held liable for acts of violence by members of Hamas that were not authorized by Hamas. Nor would persons be liable who gave moral rather than material support, short of incitement, to violent organizations that have political aims. As intimated earlier in this opinion, a person who gives a speech in praise of Hamas for firing rockets at Israel is exercising his freedom of speech, protected by the First Amendment. See, e.g., *Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 447–49, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974); *Brandenburg v. Ohio,* 395 U.S. 444, 447–48, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) (per curiam). But as Hamas engages in violence as a declared goal of the organization, anyone who provides *material* support to it, knowing the organization's character, is punishable (provided he is enchained by the chain of statutory incorporations necessary to impose liability under section 2333) whether or not he approves of violence.

[8] Enough about the liability standard. We have now to consider its application to the facts. That turns out to be straightforward, except with respect to one of the defendants, the Holy Land Foundation, about which we can be brief because of the thoroughness of the panel's consideration. See 511 F.3d at 720–33. A principal basis for the district court's finding that the Foundation had violated the statute was the court's giving collateral estoppel effect to findings made in *Holy Land Foundation for Relief & Development v.*

Ashcroft, 219 F.Supp.2d 57 (D.D.C.2002), affirmed, 333 F.3d 156 (D.C.Cir.2003). The panel was unanimous that this ruling was erroneous.

In 2001 the Secretary of the Treasury determined that the Foundation "acts for or on behalf of" Hamas, and an order freezing the Foundation's funds was issued. The Foundation sued in the District of Columbia. The district court there found that the Secretary's finding was not "arbitrary and capricious" (the standard of review) and upheld the blocking order. Although the court recited extensive evidence that the Foundation knew that Hamas was and had long been a terrorist organization, 219 F.Supp.2d at 69–75, and it appears that most or perhaps all of the evidence related to its knowledge before 1996 when David Boim was killed, the validity of the blocking order did not depend on the Foundation's knowledge. 511 F.3d at 731; see Executive Order 13244, 66 Fed.Reg. 49079 (Sept. 23, 2001); Garry W. Jenkins, "Soft Power, Strategic Security, and International Philanthropy," 85 *N. Car. L.Rev.* 773, 808–09 (2007); Jennifer Lynn Bell, "Terrorist Abuse of Non–Profits and Charities: A Proactive Approach to Preventing Terrorist Financing," 17 *Kan. J.L. & Public Policy* 450, 458–59 (2008). If someone is giving money to an organization that the government knows to be a terrorist organization, any subsequent gift can be blocked whether or not the donor knows (or agrees with the government concerning) the nature of the recipient.

Even if the decision of the district court in the District of Columbia were read as finding that the Foundation knew that Hamas was a terrorist organization (and, as the court also found, that the Holy Land Foundation made contributions to Hamas after the effective date of 18 U.S.C. § 2339A, 219 F.Supp.2d at 70–71), such a finding would not have been essential to the judgment upholding the blocking order—and essentiality is at the heart of collateral estoppel. *Arizona v. California*, 530 U.S. 392, 414, 120 S.Ct. 2304, 147 L.Ed.2d 374 (2000); *Montana v. United States*, 440 U.S. 147, 159, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979); *H–D Michigan, Inc. v. Top Quality Service, Inc.*, 496 F.3d 755, 760 (7th Cir.2007); *Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir.1995); *Restatement (Second) of Judgments* § 27 (1982). If a finding is unnecessary to the judgment, the appellant has no reason to challenge it and if he does the appellate court has no reason to review it because it is irrelevant to the appeal—and so the appellant would not have his (full) day in court.

[9] So the judgment against the Foundation must be reversed and the case against it remanded for further proceedings to determine its liability. The judgment against Salah must also be reversed, as we explained earlier. Regarding the remaining defendants, the American Muslim Society and the Quranic Literacy Institute, the judgment of the district court was in our view correct. The activities of the American Muslim Society are discussed at length in the district court's second opinion. See 340 F.Supp.2d at 906–13. There we learn that while its activities included donating money to the Holy Land Foundation, there was much else besides. Moreover, the fact that the Foundation may not have known that Hamas was a terrorist organization (implausible as that is) would not exonerate the American Muslim Society, which *did* know and in giving money to the Foundation was deliberately funneling money to Hamas. The funnel doesn't have to know what it's doing to be an effective funnel.

Nor should donors to terrorism be able to escape liability because terrorists and

their supporters launder donations through a chain of intermediate organizations. Donor *A* gives to innocent-appearing organization *B* which gives to innocent-appearing organization *C* which gives to Hamas. As long as *A* either knows or is reckless in failing to discover that donations to *B* end up with Hamas, *A* is liable. Equally important, however, if this knowledge requirement is not satisfied, the donor is not liable. And as the temporal chain lengthens, the likelihood that a donor has or should know of the donee's connection to terrorism shrinks. But to set the knowledge and causal requirement higher than we have done in this opinion would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter.

[10] With regard to the Quranic Literacy Institute, the district court, after denying the Institute's motion for summary judgment, 340 F.Supp.2d at 929, submitted the case against the Institute to a jury trial but instructed the jury that Hamas was responsible for the murder of David Boim. The jury was left to decide whether the Institute had knowingly provided material support to Hamas. The jury found the Institute liable. By deciding not to participate in the trial, the Institute waived any objection it might have had to the jury instructions or the jury's findings.

In any event, the only factual determination underlying the judgment against the Institute, as against the American Muslim Society, that might be questioned—and was by the panel—was the determination, made by the district court on summary judgment, that Hamas had been responsible for the murder. The panel thought that the district judge had considered inadmissible evidence that the two terrorists who shot Boim were in fact members of Hamas.

Here is the panel's critique of the principal though not only evidence of their membership:

> To show that the murder of David Boim was the work of Hamas, the Boims submitted the declaration of Dr. Ruven [*sic*] Paz, a former member of the Israeli security community who describes himself as an expert in terrorism and counter-terrorism, Islamic movements in the Arab and Islamic world, Palestinian Islamic groups, and Palestinian society and politics. Based on his review of various exhibits submitted in connection with this case, his independent research, and his knowledge of how Hamas and other Islamic terror organizations operate, Paz concluded that Hinawi and Al–Sharif had murdered David Boim, that Hinawi and Al–Sharif were members of Hamas at the time they killed Boim, and that Hamas itself had accepted responsibility for the murder. . . .
>
> In concluding that Al–Sharif was a member of Hamas and that Hamas had taken responsibility for the murder, Paz relied heavily on information set forth on certain websites that he attributed to Hamas. Paz explained that Hamas publicly acknowledges its terrorist acts and identifies its "martyrs" as a way to promote itself and to recruit new members. According to Paz, internet websites are a means by which Hamas disseminates such information. Paz's declaration asserts that scholars, journalists, and law enforcement routinely rely on the website postings of terrorist organizations for what they reveal about the activities of those organizations. Looking to certain websites whose content he asserts is controlled by Hamas, Paz found statements indicating that Hamas had taken responsibility for the Beit–El attack that

took David Boim's life and that Al–Sharif was one of the participants in this attack. Paz repeated these statements in his declaration.

Paz's reliance upon, and his recounting of, internet website postings demand a certain caution in evaluating his prospective testimony. Such postings would not be admissible into evidence for their truth absent proper authentication, and this would typically require some type of proof that the postings were actually made by the individual or organization to which they are being attributed—in this case, Hamas—as opposed to others with access to the website. Paz's declaration identifies the websites from which he quotes as ones controlled by Hamas, but it does not describe the basis for his conclusion, and consequently his declaration does not permit any independent assessment of the purported links between these sites and Hamas and the source of the postings that he recounts. Of course, the rules of evidence do not limit what type of information an expert may rely upon in reaching his opinion; even if that information would not otherwise be admissible in a court proceeding, an expert witness may rely upon it so long as it is the type of information on which others in the field reasonably rely. Indeed, Rule 703 now expressly permits the expert to disclose such information to the jury, provided the court is satisfied that its helpfulness in evaluating the expert's opinion substantially outweighs its prejudicial effect. Nonetheless, a judge must take care that the expert is not being used as a vehicle for circumventing the rule against hearsay. Where, as here, the expert appears to be relying to a great extent on web postings to establish a particular fact, and where as a result the factfinder would be unable to evaluate the soundness of his conclusion without hearing the evidence he relied on, we believe the expert must lay out, in greater detail than Paz did, the basis for his conclusion that these websites are in fact controlled by Hamas and that the postings he cites can reasonably and reliably be attributed to Hamas.

Paz's conclusion that Hinawi was responsible for the murder of David Boim was based in significant part on two documents related to Hinawi's trial and sentencing by a Palestinian Authority tribunal: (1) a set of notes prepared by a U.S. foreign service officer who attended Hinawi's trial in February 1998, and (2) an Arabic-language document purporting to be the written verdict reflecting Hinawi's conviction and sentence. The foreign service officer's notes indicate that Hinawi was tried in open proceedings for participating in a terrorist act and acting as an accomplice in the killing of David Boim, that he was afforded counsel by the tribunal, that he contended in his defense that his friend Al–Sharif was the gunman and that Al–Sharif exploited his friendship with Hinawi by asking him to drive the car, and that he was convicted on both charges and sentenced to ten years. Paz's declaration accepts these documents as genuine and relies principally on them for the proposition that Hinawi participated in David Boim's murder and was convicted by the Palestinian Authority tribunal for the same.

Once again we have concerns about whether the record as it stands lays an appropriate foundation for these documents. We can assume that the report of a U.S. government official who, in the course of his duties, observed a trial in a foreign tribunal may constitute proof of what occurred in that proceeding. We also have no doubt that a properly authenticated, official report of a judgment

> issued by a foreign tribunal constitutes adequate proof of that judgment. The difficulty we have with Paz's reliance upon these documents is that they have not been properly authenticated. The foreign service officer's notes are unsigned and reveal nothing about the circumstances under which they were prepared. The document that we are told is the official verdict is entirely in Arabic, is not readily evident as an official document, and is unaccompanied by an English translation. There is a single cover note, on the letterhead of the U.S. Consulate General in Jerusalem, which accompanies these documents and explains what they are. But the cover note itself is unsigned and does not even identify its author. This is unacceptable. We assume that Paz knows more about these documents and that he would not have relied upon them if he had doubts about their authenticity. But given that Paz relies almost exclusively on these documents as proof of Hinawi's complicity in Boim's murder, and because a factfinder could not evaluate the soundness of Paz's conclusion without knowing what these documents say, an appropriate foundation must be laid for these documents before the conclusions that Paz has drawn from these documents may be admitted.

511 F.3d at 752–54 (citations omitted).

We accept the panel majority's description of the infirmities of the evidence on which Reuven Paz (formerly research director of Shin Bet, Israel's domestic security agency) based his expert opinion. But we do not agree that the district court abused its discretion in allowing the opinion into evidence. As the quoted passage acknowledges (albeit grudgingly, in its warning against using an expert witness "as a vehicle for circumventing the rule against hearsay"), an expert is not limited to relying on admissible evidence in forming his opinion. Fed.R.Evid. 703; *Wendler & Ezra, P.C. v. American Int'l Group, Inc.,* 521 F.3d 790, 791 (7th Cir.2008); *In re James Wilson Associates,* 965 F.2d 160, 172–73 (7th Cir.1992); *United States v. Locascio,* 6 F.3d 924, 938 (2d Cir.1993). That would be a crippling limitation because experts don't characteristically base their expert judgments on legally admissible evidence; the rules of evidence are not intended for the guidance of experts. Biologists do not study animal behavior by placing animals under oath, and students of terrorism do not arrive at their assessments solely or even primarily by studying the records of judicial proceedings. Notice, moreover, that there was no need for the plaintiffs to prove that *both* Al–Sherif and Hinawi were complicit in Boim's death; if either was complicit and a member of Hamas, that is enough to fix responsibility on Hamas for killing Boim.

In dissenting from the panel's ruling Judge Evans offered an assessment of Paz's evidence (see 511 F.3d at 758) that we find persuasive. An expert on terrorism in the Arab world, fluent in Arabic, Paz explained that the websites of Islamic movements and Islamic terrorist organizations have long been accepted by security experts as valid, important, and indeed indispensable sources of information. Terrorist organizations rely on the web to deliver their messages to their adherents and the general public. The United States Institute for Peace, a nonpartisan federal institution created by Congress, published an extensive report, submitted to the district court along with Paz's declaration, on the use of the Internet by terrorists. And—critically—the defendants presented no evidence to contradict Paz: no evidence that the killing of Boim was *not* a Hamas hit. Had they thought Paz had mistranslated the Arabic judgment against Hinawi, they could have provided the district court

with their own translation. Had they doubted that Paz can identify a Hamas website (he gave the web addresses of several of them), they could have presented testimony to that effect. Paz's 12–page declaration is detailed, concrete, and backed up by a host of exhibits. The district court did not abuse its discretion in admitting his evidence; and with it in the record and *nothing* on the other side the court had no choice but to enter summary judgment for the plaintiffs with respect to Hamas's responsibility for the Boim killing.

To summarize, the judgment of the district court is affirmed except with respect to (1) Salah, as to whom the judgment is reversed with instructions to enter judgment in his favor; (2) the Holy Land Foundation, as to which the judgment is reversed and the case remanded for further proceedings consistent with this opinion; and (3) the award of attorneys' fees—for we adopt the panel's criticisms of that award, 511 F.3d at 749–50, and anyway the award will have to be adjusted because of the further proceedings on remand that we are ordering.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

ROVNER, Circuit Judge, with whom WILLIAMS, Circuit Judge, joins, concurring in part and dissenting in part.[1]

At this late stage in the litigation, we are now turning to a fundamental question: Are we going to evaluate claims for terrorism-inflicted injuries using traditional legal standards, or are we going to rewrite tort law on the ground that "terrorism is *sui generis*"? *Ante* at 698. My colleagues in the majority have opted to "relax[ ]"—I would say eliminate—the basic tort requirement that causation be proven, believing that "otherwise there would be a wrong and an injury but no remedy because the court would be unable to determine which wrongdoer inflicted the injury." *Ante* at 697. The choice is a false one. The panel took pains to identify a number of ways in which the plaintiffs might establish a causal link between the defendants' financial contributions to (and other support for) Hamas and the murder of David Boim. *Boim II*, 511 F.3d at 741–43. It is not the case that the plaintiffs were unable show causation, it is rather that they did not even make an attempt; and that was the purpose of the panel's decision to remand the case.[2] But rather than requiring the plaintiffs to present evidence of causation and allowing the factfinder to determine whether causation has been shown, the majority simply deems it a given, declaring as a matter of law that any money knowingly given to a terrorist organization like Hamas is a cause of terrorist activity, period. This sweeping rule of liability leaves no role for the factfinder to distinguish between those individuals and organizations who directly and purposely finance terrorism from those who are many steps removed from terrorist activity and whose aid has, at most, an indirect, uncertain, and unintended effect on terrorist activity. The majority's approach treats all financial support provided to a terrorist organization and its affiliates as support for terrorism, regardless of whether the money is given to the terrorist organization itself, to a charitable entity controlled by that organization, or to an intermediary organization, and regardless of what the money is actually used to do.

1. Judge Wood also joins this opinion except as to Salah's liability.

2. Judge Evans, in his dissent from this holding, not only thought that the plaintiffs could show causation, but that they already had. 511 F.3d at 760–61.

The majority's opinion is remarkable in two additional respects. By treating all those who provide money and other aid to Hamas as primarily rather than secondarily liable—along with those who actually commit terrorist acts—the majority eliminates any need for proof that the aid was given with the intent to further Hamas's terrorist agenda. Besides eliminating yet another way for the factfinder to distinguish between those who deliberately aid terrorism from those who do so inadvertently, this poses a genuine threat to First Amendment freedoms. Finally, the majority sustains the entry of summary judgment on a basic factual question—Did Hamas kill David Boim?—based on an expert's affidavit that both relies upon and repeats multiple examples of hearsay. Rather than sustain the panel's unexceptional demand that the expert's sources be proven reliable, consistent with *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 597, 113 S.Ct. 2786, 2799, 125 L.Ed.2d 469 (1993), the majority gives its blessing to circumventing the rules of evidence altogether.

Thus, although I concur in the decision to remand for further proceedings as to HLF, I otherwise dissent from the court's decision.

1.

One point of clarification at the outset. The majority's opinion reads as though the defendants were writing checks to Hamas, perhaps with a notation on the memo line that read "for humanitarian purposes." If indeed the defendants were directing money into a central Hamas fund out of which all Hamas expenses—whether for humanitarian or terrorist activities—were paid, it would be easy to see that the defendants were supporting Hamas's terrorism even if their contributions were earmarked for charity. In fact, the case is not as simple as that. For example, much of the money that defendant HLF provided to Hamas apparently was directed not to Hamas per se but to a variety of zakat committees and other charitable entities, including a hospital in Gaza, that were controlled by Hamas. *See Holy Land Found. for Relief & Dev. v. Ashcroft,* 219 F.Supp.2d 57, 70–71 (D.D.C.2002), *j. aff'd,* 333 F.3d 156 (D.C.Cir.2003).[3] I gather that this is a distinction without a difference in the majority's view, and certainly I agree that if the zakat committees and other recipients of HLF's funding were mere fronts for Hamas or were used to launder donations targeted for Hamas generally, then those donations ought to be treated as if they were direct donations to Hamas itself.[4] But to the extent that these Hamas subsidiary organizations actually were engaged solely in humanitarian work and HLF was sending its money to those subsidiaries to support that work, HLF is one or more significant steps removed from the direct financing of terrorism and the case for HLF's liability for terrorism is, in my view, a much less compelling one. Defendant AMS is yet another step removed, in that AMS is alleged to have contributed money not to Hamas but to HLF.

Moreover, the type of support that can give rise to civil liability is not limited to financial support. As the panel discussed

3. HLF's ties to Hamas have yet to be evaluated in this litigation, because the district court erroneously gave collateral estoppel effect to the D.C. Circuit's determination that HLF funded terrorism by funding Hamas and its affiliates. *See ante* at 700–01; *Boim II,* 511 F.3d at 726–33.

4. Thus, when I discuss aid given to zakat committees and other organizations controlled by or affiliated with Hamas, I am assuming that they are not, in fact, mere fronts for Hamas that are used to launder donations meant to fund Hamas's terrorism.

in *Boim I,* civil liability under section 2333(a) can result from the provision of "material support or resources" to terrorism and to terrorist organizations as prohibited by 18 U.S.C. §§ 2339A and 2339B, *see* 291 F.3d at 1012–17, and "material support or resources" is defined broadly to include not only weapons and money but "any property, tangible or intangible, or service," including such things as lodging, expert advice, training, and personnel. § 2339A(b)(1). Notably, the plaintiffs have sought to hold AMS liable, and the district court found it liable, not simply for the financial support it provided to HLF, but for various types of pro-Hamas advocacy, such as hosting Hamas speakers at its conferences, publishing sympathetic editorials in its newsletter, and the like. *See Boim v. Quranic Literacy Inst.,* 340 F.Supp.2d 885, 908–13 (N.D.Ill.2004).

So the majority's rule has the potential to sweep within its reach not only those who write checks to Hamas and the organizations that it controls but also individuals and groups who support Hamas and its affiliates in myriad other ways, including those who advocate on Hama's behalf. My point is not that there is no case to be made for imposing liability on such supporters for Hamas's terrorist acts. My point is simply that the basis for their liability is not nearly as clean and straightforward as it might seem from the majority's opinion.

2.

The majority has chosen to evaluate the prospective liability of the defendants in this case through the lens of primary liability, reasoning that those who provide financial and other aid to terrorist organizations are themselves engaging in terrorism and thus may be held liable on the same basis as those who actually commit terrorist acts.[5] In formulating its theory of primary liability, the majority relies in part upon section 2331(1)'s definition of "international terrorism" and partly upon section 2339A(a)'s criminal proscription against providing material support or resources to terrorists. Treating the defendants as primarily rather than secondarily liable enables the majority to accomplish two things: First, it compensates for what the majority believes was Congress's failure in section 2333(a) to authorize the imposition of secondary liability on those who aid or abet terrorist acts or conspire with terrorists. Second, it eliminates any need for proof of a defendant's intent to support terrorism; a defendant's knowledge that it is providing aid to an organization that engages in terrorism is deemed enough to hold that defendant liable for the organization's terrorist acts.

5. There is a point in the majority's opinion at which it appears to describe its liability framework as one that straddles both primary and secondary liability. After concluding that Congress did not authorize the imposition of secondary liability under section 2333(a), *ante* at 688–90, the majority goes on to say that "there is no impropriety in discussing" such secondary liability theories as conspiracy and aiding and abetting, *ante* at 691, and that "[p]rimary liability in the form of material support to terrorism has the character of secondary liability," *ante* at 691. I must confess to some uncertainty as to the majority's meaning. What is clear to me is that the majority has rejected the theories of secondary liability discussed in *Boim I* and *Boim II,* and at the same time the majority is not conditioning liability under section 2333(a) on proof of a defendant's intent or agreement to aid terrorism, which would of course be necessary to recover under a traditional aiding and abetting or conspiracy theory of liability. I shall therefore describe the majority's liability framework as one of primary liability while recognizing that the majority sees some continued relevance—I am not sure what—in aiding and abetting and conspiracy concepts to liability under section 2333.

For the reasons outlined in the *Boim I* opinion, I continue to believe that Congress when it enacted section 2333(a) subjected to civil liability not only those who engage in terrorism but also those who aid or abet terrorism. 291 F.3d at 1016–21. The government as an *amicus curiae* has expressed agreement with that view. The secondary liability framework is a much more natural fit for what the defendants here are alleged to have done and as I shall discuss below, the elements of aiding and abetting serve a useful function in distinguishing between those who intend to aid terrorism and those who do not.

But even if I am wrong about the availability of secondary liability under section 2333(a), I have my doubts about the viability of the majority's theory of primary liability. For there are conceptual problems with this approach, particularly as it is applied in this case. These problems may help to explain why the plaintiffs have long since abandoned any theory of primary liability and have relied solely on theories of secondary liability in this appeal. And it makes it all the more extraordinary that this court has gone out on a limb to craft a liability standard that none of the parties has advocated.

The majority first posits that the defendants' alleged conduct falls within section 2331(1)'s definition of "international terrorism," *ante* at 689–90, but the fit is by no means perfect. In full, the statutory definition of the term reads as follows:

> [T]he term "international terrorism" means activities that—
>
> (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
>
> (B) appear to be intended—
>
> (i) to intimidate or coerce a civilian population;
>
> (ii) to influence the policy of a government by intimidation or coercion;
>
> (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
>
> (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum[.]

18 U.S.C. § 2331(1). The language of this definition certainly is broad enough to reach beyond bomb-throwers and shooters to include those who provide direct and intentional support to terrorists: someone who ships arms to a terrorist organization, for example, easily could be thought to be engaging in activity that "*involve[s]* violent acts or acts dangerous to human life" as set forth in section 2331(1)(A). *See Boim I,* 291 F.3d at 1014–15. But it is far from clear that sending money to a Hamas-controlled charitable organization, for example, is on par with that type of direct support for terrorism. It may be, as the majority posits, that donations to Hamas's humanitarian wing indirectly aid its terrorism by freeing up other funds for terrorism, by giving cover to Hamas, and by otherwise enhancing Hamas's image. But it is difficult if not implausible to characterize donations that are earmarked and used for humanitarian work as violent or life-threatening acts as referenced in section 2331(1)(A). Nor is it evident (to say the least) that financially supporting a Hamas-affiliated charity is an act that "appear[s] to be intended" to have the sorts of coercive or intimidating effects on govern-

ment policy or upon a civilian population as described in section 2331(1)(B).

It may be more plausible to say, as the majority does, that one who provides financial support to Hamas, even to its charitable subsidiaries, is "provid[ing] material support or resources" to Hamas's terrorist acts in violation of section 2339A(a) by increasing the heft of Hamas's purse. *See ante* at 690–91. But that theory too has its problems. The language of section 2339A(a) requires that the material support or resources be given with the knowledge or intent that they "*are to be used* in preparation for, or in carrying out" one of a number of specified crimes, including as relevant here the killing of American citizens. (Emphasis mine.); *see ante* at 690, citing 18 U.S.C. § 2332. In other words, the donor must at least know that the financial or other support he lends to Hamas *will be used* to commit terrorist acts. In *Boim I,* the panel agreed that giving money to Hamas with the purpose of financing its terrorism would both violate section 2339A(a) and give rise to civil liability under section 2333. 291 F.3d at 1012–16. But at that early stage of this litigation, the Boims had a straightforward and direct theory that Hamas's American contributors (including HLF) intended for their money be used to support terrorism, that the zakat committees and other humanitarian organizations to which these contributors were sending their money were mere fronts for Hamas, and that the money received by these front organizations was laundered and funneled into Hamas's coffers to fund terrorist activity, including the attack that took David Boim's life. *See id.* at 1004. That theory was consistent with the express terms of section 2339A(a). But that is no longer the Boims' theory (they have long since abandoned it in favor of aiding and abetting and conspiracy), nor is it the majority's. The majority posits that any money given to a Hamas affiliate, even if it is given with a benign intent and even if it is actually put to charitable use, furthers Hamas's terrorism in one way or another. *Ante* at 698. Even if that is so, not all donors will know or intend that their contributions will be used to commit the sorts of criminal acts identified in section 2339A(a). And what the statute proscribes is the knowing or intentional support of specific terrorist acts, not the knowing support of a terrorist organization. If nothing else, the defendants' contributions to charitable organizations controlled by Hamas would present a factual question as to whether the defendants knew that they were supporting the murder of American citizens or any of the other crimes listed in section 2339A(a).

3.

Causation, as the majority acknowledges, is a staple of tort law, *ante* at 695, and yet the majority relieves the plaintiffs of any obligation to demonstrate a causal link between whatever support the defendants provided to Hamas and Hamas's terrorist activities (let alone David Boim's murder in particular). Instead, the majority simply declares as a matter of law that any money given to an organization like Hamas that engages in both terrorism and legitimate, humanitarian activity, necessarily enables its terrorism, regardless of the purpose for which the money was given or the channel through which the organization received it. "Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities." *Ante* at 698. This is judicial activism at its most plain. The majority offers no rationale for relieving the plaintiffs of the burden of showing causation, and there is none that I can discern. The panel in *Boim II* expressly disavowed any requirement that

the Boims link specific donations or other acts of support to David Boim's murder in particular. 511 F.3d at 741. But it did insist on proof that the types of support the defendants were alleged to have given Hamas were, in fact, a cause of Hamas's terrorism. *Id.* at 741–43. The panel outlined multiple ways in which the plaintiffs might show that support given to Hamas, even donations to its humanitarian activities, furthers its terrorist agenda, such that it could be considered a cause of David Boim's murder. *Id.* Someone familiar with Hamas's financial structure, or with the financing of terrorism generally, presumably could provide that sort of testimony. But the majority is not even conditioning liability on expert opinion that might link the various types of support provided to Hamas with its terrorist acts. Expert testimony as to the ways in which even aid to Hamas's humanitarian wing enables terrorism would be subject to adversarial testing and the judgment of the factfinder based on the totality of the evidence put before the court. But rather than subject the notion of causation to those checks, the majority, acting as though we ourselves are experts, simply declares causation to be a given that cannot be challenged. Liability under the majority's announced rule is sweeping: one who gives money to any Hamas entity, even if it is a small donation to help buy an x-ray machine for a Hamas hospital, is liable from now until the end of time for any terrorist act that Hamas might thereafter commit against an American citizen outside of the United States. (The majority itself acknowledges that under its approach a contribution to a terrorist organization in 1995 might render the donor liable for the murder of an American citizen committed by that organization fifty years later. *Ante* at 700.) This type of across-the-board judgment is out of place in the realm of torts. As an appellate court, it is our job to articulate a framework of liability under the statute and thereafter leave it to the parties to present evidence pursuant to that framework and to the factfinder to determine whether or not liability has been established. Where it is open to question, as I believe it is, whether even humanitarian support given to Hamas, to its charitable subsidiary, or to a hospital or other institution that receives funding from Hamas, actually contributes to Hamas's terrorist activities, it should be left to factfinding in individual cases (subject, of course, to appellate review) to evaluate, based on the evidence presented in those cases, what types of support to Hamas and its affiliated entities actually cause terrorism. *Cf. Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 744–45 (7th Cir.2008) (where the claims of multiple plaintiffs present complex factual questions, it is preferable to let those claims be resolved via individual lawsuits, so that the aggregate outcome fairly reflects the uncertainty of the plaintiffs' claims, rather than risk error by having the issue resolved on a class-wide basis by a single trier of fact).

The majority's decision to carve out an exception to its sweeping liability rule for non-governmental organizations like the Red Cross and Doctors Without Borders who provide humanitarian aid to individuals affiliated with Hamas lays bare the weakness of the rule's analytical underpinnings.[6] Providing medical care on the bat-

6. True, "medicine" is excluded from the definition of the "material support or resources" to terrorists proscribed by section 2339(A)(a), *see ante* at 699, citing § 2239(A)(b)(1). But to the extent that the medical exclusion lets an organization like the Red Cross off the hook (although I note that the services of the Red Cross are not limited to medical aid), then it logically ought to exonerate those who fund medical services provided by Hamas hospi-

tlefield to individuals that one knows are Hamas terrorists (*see ante* at 699) undoubtedly would have the effect of aiding Hamas's terrorism—patching up an injured terrorist enables him to strike again. I do not doubt that such aid could be given for noble and compassionate reasons, but neither do I doubt that from the standpoint of the Israelis whom Hamas targets, the knowing provision of medical care to individual terrorists could be and would be understood as aid to terrorism. One can also imagine scenarios in which medical aid could be provided for ignoble and devious reasons. *Cf. United States v. Alvarez–Machain,* 504 U.S. 655, 657, 112 S.Ct. 2188, 2190, 119 L.Ed.2d 441 (1992) (physician indicted for participating in the kidnap and murder of agent of Drug Enforcement Administration by helping to prolong captured agent's life so that others could continue to interrogate and torture him). Yet, for no apparent reason other than our own sense that organizations like the Red Cross and Doctors Without Borders are good and do good, the majority simply declares them exempt from the broad liability standard that it has announced. *Ante* at 699. On the other hand, any other individual or organization that gives to a Hamas-controlled charity is deemed liable, regardless of whether the money is given with a humanitarian purpose and regardless of whether the money is, in fact, put to humanitarian use. So one cannot fund the construction of a Hamas hospital, buy the hospital an x-ray machine, or volunteer her medical services to the hospital, because this is not providing direct aid to individuals in the manner of the Red Cross. My colleagues reason that there is a distinction between providing aid to an individual, even if he is terrorist, and aid to a terrorist organization. *Ante* at 699. But to my mind, that is a distinction without a difference when one knows that the individual being aided is engaged in terrorism (or is recklessly indifferent to that possibility). For example, the majority notes that one way in which Hamas uses its social welfare activities to reinforce its terrorist agenda is by providing economic aid to the families of killed, wounded, or captured Hamas terrorists, which ensures the continued loyalty of these family members to Hamas. *Ante* at 698. In that respect, one who donates money to Hamas in order to fund such payments thus could be thought to be promoting terrorism. Yet, the same could be said of a donor who instead makes payments directly to the family members of terrorists rather than giving the money to Hamas. Indeed, that is exactly what HLF is alleged to have done (among other things). *See Boim II,* 511 F.3d at 722; *Holy Land Found. for Relief & Dev.,* 219 F.Supp.2d at 71–73. So providing this type of aid to individuals, rather than to Hamas, would be accomplishing the same end, notwithstanding the fact that the donor was giving aid to individuals rather than to a terrorist organization. *See Singh–Kaur v. Ashcroft,* 385 F.3d 293, 301 (3d Cir.2004) (providing food and shelter to militant Sikhs who had committed or planned to commit terrorist acts constituted material support for terrorism). The distinction between aiding an organization and aiding individual members of that organization does not hold up.

It is only the majority's sweeping rule of liability that puts humanitarian organizations like Doctors Without Borders in peril and that forces the majority to carve out

tals, for example, for the statute in no way suggests that the exclusion depends on how the medical aid is provided. Yet the majority insists that funding a Hamas hospital would render the donor liable while directly aiding individual Hamas terrorists would not. *See ante* at 698, 699.

an unprincipled exemption for such organizations. If a plaintiff were required to establish a donor's intent to aid terrorism, along with a causal link between the aid provided and terrorist activity, then the factfinder would be able to draw reasoned, pragmatic distinctions (subject, of course, to appellate review) between those defendants who are truly enabling terrorism and those who are not.

4.

The secondary liability framework that we outlined in *Boim I,* and on which the plaintiffs built their entire case against the defendants, provides a more grounded and effective way of identifying and distinguishing between the types of support and supporters that actually aid terrorism and those that do not. As the panel recognized, those who aid and abet Hamas's terrorism can be held liable to the same extent as those who commit the terrorist acts. *Boim I,* 291 F.3d at 1016–21. But in addition to showing knowledge of Hamas's terrorist activity and the provision of financial or other support to Hamas, aiding and abetting would require proof of an intent to help Hamas's terrorist activities succeed. *Id.* at 1021, 1023.

Proof of intent would serve two important functions. First, it would serve to single out the most culpable of Hamas's financiers and other supporters by focusing on those who actually mean to contribute to its terrorist program, as opposed to those who may unwittingly aid Hamas's terrorism by donating to its charitable arm. I think it would be possible to infer the intent to further terrorism in a number of scenarios. Donations to Hamas itself have been a crime since 1997, for example, when Hamas was formally designated a foreign terrorist organization pursuant to 8 U.S.C. § 1189, *see* § 2339B(a) and (g)(6); and so a prohibited donation in the wake of that designation would be prima facie proof of one's intent to further terrorism.[7] The same could be said of donations to zakat committees and other organizations that themselves have been formally designated as terrorist organizations based on their links with Hamas. On the other hand, a factfinder confronted with evidence that a donor gave only to a non-designated, Hamas-controlled hospital for the purpose of funding the medical services provided by that hospital would be free to conclude that the donor had a benign intent and did not aid or abet Hamas's terrorism even if, in the abstract, one might believe that furthering Hamas's humanitarian activity enhances its image and thereby supports its violent activities. The ability of the factfinder to draw such distinctions is important, given the difficulty there might be in deciding, under the majority's standard, what constitutes a terrorist organization and what constitutes the knowing provision of support to such an organization. Organizations that openly embrace terrorism as their declared goal are easy to categorize as terrorist organizations. But what about organizations that engage in terrorism but disclaim responsibility? Or organizations whose members frequently engage in terrorist acts with implicit but not explicit approval from the organizations themselves? And what are we to make of charitable entities that are affiliated with such organizations?

7. Hamas previously had been designated a terrorist organization in January 1995 (some fourteen months before David Boim was killed) and donations to Hamas were prohibited from that point forward. *See Boim II,* 511 F.3d at 720. But the criminal penalties of section 2339B were not triggered until 1997 (the year after Boim was murdered), when Hamas was designated a foreign terrorist organization pursuant to section 1189. *See Boim I,* 291 F.3d at 1016.

Or charitable entities that receive some but not all of their funding from such organizations—a hospital that receives contributions from Hamas but is not controlled by it, for example? I am not sure just how far the majority's liability rule extends. Insisting on proof of a donor's intent to support terrorism would help to confirm the donor's culpability in instances where the terrorist nature of the organization receiving aid is less clear than it would be if a donor were making out a check payable to Hamas. It would also serve as a principled way to exempt organizations like the Red Cross and Doctors Without Borders, who engage in humanitarian work that may incidentally or tangentially aid individual terrorists or terrorist organizations, but who have no intent to aid terrorist activity.

The intent requirement would also play a vital role in protecting the First Amendment rights of those accused of facilitating Hamas's terrorism. The possibility that a section 2333(a) suit might implicate First Amendment rights is not an abstract one. Even to the extent that such a suit is based on the money that a defendant has contributed to an organization that engages in terrorism, the defendant's First Amendment rights must be accounted for, given that donating money to an organization, though it is not speech in and of itself, is one way to express affinity with that organization and to help give voice to the viewpoints that organization espouses. *See Buckley v. Valeo,* 424 U.S. 1, 65–66, 96 S.Ct. 612, 657, 46 L.Ed.2d 659 (1976) (per curiam) ("The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.' ") (quoting *NAACP v. Alabama,* 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958)); *see also Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 102 S.Ct. 434, 70 L.Ed.2d 492 (1981). Certainly, given the government's paramount interest in battling terrorism, the government may prospectively ban, and even criminalize, donations to an organization that it deems a terrorist organization. *See* § 2339B(a); *Boim I,* 291 F.3d at 1027; *Humanitarian Law Project v. Reno,* 205 F.3d 1130, 1135 (9th Cir.2000). Hamas was so designated in 1997, the year after David Boim was murdered. *See* n. 7, *supra.* But when an organization engages in both legal and illegal activities and donations to that organization have not been prohibited, a donor may not be held civilly liable for the organization's illegal activity based solely on his contributions, for to do so would infringe upon the defendant's First Amendment freedoms. *In re Asbestos School Litigation,* 46 F.3d 1284, 1290 (3d Cir.1994) (Alito, J.).

And money is not the only type of support that the defendants are alleged to have provided Hamas. One need only look again at the conduct for which AMS was held liable by the district court: hosting Hamas speakers at its conferences, publishing pro-Hamas articles and editorials in his newsletters, rallying support for HLF when it was declared a terrorist organization, and so forth. 340 F.Supp.2d at 908–13. All of that conduct involves pure speech. *See ante* at 700; *Boim I,* 291 F.3d at 1026.

And so the First Amendment is very much implicated by this case. Both through their contributions of money to Hamas and its subsidiary organizations, and (in the case of AMS) through their advocacy on behalf of Hamas, the defendants have demonstrated an affiliation with and affinity for Hamas. But *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), holds that an individual may not be held

civilly liable for his mere association with an organization whose members engage in illegal acts.

> Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.

Id. at 920, 102 S.Ct. at 3429 (footnote omitted). Moreover, an individual's intent vis-à-vis an organization that holds both lawful and unlawful purposes "must be judged 'according to the strictest law,' "

> for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share."

Id. at 919, 102 S.Ct. at 3429 (quoting *Noto v. United States,* 367 U.S. 290, 299–300, 81 S.Ct. 1517, 1521, 6 L.Ed.2d 836 (1961)). The panel in *Boim I* recognized that the aiding and abetting standard is consistent with the rule announced in *Claiborne Hardware* in that it conditions liability on proof that a defendant knew of the organization's illegal purposes *and* had the intent to further those purposes when that defendant joined and/or aided the organization. 291 F.3d at 1023–24. By contrast, the majority's approach requires no proof of an intent to further Hamas's activities; so long as a donor to Hamas or its affiliate knows that Hamas engages in terrorism, the donor is liable for any terrorist act committed by Hamas against an American citizen regardless of the purpose behind the donation.

The majority suggests that the rule of *Claiborne Hardware* does not apply because violence is a stated goal of Hamas rather than something a few rogue members happen to engage in without its approval.

> The defendants in the present case could not be held liable for acts of violence by members of Hamas that were not authorized by Hamas.... But as Hamas engages in violence as a declared goal of the organization, anyone who provides *material* support to it, knowing the organization's character, is punishable ... whether or not he approves of violence.

Ante at 700 (emphasis in original). But this holding is directly contrary to *Claiborne Hardware,* which requires proof of a defendant's intent to further violence even when violence is a goal that the organization embraces. *See* 458 U.S. at 920, 102 S.Ct. at 3429 ("For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals *and* that the individual held a specific intent to further those illegal aims.") (emphasis added). *See Scales v. United States,* 367 U.S. 203, 229, 81 S.Ct. 1469, 1486, 6 L.Ed.2d 782 (1961) (individual may be convicted for active membership in organization that advocates violent overthrow of U.S. government so long as there is "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.' ") (quoting *Noto v. United States,* 367 U.S. at 299, 81 S.Ct. at 1522); *see also Communist Party of Indiana v. Whitcomb,* 414 U.S. 441, 447–49, 94 S.Ct. 656, 661–62, 38 L.Ed.2d 635 (1974) (government may not forbid advocacy of lawbreaking or use of force unless it is inciting imminent lawless action) (citing *Brandenburg v. Ohio,* 395 U.S. 444, 447–48, 89 S.Ct. 1827, 1829–30, 23 L.Ed.2d 430 (1969)); *Elfbrandt v. Russell,* 384 U.S. 11, 15–18, 86

S.Ct. 1238, 1240–41, 16 L.Ed.2d 321 (1966). Certainly I agree that someone who gives money or other support to Hamas knowing that it *will* be used for terrorist activity—a violation of section 2339A(a)—can be held civilly liable for that activity, but in that case one's intent could readily be inferred. But to impose liability based on aid that may have been given—and, in fact, used-for humanitarian purposes is to do exactly what *Claiborne Hardware* proscribes: punish the supporter "for his adherence to [an organization's] lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." 458 U.S. at 919, 102 S.Ct. at 3429 (quoting *Noto*).

Given that the majority's analysis requires no proof of that any of the defendants intended to support Hamas's terrorism, it is inconsistent with the Supreme Court's First Amendment jurisprudence. Although the majority suggests that an intent requirement would, as a practical matter, eliminate donor liability except in those few cases where a donor declared his intent to support terrorism, *ante* at 698, that certainly is not true in other areas of the law where proof of a defendant's intent is required. As we often note in employment discrimination and a wide variety of other cases, there is rarely direct proof of a defendant's intent, and yet intent can be proved circumstantially. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 141, 120 S.Ct. 2097, 2105, 147 L.Ed.2d 105 (2000) (age discrimination); *Amrhein v. Health Care Serv. Corp.,* 546 F.3d 854, 858 (7th Cir.2008) (Title VII retaliation); *United States v. Roberts,* 534 F.3d 560, 571 (7th Cir.2008) (wire fraud); *United States v. Patterson,* 348 F.3d 218, 225–26 (7th Cir.2003) (narcotics conspiracy), *abrogated on other grounds by Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Toushin v. Comm'r of Internal Revenue,* 223 F.3d 642, 647 (7th Cir.2000) (tax fraud); *United States v. Rose,* 12 F.3d 1414, 1417, 1420 (7th Cir.1994) (aiding and abetting the transportation and receipt of a stolen motor vehicle). Moreover, should there be evidence that a defendant has made statements in support of the use of violence to achieve political ends, relying on such statements as proof that the defendant provided financial or other aid to a terrorist organization with the intent to support its terrorist activities would not, as the majority suggests, ante at 698–99, pose a First Amendment problem. *See Wisconsin v. Mitchell,* 508 U.S. 476, 489, 113 S.Ct. 2194, 2201, 124 L.Ed.2d 436 (1993) ("The First Amendment ... does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.").

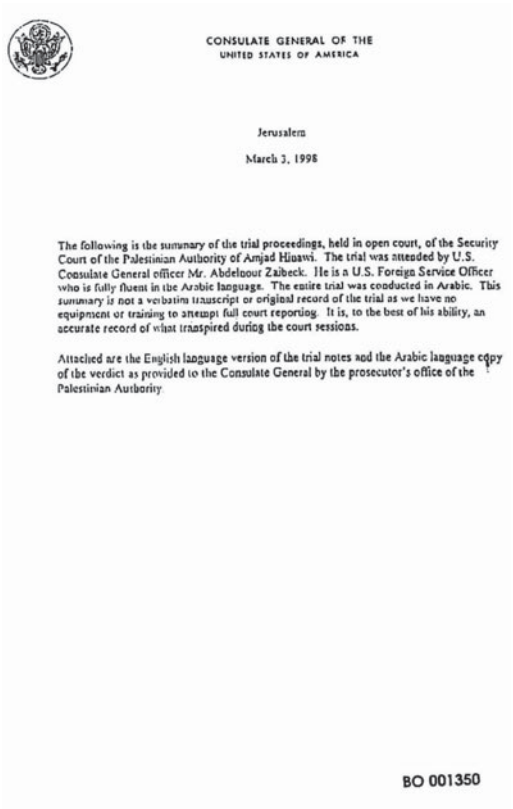
5.

Finally, the majority treats Dr. Paz's affidavit as sufficient evidence that Hamas was responsible for David Boim's murder. Although the majority recognizes that Paz relied on a variety of unauthenticated electronic and documentary sources for his conclusion, it nonetheless deems his affidavit admissible and sufficient to sustain summary judgment for the plaintiffs on this point because an expert is free in forming his opinion to rely on evidence that would not be admissible in court. *Ante* at 704. But the panel's principal point was that Dr. Paz's conclusion as to who killed David Boim is meaningless without reference to the websites and documents that he so heavily relied upon in forming his opinion, and yet allowing Paz to recount what those sources say without establishing their authenticity and trustworthiness would contradict the basic requirement that expert opinion have "a reliable foundation," *Daubert v. Merrell Dow Pharmaceuticals, supra,* 509 U.S. at 597,

113 S.Ct. at 2799; *see also* Fed.R.Evid. 703. Paz's opinion is based exclusively on what these websites and documents say; he has no personal knowledge of who killed David Boim. So if these sources are not genuine or say something other than what he has represented, then his opinion is worthless. No expert worth his salt would base his opinion on internet and documentary sources without assuring himself that they are reliable—that a website thought to be a Hamas site is, in fact, a website controlled by Hamas and authorized to make representations on its behalf, for example, or that what purports to be the written judgment of a foreign tribunal is actually that. But Paz's affidavit does not describe any such efforts that he made, and there is no other evidence in the record that establishes the authenticity and reliability of the websites and documents whose contents he recounts.

The glaring lack of any information confirming the authenticity and accuracy of Paz's sources raises obvious doubts about the reliability of his opinion. To cite just a few examples: For the proposition that Hinawi killed David Boim, Paz relies on a document in Arabic that purports to be the written judgment reflecting Hinawi's conviction and sentence before a Palestinian Authority tribunal, along with the notes of a U.S. State Department employee who observed Hinawi's trial. Here is the cover letter accompanying and describing both the trial notes and the judgment (Figure 1), followed by the judgment form (Figure 2):

Figure 1: Cover letter



CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

Jerusalem

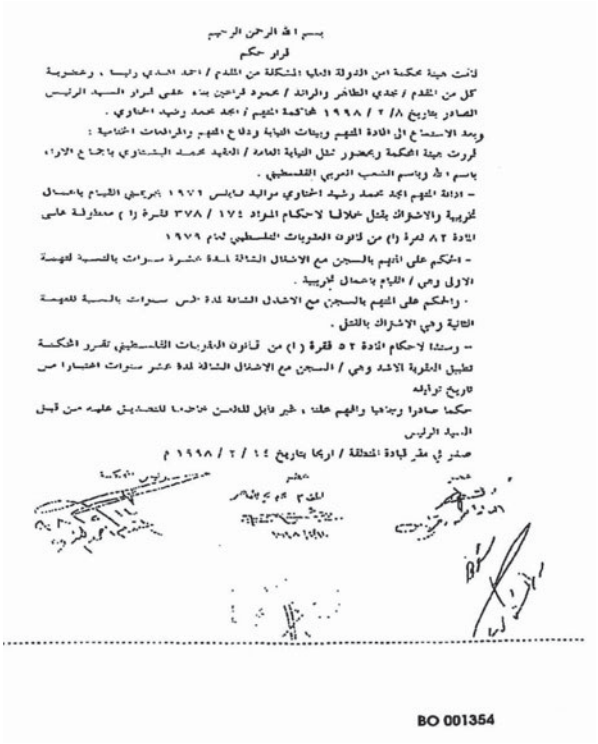
March 3, 1998

The following is the summary of the trial proceedings, held in open court, of the Security Court of the Palestinian Authority of Amjad Hinawi. The trial was attended by U.S. Consulate General officer Mr. Abdelnour Zaibeck. He is a U.S. Foreign Service Officer who is fully fluent in the Arabic language. The entire trial was conducted in Arabic. This summary is not a verbatim transcript or original record of the trial as we have no equipment or training to attempt full court reporting. It is, to the best of his ability, an accurate record of what transpired during the court sessions.

Attached are the English language version of the trial notes and the Arabic language copy of the verdict as provided to the Consulate General by the prosecutor's office of the Palestinian Authority.

BO 001350

Figure 2: Hinawi Judgment



بسم الله الرحمن الرحيم

قرار حكم

لدى هيئة محكمة امن الدولة العليا المشكلة من المقدم / احمد الشدي رئيسا ، وعضوية كل من المقدم / عبدي الطاهر والرائد / محمود فراجين بناء على قرار السيد الرئيس الصادر بتاريخ ٨/ ٢ / ١٩٩٨ لمحاكمة المتهم / ايجد محمد رشيد الحناوي .

وبعد الاستماع الى المادة المتهم وبينات النيابة ودفاع المتهم والمرافعات الختامية :

قررت هيئة المحكمة وبحضور ممثل النيابة العامة / العقيد محمد البشتاوي باجتماع الاراء باسم الله وباسم الشعب العربي الفلسطيني .

- ادانة المتهم ايجد محمد رشيد الحناوي مواليد نابلس ١٩٧١ بجريمتي القيام باعمال تخريبية والاشتراك بقتل خلافا لاحكام المواد ١٧٤ / ٣٧٨ فقرة (أ) معدلة على المادة ٨٢ فقرة (أ) من قانون العقوبات الفلسطيني لعام ١٩٧٩

- الحكم على المتهم بالسجن مع الاشغال الشاقة لمدة عشرة سنوات بالنسبة للتهمة الاولى وهي / القيام باعمال تخريبية .

- والحكم على المتهم بالسجن مع الاشغال الشاقة لمدة خمس سنوات بالنسبة للتهمة الثانية وهي الاشتراك بالقتل .

- وعملا لاحكام المادة ٥٢ فقرة (أ) من قانون العقوبات الفلسطيني تقرر المحكمة تطبيق العقوبة الاشد وهي / السجن مع الاشغال الشاقة لمدة عشر سنوات اعتبارا من تاريخ توقيفه

حكما صادرا وجاهيا والمهم علنا ، قابل للطعن خلال (١٥) يوما للتصديق عليه من قبل السيد الرئيس

صدر في مقر قيادة المنطقة / اريحا بتاريخ ١٤ / ٢ / ١٩٩٨ م

BO 001354

No translation of the Arabic-language judgment has been provided (it could be an advertisement for all I know), and neither the judgment nor the notes of the foreign service officer have been authenticated in any meaningful way by the cover letter, which does not even identify the letter's author. We have absolutely no way to know, given the current state of the record, whether these documents are what Paz says they are, and thus no way of assessing the reliability of his conclusions. As a final example, here is one of the web pages Paz relied on as evidence that Hamas took responsibility for David Boim's murder:

Figure 3: web page

في كل السجون، فساهمت في رفع معنويات المجاهدين ليخرجوا من السجون كمن يتخرج من الجامعة ويواصلوا مسارك الجهاد والشرف مع شعبهم.

وفور خروجه من السجن عاد إلى ساحة العمل النضالي في الانتفاضة وفي كلية الدعوة وأصول الدين في القدس المحتلة التي انتسب إليها، وواصل الكفاح من احدى ساحات المواجهة وأرض الرباط قدس الأقداس. وبسبب ما تميز به من صفات القيادة والعطاء جعله يتمتع بشعبية كبيرة ويقود الحركة الطلابية ويصبح رئيس مجلس الطلبة في الكلية.

هذا السجل المشرف غرضه للاعتقال من قبل الاحتلال مرة أخرى عام 1992، وبعد أيام محدودة صدر قرار بإبعاده مع 412 مجاهداً من حركتي حماس والجهاد الإسلامي إلى مرج الزهور في جنوب لبنان. وقد حدثنا رفاقه الذين عاشوا معه لحظات المنفى انه كان شديد البأس قوي العزيمة وضع لنفسه برنامجاً لاستغلال كل لحظة لما يفيد شعبه ورفاقه. وحسب روايات الأجهزة الأمنية الإسرائيلية فإن أبو هنود تلقى تدريبات عسكرية مهمة خلال فترة إبعاده التي دامت عاماً. والتقى كبار مسؤولي حماس وحمل منهم على تعليمات خاصة بالجناح العسكري، الذي انخرط فيه بعد عودته من مرج الزهور. وتؤكد مصادر حماس ان وتيرة العمل الجهادي لأبو هنود تزايدت وارتفعت بعد الإبعاد. وكرس كل أوقاته لمطاردة المحتلين. حتى اصبح بعد الإبعاد بثلاث سنوات المسؤول عن الجهاز العسكري في كتائب القسام خلفاً للقائد الشهيد محيي الدين الشريف ويقي في هذه المهمة حتى استشهاده.

سجل الشرف (Record of honor)

يزخر سجل الشرف والجهاد للشهيد القائد ابو هنود بالعشرات من العمليات النوعية التي قادها أو نفذها شخصياً. ومن أبرزها استهداف حافلة صهيوني في تشرين الأول / اكتوبر عام 1995 قرب مستوطنة "كوفاف يعقوب" وأدت لإصابته (الحادثة) بجراح بالغة. وفي ايار/ مايو 1996 قاد مجموعة أطلقت النار على حافلة مستوطنين قرب "بيت ايل" وأسفرت عن مقتل صهيوني وإصابة 3 آخرين بجروح. (In May 1996 he led a group that shot at a convoy of settlers near Bet El, what resulted in the killing of one Zionist and injuring three others) وفي الشهر نفسه اطلق النار على حافلة اسرائيلية قرب "حيل عيال" ما أدى لاصابة جميع ركابها ومقتل أحدهم.

ولم يتوقف أبو هنود عن عملياته الجريئة رغم ذياع صيته واعلان "اسرائيل" حالة الاستنفار القصوى لاعتقاله وتصفيته، والتي ارفقتها بحملات مستمرة من التهديد والوعيد لأسرته لم توفر مفراً أو كبيراً. وفي تموز / يوليو 1997 قام بتفجير عبوة ناسفة بدورية ا "حرس الحدود" قرب قبر "سيدنا يوسف" فأصيب جنديان في العملية ولكن الضربة الأكبر كانت في شهر تموز نفسه تمثلت بالعملية الاستشهادية المزدوجة التي اعد لها بإتقان في سوق "محنيه يهودا" وأدت إلى مصرع 16 وجرح 196 صهيونياً. وفي أيلول / سبتمبر عام 1997 كانت العملية المزدوجة الاستشهادية الثانية في شارع "بن يهودا" في القسم الغربي من القدس المحتلة وأسفرت عن مصرع 5 وأصابة 120 صهيونياً. وفيها كان كيان العدو يتخبط امام ضربات المجاهدين جاءت العملية الاستشهادية الثالثة في أيلول نفسه في المركز التجاري في "تل ابيب" وكانت حصيلتها 5 قتلى وأصابه 67 صهيونيا.

وفي تشرين الأول من العالم 97 أيضاً قاد أبو هنود عملية لأسر جندي صهيوني قرب "الون موريه" ولكنه لم يوفق. ولانه موصوف بأنه كان العدو الأكبر للفشل ثلاث عمليات "كتائب القسام" وتزايدت في انتفاضة الاقصى. ودحلته "اسرائيل" المسؤولية الأولى والأخيرة عنها ليصبح المطلوب رقم واحد، وتتواصل محاولات اغتياله لتعيش أسرته لحظات عصيبة وقاسية في ظل المداهمات والكمائن التي كانت تنصب حول بيتها. وقد مارست قوات الاحتلال كل أشكال التنمر والعقاب بحق أهله. فتم اعتقال الأخير لاجباره على تسليم نفسه. ومنعت ذويه من السفر وتعرضوا للاحتجاز والتعذيب على يد جنود الاحتلال. وتقول والدته: "كنا نرفض أن يستسلم لأنه يقود معركة عادلة من

The selective translation obviously makes it impossible for the reader to independently evaluate the context and meaning of what Paz is relying on. Notwithstanding these infirmities, the majority is content not only to deem Paz's opinion admissible, but to sustain the entry of summary judgment against the defendants on this point. The defendants cannot be faulted for failing to refute Paz's conclusions, *see ante* at 704–05, for the party opposing summary judgment is not required to rebut factual propositions on which the movant bears the burden of proof and that the movant has not properly supported in the first instance. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S.Ct. 2548, 2557, 91 L.Ed.2d 265 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE & PROCEDURE § 2727 (2d ed.1983)); *L & W, Inc. v. Shertech, Inc.*, 471 F.3d 1311, 1318 (Fed.Cir.2006); *Black v. M & W Gear Co.*, 269 F.3d 1220, 1238 (10th Cir.2001). In any other sort of case, this sort of sloppiness would not be tolerated, and we certainly would not sustain the entry of summary judgment based on such shaky evidence.[8]

6.

The murder of David Boim was an unspeakably brutal and senseless act, and I can only imagine the pain it has caused his parents. Terrorism is a scourge, but it is our responsibility to ask whether it presents so unique a threat as to justify the abandonment of such time-honored tort requirements as causation. Our own re-

8. One of the other concerns the panel noted was the lack of a foundation for attributing the representations on various websites regarding David Boim's murder to Hamas. 511 F.3d at 753. If that seems like nitpicking, consider the following: Octavia Nasr, "bin Laden hacked?", AC360, http://ac360.blogs.cnn.com/2008/10/23/bin-laden-hacked/ (last visited 11/25/2008).

sponse to a threat can sometimes pose as much of a threat to our civil liberties and the rule of law as the threat itself. *See, e.g., Korematsu v. United States,* 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The panel's opinion in *Boim II* took a conservative approach, fully consistent with precedent, that insisted on proof that the defendant's actions were a cause of Hamas's terrorism, proof that the defendants intended to support terrorism, and admissible evidence to support such basic factual points as whether Hamas was responsible for David Boim's murder. This en banc court, by contrast, relieves the plaintiffs of all of these obligations, following a path that portends sweeping liability for those individuals and groups who give their support to the humanitarian activities and affiliates of terrorist organizations but who may have no intent to support terrorism and whose actual link to terrorism has never been evaluated by a factfinder. I stand by the approach taken by the *Boim I* and *Boim II* panel.

7.

For all of the reasons set forth above and in the panel's *Boim II* opinion, I would remand for further proceedings as to all four defendants, including Salah. I would require the plaintiffs on remand to demonstrate that any financial or other support the defendants have given to Hamas and Hamas-affiliated entities was in some way a cause of Hamas's terrorism. I would also insist the plaintiffs set forth a more complete evidentiary foundation for the proposition that Hamas killed David Boim.

WOOD, Circuit Judge, concurring in part and dissenting in part.[1]

This is a heart-breaking case. No parent can fail to empathize with Joyce and Stanley Boim, who lost their son to the evil of terrorism just as he was on the brink of all of life's promise. Nothing can bring David Boim back, but the Boims have taken advantage of a statute that Congress passed that was designed to provide some degree of accountability for those who commit such awful acts. See 18 U.S.C. § 2333(a). In *Boim v. Quranic Literacy Inst. & Holy Land Found.,* 291 F.3d 1000 (7th Cir.2002) ("*Boim I* "), this court decided that the set of possible defendants in such an action includes not only the direct actors (here, Amjad Hinawi and Khalil Tawfiq Al–Sharif) and the organization to which they belonged and that directed their actions (here, said to be Hamas), but also organizations that aid and abet the former two. When all is said and done, the *en banc* majority has reaffirmed the latter ruling, though it does so under a slightly different rubric. But, in our zeal to bring justice to bereaved parents, we must not lose sight of the need to prove liability on the facts that are presented to the court. Assumptions and generalizations are no substitute for proof. Particularly because, unfortunately, this probably will not be the last case brought by a victim of international terrorism, it is crucial that we be as clear as we can in fleshing out the statutory requirements and that we do not rush to judgment. Because I do not agree with the majority's articulation and application of some of the governing legal standards, and I find too many central facts to be in dispute, I am still of the view that this case needs to be remanded for further proceedings.

I begin, however, by underscoring that I agree with the *en banc* majority's analysis on a number of points. First, throughout

1. Judge Rovner and Judge Williams join this opinion except with respect to Salah's liability.

the proceedings before this court, we have unanimously rejected the district court's decision to give collateral estoppel effect to the findings in the case that was litigated in the District of Columbia, *Holy Land Found. for Relief & Dev. v. Ashcroft,* 219 F.Supp.2d 57 (D.D.C.2002), affirmed, 333 F.3d 156 (D.C.Cir.2003) ("*HLF v. Ashcroft*"). See *Boim v. Holy Land Foundation for Relief and Dev.,* 511 F.3d 707, 720–33 (7th Cir.2007) ("*Boim II*"). We all agree that it was error to grant summary judgment in favor of the plaintiffs against the Holy Land Foundation for Relief and Development ("HLF"), and that further proceedings are required. Second, under the new analysis that the *en banc* majority has undertaken, which uses "a chain of explicit statutory incorporations by reference," *ante,* at 690, it was error to grant summary judgment in favor of the plaintiffs against Muhammad Salah. Again, we all agree that there are problems with Salah's part of the case. The *en banc* majority is reversing the finding of liability outright because Salah could not have rendered material support to Hamas between the effective date of 18 U.S.C. § 2339A, September 13, 1994, and the date of David Boim's murder, May 13, 1996, because he was in Israeli custody between January 1993 and November 1997. *Ante,* at 691. In fact, the *Boim II* panel majority took a less absolute approach. It found that the district court erred in concluding that Salah's liability could be established only by showing that (1) he knew of Hamas's terrorist activities, (2) he desired to help those activities succeed, and (3) through his participation in the Hamas conspiracy, acts of co-conspirators sufficed to show that he engaged in some act of helping to bring about Boim's murder. Rather than reversing outright, as the *en banc* majority has done, the *Boim II* panel majority would have reversed the summary judgment in the plaintiffs' favor and remanded to give plaintiffs the opportunity to identify "evidence that would permit a reasonable factfinder to find that Salah's actions on behalf of Hamas in some way caused or contributed to David Boim's death." *Boim II,* 511 F.3d at 748.

I am persuaded by the *en banc* majority's statutory analysis that the correct result is reversal of the finding against Salah, rather than a remand for further proceedings. Its careful exegesis of the way that the governing statutes in this area work together demonstrates why the furnishing of material assistance is a ground for liability under 18 U.S.C. § 2333. I thus do not dissent from the *en banc* court's decision that the judgment against Salah must be reversed.

It is the *en banc* majority's analysis of the cases against the Quranic Literacy Institute ("QLI") and the American Muslim Society ("AMS") (along with the Islamic Association of Palestine) that I find problematic. I continue to believe that the decisions in *Boim I* and *Boim II* correctly found that Congress intended, in passing 18 U.S.C. § 2333, to create an intentional tort, that it meant to "extend civil liability for acts of international terrorism to the full reaches of traditional tort law," *Boim I,* 291 F.3d at 1010, that nothing in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994), suggests that Congress lacks the power to do so when it wishes, and finally that § 2333 does impose secondary liability on those who aid and abet acts of terrorism. The *en banc* majority expresses doubts about this holding, although in the end it neither adopts it nor rejects it. Instead, it turns to "an alternative and more promising ground for bringing donors to terrorist organizations within the grasp of section 2333." *Ante,* at 690.

Working through a chain of statutes—from § 2333(a) (treble damages action for person injured by an act of international terrorism), to § 2331(1) (definition of international terrorism), to § 2339A (providing material support for something that violates a federal criminal law is itself a crime), to § 2332 (criminalizing the killing of any American citizen outside the United States)—the *en banc* majority concludes that there is *primary* liability under § 2333(a) for someone who donates money "to a terrorist group that targets Americans outside the United States." *Ante,* at 690. The *en banc* majority then establishes several criteria for the claim it has recognized: (1) it is the fact of contributing to a terrorist organization, not the amount of the contribution, that is the key to liability, *ante,* at 691; and (2) there is a knowledge requirement, to the effect that the donor-defendant must have known that the money would be used "in preparation for or in carrying out the killing or attempted killing of, conspiring to kill, or inflicting bodily injury on, an American citizen abroad." *Ante,* at 691. At that point, however, the *en banc* majority announces that its theory does not establish primary liability after all—instead, a claim based on material support "has the character of secondary liability. Through a chain of incorporations by reference, Congress has expressly imposed liability on a class of aiders and abettors." *Id.*

I would have thought that this was exactly the conclusion that the *Boim I* panel reached. By labeling its theory as one of primary liability, the *en banc* majority is apparently trying to reap the advantages of both kinds of theories. It acknowledges that in order to prove a primary liability case, the plaintiffs would need to establish "the ordinary tort requirements relating to fault, state of mind, causation, and foreseeability." *Ante,* at 692. But, it says, those requirements do not apply here, because "functionally the primary violator is an aider and abettor or other secondary actor." *Ante,* at 692.

I believe that the following is a fair summary of the formal requirements that the *en banc* majority has announced for proving a case under § 2333:

1. Act requirement: the defendant must have provided material assistance, in the form of money or other acts, directly or indirectly, to an organization that commits terrorist acts.
2. State of mind requirement: the defendant must either know that the donee organization (or the ultimate recipient of the assistance) engages in such acts, or the defendant must be deliberately indifferent to whether or not it does so.
3. Causation: there is no requirement of showing classic "but-for" causation, nor, apparently, is there even a requirement of showing that the defendant's action would have been sufficient to support the primary actor's unlawful activities or any limitation on remoteness of liability.

There is little to criticize in the first of these criteria, *as an abstract matter.* The second may also pass muster, *again as an abstract matter.* For both of these, my problem with the *en banc* majority's opinion lies more in the way that they are applied to these facts, as I explain further below, than in their formal scope. With respect to the third requirement, there is both a theoretical problem and a problem with the application, and so I begin with that.

The *en banc* majority asserts that its position on causation is supported by a number of cases that it discusses. Those cases, however, do not go as far as the *en banc* majority claims, nor am I familiar

with anything else in the law of torts that does so. It is important here to be precise once again about areas of agreement and areas of disagreement. The *en banc* majority is quite right to point out that literal "but-for" causation cannot be shown in certain cases, and in those cases, the courts have accepted substitutes for the "but-for" showing. Thus, in the case where there are two independent acts, and either one alone would have brought about the injury, a defendant who was responsible for one of those acts cannot defeat liability by pointing out that the other one would have been enough to create the harm by itself. That is the principle illustrated by *Kingston v. Chicago & N.W. Ry. Co.,* 191 Wis. 610, 211 N.W. 913 (1927), discussed in our decision in *Maxwell v. KPMG LLP,* 520 F.3d 713, 716 (7th Cir. 2008). It is also the principle endorsed by the most recent draft of the American Law Institute's Restatement (Third) of the Law of Torts: Liability for Physical and Emotional Harm, § 27 ("Restatement (Third) of Torts"), which says "[i]f multiple acts occur, each of which alone would have been a factual cause under § 26 of the physical harm at the same time in the absence of the other act(s), each act is regarded as a factual cause of the harm." This is a far cry from saying that cause need not be proven if there are multiple sufficient causes; the ALI's draft acknowledges simply that some harms may be overdetermined, and in those cases, cause can be proven by demonstrating that the defendant's tortious conduct was sufficient to produce the harm. *Maxwell,* cited by the *en banc* majority, illustrates this principle as well as anything: "There are also cases in which a condition that is not necessary, but is sufficient, is deemed the cause of an injury, as when two fires join and destroy the plaintiff's property and each one would have destroyed it by itself and so was not a necessary condition; yet each of the firemakers (if negligent) is liable to the plaintiff for having 'caused' the injury." 520 F.3d at 716. The key word here is "sufficient": the plaintiff cannot win without showing that the defendant's act would have been sufficient to cause the injury, even though it may be the case that other acts might also have been sufficient.

The other examples the *en banc* majority uses fit the rule articulated in Restatement (Third) § 27. Thus, if there were two wrongful causes and a third innocent one (two arsonists plus a lightning strike, for example), any of which would have caused the injury at issue, the person responsible for one of the wrongful acts cannot take refuge in the fact that other sufficient causes were also present. Or if, as in the classic case of *Summers v. Tice,* 33 Cal.2d 80, 199 P.2d 1 (1948), there are two possible causes, either of which would have been sufficient to cause the harm (a bullet from each of two guns, either one of which would have sufficed to harm the third party), once again *sufficient* cause has been proven even if *necessary* cause cannot be. Ditto with the *en banc* majority's example of several firms that spill toxic waste that finds its way into groundwater and damages property. Even if the damage is slight, that wrongful act is sufficient for liability. Any remaining uncertainties can be resolved through rules on apportionment of damages.

In the end, the *en banc* majority is reduced to relying on a case where a roomful of junior high school students erupted into a melee and a bystander student was seriously hurt. See *Keel v. Hainline,* 331 P.2d 397 (Okla.1958). A closer look at the facts of that case is useful. Approximately 35 to 40 students were in their music classroom one day, but because the instructor failed to show up on time, they were unsupervised for about a half hour.

Here is the court's description of what unfolded:

> During the absence of the instructor, several of the male students indulged in what they termed "horse play". This activity consisted of throwing wooden blackboard erasers, chalk, cardboard drum covers, and, in one instance, a "coke" bottle, at each other. It appears that two or three of the defendants went to the north end of the class room and the remaining defendants went to the south end of the room. From vantage points behind the blackboard on the north end and the piano on the south end, they threw the erasers and chalk back and forth at one another. This activity was carried on for a period of some 30 minutes, and terminated only when an eraser, thrown by defendant [Larry] Jennings, struck plaintiff in the eye, shattering her eye glasses, and resulting in the loss of the use of such eye.

331 P.2d at 398–99. The defendants to whom the court refers were six boys—two or three at one end of the room, the rest at the other end of the room. Robert Keel, the plaintiff-in-error, was in one of those groups—the facts do not mention whether Keel was on Jennings's "team" or the other one. The court first found that what it characterized as "the willful and deliberate throwing of wooden blackboard erasers at other persons in a class room containing 35 to 40 students" was wrongful conduct, because it amounted to an assault and battery. *Id.* at 399. The intent of the actors was immaterial. Addressing Keel's argument that there was no evidence that he aided or abetted Jennings in the final throw that injured the plaintiff, the court said:

> It is undisputed that defendant Keel participated in the wrongful activity engaged in by the other defendants of throwing wooden blackboard erasers at each other back and forth across a class room containing 35 to 40 students, although most of the testimony indicates that defendant Keel's participation was limited to the retrieving of such erasers and handing them to other defendants for further throwing. Keel aided and abetted the wrongful throwing by procuring and supplying to the throwers the articles to be thrown. It is immaterial whether defendant Keel aided, abetted or encouraged defendant Jennings in throwing the eraser in such a manner as to injure Burge, or not, since *it is virtually undisputed that defendant Keel aided, abetted or encouraged the wrongful activity of throwing wooden erasers at other persons,* which resulted in the injury to Burge.

331 P.2d at 400 (emphasis added). The *en banc* majority reads this as a holding that Keel was liable "even though there was no proven, or even likely, causal connection between anything he did and the injury." *Ante,* at 697. But that reading entirely ignores the perspective that the Oklahoma court adopted. Keel and the other five boys jointly created a dangerous situation in the classroom. By acting together, they greatly enhanced the risk of harm to the other students in the room. So viewed, there is a readily observable causal link between the collective action of the six boys and the harm the plaintiff suffered. Whether we call Keel's contribution "material support" or something else does not matter—the point here is that the Oklahoma court did not dispense with the requirement of proving causation.

So, too, must we insist on proof that QLI's and AMS's actions amounted to at least a sufficient cause of the terrorist act that killed David Boim, even if, on these facts, there were multiple such causes. The *Boim II* panel majority opinion outlines ways in which this might be done. I would summarize these approaches to the

causation element as follows: there must be proof (1) that the actual recipient organization received a non-trivial amount of money from either QLI or AMS, and (2) that the recipient was, itself, sufficiently affiliated with Hamas that those dollars indirectly supported Hamas's terrorist mission. Because money is fungible, the combination of the link to Hamas and the receipt of an amount that would have been sufficient to finance the shooting at the Beit El bus stop would be enough to show that the "material assistance" of giving money caused the terrorist act that took David Boim's life. (There is no allegation here that either QLI or AMS directly funneled money to Hamas; had there been, this obviously would have sufficed as well.)

Another reason why I find it ill-advised to exempt plaintiffs suing under § 2333 on a "material assistance" theory from showing causation is that this approach also appears to eliminate the need to show what was classically called "proximate cause." As the Proposed Final Draft to the Restatement (Third) of Torts points out, that term is imprecise at best. See Restatement (Third) of Torts, ch. 6, Special Note on Proximate Cause. The new Restatement refers to this concept as "scope of liability," in recognition of the fact that "[t]ort law does not impose liability on an actor for all harm factually caused by the actor's tortious conduct." *Id.* At some point, the harm is simply too remote from the original tortious act to justify holding the actor responsible for it. It may be the case that the boundaries of liability are wider for intentional torts, see Restatement (Third) of Torts § 33, but that does not mean that they are limitless. In part, this reflects the reality that as the temporal or factual chain between the tortious act and the harm becomes ever longer, the likelihood of intervening or superseding causes becomes greater. See generally Restatement (Third) of Torts § 34. The *en banc* majority freely concedes that there are no limits at all to its rule, and that a donor who gave funds to an organization affiliated with Hamas in 1995 might still be liable under § 2333 half a century later, in 2045. I see no warrant for assuming that § 2333, unlike the rest of tort law, contains no scope-of-liability limitations. I note as well that such an open-ended rule would be in serious tension with the general four-year statute of limitations Congress has passed for civil actions based on statutes passed after 1990 (like this one). See 28 U.S.C. § 1658.

The scope of the causation element is not my only concern about the *en banc* majority's opinion. My other problem is with its application of the principles that, at a high level of generality, state the law correctly. As I noted earlier, the plaintiffs must prove that the defendant provided material assistance to an organization that commits terrorist acts. But what does it take to qualify as such an organization? The Boims did not sue Hamas, nor does their case rely on the proposition that QLI or AMS sent money directly to Hamas. We must decide how far down the chain of affiliates, in this shadowy world, the statute was designed to reach, and how deeply Hamas must be embedded in the recipient organization. QLI and AMS argue strenuously that at worst they sent money to charitable organizations with some kind of link to Hamas. Some might have been analogous to wholly owned subsidiaries; some might have been analogous to joint ventures; some might have been independent entities that accepted funding from Hamas as well as other more reputable organizations. The record throws little light on these matters, because the district court thought them irrelevant. As I understand the *en banc* majority opinion, it is saying that even if an independent day care center receives $1 from organization

H known to be affiliated with Hamas, not only the day care center but also anyone who gave to H is liable for all acts of terrorism by Hamas operatives from that time forward against any and all Americans who are outside the United States.

That is a proposition of frightening, and I believe unwise, breadth. The *en banc* majority has tried to carve out humanitarian non-governmental organizations like the American Red Cross and Doctors Without Borders, which (fortuitously) may also benefit from a "medical services" exemption in the statute. But I am not sure that it has succeeded. Those worthy organizations are not the only ones committed to nondiscriminatory treatment of all needy human beings. The United Nations High Commissioner for Refugees sponsors many programs designed to assist people in war-torn areas. The United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA") has been in existence since 1950. See http://www.unhcr.org/partners/PARTNERS/48fdeced20.html (last visited November 11, 2008). It describes itself as "the main provider of basic services—education, health, relief and social services—to over 4.1 million registered Palestine refugees in the Middle East." *Id.* The odds are strong that some of the agencies that UNRWA helps may also receive assistance from Hamas. The *en banc* majority does not tell us whether, if QLI or AMS also happens to give money to such an agency, the donor has violated § 2333 by doing so.

The *en banc* majority also slides over the statutory requirement (derived from its chain of statutory connections) that the entity providing material assistance must know that the donee plans to commit terrorist acts against U.S. citizens. *Ante,* at 691–92, 693. All that is necessary, we are told, is that

> a donor [to Hamas—and presumably to another organization with an adequate link to Hamas, whatever that may be] who knew the aims and activities of the organization [only Hamas? or the affiliated recipient?]—would know that Hamas was gunning for Israelis, that Americans are frequent visitors to and sojourners in Israel, that some Israeli citizens have U.S. citizenship as well, and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel.

Ante, at 693–94. This is awfully vague. Americans travel, and are known to travel, to every country on the face of the globe—they even go to places like Antarctica that are not even countries. If one could, it would be more realistic and sound as a legal matter simply to hold that it makes no difference whether or not the terrorist acts that the organization commits are directed toward Americans. The only problem with such a holding—which otherwise would be a routine application of the doctrine of transferred intent—is that the statutory basis for a tort action under § 2333 depends upon a finding that the material support violated U.S. federal criminal law, and that here the crime in question is the killing of an American citizen outside the United States. In my view, given the language of the statutes that Congress has passed thus far, we are required to take a more restricted view of § 2333. A statute focusing on extraterritorial killings of Americans would still be a strong tool against terrorist activities and organizations that threaten vital U.S. interests. Al Qaeda, for example, trumpets its intent to target Americans whenever and wherever it can. If the plaintiffs could show both that Hamas has done the same thing and further that Hamas's intent should be attributed to the donee organiza-

tion (recalling once again that neither QLI nor AMS gives money directly to Hamas), then a § 2333 claim may proceed; otherwise, it may not. Put differently, I find it difficult to read § 2333 as creating a claim against an organization that has, in effect, declared war on the entirety of civilization.

The *Boim II* opinion explains the problems with a finding, on the present record, that Hamas was indeed responsible for David Boim's murder. That finding rests entirely on the affidavit submitted by Dr. Reuven Paz. The majority accepts that affidavit as adequate, noting only the uncontroversial point that experts are allowed to rely on hearsay and other inadmissible evidence. See FED.R.EVID. 703 (expert may rely on facts or data "reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject"). No one doubts this. The panel's point in *Boim II* was that, at least since *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and the revision of FED. R. EVID. 702, there must nevertheless be a solid foundation for the expert's opinion. Rule 702 puts the point this way: the expert may offer an opinion "if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." It is these threshold criteria that are at issue. No one is saying that these requirements *cannot* be met in this case, or in any other case involving international terrorism. They just have not been satisfied yet, and so QLI and AMS should have won a remand on this basis as well.

For these reasons, I would remand for further proceedings on the claims against QLI and AMS. I concur in the *en banc* majority's opinion insofar as it reverses the judgment against Salah and it remands for further proceedings on the claims against HLF.

UNITED STATES of America, Plaintiff–Appellee,

v.

Gregg Michael LANGLEY, Defendant–Appellant.

No. 08–1508.

United States Court of Appeals, Eighth Circuit.

Submitted: Sept. 22, 2008.

Filed: Dec. 10, 2008.

Background: Following jury trial, defendant was convicted in the United States District Court for the Western District of Arkansas, Jimm Larry Hendren, J., of traveling in interstate commerce for the purpose of engaging in illicit sexual conduct with a minor and using a means of interstate commerce to persuade, induce, entice, or coerce a minor to engage in sexual activity. Defendant appealed.

Holdings: The Court of Appeals, Bye, Circuit Judge, held that:

(1) admission of computer pictures depicting another apparent minor engaging in sexual conduct was harmless, and

(2) evidence was sufficient to show that defendant believed victim was under age of 16, as required for convictions.

Affirmed.

Beam, Circuit Judge, filed concurring opinion.

Annex 475

18 U.S.C. § 2339A (2009)

18 U.S.C.A. § 2339A

§ 2339A. Providing material support to terrorists

Effective: December 22, 2009
Currentness

(a) Offense.--Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) Definitions.--As used in this section--

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

CREDIT(S)

(Added Pub.L. 103-322, Title XII, § 120005(a), Sept. 13, 1994, 108 Stat. 2022; amended Pub.L. 104-132, Title III, § 323, Apr. 24, 1996, 110 Stat. 1255; Pub.L. 104-294, Title VI, §§ 601(b)(2), (s)(2), (3), 604(b)(5), Oct. 11, 1996, 110 Stat. 3498, 3502, 3506; Pub.L. 107-56, Title VIII, §§ 805(a), 810(c), 811(f), Oct. 26, 2001, 115 Stat. 377, 380, 381; Pub.L. 107-197,

Title III, § 301(c), June 25, 2002, 116 Stat. 728; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(7), (c)(1), (e)(11), Nov. 2, 2002, 116 Stat. 1807, 1808, 1811; Pub.L. 108-458, Title VI, § 6603(a)(2), (b), Dec. 17, 2004, 118 Stat. 3762; Pub.L. 109-177, Title I, § 110(b)(3)(B), Mar. 9, 2006, 120 Stat. 208; Pub.L. 111-122, § 3(d), Dec. 22, 2009, 123 Stat. 3481.)

Notes of Decisions (42)

18 U.S.C.A. § 2339A, 18 USCA § 2339A
Current through P.L. 115-171.

End of Document

Annex 476

"Fighters and Lovers Case," Case 399/2008 (Sup. Ct., Den., 25 March 2009)

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. The translated passages are highlighted in the original-language document. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Memorial, but stands ready to provide additional translations should the Court so require.

"Fighters and Lovers Case"

March 25, 2009

Case 399/2008

March 25, 2009

PRESS RELEASE

The Danish Supreme Court today handed down a decision in the so-called "Fighters and Lovers Case." The Supreme Court upheld the decision of the High Court, albeit with the sentences for the accused being suspended, while the sentence for one of the accused was reduced from a four-month suspended prison sentence to a 60-day suspended prison sentence.

The case before the Supreme Court concerned six individuals who had been accused of attempting to provide support to groups engaged in terror, in that they had been involved, via the Fighters and Lovers company, in the sale of T-shirts with the intent of sending a portion of the proceeds to the Popular Front for the Liberation of Palestine (PFLP) and Fuerzas Armadas Revoluncionarias de Colombia (FARC) organizations.

All were acquitted by the Copenhagen Municipal Court, but were found guilty in the Eastern High Court judgment. The High Court sentenced two people to six-month unsuspended prison terms; the others were given suspended prison sentences of four months and 60 days, respectively.

Seven justices took part in the Supreme Court's hearing of the case. The verdict was unanimous.

The Supreme Court's decision was based on the following grounds:

"Pursuant to § 114 b (formerly § 114 a) of the Danish Penal Code, it a condition for punishment in connection with the raising or collection of funds, that the collection, etc., has been carried out for a person, group or association that is perpetrating or intends to perpetrate acts covered by § 114 of the Penal Code. It is not a requirement that they be collected for specific perpetrated or future acts of terror. To be convicted under § 114 b, it is enough that evidence exists that the person, group or association for which the funds were collected is engaged in or intends to engage in acts of the type and with the particular terrorist intentions specified in § 114, without it being necessary, as in connection with conviction under § 114, to take a more specific stance with respect to the perpetration and scope of the individual acts.

The Supreme Court finds, based on the High Court's description of its assessment of the evidence, that the High Court did perform an assessment of the evidence in the case that was in accordance with these requirements.

With regard to the claim of the accused that, in its assessment of the evidence, the High Court did not take a stance with respect to the evidence they presented in the form of reports and witness testimony, it is noted that, based on the presentation of the case in the High Court's judgment, that evidence was included in the High Court's evidentiary assessment.

As a result of its assessment of the evidence, the High Court accepted as grounds for its decision that FARC and PFLP have perpetrated serious attacks on a civilian population with the intent of terrorizing that population to a serious extent or to destabilize the fundamental political, constitutional, economic and social structures in, respectively, Colombia and Israel in such a way that, given their nature, these acts could cause those countries serious harm. In the case of FARC this pertained to FARC having murdered civilians, subjected civilians to gross acts of violence, carried out kidnappings, including kidnappings of politicians and a presidential candidate, and used imprecise mortar shells in civilian areas, in which civilians became victims. In the case of PFLP, this pertained to PFLP having attacked or

murdered civilians, including through the use of car bombs and suicide bombers.

Under § 933 Paragraph 2, cf. § 912 Paragraph 1, of the Danish Administration of Justice Act, appeals to the Supreme Court cannot be based on the High Court having wrongly decided that the accused are to be punished as a result of a faulty assessment of the evidence in the case. The Supreme Court must thus use the results of the High Court's review as the basis for its decision.

According to the preparatory works for § 114 (Legal Affairs Committee's report in *Folketingstidende* 2001-02, 2nd Session, L 35, Addendum B, p. 1466 et seq.), an evaluation as to whether an act is covered under § 114 Paragraph 1 must include whether the act targeted a democratic society that respects the principle of the rule of law, or if it targeted an occupying power, etc. These circumstances must be included in an overall assessment of all the elements of the case.

The accused have claimed that Israel must be viewed as an occupying power that is violating democracy and the principle of the rule of law, and that Colombia cannot be considered to be a democratic society that respects the principle of the rule of law, and that these circumstances must be taken into account in hearing the case. Regardless of its position with respect to the claims of the accused, the Supreme Court finds that the scope and nature of the acts which, according to the results of the High Court's review of the evidence, FARC and PFLP have perpetrated against civilians must, following an overall assessment, lead to the conclusion that these acts do not fall outside of the scope of § 114.

The accused individuals have further claimed that FARC and PFLP must be equated with state actors or the like, and that their actions in this case must consequently be judged based on the rules regarding war crimes. Based on the information in the case, the Supreme Court finds no grounds for equating the actions of FARC and PFLP with the use of power by a state; cf. Item 11 in the preamble to the Council Framework Decision on combating terrorism.

Based on the evidence presented, the Supreme Court finds that the High Court properly referred the aforementioned actions of FARC and PFLP to § 114.

A, B, C and D acknowledged before the High Court that they had cooperated in the production, sale and distribution of the T-shirts in question, with the profits to be used to purchase radio equipment for FARC and a printing press for PFLP.

In the case of F, the High Court found it to be proved that he had similarly cooperated in raising financial funds. The High Court emphasized in this regard that he had made server capacity available in the knowledge that it had to do with raising money for FARC and PFLP, and that he had written a draft for a press release.

The High Court based its decision in part on all of the accused having been aware that, or in any case having considered it to be overwhelmingly likely that FARC and PFLP were engaging in acts covered by § 114, or intended to do so.

The Supreme Court finds that the fact that the accused do not view FARC or PFLP as terrorist organizations cannot be ascribed significance with respect to the issue of guilt, insofar as it must be accepted that, based on the High Court's evidentiary assessment, they possessed the factual knowledge of the actions of FARC and PFLP required for intent.

Based on the foregoing, and because the assertions made by the accused regarding the humanitarian purpose of their support and material atypicality cannot lead to impunity, the Supreme Court concurs that A, B, C, D and E are guilty of attempted violation of § 114 Item 2 as per the indictment.

With regard to F, the High Court has, as noted, emphasized that he had prepared a draft for a press release. Based on the parties' unanimous declaration with respect thereto, this element must be omitted in assessing his status, which consists hereafter solely in that he made server capacity available with the knowledge that it pertained to raising money for FARC and PFLP.

The Supreme Court finds that this circumstance constitutes assistance that is punishable under § 114 b Paragraph 2 and not exempt from punishment under § 16 of the Danish Act on Services in the Information Society. The Supreme Court consequently concurs that F also be found guilty of attempted violation of § 144 Item 2 as per the indictment. His motion for annulment and remission for retrial can consequently not be granted.

Based on the grounds cited by the High Court, the Supreme Court finds that the sentences handed down for A, B, C, E and D are appropriate.

With respect to F, it must now be accepted that he alone made server capacity available. The Supreme Court finds that the sentence will hereafter be imprisonment for 60 days.

With respect to A, B, E and F, the Supreme Court concurs that the sentences for these accused are suspended.

With respect to C and D, the Supreme Court finds that, under the present circumstances, including that the narrower scope of § 144 b has given cause for doubt, there is justification for suspending the sentences of these individuals entirely.

The Supreme Court concurs with the determination in the judgment regarding confiscation.

The Supreme Court hereafter upholds the High Court judgment, subject to the changes that the sentence for F be reduced to imprisonment for 60 days, and that the sentences for C and D be suspended subject to the conditions cited below.

The probationary period for all six accused will be calculated from the date of the Supreme Court judgment.

The judgment of the Court

The High Court judgment is upheld, subject to the following changes:

The six-month prison sentence for C is stayed and will be rescinded after one year of probation, subject to the condition that he does not engage in criminal activity during the probationary period.

The six-month prison sentence for D is stayed and will be rescinded after one year of probation, subject to the condition that he does not engage in criminal activity during the probationary period.

The suspended sentence for F is reduced to 60 days in prison.

The Danish Treasury will pay the costs of the Supreme Court case.

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Annex 477

French Cour de cassation, Judgement of May 21st 2014, No. 13-83758

COUR DE CASSATION

BULLETIN DES ARRÊTS

CHAMBRE CRIMINELLE

N° 5

MAI 2014

qu'il a déjà été indiqué, il n'est pas contestable que s'il est établi qu'au mépris des dispositions de l'article 3 de la convention de sauvegarde des droits de l'homme des aveux ou des mises en cause ont été obtenus grâce la torture, cette violation des droits fondamentaux prévaut sur les principes de reconnaissance et de confiance mutuelles et fait obstacle à l'exécution d'un mandat d'arrêt européen ; qu'outre qu'il n'y a pas lieu à interprétation de ce texte la question telle qu'elle est proposée comporte l'affirmation qu'il est établi que la mise en cause de M. X... a été obtenue grâce à la torture ce qui n'est nullement établi en l'espèce ; qu'il n'y a en conséquence pas lieu à question préjudicielle ;

« alors que constituait une question sérieuse le point de savoir si, dans le cas d'un mandat d'arrêt européen fondé sur les déclarations d'une personne lors de sa garde à vue, au cours de laquelle elle a dénoncé avoir subi des mauvais traitements et tortures, l'article 1er, § 3, de la Décision-cadre du Conseil de l'union européenne du 13 juin 2002, selon lequel ladite Décision-cadre "ne saurait avoir pour effet de modifier l'obligation de respecter les droits fondamentaux et les principes juridiques fondamentaux tels qu'ils sont consacrés par l'article 6 du Traité sur l'Union européenne" permet au juge de l'Etat requis d'écarter le principe de confiance mutuelle pour non-respect par l'Etat d'émission des dispositions de l'article 47 de la Charte des droits de l'homme de l'Union européenne, des articles 3 et 6 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales, et de l'article 15 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants ; que la solution de la présente procédure dépend de la réponse apportée à cette question par la CJUE dès lors qu'un recours devant la Cour européenne des droits de l'homme présentait le risque d'aboutir à la constatation d'une violation de l'article 3 de la Convention européenne de sauvegarde des droits de l'homme ; que dès lors la chambre de l'instruction, qui a retenu qu'il n'y avait pas lieu à interprétation de ce texte et que la question posée supposait établi, ce qui ne l'était pas, le fait que la mise en cause de M. X... ait été obtenue grâce à la torture, ne pouvait refuser de saisir à titre préjudiciel la cour de justice de l'Union européenne sans violer l'article 267 du TFUE ; qu'en tant que de besoin, il appartiendra à la Cour de cassation de saisir préjudiciellement la Cour de justice de l'Union européenne de ladite question » ;

Les moyens étant réunis ;

Attendu qu'il résulte de l'arrêt attaqué et des pièces de la procédure qu'en vue de l'exercice de poursuites, les autorités espagnoles ont émis le 10 décembre 2008 un mandat d'arrêt européen contre M. X... visant des faits de terrorisme ;

Attendu que, pour ordonner la remise différée de l'intéressé qui faisait valoir que les charges retenues à son encontre reposaient sur les déclarations de M. A... recueillies en violation des articles 3 et 6 de la Convention européenne des droits de l'homme, l'arrêt, après avoir constaté que le mandat d'arrêt européen satisfaisait aux prescriptions de l'article 695-13 du code de procédure pénale, relève, que les allégations de M. A... étaient infondées, la juridiction suprême espagnole ayant acquitté les gardes civils des accusations portées à leur encontre, et que la saisine, à la supposer avérée, par ce dernier, de la Cour européenne des droits de l'homme ne constitue pas une voie de recours contre la décision définitive de la cour suprême espagnole ; que les juges ajoutent, pour dire n'y avoir lieu à transmettre à la Cour de justice de l'Union européenne une question préjudicielle sur l'interprétation de l'article 1er, § 3, de la Décision-cadre du Conseil du 13 juin 2002 relative au mandat d'arrêt européen, qu'il n'est pas contestable que, s'il est établi qu'au mépris de l'article 3 de la Convention européenne des droits de l'homme des aveux ou des mises en cause ont été obtenus grâce à la torture, cette violation des droits fondamentaux prévaut sur les principes de reconnaissance et de confiance mutuelles et fait obstacle à l'exécution du mandat d'arrêt européen ;

Attendu qu'en prononçant ainsi, la chambre, à laquelle il ne saurait être reproché de ne pas s'être expliquée davantage qu'elle ne l'a fait, dès lors que les griefs invoqués par le demandeur demeuraient à l'état de simples allégations, a justifié sa décision ;

D'où il suit, et sans qu'il y ait lieu de poser une question préjudicielle à la Cour de justice de l'Union européenne, que les moyens ne sauraient être admis ;

Et attendu que l'arrêt a été rendu par une chambre de l'instruction compétente et composée conformément à la loi, et que la procédure est régulière ;

REJETTE le pourvoi.

Président : M. Louvel – *Rapporteur :* Mme Moreau – *Avocat général :* M. Le Baut – *Avocat :* SCP Nicolaÿ, de Lanouvelle et Hannotin.

Sur l'examen des conditions dans lesquelles les éléments fondant les charges objet du mandat d'arrêt européen ont été recueillies, évolution par rapport à :

Crim., 5 avril 2006, pourvoi n° 06-81.835, *Bull. crim.* 2006, n° 106 (rejet).

N° 136

RESPONSABILITE PENALE

Personne morale – Conditions – Commission d'une infraction pour le compte de la personne morale par l'un de ses organes ou représentants – Applications diverses – Association – Membres – Organisation et gestion de la partie clandestine des activités constituant un soutien logistique et financier à une organisation terroriste

Est justifiée la décision de la cour d'appel qui déclare une association coupable d'association de malfaiteurs en relation avec une entreprise terroriste, financement du terrorisme, par des constatations qui établissent que certains membres identifiés de cette association, mandatés par une organisation terroriste et également poursuivis, organisaient, supervisaient, coordonnaient la partie clandestine des activités de cette association, au profit de l'organisation terroriste, notamment les réunions régulières de cadres venus de divers pays européens, la propagande, le recueil des fonds, la tenue de la comptabilité et, plus généralement, dirigeaient, pour son compte, les opérations représentant la contribution délibérée de celle-ci au soutien de l'organisation terroriste.

REJET des pourvois formés par M. Nedim X... se disant Y..., M. Kadri Z..., l'association Centre culturel kurde Ahmet Kaya, contre l'arrêt de la cour d'appel de Paris, chambre 8-1, en date du 23 avril 2013,

qui, pour association de malfaiteurs en vue de la préparation d'un acte de terrorisme et financement d'entreprise terroriste, a condamné le premier, à quatre ans d'emprisonnement avec sursis, le deuxième, à trois ans d'emprisonnement avec sursis, a prononcé la dissolution de la dernière, et a ordonné la confiscation des scellés.

21 mai 2014 **N° 13-83.758**

LA COUR,

Joignant les pourvois en raison de la connexité ;

I. – Sur les pourvois formés par MM. X... et Z... :

Attendu qu'aucun moyen n'est produit ;

II. – Sur le pourvoi formé par l'association Centre culturel kurde (CCK) Ahmet Kaya :

Vu le mémoire produit ;

Sur le premier moyen de cassation, pris de la violation des articles 11 et 14 de la Convention européenne des droits de l'homme, 1er de la Déclaration des droits de l'homme et du citoyen, de la loi du 1er juillet 1901 relative à la liberté d'association, ensemble violation du principe de non-discrimination :

« en ce que l'arrêt confirmatif attaqué a déclaré la prévenue coupable de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme et de financement d'entreprise terroriste et l'a condamnée à la peine de dissolution ;

« aux motifs que la cour relève qu'il ressort des éléments recueillis au cours de l'enquête et de l'instruction, que l'association CCK Ahmet Kaya était "la vitrine légale du PKK", de nombreux membres de cette organisation fréquentant ses locaux et le présentant comme un lieu de rencontre de propagande, d'information et de soutien à cette organisation ; que d'ailleurs Metin A... le représentant légal du CCK, ne contestait pas devant le juge d'instruction que "des gens de tous horizons" du PKK, du TKPLM, du MKP s'exprimaient mais expliquait qu'il ne pouvait les censurer ; qu'elle relève encore que de nombreux documents comportant des listes de comptes ont été saisis dans les armoires de l'association, les chiffres y figurant étant bien supérieurs à la somme de 5 euros représentant le montant de la cotisation de chaque adhérent. Si le montant global collecté par le biais du CCK ne pouvait être déterminé avec précision, la comptabilité découverte étant partielle et les dons perçus en numéraire ou en chèque, encaissés sur le compte des collecteurs, il ressort toutefois de la procédure que le CCK a favorisé les activités et le financement de membres du PKK sur le territoire national, même si l'association a effectivement poursuivi d'autres buts, culturels notamment, présentés comme étant dans l'intérêt de la communauté kurde en France ; le CCK a ainsi assuré le soutien du PKK, la propagande de ce mouvement et son financement sur le territoire national et en a coordonné les collecteurs [...] ; que la Cour considère enfin que le rapport de police établi en 2008 et au demeurant avant la fin de l'instruction intervenue le 20 décembre 2010, dont il est fait état dans les conclusions déposées par le conseil de l'association, selon lequel "l'hypothèse d'un réseau financier occulte ne peut à ce jour être confirmée" n'est pas de nature à remettre en cause les autres éléments du dossier et les déclarations de certains coprévenus qui établissent au contraire, qu'il existait sur le sol français une activité des prévenus consistant à apporter une aide financière aux Kurdes restés au pays et à la guérilla, cette aide servant notamment à l'achat d'armes et d'explosifs et à l'entretien des combattants ;

« alors que nul ne peut faire l'objet d'une condamnation et d'une sanction pénales en raison de son appartenance à une minorité nationale ; qu'il ressort des constatations des juges du fond que la prévenue a vocation à rassembler et représenter l'ensemble de la communauté et de la culture kurde en France ; que le PKK, de par son importance au sein de la communauté kurde, est nécessairement amené à être présent et à exercer une influence au sein de cette communauté ; que, dès lors, déclarer coupable et dissoudre une association culturelle kurde en raison de ses liens supposés avec le PKK revient à interdire toute forme associative à la communauté kurde de France ; qu'en condamnant l'association CCK pour le financement et la participation à une entreprise terroriste et en en prononçant la dissolution, les juges du fond ont violé le principe de nondiscrimination visé ci-dessus » ;

Attendu que le moyen, mélangé de fait et de droit, est nouveau en ce qu'il invoque, pour la première fois devant la Cour de cassation, la méconnaissance des articles 11 et 14 de la Convention européenne des droits de l'homme, et comme tel irrecevable ;

Sur le deuxième moyen de cassation, pris de la violation des articles 421-1, 421-2-1 et 421-2-2 du code pénal, 485, 591 et 593 du code de procédure pénal, défaut de motifs, manque de base légale :

« en ce que l'arrêt confirmatif attaqué a déclaré l'association prévenue coupable de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme ;

« aux motifs que "les diligences entreprises ont permis de faire apparaître l'existence, sur le territoire français, d'un réseau structuré de militants actifs du PKK chargé de procéder à des collectes de fonds au bénéfice de cette organisation ; que les écoutes téléphoniques ont confirmé que le réseau était hiérarchisé avec des responsables en Europe, en France et locaux, ayant des contacts fréquents entre eux et partageant l'idéologie du PKK auquel ils apportaient leur soutien [...] ; que les prévenus n'ont pu ignorer, comme l'ont démontré les premiers juges dans la décision déférée, les idées développées par le PKK, les actes déjà intervenus et revendiqués par le mouvement, revendication dont la presse internationale se faisait l'écho ; qu'en poursuivant leur action, ils ont ainsi manifesté une adhésion à la cause et aux moyens de ladite cause et se sont engagés sciemment dans l'organisation illicite avec la volonté d'y apporter une aide efficace dans la poursuite du but que celle-ci s'était assignée. Elle [la cour] constate qu'il n'est nullement reproché aux prévenus, comme le soutient la défense, d'avoir commis une des infractions énumérées aux articles 421-1 ou 421-2 du code pénal ni même d'avoir commis des crimes ou des délits en Turquie mais d'avoir participé à une organisation terroriste, délit prévu par l'article 421-2-1 du code pénal. Elle rappelle que cet article dispose que la participation à une entente établie en vue de la préparation d'un des actes de terrorisme visés aux articles 421-1 et 421-2 du code pénal constitue un acte de terrorisme et que cette participation est caractérisée dès lors qu'un ou plusieurs faits matériels ont été commis par un individu et qu'il est bien évidemment démontré que celui-ci entendait ainsi par cette action, soutenir l'organisation critiquée ; qu'elle constate en conséquence que les juridictions françaises sont compétentes pour connaître des faits matériels reprochés aux prévenus commis en France et que les articles visés par les avocats au soutien de leurs conclusions ne

sont pas applicables en l'espèce [...] ; que la cour relève qu'il ressort des éléments recueillis au cours de l'enquête et de l'instruction, que l'association CCK Ahmet Kaya était "la vitrine légale du PKK", de nombreux membres de cette organisation fréquentant ses locaux et le présentant comme un lieu de rencontre de propagande, d'information et de soutien à cette organisation. D'ailleurs Metin A... le représentant légal du CCK, ne contestait pas devant le juge d'instruction que "des gens de tous horizons" du PKK, du TKPLM, du MKP s'exprimaient mais expliquait qu'il ne pouvait les censurer ; qu'elle relève encore que de nombreux documents comportant des listes de comptes ont été saisis dans les armoires de l'association, les chiffres y figurant étant bien supérieurs à la somme de 5 euros représentant le montant de la cotisation de chaque adhérent. Si le montant global collecté par le biais du CCK ne pouvait être déterminé avec précision, la comptabilité découverte étant partielle et les dons perçus en numéraire ou en chèque, encaissés sur le compte des collecteurs, il ressort toutefois de la procédure que le CCK a favorisé les activités et le financement de membres du PKK sur le territoire national, même si l'association a effectivement poursuivi d'autres buts, culturels notamment, présentés comme étant dans l'intérêt de la communauté kurde en France ; que le CCK a ainsi assuré le soutien du PKK, la propagande de ce mouvement et son financement sur le territoire national et en a coordonné les collecteurs ; que la cour, pour ces motifs et les motifs liminaires ci-dessus exposés, en réponse aux conclusions déposées par la défense et ceux du tribunal qu'elle adopte expressément, sauf à ne pas retenir comme élément à charge la perquisition effectuée en 2009 hors de la période de prévention, les faits étant établis pour les deux infractions visées à l'ordonnance de renvoi, confirmera le jugement sur la déclaration de culpabilité dans les termes de la prévention, la cour relevant, en tout état de cause, que la participation à l'association terroriste visée à l'ordonnance de renvoi est caractérisée, pour l'intéressée, par les faits matériels relevés par le tribunal et par la cour, entente à laquelle le CCK en tant que personne morale a sciemment adhéré, en connaissant les objectifs ;

« alors que l'infraction de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme suppose pour être constituée que soit rapportée la preuve de ce qu'un acte de terrorisme était en préparation, préparation caractérisée par un ou plusieurs actes matériels ; qu'en constatant que les prévenus étaient en lien avec une organisation ayant commis des actes terroristes sans rechercher si de tels actes étaient en préparation durant la période de la prévention et si les prévenus avaient matériellement contribué à leur préparation, la cour d'appel a violé l'article 421-2-1 du code pénal et privé sa décision de base légale » ;

Sur le troisième moyen de cassation, pris de la violation des articles 121-1 et 121-2 du code pénal, 591 du code procédure pénale :

« en ce que l'arrêt confirmatif attaqué a déclaré l'association prévenue coupable de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme et de financement d'entreprise terroriste ;

« aux motifs que l'association CCK en tant que personne morale a adhéré à l'entente terroriste visée à la prévention et assuré le soutien financier du PKK ;

« alors que nul n'est responsable pénalement que de son propre fait ; que la mise en cause de la responsabilité pénale des personnes morales ne peut être retenue qu'à la condition de démontrer que les infractions ont été commises, pour leur compte, par leurs organes ou représentants ; qu'en se bornant à constater que certains des membres de l'association prévenue étaient adhérents à l'organisation terroriste et en attribuant la responsabilité pénale directement à la personne morale sans rechercher si l'infraction avait été commise par l'un de ses organes ou représentants, la cour d'appel a violé les dispositions susvisées » ;

Les moyens étant réunis ;

Attendu que, pour déclarer l'association Centre culturel kurde Ahmet Kaya coupable des infractions de participation à une association de malfaiteurs en relation avec une entreprise terroriste, financement d'une entreprise terroriste, l'arrêt attaqué relève que l'enquête et l'information, notamment les résultats des commissions rogatoires internationales, perquisitions et surveillances, l'exploitation de ses comptes bancaires, les déclarations des personnes mises en examen et des témoins établissent que cette association servait régulièrement de lieu de rencontre à des membres importants du Parti des travailleurs du Kurdistan (PKK) et de ses émanations, qu'elle était un lieu majeur d'élaboration et de diffusion de la propagande pour le compte de celui-ci et se chargeait de la collecte de fonds destinés à son financement ; que les juges ajoutent que, si cette personne morale a effectivement poursuivi d'autres buts, notamment culturels, présentés comme étant dans l'intérêt de la communauté kurde en France, elle avait également pour objet d'assurer un soutien logistique et financier au PKK, organisation terroriste ou à ses émanations, dont elle constituait la vitrine légale ; que les constatations de l'arrêt et du jugement qu'il confirme établissent également que certains membres de cette association, mandatés par le PKK ou des organisations assimilées, parmi lesquels MM. Kadri Z... et Nedim X..., également poursuivis, organisaient, supervisaient, coordonnaient la partie clandestine des activités du Centre culturel kurde au profit du PKK, notamment les réunions régulières de cadres venus de divers pays européens, la propagande, le recueil des fonds, la tenue de la comptabilité et, plus généralement, dirigeaient, pour le compte de l'association, les opérations représentant sa contribution au soutien de l'organisation terroriste ;

Attendu qu'en l'état de ces motifs reproduits partiellement aux moyens, qui établissent que l'association Centre culturel kurde Ahmet Kaya a apporté, en connaissance de cause, par ses organes ou ses représentants, en l'espèce par les dirigeants de fait identifiés ci-dessus, ayant agi pour son compte, un soutien logistique et financier effectif à une organisation classée comme terroriste, la cour d'appel a caractérisé en tous leurs éléments les infractions dont elle l'a déclarée coupable ;

D'où il suit que les moyens ne sauraient être accueillis ;

Sur le quatrième moyen de cassation, pris de la violation des articles 6, 7 et 11 de la Convention européenne des droits de l'homme, 8 de la Déclaration des droits de l'homme et du citoyen, de la loi du 1er juillet 1901 relative à la liberté d'association, des articles 111-3 et 131-39 du code pénal, 485, 591 et 593 du code de procédure pénale, défaut de motifs, manque de base légale :

« en ce que l'arrêt confirmatif attaqué a prononcé la dissolution de l'association CCK Ahmet Kaya ;

« aux motifs propres que selon l'article 6, § 3, de la Convention européenne des droits de l'homme, tout prévenu a droit d'être informé de la nature et de la cause de

la prévention dont il est l'objet et doit, par suite, être mis en mesure de se défendre sur les divers chefs d'infractions qui lui sont imputées ; que la cour constate que l'association CCK Ahmet Kaya représentée par son président, a toujours été assistée d'un avocat devant le juge d'instruction, le tribunal et la cour, que la copie de l'ordonnance de renvoi a été jointe au mandement de citation devant le tribunal ; que dès lors, nonobstant le seul visa de l'article 422-6 du code pénal sur la peine complémentaire de confiscation encourue, à l'ordonnance de renvoi, à l'exclusion de l'article 422-5 du code pénal prévoyant les autres peines, l'ensemble des constatations qui précèdent permet à la cour de s'assurer que l'association CCK Ahmet Kaya a été informée, dès la première comparution devant le magistrat instructeur, d'une manière détaillée, de la nature et de la cause de l'accusation portée contre elle et a disposé du temps et des facilités nécessaires à la préparation de sa défense ; que les dispositions de l'article 6, § 3, de la Convention européenne des droits de l'homme n'ont donc pas été méconnues ; que la cour relève qu'il ressort des éléments recueillis au cours de l'enquête et de l'instruction, que l'association CCK Ahmet Kaya était "la vitrine légale du PKK", de nombreux membres de cette organisation fréquentant ses locaux et le présentant comme un lieu de rencontre de propagande, d'information et de soutien à cette organisation. D'ailleurs Metin A... le représentant légal du CCK, ne contestait pas devant le juge d'instruction que "des gens de tous horizons" du PKK, du TKPLM, du MKP s'exprimaient mais expliquait qu'il ne pouvait les censurer ; qu'elle relève encore que de nombreux documents comportant des listes de comptes ont été saisis dans les armoires de l'association, les chiffres y figurant étant bien supérieurs à la somme de 5 euros représentant le montant de la cotisation de chaque adhérent. Si le montant global collecté par le biais du CCK ne pouvait être déterminé avec précision, la comptabilité découverte étant partielle et les dons perçus en numéraire ou en chèque, encaissés sur le compte des collecteurs, il ressort toutefois de la procédure que le CCK a favorisé les activités et le financement de membres du PKK sur le territoire national, même si l'association a effectivement poursuivi d'autres buts, culturels notamment, présentés comme étant dans l'intérêt de la communauté kurde en France ; le CCK a ainsi assuré le soutien du PKK, la propagande de ce mouvement et son financement sur le territoire national et en a coordonné les collecteurs ; [...] que la cour confirmera la dissolution de l'association CCK prononcée à bon droit par le tribunal, seule peine de nature à sanctionner justement les infractions commises et le soutien apporté à une organisation terroriste ;

« aux motifs adoptés que la première perquisition, effectuée dans le cadre de la présente enquête, avait permis d'y saisir : de très nombreux documents manuscrits et comptables associant des noms et des surnoms de mis en examen de ce dossier (notamment B..., C..., D..., E..., F..., G...) avec des sommes d'argent dans différentes régions, villes, un document récapitulatif de la collecte de sommes en 2005 (1 134 854 euros), un document récapitulatif correspondant à la clôture des comptes 2006, des mentions de sommes d'argent excédant de beaucoup le budget officiel du CCK, des carnets à souches dont certains remplis avec la mention TECAK inscrite sur chacun des reçus ; des blocs-notes contenant principalement des montants associés à des noms ainsi que des notes prises pendant des réunions et des congrès relatives au PKK ; des documents de propagande du PKK, d'affiches d'Abdullalh H..., de drapeaux de posters de combattants ; des supports informatiques contenant de très nombreux fichiers divers et variés, la découverte d'écrits, d'entretiens avec ou sur Abdullah H..., des rapports du YJA dont un daté du 28 septembre 2006 rendant compte principalement de l'avancement des travaux de campagne et de la situation organisationnelle et financière de Paris, un tract signé PAJK (parti des femmes libres du Kurdistan) rédigé à l'occasion du 29e arrondissement [sic] *de la fondation du PKK ainsi qu'un discours de Murat, un questionnaire sous forme QCM comportant des questions sur le PKK, des exemplaires de bulletins de vote destinés à être utilisés lors des élections des membres de l'assemblée du conseil général du KONGRA GEL, une circulaire signée Comité de la défense du Peuple du KKK [sic] et adressée à tous les commandants et combattants du HPG, une lettre datée du 7 décembre 2006 signée du "comité des Martyrs" et adressée à la famille I..., l'informant de ce que leur fils Kasim I... était tombé martyr le 20 décembre 1994 au cours d'une fusillade à Bingol ; divers dessins représentant le marteau et la faucille, une kalachnikov, l'étoile du drapeau du PKK, des documents relatifs à des extraits du livre d'Abdullah H..., des interviews de ce leader en prison, divers articles sur la place de la femme et sur les combattants martyrs issus du magazine* Serxwebun, *un historique du PKK [... motifs non adoptés en appel] ; que par ailleurs, dès le 18 octobre 2006, la direction de la surveillance du territoire (DST) avait indiqué qu'en plus de ses activités culturelles légales, le CCK servait également de lieu pour des conférences ou des réunions clandestines des cadres du PKK, ce qu'avaient d'ailleurs admis notamment Riza J... et Burcin K... dans leurs déclarations à la police ; qu'enfin les éléments de comptabilités occultes, manifestement en rapport avec le produit des collectes de fonds effectuées pour le compte du PKK, avaient été saisis dans une armoire de cette association ; que dès lors et malgré les dénégations des responsables du CCK, cette association sera déclarée coupable des infractions qui lui sont imputées ; qu'en conséquence, il y a lieu d'en prononcer la dissolution ;*

« 1° alors que le principe de légalité de la peine s'oppose à ce qu'une peine soit prononcée alors que toutes les conditions requises par la loi ne seraient pas réunies ; qu'en vertu de l'article 131-39 du code pénal, la peine de dissolution ne peut être prononcée qu'à l'encontre des personnes morales créées ou détournées de leur objet pour commettre les faits incriminés ; qu'en prononçant la dissolution du CCK alors même qu'il ressortait de ses constatations que l'objet initial et licite de l'association prévenue avait été préservé, la cour d'appel a violé l'article 131-39 du code pénal et le principe de légalité des peines ;

« 2° alors que tout arrêt doit comporter les motifs propres à justifier son dispositif ; qu'en vertu de l'article 131-39 du code pénal, la peine de dissolution ne peut être prononcée à l'encontre des partis ou groupements politiques ; que l'entière condamnation de l'association prévenue repose sur sa supposée affiliation au parti des travailleurs du Kurdistan, parti politique turc ; qu'en ne recherchant pas si cette association était susceptible d'être qualifiée de parti ou groupement politique et en en prononçant la dissolution, la cour d'appel a insuffisamment motivé sa décision au regard de l'article 131-39 du code pénal ;

« 3° alors que tout prévenu a le droit d'être informé de la nature et de la cause de l'accusation portée contre lui ; que cette information comprend celle, nécessaire à l'exercice des droits de la défense, relative à la nature des peines encourues ; qu'en constatant que l'association prévenue n'avait pas été informée de ce qu'elle encourrait la dissolution sans en conclure que ses droits de la défense avaient été méconnus, la cour d'appel a violé les prescriptions de l'article 6, § 3, de la Convention européenne des droits de l'homme ;

« 4° alors que peuvent seules être prononcées des peines strictement nécessaires et proportionnées ; que la peine de dissolution constitue une atteinte grave à la liberté d'association et implique à ce titre que sa nécessité et sa proportionnalité au regard des faits commis et du but poursuivi soient spécifiquement motivées ; qu'en prononçant la peine de dissolution en s'abstenant de toute motivation, la cour d'appel a insuffisamment motivé sa décision et violé les principes de nécessité et de proportionnalité des peines » ;

Attendu que, d'une part, pour prononcer la dissolution de l'association Centre culturel kurde Ahmet Kaya, après l'avoir déclarée coupable de participation à une association de malfaiteurs en relation avec une entreprise terroriste et de financement du terrorisme, l'arrêt attaqué retient que cette personne morale a sciemment adhéré, en connaissant les objectifs recherchés, à une entente destinée à assurer, sur le territoire français, la propagande et le financement du PKK, servant notamment à l'achat d'armes et d'explosifs ainsi qu'à l'entretien des combattants de ce mouvement ; que les juges ajoutent que cette dissolution est la seule peine de nature à sanctionner justement les infractions commises et le soutien apporté à une organisation terroriste ; que, d'autre part, le prononcé de la dissolution d'une association étant rendu possible par l'article 422-5 du code pénal, qui renvoie à l'article 131-39 du même code, pour déterminer les peines encourues par les personnes morales déclarées coupables des infractions prévues par les articles 421-1, 421-2-1 et 421-2-2 dudit code, visés par l'ordonnance de renvoi devant le tribunal correctionnel, il en résulte qu'en l'absence d'incertitude sur l'objet de la prévention et la peine encourue, l'omission, dans l'ordonnance précitée, de la mention du texte applicable à la dissolution ne saurait entraîner la nullité ;

Attendu qu'en l'état de ces motifs et en l'absence de toute cause de nullité, la cour d'appel a justifié sa décision, sans méconnaître les dispositions conventionnelles dont la violation est alléguée au moyen ;

D'où il suit que le moyen ne peut qu'être écarté ;

Et attendu que l'arrêt est régulier en la forme ;

REJETTE les pourvois.

Président : M. Louvel – *Rapporteur :* Mme Caron – *Avocat général :* M. Lacan – *Avocat :* SCP Waquet, Farge et Hazan.

Sur la responsabilité pénale d'une personne morale résultant d'une infraction commise par l'un de ses organes ou représentants, à rapprocher :

Crim., 11 décembre 2012, pourvoi n° 11-87.421, *Bull. crim.* 2012, n° 274 (rejet), et les arrêts cités.

Sur la nécessité de rechercher si l'infraction a été commise pour le compte de la personne morale par l'un de ses organes ou représentants, à rapprocher :

Crim., 1er avril 2014, pourvoi n° 12-86.501, *Bull. crim.* 2014, n° 99 (cassation), et les arrêts cités.

Sur la qualité de représentant de la personne morale, à rapprocher :

Crim., 25 mars 2014, pourvoi n° 13-80.376, *Bull. crim.* 2014, n° 94 (rejet), et l'arrêt cité.

N° 137

1° ACCIDENT DE LA CIRCULATION

Victime – Victime autre que le conducteur – Loi du 5 juillet 1985 – Dispositions d'ordre public de la loi du 5 juillet 1985 – Compatibilité – Application – Règles de la responsabilité du fait d'autrui – Portée

2° ASSURANCE

Assureur appelé en garantie – Juridictions pénales – Intervention ou mise en cause – Assureur du prévenu ou du civilement responsable – Subrogation dans les droits de la victime – Action récursoire contre des codébiteurs solidaires – Recevabilité (non)

1° Les dispositions d'ordre public de la loi du 5 juillet 1985 relatives à l'indemnisation des victimes d'accidents de la circulation n'excluent pas celles de l'article 1384, alinéa 5, du code civil relatives à la responsabilité du commettant du fait de son préposé.

Justifie sa décision la cour d'appel qui dit non tenu à indemnisation à l'égard de la victime le préposé, condamné pour blessures involontaires, conducteur du véhicule d'un tiers dans le cadre de l'activité accomplie pour le compte de son commettant.

2° L'assureur couvrant la responsabilité civile du prévenu, conducteur non autorisé d'un véhicule automobile et de son civilement responsable, qui a indemnisé la victime en cette qualité, ne peut exercer, devant la juridiction répressive, contre le responsable de l'accident ayant obtenu la garde ou la conduite du véhicule sans autorisation, l'action récursoire prévue à l'article L. 211-1 du code des assurances.

CASSATION PARTIELLE sans renvoi sur les pourvois formés par M. Frédéric X..., l'Etablissement national des invalides de la Marine, parties intervenantes, contre l'arrêt de la cour d'appel de Poitiers, chambre correctionnelle, en date du 21 décembre 2012, qui, dans la procédure suivie contre M. Jean-François Y... du chef de blessures involontaires, a prononcé sur les intérêts civils.

27 mai 2014 **N° 13-80.849**

LA COUR,

Joignant les pourvois en raison de la connexité ;

Vu les mémoires en demande, en défense et les observations complémentaires produits ;

Attendu qu'il résulte de l'arrêt attaqué et des pièces de procédure que M. Y..., marin pêcheur, chargé par son employeur, M. X..., de placer le produit de la pêche dans la glacière de la criée du port, en a été empêché par une fourgonnette arrêtée devant le bâti-

Références

Cour de cassation
chambre criminelle
Audience publique du mercredi 21 mai 2014
N° de pourvoi: 13-83758
Publié au bulletin **Rejet**

M. Louvel , président
Mme Caron, conseiller rapporteur
M. Lacan, avocat général
SCP Waquet, Farge et Hazan, avocat(s)

Texte intégral

REPUBLIQUE FRANCAISE

AU NOM DU PEUPLE FRANCAIS

LA COUR DE CASSATION, CHAMBRE CRIMINELLE, a rendu l'arrêt suivant :

Statuant sur les pourvois formés par :

- M. Nedim X...se disant Z...,- M. Kadri Y...,

- L'association Centre culturel kurde Ahmet Kaya,

contre l'arrêt de la cour d'appel de PARIS, chambre 8-1, en date du 23 avril 2013, qui, pour association de malfaiteurs en vue de la préparation d'un acte de terrorisme et financement d'entreprise terroriste, a condamné le premier, à quatre ans d'emprisonnement avec sursis, le deuxième, à trois ans d'emprisonnement avec sursis, a prononcé la dissolution de la dernière, et a ordonné la confiscation des scellés ;

La COUR, statuant après débats en l'audience publique du 7 mai 2014 où étaient présents dans la formation prévue à l'article 567-1-1 du code de procédure pénale : M. Louvel, président, Mme Caron, conseiller rapporteur, M. Foulquié, conseiller de la chambre ;

Greffier de chambre : Mme Zita ;
Sur le rapport de Mme le conseiller CARON, les observations de la société civile professionnelle WAQUET, FARGE et HAZAN, avocat en la Cour, et les conclusions de M. l'avocat général LACAN ;

Joignant les pourvois en raison de la connexité ;

I-Sur les pourvois formés par MM. X... et Y...:

Attendu qu'aucun moyen n'est produit ;

II-Sur le pourvoi formé par l'association Centre culturel kurde (CCK) Ahmet Kaya :

Vu le mémoire produit ;

Sur le premier moyen de cassation, pris de la violation des articles 11 et 14 de la Convention européenne des droits de l'homme, 1er de la Déclaration des droits de l'homme et du citoyen, de la loi du 1er juillet 1901 relative à la liberté d'association, ensemble violation du principe de non-discrimination ;

" en ce que l'arrêt confirmatif attaqué a déclaré la prévenue coupable de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme et de financement d'entreprise terroriste et l'a condamnée à la peine de dissolution ;
" aux motifs que la cour relève qu'il ressort des éléments recueillis au cours de l'enquête et de l'instruction, que l'association CCK Ahmet Kaya était « la vitrine légale du PKK », de nombreux membres de cette organisation fréquentant ses locaux et le présentant comme un lieu de rencontre de propagande, d'information et de soutien à cette organisation ;

que d'ailleurs Metin C...le représentant légal du CCK, ne contestait pas devant le juge d'instruction que « des gens de tous horizons » du PKK, du TKPLM, du MKP s'exprimaient mais expliquait qu'il ne pouvait les censurer ; qu'elle relève encore que de nombreux documents comportant des listes de comptes ont été saisis dans les armoires de l'association, les chiffres y figurant étant bien supérieurs à la somme de 5 euros représentant le montant de la cotisation de chaque adhérent. Si le montant global collecté par le biais du CCK ne pouvait être déterminé avec précision, la comptabilité découverte étant partielle et les dons perçus en numéraire ou en chèque, encaissés sur le compte des collecteurs, il ressort toutefois de la procédure que le CCK a favorisé les activités et le financement de membres du PKK sur le territoire national, même si l'association a effectivement poursuivi d'autres buts, culturels notamment, présentés comme étant dans l'intérêt de la communauté kurde en France ; le CCK a ainsi assuré le soutien du PKK, la propagande de ce mouvement et son financement sur le territoire national et en a coordonné les collecteurs ¿ ; que la Cour considère enfin que le rapport de police établi en 2008 et au demeurant avant la fin de l'instruction intervenue le 20 décembre 2010, dont il est fait état dans les conclusions déposées par le conseil de l'association, selon lequel « l'hypothèse d'un réseau financier occulte ne peut à ce jour être confirmée » n'est pas de nature à remettre en cause les autres éléments du dossier et les déclarations de certains coprévenus qui établissent au contraire, qu'il existait sur le sol français une activité des prévenus consistant à apporter une aide financière aux Kurdes restés au pays et à la guérilla, cette aide servant notamment à l'achat d'armes et d'explosifs et à l'entretien des combattants ;
" alors que nul ne peut faire l'objet d'une condamnation et d'une sanction pénales en raison de son appartenance à une minorité nationale ; qu'il ressort des constatations des juges du fond que la prévenue a vocation à rassembler et représenter l'ensemble de la communauté et de la culture kurde en France ; que le PKK, de par son importance au sein de la communauté kurde, est nécessairement amené à être présent et à exercer une influence au sein de cette communauté ; que, dès lors, déclarer coupable et dissoudre une association culturelle kurde en raison de ses liens supposés avec le PKK revient à interdire toute forme associative à la communauté kurde de France ; qu'en condamnant l'association CCK pour le financement et la participation à une entreprise terroriste et en en prononçant la dissolution, les juges du fond ont violé le principe de nondiscrimination visé ci-dessus " ;
Attendu que le moyen, mélangé de fait et de droit, est nouveau en ce qu'il invoque, pour la première fois devant la Cour de cassation, la méconnaissance des articles 11 et 14 de la Convention européenne des droits de l'homme, et comme tel irrecevable ;

Sur le deuxième moyen de cassation, pris de la violation des articles 421-1, 421-2-1 et 421-2-2 du code pénal, 485, 591 et 593 du code de procédure pénal, défaut de motifs, manque de base légale ;
" en ce que l'arrêt confirmatif attaqué a déclaré l'association prévenue coupable de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme ;
" aux motifs que « les diligences entreprises ont permis de faire apparaître l'existence, sur le territoire français, d'un réseau structuré de militants actifs du PKK chargé de procéder à des collectes de fonds au bénéfice de cette organisation ; que les écoutes téléphoniques ont confirmé que le réseau était hiérarchisé avec des responsables en Europe, en France et locaux, ayant des contacts fréquents entre eux et partageant l'idéologie du PKK auquel ils apportaient leur soutien ¿ ; que les prévenus n'ont pu ignorer, comme l'ont démontré les premiers juges dans la décision déférée, les idées développées par le PKK, les actes déjà intervenus et revendiqués par le mouvement, revendication dont la presse internationale se faisait l'écho ; qu'en poursuivant leur action, ils ont ainsi manifesté une adhésion à la cause et aux moyens de ladite cause et se sont engagés sciemment dans l'organisation illicite avec la volonté d'y apporter une aide efficace dans la poursuite du but que celle-ci s'était assignée.

Elle la cour constate qu'il n'est nullement reproché aux prévenus, comme le soutient la défense, d'avoir commis une des infractions énumérées aux articles 421-1 ou 421-2 du code pénal ni même d'avoir commis des crimes ou des délits en Turquie mais d'avoir participé à une organisation terroriste, délit prévu par l'article 421-2-1 du code pénal. Elle rappelle que cet article dispose que la participation à une entente établie en vue de la préparation d'un des actes de terrorisme visés aux articles 421-1 et 421-2 du code pénal constitue un acte de terrorisme et que cette participation est caractérisée dès lors qu'un ou plusieurs faits matériels ont été commis par un individu et qu'il est bien évidemment démontré que celui-ci entendait ainsi par cette action, soutenir l'organisation critiquée ; qu'elle constate en conséquence que les juridictions françaises sont compétentes pour connaître des faits matériels reprochés aux prévenus commis en France et que les articles visés par les avocats au soutien de leurs conclusions ne sont pas applicables en l'espèce ¿ ; que la cour relève qu'il ressort des éléments recueillis au cours de l'enquête et de l'instruction, que l'association CCK Ahmet Kaya était « la vitrine légale du PKK », de nombreux membres de cette organisation fréquentant ses locaux et le présentant comme un lieu de rencontre de propagande, d'information et de soutien à cette organisation. D'ailleurs Metin C...le représentant légal du CCK, ne contestait pas devant le juge d'instruction que « des gens de tous horizons » du PKK, du TKPLM, du MKP s'exprimaient mais expliquait qu'il ne pouvait les censurer ; qu'elle relève encore que de nombreux documents comportant des listes de comptes ont été saisis dans les armoires de l'association, les chiffres y figurant étant bien supérieurs à la somme de 5 euros représentant le montant de la cotisation de chaque adhérent. Si le montant global collecté par le biais du CCK ne pouvait être déterminé avec précision, la comptabilité découverte étant partielle et les dons perçus en numéraire ou en chèque, encaissés sur le compte des collecteurs, il ressort toutefois de la procédure que le CCK a favorisé les activités et le financement de membres du PKK sur le territoire national, même si l'association a effectivement poursuivi d'autres buts, culturels notamment, présentés comme étant dans l'intérêt de la communauté kurde en France ; que le CCK a ainsi assuré le soutien du PKK, la propagande de ce mouvement et son financement sur le territoire national et en a coordonné les collecteurs ; que la cour, pour ces motifs et les motifs liminaires ci-dessus exposés, en réponse aux conclusions déposées par la défense et ceux du tribunal qu'elle adopte expressément, sauf à ne pas retenir comme élément à charge la perquisition effectuée en 2009 hors de la période de prévention, les faits étant établis pour les deux infractions visées à l'ordonnance de renvoi, confirmera le jugement sur la déclaration de culpabilité dans les termes de la prévention, la cour relevant, en tout état de cause, que la participation à l'association terroriste visée à l'ordonnance de renvoi est caractérisée, pour l'intéressée, par les faits matériels relevés par le tribunal et par la cour, entente à laquelle le CCK en tant que personne morale a sciemment adhéré, en connaissant les objectifs ;
" alors que l'infraction de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme

suppose pour être constituée que soit rapportée la preuve de ce qu'un acte de terrorisme était en préparation, préparation caractérisée par un ou plusieurs actes matériels ; qu'en constatant que les prévenus étaient en lien avec une organisation ayant commis des actes terroristes sans rechercher si de tels actes étaient en préparation durant la période de la prévention et si les prévenus avaient matériellement contribué à leur préparation, la cour d'appel a violé l'article 421-2-1 du code pénal et privé sa décision de base légale " ;
Sur le troisième moyen de cassation, pris de la violation des articles 121-1 et 121-2 du code pénal, 591 du code procédure pénale ;

" en ce que l'arrêt confirmatif attaqué a déclaré l'association prévenue coupable de participation à une association de malfaiteurs en vue de la préparation d'un acte de terrorisme et de financement d'entreprise terroriste ;
" aux motifs que l'association CCK en tant que personne morale a adhéré à l'entente terroriste visée à la prévention et assuré le soutien financier du PKK ;
" alors que nul n'est responsable pénalement que de son propre fait ; que la mise en cause de la responsabilité pénale des personnes morales ne peut être retenue qu'à la condition de démontrer que les infractions ont été commises, pour leur compte, par leurs organes ou représentants ; qu'en se bornant à constater que certains des membres de l'association prévenue étaient adhérents à l'organisation terroriste et en attribuant la responsabilité pénale directement à la personne morale sans rechercher si l'infraction avait été commise par l'un de ses organes ou représentants, la cour d'appel a violé les dispositions susvisées " ;

Les moyens étant réunis ;
Attendu que, pour déclarer l'association Centre culturel kurde Ahmet Kaya coupable des infractions de participation à une association de malfaiteurs en relation avec une entreprise terroriste, financement d'une entreprise terroriste, l'arrêt attaqué relève que l'enquête et l'information, notamment les résultats des commissions rogatoires internationales, perquisitions et surveillances, l'exploitation de ses comptes bancaires, les déclarations des personnes mises en examen et des témoins établissent que cette association servait régulièrement de lieu de rencontre à des membres importants du Parti des travailleurs du Kurdistan (PKK) et de ses émanations, qu'elle était un lieu majeur d'élaboration et de diffusion de la propagande pour le compte de celui-ci et se chargeait de la collecte de fonds destinés à son financement ; que les juges ajoutent que, si cette personne morale a effectivement poursuivi d'autres buts, notamment culturels, présentés comme étant dans l'intérêt de la communauté kurde en France, elle avait également pour objet d'assurer un soutien logistique et financier au PKK, organisation terroriste ou à ses émanations, dont elle constituait la vitrine légale ; que les constatations de l'arrêt et du jugement qu'il confirme établissent également que certains membres de cette association, mandatés par le PKK ou des organisations assimilées, parmi lesquels MM. Kadri Y...et Nedim X..., également poursuivis, organisaient, supervisaient, coordonnaient la partie clandestine des activités du Centre culturel kurde au profit du PKK, notamment les réunions régulières de cadres venus de divers pays européens, la propagande, le recueil des fonds, la tenue de la comptabilité et, plus généralement, dirigeaient, pour le compte de l'association, les opérations représentant sa contribution au soutien de l'organisation terroriste ;
Attendu qu'en l'état de ces motifs reproduits partiellement aux moyens, qui établissent que l'association Centre culturel kurde Ahmet Kaya a apporté, en connaissance de cause, par ses organes ou ses représentants, en l'espèce par les dirigeants de fait identifiés ci-dessus, ayant agi pour son compte, un soutien logistique et financier effectif à une organisation classée comme terroriste, la cour d'appel a caractérisé en tous leurs éléments les infractions dont elle l'a déclarée coupable ;
D'où il suit que les moyens ne sauraient être accueillis ;
Sur le quatrième moyen de cassation, pris de la violation des articles 6, 7 et 11 de la Convention européenne des droits de l'homme, 8 de la Déclaration des droits de l'homme et du citoyen, de la loi du 1er juillet 1901 relative à la liberté d'association, des articles 111-3 et 131-39 du code pénal, 485, 591 et 593 du code de procédure pénale, défaut de motifs, manque de base légale ;

" en ce que l'arrêt confirmatif attaqué a prononcé la dissolution de l'association CCK Ahmet Kaya ;
" aux motifs propres que selon l'article 6, § 3, de la Convention européenne des droits de l'homme, tout prévenu a droit d'être informé de la nature et de la cause de la prévention dont il est l'objet et doit, par suite, être mis en mesure de se défendre sur les divers chefs d'infractions qui lui sont imputées ; que la cour constate que l'association CCK Ahmet Kaya représentée par son président, a toujours été assistée d'un avocat devant le juge d'instruction, le tribunal et la cour, que la copie de l'ordonnance de renvoi a été jointe au mandement de citation devant le tribunal ; que dès lors, nonobstant le seul visa de l'article 422-6 du code pénal sur la peine complémentaire de confiscation encourue, à l'ordonnance de renvoi, à l'exclusion de l'article 422-5 du code pénal prévoyant les autres peines, l'ensemble des constatations qui précèdent permet à la cour de s'assurer que l'association CCK Ahmet Kaya a été informée, dès la première comparution devant le magistrat instructeur, d'une manière détaillée, de la nature et de la cause de l'accusation portée contre elle et a disposé du temps et des facilités nécessaires à la préparation de sa défense ; que les dispositions de l'article 6-3 de la Convention européenne des droits de l'homme n'ont donc pas été méconnues ; que la cour relève qu'il ressort des éléments recueillis au cours de l'enquête et de l'instruction, que l'association CCK Ahmet Kaya était « la vitrine légale du PKK », de nombreux membres de cette organisation fréquentant ses locaux et le présentant comme un lieu de rencontre de propagande, d'information et de soutien à cette organisation. D'ailleurs Metin C...le représentant légal du CCK, ne contestait pas devant le juge d'instruction que « des gens de tous horizons » du PKK, du TKPLM, du MKP s'exprimaient mais expliquait qu'il ne pouvait les censurer ; qu'elle relève encore que de nombreux documents comportant des listes de comptes ont été saisis dans les armoires de l'association, les chiffres y figurant étant bien supérieurs à la somme de 5 euros représentant le montant de la cotisation de chaque adhérent. Si le montant global collecté par le biais du CCK ne pouvait être déterminé avec précision, la comptabilité découverte étant partielle et les dons perçus en numéraire ou en chèque, encaissés sur le compte des collecteurs, il ressort toutefois de la procédure que le CCK a favorisé les activités et le financement de membres du PKK sur le territoire national, même si l'association a effectivement poursuivi d'autres buts, culturels notamment, présentés comme étant dans l'intérêt de la communauté kurde en France ; le CCK a ainsi assuré le soutien du PKK, la propagande de ce mouvement et son financement sur le territoire national et en a coordonné les

collecteurs ; ¿ que la cour confirmera la dissolution de l'association CCK prononcée à bon droit par le tribunal, seule peine de nature à sanctionner justement les infractions commises et le soutien apporté à une organisation terroriste ;
" aux motifs adoptés que la première perquisition, effectuée dans le cadre de la présente enquête, avait permis d'y saisir : de très nombreux documents manuscrits et comptables associant des noms et des surnoms de mis en examen de ce dossier (notamment H..., I..., J..., K..., D..., L...) avec des sommes d'argent dans différentes régions, villes, un document récapitulatif de la collecte de sommes en 2005 (1 134 854 euros), un document récapitulatif correspondant à la clôture des comptes 2006, des mentions de sommes d'argent excédant de beaucoup le budget officiel du CCK, des carnets à souches dont certains remplis avec la mention TECAK inscrite sur chacun des reçus ; des blocs-notes contenant principalement des montants associés à des noms ainsi que des notes prises pendant des réunions et des congrès relatives au PKK ; des documents de propagande du PKK, d'affiches d'Abdullalh E..., de drapeaux de posters de combattants ; des supports informatiques contenant de très nombreux fichiers divers et variés, la découverte d'écrits, d'entretiens avec ou sur Abdullah E..., des rapports du YJA dont un daté du 28 septembre 2006 rendant compte principalement de l'avancement des travaux de campagne et de la situation organisationnelle et financière de Paris, un tract signé PAJK (parti des femmes libres du Kurdistan) rédigé à l'occasion du 29e arrondissement sic de la fondation du PKK ainsi qu'un discours de N..., un questionnaire sous forme QCM comportant des questions sur le PKK, des exemplaires de bulletins de vote destinés à être utilisés lors des élections des membres de l'assemblée du conseil général du KONGRA GEL, une circulaire signée Comité de la défense du Peuple du KKK sic et adressée à tous les commandants et combattants du HPG, une lettre datée du 7 décembre 2006 signée du « comité des Martyrs » et adressée à la famille F..., l'informant de ce que leur fils Kasim F...était tombé martyr le 20 décembre 1994 au cours d'une fusillade à Bingol ; divers dessins représentant le marteau et la faucille, une kalachnikov, l'étoile du drapeau du PKK, des documents relatifs à des extraits du livre d'Abdullah E..., des interviews de ce leader en prison, divers articles sur la place de la femme et sur les combattants martyrs issus du magazine Serxwebun, un historique du PKK ¿ motifs non adoptés en appel ; que par ailleurs, dès le 18 octobre 2006, la direction de la surveillance du territoire (DST) avait indiqué qu'en plus de ses activités culturelles légales, le CCK servait également de lieu pour des conférences ou des réunions clandestines des cadres du PKK, ce qu'avaient d'ailleurs admis notamment Riza G...et Burcin M...dans leurs déclarations à la police ; qu'enfin les éléments de comptabilités occultes, manifestement en rapport avec le produit des collectes de fonds effectuées pour le compte du PKK, avaient été saisis dans une armoire de cette association ; que dès lors et malgré les dénégations des responsables du CCK, cette association sera déclarée coupable des infractions qui lui sont imputées ; qu'en conséquence, il y a lieu d'en prononcer la dissolution ;
" 1°) alors que le principe de légalité de la peine s'oppose à ce qu'une peine soit prononcée alors que toutes les conditions requises par la loi ne seraient pas réunies ; qu'en vertu de l'article 131-39 du code pénal, la peine de dissolution ne peut être prononcée qu'à l'encontre des personnes morales créées ou détournées de leur objet pour commettre les faits incriminés ; qu'en prononçant la dissolution du CCK alors même qu'il ressortait de ses constatations que l'objet initial et licite de l'association prévenue avait été préservé, la cour d'appel a violé l'article 131-39 du code pénal et le principe de légalité des peines ;
" 2°) alors que tout arrêt doit comporter les motifs propres à justifier son dispositif ; qu'en vertu de l'article 131-39 du code pénal, la peine de dissolution ne peut être prononcée à l'encontre des partis ou groupements politiques ; que l'entière condamnation de l'association prévenue repose sur sa supposée affiliation au parti des travailleurs du Kurdistan, parti politique turc ; qu'en ne recherchant pas si cette association était susceptible d'être qualifiée de parti ou groupement politique et en en prononçant la dissolution, la cour d'appel a insuffisamment motivé sa décision au regard de l'article 131-39 du code pénal ;
" 3°) alors que tout prévenu a le droit d'être informé de la nature et de la cause de l'accusation portée contre lui ; que cette information comprend celle, nécessaire à l'exercice des droits de la défense, relative à la nature des peines encourues ; qu'en constatant que l'association prévenue n'avait pas été informée de ce qu'elle encourrait la dissolution sans en conclure que ses droits de la défense avaient été méconnus, la cour d'appel a violé les prescriptions de l'article 6, § 3, de la Convention européenne des droits de l'homme ;

" 4°) alors que peuvent seules être prononcées des peines strictement nécessaires et proportionnées ; que la peine de dissolution constitue une atteinte grave à la liberté d'association et implique à ce titre que sa nécessité et sa proportionnalité au regard des faits commis et du but poursuivi soient spécifiquement motivées ; qu'en prononçant la peine de dissolution en s'abstenant de toute motivation, la cour d'appel a insuffisamment motivé sa décision et violé les principes de nécessité et de proportionnalité des peines " ;
Attendu que, d'une part, pour prononcer la dissolution de l'association Centre culturel kurde Ahmet Kaya, après l'avoir déclarée coupable de participation à une association de malfaiteurs en relation avec une entreprise terroriste et de financement du terrorisme, l'arrêt attaqué retient que cette personne morale a sciemment adhéré, en connaissant les objectifs recherchés, à une entente destinée à assurer, sur le territoire français, la propagande et le financement du PKK, servant notamment à l'achat d'armes et d'explosifs ainsi qu'à l'entretien des combattants de ce mouvement ; que les juges ajoutent que cette dissolution est la seule peine de nature à sanctionner justement les infractions commises et le soutien apporté à une organisation terroriste ; que, d'autre part, le prononcé de la dissolution d'une association étant rendu possible par l'article 422-5 du code pénal, qui renvoie à l'article 131-39 du même code, pour déterminer les peines encourues par les personnes morales déclarées coupables des infractions prévues par les articles 421-1, 421-2-1 et 421-2-2 dudit code, visés par l'ordonnance de renvoi devant le tribunal correctionnel, il en résulte qu'en l'absence d'incertitude sur l'objet de la prévention et la peine encourue, l'omission, dans l'ordonnance précitée, de la mention du texte applicable à la dissolution ne saurait entraîner la nullité ;
Attendu qu'en l'état de ces motifs et en l'absence de toute cause de nullité, la cour d'appel a justifié sa décision, sans méconnaître les dispositions conventionnelles dont la violation est alléguée au moyen ;
D'où il suit que le moyen ne peut qu'être écarté ;

Et attendu que l'arrêt est régulier en la forme ;

REJETTE les pourvois ;

Ainsi fait et jugé par la Cour de cassation, chambre criminelle, et prononcé par le président le 21 mai deux mille quatorze ;

En foi de quoi le présent arrêt a été signé par le président, le rapporteur et le greffier de chambre ;

ECLI:FR:CCASS:2014:CR02790

Analyse

Publication : Bulletin criminel 2014, n° 136

Décision attaquée : Cour d'appel de Paris , du 23 avril 2013

Titrages et résumés : RESPONSABILITE PENALE - Personne morale - Conditions - Commission d'une infraction pour le compte de la personne morale par l'un de ses organes ou représentants - Applications diverses - Association - Membres - Organisation et gestion de la partie clandestine des activités constituant un soutien logistique et financier à une organisation terroriste

Est justifiée la décision de la cour d'appel qui déclare une association coupable d'association de malfaiteurs en relation avec une entreprise terroriste, financement du terrorisme, par des constatations qui établissent que certains membres identifiés de cette association, mandatés par une organisation terroriste et également poursuivis, organisaient, supervisaient, coordonnaient la partie clandestine des activités de cette association, au profit de l'organisation terroriste, notamment les réunions régulières de cadres venus de divers pays européens, la propagande, le recueil des fonds, la tenue de la comptabilité et, plus généralement, dirigeaient, pour son compte, les opérations représentant la contribution délibérée de celle-ci au soutien de l'organisation terroriste

TERRORISME - Infractions en relation avec une entreprise ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur - Responsabilité pénale - Personne morale - Commission d'une infraction pour le compte de la personne morale par l'un de ses organes ou représentants - Cas - Association - Membres - Organisation et gestion de la partie clandestine des activités constituant un soutien logistique et financier à une organisation terroriste

Précédents jurisprudentiels : Sur la responsabilité pénale d'une personne morale résultant d'une infraction commise par l'un de ses organes ou représentants, à rapprocher :Crim., 11 décembre 2012, pourvoi n° 11-87.421, Bull. crim. 2012, n° 274 (rejet), et les arrêts cités. Sur la nécessité de rechercher si l'infraction a été commise pour le compte de la personne morale par l'un de ses organes ou représentants, à rapprocher :Crim., 1er avril 014, pourvoi n° 12-86.501, Bull. crim. 2014, n° 99 (cassation), et les arrêts cités. Sur la qualité de représentant de la personne morale, à rapprocher :Crim., 25 mars 2014, pourvoi n° 13-80.376, Bull. crim. 2014, n° 94 (rejet), et l'arrêt cité

Textes appliqués :

- article 121-2 du code pénal ; articles 421-1, 421-2 et 421-2-2 du code pénal

Annex 478

Press Release, U.S. Department of the Treasury, Treasury Targets Additional Ukrainian Separatists and Russian Individuals and Entities (19 December 2014)

U.S. DEPARTMENT OF THE TREASURY

Press Center

Treasury Targets Additional Ukrainian Separatists and Russian Individuals and Entities

12/19/2014

Action Targets 24 Ukrainian and Russian Separatist Leaders,
a Financier, and the Militias or Entities they Lead
Complements Action Taken by the President to Ban Investment in and Trade with Crimea

WASHINGTON – In light of the continued conflict in eastern Ukraine and Russia's continued disregard for its obligations under the Minsk agreements, which fuels the continued conflict, the U.S. Department of the Treasury today imposed sanctions pursuant to Executive Order (E.O.) 13660 on 24 Ukrainian and Russian-backed separatists and the militias or entities they lead or support. The individuals and entities sanctioned today were designated for being responsible for, or complicit in, actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine, or for being militias or entities, and/or asserting governmental authority over a part or region of Ukraine without the authorization of the Government of Ukraine.

This action complements the step taken by President Obama today to issue an E.O. that prohibits new investment in the Crimea region of Ukraine by U.S. persons; the importation of any goods, services, or technology from the Crimea region of Ukraine into the United States; the exportation, reexportation, sale, or supply of any goods, services, or technology from the United States to the Crimea region of Ukraine; and any approval, financing, facilitation, or guarantee by a U.S. person of any such transaction by a foreign person. This new E.O. also authorizes the Secretary of the Treasury, in consultation with the Secretary of State, to impose sanctions on any person determined to be operating in the Crimea region of Ukraine, to be a leader of an entity operating in the Crimea region of Ukraine, or to be owned or controlled by, or to provide material support to any person designated under this E.O. Treasury's Office of Foreign Assets Control (OFAC) is simultaneously issuing a general license to authorize the sale of agricultural commodities, medicine, and medical supplies to the Crimea region of Ukraine.

Both of these actions complement recent measures taken by the European Union. Our efforts respond to actions by Russia, and the separatists Russia supports, which destabilize and undermine the territorial integrity of Ukraine. These actions also reflect the ongoing close collaboration between the United States and European Union on our respective sanctions programs. As the President has said, our goal is to promote a diplomatic solution that provides a lasting resolution to the conflict and helps to promote growth and stability in Ukraine and regionally, including in Russia. In this context, the President has continued to call on Russia's leadership to implement the Minsk agreements and to reach a lasting and comprehensive resolution to the conflict that respects Ukraine's sovereignty and territorial integrity.

"These actions target people who are undermining peace and stability in Ukraine and impose additional costs on Russia for its destabilizing actions," said Under Secretary for Terrorism and Financial Intelligence David S. Cohen. "Alongside our partners in Europe and around the world, we call on Russia to end its occupation and attempted annexation of Crimea, to cease its support to separatists in eastern Ukraine, and to implement the obligations it signed up to under the Minsk agreements. The ball is in Russia's court; if it implements its commitments and abides by international law, sanctions could be rolled back."

Vladimir Antyufeyev was appointed "deputy prime minister" of the so-called Donetsk People's Republic in July 2014. He was engaged in separatist "governmental" activities on behalf of the so-called Donetsk People's Republic and was responsible for its domestic security and law enforcement. Antyufeyev is being designated because he has acted or purported to act for or on behalf of the so-called Donetsk People's Republic and was responsible for or complicit in, or has engaged in, actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Fedor Berezin served as the deputy to Igor Girkin (a.k.a. Igor Strelkov), "defense minister" of the so-called Donetsk People's Republic. Berezin continues to play a leadership role in the separatist region's armed forces following Girkin's August 2014 resignation. Berezin is being designated because he is responsible for actions that threaten the territorial integrity of Ukraine, has acted on behalf of the so-called Donetsk People's Republic, and is a leader of the so-called Donetsk People's Republic.

Igor Bezler is a former Russian military officer who has actively coordinated subversion activities in Ukrainian territory. Bezler served in the Main Intelligence Directorate (GRU) of the General Staff of the Russian Federation Armed Forces until 2002 and was then sent to Ukraine. In April, Bezler ordered the arrest and kidnapping of OSCE representatives. Bezler is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace security, stability, sovereignty, or territorial integrity of Ukraine.

The Donbass People's Militia is being designated because of the group's engagement in actions and policies that threaten the peace, security, stability, sovereignty, and territorial integrity of Ukraine. The Donbass People's Militia is an armed pro-Russian separatist group of rebels fighting Government of Ukraine forces in eastern Ukraine and threatening the stability and security of Ukraine in the Donetsk region. This militia seized control of several government buildings in eastern Ukraine in early April 2014 and under the command of its former leader, Pavel Gubarev, took over the regional government building in Donetsk while Gubarev proclaimed himself the "people's governor." Its forces have been involved in organizing "referendums" on Donetsk's future without the involvement of the Government of Ukraine.

Pavel Gubarev was the self-proclaimed "governor" of the so-called Donetsk People's Republic, an entity that was designated pursuant to E.O. 13660 on July 16, 2014. Gubarev has been described as one of the three most prominent leaders of the separatists in southeast Ukraine. In March 2014, Gubarev was detained by Ukraine's Security Service during a media conference in Donetsk and then moved to a detention center in Kyiv. He is facing charges of separatism, organizing mass disorder, and infringing Ukrainian territorial integrity. Gubarev is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine and is a leader of an entity that has, or whose members have, engaged in actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Alexei Karyakin is speaker of the self-proclaimed Luhansk People's Republic Council of Ministers. Karyakin signed a memorandum uniting the so-called Donetsk and Luhansk People's Republics on May 24, 2014. On June 20, 2014 Karyakin addressed a letter to Belarusian President Lukashenka and the national assembly of

Belarus requesting that Belarus recognize the independence of the so-called Luhansk People's Republic. On June 25, 2014 he declared the separatist regions' intent to seek accession to the Customs Union of Russia, Belarus, and Kazakhstan. Karyakin is being designated because he is responsible for actions that threaten the territorial integrity of Ukraine and has asserted governmental authority over a region of Ukraine.

Alexander Khryakov was the self-proclaimed "information and mass communications minister" of the so-called Donetsk People's Republic and was responsible for directing its pro-separatist propaganda activities. Khryakov is now a member of the council for the so-called Donetsk People's Republic. Khryakov is being designated because he has acted or purported to act for or on behalf of the so-called Donetsk People's Republic, and is responsible for or complicit in, or has engaged in, actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Nikolai Kozitsyn is described as one of the first-hand organizers and coordinators of the separatist actions in Ukraine and is responsible for forming separatist groups on the territory of Ukraine. He also provides separatists with weapons and sends them to Ukraine. Kozitsyn is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Konstantin Malofeyev funds separatist activities in eastern Ukraine and is closely linked with Aleksandr Borodai, Igor Girkin (a.k.a. Igot Strelkov), and the so-called Donetsk People's Republic, which have all been previously sanctioned as Specially Designated Nationals (SDNs). Malofeyev is one of the main sources of financing for Russians promoting separatism in Crimea. Malofeyev is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine and has materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of the so-called Donetsk People's Republic.

Malofeyev owns the **Marshall Capital Fund**, which is a Russian equity investment group. The Marshall Capital Fund is being designated because it is owned or controlled by Malofeyev.

Aleksey Mozgovy is described as the commander of a separatist force in Ukraine's Luhansk region. He is responsible for training separatists to fight against the Government of Ukraine forces and has called for regions in Ukraine's southeast to unite in order to achieve their separatist objectives. Mozgovy is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine and is a leader of an entity that has, or whose members have, engaged in actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Dmitry Neklyudov was appointed "deputy minister of interior of the so-called Republic of Crimea on May 5, 2014. Neklyudov is being designated because he has asserted governmental authority over a region of Ukraine without the authorization of the Government of Ukraine.

The **Novorossiya Party** was created to unite all supporters for the establishment of an independent federal state of Novorossiya and to withdraw all southeastern lands in Ukraine from the authority of Kyiv. The Novorossiya Party is being designated because it has engaged in actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Oplot is one of the militias that is attempting to assert control over the Donetsk and Luhansk regions of Ukraine. In April, its members occupied the Donetsk city council building, and the militia pushed for the holding of a "referendum" on the territorial status of the Donetsk Region. Oplot is being designated because it is responsible for or complicit in, or has engaged in, actions or polices that undermine democratic processes or institutions in Ukraine, and actions or polices that threaten the peace security, stability, sovereignty, or territorial integrity of Ukraine.

Igor Plotnitsky, an ex-Soviet army officer, was "elected" head of the so-called Luhansk People's Republic in unrecognized "elections" that took place on November 2, 2014, which also included ballots from polling stations in Russia. Plotnitsky became the leader of the separatists in Luhansk in February 2014. In April, he became the first commander of the so-called Zarya (Dawn) separatist battalion and in May 2014, he took the position of Defense Minister of the so-called Luhansk People's Republic. Plotnitsky is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine and has asserted governmental authority over a part or region of Ukraine without the authorization of the Government of Ukraine.

Natalia Poklonskaya was appointed as the de facto prosecutor of the so-called Republic of Crimea in May 2014 by Russian President Vladimir Putin. A Ukraine court in Kyiv ordered Poklonskaya's detention on suspicion of subverting Ukraine's constitutional system and seizing state power. She is accused of having accepted an illegal offer to head the Crimean prosecutor's office and has illegally taken office. Poklonskaya is being designated because she has asserted governmental authority over a part or region of Ukraine without the authorization of the Government of Ukraine.

Miroslav Rudenko is described as an official of the government of the so-called Donetsk People's Republic, and he is also the deputy commander of its defense forces. He rejected Ukrainian President Poroshenko's unilateral cease-fire offer as a "tactical ploy" and refused to negotiate on the organization of the Ukrainian presidential elections in Donetsk. Rudenko is being designated because he is responsible for actions that threaten the territorial integrity of Ukraine, has acted on behalf of the so-called Donetsk People's Republic, and is a leader of the so-called Donetsk People's Republic.

Petr Savchenko was the "minister of taxes and duties" of the so-called Donetsk Peoples Republic and is now a member of its council. Savchenko is being designated because he is responsible for or complicit in, or has engaged in, actions or polices that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Savchenko is the Chief Executive, Principal and Senior Executive of **PROFAKTOR, TOV**, which specializes in accounting, auditing and bookkeeping in Ukraine. PROFAKTOR, TOV is being designated because it is owned or controlled by, or has acted or purported to act for or on behalf, directly or indirectly, of Savchenko.

Oleh Tsaryov is a leader of the separatist South-East Movement and chairman of the parliament of the union of the so-called Donetsk and Luhansk People's Republics. Tsaryov is additionally a member of the Committee for Public Support for the Inhabitants of Southeast Ukraine, operating under the auspices of the Russian parliament, providing volunteers and military material to separatists in eastern Ukraine. Tsaryov is being designated because he is responsible for actions that threaten the territorial integrity of Ukraine and has asserted governmental authority over a region of Ukraine.

The **South-East Movement** (Yugo-Vostok Movement) promotes the creation of a separate pro-Russian state in southeast Ukraine and was banned in Ukraine in August 2014. The South-East Movement is being designated because it has engaged in actions which threaten the territorial integrity of Ukraine, and for being controlled by Tsaryov.

Alexander Zakharchenko was declared the winner of a recent unrecognized election in the so-called Donetsk People's Republic. Ukrainian President Petro Poroshenko denounced the November 2, 2014 "elections" in the so-called Donetsk and Luhansk People's Republics as an "electoral farce" and stated that they violated the September 5, 2014 Minsk Accord. Prior to claiming the position of prime minister, Zakharchenko was a commander in the insurgency against the

government of Ukraine. He is being designated because he is responsible for actions that threaten the territorial integrity of Ukraine, has acted on behalf of the so-called Donetsk People's Republic, and is a leader of the so-called Donetsk People's Republic.

The **Night Wolves** biker group had its members serve in the Crimean self-defense forces as early as February 2014, which supported local Crimeans against the Government of Ukraine. In March 2014, the Night Wolves conducted intimidation and criminal activities within Ukraine and also abducted and subsequently assaulted a Ukrainian Border Guard official. This biker group also participated in the storming of the gas distribution station in Strikolkove and the storming of the Ukrainian Naval Forces Headquarters in Sevastopol. In early-April 2014, the Night Wolves helped smuggle a former senior Ukrainian official out of Ukraine and also helped obtain Russian passports for another larger group of senior Ukrainian officials that they helped get into Russia. The Night Wolves have been closely connected to the Russian special services, have helped to recruit separatist fighters for Donetsk and Luhansk, Ukraine, and were deployed to the cities of Luhansk and Kharkiv. The Night Wolves group is being designated because it is an entity that is responsible for or complicit in, or has engaged in, directly or indirectly, actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

Aleksandr Zaldostanov, also known as "the Surgeon," is the leader of the Night Wolves. Zaldostanov chairs the overall Night Wolves organization, and some of his responsibilities include the punishing of chapter groups and members for disloyalty to the Night Wolves organization. During the late-March storming of the Ukrainian Naval Forces Headquarters in Sevastopol, he coordinated the confiscation of Ukrainian weapons with the Russian forces. Zaldostanov is being designated for being a leader of a group, the Night Wolves, that is engaging in, directly or indirectly, actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine.

For identifying information on the individuals and entities named in this release, please click *here*.

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Annex 479

Australian Government: Department of Foreign Affairs and Trade, Ukraine Sanctions: Review of Australia's Autonomous Sanctions Imposed on 84 Individuals and Entities in Relation to Ukraine (2 September 2017)

Australian Government
Department of Foreign Affairs and Trade

Ukraine Sanctions: Review of Australia’s autonomous sanctions imposed on 84 individuals and entities in relation to Ukraine

Members of the public are invited to comment on a statutory review of Australia's autonomous sanctions imposed on 63 individuals and 21 entities in response to Russia's ongoing threat to the sovereignty and territorial integrity of Ukraine. These individuals and entities have been designated by the Minister for Foreign Affairs under the *Autonomous Sanctions Regulations 2011* for the purpose of targeted financial sanctions. These individuals have also been declared by the Minister under the *Autonomous Sanctions Regulations 2011* for the purpose of travel bans. These listings were made on 2 September 2014 and will expire on 2 September 2017 unless extended by the Minister for Foreign Affairs.

Individuals:

1. Sergey BESEDA
2. Alexander Vasilyevich BORTNIKOV
3. Mikhail Vladimiorich DEGTYAREV
4. Mikhail Yefimovich FRADKOV
5. Valery Vasilevich GERASIMOV
6. Boris Vyacheslavoich GRYZLOV
7. Ramzan Akhmadovitch KADYROV
8. Sergei Ivanovich MENYAILO
9. Sergei Ivanovich NEVEROV
10. Rashid Gumorovich NURGALIEV
11. Nikolai Platonovich PATRUSHEV
12. Vladimir Nikolavich PLIGIN
13. Nikolay Terentievich SHAMALOV
14. Vladimir SHAMANOV
15. Ludmila Ivanovna SHVETSOVA
16. Sergey ABISOV
17. Vladimir ANTYUFEYEV (also known as Vladimir Shevtsov)
18. Marat BASHIROV
19. Fedir Dmytrovych BEREZIN
20. Igor Mykolaiovych BEZLER
21. Valeriy BOLOTOV
22. Aleksandr Yurevich BORODAI
23. Pavel Yurevich GUBAREV
24. Ekaterina GUBAREVA
25. Yurij IVAKIN
26. Petr Grigorievich JAROSH
27. Igor KAKIDZYANOV
28. Alexandr Aleksandrovich KALYUSSKY
29. Aleksey KARYAKIN
30. Valery Vladimirovich KAUROV
31. Alexander KHODAKOVSKY

32. Alexander KHRYAKOV
33. Nikolay KOZITSYN
34. Oleg Grigorievich KOZYURA
35. Boris LITVINOV
36. Roman LYAGIN
37. Konstantin Valerevich MALOFEEV
38. Aleksandr MALYKHIN
39. Oleksiy MOZGOVYI
40. Vasyl NIKITIN
41. Igor PLOTNITSKY
42. Natalia Vladimirovna POKLONSKAYA
43. Andriy PURGIN

44. Igor Sergeievich SHEVCHENKO
45. Oksana TCHIGRINA
46. Alexander Nikolayevich TKACHYOV
47. Oleg TSARIOV
48. Serhii Anatoliyovych ZDRILIUK
49. Victor Yuriiovych ANOSOV
50. Viacheslav Anatoliiovych APRAKSIMOV
51. Ruslan Yunirovish ILKAEV
52. Victor Petrovich IVANOV
53. Alexander KARAMAN
54. Valery Vladimirovich KULIKOV
55. Valerii Kostiantynovych MUSIIENKO
56. Alexander Mihailovich NOSATOV
57. German PROKOPIV
58. Yurii Oleksandrovych PROTSENKO
59. Sergey Gennadevich TSYPLAKOV
60. Lt. Gen. Igor TURCHENYUK
61. Oleh Anatoliiovych VASIN
62. Aleksandr ZAKHARCHENKO
63. Vladimir ZHIRINOVSKY

Entities:

1. Almaz-Antey
2. Army of the Southeast
3. Azov Distillery Plant
4. Donbass People's Militia
5. Factory of Sparkling Wine Novy Svet – State Enterprise
6. Federal State of Novorossiya
7. Feodosiya Enterprise
8. International Union of Public Associations 'Great Don Army'
9. Kerch Ferry – State Ferry Enterprise
10. Kerch Commercial Sea Port – State Enterprise
11. Luhansk Guard
12. Magarach of the National Institute of Wine – State Enterprise
13. National Association of Producers "Massandra" – State Concern
14. People's Republic of Donetsk
15. People's Republic of Luhansk
16. Resort 'Nizhnyaya Oreanda'
17. Russian National Commercial Bank
18. Sevastopol Commercial Seaport
19. SOBOL
20. Universal-Avia – State Enterprise
21. Vostok Battalion

Under the *Autonomous Sanctions Regulations 2011* in relation to Ukraine, the Minister for Foreign Affairs may designate an entity or designate and/or declare a person that the Minister is satisfied is responsible for, or complicit in, the threat to the sovereignty and territorial integrity of Ukraine.

Persons and entities who have been designated by the Minister are subject to targeted financial sanctions. Persons who have been declared by the Minister are subject to travel bans.

Details of all persons and entities listed by the Australian Government pursuant to the *Autonomous Sanctions Regulations 2011*, including Australia's autonomous sanctions in relation to Ukraine, can be found in the DFAT Consolidated List.

More information on Australian sanctions laws in relation to Ukraine

How to make a submission

1. Complete a submission cover sheet [Word 305 KB]
2. Prepare your submission
3. Email your cover sheet and submission to sanctions@dfat.gov.au

Alternatively, post your submission to:

Sanctions Section
Department of Foreign Affairs and Trade
R.G. Casey Building
John McEwen Crescent
Barton ACT 0221 Australia

Submissions must be received by 5pm on Wednesday 2 August 2017, Australian Eastern Standard Time. The Department reserves the right not to consider late submissions.

Confidentiality and privacy

All submissions will be made available on the Department of Foreign Affairs and Trade (DFAT) website, subject to DFAT's sole discretion. If you would like your submission to be treated as confidential, in whole or in part, please note this on the submission cover sheet. If you ask for part of your submission to be treated as confidential, please provide two versions of it, one with the confidential information removed for publication.

DFAT will collect personal information from you for the purpose of processing, reviewing and assessing your submission. Your personal information will be used and disclosed for the purpose for which it was collected, or as otherwise authorised in accordance with the *Privacy Act 1988*.

The names of individuals making submissions will be published unless you ask us not to publish your name. No contact details will be disclosed. For submissions made by or on behalf of organisations only the name of the organisation will be published.

DFAT's privacy policy is available online and contains information about how you may access and seek correction of your personal information and how you can complain about a breach of your privacy.

Annex 480

Nouvelobs, Deux Ans de Prison Pour la Mère d'un Djihadiste :
"J'aurais Pu Sauver mon Fils" (6 Septembre 2017)

Deux ans de prison pour la mère d'un djihadiste : "J’aurais pu sauver mon fils"

Une mère qui avait envoyé de l'argent à son fils parti faire le djihad a été condamnée ce jeudi à deux ans de prison ferme pour "financement du terrorisme".

Par Emilie Brouze

Publié le 06 septembre 2017 à 19h02
Mise à jour : ajout de la condamnation du tribunal, ce 28 septembre 2017.

Est-ce qu’envoyer de l’argent à un proche radicalisé, qui a ensuite rejoint les rangs de l’Etat islamique, signifie financer le terrorisme ? La question était au cœur de l’audience, pesante et extrêmement tendue, qui s’est déroulée dans la nuit de mardi 4 au mercredi 5 septembre, au tribunal correctionnel de Paris.

Abbes Bounaga, le fils, le frère et le meilleur ami des trois prévenus, est présumé mort après avoir rejoint les rangs de l’Etat islamique en zone irako-syrienne. C’est par une vidéo testamentaire envoyée sur la messagerie Telegram qu’on a fait savoir à Nathalie Haddadi, le 17 août 2016, que son fils de 21 ans était mort au combat.

Veste de tailleur noir et long carré brun, elle s’avance à la barre. Nathalie Haddadi comparaît ce mardi pour complicité de sortie de territoire et financement de terrorisme. Les deux autres prévenus, le frère et un ami, sont tous les deux présents pour ce dernier chef d’inculpation. En cause, plusieurs sommes d’argent envoyées par mandat à Abbes pendant son périple qui le mènera jusqu’aux rangs de l'Etat islamique.

"Conneries sur conneries"

Né en Algérie en 1994, Abbes, "très actif sur les réseaux djihadistes", avait attiré l’attention des services de la DGSI en 2015, après avoir acheté des billets pour Istanbul. Il fut condamné et incarcéré juste avant sa date de départ pour des faits de délinquance. Depuis son adolescence, il enchaîne "conneries sur conneries", et écope à plusieurs reprises de peine de prison pour vol avec violence ou trafic de stups.

Pour ses proches, sa radicalisation remonte à son avant-dernier passage en prison, à Strasbourg. "Il n’était pas comme d’habitude", appuie son frère, Tarik. "Il était froid. Il m’encourageait à faire mes prières."

Le 7 novembre 2015, Abbes reçoit au domicile familial la visite de la police, qui lui notifie une interdiction de sortie de territoire et qui lui demande de donner son passeport français – le ministère public craint alors qu’il ne parte en Syrie. Le lendemain, Abbes se rend en Allemagne pour s’envoler vers l’Algérie, avec le passeport qu’il disait avoir perdu.

Au terme d’un périple de six mois détaillé pendant l’audience, d'abord en Malaisie, puis

dans les pays du Golfe, en Iran et enfin via la Turquie, le djihadiste rejoindra l'Etat islamique en juin 2017.

Sur place, il dit à Souleymane, son ami et prévenu ce mardi, espérer intégrer les forces spéciales. "Ce sont les meilleurs soldats, dont l'espérance de vie ne dépasse pas une semaine." Il deviendra, dit-il, un "inghimasi", terme utilisé par Daech pour désigner celui qui combat avec une ceinture explosive mais ne l'actionne qu'en dernier recours. Il mourra moins de deux mois après son arrivée.

"J'ai perdu la chair de ma chair"

La mère, Nathalie Haddadi, ne signale pas à la police le voyage et la mort présumée de son fils. C'est l'une de ses amies d'enfance qui s'en chargera.

Pourquoi avoir supprimé la vidéo testamentaire et caché les circonstances de sa mort, s'interroge le tribunal ? "Je ne voulais pas avoir de soucis moi-même, mes enfants, et notre réputation aussi", répond la mère.

La présidente lit ses propos dans une conversation versée au dossier : "La mort au djihad doit rester secrète, et notamment par rapport aux autorités, ils vont le salir." "Ce qu'a fait mon fils n'est pas beau, pas glorieux, il s'est sali lui-même", rectifie Nathalie Haddadi.

Cette conseillère commerciale en Alsace reconnaît avoir payé à son fils un aller et retour en Algérie en novembre 2015, avant que celui-ci ne fasse l'objet d'une interdiction de sortie de territoire. Elle l'a envoyé chez son père parce qu'elle "n'en pouvait plus".

A-t-elle dissimulé le passeport français de son fils, réclamé par les policiers quand ils sont venus chez elle ? La présidente remarque que ses versions à son sujet ont varié. Nathalie Haddadi raconte l'avoir entreposé hors de sa portée, dans une pochette enroulée dans la piscine gonflable entreposée sur la terrasse du logement. A moins que son fils ne soit allé le récupérer au consulat d'Algérie, lors de sa demande de visa. "C'est un grand manipulateur mon fils."

La présidente, sarcastique : "S'il avait respecté son interdiction…" "Il serait en vie", complète Nathalie Haddadi. "Et oui", ponctue la juge Isabelle Prévost-Desprez.

La remarque fait éclater son avocat, Me Hervé Denis, qui menace de quitter le tribunal : "Madame, vous être odieuse !" La mère éclate en sanglots, l'avocat s'emporte. Soulagement quand le procureur demande une suspension de séance. Tarik, le fils cadet, accompagne sa mère vers la sortie, qui pleure, "j'ai perdu la chair de ma chair".

"J'aurais pu sauver mon fils"

L'audience reprendra dans le calme une dizaine de minutes plus tard. "Je vis avec les remords et la culpabilité", expose à la barre Nathalie Haddadi.

""J'aurais pu sauver mon fils si j'avais fait autrement. J'aime mon fils, il représente beaucoup pour moi.""
Elle dit avoir pensé qu'Abbes avait changé pendant son séjour algérien. "Il avait le projet d'ouvrir un fast-food, il avait rencontré une fille", argumente-t-elle.

La mère lui enverra de l'argent sur place, ainsi que son passeport algérien. C'est elle qui lui a ensuite payé son billet pour la Malaisie ainsi qu'un vol interne. Nathalie Haddadi lui a aussi transmis 2.800 euros parce qu'il s'était fait agresser en Malaisie, où il était soi-disant pour des vacances. A "aucun moment" il ne s'agissait de financer son projet, soutient-elle.

"Un des grands travers de Mme Haddadi, c'est d'avoir menti", appuiera plus tard le procureur. "On a bien du mal à lui accorder du crédit et de la bonne foi. Ses déplacements, sa cohérence, ne pouvaient pas lui échapper. Son état d'esprit en Malaisie non plus."

Pour le procureur, Nathalie Haddadi n'est pas "quelqu'un de radical". "Ce n'est pas une démarche pro-Daech, c'est une démarche de valorisation de son fils, indéfectible, y compris dans ses pires erreurs." D'une "hypervalorisation" du fils aîné. Il s'appuie sur les propos de Tarik, le cadet, en audition : "Ma mère considérait Abbes comme son égal, et moi j'étais en dessous."

"Machine de guerre"

Souleymane, le deuxième prévenu, est un ami d'enfance d'Abbes, un "frère", avec qui il a d'ailleurs été à plusieurs reprises condamné, la première fois à 15 ans pour vol. Lui aussi a envoyé de l'argent à Abbes. 2.280 euros en Algérie et à Dubaï, pendant une escale. En grande partie des dettes de stups, collectées par ses soins.

"Pendant une période de ma vie, j'ai été pour Daech", admet-il. "J'ai été mis dedans par sa faute." Jusqu'à quand, tente de déterminer le tribunal ? Automne 2015, répond-il à la barre, juste avant son mariage.

Souleymane a été en contact avec son ami tout au long de son périple. "Devine je suis où ? Tiens je t'envoie une photo." Il affirme : "Je ne savais pas que le but était le Shâm, je l'ai su que quand il était au Shâm."

Février 2016, Abbes est en Malaisie. Il hésite sur le choix de sa "kounia" (nom de guerre). Il lui dit sur WhatsApp qu'il est "en mode mission", "en mode sport intensif, un mois et je deviens une machine de guerre". La présidente tique. "Chez nous à Strasbourg, être une machine de guerre, c'est pas ce que vous pensez. C'est avoir un beau corps, c'est une expression, Madame."

"T'aurais pu me raconter", lui écrit Souleymane quand Abbes le prévient qu'il est "en zone". Il tente de l'inciter à le rejoindre. "Vivre là-bas c'est formidable, les vrais musulmans doivent le faire sinon ce sont des kouffars." Abbes lui demande de dire à sa mère "qu'il est bien arrivé et qu'il vit des trucs de fou". Pour l'avocat du prévenu, son client est dans ses conversations "complaisant", mais "il n'essaie pas de le faire revenir, il essaie de le maintenir en vie".

"Si c'était à refaire, j'aurais prévenu la police", regrette Souleymane à la barre.

"J'y croyais"

Tard dans la soirée, Tarik, 20 ans, le petit frère, casier judiciaire vierge, prend la parole devant le tribunal d'une voix douce et triste. Ses derniers échanges avec Abbes, sur Facebook, remontent au printemps 2016. Il n'a pas regardé jusqu'à la fin la vidéo

testamentaire, "pas eu le courage".

Sur demande de son frère, Tarik a envoyé plusieurs sommes d'argent, donné par Souleymane (les dettes, encore). A Dubaï, puis au Maroc et en Turquie.

""Je me suis posé des questions", assure-t-il. " ""J'ai demandé à quoi sert l'argent. Il m'a dit qu'il servait à faire l'aumône. J'y croyais.""
Tarik explique s'être détaché progressivement de son frère, avoir pris un chemin différent. La présidente : "On a l'impression que vous avez cloisonné, que ce soit par rapport à la délinquance de votre frère ou sa radicalisation."

"J'ai une vie comme tout le monde, j'ai une vie ordinaire", opine Tarik.

"On reste parent. C'est tout"

Début de la nuit. Véronique Roy, dont le fils est présumé mort en Syrie en 2014, est appelée à entrer dans la chambre du tribunal, citée comme témoin.

"Je me sens solidaire de Mme Haddadi", formule-t-elle dans une salle d'audience absolument silencieuse. A l'instar d'autres parents, la mère explique n'avoir pas compris la radicalisation de son fils et n'avoir rien vu de son projet de départ.

""Je comprends le lien qu'on veut garder avec son enfant quand il se radicalise et qu'il parte car c'est la seule chose qui nous reste. [...] On continue d'aimer un enfant qui est parti, ça ne veut pas dire qu'on légitime.""
Véronique Roy parle des parents qui ont envoyé et continuent d'envoyer de l'argent à leur fils ou à leur fille, pour payer du lait aux petits-enfants nés sur place par exemple.

""On ne cautionne pas le terrorisme, on reste parent. C'est tout.
Je n'ai pas donné d'argent à mon enfant car il me l'a pas demandé. C'est une question que je me suis posée avec mon mari. Est-ce que je l'aurais fait ? Peut-être."

Alors tous les parents le sont

Pour cette mère qui a raconté son combat dans un livre, s'il y a financement du terrorisme, il est à grande échelle – elle cite pour exemple un cimentier accusé de financer Daech.

'"Si Nathalie est jugée coupable ce soir, je le suis aussi et tous les parents le sont."' "
"Je crois que les enjeux de cette audience dépassent très largement le cas de ces quatre prévenus", entame le procureur dans son réquisitoire, soulignant que le parquet ne poursuit pas systématiquement les familles et les proches pour ce motif.

""Le parquet a estimé que dans ce dossier, on n'était pas dans un cas de naïveté absolu et que les rôles des uns et des autres sont beaucoup plus importants qu'il ne pourrait y paraître."" "
Pour la mère, le procureur requiert 18 mois de prison et un mandat de dépôt (c'est-à-dire son incarcération immédiate) ; pour Tarik, 1 an de prison dont 6 mois avec sursis ; et 3 ans de prison et un mandat de dépôt pour Souleymane.

"In fine"

Dans sa plaidoirie, le conseil de Souleymane a repris les mots du procureur prononcés au sujet des sommes d'argent, "destinées in fine à financer le périple pour rallier le djihad". "In fine."

""C'est facile de le dire a posteriori, parce que c'est arrivé, que ça devait arriver."" " L'argent a été envoyé avant qu'Abbes rejoigne l'Etat islamique, souligne son confrère. Il aurait pu changer d'avis, faire demi-tour. "Comment savoir ce qu'il avait dans sa tête à ce moment-là ?" Il rappelle que le périple a duré six mois, "c'est long".

L'avocat de la mère, "affligé", pointe également les faiblesses de l'accusation. "En quoi ça protégera plus [la société] que Nathalie soit incarcérée ?"

Les avocats des trois prévenus ont demandé la relaxe, un peu avant 4 heures du matin.

Ce 28 septembre 2017, le tribunal correctionnel de Paris a condamné la mère à deux ans de prison ferme.

"

Annex 481

Swiss State Secretariat for Economic Affairs, SECO Bilateral Economic Relations Sanctions, Programs (Situation in Ukraine: Ordinance of 27 August 2014), Individual Malofeev Konstantin Valerevich (23 May 2018)

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Economic Affairs,
Education and Research EAER

State Secretariat for Economic Affairs SECO
Bilateral Economic Relations
Sanctions

Version of 23.05.2018

Sanctions program: Situation in Ukraine: Ordinance of 27 August 2014 on measures to prevent the circumvention of international sanctions related to the situation in Ukraine (RS 946.231.176.72), annexes 2, 3 and 4 **Origin:** EU **Sanctions:** article 8 (Ban on entering into new business relationships)

Individuals

SSID: 175-28550 **Name:** Malofeev Konstantin Valerevich **Spelling variant:** Малофеев Константин Валерьевич (Russian)
DOB: 3 Jul 1974 **POB:** Puschino, Moscow region
Justification: a) Mr Malofeev is closely linked to Ukrainian separatists in Eastern Ukraine and Crimea. He is a former employer of Mr Borodai, former so-called "Prime Minister" of the "Donetsk People's Republic" and met with Mr Aksyonov, so-called "Prime Minister" of the so-called "Republic of Crimea", during the period of the Crimean annexation process. The Ukrainian Government has opened a criminal investigation into his alleged material and financial support to separatists. In addition, he gave a number of public statements supporting the annexation of Crimea and the incorporation of Ukraine into Russia and notably stated in June 2014 that "You can't incorporate the whole of Ukraine into Russia. The East (of Ukraine) maybe". **b)** Therefore Mr Malofeev is acting in support of the destabilisation of Eastern Ukraine. **Modifications:** Listed on 27 Aug 2014, amended on 6 Oct 2015, 11 Oct 2016, 26 Sep 2017

Annex 482

9M38M1 Missile. Technical Description. 9M38M1.0000.000 TD. 1984

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. The translated passages are highlighted in the original-language document. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Memorial, but stands ready to provide additional translations should the Court so require.

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APPROVED
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No. A01250-83

Specifications Ref. No. 7N-98g
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Copy No. 31

9M38M1 MISSILE

TECHNICAL SPECIFICATIONS
9M38M1.0000.000 TO

[Stamp: 431186]

[Stamp: 43783, crossed out]

1984

Form 5 GOST 2.106.68

CONTENTS

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						9M38M1		
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		Sviridova		7/22/84			1	3	222
		Pliev		7/22/84			DT	
		Kozlov		7/22/84				
		Ektov		7/22/84				

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There is no KNI-L mode in the M-22 air defense system.

Guidance of the missile to the target can be carried out either by signal reflected from the target or active noise generated by the target.

Depending on the target acquisition mode used (when the missile is located on a launcher or in the air), the radar guidance head acquires the signal reflected from the target (or the active noise) either before the missile leaves the launcher or after the missile leaves the launcher, during the flight process. In the latter case, before transitioning to guidance, radar correction mode can be used to refine the initial target designation and increase the probability of capturing the target or performing the maneuver. Radar correction mode is not used in the M-22 air defense system, when firing for a third time, or when firing a 9K37M1 (9K37) air defense system using a TEL.

When firing a radar guidance head using a signal reflected from the target (AF-IC mode), the missile is launched after the start of the RGS target autoconfiguration. This mode is possible only with the 9K37M1 (9K37) air defense system and is used only to illuminate a target with a nearby TELAR.

When firing a radar guidance head using a signal reflected from the target (or noise signal) in the air (ZV mode), missile control and generation of the RGS angular and Doppler target designation prior to target acquisition is performed by the on-board computing equipment or with or without using radar line correction (RLC).

In ZV mode without using RLC, the target acquisition authorization command is given in the second second of flight when the NEAR ZONE (NZ) command is present or in the fourth second of flight when the NZ command is absent. This is the only mode for the M-22 air defense system when firing a TEL at a 9K37M1 (9K37)

air defense system.

ZV mode with RLC significantly increases the missile's flight duration before RGS target acquisition with signal from the target, which in turn increases the missile's possible range and provides protection from interference in SPT mode.

The latter is ensured by signal acquisition occurring at the minimum possible distance from the target and by preventing RGS radar antenna beam interference. This mode is used only with the 9K37M1 (9K37) air defense system.

Missile equipment function under various modes of operation is described in Section 10 of these technical specifications.

The volume and order of issue and execution of commands and signals during operation of the missile's on-board equipment are shown in cyclograms (Figs. 19, 20, 21)

2.3. Brief information on missile guidance

Guiding the 9M38M1 missile to its target after target is acquired by the radar guidance head using proportional nativation A diagram of proportional navigation is given in Fig. 3.

The essence of proportional navigation lies in the fact that the missile's flight to the meeting point with the target during the guidance phase occurs on a trajectory at each point of which the speed of rotation of the velocity vector of the missile that is proportional to the angular velocity of rotation of the "missile-target" line (RGS antenna line of sight to the target).

The principle of proportional navigation on, for example, the vertical plane, can be expressed by the equation:

$$\frac{d\theta}{dt} = \frac{d\vartheta}{dt} \cdot f\,(\Delta, Nx, \varphi),$$

where θ is equal to the tilt angle of the velocity vector of the missile to the horizon;

ref. 1450s

4. MISSILE ENGINE

4.1. Purpose, components, and structure of the engine

The 9D131 engine of the 9M38M1 (see Fig. 6) is designed to generate jet propulsion to allow the missile to allow the missile to fly at a given speed and is a single-chamber, dual-mode, solid-propellant jet engine with a case-bonded charge of composite propellant.

Main technical characteristics of the engine:

	432.2 ± 5.[illegible]
– engine mass……..	433 kg;
– composite propellant mass (PD 17/18) ……	339.4 ± 3.6 kg;
– engine output time …….....	less than 0.1 s;
– engine operating time ……..	19.35 ± 3.65 s;
– maximum pressure of engine combustion chamber within the temperature range of combat use ……	127 kG/cm^2;
– nozzle throat diameter …….	95 mm;
– nozzle exit diameter …….	340 mm;
[illegible]	272 ± 7.5 s.

The engine consists of the 9X172 charge, the 9X253 igniter, fore end plate (3), aft end plate (30), and nozzle cluster (26). The 9X172 charge consists of a steel body (1) with a protective fastening barrier and an attached propellant monoblock (12) of grooved tubing. The blast tube (29) is welded to the aft end plate.

The engine's charge body, fore end plate, aft end plate, and blast tube make up the engine's combustion chamber during its operation.

The engine's charge body (1) has a complex design consisting of two flanges (7), two shells (11), a heavy ring (13), and collar with lobes attached with resin.

The flanges, shells, and heavy ring are made of corrosion-resistant steel. The fore end plate, aft end plate with blast tube, nozzle cluster body, and collar are made of titanium alloy.

The fore and aft flanges have 67 threaded holes for bolts and studs. The end plates are attached to the shell with bolts (33), and the engine coupling with adjacent sections is attached with studs (2) and flange nuts. To orient the sections and fore and aft end plates with respect to the body, nails are pressed into the flanges (49).

On the engine’s fore end plate there are an adapter (4), 15X341 engine ignition cartridge (37), 9X253 igniter (6), and SSD-65 pressure decay signaling device (36).

There are lobes (31) on the heavy ring for attaching the fins, hook, and rear rigging.

There is additional rigging for attaching the fins on the ring (24).

The 15X341 engine ignition cartridge has a preliminary arming setting in the ignition chain (to prevent accidental triggering of the charge). In its initial state, the ignition chain of the combat charge initiator is blocked by a flap that allows access to the ignition channel only after preliminary arming of the initiator.

The ignition channel between the 15X341 cartridge (37) and the 9X235 igniter (6) in the adapter (4) is blocked by the safety-start device rotor (39) in order to prevent accidental starting of the engine in the initial state. A switch automatically switches the SSD rotor from the CLOSED position to the OPEN position.

SSD during missile launch on the launching shoe

The SSD-65 pressure decay signaling device is designed to deliver to SAD the CRUISE MODE signal (+ 27V PTSh MR) to remove the second stage of SAD safing.

The engine's dual-mode (high thrust on startup mode and low thrust on cruise mode) operation is achieved by contouring the engine's composite propellant. The propellant monoblock (23) of grooved tubing has free ends and aft placement of the slit compensator for moving the engine's center of gravity during operation.

The interior channel of the fore monoblock portion of the charge is shaped like a truncated cone with the top facing the fore end. The difference in the radii of the bases of the cone provides the required duration for the pressure drop. The slit compensator is transitioned to the main part radially to reduce the stress level at the base of the slit. The shape of the slit and thickness of the arch in the fore part of the charge were chosen so as to ensure balance in strength. The ends of the charge protrude and fill part of the volume of the combustion chamber formed by the charge body, fore end plate, aft end plate, and blast tube.

The inner surface of the body is protected by a heat-resistant coating (HRC). To prevent the plasticizer from migrating from the propellant to the body HRC there is an oxidized aluminum foil (near the slit) on the surface of the HRC. The body section (near the slit) containing the propellant that burns during startup mode has a thicker coating of HRC. Near the body's flanges, HRC switches to wedge-shaped elastic cuffs (9) designed to reduce pull on the joints of the propellant monoblock when the body experiences a difference of temperature

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with ambient temperature of ±50°C. To reduce the weight of the engine on the outer surface of the body, there are grooves filled with fiberglass near the flanges (8).

The fore end plate (3) is made of titanium alloy and is a torispherical shell with an outer flange and a central hole for mounting the adapter (4). On the end plate flange there are grooves for sealing the rubber ends, a hole for securing the angular orientation of Section No. 2, and 67 holes (50 bolt holes and 17 stud holes). Section No. 2 is attached to the engine with 17 threaded studs.

The adapter has a threaded socket for mounting the 15X341 cartridge (37) gas supply connection to the SSD-65 pressure decay signaling device (36). The adapter is affixed to the end plate central hole with a nut (5), which is threaded for installation of the 9X253 igniter (6). The nut and the internal surface of the fore end plate are protected by a heat-resistant coating.

A nozzle with blast tube converts the combustion products of the propellant into the kinetic energy of gas outflow with minimal losses of thermal energy. The blast tube (29) is included in the engine construction because of the need for optimal placement of missile components on the tail section, is made of titanium alloy, and is a shell (16) with an outer flange for attaching the blast tube to the body of the engine. In the central section, the spherical shell becomes cylindrical, ending in a threaded flange with a groove for sealing of the rubber ring. The outer flange has a groove for sealing rings and holes for connecting the blast tube to the engine body and Section No. 4 of the missile. Section No. 4 attaches to the engine

with 17 threaded studs.

HRC has been applied to the inner surface of the blast tube body to protect the spherical and cylindrical shells from the thermal effects of the propellant combustion products. To prevent the HRC from eroding, a protective collar (17) is adhered to the entrance to the cylindrical part of the blast tube. A single layer of asbestos cloth is applied between the blast tube body and HRC as a drainage course for decomposition products. The inner surface of the cylindrical part of the blast tube is protected from thermal and erosive effects of hot gas flow by a carbon fiber insert (19) in the form of a tube attached to the HRC.

The engine nozzle consists of the nozzle body (22), nozzle insert (27), insert (20) with substrate (21), and barrier seal (28). The nozzle body is made of titanium by welding, and consists of the insert body (cylindrical part), two conical shells (23), and a flange. The nozzle is attached to the blast tube with a threaded joint.

To prevent the nozzle from spontaneously unscrewing, the nozzle contacts the body of the fourth section (see Fig. 2) with eight screws (71) screwed into the threaded holes on the body of the section. Between the nozzle body and the body of the fourth section there is a ring slit (72) designed to release exhaust fumes from the missile's gas supply system and which is closed by a plug (27) in the initial state that burns on startup of the missile.

The graphite insert with substrate (see Fig. 6, pos. 20, 21) prevents the cylindrical part of the nozzle from overheating. To prevent the nozzle throat from heat, the inner surface of the insert is coated with an anti-corrosive coating. The supercritical nozzle flow passage

is constructed by the nozzle insert (27) mounted with adhesive..

A seal made of aluminum alloy and mounted with two rubber sealing rings on screws ensures the engine's sealing.

The 9X253 igniter creates the initial pressure in the combustion chamber and ignites the engine's propellant charge. The igniter is attached to the engine's fore end plate adapter with a threaded joint. The igniter structure is shown in Fig. 6 (position 6).

The 15X341 cartridge is designed to ignite the explosive material of the 9X253 igniter. It is attached to the adapter socket of the engine's fore end plate with a threaded joint. The cartridge electrical circuit and missile are connected using a small plug-in connector.

The safety-start device located in the cartridge provides safety when operating the 15X341 cartridge and arming the cartridge in the ignition chain during electric current pulse. The cartridge becomes live by arming the igniter and is triggered by the igniter. The cartridge is an electric switch with two independent bridgewires. The 15X341 cartridge has measures preventing the arming of the propellant charge cartridge by gases from the arming of the igniter as well as in the event of accidental arming of the propellant igniter when the cartridge is unarmed.

4.2. Operating principles of the engine

The 15X341 cartridge starts the engine by igniting the explosive material of the 9X253 igniter.

6. MISSILE PAYLOAD

The missile payload of the 9M38M1 consists of the 9H314M warhead, the 94231M1 radar proximity fuse, the 9E129 safing and arming device, and the 9E242 contact sensor system.

6.1. Warhead: Purpose and structure

The 9H314M warhead is designed to defeat air and surface targets with its fragments (damaging agents) and the propellant action of its explosion.

The warhead is a one-shot initiation carried out by the 9E129 safing and arming device (SAD). The SAD's operating signal during non-contact firing of the warhead is delivered to the SAD on the 9E241M1 radar proximity fuse and during contact firing of the warhead from the 9E242 contact sensor system (CSS).

Main characteristics of the 9H314M warhead:

– warhead mass …….. $70_{-2.6}$ kg;
– mass of the body and damaging agents ……..... $35.5^{+0.7}_{-1.2}$ kg;
– mass of the explosive material ……. $33.5^{+0.3}_{-0.4}$ kg;
– the warhead contains three types of damaging agents: two small and one large;
– mass [illegible] 27 kg;
– average mass of a small damaging agent:
Type 1 ……. 2.1 grams
Type 2 ……. 2.35 grams

ref. 1450s

– total number of small damaging agents:
Type 1 …….. 1870 ± 47
Type 2 ……... 4060 ± 100
– average mass of a large damaging agent …… 8.1 grams
– total number of large damaging agents …… 1870 ± 47
angle of separation of damaging agents 38°

The warhead (see Fig. 5) consists of the body (8) and explosive charge (23). The body consists of a frame adhered with fiberglass (fragmentation shell) with prepared damaging agents (22).

The warhead fragmentation shell consists of two layers of damaging agents. The inner layer consists of large damaging agents and the outer later consists of small damaging agents.

The damaging agents are made of steel. Large damaging agents are shaped like I-bars while the small damaging agents are parallelepiped.

The band with the damaging agents is soaked in an epoxy resin when being wound onto the frame. The fragment layers along the outer surface are soaked in an epoxy resin. After polymerization of the resin under the appropriate thermal conditions, a solid monolithic fragmentation assembly is formed.

The explosive charge is a composite of TG-24, containing 24% tritol and 76% hexogen.

The warhead frame consists of the bottom (1), the shell (7), the gasket (16), and the cover (17). The bottom of the frame is made of aluminum alloy. In the center, the bottom has a thin wall (opposite

the SAD detonating part) and threaded holes for attaching the SAD (3) to the warhead. The bottom is attached to the warhead shell with screws. The bottom and shell joint is sealed with resin.

The frame cover is made of aluminum alloy and has a platform (18) and two eyes (15) to mount the lifting attachment on the warhead and a platform with threaded holes to attach the bracket (14), on which the electrical plug is mounted (13). The cover attaches to the shell with screws after filling the body of the warhead with the TG-24 composite explosive material. A paronite gasket (16) is mounted at the junction of the cover and shell and sealed with resin.

The shell (7) is the warhead's main constructive element and provides the specified fragmentation profile in the form of the explosive charge, and together with the bottom and cover forms a sealed chamber for the explosive charge.

The shell consists of a flange (24), shells (21), and plates (19). The flange is made of aluminum alloy and has threaded holes for thrust bearings (25), with which the warhead connects to Section No. 2 of the missile using four thrust screws (26). The shell is a thin sheet made of aluminum alloy welded to a plate and flange. The plate is made of aluminum alloy and has four eyes (11) with stud holes (12) that attaches to the warhead in Section No. 2.

The mounting plate (5) is attached to the warhead shell flange with four bolts (6), on which the contact sensor system B-168B sensors (2) and B-166 distribution unit (shoe) are mounted.

Electric wiring harnesses (10) from the SAD to the CSS, which lay along the body of the warhead, are affixed with rubber rims (9) and brackets (27).

The on-board electric wiring harness is attached to the missile's in vehicle network.

The 9H314M warhead is located in Section No. 2 of the missile. The aft end of the warhead (plate) is mounted by its eyes on the four studs of the aft frame of the section and is attached with flange nuts. The fore end of the warhead rests by its thrust bearings on the tightened thrust screws (26) of the fore frame of the section.

Annex 483

Firing and combat operation rules for surface-to-air missile systems of anti-aircraft defense forces of the infantry. Part 6. Buk-M1 surface-to-Air Missile System. Moscow : Military Publishing House, 1986.

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MINISTRY OF DEFENSE OF UKRAINE
KHARKOV IVAN KOZHEDUB NATIONAL
AIR FORCE UNIVERSITY

A. B. Skorik

CONSTRUCTION, TECHNICAL OPERATION AND TACTICAL USE OF BUK-M1 SURFACE-TO-AIR MISSILE SYSTEM LAUNCHERS

Textbook

Kharkov
2016

UDC 623.76:621.396.9(075.8)
BBK Ts641.4:571.432ya73
S15

Recommended for printing by the
Scientific Council
of Kharkov National Air Force University
(report No. ___ of October 1, 2016)

Author: A. B. Skorik.
Reviewers:
M. A. Yermoshin, Dr. of Military Science, Professor
V. V. Burtsev, Candidate of Technical Science, Professor

Construction, Technical Operation, and Tactical Use of Buk-M1 Surface-to-Air Missile System Launchers: Textbook, S16 A. B. Skorik, Kharkov: Kharkov National Air Force University, 2016, 294 p., illustrations

The textbook discloses the features of the construction, functioning, equipment design, and technical operation of SOU 9A310M1 electronic devices.

The textbook is designed to train foreign specialists who are serving in units armed with the Buk-M1 surface-to-air missile system. This textbook may be used by officers for independent study of specialized topics in the commander training system and for conducting exercises with personnel in technical and specialized training.

UDC 623.76:621.396.9(075.8)
BBK Ts641.4:571.432ya73

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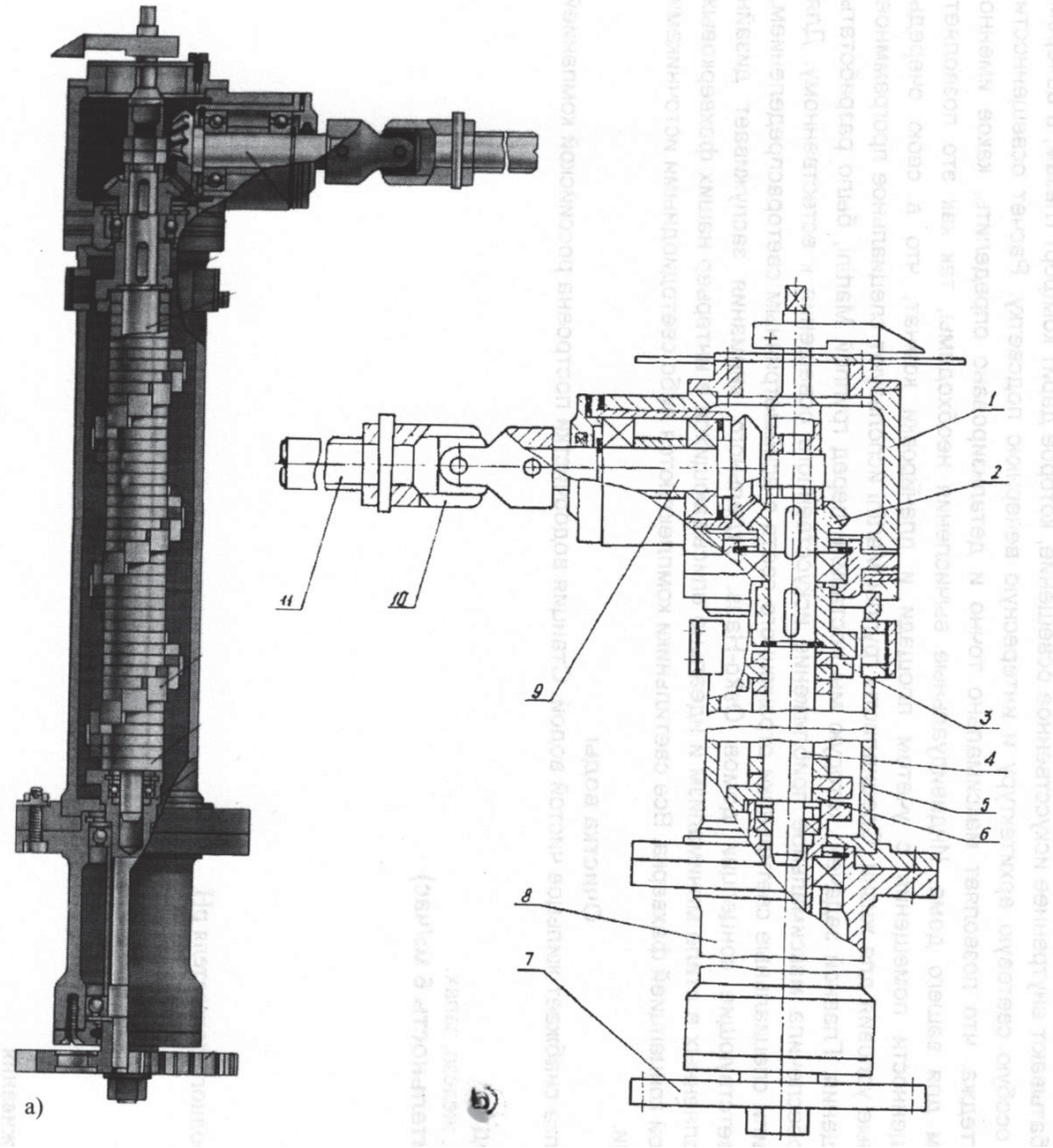

Fig. 2.12. Angle limiter: a) Limiter image; b) Limiter diagram
1 – housing; 2 – conical wheel;
3 – cam washer; 4 – shaft; 5 – housing; 6 – cam washer; 7 – pinion;
8 – outlet shaft unit; 9 – pinion shaft; 10 – articulated coupling; 11 – spindle.

CONICAL REDUCTION GEAR

The conical reduction gear *24* (Fig. 2.13) is designed to transmit rotation from the angle limiter through the hinged shaft system to HP drive cradle 9I31M1. The conical reduction gear consists of interconnected housings *2* (Fig. 12) and *6*. Housing *2* on bearings *4* has shaft-pinion *5* which is coupled to conical wheel *9* installed on the shaft by hinge *8*. Housing *2* is covered by covers *1* and *7*. Pads *3* have been placed between housings *2* and *6*, as well as between housing *2* covers *1* and *7*.

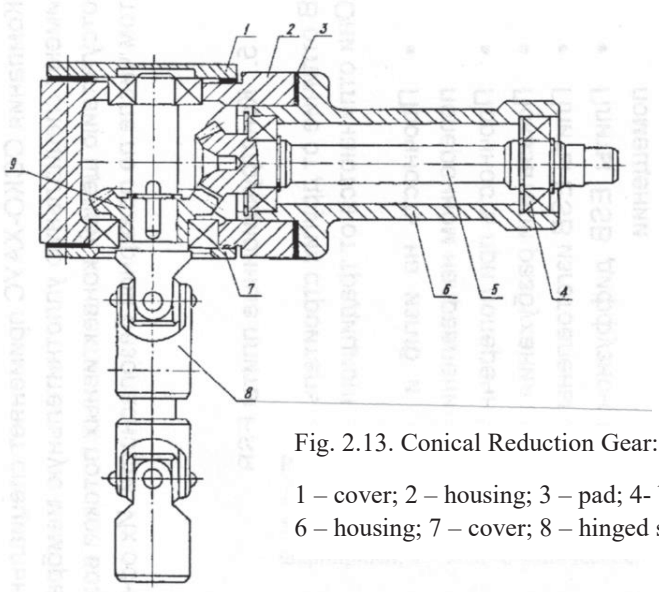

Fig. 2.13. Conical Reduction Gear:

1 – cover; 2 – housing; 3 – pad; 4- bearing; 5 – shaft-pinion; 6 – housing; 7 – cover; 8 – hinged shaft; 9 – conical wheel.

2.2.2. 9P315 LAUNCHER MANUAL TURNING, LIFTING, AND LOCKING MECHANISMS

MANUAL TURNING DRIVE

The manual turning drive, consists of two drives (Fig. 2.14b, 2.14c), together with the *manual turning unit and turning valve box with handle* ensuring manual turning of the launcher base on the azimuth.

Drive I transmits rotation from the manual turning unit to drive II, which then transmits rotation to the turning mechanism brake (Fig. 2.5 and 2.7).

Drive I (Fig. 2.14b) consists of housing 7, closed by covers *1* and *5*. The housing on the bearings holds two conical shaft-pinions *2*, each of which is connected with hinged coupling *4*. The hinged couplings are connected to shaft *3* and spindle 8, the first of which is connected to spindle *8* of the drive (Fig. 13), while the second is connected to manual turning unit shaft *12*.

Drive II (Fig. 2.14c) consists of housing *9*, closed by covers *3* and *7*. The housing *9* holds shaft-pinion *10*, coupled to pinion *5*. Pinion *5* is installed on spindle 6, the end of which is connected with hinged coupling *1*, while it, in turn, is connected to shaft *2*. Shaft 2 is connected to shaft yoke *3* (Fig. 2.9) of the turning mechanism brake.

Shaft-pinion *10* (Fig. 2.14b) installed on bearings *4* is connected via the hinged coupling with spindle *8*, which, in turn, is connected to shaft *3* of drive I (Fig. 2.14b).

MANUAL TURNING UNIT

The manual turning unit consists of shaft *6* (Fig. 2.15), connected through hinged coupling *5* with shaft *2*, sleeve *4*, bushing *3*, and lubricating valve *1*. Sleeve *4* is secured to the base wall, while handle 9P315.11.02.110 for the manual GP drive is mounted on the stem of shaft *2*. The plate (Fig. 2.15b) indicates the direction in which the handle needs to be turned. Lubricating valve *1* ensures lubrication of the contacting surfaces of shaft *2* and bushing *3*.

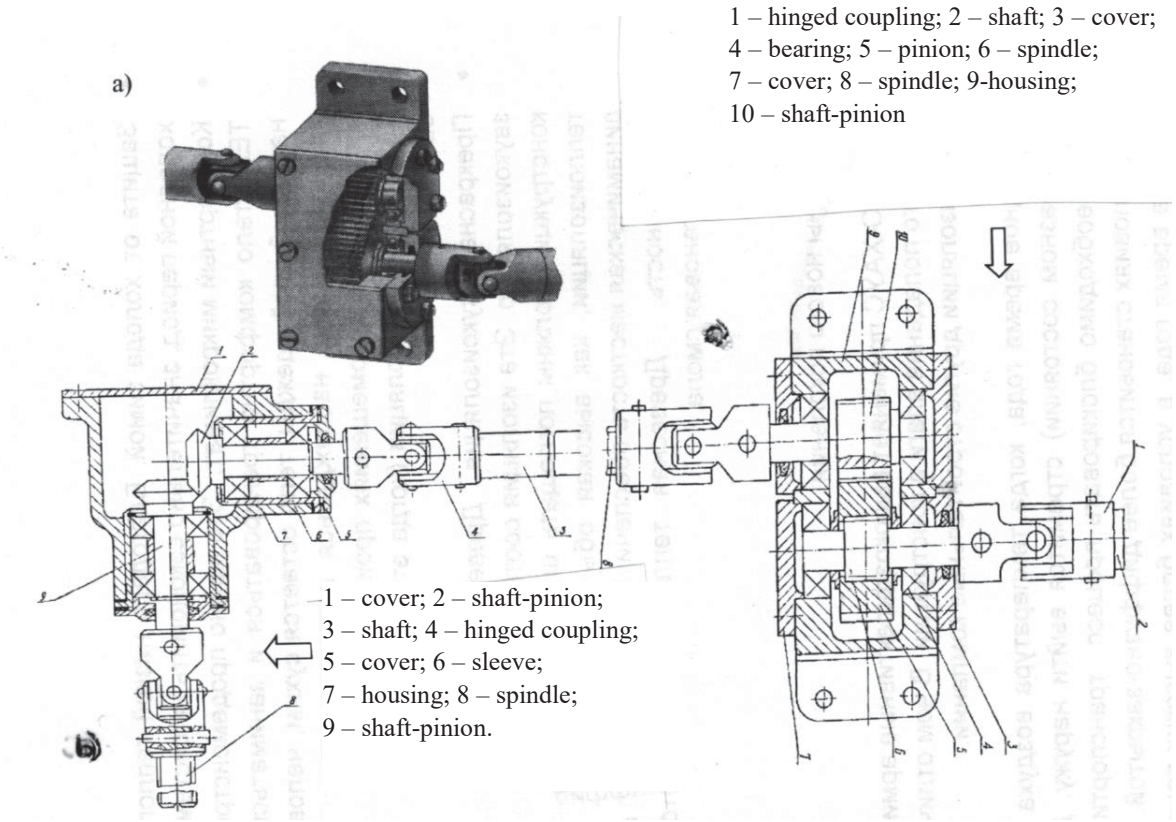

Fig. 2.14. Manual turning drive: a) image of manual turning drive; b) drive I diagram; c) drive II diagram

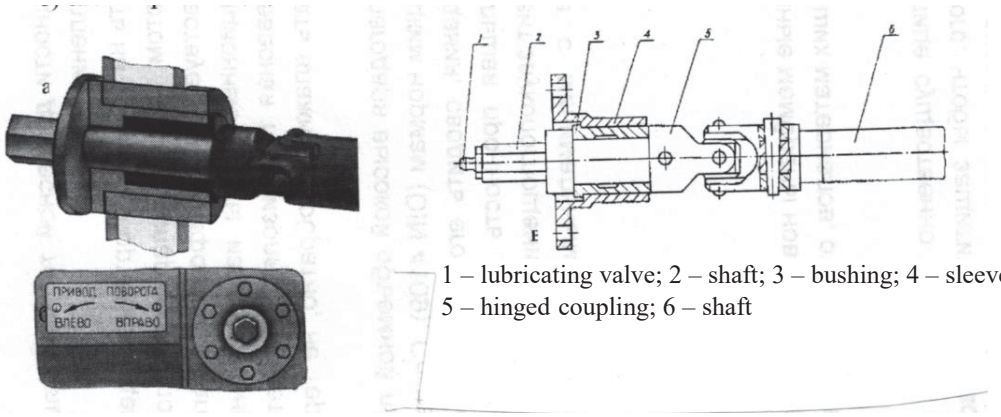

Fig. 2.15. Manual turning unit: a) image of manual turning unit; b) plate; c) manual turning unit diagram

Annex 484

Roberto Lavalle, The International Convention for the Suppression of the Financing of Terrorism, 60 Zao¨RV 491, 496-97 (2000)

The International Convention for the Suppression of the Financing of Terrorism

*Roberto Lavalle**

Prior to the adoption by the United Nations General Assembly, on December 9, 1999, of the International Convention for the Suppression of the Financing of Terrorism (Financing Convention or Convention),[1] the community of states had made arduous efforts, which are being pursued, to cope with international terrorism in a collective manner. This has been done through two basic modalities. The longest established one is embodied in an impressive series of complex and wide-ranging multilateral treaties, most of them open to all states, that seek to cope with the phenomenon by depriving terrorists of sanctuaries and ensuring international cooperation in suppressing their activities and bringing them to justice. Each of these treaties is directed towards a specific type or area of terrorist activity.[2] The other, far more recent of the two modalities takes the form of two comprehensive declarations on measures to eliminate international terrorism, adopted without a vote by the United Nations General Assembly in 1994 and 1996 and which may be a source of customary law.[3] Since 1998 the Security Council also has become engaged.[4]

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The views expressed here are, however, purely personal to the author, who is indebted to Professor Rüdiger Wolfrum, as well as Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law-Camden, for valuable comments and suggestions on initial drafts of this article.

[1] The text of the Financing Convention is contained in the Annex to resolution 54/169, adopted on the date indicated. In accordance with paragraph 1 of article 26, it will come into force thirty days after 22 states have taken action to become parties.

[2] The existing global, as distinct from regional, counterterrorism treaties are the nine listed in the Annex to the Financing Convention (and in note 14 *infra*), as well as the Convention on Offences and Certain Other Acts committed on Board Aircraft, of 1963 (text in 704 UNTS 219) and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, of 1991. Another multilateral treaty against terrorism is the 1971 Organization of American States Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, which, although adopted within a regional organization, is, pursuant to its article 9, open to participation by all members of the United Nations or of a specialized agency. (There are three purely regional treaties, one of which is the 1977 European Convention on the Suppression of Terrorism.)

[3] The two declarations, adopted on reports of the Sixth Committee, are annexed, respectively, to General Assembly resolutions 49/60 and 51/210, of December 9, 1994 and December 17, 1996, respectively.

[4] Cf. the general pronouncements on terrorism contained in the preambles of Council resolutions 1189 (1998) and 1267 (1999), of August 13, 1998 and October 15, 1999, respectively, as well as operative paragraph 5 of the former, and, more important, the resolution dealing with terrorism as a whole that the Council adopted on October 19, 1999, i.e. resolution 1269 (1999).

It may be added that, although the 1998 Rome Statute of the International Criminal Court (ICC) does not include terrorism among the crimes falling within the jurisdiction of the ICC, the crime of terrorism was provided for in proposals considered in the course of the preparatory work.[5] Moreover at the close of the Rome conference a resolution was adopted without a vote by which it was recognized, *inter alia*, that "terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community" and recommended further "that a Review Conference pursuant to article 123 of the Statute ... consider" (together with drug crimes) the crime "of terrorism with a view" to its "inclusion in the list of crimes within the jurisdiction of the Court."[6]

The Financing Convention, the most recent addition to the series of treaties mentioned, takes an altogether different approach from its forerunners in that, instead of addressing, as they do, specific types or areas of terrorism, it seeks to cripple the phenomenon as a whole. It does so not by addressing acts of terrorism proper, but by striving to cut off what can be regarded as the lifeblood of terrorism of all types, i. e. the provision of material, chiefly financial, resources to terrorists. This feature of the Financing Convention puts it in a class by itself among counterterrorism treaties.

This note aims to provide a critical overview of the latter and other principal features of the Financing Convention.

I.

In paragraph 3 (f) of the second of the two resolutions referred to in note 3, entitled "Measures to Eliminate International Terrorism," the United Nations General Assembly called "upon all States to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have

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[5] The draft statute initially prepared by the International Law Commission included the crime of terrorism, but only by way of a reference to so-called "treaty crimes," i. e. those provided for in the counterterrorism treaties whose titles are listed in the annex to the draft statute. (For the text of the latter see GAOR, 49th session, Supplement No. 10, para. 91.) In contrast, in including that crime among those over which the ICC was to have jurisdiction, the draft statute elaborated at the intersessional meeting held in the Netherlands in January 1998, gave a definition thereof. (Text in M. Cherif Bassiouni, The Statute of the International Criminal Court, a Documentary History, 221, at 234–235 [1998].) This text found its way, between brackets, into the draft statute that was the basis of the work of the Rome Conference. (Cf. UN doc. A/CONF.183/2/Add.1, p. 27–28.) (The core element of this definition does not differ from the one by India referred to in note 19 *infra*.) At the plenary meetings of the Conference and those of its Committee of the Whole the majority of representatives (including those belonging to the Western European and others Group) opposed recommendations by a minority advocating the inclusion of the crime of terrorism in the Statute. (Its final exclusion is, needless to say, not unrelated to the political problems involved in its definition and referred to in note 19 *infra*.)

[6] For the text of the resolution (numbered "F"), see p. 7–8 of the Final Act of the Conference (UN doc. A/CONF/183/10).

or claim to have charitable, social or cultural goals or which are also engaged in [other] unlawful activities ... including the exploitation of persons for purposes of funding terrorist activities." In the same provision the General Assembly also called on states "to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes ... and to intensify the exchange of information concerning international movements of such funds." On September 23, 1998, at the 53rd regular session of the General Assembly, the French foreign minister echoed those concerns by emphasizing the "need to define concrete mechanisms for legal measures and mutual judicial assistance against those who finance terrorism" and proposed that negotiations on the matter be launched before the end of the year.[7] In November 1998, the Permanent Representative of France to the United Nations followed up on this statement by submitting a draft international convention for the suppression of terrorist financing and proposing that it be considered by the open-ended *Ad Hoc* Committee established by the above-mentioned General Assembly resolution 51/210.[8] This Committee dealt with the proposal at a two-week session in March 1999.[9] Its work was completed, in September-October 1999, by an open-ended working group of the General Assembly's Sixth Committee, which, on the recommendation of the working group,[10] adopted without change a draft convention later submitted to the plenary, which also adopted it as submitted. Pursuant to its testimonium, the Financing Convention was opened for signature at United Nations Headquarters on January 10, 2000.

II.

1. Basic Features Common to the Financing Convention and Prior Counterterrorism Treaties

Broadly speaking, one can consider global counterterrorism treaties, particularly the most recent ones, as consisting of a fairly standard element and a set of provisions specific to each treaty.[11] The core of the latter provisions is the definition of the offences sanctioned by the particular treaty.

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[7] Cf. UN Doc. A/54/PV.11, p. 18.

[8] Cf. UN Doc. A/C.6/53/9, of November 4, 1998.

[9] For the report of the *Ad Hoc* Committee, see GAOR, 54th session, Supplement No. 37. A revised version of the French proposal whose symbol is given in the preceding note was before the *Ad Hoc* Committee. (For the text see Annex II of its report.)

[10] For the report of the working group (which for all practical purposes is indistinguishable from the *Ad Hoc* Committee), see UN Doc. A/C.6/54/L.2.

[11] The first postwar global counterterrorism treaty, i. e. the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, does not follow this pattern. This treaty concerns itself more with the allocation of jurisdiction of states parties over and the coordination of actions by them with respect to the wrongful acts with which it deals than with ensuring cooperation among those states with a view to the suppression of those acts. The 1991 Convention on the Marking of

The standard element contains provisions requiring states to criminalize those offences and make them punishable by appropriate penalties, as well as provisions that specify a wide range of cases in which states parties are required to or may establish their jurisdiction over the offences. These provisions are complemented by one to the effect that whenever an alleged offender is present in the territory of a state party it shall either prosecute or extradite that person, as well as by other provisions seeking to ensure, particularly through mutual legal assistance and other forms of cooperation among the states parties, that no person suspected of having committed an offence covered by the treaty can find refuge in the territories of any of them. Also part of the standard element are provisions that criminalize, in addition to the primary offences defined in each particular treaty, ancillary offences, typically attempts to commit and participation as an accomplice in the commission of the primary offences. Other important provisions of the standard element prohibit the characterization of the offences covered, for purposes of extradition or mutual legal assistance, as political offences, as well as their justification on other grounds of a general nature (e.g. their alleged ideological character). The standard element also includes certain miscellaneous provisions, such as savings, dispute settlement and final clauses, as well as a few other sundry provisions.

It is on the standard element of the most recent prior global counterterrorism treaty, i. e. the 1997 International Convention for the Suppression of Terrorist Bombings (Bombing Convention),[12] that the corresponding provisions of the Financing Convention are based.[13]

Plastic Explosives for the Purpose of Detection, whose objective is merely to prohibit acts that facilitate but do not constitute acts of terrorism, deviates even more markedly from the normal pattern of counterterrorism treaties. As used in the remainder of the text, the expression "counterterrorism treaties" does not include these two treaties. (A 1937 counterterrorism treaty that did not come into force is referred to in note 19 *infra*.)

[12] Adopted by the United Nations General Assembly, on December 15, 1997, as the annex to its resolution 52/164, of that date. In respect of this treaty, cf. Samuel M. Witten, The International Convention for the Suppression of Terrorist Bombings, 92 AJIL 774–781 (1998). Interestingly, the treaty contains a provision (paragraph (a) of article 15) that, among other things, requires states parties to "prohibit in their territories illegal activities of persons, groups and organizations that ... knowingly finance ... the perpetration of offences" covered by it.

[13] Most of the provisions of the Financing Convention, pertaining as they do to what has been termed the "standard element," are identical with or very similar to provisions of the Bombing Convention. Thus: (a) article 4 of the former, requiring a state party "to adopt such measures as may be necessary ... [t]o establish as criminal offences under its domestic law the offences" covered and "make them punishable by appropriate penalties which take into account their grave nature," is identical with article 4 of the Bombing Convention; (b) article 2 (4 and 5) of the Financing Convention, on ancillary offences (i. e. attempts to commit an offence, acts of complicity therewith, organizing or directing others to commit an offence, and contributing to the commission of an offence by a group of persons acting with a common purpose), is almost identical with article 2 (2 and 3) of the Bombing Convention); (c) article 6 of the Financing Convention, precluding certain abstract considerations from justifying the offences covered, is *mutatis mutandis* identical with article 5 of the Bombing Convention; (d) articles 7 (4) and 10 (1) of the Financing Convention set out the fundamental *aut dedere*

2. Primary Offences Provided for in the Financing Convention

Each of the prior counterterrorism treaties complemented its predecessors in what could be described as a self-contained manner, the offences covered being autonomous, i. e. entirely distinct from the ones defined in those treaties. In contrast, the offences that the Financing Convention covers are, in a sense, grafted upon other wrongful acts, i. e. either the offences defined in those prior counterterrorism treaties, or another wrongful act, namely one that the Financing Convention defines in the abstract and, although in the nature of a terrorist act, does not coincide with any of the offences defined in the prior counterterrorism treaties.

The relevant provision of the Financing Convention is paragraph 1 of article 2, in conjunction with the Annex to the Convention. These provisions are, together with paragraph 1 of article 1 of the Convention, which defines a fundamental term figuring in paragraph 1 of article 2, i. e. the term "funds," the key elements of the Convention. Paragraph 1 of article 2 reads as follows:

> "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 and as defined in one of the [counterterrorism] trea-

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aut judicare principle in the same terms as articles 6 (4) and 8 (1) of the Bombing Convention; (e) article 9 of the Financing Convention, on the treatment by states parties and the rights of alleged perpetrators of offences covered by it, is identical with article 7 of the Bombing Convention; (f) article 10 (2) of the Financing Convention, on service of sentences imposed in one state that extradited the person sentenced, is identical with article 8 (2) of the Bombing Convention; (g) article 11 of the Financing Convention, on extradition, is identical with article 9 of the Bombing Convention; (h) article 12 (1 and 5) of the Financing Convention, on reciprocal assistance between states parties in criminal investigations, or criminal or extradition proceedings, is identical with article 10 (1 and 2) of the Bombing Convention; (i) articles 14 and 15 of the Financing Convention, prescribing, respectively, that requests for extradition shall not be denied on account of the alleged political nature of the corresponding offences and prohibiting requests for extradition or legal assistance from being denied on the grounds that they are improperly motivated, are identical, respectively, with articles 11 and 12 of the Bombing Convention; (j) articles 16, 17 and 19 of the Financing Convention, on, respectively, the transfer from one state party to another, for certain purposes, of persons serving sentences in the former, fair treatment of persons in respect of whom measures are taken or proceedings are carried out, and communication to the United Nations Secretary-General of the outcome of prosecutions under the Convention, are identical with articles 13, 14 and 16, respectively, of the Bombing Convention; (k) articles 20 and 22 of the Financing Convention, which aim to prevent states from abusing their rights under the Convention, are identical with articles 16 and 18 of the Bombing Convention; (l) article 21 of the Financing Convention, providing for the prevalence of general international law, and in particular the United Nations Charter and international humanitarian law, over the Convention, is identical with article 19 (1) of the Bombing Convention; (m) article 24 of the Financing Convention, which, subject to the possibility of opting out, mandates arbitration as a means of settling disputes on the interpretation or application of the Convention (and recourse to the International Court of Justice if no agreement is possible on the terms of arbitration), is identical with article 20 of the Bombing Convention; (n) article 27 of the Financing Convention, which allows states parties to denounce it, is identical with article 23 of the Bombing Convention.

For a summary of and comments on the provisions of the Bombing Convention referred to in this note, see Witten, *supra* note 12, at 777–781.

ties listed in the annex;[14] or (b) Any other act intended to cause death or serious bodily injury to a civilian, or 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." (Emphasis added.)

a) The notion of "funds"

In regard to the scope of the above-quoted paragraph, attention must be drawn to the definition to which reference has been made, namely that of the third of the words underlined in the quotation, that is, the term "funds."

The inclusion in multilateral treaties adopted under United Nations auspices of definitions of the terms they use, which definitions are akin to the logical category of "stipulative definitions,"[15] is a fairly common feature of those treaties. There is, however, a significant difference between the definition of "funds" contained in the Financing Convention and the definitions that normally figure in other multilateral treaties. The latter definitions do not as a rule depart considerably from the common or dictionary definitions of the terms defined, or, if they do, the departure is not very significant.[16] The contrary is, however, the case with the definition in the Financing Convention to which reference has been made, i. e. that of the term "funds." Thus, as defined in the relevant provision of the Convention, i. e. paragraph 1 of article 1, this term 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."(Emphasis added.) The meaning of the term in question is thus stretched very far beyond its dictionary meaning, which is that of "pecuniary resources,"[17] to cover any tangible or intangible "asset." Thus, animals, buildings

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[14] These treaties are the following: 1. Convention for the Suppression of Unlawful Seizure of Aircraft, of 1970; 2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, of 1971; 3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973; 4. International Convention against the Taking of Hostages, of 1979; 5. Convention on the Physical Protection of Nuclear Material, of 1980; 6. 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, of 1988; 7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, of 1988; 8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, of 1988; and 9. International Convention for the Suppression of Terrorist Bombings, of 1997.

[15] Cf. Irving M. Copi/Carl Cohen, Introduction to Logic, 132–133 and 486–488 (1990).

[16] An exception is the definition of the "continental shelf" in article 76 of the United Nations Law of the Sea Convention; this article expands the concept of continental shelf to include the continental slope and the continental rise.

[17] Cf. Merriam-Webster's Collegiate Dictionary, 10th ed., which defines the term "funds" to mean "available pecuniary resources."

or vehicles of any kind are "funds" for the purposes of the Financing Convention. A curious corollary of the violence thus done to the meaning of a rather precise term, which is made to cover virtually anything under the sun,[18] is that the title of the Financing Convention is a misnomer: in this title the meaning of the term "financing," which normally designates the provision of pecuniary resources, is stretched to the same extent as the definition of the term "funds," so that the title would be more appropriate if it referred not to "financing" but rather to "material assistance."

The act of terrorism that, as has been pointed out, is defined by the Financing Convention in the abstract, is the one specified in subparagraph (b) of paragraph 1 of article 2. This subparagraph creates a residual category whose purpose is to "catch" any act that clearly corresponds to what the layman normally understands by terrorist act but is not one of the offences defined in any of the treaties listed in the Annex to the Financing Convention. An example of such an act would be one by which individuals, without any attempt at kidnapping, would, in order to create terror in the general public, indiscriminately use firearms against a crowd in a public place (other than an airport) of any city or a rural area. This act (assuming that no explosive bullets are used) would be covered neither by the Bombing Convention, nor by any other of the counterterrorism treaties listed in the Annex to the Financing Convention.

An interesting characteristic of the residual class of wrongful acts in question is that their definition in subparagraph (b) of paragraph 1 of article 2 could well serve as a general definition of terrorism.[19]

The overall definition in paragraph 1 of article 2 of the Financing Convention is manifestly a complex one.

b) The necessary mens rea

The dichotomy between subparagraphs (a) and (b), already commented on, is clear and can hardly raise major difficulties. It is necessary, however, to break paragraph 1 down into its other basic elements.

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[18] The only objects that, conceivably, might not be covered by paragraph 1 of article 1 would be those that, having no pecuniary value whatsoever, cannot be regarded as assets. (One wonders, however, if, assuming that such objects exist, any of them are likely to be of assistance to terrorists.)

[19] Although the need or usefulness of such a definition has long been emphasized, it has thus far proved impossible to adopt one. As is well known, the reason for this failure is that the question is a politically charged one. This arises, primarily if not exclusively, from the urging by many developing countries that the definition exclude acts of violence by national liberation movements and include so-called "state terrorism." (In respect of which cf. UN General Assembly resolution 39/159 of December 17, 1984.) For what could also be regarded as a general definition of terrorist acts cf. paragraph 2 (1) of the draft international convention on the suppression of terrorism submitted by India to the United Nations in 1996. (UN doc. A/C.6/51/6, Annex, of November 11, 1996.) (This definition borrows from the one contained in article 1 (2) of the 1937 Convention for the Prevention and Punishment of Terrorism. [Text in 19 League of Nations O. J. 23 (1938), and in 1 R. Friedlander, Terrorism: Documents of International and Local Control 253 (1979)].)

The first point to be noted in this respect is that the definition contained in the paragraph has two distinct branches, an active and a (largely) passive one, i. e. the provision of "funds" and the collection of "funds," each of which corresponds to a separate offence.[20] Moreover, the commission of either offence involves, in addition to certain acts done by the offender (i. e. providing or collecting "funds"), a certain type of awareness by the latter that his action can or will entail certain wrongful consequences. This additional element constitutes the *mens rea* of each of the two offences.

The additional element, which is the same for both offences, subdivides into two variants. One is providing or collecting, as the case may be, "funds with the intention that they should be used ... in full or in part, in order to carry out" (emphasis added) an offence covered by either subparagraph (a) or subparagraph (b) of paragraph 1 of article 2. The other variant consists in likewise providing or collecting, as the case may be, "funds ... in the knowledge that they are to be ... [so] used" (emphasis added).

What is the basis of the distinction between these two variants? It would seem that the former is in the nature of a desire (or conviction of the appropriateness) that the funds provided or collected be used for supporting an act of terrorism, coupled with a belief that they probably will be so used, whereas the latter is in the nature of a certainty that they will be so used. It should be noted, however, that the distinction between the two variants appears to be one without much of a difference. For, on the one hand, there can never be absolute certainty as to how anyone will behave, and, on the other, it is inconceivable that someone who does not desire that material assistance provided to terrorists be used to further their criminal activities should knowingly provide any such assistance to them.[21]

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[20] Although collecting "funds" may be a preparatory act to their provision, it is not a prerequisite to it (since "funds" provided to terrorists need not have been the object of a prior collection). Thus if, in accordance with paragraph 1 of article 2, someone first collects "funds" for terrorists and then provides them to the latter, he will have (successively) committed two separate offences. Moreover, in each particular case where "funds" have been collected and then provided to terrorists, the perpetrator of the "collection" offence need not be the person who has perpetrated the "provision" offence (since the transfer of the "funds" from one person to another cannot normally be regarded as a collection). From all these considerations it follows that each of the two offences is an altogether freestanding one. (For which reason it might have been wise for the drafters of the Convention not to have lumped them together.)

[21] A conceivable difference between the two variants might appear to be that, in a prosecution under the "intention" variant, lack of evidence that the recipients of the "funds" (or their intended recipients, if the charge is that of collecting) are terrorists would not necessarily prevent the defendant's conviction, whereas in a prosecution under the "knowledge" variant the contrary would be the case. (I can have the intention of murdering a person who, unknown to me, is dead; but in no case can I possibly have the knowledge that by doing a certain act I will have murdered that person.) In the opinion of the present author, however, such a difference between the "intention" and the "knowledge" variants, consistent as it may be with the letter of paragraph 1 of article 2, cannot be accepted: 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. Accordingly, under either variant, lack of evidence that the recipients (or intended recipients) of the "funds" are terrorists should be a valid defense in any criminal action brought under paragraph 1 of article 2.

The lack of a real difference between the two variants is corroborated by a contextual analysis of the key term of the former variant, i. e. the term "intention". It appears that there is some abuse of language here. For the general concept of intention is a reflexive one, in the sense that the intention of a person normally refers only to what that person plans to do himself, not to future actions by others.[22] This can nevertheless be countered, censurable though this abuse of language may be, by resorting to the well known concept of *dolus eventualis*, or (roughly) recklessness. This Latin term (a French synonym for which is *insouciance*) designates the criminal offence committed by a person who, knowing that an act he plans to carry out involves the risk of (generally physical) damage to others, nonetheless carries out the act.[23] In such cases one may consider that the actor has, indirectly, intended such harmful consequences as may arise from his behaviour. Thus the notion of *dolus eventualis* has been rendered in English by the expression "oblique" or "indirect" intention.[24] Similarly Swiss criminal courts have considered that the concept of intention can encompass the *dolus eventualis*.[25] But, whatever its nature, intention cannot exist without some degree of knowledge, for no criminal act takes place in a vacuum and, as has been pointed out by a well-known British author, "an act is not intentional as to a circumstance of which the actor is ignorant,"[26] which ties in with the German doctrine of *Tatbestandsvorsatz*.[27] We are thus brought to the knowledge variant.

It follows from the foregoing that the drafters of the Convention could well, without in any way changing the thrust of paragraph 1, have done away with the distinction between the two variants. This could have been done by adopting a single formulation, namely the one contained in the second of the two draft con-

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[22] One would normally experience some puzzlement on hearing someone, say John, state that he intends that someone else, say Peter, is to do something. Such a statement might make sense to the layman if, but only if, John has control so complete over the behaviour of Peter that the latter can be regarded, at least so far as the intended act is concerned, as his instrument. (Thus one might not be overly surprised to hear the master of a ship state that he intends that in exercising his duties the first mate is to do this or that.)

[23] Cf. Jean Pradel, Droit pénal comparé, 261 (1995). Two differences may be noted between the normal features of a *dolus eventualis* offence and the one dealt with here. In the normal case the reprehensible act or omission giving rise to the offence becomes criminal only upon the occurrence of a harmful result. Moreover the actor will not at all desire that result. In the case under consideration here, however, the offence is consummated by the culprit's action, whatever occurs later being irrelevant. In addition, the actor will not normally look askance at the harmful consequences of his act.

It can thus be considered that the *dolus eventualis* that is part of the offence defined in paragraph 1 of article 2 of the Convention is, to a certain extent, virtual (or otherwise *sui generis*) in nature.

[24] Cf. Ilias Bantekas, The Contemporary Law of Superior Responsibility, 93 AJIL 573, at 590 (1999).

[25] Cf. Pradel, *supra* note 23, 261. Similarly, some American courts, in finding criminally liable motorists who as a result of speeding involuntarily hit pedestrians, have grounded their decisions on the idea that the motorists were deemed to intend the natural consequences of their acts. (Cf. Glanville Williams, Criminal Law, The General Part, 2nd ed., 35, note 5 [1961].)

[26] Cf. Williams, *supra* note 25, 148.

[27] Cf. paragraph 16 (1) of the German *Strafgesetzbuch*, as well as article 30 of the Rome Statute of the ICC.

ventions successively proposed by France, which formulation would have merely called for knowledge by the person charged with the offence that the financing provided by that person "will or could be used" to commit the terrorist offences in question.[28]

Another formulation that could have been used would have been one along the lines of what appears to have been the wording of a British Second World War Regulation. This would have consisted in defining the primary offence as that of providing funds with the intent to assist terrorists in the commission of terrorist offences.[29]

At any rate, given the inherent subtlety of the questions that the "intention" and "knowledge" variants elements of paragraph 1 of article 2 may raise, as well as the differences between the ways in which different national criminal laws envisage the criminal state of mind, it would appear that discrepancies in the application and interpretation of that key provision are likely to arise as between national criminal justice systems.

c) The "unlawfulness" of the provision of funds

Another difficulty may result from the use, in the introductory sentence of paragraph 1, of the adverb "unlawfully" to qualify the actions that constitute the collecting and providing offences. If paragraph 1 is, in this respect, taken literally, the effect of the adverb would be that if the conduct described in the paragraph is, under the law of a state concerned, unlawful but not criminal at the time of its becoming a party to the Financing Convention, then that state would not, after acquiring this status, be under a duty to criminalize that conduct. This would of course be the height of absurdity. The adverb in question, which did not figure in the draft originally presented by France (cf. note 8 *supra*), might however give rise to difficulties. To be sure, the adverb is also included, to qualify the primary offence sanctioned by the Bombing Convention, in the provision thereof that defines that offence. (Cf. the introductory sentence of paragraph 1 of article 2 of the Bombing Convention.) But in this case its inclusion can be justified (at least to a certain extent) on the ground that in all countries persons other than the military can lawfully use explosives in certain cases (e.g. in civil engineering work). It appears that the adverb in question was included in paragraph 1 of article 2 of the Financing Convention, at least in part, to meet concerns expressed by the UN High Commissioner for Refugees and the International Committee of the Red Cross, which feared that in providing assistance, under their mandates, to

[28] Cf. the introductory part of paragraph 1 of article 2 of the draft convention in Annex II of the report referred to in note 5 above. The same formulation is contained in language proposed by Brazil for that paragraph at the meetings of the *Ad Hoc* Committee.

For the full text of this proposal, see the report referred to in note 9 *supra*, 38, No. 28. Adoption of the formulation would have had the advantage of eliminating the word "intention," which, regard being had to its context, could prove perplexing in some countries and thus give rise to problems of interpretation.

[29] Williams, *supra* note 25, 40–41.

groups of individuals they might fall afoul of that paragraph.[30] In United States criminal statutes the adverb is used as a shorthand reference to grounds excluding criminal responsibility that are to be developed by the courts. The extrapolation of such authority to national courts as interpreters of paragraph 1 of article 2 might, conceivably, be helpful to those organizations. One wonders, however, whether it could not, by leading national courts to use the adverb as a pretext for acquitting individuals financing terrorism in certain cases, be harmful in other respects.[31]

d) The link between the provision of funds and the terrorist acts

Another point that should be noted is that the primary offences covered by the Financing Convention are defined in such a way that they may, in specific cases, render the perpetrators of those offences guilty of complicity (or attempted complicity) pure and simple with respect to offences within the scope of one of the treaties listed in the Annex to the Convention (or offences covered by subparagraph (b) of paragraph 1 of article 2, which defines an act that cannot but be sanctioned by the general criminal law of any state).[32] Thus, for instance, if the owner of an automobile were to make it available to terrorists for the specific purpose of its being used as a car bomb at a certain place at a certain time, as well as with the knowledge that it is to be so used, and the vehicle is in fact so used, then that person would, in accordance with paragraph 3 (a) of article 2 of the Terrorist Bombing Convention, be an accomplice to an offence covered by it. The owner of the automobile could thus be charged with having committed an ancillary offence under the Bombing Convention and another, primary, offence under the Financing Convention.

Another question, far more important than but not unrelated to the overlap just adverted to, deserves to be discussed at greater length. This question is the link that, in accordance with paragraph 1 of article 2 of the Financing Convention, should exist between the offences covered by the Financing Convention and those covered by the treaties listed in its Annex, or coming within the residual category

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[30] Cf. UN docs. A/AC.252/1999/INF/2, Annex, and A/C.6/54/WG.1/INF/1, of March 26 and November 9, 1999, respectively, as well as paragraph 67 of Annex III to the report referred to in note 10 *supra*.

[31] The *travaux préparatoires* of the Convention show that the reason for the inclusion of the adverb in question was similar to the one that, as has been noted, justifies its inclusion in United States criminal statutes. (Cf. paragraph 67 of the Informal Summary of the Discussions in the Working Group that is contained in Annex III to the report referred to in note 10 *supra*; the reference in this paragraph to "ransom payments" as being lawful is quite noteworthy; equally worthy of being pointed out is the reference in paragraph 81 to "lawful acts of national liberation movements.")

[32] In fact the language of subparagraphs (a) and (b) of paragraph 1 of article 2, which begin with the words "[a]n act" and "[a]ny other act," respectively, seems to suggest that what the drafters of these provisions had in mind were no more than acts of complicity pure and simple. Such an interpretation (which at any rate may not be entirely consistent with paragraph 3 of article 2) should nevertheless be rejected, as largely depriving the Financing Convention of useful effect.

defined in subparagraph (b) of that paragraph.[33] As provided by the latter, in order that an act (whether of providing or of collecting "funds") falling within the definition contained in the introductory sentence of the paragraph constitute an offence covered by the Financing Convention, it is necessary that the person who, as the case may be, has provided or collected the "funds," have done so with the "intention" or in the "knowledge" that they are to be used, in full or in part, to carry out an offence covered by one of the treaties listed in the Annex, or falling within the residual category.

This would mean that if in the trial of a person charged with an offence under the Financing Convention the prosecutor proves that the defendant has provided or collected "funds" as laid down in paragraph 1 of article 2, that the actual or intended recipient or recipients of the "funds" were terrorists and as such have committed and/or are willing and able to commit any of the terrorist offences referred to in subparagraphs (a) and (b) of that paragraph, and that the defendant was aware of this, the evidence will fall short of what is needed to secure the conviction sought. The prosecutor will still have to prove that all has gone as further specified in paragraph 1, namely that in providing or collecting the "funds" the defendant has i n t e n d e d that they should be used or k n o w n that they are to be used to carry out an act within the purview of one or the other of those subparagraphs.

The interpretation of paragraph 1 underlying this conclusion is buttressed not only by the letter of paragraph 1, but also by paragraph 2 of article 2, as well as article 23 of the Financing Convention. In conformity with paragraph 2, if a state, on becoming a party to the Convention, is not a party to one of the treaties listed in its annex, that state may, at that time, declare that "in the application ... to" it of the Convention that "treaty shall be deemed not to be included in the annex;" paragraph 2 complements the latter provision by laying down that if a state party to the Convention ceases to be a party to a treaty listed in its annex, it may make a declaration having the same effect "with respect to that treaty." Article 23 of the Convention lays down, for its part, a procedure for adding future global multilateral treaties to its Annex. These provisions seem to reflect considerable rigour on the part of the drafters of the Convention with respect to the link established in paragraph 1 of article 2 between the offence of providing or collecting "funds" and their use to carry out an offence precisely covered by subparagraphs (a) or (b) of paragraph 1 of article 2.

There are several reasons why, regrettably, it will, in many if not most cases, be impossible to prove the existence of the one-on-one link that thus appears to be required between an act of collecting or providing "funds" and an offence specifically covered by one of the treaties listed in the annex or falling within the residual category.

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[33] Subject to paragraph 2 of article 2 of the Financing Convention, a provision to be commented on later, for a treaty listed in the annex to apply with respect to any particular state party to the Financing Convention it is not necessary for that state to be a party to that treaty.

The specific use to which the recipient or recipients will put the "funds" received will as a rule be a matter of indifference to whoever provides material assistance of any kind to a terrorist or a terrorist group or organization. What will determine that person to render the assistance is usually no more than that person's desire to support the particular cause that the recipient or recipients promote. It is moreover unlikely that the latter will specialize in acts covered by this or that counterterrorism treaty (or subparagraph (b)). In addition, it may be the case that at the time they receive the "funds" the terrorist or terrorists have not yet decided on their next strike. Finally, it is quite probable that, for obvious security reasons, terrorists may be unwilling to reveal their plans to persons outside their inner circle, even when they are a source of assistance. It follows that very frequently, if not normally, whoever provides "funds" or (*a fortiori*) collects them for terrorists will have virtually no idea about the precise use to which they will be put.

Besides, and perhaps more importantly, it will often be very difficult if not impossible to establish a precise link between items provided to terrorists and a particular act or acts of terrorism committed by the recipient(s). What will happen in the instances where the "funds" provided take the form of pecuniary resources, which will generally be the case, is that the resources, being perfectly fungible, will, in the hands of the terrorist or terrorists that received them, merge with their other pecuniary resources in a way that makes it impossible to link the particular provision of "funds" with a particular terrorist act.[34] And clearly this is *a fortiori* the case with the collection of "funds." Such difficulties will be compounded whenever a terrorist group or organization carries out activities, lawful or unlawful, other than terrorist acts. One could accordingly, in respect of the provision or collection of purely pecuniary resources, argue that, in strictness, it does not normally make sense to speak of an intention or, *a fortiori*, of knowledge, that they are to be used to carry out a specific act of terrorism or one of a specific type.[35]

For all these reasons it would appear that, regard being had to the importance attributed by article 31 (1) of the Vienna Convention on the Law of Treaties to the

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[34] A colorful simile that is apropos here is the impossibility of unscrambling scrambled eggs. (It may be noted that, as shown by paragraph 6 (b) of article 5 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the authors of this treaty realized that financial resources could become "intermingled". [Text in 28 (I) International Legal Materials 497 (1989)].)

[35] One can hardly expect terrorists to use a specific financial contribution to set up a trust fund that would receive only monies destined for defraying the commission of a particular terrorist act. More realistic would be the case where a cheque received by terrorists would be endorsed to a purveyor of weapons or explosives used for committing a particular terrorist crime. An analogous but simpler case would be that where the contributor of an amount of money to terrorists would himself pay the purveyors. But such cases are not likely and at any rate the facts would often be difficult to prove.

"object and purpose" of a treaty, paragraph 1 of article 2 of the Financing Convention, whose object is epitomized by its very title,[36] should be interpreted to mean that to convict a person of a primary offence under the Convention it is sufficient to prove that the recipient or recipients, actual or intended, of the "funds" are terrorists, that that person was aware of this, and that accordingly he or she had to know that the "funds" would probably be used (or could be used) to commit an offence or offences covered by one of the treaties listed in the Annex to the Financing Convention, or falling within the residual category. It is submitted that the discrepancy between this liberal interpretation of the Convention and the letter of paragraph 1 of article 2 of the Convention is sufficiently minor to justify that interpretation.

This raises a difficulty, however. If a state party to the Convention, either because, treaties being self-executing under its legal system, paragraph 2 of article 1 of the Convention may be applied directly by its courts,[37] or, this not being the case, it has enacted a statute defining the offences provided for in paragraph 1 of article 2 of the Convention in substantially the same way as that paragraph, then its courts could not adopt the liberal interpretation of the Convention that has been advocated without violating the principle *nullum crimen sine lege*.[38]

It follows that every state should, on becoming a party to the Convention, enact a statute embodying that interpretation, i. e. one prescribing that to commit an offence under the Convention it suffices that the accused has knowingly provided funds, as defined in the Convention, to individuals likely to use them to commit offences as defined in subparagraphs (a) or (b) of paragraph 1 of article 2 of the Convention.

e) Specific issues

Strictly speaking, the offences to which the Financing Convention applies, as defined in paragraph 1 of article 2, are victimless ones. The reason is that no harm comes within the objective elements of those offences, as thus defined. It may be noted, moreover, that, unlike the offence of providing funds, the separate offence of collecting them cannot in and of itself be an even indirect source of

[36] Cf. also the second, ninth, tenth and twelfth paragraphs of the preamble of the Financing Convention, in which, respectively, states parties declare themselves to be "[d]eeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations," state that "the financing of terrorism is a matter of grave concern to the international community as a whole," note "that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain," and express their conviction "of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators" (emphasis added).

[37] There are likely to be few, if any, states parties to the Convention for which paragraph 1 of article 2 is self-executing.

[38] Cf. the provision in article 22 of the Rome Statute that "the definition of a crime shall be strictly construed." The article adds that "[i]n case of ambiguity, the definition shall be interpreted in favour of the person being ... prosecuted or convicted."

harm.[39] It was therefore not absolutely necessary for the drafters of the Financing Convention to have provided in it, as they did in paragraph 3 of article 2, that "[f]or an act to constitute" an offence under the Convention, "it shall not be necessary that the funds were actually used to carry out an act of terrorism."

The nature of the offences criminalized by the Financing Convention accounts for a significant difference between it and the counterterrorism treaties it complements. Being as they are grave instances of violent behavior (murder or manslaughter, mayhem, wounding, kidnapping, or the destruction of or severe damage to property), the offences criminalized by those treaties can hardly not be punishable under the general criminal law of any state. It therefore seems that, in order to fulfil its obligation to criminalize the offences defined by a particular one of the treaties in question, a state party for which treaties are not self-executing need not normally take any specific legislative action.[40] Such is clearly not the case, however, with the offences criminalized by the Financing Convention, which, given their nonviolent, victimless and extremely specific nature, are not likely to constitute offences under the general criminal law of states.

Another difference between the Financing Convention and prior counterterrorism treaties may also be noted. Since those treaties normally define the offences they cover without any reference to terrorism, they may apply in practice to offences committed for purposes unrelated to terrorism. (Thus someone placing a bomb on an airliner for the sole purpose of collecting on a life insurance policy taken out by a passenger falls afoul of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.)[41] The contrary is the case with the Financing Convention.

3. Jurisdiction of States Parties over Offences under the Financing Convention

Under either the Financing or the Bombing Convention a state party is, by virtue of a provision that can be regarded as part of the standard element, obligated

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[39] In respect of the "collecting" offence, two points may be noted. It would appear, in the first place, that in this case the all-embracing definition of the term "funds" is hardly appropriate: Can one take up a collection of, say, weapons in aid of terrorists? Nor does it seem possible that a collection of "funds" could be carried out "indirectly."

[40] Cf. Gilbert Guillaume, Terrorisme et droit international, Recueil des Cours, Hague Academy, vol. 215, 327 (1989). Thus, as stated in the general report on terrorism submitted by the UN Secretary-General to the General Assembly in 1999, Austria and Sweden, which are parties to the majority of global counterterrorism treaties, have no specific criminal legislation against terrorism and accordingly sanction terrorist acts under their general criminal law. (UN doc. A/54/301, paras. 7 and 31.)

[41] It is submitted that there is nothing wrong with this wide casting of the net. So long as an offence falling within the definition of one of the treaties has not been completely cleared up (and even a conviction will not necessarily achieve this), the public (and the authorities) will suspect that the offence has been a terrorist one, for which reason it will, by arousing or stimulating fear of terrorist acts, have promoted the aims of terrorism.

to establish its jurisdiction over an offence covered by them in any of the following three cases: whenever it is committed in its territory,[42] by one of its nationals, or on board a vessel or an aircraft flying its flag or registered under its laws, respectively.[43] Equally under either Convention a state party may establish its jurisdiction over the offences covered by it if the perpetrator of the offence is a stateless person residing habitually in its territory, or the offence is committed on board an aircraft operated by its government.[44] Under the Bombing Convention a state party may further establish its jurisdiction over an offence covered by it if the offence is committed against a national of the state or against the state or one of its facilities abroad, including its diplomatic or consular premises, or in an attempt to compel the state to do or abstain from doing any act.[45] Since, as has been observed, the offences covered by the Financing Convention are in themselves, as therein defined, victimless ones, the Financing Convention could not possibly contain provisions duplicating exactly the ones just referred to. It does, however, contain provisions based on them. They are to the effect that a state party to the Financing Convention may establish its jurisdiction over an offence covered by it if the offence is directed towards or resulted in the carrying out of an offence referred to in subparagraphs (a) or (b) of paragraph 1 of article 2 of the Financing Convention, provided that the offence falls into one of three categories: (1) the offence is committed in the territory or against a national of the state, (2) it is committed against the state or one of its facilities abroad, including diplomatic or consular premises, or (3) it is committed in an attempt to compel the state to do or abstain from doing an act.[46]

4. Scope of the Financing Convention

As provided in article 3 of the Financing Convention, which is *mutatis mutandis* identical with article 3 of the Bombing Convention, the Financing Convention applies only in cases other than those where "the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under" article 7 to exercise jurisdiction. Paralleling article 3 of the Bombing Convention, article 3 of the Financing Convention exempts from this limitation, however, the applicability, "as

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[42] This may create difficulties in cases of transboundary financing.

[43] Paragraph 1 of article 7 of the Financing Convention, identical with paragraph 1 of article 6 of the Bombing Convention.

[44] Subparagraphs (d) and (e) of paragraph 2 of article 7 of the Financing Convention, identical with subparagraphs (c) and (e), respectively, of paragraph 2 of article 6 of the Bombing Convention.

[45] Subparagraphs (a), (b) and (d) of paragraph 2 of article 6 of the Bombing Convention.

[46] Subparagraphs (a), (b) and (c) of paragraph 2 of article 7 of the Financing Convention. (It may be noted that in this respect difficulties may arise from the link [unfortunately] required by paragraph 1 of article 2 between the offences it defines and those covered by the treaties listed in the Annex [or defined in subparagraph (b) of that paragraph].)

appropriate," of its articles 12 to 18, on legal assistance and other forms of cooperation between states parties.[47]

5. Position of Legal Entities in Respect of the Commission of Offences under the Convention

A significant difference between the Financing Convention and the prior counterterrorism treaties lies in that, unlike what is the case with the offences defined in the latter treaties, all of which are acts for whose commission legal entities could hardly be held directly responsible, the offences defined by the Financing Convention, which consist in providing or collecting pecuniary resources, may well be attributed directly to such entities. And, as is well-known, in certain countries legal entities are subjects of the criminal law.

One might therefore have expected the Financing Convention not to differentiate, in the sanctioning of the offences it defines, between natural persons and legal entities. And one could indeed, by reading paragraph 1 of article 2 in complete isolation, be inclined to feel that the term "person," as used in the introductory sentence of that paragraph, encompasses legal entities.

Since, however, in many if not the majority of states only natural persons can incur criminal responsibility, the drafters of the Financing Convention steered clear of putting legal entities on a footing of equality with natural persons insofar as the perpetration and sanctioning of the offences it covers are concerned. They did so by including in the Convention article 5, which reads as follows:[48]

> "1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.
>
> 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
>
> 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions." (Emphasis added.)[49]

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[47] Regarding these articles, see note 13 *supra*, as well as the relevant parts of the remainder of the text.

[48] This article of the Financing Convention largely parallels article 5 of the Revised draft United Nations Convention against Transnational Organized Crime. (Text in UN doc. A/AC.254/4/Rev. 4, of July 19, 1999.)

[49] The underlined phrase of paragraph 1 is of particular importance, since it lays down the condition precedent to the applicability of article 5. In so doing it adopts the narrow version of corporate criminal responsibility found in certain common law jurisdictions. It may further be noted that the country where the offence to which the phrase refers is committed will normally be the country where the legal entity concerned is "located" or under whose laws it is "organized," but that this will

It is interesting to note that, although all states are legal entities, the language of paragraph 1 of article 5 clearly precludes a state party to the Convention from holding another one, under that paragraph, liable for committing offences as set forth in article 2 of the Convention. For, whatever may be meant by the location of a legal entity, no state can possibly be deemed to be "located" in "the territory" of another one or "organized under its laws." Thus if the embassy of a state party in another state party carries out in the territory of the latter state acts falling within the definition of paragraph 1 of article 2, the latter state could not reasonably consider that the former should (assuming that state immunity does not stand in the way) be held liable under paragraph 1 of article 5. For embassies, in addition to lacking legal personality, are not "organized under" the laws of the state where they carry out their activities.

As regards public authorities or public entities of a state party to the Convention acting in the territory of a foreign state also a party to the Convention, it would also appear that paragraph 1 of article 5 precludes the latter state from holding them liable thereunder for the commission in its territory of offences set forth in article 2, even if they have branches or offices in the territory of that state. Needless to say, every state party is obligated to apply paragraph 1 of article 5 to any of its public authorities or public entities.

6. Control of "Funds"

Another article of the Financing Convention not forming part of what has been called the standard element should also be noted. This is article 8, which is based on an OECD treaty, namely the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime, of 1990. Article 8 obligates states parties to the Financing Convention to take measures to identify, detect, freeze, seize or decree forfeiture of "funds" used or allocated to commit offences covered by the Convention and proceeds therefrom.

7. Cooperation between States Parties

In its introductory sentence and subparagraph (a), paragraph 1 of article 18 of the Financing Convention requires states parties to cooperate against offences covered by the Convention by preventing and countering "preparations in their respective territories for the commission of those offences within and outside their territories, including measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize, or en-

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not necessarily be the case. It may be observed further that the nebulous notion of a legal entity being "located in" a certain territory, which, in addition to jarring with the *corpus mysticum* nature of any legal entity, is not among the criteria normally applied to determine the law governing the status of legal entities, is liable to cause difficulties of interpretation. (It should be recognized, however, in fairness, that use of more orthodox criteria would not have entirely eliminated those difficulties.)

gage in the commission of" those offences.[50] The remainder of article 18 contains provisions of a specifically financial nature that aim to strengthen cooperation between states parties. In particular those provisions obligate them to take measures requiring their financial institutions to identify their customers, whether usual or occasional, paying special attention to unusual or suspicious transactions. Article 18 also imposes on those states the obligation to exchange, through Interpol if they so wish, information to prevent offences covered by the Convention, in particular by cooperating in the conduct of inquiries. In addition article 18 sets forth a number of specific measures that are not mandatory for states parties but which they are required to "consider" in that connection.

It should be noted further that particular importance appears to attach to paragraphs 2 and 3 of article 12 of the Financing Convention. These provisions deny states parties the possibility of turning down requests for legal assistance on the ground of bank secrecy (limiting, however, use by a state party of information obtained from another to the purposes stated in the corresponding request, unless the state party that complied with it otherwise consents). A somewhat comparable provision is article 13, which precludes states parties from refusing in specific cases to comply with the provisions of the Convention on extradition or mutual legal assistance in respect of offences it covers by characterizing them as "fiscal offences."

III.

As has been noted, the core provisions of the Financing Convention, namely those that define the primary offences it is intended to suppress, are liable to raise difficulties of interpretation and application (not all of which have been commented on). Moreover it is to be regretted that, if taken literally, the link that paragraph 1 of article 2 establishes between acts sanctioned by the Convention and specific terrorist acts could, as has been observed, inhibit its application to certain modalities of terrorism financing. One can hardly expect these difficulties not to be compounded by the discrepancies in the application of the Convention that the diversity of national criminal systems are apt to generate (to say nothing of the fact that they will be interpreted in different countries through the different language versions). The drafters of the Convention would, moreover, have been well-advised to leave out paragraph 2 of article 2. In addition certain weaknesses in the provisions that call for cooperation between the parties are to be regretted.[51]

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[50] Cf. the introductory sentence and paragraph (a) of article 15 of the Bombing Convention, which parallel the provisions of the Financing Convention referred to.

[51] These are provisions that, instead of requiring states parties to take certain measures, obligate them merely to c o n s i d e r taking them or are otherwise merely permissive. (Cf. paragraph 4 of article 8 [a provision that is, however, of little practical importance], paragraph 4 of article 12 [a provision already mentioned], and, particularly, the measures numbered (i) to (iv) in paragraph 1 (b) of article 18, as well as paragraph 4 of the same article.)

It is nevertheless to be hoped that given good faith on the part of the states parties and a genuine desire to accomplish the objectives of the Financing Convention, it will make a significant contribution to the struggle against the scourge of international terrorism.[52]

[52] It would seem that only with the assistance of persons with a solid background in finance, as well as expert knowledge, not only of terrorism in general, but also of the methods by which terrorists finance their nefarious activities, of the importance to them of such financing, and of the degree of effectiveness attained in the application of earlier counterterrorism treaties, could one, with a modicum of confidence, hazard a prediction about how effective the Financing Convention is likely to be.

Annex 485

Anthony Aust, Counter-Terrorism — A New Approach: The International Convention for the Suppression of the Financing of Terrorism, 5 Max Planck Y.B. U.N. L. 285, 287 (2001)

Counter-Terrorism — A New Approach

The International Convention for the Suppression of the Financing of Terrorism

Anthony Aust[1]

On 10 January 2000 at United Nations Headquarters in New York the *International Convention for the Suppression of the Financing of Terrorism*[2] was opened for signature. It had been negotiated in two two-week sessions in New York in 1999. This was particularly remarkable since, unlike the previous nine counter-terrorism conventions[3] the new

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1 Author of *Modern Treaty Law and Practice*, 2000 and "Lockerbie: the other case", *ICLQ* 49 (2000), 278 et seq. about how the two accused of the Lockerbie crime were brought to trial before a Scottish court sitting in the Netherlands. The views expressed are personal, not those of the United Kingdom Government.

2 *ILM* 39 (2000), 270 et seq.; A/RES/54/109 of 9 December 1999.

3 Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (UNTS Vol. 860 No.12325; UKTS (1972) 39); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (UNTS Vol. 974 No. 14118; UKTS (1974) 10); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 (UNTS Vol. 1035 No. 15410; UKTS (1980) 3); International Convention against the Taking of Hostages 1979 (UNTS Vol. 1316 No. 21931; *ILM* 18 (1979), 1460 et seq.; UKTS (1983) 81); Convention on the Physical Protection of Nuclear Material 1980 (*ILM* 18 (1979), 1419 et seq.; UKTS (1995) 61); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, 1988 (*ILM* 27 (1988), 627 et seq.); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 and Protocol for the Sup-

J.A. Frowein and R. Wolfrum (eds.),
Max Planck Yearbook of United Nations Law, Volume 5, 2001, 285–306.

one is quite different in nature in that it is not concerned with terrorist crimes, like planting a bomb on board a civil aircraft, but with the financing of such crimes. Although financing aids the commission of terrorist crimes, because it is not itself a terrorist act the drafters of the new convention encountered some unusual problems. The two main ones were, first, the precise scope of the new offence, in particular how to define the terrorist acts the financing of which would be criminalised; and, secondly, how to deal with corporate bodies involved in terrorist financing. There were other problems of a lesser order which will also be discussed.

I. The Negotiations

The new convention was a French initiative. The initial draft was first considered at meetings in Brussels of European Union Member States and at meetings in London and Paris of the G8.[4] Most of the work was done by government legal experts. The draft went through several versions before it was tabled at the United Nations.[5] It was then considered at a meeting of an *ad hoc* Committee from 15 to 26 March 1999.[6] The work was continued by a Working Group of the Sixth Committee

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pression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf 1988 (UNTS Vol. 1678 No. 29004); International Convention for the Suppression of Terrorist Bombings 1997 (*ILM* 36 (1997), 251 et seq.). On the present status of the conventions, see Doc. A/55/179, 14–23.

Negotiations for an International Convention for the Suppression of Acts of Nuclear Terrorism (originally proposed by Russia to fill lacunae in the 1980 Convention), were concluded in 1998, except for, in particular, the question whether to exclude from the scope of the convention the activities of armed forces. At the time of writing (December 2000) the negotiations on that question have still not been concluded (see Doc. A/55/37). For the 55th Sess. of the General Assembly in 2000 India tabled a draft Comprehensive Convention on Terrorism: see Docs A/C.6/55/1(draft) and A/C.6/55/L.2 (Working Group Report).

4 The Group of Seven, plus the Russian Federation.

5 Doc. A/C.6/53/L.4.

6 The Committee was established by A/RES/51/210 of 17 December 1996 as an inter-sessional committee, originally to consider the draft convention on terrorist bombings and, subsequently the drafts on nuclear terrorism and terrorist financing. For its report on the latter, see Doc. A/54/37.

which met from 27 September to 8 October 1999.[7] Given the subject, Liechtenstein, Luxembourg and Switzerland[8] naturally played a rather bigger role than usual. The meetings of the *ad hoc* Committee and the Working Group were chaired by Philippe Kirsch of Canada, ably assisted by Sylvia Fernandez of Argentina in the Working Group's informal negotiations on key article 2. After an insubstantial discussion as is usual on such occasions,[9] the Sixth Committee recommended, by 116 votes for, none against and three abstentions,[10] that the General Assembly adopt the text of the Convention,[11] and on 9 December 1999 it did so without a vote. The Convention will enter into force thirty days after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession.[12]

Most of the draft followed precedent, in particular the *International Convention for the Suppression of Terrorist Bombings 1997* (Terrorist Bombings Convention), which has become the benchmark for new UN counter-terrorism conventions. However, as will be explained, the nature of the offence to be created by the new convention required creative thinking to overcome some new problems.

II. Definitions

Article 1 contains only three definitions. The first, "Funds", is drawn deliberately wide:

> ...assets of every kind, whether tangible [e.g. cash] or intangible [e.g. a bank account], movable [e.g. diamonds] or immovable [e.g. land], however acquired [i.e. legally or illegally], and legal documents or

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7 For its report to the Sixth Committee, see Doc. A/C.6/54/L.2.

8 Although Switzerland is not a member of the United Nations, the mandates of the *ad hoc* Committee and the Working Group allowed it to participate as a full member at their meetings, not merely as an observer, though for some years the distinction has in practice not been particularly important in such subsidiary bodies.

9 A/C.6./54/SR. 31-2, 34, 35 and 37.

10 Benin, Lebanon and Syria.

11 Doc. A/54/615.

12 Doc. A/54/PV. 76; A/RES/54/109 of 9 December 1999. The Convention was opened for signature from 10 January 2000 to 31 December 2001. It can be acceded to at any time. By 1 December 2000 it had been signed by 35 states, of whom two had ratified.

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 and letters of credit.

The first half of the definition is based largely on article 1 (g) of the *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988* (Vienna Drugs Convention).[13] The list at the end is only illustrative. The second definition, "State or government facility" is drawn word for word from the Terrorist Bombings Convention.[14] It is also taken from the Vienna Drugs Convention, article 1 (p). The last definition, "Proceeds", is relevant only to article 8.[15]

III. Defining the New Offence

An unexpected threshold issue was raised by representatives of certain Western European states. They questioned whether there was need for a new convention, since, in their view, the financier of a terrorist act would commit the ancillary offence of being an accomplice, and existing counter-terrorism conventions provide for the offence of being an accomplice. They also had difficulty with the concept that financing a terrorist act is as serious a crime as committing the terrorist act itself, though the whole point of the new convention is to tackle the difficult problem of financial "godfathers", without whom most terrorist crimes would not be possible. Their reluctance may, however, have had more to do with perceived domestic problems in enacting the necessary implementing legislation. Other Western European states, and states from other regions, saw no problem in creating a new *principal* offence. They considered that the provisions on accomplices in existing conventions were not enough, and that those who finance terrorist crimes should be treated as severely as those who commit the crimes.[16]

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13 *ILM* 28 (1989), 493 et seq.; UKTS (1992) 11.

14 Since it is relevant only to article 7 para. 2 (b) it would have been more practical to have located it there. See *Modern Treaty Law*, see note 1, 343.

15 And should have been placed there.

16 See the Report of the *ad hoc* Committee (Doc. A/54/37), Annex IV. B, para. 84.

The United Nations has for the last thirty years been much concerned with the problem of terrorism,[17] yet the resolutions of the General Assembly and the Security Council from 1969 refer either to specific types of terrorist crimes, such as hijacking, or to particular incidents, or to terrorism generally. They do not contain any general definition of terrorism; and there is still no universally agreed definition, although many states have defined terrorism for the purposes of their domestic law:

Section 1(1) of the (UK)Terrorism Act 2000 defines terrorism as:

(1) the use or threat of action where-

(a) the action falls within subsection (2),

(b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system [e.g. a computer network].

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-

(a) "action" includes action outside the United Kingdom,

(b) a reference to any person or to property is a reference to any person, or to property, wherever situated,

(c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and

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17 See the Hague Academy lectures by G. Guillaume, "Terrorisme et Droit International", *RdC* 215 (1989), 287 et seq.

(d) "the government" means the government of the United Kingdom, or of a Part of the United Kingdom [e.g. Scotland] or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

It should be noted, however, that this is a definition for the purposes of the Act; it is not the definition of a criminal offence. The Act does not create an offence of terrorism as such, since terrorist activities generally involve the commission of "ordinary" criminal acts, but the Act makes it easier for the police to investigate and frustrate terrorist acts.[18]

Reaching an internationally agreed definition has proved elusive.[19] The main obstacle now is the insistence of a few states that violent acts done for the purposes of national liberation movements should be excluded.[20] The vast majority of states regard indiscriminate acts of violence done for the purpose of intimidating ordinary people as deserving of punishment whatever the motive, and are therefore unwilling to accept any such exception. The impasse is illustrated by the series of resolutions of the General Assembly on the general subject of terrorism, beginning in 1972 after the attack by Black September at the Munich Olympic Games.[21] Each one was the subject of lengthy, and often acrimonious, informal negotiations. The Resolution of 9 December

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18 The definition is particularly relevant to the much expanded provisions of Section 3 enabling the Government to add to the list of organisations which are proscribed because they are concerned in terrorism. Foreign terrorist organisations operating from the United Kingdom can now be proscribed. In addition, there are some specific terrorist offences in the Act, for example in Part III in relation to the property of terrorists, which are of particular relevance to the Convention. The further legislation to enable the United Kingdom to ratify the Convention is in Section 63 of the Act.

19 See J. Lambert, *Terrorism and Hostages in International Law*, 1990, 29–45.

20 See note 28 for example.

21 A/RES/3034(XXVII) of 18 December 1972; A/RES/31/102 of 15 December 1976; A/RES/32/147 of 16 December 1977; A/RES/34/145 of 17 December 1979; A/RES/36/109 of 10 December 1981; A/RES/38/130 of 19 December 1983; A/RES/40/61 of 9 December 1985; A/RES/42/159 of 7 December 1987; A/RES/44/29 of 4 December 1989; A/RES/46/51 of 9 December 1991; A/RES/49/60 of 9 December 1994; A/RES/51/210 of 17 December 1996; A/RES/53/108 of 8 December 1998; A/RES/54/110 of 9 December 1999.

1994,[22] adopted by consensus, was the first which, by avoiding any language about the underlying causes of terrorism, shut the door to any argument that the United Nations implicitly recognised that some terrorist acts could be justified by the aims of the perpetrators. The *Declaration on Measures to Eliminate International Terrorism*, annexed to the resolution, contains a general description of terrorism in its solemn reaffirmation by the members of the United Nations of their:

> "unequivocal condemnation of all acts, methods and practices of terrorism, as criminal and unjustifiable, wherever and by whomever (*sic*) committed" and that "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."

These formulas have been repeated in subsequent resolutions, and were recalled in the preamble to the new convention.

None of the previous counter-terrorism conventions had attempted to define terrorism. Instead, they follow a "segmental", "sectoral" or "piecemeal" approach. Each deals with a specific terrorist act, such as hijacking, hostage-taking or aircraft sabotage. The problem facing the drafters of the new convention was that, unlike previous conventions, they would not be able simply to define the new offence by reference to a specific category of act. Instead they would have to define an offence of financing terrorism. Some thought that one might be able to define the new offence simply by including a list of the specific terrorist offences defined in the nine existing conventions and any further ones. This approach was similar to that adopted in the *European Convention on the Suppression of Terrorism 1977*,[23] which lists a number of serious offences and provides that, for the purposes of extradition, they are not be regarded as political. From the beginning of the negotiation of the new convention the listing approach was acceptable to all, although there were certain technical problems which will be discussed later. But other states wanted to go further and include also what would be, in effect, a mini-definition of terrorism. The proponents of this argued that there was a lacuna in the existing conventions since they did not cover terrorist acts such as murder done by shooting, bludgeoning,

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22 A/RES/49/60 of 9 December 1994.

23 UNTS Vol. 1137 No. 17828; *ILM* 15 (1976) 255 et seq.; UKTS (1978) 93.

stabbing, strangulation, suffocating, poisoning, drowning and suchlike. It was said the lacuna could represent as much as 30 per cent of terrorist crimes and so had to be filled. But it was pointed out by others that the new convention would not "internationalise" such crimes, only the *financing* of them; it was therefore rather illogical to make it an "international offence" to finance an act which would be unlikely to be such an offence for the foreseeable future. Those advocating the mini-definition seemed sometimes to forget the limitations of the immediate exercise, though, as it turned out, they were right to persist.[24]

But the main argument against trying to include a mini-definition was that it would inevitably reopen the dormant debate on what is terrorism, and thereby complicate and delay, perhaps even prevent, the adoption of an important new convention. As it turned out we were wrong. The inclusion of a mini-definition was achieved without too much difficulty. At the meeting of the *ad hoc* Committee a few states spoke of the need to distinguish between "legitimate national liberation movements" and terrorist groups.[25] At the Working Group there was little pressure to omit the mini-definition.[26] When the draft convention was considered by the Sixth Committee[27] certain states mentioned the need to "differentiate between acts of terrorism committed by individuals, groups or states, and the legitimate acts of resistance undertaken by peoples subjected to colonial rule, oppression and foreign occupation with a view to regaining their legitimate rights".[28]

The first three paragraphs of article 2 read as follows:

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:

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24 The Indian proposal for a comprehensive convention on terrorism is much more ambitious (see the end of note 3).

25 Report of the *ad hoc* Committee (Doc. A/54/37, para. 38).

26 Report of the Working Group (Doc. A/C. 6/54/L.2, Annex III, paras 2 and 81).

27 Doc. A/C.6./54/SR.31-2, 34, 35 and 37.

28 UAE statement. Others who made a similar point were Cuba, Iraq, Lebanon, Libya, Oman, Qatar, Pakistan and Syria. At the 55th Sess. of the General Assembly in 2000, the terrorism resolution (A/RES/55/158 of 12 December 2000) was, for the first time for some years, put to the vote. There were no negative votes, but Lebanon and Syria abstained.

(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 organisation to do or to abstain from doing any act.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph *(a)*.[29] The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.

3. For an act to constitute an offence set forth in paragraph 1 [i.e. financing terrorism], 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)*.[30]

The reports of the *ad hoc* Committee, containing as they do the texts of all the many drafting proposals, well illustrate the complex business of negotiating even a relatively short multilateral treaty. A blow-by-blow account of the tortuous path leading to the final text of article 2 might

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29 This identification of the Annex should have been made earlier in the subparagraph. The mistake was not corrected by the depositary. There are few multilateral treaties today which do not contain (mainly drafting) errors, large and small: see *Modern Treaty Law*, see note 1, 270-273.

30 As used in the other articles, the references to "offences *set forth* in article 2" relate to the *new* offences of financing terrorism; and references to "offences *referred to* in article 2, paragraph 1, subparagraphs (a) or (b)" relate to offences under the existing conventions or acts coming within the mini-definition of terrorism. What these references mean does not exactly leap off the page, but they were preferred to a suggestion for more intelligible and concise formulations, such as "financing offences" and "terrorist offences".

be interesting to some, but will not be attempted. Instead, only the most difficult or contentious issues will be discussed.

Paragraph 1

"any person"

As in existing counter-terrorism conventions, this phrase encompasses anyone, whether private individuals or public or government officials. Because of the particular nature of the new offence, article 5 extends the scope of the Convention to legal entities, such as companies (see below).

"by any means, directly or indirectly"

This comprehensive phrase was adopted so as to prevent a loophole. Thus, it does not matter *how* funds get to a terrorist so long as the person supplying the funds — whether as originator or intermediary — has the necessary intention or knowledge (see below).

"unlawfully and wilfully"

There were lengthy discussions as to whether "unlawfully" should be included. Some said that, since providing or collecting funds for the purposes of terrorism constituted the offence, it was tautological to qualify it by "unlawfully". Such a qualification had certainly been needed when defining offences in the earlier conventions. In the Terrorist Bombings Convention it had been necessary because there could be cases where law enforcement authorities might have to cause explosions in a public place. Although such cases would be exceptional, it had to be made clear that they were outside the scope of the offence. On the other hand, others pointed out that law enforcement agencies might wish to provide funds to a terrorist organisation as part of a plan to infiltrate it and trap its members, or money might be paid as a ransom (though in the latter case the purpose of the payment would seem to take it out of the scope of the offence). Others favoured retention of "unlawfully" so as not to criminalise unintentionally lawful acts of financing which might have the unintended result of aiding the commission of terrorist offences, such as giving money to a national liberation movement when only part of the movement is believed to be involved in terrorism (Hamas was often quoted). Given the nature of their activities, the International Committee of the Red Cross and the United

Nations High Commissioner for Refugees had similar concerns.[31] It was therefore decided that, rather than rely solely on any prosecutorial discretion (which does not exist in all legal systems), it should be made absolutely clear that in such cases no financing offence would be committed. For similar reasons "wilfully" was added to emphasise that the financing had to be done deliberately, not accidentally or negligently, though the following elements of intention or knowledge are probably sufficient.

"provides or collects funds"

Various formulations were suggested for this element of the offence. Of special concern to some was the possibility (perhaps probability) that a person could *receive* funds which he might know are likely to be used, at least in part, for terrorism. Once again the example of national liberation movements was given. Although the elements of intention or knowledge might be sufficient protection, it was thought that the more active concept of *providing or collecting* funds would better protect the innocent receiver of funds. Some had wanted to include the *receiving* of funds, even though it is the providing of funds, either as a principal or an intermediary, which is the main concern. Suggestions that the text should specify types of fund-raising were not adopted as they could have created a loophole.

"with the intention that they should be used or in the knowledge that they are to be used"

The United Kingdom had proposed, on the basis of its existing legislation,[32] that it should be sufficient for the purposes of the offence if a

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31 See Docs A/AC.252/1999/INF/2(ICRC) and A/C.6/54/WG.1/INF/1 (UNHCR).

32 *Prevention of Terrorism (Temporary Provisions) Act 1989*, Section 9. See now the Terrorism Act 2000, Section 57 (1) and (2):

> (1) A person commits an offence if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism.
>
> (2) It is a defence for the person charged with an offence under this section to prove that his possession of the article was not for a purpose connected with the commission, preparation or instigation of an act of terrorism.

person provides funds in circumstances where there is a reasonable suspicion that they will be used for terrorist purposes, unless the person can prove otherwise. This was opposed by those who felt that it shifted the burden of proof on to the accused contrary to fundamental human rights principles. However, in many of today's serious crimes (e.g. drug trafficking) such a reverse burden of proof is sometimes essential; the prosecution still has to establish certain facts (such as the possession of bomb-making equipment), before the accused is required to convince the court or the jury that he had no reason to believe they would be used for terrorist attacks.[33] And the prosecution still has to prove all other elements of the offence "beyond reasonable doubt". But for the new convention the two alternatives (intention or knowledge) were felt to be as far as one should go.

Paragraph 3

It is convenient to deal with this paragraph now since it is related to the last point. To say, as the paragraph does, that in order to prove the offence the funds in question do not in fact have to be used to carry out a terrorist offence (for that is what the somewhat opaque wording means), may seem strange. But 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. Whereas it can be possible to trace the supplier of a physical object used in an 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

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During the Parliamentary debates on the draft of the Act the above provisions were criticised, albeit wrongly, for shifting the burden of proof of the crime on to the accused. Therefore, in relation to Section 57 and certain other provisions, Section 118 provides (though not in the most pellucid prose) that where the prosecution has established an *evidential* presumption regarding a certain matter, if the accused produces evidence which is sufficient to raise an issue with respect to that matter, the court or jury shall assume that the defence has rebutted the presumption, unless the *prosecution* disproves beyond reasonable doubt that it has not.

33 Article 6 para. 2 of the European Convention on Human Rights (UNTS Vol. 213 No. 2889; UKTS (1953) 71) does not prohibit presumptions of fact that may operate against the accused: see D. Harris/ M. O'Boyle/ C. Warbrick, *Law of the European Convention on Human Rights*, 1995, 243-244, and the judgment of the English Court of Appeal (Criminal Division) of 31 July 2000 in: R. v. Lambert, *London Times* of 5 September 2000.

been used to finance a *particular* attack or even a *particular category* of terrorist act. Thus para. 3 avoids the need to prove that the accused knew the precise destination of the funds or that they would be used to finance a particular terrorist act (e.g. the planting of a bomb in a particular airport on a particular day) or even a specific category of terrorist act. It therefore removes what might have been a serious obstacle to proving the new offence. An early draft included the financing of preparations for the commission of terrorist acts, since most of the money given to terrorists is naturally spent on preparations. Although this was deleted, it is clear from the design of paras 1 and 3 that the new offence covers preparations.

We can now go back to subparas 1 (a) and (b).

Subparagraph 1 (a)

This refers to an act which constitutes an offence within the scope of, and as defined in, one of the treaties listed in the Annex to the Convention. The Annex lists the nine existing counter-terrorism conventions. Three explanations are called for. First, the *Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft 1963*[34] is not included, though it is sometimes thought of as the first of the conventions. However, it is primarily concerned with offences "against the penal law" (i.e. "ordinary" offences) or acts, whether or not they are offences, which could jeopardise the safety of the aircraft or good order and discipline on board, like being extremely drunk. Hijacking is referred only in one short article concerned with ending such incidents. Secondly, the *Convention on the Physical Protection of Nuclear Material 1980* is listed since it includes offences relating to the unlawful taking or use of nuclear material. Thirdly, the offences referred to are not only the principal offences under the listed treaties; all the ancillary offences, such as attempts and complicity, are included. Some thought this was unnecessary, but in the end it was generally felt that there would be no harm in including them, and possibly some danger in not doing so. There was a great and continuing fear of loopholes.

Subparagraph 1 (b)

The substance of this mini-definition of terrorism is more or less the same as in the first draft tabled by France,[35] except that it emphasises

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34 UNTS Vol. 704 No. 10106; *ILM* 2 (1963) 1042 et seq.; UKTS (1969) 126.

35 See the Report of the *ad hoc* Committee (Doc. A/54/37), Annex II.

more clearly the purpose of the terrorist act. This was necessary so as to distinguish such acts from "ordinary" crimes of violence.

It also excludes acts against a person "taking an active part in the hostilities in a situation of armed conflict". This is a simpler form of the so-called "military carve-out". This transatlantic term has been coined for a clause which excepts from the definition of a terrorist offence acts performed by members of armed forces during an armed conflict, and for which international humanitarian law (i.e. the laws of armed conflict) already makes provision. Such an exception was included in article 19 para. 2 of the Terrorist Bombings Convention, since some of the acts which would amount to an offence for the purposes of that convention could well be committed legitimately by members of armed forces. There was no need for such an elaborate clause in the new convention.

Although described in this article as a *mini*-definition of terrorism, the scope of subpara.1 (b) is potentially quite wide ("*Any other act* intended to cause death or serious bodily injury"), and would cover any means of attack, including acts which constitute offences under some of the earlier conventions, such the Terrorist Bombings Convention.

The criteria for judging the purpose of the act is objective. This is made clear by the references to the "nature" of the act and its "context". Some acts make their purpose only too clear, such as the murder of the Israeli athletes at the Munich Olympics. If the nature of the act is not a clear indication of its purpose, the context in which it was done may be. These criteria have to be read with the closing words which limit the purpose of the act to intimidating a population or compelling a government or an international organisation to do or to abstain from doing any act. This is in a sense narrower than in the *International Convention Against the Taking of Hostages 1979* (Hostages Convention), where the purpose is expressed to be 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, but broader in that it is wide enough to cover acts which have no political or ideological rationale, in other words, what could be seen as "ordinary" crimes. However, like the other earlier conventions, the Hostages Convention did not provide that hostage-taking shall not be regarded as a political offence for the purposes of mutual legal assistance or extradition, whereas article 14 of the new convention and article 11 of the Terrorist Bombings Convention do so provide.

But it must be remembered that although the definition of terrorism in the new convention is not comprehensive, it was devised only for that convention, and solely for the purpose of defining the new offence

of financing terrorism. Whether it will be used as the basis of an internationally accepted definition of terrorism remains to be seen. The Sixth Committee has now before it an Indian proposal for a Comprehensive Convention on International Terrorism.[36] Its proposed general definition of terrorism is intended to fill the lacuna in the complex of the existing counter-terrorism conventions by covering terrorist acts such as murder by shooting.

Before we leave the dissection of the definition of the new offence, we need to look briefly at two other matters concerning the Annex.

Paragraph 2

Discussion of this paragraph took an inordinate length of time. Not all states which wish to become parties to the new convention will necessarily be parties to all the previous conventions. But becoming a party to the new convention would, of course, not make them parties to a convention listed in the Annex if they are not already a party to it. The conventions are listed for the sole purpose of *defining* the offence of financing terrorism. Nevertheless, some states were concerned that they should not be required to accept a definition of terrorism which referred to offences specified in treaties to which they are not parties. Their concern was not lessened by the fact that by becoming party of the new convention they would not become bound by such treaties, or that the offences embodied in existing conventions may already be offences under their own domestic law. Their problem seemed to be more political. Although they well understood these points, their representatives may have been concerned that their parliamentarians might not; and negotiating parliamentary obstacles can be every bit as exhausting as negotiating a multilateral treaty. Therefore, the paragraph gives a state, when consenting to be bound by the new convention, the option of making a declaration to exclude in the application to it of the Annex any treaties to which it is not a party. If it subsequently becomes bound by any of those treaties the declaration lapses automatically. If it later ceases to be a party to one of the treaties, it can opt to exclude it from the Annex in its application to itself. The provisions may seem rather clumsy, but they are technically correct and were unavoidable politically.

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36 See the end of note 3.

When states come to consider whether to become parties to the new convention many who are not parties to all the previous conventions may conclude that they have no problem with defining the offence by reference to conventions to which they are not yet bound, and that they therefore can ratify the new convention without making a declaration. Hopefully, they may also decide to become party to those conventions as well.

Amendment of the Annex

In view of the importance of the Annex, an efficient means was needed for adding new treaties to the list. Article 23 thus provides that "relevant" treaties may be added if they are open to participation by all states (i.e. are universal), have entered into force, and have been adhered to by at least twenty-two States parties to the Convention. A State party must propose the addition of a new treaty by writing to the depositary, who will circulate the proposal the other States parties and seek their views. The proposal is deemed to have been adopted unless one-third of the States parties object in writing within 180 days. The amendment to the Annex will then come into force thirty days after the deposit of the twenty-second instrument of ratification etc. For other States parties it will come into force thirty days after deposit of their instruments.

Paragraphs 4 and 5

These paragraphs contain the — by now fairly usual — provisions regarding attempts (para. 4), accomplices (para. 5 (a)), organising and directing others to commit the offence (para. 5 (b)) and conspiracies (para. 5 (c)). All but para. 5 (c) follow closely article 2 para. 3 of the Terrorist Bombings Convention. Although a provision on conspiracies had been devised and adopted for that Convention by the United Nations as recently as two years before, some civil law states questioned the inclusion of it since, so they argued, their law did not recognise the concept of conspiracy. However, it became clear in discussion that many civil law states did have a similar concept. They included states as diverse as Algeria, China, Cuba, Ecuador, France, Germany, Russia and Turkey. But the negotiators were eventually reminded, by Canada, that the provision in the Terrorist Bombings Convention had been copied, but improved upon, in article 25 para. 3 (d) of the Rome Statute of the Inter-

national Criminal Court 1998.[37] The new convention therefore contains that formulation, which makes it clear that there is an option between subparas (a) and (b). The first subparagraph reflects the civil law concept of *association malfaiteur*; the second the common law concept of conspiracy.

Most of the other articles of the new convention will be familiar to the connoisseur of counter-terrorism conventions, and follow largely provisions of the Terrorist Bombings Convention. Only those provisions which are specific to the new convention will therefore be discussed.

IV. Liability of Legal Entities

Article 5 is an important complement to article 2, and is unique for a counter-terrorism convention:

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

There had been no need for such a provision in previous counter-terrorism conventions, since the acts they were concerned with were of such a tangible nature as to be liable to be committed only by individuals. In contrast, the financing of terrorism, although it will usually involve some handling of cash or other physical assets, is essentially intangible in nature. Moreover, when large amounts of money are involved it is likely that at some stage a legal entity, such as a bank or trust, will be the means by which the money is made available, directly or indirectly, to the terrorists. When that has been done with the help of a person responsible for the management or control of the entity, it is

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37 *ILM* 37 (1998) 1002 et seq., (1016).

important that the entity itself should be held accountable. Of course, in all this the purpose is primarily to deter such activities, in this case by giving a clear warning to those in charge of banks and suchlike that they must ensure that they are not being used, with the active involvement or knowledge of persons in management or control of them, to transmit funds to terrorists. But such a provision was viewed warily.

The first main problem was to gain acceptance of the concept that, although the legal entity cannot itself commit the offence of financing, it can nevertheless be held *vicariously* liable if a person who is responsible for the management or control of the entity commits the offence. This is the position in various legal systems, although expressed in different ways. In English law the criminal liability of corporations is still developing.[38] Their liability is vicarious, since they can act only through a director or employee. The acts of controlling officers of a corporation, such as a director or manager who are the embodiment of the corporation, and done in the course of the business, as well as their state of mind, are regarded as those of the corporation for which it can be made liable. When a statute makes it an offence for "a person" to do or to omit to do anything, a corporation can commit the offence (e.g. conspiracy to defraud involving a managing director), unless a contrary intention appears from the statute. A contrary intention can be inferred where the nature of the act could not be committed by controlling officers in the course of business, bigamy being an obvious example. If a statute imposes strict liability (i.e. no *mens rea*), it is sufficient for the act to be done by an employee or agent. For a corporation to be criminally liable, the offence must be subject to a fine. Therefore it cannot be guilty of murder, for which the only sentence is life imprisonment, but it can be guilty of manslaughter.[39] Many other countries, including Canada, the Netherlands and the United States, have similar provisions.

Although French law has been slower to recognise that corporations could be criminally liable, the *Nouveau Code Pénal 1994* made a notable innovation in the criminal law. Articles 121–122 provide that corporate bodies can be criminally liable if it is so specified by statute or decree for offences committed on their behalf by their organs or representatives. Organs include the general meeting of the corporation, the board of directors or the governing board. The representatives include the managing director. The offence must, however, be committed for the benefit of the corporation. Nevertheless, and subject to those cave-

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38 See J. Smith/ B. Hogan, *Criminal Law*, 1999, 179-187.

39 See Meridian Global Funds (1995) 2 AC 500.

ats, offences such as genocide, involuntary homicide, wounding, drug trafficking, money laundering, theft, fraud, treason, espionage, currency and environmental offences and price-fixing can all be committed by corporations.[40]

The other main problem was that the law of some states still does not enable legal entities to be prosecuted for a criminal offence. This was overcome fairly easily by providing that each State party has a discretion to apply criminal, civil or administrative liability, according to its own legal principles.

For the purposes of the new convention it is not necessary that the entity should have benefited from the transaction, but the offence must be committed by a "senior" person, not just any employee, such as a clerk in the back office. There is one other safeguard. A legal entity will only be liable if the person in management or control committed the offence in that capacity. In other words, if a bank manager merely uses his access to the bank's computer system in order to transfer funds to terrorists, that will not make the bank liable if the manager did it in a private capacity. Determining whether it was a private or official act may not be easy. There would seem, however, to be at least an evidential presumption that if a manager makes use of the bank he works for to commit the offence, he is doing it by virtue of his official position since he would not have access to the computer as a private person. The position would be different if a bank messenger without authorised access to the computer system used it to commit the offence.

V. Seizure of Funds

Article 8 provides that each State party shall, for the purpose of forfeiture, take appropriate measures, "in accordance with its domestic legal principles", to identify, detect and freeze, or seize, any funds used or allocated for the purpose of financing terrorist offences. This applies also to any proceeds deriving from terrorist financing. It also envisages States parties entering into bilateral agreements on the sharing of funds derived from forfeitures, either on a regular basis or case-by-case. State parties are encouraged to consider establishing mechanisms whereby such funds are used to compensate the victims of terrorist offences. The

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40 See, F. Desportes/ F. Le Gunehec, *Le nouveau droit penal*, 5th edition 1998, Vol. 1, paras 569–626; J. Bell/ S. Boyron/ S. Whittaker, *Principles of French Law*, 1998, 239-41.

rights of third parties acting in good faith are protected. Thus, if assets derived from the financing of terrorism have been transferred to an innocent third party they could not be forfeited.

VI. Bank Secrecy

Article 12 para. 2 prohibits the refusal of a request for mutual legal assistance on the ground of bank secrecy. Criminals increasingly abuse bank secrecy, by which is meant all aspects of the confidentiality of customers' accounts, not just secret or numbered bank accounts. More and more exceptions are being made for those cases, such as drug-trafficking and money-laundering, where the serious nature of the crimes outweighs the otherwise legitimate interest of an individual in keeping his financial affairs private. Article 12 para. 2 was taken from article 7 para. 5 of the Vienna Drugs Convention 1988.[41]

VII. New Offences Are Not Fiscal Offences

Article 13 provides that the new offences of financing terrorism shall, for the purposes of extradition or mutual legal assistance, not be regarded as fiscal offences; and a request for extradition or mutual legal assistance may not be refused on the sole ground that it concerns a fiscal offence. In this context "fiscal" means relating to money or public revenue. Tax evasion is a typical fiscal offence, for which a person cannot usually be extradited or be the subject of mutual legal assistance. The provision was drawn from article 1 of the Additional Protocol to the Council of Europe's Convention on Mutual Assistance in Criminal Matters 1978.[42] After some initial resistance by certain Western European states, it was accepted that financing terrorism should not be a fiscal offence, and that it was desirable that there shall be no doubt on the matter.

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41 *ILM* 28 (1989), 493 et seq.; UKTS (1992) 26.

42 UKTS (1992) 24; *ILM* 17 (1978), 801 et seq.

VIII. International Cooperation

Article 18 contains detailed provisions intended to enhance further practical cooperation between the States parties to prevent and counter preparations for terrorist financing, whether inside or outside their territory. Although several states already have the necessary legislation, those which do not may need to consider adapting theirs. The measures include identification by financial institutions of their usual or "occasional" customers; paying special attention to unusual or suspicious transactions; and reporting transactions suspected of stemming from crime. Based on "The Forty Recommendations" of the Financial Action Task Force on Money Laundering (FATF) of the OECD,[43] the States parties are required to consider:

> prohibiting the opening of accounts if the holders are "unidentified or unidentifiable", and requiring financial institutions to verify the identity of the "real owners", in particular of legal entities;[44]
>
> requiring financial institutions to report promptly "all complex, unusually large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose"; and
>
> "requiring financial institutions to keep records of transactions, both domestic and international, for at least five years".[45]

The States parties are also required to cooperate further by "considering":

> supervisory measures, such as the licensing, of all money-transmission agencies (including *bureaux de change*);
>
> measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments;
>
> exchanging accurate and verified information concerning all aspects of terrorist financing; and

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43 See http://oecd.org/fatf/40Recs_en.htm

44 FATF is very stringent. In May 2000 it severely criticised Austrian plans for the future of anonymous bank accounts, going so far as to say that if the plans were not tightened up by 20 May, Austria would be expelled from FATF as early as 15 June. Austria revised its plans that May.

45 For members of the European Union these measures are already required by the Directive of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering (91/308/EEC).

conducting inquiries with respect to terrorist financing concerning the identity, whereabouts and activities of suspected persons and the movement of funds involved.

For these purposes information may be exchanged through the International Criminal Police Organisation (INTERPOL).

IX. Conclusion

Some draft resolutions are promoted in the UN General Assembly for domestic or regional political reasons, rather than because they answer to a truly international need. Yet it is not easy to prevent them being adopted, albeit in an emasculated form. This fact of international life also applies, though fortunately less so, to multilateral treaties. The motive which prompts a state to propose a new treaty is not always clear. Sometimes the state may feel that, since a rival has been successful in promoting a treaty, it is time that it had a similar success. But if there is no topic which is immediately suitable for such treatment, the proposed treaty may receive a somewhat half-hearted reception. Fortunately this was not the case with the draft convention. It clearly met a need, and the doubts about the ambitious mini-definition of terrorism turned out to be mistaken. The negotiations were therefore a good example of what can be achieved in the space of only one year when there is a proposal of substance; the need is generally accepted; the first draft is carefully prepared; and the negotiators, in particular the proposers and their supporters, are open-minded, flexible and imaginative.

Annex 486

Kai Ambos and Steffen Wirth, The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000, 13 Criminal Law Forum (2002)

KAI AMBOS and STEFFEN WIRTH*

THE CURRENT LAW OF CRIMES AGAINST HUMANITY

An analysis of UNTAET Regulation 15/2000

The following paper is based on a legal brief requested by the Office of the Prosecutor General, Serious Crimes Investigation Unit, of the United Nations Transitional Administration for East Timor (UNTAET), in April 2001. The Office of the Prosecutor General required that the brief analyse the applicable law of crimes against humanity under UNTAET Regulation 15/2000[1] with regard to the crimes committed in East Timor between 1 January and 25 October 1999. This period is covered by the temporal jurisdiction of the Serious Crimes Panel of the District Court of Dili (s. 2.3 of Reg. 15/2000). The exact scope of the brief was to cover the following crimes against humanity, which are deemed to be the most important ones with regard to the situation in East Timor: murder; deportation and forcible transfer of persons; imprisonment or other severe deprivation of liberty; torture; persecution; inhumane acts. The sexual crimes defined in section 5.1(g) of Regulation 15/2000 are not included as they were dealt with in a separate brief.

Substantive parts of Regulation 15/2000, including section 5 dealing with crimes against humanity (see annex 2), are adopted almost literally from the Rome Statute of the International Criminal Court (ICC).[2] Therefore, the Serious Crimes Panel is the first court to apply substantive provisions of the Rome Statute, and its case law may be regarded as precedent for future prosecutions before the ICC. These prosecutions, however, will probably take place in completely different settings than that

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[1] Available at <http://www.un.org/peace/etimor/untaetR/r-2000.htm>.

[2] U.N. Doc. A/CONF.183/9 (1998).

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of East Timor. Insignificant issues before the Serious Crimes Panel may become crucial before the ICC. In applying Regulation 15/2000 it therefore seems important to avoid creating case law that may unnecessarily complicate future trials before the ICC.

As to the content of this paper, it intends to present a clearly defined set of elements, which must be proven in order to obtain a conviction for crimes against humanity. For this purpose, the elements of crimes against humanity have been listed in annex 1. The legal analysis will begin with an examination of the so-called context element which distinguishes crimes against humanity from ordinary crimes. The second section of this paper will then set out the current law for each inhumane act. Apart from Regulation 15/2000, the analysis will take into account national and international case law until March 2002, in particular the jurisprudence of the *ad hoc* International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). In addition, the drafts and reports of the International Law Commission (ILC) and other international bodies as well as relevant contributions in the literature will be considered.

I. THE CONTEXT ELEMENT

1. *Background for Interpretation of the Context Element*

The definition of crimes against humanity requires that the individual criminal act, for example, a murder, be committed within a broader setting of specified circumstances. This so called context element, in the case of UNTAET Regulation 2000/15, is described in the chapeau of section 5.1:

> For the purposes of the present regulation, "crimes against humanity" means any of the following acts when committed as part of a "*widespread or systematic attack and directed against any civilian population, with knowledge of the attack*" (emphasis added).

Section 5 of Regulation 15/2000 is an almost verbatim repetition of article 7 of the Rome Statute, differing only in three relevant respects from the latter. First, in section 5.1, the word "and" has been inserted between the words "attack" and "directed"; the relevant passage of the chapeau of the ICC Statute reads: "attack directed against any civilian population". The consequences of this insertion, which apparently occurred unintentionally,[3] will be discussed in connection with the individual act as a sub-element of the context element.

[3] Morten Bergsmo, *Means of proof for the objective contextual element of the existence of "a widespread and systematic attack" for crimes against humanity under s. 5 of Regulation 15/2000*, unpublished memorandum, 10 September 2000 (on file with authors), p. 2.

The second difference is the deliberate[4] omission of article 7(2)(a) of the Rome Statute in section 5.2. The subparagraph of the Rome Statute contains a definition of the word "attack" as used in the chapeau of article 7(1). Article 7(2)(a) reads:

> 2. For the purpose of paragraph 1:
> (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;

This definition is the result of a widely criticised compromise during the negotiations of the Rome Statute.[5] We will set out below, however, that the omission of the subparagraph has no particular implications for the interpretation of the term "attack" or the so-called policy element which is part of the context element.

The third difference concerns the crime of persecution. Section 5.1(h) of Regulation 15/2000 and article 7(1)(h) of the Rome Statute both require a connection between the persecutory act and other conduct. Article 7(1)(h) requires that the act be committed "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the *Court*" (emphasis added). Section 5.1(h) of Regulation 15/2000 requires a "connection with [. . .] any crime within the jurisdiction of the *panels*" (emphasis added). The difference between both provisions lies in the scope of the jurisdiction of the respective judicial body. Whereas the Rome Statute comprises only international crimes,[6] the jurisdiction of the serious crime panels also includes some "ordinary" Indonesian national crimes (*e.g.*, s. 8, "Murder"). However, it will turn out that this difference is of no practical relevance because most, if not all, national crimes under Regulation 15/2000 simultaneously fulfil the requirements of certain enumerated inhumane acts of crimes against humanity.

a. *The History of the Context Element and the War Nexus*

The context element, as formulated in section 5.1 of Regulation 15/2000, is the result of a complex evolution during which parts of the element were adopted from earlier concepts while other parts were omitted and still others newly invented. There was a permanent struggle on the part of the respective drafters or judges to meet what they felt were the demands of

[4] Morten Bergsmo, *supra* note 3, pp. 1–2.

[5] Phyllis Hwang, *Defining Crimes Against Humanity in the Rome Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 457, 497–501 (1998).

[6] Contempt of court is deliberately labeled an "offence" (not a "crime") in article 70 of the Rome Statute.

international criminal law and, at the same time, to balance these demands with state sovereignty. Therefore, awareness of origin and history of the distinct (sub-) elements of the context element is necessary in order to properly assess their respective legal significance.

The problem of the so-called war *nexus* will also be dealt with here, although, at present, it is only of historical interest. The survey concludes with a résumé highlighting the observations which will serve as a guidance for the analysis of the context element in section 5.1.[7]

(i) The Nuremberg Charter and Control Council Law No. 10. When crimes against humanity were defined for criminal law purposes for the first time in the Nuremberg Charter, the context element was different from the one contained in section 5.1 of Regulation 15/2000 and article 7 of the Rome Statute. Article 6(c) of the Nuremberg Charter requires that the individual act – *e.g.*, a murder – be committed "in execution or connection with any crime within the jurisdiction of the Tribunal [*i.e.*, crimes against peace or war crimes]".[8] Moreover, it requires that the victims be civilians. Both the so called war *nexus* and the qualification of possible victims as civilians can be explained by the origin of crimes against humanity within the law of armed conflict.[9] The Martens Clause, which is commonly cited as the first appearance of the concept of crimes against humanity,[10] is found in a treaty on the law of war, the 1907 Hague Convention (IV).[11] Another reason for

[7] For a more comprehensive narration of the history of crimes against humanity, see Beth van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUMBIA J. TRANSNAT'; L. 37, 787 (1999); for the war nexus see also recently MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE ICC 272, 302 (2002).

[8] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (1945), including the Charter of the International Military Tribunal, (1951) 82 U.N.T.S. 280.

[9] ICTY Trial Chamber I has remarked: "The inclusion of crimes against humanity in the Nürnberg Charter was justified by their relation to war crimes". *Prosecutor* v. *Tadic* (Case no. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 620; M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 60–69 (2nd ed., 1999).

[10] Matthew Lippmann, *Crimes Against Humanity*, 17 BOSTON COLLEGE THIRD WORLD L. REV. 171, 173 (1997). For references to several nineteenth century and early twentieth century cases of international concern or intervention in cases of massive atrocities, see *United States of America* v. *Altstoetter et al.* ("*Justice Case*"), 3 L.R.T.W.C. 974, 981–982 (1951).

[11] "[T]he inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the *laws of humanity*, and the dictates of the public conscience"

the requirement of the war *nexus* was the fear that, without such a *nexus*, any concept of crimes against humanity would infringe on the principle of non-intervention.[12] The war *nexus*, therefore, was considered the international element of crimes against humanity. Nevertheless, it has been argued that the Nuremberg Charter's war *nexus* was merely a precondition for the International Military Tribunal's (IMT) jurisdiction, not a material element of crimes against humanity,[13] a view strongly supported by the wording of the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. In any case, it can be said that the IMT itself rather paid mere lip service to the war *nexus* instead of strictly observing it.[14]

The war *nexus* disappeared for the first time as early as 1945 when the drafters of Control Council Law No. 10 (CCL 10)[15] deleted it from the elements of crimes against humanity in article II(c) of CCL 10.[16]

(emphasis added). Convention (IV) respecting the Laws and Customs of War on Land, text at DIETRICH SCHINDLER, JIŘÌ TOMAN, THE LAWS OF ARMED CONFLICTS 69–93 (3rd ed., 1988). The Martens clause is named after the Russian diplomat who drafted it: M. Cherif Bassiouni, *supra* note 9, p. 62, fn. 81.

12 Matthew Lippmann, *supra* note 10, p. 183, quoting Justice Jackson.

13 Margaret McAuliffe de Guzman, *The Road from Rome: The Developing Law of Crimes Against Humanity*, 22 HUMAN RTS Q. 335, 356 (2000).

14 *Prosecutor* v. *Kupreskic et al.* (Case no. IT-95-16-T), Judgment, 24 January 2000, para. 576: "[T]here was only a *tenuous* link to war crimes or crimes against the peace. This is demonstrated by the judgment rendered by the IMT in the case of defendant von Schirach. Von Schirach, as *Gauleiter* of Vienna, was charged with and convicted of crimes against humanity for the deportation of Jews from Austria. The IMT concluded that Von Schirach was probably not involved in the 'development of Hitler's plan for territorial expansion by means of aggressive war', nor had he been charged with war crimes. However, the link to another crime under the Charter (that of aggression) was found in the fact that 'Austria was occupied pursuant to a common plan of aggression'. Its occupation was, therefore, a 'crime within the jurisdiction of the Tribunal'. Another example is found in the case of Streicher, publisher of *Der Stürmer*, an anti-Semitic weekly newspaper. Streicher was convicted for 'incitement of the German people to active persecution'. There was no evidence that he had ever committed war crimes or 'that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war'. Nevertheless he was convicted of persecution as a crime against humanity (in connection with war crimes)".

15 Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity of 20 December 1945, 3 OFFICIAL GAZETTE CONTROL COUNCIL FOR GERMANY 50–55 (1946).

16 Olivia Swaak-Goldman, in I SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW. THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS 141, 159–160 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., 2000).

This elimination was not unanimously accepted. Some military tribunals continued to require the war *nexus* because of the reference to the Nuremberg Charter in Article 1 of CCL 10.[17] Another reason given was that "the only purpose of the Charter was to bring to trial 'major war criminals'."[18] In contrast, the judges of Military Tribunal III accepted the elimination of the war *nexus* in the *Justice case*.[19] It is significant, however, that they nevertheless felt that "crimes against humanity [. . .] must be strictly construed to exclude isolated cases of atrocity or persecution". Thus, they introduced a new element to this end, namely: "[P]roof of conscious participation in systematic government organised or approved procedures".[20] The *Justice case* indicates for the first time that what is required under international law is not a *specific* context element but one that excludes isolated crimes.

German courts which applied CCL 10[21] in a great number of cases[22] used a similar context element which, however, had a wider scope than the one in the *Justice case*. To turn a particular criminal conduct into a crime against humanity they required only that it be committed in "context [*Zusammenhang*] with the system of power and tyranny as it existed in the National-Socialist Period".[23] The war *nexus* played no role in their judgments. Together with the *Justice case* these decisions represent the beginning of a tendency in national and international practice which tries to distinguish crimes against humanity from ordinary crimes by requiring – instead of the war *nexus* – a link to some kind of authority.

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17 *United States of America* v. *Flick et al.*, 3 L.R.T.W.C. 1212–1214 (1952). See Darryl Robinson, *Crimes Against Humanity: Reflections on State Sovereignty, Legal Precision and the Dictates of the Public Conscience*, in I ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 139, 145 (Flavia Lattanzi & William A. Schabas, eds., 1999). For reference to further cases see Beth van Schaack, *supra* note 7, pp. 814–819.

18 *United States* v. *Flick*, *ibid.*, p. 1213.

19 *Justice Case*, *supra* note 10, p. 974.

20 *Ibid.*, p. 982.

21 On the competence of German courts to apply this law, see Ulrich Vultejus, *Verbrechen gegen die Menschlichkeit*, 12 STRAFVERTEIDIGER 602 (1992).

22 The German Supreme Court in the British occupied zone alone decided an estimated 100 published cases concerning crimes against humanity.

23 German Supreme Court in the British occupied zone, Judgment of 20 May 1948 – StS 3/48, 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE 11, 14 (1949), authors' translation ("Zusammenhang mit der Gewalt- und Willkürherrschaft, wie sie in nazistischer Zeit bestanden hat"); see also German Supreme Court in the British occupied Zone, judgment of 21 Dec. 1948 – StS 139/48, 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES FÜR DIE BRITISCHE ZONE 203, 206 ("*Weller Case*") (Berlin, Hamburg 1949).

(ii) Developments after World War II (1950–1996). In its 1950 Nuremberg Principles,[24] the International Law Commission repeated the war *nexus* in the formulation of the Nuremberg Charter. The *nexus* requirement introduced by the 1951 Draft Code of offenses against the peace and security of mankind[25] one year later was considerably broader, as it no longer considered necessary that the *nexus* exist with regard to a war related crime (as in the Nuremberg Charter). It was held sufficient for there to be a *nexus* to any of the crimes contained in the Draft Code, including, for example, "encouragement [. . .] of terrorist activities in another State".[26] However the 1951 *nexus* fulfilled the same purpose as the original one because all of the Draft Code's crimes – except genocide – concerned incursions into the sovereign sphere of another state. This transnational character rendered the respective crime an international matter in the classical sense and, thus, provided for some kind of link to international law. Indeed, it seems as if the ILC was guided by the same concerns with regard to the principle of non-intervention as the drafters of the Nuremberg Charter.

These concerns evidently had disappeared when the 1954 Draft Code of offenses against the peace and security of mankind, instead of requiring a *nexus* to another crime of the same draft, introduced the requirement that the perpetrator act "at the instigation or with toleration of [state] authorities".[27] This formulation continued the development initiated by the courts applying CCL 10 which replaced the war *nexus* with a link to authority. The new approach, thus, focussed rather on the relationship between official authorities and individuals, a situation that is also subject to international human rights law. Once this body of law emerged as binding rules of international law, it would serve as the link to international law that formerly may have been provided by the law of warfare. The Draft Code's only reminder of the humanitarian law origin of crimes against humanity is its definition of possible victims as "civilian population". This term, as well, disappeared in later ILC Drafts. However, it was revived by the drafters of the ICTY Statute and after that included in the definition of crimes against humanity in the statutes or other constitutive documents of all modern international criminal tribunals and courts.

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[24] Principle IV (c) of the Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, II YEARBOOK INT'L L. COMM'N 374 (1950).

[25] *Draft Code of Crimes against the Peace and Security of Mankind*, II YEARBOOK INT'L L. COMM'N 134 (1951), art. 2(10).

[26] *Ibid.*, art. 2(6).

[27] *Draft Code of Crimes against the Peace and Security of Mankind*, II YEARBOOK INT'L L. COMM'N 151 (1954), art. 2(11), chapeau.

The next landmark in the development of crimes against humanity was the 1968 Convention of the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[28] According to article 1(b) of the Convention, it applies to "[c]rimes against humanity whether committed in time of war *or in time of peace* as they are defined in the Charter of the International Military Tribunal, Nurnberg" (emphasis added). Obviously, the Convention does not consider the war *nexus* a requirement of crimes against humanity. Moreover, the Convention explicitly states that the crimes against humanity to which it refers are the same crimes which are "defined in the Charter" of the International Military Tribunal. This evidently implies that the Nuremberg Charter's crimes against humanity can be committed in time of peace. Therefore, it is clear that the Convention views the war *nexus* of article 6(c) of the Nuremberg Charter not as a material element of crimes against humanity but merely as a jurisdictional restriction of the IMT's competence.

The shift of the context element from a war *nexus* to a link with some kind of official authority, which had started in the post World War II decisions under CCL 10 and was continued by the 1954 Draft Code, was later affirmed by some judgments of national courts. In the *Menten case*, the Dutch Supreme Court held in 1981 that the concept of crimes against humanity requires that the crimes "form part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people".[29] This definition shows some similarity with the formulation in the *Justice case* and judgments of German courts under CCL 10. In 1985, the French Court of Cassation ruled in the *Barbie case* that crimes against humanity must be "committed in a systematic manner in the name of a State practising a policy of ideological supremacy".[30] This ruling was repeated in 1992 in *Touvier*.[31] A few years later, in 1994, the Supreme Court of Canada ruled in the *Finta case*: "What distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance

[28] 754 U.N.T.S. 73.

[29] *Menten Case*, 75 I.L.R. 362, 362–363 (Dutch Supreme Court).

[30] *Barbie Case*, 78 I.L.R. 136, 137 (French Court of Cassation).

[31] *Touvier Case*, 100 I.L.R. 350, 352 (French Court of Cassation). The very specific language of the context element in these cases may be aimed at excluding acts of the Vichy regime or of French officials in Algeria from the scope of crimes against humanity, see pp. 353–355 where the Court explains that the Vichy regime collaborated with Germany only for pragmatic reasons and not for reasons of ideological supremacy. Also: Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1336–1338 (1989).

of a policy of discrimination or persecution of an identifiable group or race".[32]

Article 21 of the ILC's 1991 Draft Code of crimes against the peace and security of mankind which renamed crimes against humanity "systematic or mass violations of human rights", took a slightly different approach with regard to the trend to require a link with authority. It declared punishable any "individual who commits or orders the commission of any of the following violations of human rights: – murder, – torture [. . .] in a systematic manner or on a mass scale [. . .]".[33] This formulation differs significantly from previous and subsequent formulations: it requires that the perpetrator commit or order a multiplicity of crimes on a "systematic or mass scale" *on his or her own*. It is not sufficient (as, for example, in section 5.1 of Reg. 15/2000) that he or she commit a single act or merely a few acts in the context of a broader attack. Therefore the Draft considered as possible perpetrators of crimes against humanity only persons in a position to act on a large scale. This must be kept in mind when considering the ILC's commentary pointing out that private individuals can also commit the crime.[34] The ILC listed as examples of such individuals persons with "*de facto* power or organised in criminal gangs or groups".[35] Thus, the draft, in fact, retains the need for some kind of authority, or at least power, behind the crimes, simply clarifying that a non-state actor can also meet this element.[36] Finally, the Draft Code is remarkable in that it does not require, like its successor,[37] that the victims of crimes against humanity be civilians.

The most recent result of the ILC's work on crimes against humanity, the 1996 Draft Code of crimes against the peace and security of mankind,[38] does not, as its predecessor, require that the perpetrator personally commit a multiplicity of crimes, but it reintroduces the context-related structure.

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[32] *R.* v. *Finta*, [1994] 1 S.C.R. 701, 812 (Supreme Court of Canada, per Cory J.).

[33] *Draft Code of Crimes against the Peace and Security of Mankind*, II(2) YEARBOOK INT'L L. COMM'N 94 (1991), art. 21.

[34] *Ibid.*, Commentary on Article 21, para. 5.

[35] *Ibid.*

[36] For a critical opinion on a too broad definition of the organisation which implements the policy to commit crimes against humanity, see Claus Kress, *Der Jugoslawien-Strafgerichtshof im Grenzbereich zwischen internationalem bewaffneten Konflikt und Bürgerkrieg*, in VÖLKERRECHTLICHE VERBRECHEN VOR DEM JUGOSLAWIEN-TRIBUNAL, NATIONALEN GERICHTEN UND DEM INTERNATIONALEN STRAFGERICHTSHOF 15, 54–55 (Horst Fischer & Sascha Rolf Lüder, eds., 1999).

[37] Article 18 of the *Draft Code of Crimes against the Peace and Security of Mankind*, II(2) YEARBOOK INT'L L. COMM'N 15 (1996).

[38] *Ibid.*

Accordingly, the systematic manner or large scale commission of crimes is required only as background for the individual criminal conduct.[39] However, it is similar to the 1991 Draft Code in that the authority behind the crimes need not be a state in the sense of public international law. It is sufficient that the crimes be "instigated or directed by a Government or any organisation or group".[40] A war *nexus* was deliberately excluded by the ILC.[41] Finally, it is worthwhile noting that the formulation "in a systematic manner or on a large scale" greatly influenced the jurisprudence of the ICTY and ICTR, both of which, in the wake of the 1996 Draft Code, have required a "widespread or systematic attack". However, it is equally possible that the 1996 Draft was influenced by the language of the ICTR Statute which expressly requires a "widespread or systematic attack". The drafters of the Rome Statute and of Regulation 15/2000 also adopted the widespread or systematic attack requirement.

(iii) The ad hoc *International Criminal Tribunals.* The wording of article 5 of the ICTY Statute[42] of 1993 brought a renaissance of the humanitarian law origins of crimes against humanity. It required for the first time since 1951 a new version of the war *nexus* and reintroduced the requirement that possible victims of crimes against humanity be civilians.[43] The explanation of both of these aspects may be found in the Report of the Secretary General[44] accompanying the draft Statute of the ICTY. In explaining the inclusion of crimes against humanity in the ICTY Statute, the report refers exclusively to common article 3 of the four Geneva Conventions,[45] apparently (and incorrectly) considering the prohibition of war crimes in

[39] At least this seems to be the interpretation given in *Tadic*, *supra* note 9, para. 649.

[40] 1996 *Draft Code*, *supra* note 37, chapeau of article 18.

[41] *Ibid.*, commentary on article 18(6).

[42] Statute of the International Tribunal for the Former Yugoslavia, U.N. Doc. S/RES/827 (1993).

[43] The Statute's drafters, in article 5, gave the *ad hoc* Tribunal jurisdiction over "[t]he following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder [. . .]".

[44] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704.

[45] *Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949*, 75 U.N.T.S. 31; *Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949*, 75 U.N.T.S. 85; *Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949*, 75 U.N.T.S. 135; *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949*, 75 U.N.T.S. 287.

internal armed conflict as identical with the prohibition of crimes against humanity.[46]

In this context it should also be noted that the ICTY Statute's war *nexus* differs significantly from that of the Nuremberg Charter in two respects. On the one hand, the Nuremberg Charter was narrower than the Statute in that it required not only a commission of the crimes "in armed conflict" but a more specific *nexus* to one of the other war crimes enumerated in the Charter. On the other hand, the Charter had a wider scope than the ICTY Statute in that it extended the *nexus* to the mere preparation of an aggressive war. Considered together with the drafting history of the ICTY Statute, the differences between the Nuremberg war *nexus* and the war *nexus* of the ICTY Statute make it difficult to argue that the Statute's war *nexus* is required by customary international law as expressed in the Nuremberg Charter.[47]

Indeed, in one of its first rulings, – the *Tadic Jurisdictional Appeal* – the ICTY Appeals Chamber held that "there is no logical or legal basis for [a war *nexus*] and it has been abandoned in subsequent State practice with respect to crimes against humanity".[48] Moreover, it stated: "It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed [. . .] customary international law may not require a connection between crimes against humanity and any conflict at all. Thus [. . .] the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law".[49] In a later decision, the Appeals Chamber went one step further pronouncing that "the armed

[46] According to the Report, *supra* note 44, para. 49 (footnote omitted): "Crimes against humanity were first recognised in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character". Footnote 9 reads: "In this context, it is to be noted that the International Court of Justice has recognised that the *prohibitions contained in common article 3 of the 1949 Geneva Conventions* are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character". (reference omitted; emphasis added).

[47] This is all the more true if it is accepted that the Nuremberg war *nexus* was a merely jurisdictional element.

[48] *Prosecutor* v. *Tadic* (Case no. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 140.

[49] *Ibid.*, para. 141. Part of this phrase was cited by the International Law Commission in explaining its reasons for the exclusion of the war *nexus* in its 1996 Draft Code, *supra* Note 37, commentary on article 18(6).

conflict requirement is a *jurisdictional* element"[50] which "is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law".[51] This view has also been expressed in the *Kordic case*.[52]

Another clear indication that the war *nexus* is not required under customary international law is the wording of the chapeau of article 3 of the ICTR Statute[53] which does not require any link to an armed conflict. In fact, it seems that the ICTR did not even deliberate as to whether it should require a war *nexus* as an element of crimes against humanity, since there are no decisions dealing with the issue. Instead, the context element introduced by the ICTR Statute is the first codification of the element of "widespread or systematic attack against any civilian population". It was later repeated almost verbatim in the chapeau of article 7(1) of the Rome Statute and finally became part of section 5.1 of Regulation 15/2000. A last noteworthy aspect of article 3 of the ICTR Statute is the requirement of a discriminatory intent.

In sum, the judges of both tribunals replaced the war *nexus* with a context element which has been the blueprint for the immediate predecessor of section 5.1 of Regulation 15/2000, namely article 7(1) of the Rome Statute.[54] For this reason, the jurisprudence of the *ad hoc* Tribunals is of considerable relevance to interpretation of the crimes against humanity provision in UNTAET Regulation 15/2000.

(iv) Conclusions. The most striking conclusion that can be drawn from the above survey of the context element's evolution is that it has continued to change throughout its history. In a way, the only common denominator is the fact that some kind of context has been required by every drafter or judge dealing with crimes against humanity. In addition, after the abandonment of the war *nexus*, a *link to an authority or power*, be it a state, organisation or group, was required by most formulations of crimes against humanity as well as by the case law of the *ad hoc* Tribunals.

It can be concluded that no specific details of the context element are required, but rather only its general existence. Moreover, there is a strong tendency to include a link to an authority. Thus, it seems that the fluctuations of the past definitions of the context element leave wide discretion

50 *Prosecutor* v. *Tadic* (Case no. IT-94-1-A), Judgment, 15 July 1999, para. 249.

51 *Ibid.*, para. 251.

52 *Prosecutor* v. *Kordic* (Case no. IT-95-14/2-T), Judgment, 26 February 2001, para. 33.

53 Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), annex.

54 Rome Statute of the International Criminal Court, *supra* note 2. The Rome Statute was adopted on 17 July 1998 and entered into force on 1 July 2002.

to the drafters of international criminal law in their interpretation of the content of the context element under customary international law. Another important observation regards the origin of crimes against humanity in the law of war or humanitarian law. In particular, the qualification of the population attacked as "civilian" derives from these origins. A war *nexus*, however, if it ever was an element of crimes against humanity at all, is no longer required.

b. *The Rationale of the Context Element as a Guideline for Interpretation*

The reason for the inclusion of a context element in crimes against humanity is to distinguish ordinary crimes under national law from international crimes which are criminal under international criminal law even if national law does not punish them. The context element is the "international element"[55] in crimes against humanity which renders certain criminal conduct a matter of international concern.[56] The exact nature of this international concern, the rationale why these crimes are considered important enough to deal with them on an international level, is a very important aid in the interpretation of these crimes and, must therefore be briefly analysed here.

There are two possible reasons why the international community may treat a crime as a matter of international law. Firstly, a crime can obtain an international character since it cannot be prosecuted effectively on a national level and there is a common interest of states to prosecute. This practical reason applies to piracy, probably the most ancient international crime,[57] or damaging submarine telegraph cables.[58] The second reason is the extreme gravity of certain crimes[59] which is usually accompanied by the unwillingness or inability of national criminal systems to prosecute them. This is the rationale for the criminalisation of crimes

[55] *Prosecutor* v. *Tadic* (Case no. IT-94-1-A and IT-94-1-A *bis*), Separate Opinion of Judge Shahabuddeen, 26 January 2000; M. Cherif Bassiouni, *supra* note 9, p. 243 (cf. the title of Chapter 6: "The International or Jurisdictional Element").

[56] Claus Kress, *supra* note 36, p. 53; Beth van Schaack, *supra* note 7, p. 819; Matthew Lippman, *supra* note 10, p. 183 quoting Robert H. Jackson, head of the United States delegation at the London Conference in 1945, where the Nuremberg Charter was negotiated.

[57] ROBERT JENNINGS & ARTHUR WATTS, I OPPENHEIM'S INTERNATIONAL LAW 746 (9th ed., 1992); M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, in I INTERNATIONAL CRIMINAL LAW, CRIMES 3, 83 (M. Cherif Bassiouni, ed., 1999); Brigitte Stern, *A propos de la compétence universelle* . . . , in LIBER AMICORUM JUDGE MOHAMED BEDJAOUI 735, 736, 744 *et seq*. (Emile Yakpo & Tahar Boumedra, eds., 1999).

[58] Robert Jennings & Arthur Watts, *supra* note 57, p. 761 (§ 311).

[59] Margaret McAuliffe de Guzman, *supra* note 13, p. 376.

against humanity under international law. Particularly grave violations of individual rights by action or deliberate inaction of official authorities has been an issue of international law since the concept of human rights began to develop at the end of the nineteenth century.[60] This concept gained the status of "hard law", at the latest, with the adoption of the Charter of the United Nations.[61] Thus, it was a logical consequence to criminalise the worst human rights violations, which coincide with the gravest crimes known to mankind.

The specific seriousness in relation to ordinary crimes (*e.g.*, fraud) and "normal" human rights violations (*e.g.*, denial of the right to associate in trade unions[62]) is constituted by two characteristics of crimes against humanity. They comprise only the most severe violations of human rights (for example violations of dignity, life or freedom) and, in addition, must be committed in a multiplicity of cases, either in a systematic or a widespread manner. Accordingly, it has been emphasised repeatedly, *inter alia* by the International Law Commission and by case law,[63] that the context element serves to single out random acts of violence from the scope of crimes against humanity.

The multiple commission of crimes required for crimes against humanity increases the gravity of the single crime as it increases the *danger* of the individual perpetrator's conduct.[64] For example, a victim who is attacked in the broader context of a widespread or systematic attack is much more vulnerable. A victim of ordinary criminal conduct has far better means of defense. He or she can call police or neighbours or even defend himself or herself without having to fear that the perpetrator calls to his or her peers for support. A perpetrator of crimes against humanity also poses a greater threat because ordinary social correctives cannot function properly. Public disapproval of criminal behaviour, a strong counterincentive against criminal conduct, is not available. On the contrary, collective action tolerated or supported by the authorities helps to overcome natural inhibi-

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60 Robert Jennings & Arthur Watts, *supra* note 57, pp. 849–850; also pp. 995–998, where the authors consider crimes against humanity in the context of human rights.

61 ALFRED VERDROSS & BRUNO SIMMA, UNVIVERSELLES VÖLKERRECHT. THEORIE UND PRAXIS 162 (3rd ed., 1984); German Constitutional Court (*Bundesverfassungsgericht*), Decision of 13 December 1977, Case no. 2 BvM 1/76, 46 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS 342, 362.

62 International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, art. 22.

63 1996 *Draft Code*, *supra* note 37, commentary on article 18(5); *Justice Case*, *supra* note 19, p. 982; *Prosecutor* v. *Tadic*, *supra* note 9, paras. 646, 648, 653; *Prosecutor* v. *Akayesu* (Case no. ICTR-96-4-T), Judgment, 2 Sepember 1998, para. 579.

64 Günter Heine & Hans Vest, *Murder/Wilful Killing*, in SUBSTANTIVE AND PROCEDURAL ASPECTS, *supra* note 16, pp. 175, 194.

tions. Yet another reason for the magnified danger of the single perpetrator has been pointed out by Judge Cassese who noted that, in contrast to the perpetrator of an ordinary crime, a perpetrator committing a crime against humanity may not fear punishment.[65] What is more, not only the danger by the single perpetrator is increased but his or her participation in the attack also helps to constitute the attack itself, and, thus, helps to constitute the atmosphere and the environment for the crimes of others.

Thus, the rationale of the context element can be summarised as the protection of human rights[66] against the most serious and most dangerous violations. This rationale at the same time serves to distinguish crimes against humanity from the less serious national law crimes.

2. *Elements of the Context Element*

a. *Widespread or Systematic Attack*

The requirement of a widespread or systematic attack was codified for the first time in the ICTR Statute and subsequently in the Rome Statute.[67] It is repeated in section 5.1 of Regulation 15/2000. Despite its absence in the ICTY Statute, the ICTY has adopted this element as well. In the *Tadic* and the *Blaskic* cases it was argued that the requirement of a widespread or systematic attack was implied in the requirement that the object of such crimes must be a "population".[68] In addition, both judgments refer to the 1996 ILC Draft Code which requires the commission of crimes "in a systematic manner or on a large scale". Finally, *Blaskic* considers the Statutes of the ICTR and the ICC as well as other case law of the Tribunals.[69]

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[65] *Prosecutor* v. *Tadic* (Case no. IT-94-1-A and IT-94-1-A *bis*), Separate Opinion of Judge Cassese, 26 January 2000, para. 14.

[66] "[Crimes against humanity] are intended to safeguard basic human values by banning atrocities directed against human dignity": *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 547.

[67] On negotiations concerning the term "widespread or systematic attack" at the Rome Diplomatic Conference, see Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 47–51 (1999).

[68] "[E]ither a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement (that the acts must be directed against a civilian population)". *Prosecutor* v. *Tadic*, *supra* note 9, para. 648. "It is appropriate, however, to note that the words 'directed against any civilian population' and some of the sub-characterisations set out in the text of the Statute imply, both by their very nature and by law, an element of being widespread or organised, whether as regards the acts or the victims. 'Extermination', 'enslavement' and 'persecutions' do not refer to single events". *Prosecutor* v. *Blaskic* (Case no. IT-95-14-T), Judgment, 3 March 2000, para. 202.

[69] *Prosecutor* v. *Blaskic*, *ibid.*, para. 202.

(i) Attack. The notion of "attack" as part of the concept of a "widespread or systematic attack" concerns the nature of the action directed against any civilian population. The particular language of the chapeau of section 5.1 may give the wrong impression, suggesting that the attack and conduct directed against a civilian population are two different concepts. The first explicit definition of attack was presented in the *Akayesu* judgment of ICTR Trial Chamber I:

> The concept of attack may be defined as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.[70]

This definition is repeated by the Trial Chamber in *Rutaganda*[71] and *Musema*.[72] Its first part is slightly misleading as it paraphrases "attack" as "unlawful act". However, a little earlier the decision expressly sets out that "the [individual] act must be committed *as part* of a widespread or systematic attack".[73] Thus it is clear that the general notion of attack and the (individual) criminal acts, *e.g.*, murder or torture, are not put on the same footing. Rather, the Chamber defines an attack as a multiplicity of such acts "orchestrated on a massive scale or in a systematic manner".

Trial Chamber II in *Kayishema* seems to adopt a similar standard but clarifies that an attack need not consist of a multiplicity of the *same* crimes (for example murder) but can also consist of an accumulation of *different* crimes: "The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation".[74]

The *Kupreskic* decision of an ICTY Trial Chamber refers to "acts" that "were part of a widespread or systematic occurrence of crimes".[75]

Thus, the Tribunals understand an attack as the multiple commission of acts which fulfil the requirements of the enumerated inhumane acts. This approach fits well with the rationale of crimes against humanity, *i.e.*, to criminalise only the most serious human rights violations. It also is

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70 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 581.

71 *Prosecutor* v. *Rutaganda* (Case no. ICTR-96-3-T), Judgment, 6 December 1999, para. 70.

72 *Prosecutor* v. *Musema* (Case no. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 205.

73 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 578 (emphasis added).

74 *Prosecutor* v. *Kayishema & Ruzindana* (Case no. ICTR-95-1-T), Judgment, 12 May 1999, para. 122.

75 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 544.

compatible with article 7(2)(a) Rome Statute, according to which attack is "a course of conduct involving the multiple commission of acts referred to in paragraph 1". It is true that this definition of attack has been omitted from section 5.2 of Regulation 15/2000. However, in the light of the case law of the *ad hoc* Tribunals, this omission cannot support the inclusion of acts which are *not* among the enumerated inhumane acts into the definition of attack under Regulation 15/2000. As a consequence, other human rights violations like denial of fair trial or infringements on property do not, in general,[76] constitute an attack, even if committed on a widespread basis or systematically. On the other hand, it must be borne in mind that among the enumerated inhumane acts are "other inhumane acts" including, for example, severe beatings. Moreover, according to the jurisprudence of the Tribunals, persecution may comprise acts not otherwise enumerated among the enumerated inhumane acts, including the destruction of homes.

A further important characteristic of the attack is that it need not necessarily be executed by a multiplicity of perpetrators, nor does a single perpetrator have to act at different times.[77] For example, if a single perpetrator poisons the water for a large population, he or she would thereby commit a multiplicity of killings with a single conduct. The same holds true for the attacks of 11 September in the United States. Every single killing, under the doctrine of concurrence of offences (*concours idéal, Idealkonkurrenz*), amounts to a separate crime thus constituting the multiplicity of crimes required for the attack.[78] The general introduction of the Draft Elements of Crimes for the ICC states: "A particular conduct may constitute one or more crimes".[79]

Finally, the above discussions leave no doubt that the attack need not be a military attack.[80]

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[76] But see *ibid.*, para. 631.

[77] Simon Chesterman, *An Altogether Different Order: Defining the Elements of Crimes against Humanity*, 10 DUKE J. COMP. INT'L L. 307, 316 (2000).

[78] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 712; Kai Ambos & Steffen Wirth, *Commentary on Prosecutor* v. *Kayishema and Ruzindana*, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994–1999 701 (André Klip & Göran Sluiter, eds., 2001), Ruth Rissing-van Saan, in STRAFGESETZBUCH. LEIPZIGER KOMMENTAR. GROSSKOMMENTAR § 52 mn. 36 (Burkhard Jähnke, Heinrich Wilhelm Laufhütte & Walter Odersky, eds., 28th delivery, 1999); Alicia Gil Gil, *Comentario a la primera sentencia del Tribunal Supremo Alemán condenando por el delito del genocidio*, 4 REVISTA DE DERECHO PENAL Y CRIMINOLOGÍA 771, 788 *et seq.* (1999).

[79] Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2, general introduction, para. 9.

[80] Rodney Dixon, *Article 7*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT. OBSERVERS' NOTES, ARTICLE BY ARTICLE mn. 8 (Otto Triffterer, ed., 1999).

It has been repeated many times by both international Tribunals that an attack need not be widespread *and* systematic but only *either* widespread *or* systematic.[81] As this is consistent with the wording of section 5.1 the matter need not be given further consideration here.

(ii) Systematic Attack. According to the *Tadic* trial judgment, a systematic attack requires the existence of a "pattern or methodical plan".[82] *Akayesu* defined a systematic attack "as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".[83] Thereby, it added to the *Tadic* definition *inter alia* the requirements that the organisation of the attack be "thorough" and that "substantial resources" be used. ICTR Trial Chamber II, in *Kayishema*, gave a shorter definition emphasising the relation between the systematic nature of the attack and the policy: "A systematic attack means an attack carried out pursuant to a preconceived policy or plan".[84] Similarly, *Kunarac* very recently held: "The adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence".[85] All decisions rely on the 1996 ILC Draft Code which defined a systematic attack as committed "pursuant to a preconceived plan or policy".[86]

It is unclear what the basis is for the "thoroughly organised and following a regular pattern" and the "substantial resources" requirements of *Akayesu*. Therefore, these terms should not be regarded so much as strict requirements of a systematic attack but rather as an illustration referring to typical situations in which an attack exists. It cannot be convincingly assumed that the ICTR Trial Chamber intended to exclude an attack on innocent persons from the scope of the systematic variant[87] of

[81] *Prosecutor* v. *Tadic*, *supra* note 9, para. 646–648; *Prosecutor* v. *Akayesu*, *supra* note 63, para. 579; *Prosecutor* v. *Kayishema*, *supra* note 74, para. 123; *Prosecutor* v. *Rutaganda*, *supra* note 71, paras. 67–68; *Prosecutor* v. *Musema*, *supra* note 72, paras. 202–203; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 207; *Prosecutor* v. *Kunarac et al.* (Case no. IT-96-23 and IT-96-23/1), Judgment, 22 February 2001, para. 427; *Prosecutor* v. *Kordic*, *supra* note 52, para. 178; *Prosecutor* v. *Bagilishema* (Case no. ICTR-95-1A-T), Judgment, 7 June 2001, para. 77.

[82] *Prosecutor* v. *Tadic*, *supra* note 9, para. 648.

[83] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 580. The same Chamber confirms this holding in *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 69 and *Prosecutor* v. *Musema*, *supra* note 72, para. 204.

[84] *Prosecutor* v. *Kayishema*, *supra* note 74, para. 123.

[85] *Prosecutor* v. *Kunarac*, *supra* note 81, para. 429.

[86] 1996 Draft Code, *supra* note 37, commentary on article 18(3).

[87] A widespread attack requires a larger number of victims than a systematic attack. Therefore it cannot fully fill a gap in the definition of the systematic attack.

crimes against humanity for the sole reason that it was committed with very limited resources – for example machetes – or that it was sloppily organised.[88]

ICTY Trial Chamber I, in *Blaskic*, adopted a set of four different criteria which must be fulfilled to render an attack systematic:

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[89]

The Chamber's somewhat hypertrophic definition of "systematic" is derived from an accumulation of material from several different sources, including the ILC Drafts of 1991 and 1996, and the quoted passages in *Tadic* and *Akayesu*.[90] Such a method is questionable in itself because the result of this accumulation is a new definition of "systematic" which cannot be attributed to any of the sources (as none of them require *all* of the named criteria).

Therefore, only the first criterion from the *Blaskic* catalogue, which has also been adopted by *Kayishema* and *Kunarac*, can be regarded as a genuine element of the systematic attack. As to the second criterion in the catalogue, the *Blaskic* Trial Chamber adduced no source at all for its first alternative, namely that the crimes must be committed on a "very large scale". Rather, this seems to belong to the definition of the *widespread* attack which is different from the systematic attack in that it requires a large number of victims. But also the second alternative of the second criterion, the repeated and continuous commission of inhumane acts, was named by the ILC only as an example, that is, as a *possible* result of the

88 Thus the view expressed by Suzannah Linton, *Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, unpublished paper (on file with the authors) who takes the *Akayesu* formula verbatim and requires that the prosecution prove that the attacks be "thoroughly organised and following a regular pattern", is not shared by the authors.

89 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 203 (footnotes omitted); these requirement are repeated in *Prosecutor* v. *Kordic*, *supra* note 52, para. 179.

90 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 203, fn. 379–381.

implementation of a plan or policy.[91] Thus, it seems that the inclusion of the whole second criterion is not well founded. The same applies to the third criterion which is taken from *Akayesu* and has been dealt with above. The fourth and last criterion, finally, is formulated too narrowly, as will be explained.

In conclusion, the common denominator in the various definitions of a systematic attack is that "a systematic attack is one carried out pursuant to a preconceived policy or plan".[92] More explicitly, what constitutes the *systematic* character of the attack is the *guidance* provided for the individual perpetrators as to the envisaged object of the attack, namely the group of victims.

(iii) Widespread Attack. With regard to the widespread attack, most of the decisions of the *ad hoc* Tribunals simply focus on the scale of the attack or, equivalently, on the number of victims. Thus, the *Tadic* Trial Chamber, following the ILC's 1996 Draft Code,[93] defined the widespread attack as referring "to the [large] number of victims".[94] Very similarly, *Kayishema* held that a widespread attack must be "directed against a multiplicity of victims".[95] *Blaskic* explained, quoting the ILC: "A crime may be widespread or committed on a large-scale by 'the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude'."[96] And the Chamber in *Kunarac* noted: "The adjective 'widespread' connotes the large-scale nature of the attack and the number of its victims".[97] In contrast to these concise formulations, *Akayesu* provided a much longer and more complicated definition, holding that a "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims" is required.[98]

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91 1996 Draft Code, *supra* note 37, commentary on article 18(3).

92 *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 77.

93 1996 Draft Code, *supra* note 37, commentary on article 18(4).

94 *Prosecutor* v. *Tadic*, *supra* note 9, para. 648.

95 *Prosecutor* v. *Kayishema*, *supra* note 74, para. 123.

96 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 206, quoting the International Law Commission's Commentary to the 1996 Draft Code, *supra* note 37, commentary on article 18(4). The Trial Chamber in *Prosecutor* v. *Kordic*, *supra* note 52, para. 179, follows closely.

97 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 428; see also *Prosecutor* v. *Tadic*, *supra* note 9, para. 648; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 202; *Prosecutor* v. *Krnojelac et al.* (Case no. IT-97-25-T) Judgment, 15 March 2002, para. 57.

98 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 580; the definition is repeated in *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 69, and *Prosecutor* v. *Musema*, *supra* note 72, para. 204.

Again, all judgments mentioned draw on the ILC's Commentary and their common denominator is the ILC's formulation. Thus, it may be concluded that all that a widespread attack requires is a large number of victims which, as stated in *Blaskic*, can also be attacked by a single conduct "of extraordinary magnitude". The additions to this core definition in *Akayesu* do not contribute substantially to this definition and may, as above, be regarded as merely illustrative.

Finally, as to the numbers of victims, the Tribunal's jurisprudence and other sources imply that for a widespread attack a *larger* number of victims is required than for a systematic attack.

b. *Any Population*

The rationale of the requirement that the object of the attack must be a population is the same as the one for the widespread or systematic attack, *i.e.*, to exclude single or random acts of violence.[99] In the *Tadic* trial judgment the Chamber held that this element also implies the collective nature of the crimes.[100] However, the word "collective" must not be understood as requiring that the victims of the attack be victimised *because* of their membership in a certain group.[101] This interpretation was rejected by the Appeals Chamber in *Tadic*, which held that the Trial Chamber was wrong in requiring discriminatory intent for crimes against humanity. The element "population", therefore, simply requires that a multiplicity of victims exists and, thus, means exactly the same as the element (widespread or systematic) attack, namely, that an isolated single crime which is not part of an attack against a multiplicity of victims does not constitute a crime against humanity. Indeed, the judges of the ICTY deduced the very requirement of the widespread or systematic attack from the term "population". Consequently, if an instrument such as the Rome Statute or Regulation 15/2000 explicitly requires a widespread or systematic attack, the term "population" does not add anything to this requirement. It is only meaningful insofar as it is qualified by the adjective "civilian" in the phrase "any civilian population". Therefore, the incorporation of the term "population" in these texts should be understood rather as a historical reminiscence to a time honoured phrase than as adding any substantial element to crimes against humanity.[102]

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[99] See also *Prosecutor* v. *Kunarac*, *supra* note 81, para. 422.

[100] *Prosecutor* v. *Tadic*, *supra* note 9, para. 644; the same assertion was made in *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 80.

[101] Margaret McAuliffe de Guzman, *supra* note 13, p. 362; Simon Chesterman, *supra* note 77, p. 325.

[102] Margaret McAuliffe de Guzman, *supra* note 13, pp. 362–364.

The word "any" which qualifies the term "population" originally was intended to clarify that the victims need not be nationals of a foreign state.[103] Such clarification was necessary as long as crimes against humanity had not been fully emancipated from the laws of war. At present, the qualifier "any" only emphasises that no part of the civilian population is excluded from the protection provided by the prohibition of crimes against humanity.[104] Moreover, it implies that a broad interpretation of the term "civilian" is required.[105]

The term "any [. . .] population", thus denotes merely a multiplicity of victims. As this is already implied in the term "attack", it does not add any distinct element to the requirements of crimes against humanity.

c. *Civilian*

The attack must be directed against a "*civilian* population". In this respect, two questions arise. In the first place it must be clarified which individuals fall within the definition of civilians. Secondly, it is necessary to examine the circumstances under which a population, *i.e.*, a multiplicity of individuals, must be regarded as "civilian".

The requirement that the victims of crimes against humanity must be civilians is a relic of the origins of crimes against humanity in the laws of war. Moreover, its inclusion in modern codifications of international criminal law is most probably based on a confusion of common article 3 of the Geneva Conventions with the law of crimes against humanity (see above). If the scope of crimes against humanity was ever limited to the protection of (civilian) war victims this is no longer the case. At present, the prohibition of crimes against humanity serves the protection of human rights of civilians in general. However, not only the human rights of civilians but also those of soldiers can be violated. The ICTY described this dilemma as follows: "One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes".[106] Whereas the Tribunal felt that it could not ignore the wording of its Statute – which explicitly requires the element "civilian" – it nevertheless concluded that a wide interpretation of the term was required.[107]

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[103] Darryl Robinson, *supra* note 67, p. 51; also *Prosecutor* v. *Tadic*, *supra* note 9, para. 635; *Prosecutor* v. *Kunarac*, *supra* note 81, para. 423.

[104] Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc. S/1994/674, para. 77.

[105] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 208.

[106] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 547.

[107] *Ibid.*

Indeed an extensive interpretation is strongly supported by case law starting with the decisions of German courts under CCL 10. In a case of the German Supreme Court in the British Occupied Zone, the defendants were convicted for having sentenced to death and ordered the execution of two (German) soldiers who had deserted in the last days of the war. The court noted that the crime against the soldiers was not committed against the civilian population but ruled this was not necessary since crimes against humanity can be committed against soldiers as well.[108] In another case, the same court convicted a defendant for sentencing to death two (German) soldiers who had committed the "crime" of demoralisation of the armed forces (*Wehrkraftzersetzung*).[109] Both decisions support the view that crimes against humanity can be committed against soldiers of the same nationality as the perpetrators.

Moreover, the *ad hoc* Tribunals[110] have frequently referred to the *Barbie case* in which the French *Cour de Cassation* decided that members of the Resistance could be victims of crimes against humanity.[111] The Commission of Experts, which prepared a legal analysis of the situation in the former Yugoslavia for the Security Council, considered that the term "civilians", meaning non-combatants, included a head of family who "tries to protect his family gun-in-hand".[112]

The *ad hoc* Tribunals have followed the Commission of Experts and adopted a wide definition of civilian. The *Vukovar* decision held: "Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance".[113] Consequently, the Tribunal ruled that former resistance fighters who had laid down their

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[108] German Supreme Court in the British Occupied Zone, Judgment, Case no. StS 111/48, 7 December 1948, in 1 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 219, 228 (1948).

[109] German Supreme Court in the British Occupied Zone, judgment, Case no. StS 309/49, 18 October 1949, in 2 ENTSCHEIDUNGEN DES OBERSTEN GERICHTSHOFES DER BRITISCHEN ZONE IN STRAFSACHEN 231 (1948).

[110] *Prosecutor* v. *Mrksic et al* (Case no. IT-95-13-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para. 29; *Prosecutor* v. *Tadic*, *supra* note 9, para. 614; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 212; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 548; also *Prosecutor* v. *Akayesu*, *supra* note 63, para. 582, quoting *Prosecutor* v. *Mrksic* in footnote 146.

[111] *Barbie Case, supra* note 30, p. 140. The court also held, at p. 137, that crimes against humanity could be committed "against the opponents of [a policy of ideological supremacy], whatever the form of their opposition".

[112] Commission of Experts, *supra* note 104, para. 78.

[113] *Prosecutor* v. *Mrksic*, *supra* note 110, para. 29.

arms and were now hospital patients could be victims of crimes against humanity.[114] In *Tadic*, the Trial Chamber opined that "those actively involved in a resistance movement can qualify as victims of crimes against humanity".[115]

A more comprehensive definition is given by *Akayesu*: "Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause".[116] This definition has been reformulated and clarified in *Blaskic*:

> Crimes against humanity therefore do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants – regardless of whether they wore a uniform or not – but who were no longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. It also follows that the specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.[117]

The latter formulation summarises and structures the jurisprudence of the Tribunals regarding the term "civilian". There are two aspects which support this interpretation of the term "civilian". First, the element stems from humanitarian law. Consequently, it must be understood to be at least as comprehensive as the definition of "civilian" under humanitarian law. Second, crimes against humanity are no longer linked to the laws of war but rather to human rights law. Against this background, an effective protection of *any* individual against inhumane acts is required. It is therefore necessary to find an interpretation of the term "civilian" which covers at least all persons not protected by humanitarian law. In time of peace, the prohibition of crimes against humanity is – apart from the very narrow law of genocide – the only applicable (criminal) law to protect human rights. Thus, in time of peace, the term "civilian" must be interpreted even more broadly than in time of war, when humanitarian law provides some protection.

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114 *Ibid.*, para. 32.

115 *Prosecutor* v. *Tadic*, *supra* note 9, para. 643; the same definition is used in *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 549.

116 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 582; *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 72; *Prosecutor* v. *Musema*, *supra* note 72, para. 207; *Prosecutor* v. *Krnojelac, supra* note 97, para. 56.

117 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 214.

In conclusion, the definition of "civilian" in the elements of crimes against humanity must fully encompass the definition of "civilian" in humanitarian law. At the same time it must be wider than that because it must also cover all persons which are not protected by humanitarian law, especially in time of peace.[118] Indeed, many of the *ad hoc* Tribunals' decisions base their interpretation of the term "civilian" on humanitarian law.[119] In addition the *Tadic* Trial Chamber emphasised that the definition of humanitarian law is not directly applicable to crimes against humanity but may provide useful guidance.[120]

The passage from *Blaskic* reprinted above seems to be in full accordance with the interpretation developed here. It equates the wide concept of non-combatants in common article 3 of the Geneva Conventions[121] with the term "civilian" as an element of crimes against humanity. Despite the fact that common article 3 is intended only for *non-international* armed conflict, *Blaskic* applies this definition without distinguishing between the different kinds of armed conflict or between armed conflict and peace. Moreover, the Trial Chamber clarified that the (formal) status of an individual is not decisive but rather the individual's "specific situation". This statement has been recently confirmed.[122] It meets the needs of comprehensive protection of human rights very well since everyone except an active combatant of a hostile armed force is in a "specific situation" requiring the protection of his or her human rights. This view is in full accordance with the decisions of the German Supreme Court in the British Occupied Zone mentioned above: the Court convicted the defendants for crimes against humanity against soldiers who belonged to the German forces, *i.e.*, to military forces not hostile towards the perpetrator.

In light of the case law and the foregoing analysis, the opinion of the ICTR Trial Chamber in *Kayishema* excluding, *inter alia*, members of the police as possible victims of crimes against humanity must be considered erroneous.[123] Members of the police are non-combatants as they are responsible for the maintenance of *civil* order. Unless a police member takes up arms and joins a hostile military force he or she may not be considered a non-civilian for purposes of application of crimes against humanity. Thus, in sum, every individual, regardless of his or her formal

118 *Prosecutor* v. *Kayishema*, *supra* note 74, para. 127.

119 *Prosecutor* v. *Tadic*, *supra* note 9, para. 643; *Prosecutor* v. *Akayesu*, *supra* note 63, para. 582, fns 146 and 147.

120 *Prosecutor* v. *Tadic*, *supra* note 9, para. 639.

121 The language of common article 3 is used almost verbatim in *Prosecutor* v. *Blaskic*, *supra* note 68, para. 214.

122 *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 79.

123 *Prosecutor* v. *Kayishema, supra* note 74, para. 127.

status as a member of an armed force, must be regarded as a civilian unless the forces are hostile towards the perpetrator and the individual has not laid down his or her arms or, ultimately, been placed *hors de combat*.

The second important issue with regard to "civilian population" is the question of whether a certain number of hostile combatants among a group of non-combatants deprives such a group, or multiplicity of individuals, of their civilian character. The question has been addressed and answered many times by the Tribunals in the sense that the character of a predominantly civilian population is not altered by "the presence of certain non-civilians in their midst".[124] No further consideration of the issue is required.

d. *Policy Element*

As has been shown, the "international element" of crimes against humanity has shifted away from the war *nexus* and turned to the requirement that the single crime must somehow be linked to state (or organisational) authority. Such an element was required by the ILC Draft Codes of 1954[125] and 1996[126] and probably also the Draft Code of 1991. Similar language can be found in several judicial decisions in the period between World War II and the establishment of the *ad hoc* Tribunals. The jurisprudence of the *ad hoc* Tribunals, which will be discussed below, has introduced the term "policy element" to describe this requirement. It is explicitly codified in article 7(2)(a) Rome Statute[127] but has been deliberately omitted from section 5.2 of Regulation 15/2000.

(i) The Entity behind the Policy. At present, there is no doubt that the entity behind the policy does not have to be a state in the sense of public international law. It is sufficient that the entity be an organisation which exercises *de facto* power in a given territory. This was the position of the ILC Draft Codes of 1991 and 1996 and has been codified in article 7(2) Rome Statute which requires a "State *or* organisational policy" (emphasis added).

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[124] *Prosecutor* v. *Tadic, supra* note 9, para. 638; affirmed in *Prosecutor* v. *Akayesu, supra* note 63, para. 582; *Prosecutor* v. *Kayishema, supra*, note 74, para. 128; *Prosecutor* v. *Rutaganda, supra* note 71, para. 72; *Prosecutor* v. *Musema, supra* note 72, para. 207; *Prosecutor* v. *Kupreskic, supra* note 14, para. 549; *Prosecutor* v. *Kunarac, supra* note 81, para. 325; *Prosecutor* v. *Kordic, supra* note 52, para. 180; *Prosecutor* v. *Bagilishema, supra* note 81, para. 79; *Prosecutor* v. *Krnojelac, supra* note 97, para. 56.

[125] 1954 Draft Code, *supra* note 27, article 2(11).

[126] 1996 Draft Code, *supra* note 37, chapeau of article 18.

[127] On the negotiations of the Rome Statute, see Darryl Robinson, *supra* note 67, pp. 47–51.

After consideration of the 1996 Draft Code according to which not only a government but "any organisation or group" can be behind the policy, the ICTY concluded in *Tadic*: "[A]lthough a policy must exist to commit these acts, it need not be the policy of a State".[128] *Kupreskic* held that behind the policy must be an "entity holding *de facto* authority over a territory".[129] The Chamber went on to explain that the policy need not be conceived on the highest level in the state or organisation.[130] Similarly, the *Nikolic* Rule 61 Decision held as early as 1995: "[The crimes] need not be related to a policy established at State level, in the conventional sense of the term [. . .]".[131] Indeed, every level in the respective state or other organisation which, as such, exercises the *de facto* power in a given territory can also develop an explicit or implicit policy with regard to the commission of crimes against humanity in this territory.

It may be noted that the above definition does not include an organisation which, while being able to exercise a certain power, is not the *de facto* authority over a territory because there is a higher or more powerful entity which controls it. The relevant authority is rather the entity which exercises the *highest de facto* authority in the territory and can – within limits – control all other holders of power and all individuals. Thus, a criminal organisation in a state which still exercises the power over the territory (*e.g.*, through normal police forces) where the organisation is active would not qualify as the entity behind the policy. If such an organisation, according to its policy, commits multiple crimes, this, as such, will not turn these crimes into crimes against humanity. The situation will be different, however, if the highest *de facto* authority over the territory, for example the state, at least tolerates these crimes in pursuance of its policy (see below).

(ii) The Content of the Policy and the Form of its Adoption. As to the *form* of the policy, it has been repeatedly stated by the *ad hoc* Tribunals that "[t]here is no requirement that this policy must be adopted formally as the policy of a state",[132] nor must the policy or plan "necessarily be

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[128] *Prosecutor* v. *Tadic*, *supra* note 9, para. 655; confirmed in *Prosecutor* v. *Kayishema*, *supra* note 74, para. 126; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 551; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 205; *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 78.

[129] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 552.

[130] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 205.

[131] *Prosecutor* v. *Nikolic* (Case no. IT-94-2-R61), Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 26.

[132] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 580; also *Prosecutor* v. *Tadic*, *supra* note 9, para. 653; *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 69; *Prosecutor* v. *Musema*,

declared expressly or even stated clearly and precisely".[133] Consequently, an implicit or *de facto* policy is sufficient.

The *content* of the policy must be to commit crimes against humanity,[134] *i.e.*, to commit a multiplicity of the enumerated individual criminal acts against a civilian population.[135]

(iii) The Need for a Policy Element and the Conduct Required. The most significant question with regard to the policy element is whether, under current international law, it is required at all and, if so, whether it is required for both the widespread and systematic alternative or only the systematic. This question also demands clarification as to whether a policy always requires active conduct from the entity behind the policy or if a policy of toleration is sufficient.

The first pronouncement of the *ad hoc* Tribunals on the policy element was the 1995 Rule 61 decision in *Nikolic* which stated that "[a]lthough [the crimes] need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone".[136] The *Tadic* Trial Chamber took a more restrictive view and opined:

> [T]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts.[137]

Thus, the judges in *Tadic* required a policy, even if the attack is only widespread and not, at the same time, systematic. In contrast, the *Akayesu* Trial Chamber mentioned the policy element only with regard to the systematic alternative. It first defined the concept of widespread as requiring a multiplicity of victims – without mentioning a policy – and then went on to explain: "The concept of systematic may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources".[138]

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supra note 72, para. 204; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 551; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 204.

133 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 204.

134 Cf. *e.g.*, *Prosecutor* v. *Tadic*, *supra* note 9, para. 653.

135 Article 7(2)(a) of the Rome Statute.

136 *Prosecutor* v. *Nikolic*, *supra* note 131, para. 26.

137 *Prosecutor* v. *Tadic*, *supra* note 9, para. 653; in support, the Chamber cited the Dutch *Menten Case* which is mentioned above.

138 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 580; confirmed in *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 69 and *Prosecutor* v. *Musema*, *supra* note 72, para. 204.

The next decision dealing with the issue, the *Kayishema* judgment, seems to return to the position of *Tadic* as it develops the policy element as an implication of the "attack against any civilian population": "[T]he requirement that the attack must be committed against a 'civilian population' inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy".[139] As the requirement "attack against any civilian population" is valid for both widespread *and* systematic attacks this ruling seems to imply that a policy would also be required for a widespread attack. However, the reasons given in *Kayishema* are not convincing: It has already been stated that the term "population" need not be interpreted as requiring the attack on a particular group of victims. Moreover, unlike article 3 of the ICTR Statute, customary international law does not require a discriminatory intent for the commission of crimes against humanity. Thus, at least in theory, there is no need for any process of selection of the victims which would require any kind of planning and policy.

Subsequent decisions, unlike *Kayishema* and *Tadic*, have adopted a fairly critical attitude towards the policy. *Kupreskic* holds that whereas crimes against humanity necessarily imply a policy element "there is some doubt as to whether it is strictly a *requirement*, as such, for crimes against humanity".[140] The ICTR shared this doubt in *Bagilishema*.[141] Whereas both decisions accept that a policy is not an element of crimes against humanity they claim that, whenever the elements of crimes against humanity are fulfilled, a policy must exist as well. However, in *Kordic*, ICTY Trial Chamber III went even further and stated (after agreeing with the quoted passage from *Kupreskic*): "In the Chamber's view, the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity".[142] This decision views the policy rather as an indicator and, what is more, as an indicator (only) for a *systematic* attack.[143]

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139 *Prosecutor* v. *Kayishema*, *supra* note 74, para. 124.

140 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 551. However, it must be noted that the decision is somehow inconsistent as, with regard to the mental element, it relies on a passage from *Prosecutor* v. *Kayishema*, *supra* note 74, para. 134 which requires that the "accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan". The Chamber seems to have overlooked the doubts it expressed regarding the requirement that a policy element has necessary implications for the mental elements of the crime.

141 *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 78.

142 *Prosecutor* v. *Kordic*, *supra* note 52, para. 182.

143 However, the decision quotes the same passage of *Kayishema* as *Kupreskic*, thus contradicting its holding that the policy element is not required for crimes against humanity.

Thus, it is fair to say that the jurisprudence of the *ad hoc* Tribunals shows a wide range of opinions regarding the policy element. However, in more recent decisions a tendency is discernable to omit it altogether and to regard existence of a policy merely as an indicator for the existence of a (systematic) attack. Regulation 15/2000 supports this trend inasmuch as paragraph (2)(a) of article 7 of the Rome Statute, which requires a policy element, has been deliberately omitted from section 5.2 of the Regulation.[144]

This new development is fairly unproblematic with regard to the *systematic* attack, as any kind of systematic conduct requires, however small, a degree of organisation which, in turn, requires a policy and an entity powerful enough to implement it. Thus, the "systematic attack" element indeed inevitably implies a policy element.

This is not the case, however, with regard to a *widespread* attack; an issue that has drawn little attention so far because, up to now, no decision exists which has had to rely exclusively on a widespread (and not, at the same time, systematic) attack. The widespread element is fulfilled if there exists a great number of crime victims. If no further requirement were necessary a town with an extraordinarily high level of criminality – resulting in a great number of victims – could qualify as a crime-site for crimes against humanity. This, obviously, cannot be true because the context element would be unable to exclude ordinary crimes from the scope of the crime.[145] On this issue, the Commission of Experts noted "that the ensuing upsurge in crimes that follows a general breakdown of law and order does not qualify as crimes against humanity".[146]

Moreover, human rights, the value protected by the prohibition of crimes against humanity, are norms which consider the relationship between state (or other authorities exercising *de facto* power in a given territory) and individual: "Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence".[147] In contrast, an ordinary criminal who robs or even kills his or her victim, at least under a classical perspective[148] of human rights, does not violate the victim's

144 Morten Bergsmo, *supra* note 3, p. 2.

145 Similar concerns are expressed by M. Cherif Bassiouni, *supra* note 9, p. 245.

146 Commission of Experts, *supra* note 104, para. 84. The Commission added: "However, a general breakdown in law and order may be a premeditated instrument, a situation carefully orchestrated to hide the true nature of the intended harm".

147 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 470.

148 The position taken here may be considered semi-classical as we accept that also non-state actors are bound by human rights law if they exercise the functions of a state (*de facto* power) in a territory where no state effectively exercises its jurisdiction.

human rights even if many similar crimes happen at the same time. It is rather the state which violates the victim's human rights if it does not protect[149] the victim from being robbed or killed despite its ability to do so. Therefore, it is important to retain some link to state or *de facto* authority, not only with regard to a systematic but also a widespread attack. As the omission of the policy element in section 5.2 of Reg. 15/2000) does not alter the need for such a link, nothing should be implied from this omission.

Given that a policy element is required even for a widespread attack it is necessary to examine how an attack can be merely widespread, *i.e.*, not systematic, and still somehow connected to a state or organisational authority. In other words, it must be explained how a multiplicity of criminal acts which are not organised or planned can still be the object of a policy. Otherwise, the well established rule that the attack can be either systematic or widespread would be violated.[150]

The only solution to this problem is to accept that a policy can also consist in the deliberate denial of protection for the victims of widespread but unsystematic crimes, *i.e.*, in the tolerance of these crimes.[151] This can be the case, for example, if a government consciously refrains from putting a stop to the activity of criminals who, on a very large scale, kill the inhabitants in a certain area to gain easier access to its natural resources. The government's motive for inaction could be that these persons, at the same time, oppose the government's politics. In such a case the government

[149] For example, under the Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 213 U.N.T.S. 212, it is accepted that States are under an obligation to actively protect human rights. ARTHUR HAEFLINGER & FRANK SCHÜRMANN, DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION UND DIE SCHWEIZ 55–57 (2nd ed., 1999). *Prosecutor* v. *Kunarac*, *supra* note 81, para. 470, held: "In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights *or fails in its responsibility to protect* the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements" (emphasis added).

[150] With regard to the interpretation of codified law (*e.g.*, Regulation 15/2000 which provides expressly that the attack must be widespread *or* systematic), the Appeals Chamber in *Prosecutor* v. *Tadic*, *supra* note 50, para. 284, noted: "It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless".

[151] The present paper, consequently, would seem not to be in full accord with Bergsmo's analysis, *supra* note 3, p. 2, that the policy requirement in article 7(2)(a) Rome Statute turns the alternative formulation of the chapeau of article 7(1) ("widespread *or* systematic") into a cumulative requirement (widespread *and* systematic): An attack "pursuant to or in furtherance of a State or organisational policy" (Rome Statute, art. 7(2)(a)) can be widespread and still, at the same time, *not* systematic if the official policy consists in the mere *toleration* of an (unsystematic) widespread attack.

would be content that someone else is doing the "dirty work". Another example – more relevant for East Timor – would be that small groups of unorganised militia carry out small uncoordinated missions which, however, viewed in their totality, involve sufficient victims to qualify as widespread. If this conduct were in line with the intentions of the government or the *de facto* power in the territory and would, therefore, remain unopposed (*i.e.*, tolerated), the policy not to oppose the attacks would meet the requirements of the policy element.[152] According to the view of the authors, it would therefore not be necessary to prove that such militia were actively supported or instructed by a state or organisation (as may be the case in East Timor). However, if it could be proven, the active support would render the attack a systematic one.

This interpretation is also in conformity with the rulings in *Kupreskic*. ICTY Trial Chamber II explicitly included toleration, approval, endorsement etc. as possible methods to implement a policy: "The need for crimes against humanity to have been at least *tolerated* by a State, Government or entity is also stressed in national and international case-law [. . .]"[153] (emphasis added). Moreover, "[t]he available case-law seems to indicate that in these cases some sort of explicit or *implicit approval or endorsement* by State or governmental authorities is required [. . .]"[154] (emphasis added).

It should be noted that mere negligence on the part of an authority would not suffice to render a multiplicity of crimes which remain unopposed by such authority a widespread attack. The same holds true if the authorities are not able to oppose the crimes (*ultra posse nemo obligatur*). However, a policy of toleration adopted by a government which has the ability to prevent the crimes but nevertheless chooses to tolerate them – for example, because it expects political disadvantages in opposing them – would fulfil the requirements of the policy element with regard to a widespread attack.

Moreover, it is obvious that the entity must also be under a legal obligation, based for example on international human rights law, to provide protection against the attack. At least for purposes of defining the elements of crimes against humanity a (foreign) state not exercising legitimate or *de*

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[152] M. Cherif Bassiouni, *supra* note 9, p. 264: "[W]henever [public] officials with the intent that certain crimes be committed, knowingly or intentionally fail to carry out their duties to enforce criminal laws equally and fairly [. . .] then such public officials are criminally accountable for the conduct of others". However, it must be noted that the issue at hand is not the criminal responsibility of the individuals who tolerate the attack but the question of whether a *policy* can consist in the mere toleration of crimes.

[153] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 552.

[154] *Ibid.*, para. 555.

facto power in a certain territory cannot, in general, be considered under a legal obligation to halt human rights violations in this territory.

A final issue which must be considered is the complicated wording of the Elements of Crimes for the ICC. The third paragraph of the Introduction to the Elements concerning article 7 reads: "It is understood that 'policy to commit such attack' requires that the State or organisation *actively* promote or encourage such an attack against a civilian population".[155] This statement contradicts the result of the above analysis, that a policy can be implemented by mere toleration. However, a footnote attached to this sentence provides: "A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented *by a deliberate failure to take action*, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organisational action" (emphasis added).

The text of the Element and the footnote obviously contradict each other. Whereas the Element requires active conduct with regard to the attack the footnote provides that failure to take action may suffice as well. This lack of clarity – the result of a compromise achieved during the Fourth Session (13 to 31 March 2000) of the Preparatory Commission ("PrepCom") – is not resolved by the qualification that inactivity may suffice only in "exceptional circumstances".

However, even if the limitation ("actively promote or encourage") is not invalidated by the contradictory footnote, it cannot vitiate our analysis, since in any case it has no legal effect. First, the ICC itself is not bound by the formulation in the Elements of Crimes because it is inconsistent with the Statute and therefore legally void.[156] It has been argued above that a policy with respect to a widespread but not, at the same time, systematic attack can only consist in the deliberate denial of protection against a widespread attack, *i.e.*, in inaction on the part of the responsible state or organisation. The Rome Statute, like section 5.1 of Regulation 15/2000 and customary international law, clearly provides for widespread and systematic in the alternative. To require an active policy for crimes against humanity, however, would amount to deleting the "widespread" alternative from the Statute.[157] Second, the problematic Element need not

[155] Elements of Crimes, *supra* note 79 (emphasis added).

[156] Article 9 reads: "1. Elements of Crimes shall *assist* the Court in the interpretation and application of articles 6, 7 and 8 [. . .] 3. The Elements of Crimes and amendments thereto shall be *consistent with this Statute*" (emphasis added).

[157] Darryl Robinson, *supra* note 67, pp. 50–51, is of the opinion that a systematic attack, as codified in the Rome Statute, requires a very high degree of organisation. However,

be followed by the Serious Crimes Panel because, in addition to the reasons given above, it is not bound by the decisions of the PrepCom but only by Regulation 15/2000 and customary international law (in this regard article 10 of the Rome Statute explicitly provides that customary international law shall not be influenced "in any way" by the formulation of the crimes in Part 1 of the Statute).

In conclusion, both a systematic and a widespread attack require some kind of link with a state or a *de facto* power in a certain territory by means of the policy of this entity. The policy in the case of a systematic attack would be to provide at least certain guidance regarding the prospective victims in order to coordinate the activities of the single perpetrators. A systematic attack thus requires active conduct from the side of the entity behind the policy. However, extensive or repeated activity is not required. Rather, what counts is whether the conduct suffices to trigger and direct the attack. Thus, for example, the identification of possible victims by the authorities and an (implicit or explicit) announcement of impunity would be sufficient.

A widespread attack which is not at the same time systematic must be one that lacks any guidance or organisation. The policy behind such an attack may be one of mere deliberate inaction (*toleration*). Such a policy, however, can only exist if the entity in question is able and, moreover, legally obligated to intervene.[158]

e. *The Individual Act and the Context Element*

The relation between the individual act and the context element is largely a subjective one and will be discussed below. However, the wording of the context element in the ICTY Statute also gives rise to the question of the objective relationship between the conduct of the single perpetrator and the context. The relevant passage of the chapeau of article 5

in support of this view he adduces the *Akayesu* formula, rejected above. In fact, any multiplicity of crimes which is centrally organised must be considered a systematic attack, regardless of the degree of organisation. This is because a systematic attack requires fewer victims than a widespread attack. For example, if in a period of several years a few hundred people in a large country were killed, this would hardly qualify as a *widespread* attack. If, however all of the victims belonged to a small community of homosexuals, and state officials had made known that they have no intention of prosecuting any crimes committed against these homosexuals, the crimes amount clearly to a *systematic* attack. However all the organisation required for the attack is the selection of the victims and the announcement of impunity.

158 Members of governments which implement a policy by tolerance may be responsible themselves under the doctrine of command responsibility, see Kai Ambos, *Superior Responsibility (Art. 28)*, in THE ROME STATUTE OF THE ICC: A COMMENTARY 812–813, 836–839 (Antonio Cassese et al., eds., 2002).

provides that a person is responsible "for the following crimes when committed in armed conflict [. . .] and directed against any civilian population" (emphasis added). This formulation (specifically the "and") – if taken literally – could be read to require that the perpetrator personally must direct the crime against a civilian population (*i.e.*, not only one or a few single victims) and, thus, commit a multiplicity of acts.

However, as early as 1996, Trial Chamber I of the ICTY decided that "as long as there is a link with the widespread or systematic attack against any civilian population, a single act could qualify as a crime against humanity".[159] This has become the invariable practice of both Tribunals.[160] It was reformulated in the clearest possible way in *Kunarac*: "The underlying offence does not need to constitute the attack but only to form a part of the attack".[161]

The wording of both the chapeau of article 3 of the ICTR Statute and article 7(1) of the Rome Statute leaves no doubt about the relationship between the single crime and the context element: they provide that the enumerated criminal acts must be "committed *as part* of a widespread or systematic attack directed against any civilian population" (emphasis added).

Unfortunately, the wording of the chapeau of section 5.1 of Regulation 15/2000 combines the formulation of the Rome Statute and the ICTY Statute in such a way as to require that the single act be "committed *as part* of a widespread or systematic attack *and* directed against any civilian population" (emphasis added). In effect, the "and" of the ICTY Statute is inserted into the formulation of the Rome Statute. The outcome is confusing for two reasons. First, the language, if taken literally, would separate the attack from its very object, namely the civilian population, suggesting that both are two different concepts. Secondly, for the same reasons as in the case of the ICTY Statute, section 5.1 seems to provide that a single criminal act by a perpetrator does not suffice for criminal responsibility for crimes against humanity to be incurred.[162] Bergsmo[163] reports that the change of the wording in section 5.1 was not intended by the drafters but is simply an error and recommends that it should be corrected, deleting the word "and". To follow this recommendation would

159 *Prosecutor* v. *Mrksic*, *supra* note 110, para. 30.

160 *Prosecutor* v. *Tadic*, *supra* note 9, para. 649; *Prosecutor* v. *Kayishema*, *supra* note 74, para. 135; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 550; *Prosecutor* v. *Kunarac*, *supra* note 81, para. 417; *Prosecutor* v. *Kordic*, *supra* note 52, para. 178; *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 82.

161 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 417.

162 Morten Bergsmo, *supra* note 3, pp. 1–2.

163 *Ibid.*

help to avoid confusion, simplify the argumentation of both the prosecution and the Court and, thus, save resources. In any case, section 5.1 must be *applied* in such a corrected form because the "new" – verbatim – meaning would be in contradiction with customary international law and nonsensical.

With regard to the nature of the link between the enumerated inhumane criminal act and the attack, *Kayishema* requires that "[t]he crimes [. . .] must form part of [. . .] an attack".[164] And the *Kunarac* Chamber held: "It is sufficient to show that the act took place in the context of an accumulation of acts of violence which, individually, may vary greatly in nature and gravity".[165]

A more precise definition of the required link between the act and the attack may be derived from the rationale of crimes against humanity. It consists in the protection against the particular dangers of multiple crimes supported or unopposed by the authorities. If the dangerousness of an individual criminal is increased *because* his or her conduct occurs in such a context the act must be regarded objectively as a part of the attack. For example, a person who, because of the attack and the policy behind it, could not turn to the police for help suffers the specific risk created by the attack. If this person is killed, the killing is part of the attack. On the other hand, a person who is killed in the course of an ordinary burglary is not a victim of crimes against humanity if the police would have been willing to protect the person (but arrived too late). Such a person suffers only the general risk to become a crime victim but not the special risk created by the attack. Thus, an adequate test to determine whether a certain act was part of the attack is to ask whether the act would have been less dangerous for the victim if the attack and the policy had not existed.

f. *Knowledge of the Attack*

Section 5.1 of Regulation 15/2000 requires that the perpetrator has "knowledge of the attack". The exact meaning of this term is not easily determined since both the meaning of "knowledge" and the question how much the perpetrator must "know" pose complicated questions.

In general, a person incurs criminal responsibility for a certain (objective) conduct only if a mental element with respect to this conduct exists (*actus non facit reum nisi mens sit rea*[166]). With regard to the

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164 *Prosecutor* v. *Kayishema*, *supra* note 74, para. 135.

165 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 419.

166 "An act does not make a culprit unless the mind is culpable as well". It may be noted that this phrase equates mental element and culpability; however, modern civil

commission of international crimes mere negligence is in most cases insufficient. These crimes require a state of mind which in civil law jurisdictions is referred to as *dolus* or intent.[167] *Dolus* exists in the following forms: *dolus directus* first degree (also called *dolus directus*), *dolus directus* second degree (or *dolus indirectus*) and *dolus eventualis*. The corresponding forms of mental states in Anglo-American law are described by the Model Penal Code[168] as purpose, knowledge and recklessness.[169] Purpose and knowledge are similar to *dolus directus* first and second degree. Recklessness, however, while similar to *dolus eventualis*, appears to cover a wider range of mental states than *dolus eventualis*.[170]

The *Blaskic* Trial Chamber rendered a complete definition of the three degrees of intent when dealing with the subjective side of the context element. Quoting a definition from a Belgian textbook,[171] the Chamber held that there is "intent" or "direct malicious intent" if "the agent *seeks* to commit the sanctioned act which is either his *objective* or at least the method of achieving his objective"; there is "indirect malicious intent" if "the agent did not deliberately seek the outcome but knew that it would be the result"; and there is "recklessness" if "the outcome is foreseen by the perpetrator as only a probable or possible consequence".[172]

However, *Blaskic* does not equate the term "knowledge" with what the Chamber calls indirect malicious intent. Applying the definition of another

law jurisdictions, in principle, distinguish between mental elements and culpability; cf. HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHTS. ALLGEMEINER TEIL 430 (5th ed., 1996).

167 Note, however, that the term "intent" is also used, in a narrower sense, to denote only the highest degree of *dolus* or intent in a broader sense; namely *dolus directus* first degree, as defined below.

168 *American Law Institute Model Penal Code. Official Draft*, 1962, reprinted in SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW, CASES AND MATERIALS 1127–1192 (6th ed., 1995).

169 WAYNE R. LAFAVE, CRIMINAL LAW 227 (3rd ed., 2000).

170 According to German legal doctrine, a perpetrator acts with *dolus eventualis* if two conditions are fulfilled. Firstly he or she must consider the prohibited result (*e.g.*, a death) as a possible but not certain effect of his or her conduct. Secondly he or she must accept or approve of the forbidden result, or – in other words – if he or she hopes that, despite the risk, the prohibited result will not occur her mental state is not regarded as *dolus eventualis* but as conscious negligence. Kai Ambos, *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L. FORUM 1, 21 (1999), with further references; Hans-Heinrich Jescheck & Thomas Weigend, *supra* note 166, pp. 299–301. As Anglo-American law requires only the first of both named elements for recklessness, Wayne R. LaFave, *supra* note 169, p. 254, this definition is wider than *dolus eventualis*.

171 CHRISTIANE HENNAU & JACQUES VERHAEGEN, DROIT PÉNAL GÉNÉRAL (1991).

172 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 254 (footnotes omitted).

text book,[173] the judges opined that "knowledge also includes the conduct 'of a person taking a deliberate risk in the hope that the risk does not cause injury' ".[174] This finding was repeated in *Kunarac*.[175] It is also compatible with the German doctrine according to which all three forms of mental state mentioned above require a volitional and an intellectual element.[176] The intellectual element requires that the perpetrator has certain (*dolus directus* second degree) or at least uncertain (*dolus directus* first degree and *dolus eventualis*) knowledge that the prohibited result will occur or the circumstance exists.

In the jurisprudence of the Tribunals there is no dispute that, with regard to the context element, *dolus directus* first degree (intent in the narrower sense, purpose) is not required, *i.e.*, the perpetrator need not seek to participate in the attack.[177] All decisions agree that knowledge is sufficient and most even expressly include "constructive knowledge".[178] Constructive knowledge, though, is an inherently unclear concept.[179] It was first used in *Tadic* where, however, the Chamber introduced it for the first time in the summary[180] of its deliberations concerning the necessary mental state regarding the context element. The Chamber did not make clear to which of the various qualifications of the concept of knowledge in the judgment the term "constructive knowledge" refers. Most probably it was referring to a quotation from the Canadian *Finta case*[181] holding that wilful blindness with regard to the context is sufficient.[182] A perpetrator is wilfully blind if he or she wishes to remain ignorant and therefore does not engage in

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173 FRANCIS LE GUNEHEC, LE NOUVEAU CODE PÉNAL ILLUSTRÉ (1996).

174 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 254 (footnotes omitted).

175 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 434.

176 Hans-Heinrich Jescheck & Thomas Weigend, *supra* note 166, p. 293.

177 This is stated explicitly in *Prosecutor* v. *Blaskic, supra* not 68, para. 251. No (other) decision of the *ad hoc* tribunals requires *dolus directus* first degree or an analogous state of mind.

178 *Prosecutor* v. *Tadic*, *supra* note 9, paras. 656–659; *Prosecutor* v. *Tadic*, *supra* note 50, para. 248 (does not mention constructive knowledge); *Prosecutor* v. *Kayishema*, *supra* note 74, paras. 133–134; *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 71; *Prosecutor* v. *Kupreskic*, *supra* note 14, paras. 556–557; *Prosecutor* v. *Musema*, *supra* note 72, para. 206; *Prosecutor* v. *Ruggiu* (Case no. ICTR-97-32-I), Judgment and Sentence, 1 June 2000, para. 20; *Prosecutor* v. *Kordic*, *supra* note 52, para. 185.

179 Wayne R. LaFave, *supra* note 169, pp. 237–238.

180 *Prosecutor* v. *Tadic*, *supra* note 9, para. 659.

181 *R.* v. *Finta*, *supra* note 32.

182 *Prosecutor* v. *Tadic*, *supra* note 9, para. 657; Simon Chesterman, *supra* note 101, also seems to think that the judges used the term "constructive knowledge' synonymously with "wilful blindness".

further inquiry.[183] As LaFave explains, the concept is very closely linked to a provision in the Model Penal Code which provides that knowledge of the existence of a fact can be equated with the awareness of a high probability of the existence of a fact.[184] This concept – in turn – is close to *dolus eventualis* and even recklessness, which both require that the perpetrator be aware of a risk, *i.e.*, aware of a probability that a circumstance exists or a result will occur.

Therefore, the clear and also practical definition of knowledge given in *Blaskic*, namely that the term "knowledge" includes knowledge of a risk, is not in contradiction with other decisions but a useful clarification of the obscure concept of constructive knowledge. To summarise, under customary international law, a perpetrator has knowledge of the attack if he or she is aware of the risk that his or her conduct is objectively part of a broader attack.

The customary law standard which is required by the Tribunals may be inapplicable under Regulation 15/2000. Section 18.3 of Regulation 15/2000 (which is very similar to article 30 of the Rome Statute)[185] defines "knowledge" as follows:

> 18.3. For the purposes of the present Section, "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.

Under this standard awareness of a mere *risk* would not be sufficient.[186]

However, it is clear that the mental standard of section 18 has been replaced by the more specific requirement in section 5.1, namely "knowledge of the attack" (*lex specialis derogat legi generali*). On the other hand, section 5.1 does not provide a definition for "knowledge". Therefore, the question arises whether the term "knowledge of the attack" in section 5.1 must be interpreted in line with the narrow requirements of section 18.3 or according to the broader customary international law applied by the *ad hoc* Tribunals. Two reasons support the latter approach: first, the definition of knowledge in section 18 is expressly given only "[f]or the purposes of the present Section". Second, the general introduction to the Elements of

183 Wayne R. LaFave, *supra* note 169, p. 232.

184 *Ibid.*, quoting Model Penal Code, *supra* note 168, s. 2.02(2)(b)(ii). Moreover it has been noted that the concept of knowledge in United States law is close to the concept of *dolus eventualis*, NIKLAUS SCHMID, STRAFVERFAHREN UND STRAFRECHT IN DEN VEREINIGTEN STAATEN. EINE EINFÜHRUNG 184 (2nd ed., 1993).

185 For a detailed analysis of articles 30 and 32 see: KAI AMBOS, DER ALLGEMEINE TEIL EINES VÖLKERSTRAFRECHTS. ANSÄTZE EINER DOGMATISIERUNG, at 757 et seq. (2002).

186 Kai Ambos, *supra* note 170, pp. 21–22.

Crimes for the ICC explains: "Where *no* reference is made in the Elements of Crimes to a mental element [. . .] it is understood that the relevant mental element [. . .] set out in article 30 [of the Rome Statute] applies" (emphasis added).[187] However, knowledge of the attack is mentioned separately in the Elements for each of the enumerated criminal acts of crimes against humanity. It appears, therefore, that the drafters of the Elements of Crimes considered knowledge of the attack to be a standard independent of the general provision in article 30 of the Rome Statute which is equivalent to section 18 of Regulation 15/2000. Consequently, the knowledge requirement in the chapeau of section 5.1 must be interpreted in accordance with the customary international law requirement of knowledge as developed above.

The drafters of the Elements perceived a particular problem in cases where the perpetrator commits his or her crimes at the very beginning of the attack, *i.e.*, at a time where still too few crimes have been committed to reach the threshold necessary for a widespread or systematic attack. The Elements of Crimes provide that in such a situation it is sufficient that the perpetrator intends "to further such an attack",[188] or intends "the conduct to be part of a[n . . .] attack". The drafters obviously intended that in such situations the requirement of knowledge should be replaced by the perpetrator's desire to bring about the relevant facts. It is worth while pointing out that the concept of knowledge developed by the *ad hoc* Tribunals makes this clause superfluous[189] since according to the Tribunals it is sufficient that the perpetrator be aware of the *risk* that his or her conduct is (or will become) part of an attack.

In summary, "knowledge of the attack" in section 5.1 of Regulation 15/2000 must be interpreted as requiring (only) awareness of the *risk* that the conduct be objectively part of a broader attack. A recklessness or *dolus eventualis* standard is thus sufficient with regard to the context element. (However, it is important to note that this is not the case with respect to the single inhumane act, where section 18 remains fully applicable.)

The *ad hoc* Tribunals have agreed that the perpetrator must know of both the attack and the link which renders the individual criminal act part of the attack.[190] As the *Tadic* Trial Chamber held: "[T]he perpetrator must

[187] Elements of Crimes, *supra* note 79, general introduction, para. (2).

[188] *Ibid.*, introduction to the Elements of article 7(2).

[189] In any case, every crime which can be committed with *dolus directus* second degree can, in general, also be committed with *dolus directus* first degree.

[190] *Prosecutor* v. *Tadic*, *supra* note 9, para. 659; *Prosecutor* v. *Kayishema*, *supra* note 74, para. 133; *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 171; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 557 (citing *Prosecutor* v. *Kayishema*); *Prosecutor* v. *Musema*, *supra*

know that there is an attack on the civilian population [and] know that his act fits in with the attack".[191] The language of this and other rulings suggests that the perpetrator need not have detailed knowledge of the particularities of the attack but simply be aware (of the risk) that an attack *exists*. This view is confirmed by *Kunarac* which noted that the knowledge requirement does not "entail knowledge of the details of the attack".[192] Moreover, the Elements of Crimes provide that no proof is required "that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation".[193]

Indeed, such an interpretation of the knowledge element is also in accordance with the rationale of crimes against humanity. For the particular dangerousness of crimes against humanity a crime need not be perpetrated with knowledge of details of a widespread or systematic attack (*e.g.*, the number of attacks, perpetrators or victims). It is sufficient that the perpetrator knows the facts related to the attack which increase the dangerousness of his or her conduct or which render this conduct a contribution to the crimes of others. Thus it is sufficient, for example, if the perpetrator understands that his or her act is part of a collective criminal conduct which renders the victims more vulnerable. Moreover he or she may also hope that the collective nature of the crimes will provide impunity.

The same holds true with regard to the increased culpability of a perpetrator of crimes against humanity.[194] It is sufficient that he or she knows that an attack exists and is thus able to understand that his or her conduct is much more serious than the same conduct would be if committed outside the context of a widespread or systematic attack.

In conclusion, the perpetrator must only be aware of the risk that an attack exists and the risk that certain circumstances of the attack render his or her conduct more dangerous than if the attack did not exist or that the conduct creates the atmosphere for other crimes. Knowledge of details is not required.

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note 72, para. 206; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 244; *Prosecutor* v. *Ruggiu*, *supra* note 178, para. 20; *Prosecutor* v. *Kunarac*, *supra* note 81, para. 434; *Prosecutor* v. *Kordic*, *supra* note 52, para. 185.

191 *Prosecutor* v. *Tadic*, *supra* note 9, para. 659.

192 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 434.

193 Elements of Crimes, *supra* note 79, introduction to the Elements of article 7(2).

194 Margaret McAuliffe de Guzman, *supra* note 13, p. 380; *Prosecutor* v. *Kayishema*, *supra* note 74, para. 134, noting that it is necessary that the perpetrator knew of the attack in order to be culpable; quoted in *Prosecutor* v. *Blaskic*, *supra* note 68, para. 249; *Prosecutor* v. *Ruggiu*, *supra* note 178, para. 20.

Another question is whether the perpetrator must know only of the attack or also of the policy behind the attack. McAuliffe de Guzman notes that the wording of article 7(1) of the Rome Statute merely requires "knowledge of the attack".[195] She, therefore, argues that the perpetrator need not know about the exact content of the attack (but merely of its existence) to incur culpability for crimes against humanity. As, in her view, the policy is a mere detail of the attack, she concludes that the perpetrator need not know of the existence of the policy.

Indeed, the question is whether the policy element must be considered among the details of the attack which the perpetrator need not know or whether it is a distinct material element of crimes against humanity. In the latter case the doctrine of *actus non facit reum nisi mens sit rea* applies, and the same *dolus* is required as for the attack.

The point has already been made that the policy element is necessary to distinguish crimes against humanity from ordinary crimes and moreover to safeguard the link of crimes against humanity with human rights violations. Therefore it is an indispensable material element of crimes against humanity which is distinct from the attack. Consequently, a perpetrator who does not know of this element, does not know all the necessary facts to incur culpability for crimes against humanity. On the other hand, as noted above, the perpetrator need not be absolutely sure: it is sufficient to be aware of a *risk* that a policy exists. The offender need not know details of the policy.

The decisions of the Tribunals come to the same conclusion. *Kayishema*, without giving further reasons, requires that the "accused must know that his act(s) is part of a widespread or systematic attack on a civilian population *and pursuant to some kind of policy or plan*" (emphasis added).[196] This holding has been repeated by virtually all judgments dealing with the matter.[197]

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195 Margaret McAuliffe de Guzman, *supra* note 13, p. 380.

196 *Prosecutor* v. *Kayishema, supra* note 74, para. 134.

197 *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 71; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 556; *Prosecutor* v. *Musema*, *supra* note 72, para. 206; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 249; *Prosecutor* v. *Ruggiu*, *supra* note 178, para. 20; *Prosecutor* v. *Kordic*, *supra* note 52, para. 185.

II. THE INDIVIDUAL INHUMANE ACTS

1. *The Mental State Required with Regard to The Individual Criminal Acts*

Section 18 of Regulation 15/2000 is reasonably clear with regard to the required mental elements. The perpetrator must mean to engage in a certain conduct (s. 18(2)(a)), he or she must mean to bring about the criminalised consequence (*e.g.*, a death) or be aware that it will occur in the ordinary course of events and must be aware that necessary circumstances exist (*e.g.*, that the torture victim is under his or her control). As has been argued above, section 18 does not apply to the perpetrator's knowledge of the (widespread or systematic) attack.

Where awareness is required that the consequence will occur in the ordinary course of events or that a circumstance exists (s. 18(2)(b) and (3)), it is not sufficient that the person consider the occurrence of the consequence to be a mere possibility.[198] This must be emphasised for the following reasoning: as one can never be absolutely sure what happens in the future (the perpetrator's grenade may fail to explode), the highest possible certainty with regard to future events is the one described in section 18(2)(b) and (3), namely that the consequence will (not "may") occur "in the ordinary course of events". Thus, the phrase "in the ordinary course of events" cannot be read in such a way as to include mere possibilities where the perpetrator is not sure whether the result will occur, even if everything goes normally. Consequently, under Regulation 15/2000 recklessness or *dolus eventualis* are not sufficient.[199]

There has been much discussion as to whether crimes against humanity can only be committed if the perpetrator acts with a discriminatory intent. The *Tadic* Trial Chamber doubted whether discriminatory intent was an indispensable requirement for crimes against humanity because it had not been included in the ICTY Statute and for other reasons. However, the Chamber felt forced to require discriminatory intent because the Report

[198] Kai Ambos, *supra* note 170, pp. 21–22. See, however, the wider interpretation of the term awareness of Donald Piragoff, *Article 30*, in COMMENTARY ON THE ROME STATUTE, *supra* note 80, margin no. 25–27.

[199] The same view is taken by the German expert working group which prepared the German Draft Code on International Crimes: ENTWURF EINES GESETZES ZUR EINFÜHRUNG DES VÖLKERSTRAFGESETZBUCHES 31(2001), available at <http://www.bmj.bund.de/images/10185.pdf>. For translations of the official govt. draft in all United Nations languages see <www.iuscrim.mpg.de/forsch/online_pub.html #legaltext>.

of the Secretary General on the establishment of the ICTY[200] and some members of the Security Council considered it necessary.[201] This holding was criticised in the literature[202] and was reversed by the *Tadic* appeal decision:

> The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely "persecutions" provided for in Article 5 (h).

Moreover, the Appeals Chamber contended that an interpretation in the light of the humanitarian goals of the drafters[203] and a review of the relevant state practice led to the same result.[204] This holding has become the ICTY's invariable practice.[205]

With regard to the ICTR, the problem is more difficult. The chapeau of article 3 of the ICTR Statute expressly requires that the crimes be "committed as part of a widespread or systematic attack against any civilian population *on national, political, ethnic, racial or religious grounds*" (emphasis added). The judges of the ICTR have taken notice of the *Tadic* appeal but have held that the wording of their Statute forces them to require discriminatory intent for the commission of crimes against humanity.[206] Recently, the *Akayesu* appeals decision[207] and the *Bagilishema* trial judgment have ruled that "the qualifier 'on national, political, ethnic, racial or religious grounds', which is peculiar to the ICTR Statute should, as a matter of construction, be read as a characterisation of the nature of the 'attack' rather than of the *mens rea* of the perpetrator".[208] This opinion was explained: "Had the drafters of the Statute sought to characterise the individual actor's intent as discriminatory, they would have inserted the relevant phrase immediately after the word 'committed', or they would have used punctuation to set aside the intervening description of the attack".[209]

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200 Report of the Secretary-General, *supra* note 44, para. 48.

201 *Prosecutor* v. *Tadic*, *supra* note 9, para. 652.

202 Margaret McAuliffe de Guzman, *supra* note 13, pp. 364-368.

203 *Prosecutor* v. *Tadic*, *supra* note 50, para. 284.

204 *Ibid.*, paras. 288–292.

205 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 558; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 260; *Prosecutor* v. *Kordic*, *supra* note 52, para. 186.

206 See, *e.g.*, *Prosecutor* v. *Rutaganda*, *supra* note 71, paras. 75–76.

207 *Prosecutor* v. *Akayesu* (Case no. ICTR-96-4-A), Judgment, 1 June 2001, para. 469, cited after *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 81, fn. 80 (the English text of the decision is not yet available).

208 *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 81.

209 *Ibid.*, fn. 79.

Thus, it may be stated that the current law of crimes against humanity – with the exception of persecution – does not require any discriminatory intent.

The last matter with regard to the mental elements of crimes against humanity is the question of whether the motives of the perpetrator are of importance. The *Tadic* Trial Chamber held: "[W]hile personal motives may be present they should not be the sole motivation for the act".[210] And: "[T]he act must not be taken for purely personal reasons unrelated to the armed conflict".[211]

This holding, like the Tadic Chamber's opinion on discriminatory motives, was quashed by the Appeals Chamber, which, after thorough consideration concluded: "[T]he relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, 'purely personal motives' do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated".[212] All subsequent decisions of the ICTY dealing with crimes against humanity as well as the most recent decision of the ICTR have followed this view.[213]

Only *Kayishema* held: "The elements of the attack effectively exclude from crimes against humanity, acts carried out for purely personal motives and those outside of a broader policy or plan".[214] However, this ruling must be considered erroneous for two reasons. First, it deduces the exclusion of personal motives from the discriminatory intent which it wrongly considers necessary. Second, even if a discriminatory intent were required this would not exclude that the perpetrator acted for purely personal reasons. The *Tadic* Appeals Chamber gave an example in which "a high-ranking SS official [. . .] claims that he participated in the genocide of the Jews and Gypsies for the 'purely personal' reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason".[215] This example shows that discriminatory intent does not exclude personal motives. Consequently the *Tadic* Appeals Chamber revised the Trial Chamber.[216] Personal motives are irrelevant with regard to the elements of crimes against humanity.

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210 *Prosecutor* v. *Tadic*, *supra* note 9, para. 658.

211 *Ibid.*

212 *Prosecutor* v. *Tadic*, *supra* note 50, para. 270.

213 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 558 (noting that the issue was "free from dispute"); *Prosecutor* v. *Kunarac*, *supra* note 81, para. 433; *Prosecutor* v. *Kordic*, *supra* note 52, para. 187; *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 95.

214 *Prosecutor* v. *Kayishema*, *supra* note 74, para 122.

215 *Prosecutor* v. *Tadic*, *supra* note 50, para. 269.

216 *Ibid.*

2. *Murder (s. 5.1(a))*

Section 5.1(a) of Regulation 15/2000 provides that murder is one of the inhumane acts which may amount to a crime against humanity. The section reiterates article 7(1)(a) of the Rome Statute.[217] Therefore, provisions which assist in the interpretation of article 7 should also be applicable in the interpretation of section 5. The core elements of article 7(1)(a) have been articulated in the Elements of Crimes. In relation to murder as a crime against humanity, the Elements of article 7(1)(a) provide only (and not very helpfully) that in addition to proof of core elements of a crime against humanity (namely, the context element), murder requires that the perpetrator kill[218] one or more persons. This absence of a specific definition of the elements of murder as a crime against humanity in article 7(1)(a) or elsewhere has the result that reliance has to be placed on other provisions of Regulation 15/2000 (and the Rome Statute) and the general sources of international law[219] in order to ascertain these requirements, including particularly the requisite state of mind of the accused.

Murder is one of the crimes defined in article 6(c) of the Nuremberg Charter as a crime against humanity. These crimes constituted crimes in the world's major criminal law systems prior to adoption of the Charter in 1945[220] and have been replicated in the primary formulations of crimes against humanity that have been developed since Nuremberg, *i.e.*, article 5 of the ICTY Statute, article 3 of the ICTR Statute and article 7 of the Rome Statute.[221] These crimes can be deemed to be "general principles of

[217] The mutuality of the two provisions is noted by Linton, *supra* note 88, p. 10.

[218] The first Element to article 7(1)(a) provides: "For the purposes of this definition the term 'killed' is interchangeable with the term 'caused death'. This footnote applies to all elements which use either of these concepts".

[219] This issue is not addressed at length here. In summary, article 21 of the Rome Statute (followed, but not in identical terms, in section 3 of Reg. 15/2000) establishes a hierarchy for the applicable law for interpretation of the Statute. The absence however of a definition of murder in the Rome Statute and in Regulation 15/2000 (as well as the other international instruments relating to murder as a crime against humanity) has the result that, in order to define murder, resort must be had, *inter alia*, to decisions of international tribunals and the common elements of the crime of murder in different legal systems.

[220] M. Cherif Bassiouni, *supra* note 9, 293. The methodology by which this is established is set out at 294–300. For analysis of the main characteristics of relevant provisions of national penal codes of the world's major legal systems see similarly Günter Heine & Hans Vest, *supra* note 64, pp. 176 *et seq.*, esp. at p. 195.

[221] See also M. Cherif Bassiouni, *supra* note 9, p. 290; Olivia Swaak-Goldman, *supra* note 16, pp. 148 *et seq.*, in relation to the codification and evolution of article 6(c) in customary international law. Article 6(c) was also replicated in article 5(c) of the Tokyo Charter (Charter of the International Military Tribunal for the Far East of 1946, reproduced in BENJAMIN B. FERENCZ, 1 DEFINING INTERNATIONAL AGGRESSION: THE SEARCH

law".[222] The ILC has acknowledged that "murder is a crime that is clearly understood and well defined in the national law of every State".[223] This prohibited act does not require any further explanation.

According to the customary practice of states, murder – if understood as the umbrella term for all provisions which criminalise the taking of a life – is not merely intentional killing without lawful justification (*i.e.*, without the legal justifications, excuses and defenses known to the world's major legal systems) but rather is more broadly defined in its "*largo sensu*" meaning as the creation of *life-endangering conditions likely to result in death* according to reasonable human experience.[224] Bassiouni concludes that given this broad definition of murder in the world's major criminal justice systems, murder as intended in article 6(c) (and *a fortiori* in the clauses in other instruments that are framed in the same terms) includes a closely related form of unintentional but foreseeable death that in common law systems is called "manslaughter",[225] and in the Romanist-Civilist-Germanic systems is homicide with *dolus* (*Vorsatz*) and homicide with *culpa* (*Fahrlässigkeit*).[226]

Within the international law of murder (and generally in international criminal law) developed by the *ad hoc* Tribunals, murder has been classified according to the common law conception of a crime based on core criteria of *actus reus* and *mens rea*. This approach to the conception of criminal acts within international law was approved in *Celebici* which noted that, "while the terminology utilised varies, these two elements have been described as 'universal and persistent in mature systems of

FOR WORLD PEACE 522–527 (1975)) and article II(1)(c) of CCL 10, and both of these instruments are in the same or similar terms as article 6(c) and certainly refer to the same offences as article 6(c).

222 M. Cherif Bassiouni, *supra* note 9, p. 300. See also Olivia Swaak-Goldman, *supra* note 16, pp. 143 *et seq.*

223 1996 Draft Code, *supra* note 37, article 18(7). Noted in *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 821; endorsed in *Prosecutor* v. *Akayesu*, *supra* note 63, para. 587.

224 M. Cherif Bassiouni, *supra* note 9, pp. 300–302. The phrase "according to reasonable human experience" has the same meaning as ". . . according to the known or foreseeable expectations of a reasonable person in the same circumstances" which Bassiouni uses in his discussion of this issue. The definition of murder noted here is "the widespread common understanding of the meaning of murder" and arises "notwithstanding the technical differences in the definitions of various forms of intentional and unintentional killing in the world's major criminal justice systems".

225 *Ibid.* (in both of its common law forms, *i.e.*, voluntary and involuntary manslaughter).

226 *Ibid.* This definition allows an examination of motive, which is important in order to link the offence with prerequisite legal elements of carrying out the "state action or policy" (the *nexus* that establishes murder as an international crime). This extended definition is particularly relevant to "extermination", *i.e.*, murder on a large scale.

law' ".[227] Murder has been summarily defined by the *ad hoc* Tribunals as the unlawful, intentional killing of a human being.[228] Their case law has considered the following as necessary elements of murder as a crime against humanity:[229]

- The victim must be dead.[230]
- In relation to homicide of all natures the *actus reus* is the death of the victim as the result of the unlawful acts or omissions by the accused[231] or a subordinate.[232]
- The conduct of the accused or a subordinate must be a substantial cause of the death of the victim.[233]
- At the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether death ensues or not (*mens rea*).[234]

While the ICTY and ICTR have not considered the *actus reus* element of the definition to be controversial, the *mens rea* element has been extended and extensively discussed. In *Kupreskic*, purporting to follow *Akayesu*, it was held that the requisite *mens rea* for murder as a crime against humanity is the intent to kill or the intent to inflict serious injury in reckless disregard of human life.[235] An indication of the meaning of

[227] *Prosecutor* v. *Delalic et al.* (Case no. IT-96-21-T), Judgment, 16 November 1998, paras. 473–474, at footnote 433 noting *Morissette* v. *United States*, 342 U.S. 246 (1952). The Chamber apparently overlooks the main alternative conception which would be based on the Roman-Germanic conception: *Tatbestand*, *Rechtswidrigkeit und Schuld.*

[228] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 589 followed in *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 80 and *Prosecutor* v. *Musema*, *supra* note 72, para. 215.

[229] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 589, approved in *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 560, *Prosecutor* v. *Blaskic*, *supra* note 68, para. 217, *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 80 and *Prosecutor* v. *Musema*, *supra* note 72, para. 215.

[230] *Prosecutor* v. *Akayesu, supra* note 63, para. 589.

[231] *Prosecutor* v. *Delalic*, *supra* note 227, para. 424.

[232] *Prosecutor* v. *Akayesu, supra* note 63, para. 589. However, this issue is better dealt with in connection with individual responsibility and, more specifically, command responsibility; see Simon Chesterman, *supra* note 101, p. 331.

[233] *Prosecutor* v. *Delalic*, *supra* note 227, para. 424. Followed in *Prosecutor* v. *Blaskic*, *supra* note 68, para. 153 and in *Prosecutor* v. *Kordic*, *supra* note 52, para. 229 in relation to wilful killing (ICTY Statute, art. 2), adding that for the purposes of this article the victim must be a "protected person", and at para. 230 in relation to murder (ICTY Statute, art. 3) noting that the offence is against a person "taking no active part in the hostilities".

[234] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 589; *Prosecutor* v. *Kvocka* et al. (Case no. IT-98-30/1-T), Judgment, 2 November 2001, para. 132.

[235] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 561.

"reckless disregard of human life" is provided in *Blaskic*. In confirming that the intent, or *mens rea*, needed to establish the offence of wilful killing exists once it has been demonstrated that the accused intended to cause death or serious bodily injury, the Trial Chamber added "which, as it is reasonable to assume, he had to understand was likely to lead to death".[236] The Chamber considered that "recklessness" is a concept "which may be likened to serious criminal negligence".[237]

In *Blaskic*, the Trial Chamber considered further that the accused must have acted "in the reasonable knowledge that the attack was likely to result in death".[238] This phrase was followed in *Kordic*. Here the Trial Chamber held that *mens rea* would be satisfied if, in addition to the accused intending to kill the victim, or to cause grievous bodily harm, he or she also intended to inflict serious injury in the reasonable knowledge that the attack was likely to result in death.[239]

The formulation of the *mens rea* for murder as a crime against humanity in *Kupreskic*, *Blaskic* and *Kordic* is analogous to the definition of *mens rea* as stated in *Celebici*[240] in which the issue was the necessary intent required to establish the crimes of wilful killing and murder as war crimes within the Geneva Conventions. The Trial Chamber held that *mens rea* is present where an intention is demonstrated on the part of the accused to kill or inflict serious injury in reckless disregard of human life.[241] The use of the same formula for the requirement of *mens rea* in *Kupreskic* and *Celebici* is striking and demonstrates the willingness of the ICTY at least to treat

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[236] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 153. This specific requirement is in addition to the general requirement of proof for the general elements of article 2.

[237] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 152. For the reasons noted below, this comment is applicable to the *mens rea* for murder as a crime against humanity although the context of this comment is article 2 of the ICTY Statute. Thus the *mens rea* constituting all the violations of article 2 of the Statute includes both guilty intent and recklessness which may be likened to serious criminal negligence.

[238] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 217.

[239] *Prosecutor* v. *Kordic*, *supra* note 52, para. 236; *Prosecutor* v. *Kupreskic*, *supra* note 14, paras. 560–561; *Prosecutor* v. *Blaskic*, *supra* note 68, para. 217; *Prosecutor* v. *Akayesu*, *supra* note 63, para. 589.

[240] *Prosecutor* v. *Delalic*, *supra* note 227, para. 439.

[241] In formulating this definition, the Trial Chamber emphasised (*Prosecutor* v. *Delalic*, *supra* note 227, paras. 431 and 438) the importance of considering the nature and purpose of the prohibition contained in the Geneva Conventions and relevant principles of interpretation of the Statute and Rules (of the ICTY) which requires taking into account the objects of the Statute and the social and political considerations which give rise to its creation (see paras. 160 ff., especially para. 170). This decision as to the requirement of wilful killing was followed in *Prosecutor* v. *Kordic*, *supra* note 52, para. 229.

murder and wilful killing as the same offences whether they are crimes against humanity or war crimes.

Homicide (as a general, neutral term used here to describe unlawful taking of life) as used in the major instruments which relate to international criminal law is characterised as follows:

- As a crime against humanity, homicide is referred to as "murder". Murder has been listed as the first crime against humanity in every international instrument defining crimes against humanity, namely article 6(c) of the Nuremberg Charter, article 5(c) of the Tokyo Charter, article II(1)(c) of CCL 10, Principle VI(c) of the ILC's Nuremberg Principles,[242] article 10 of the ILC's 1954 Draft Code,[243] article 5(a) of the ICTY Statute, article 3(a) of the ICTR Statute, article 18(a) of the 1996 Draft Code[244] and article 7 of the Rome Statute. This use of murder as a crime against humanity is replicated in section 5 of Regulation 15/2000.
- Similarly, as a war crime contemplated by common article 3 of the four Geneva Conventions, homicide is referred to as "murder". Common article 3 totally prohibits ". . . violence to life of a person, in particular murder of all kinds, mutilation, cruel treatment and torture . . .". For use of a provision in these terms (through the incorporation of common article 3), see article 3 of the ICTY Statute, article 4 of the ICTR statute and article 8(c) of the Rome Statute. This use of murder as an offence in breach of common article 3 is replicated in s. 6.1(c)(i) of Regulation 15/2000.
- As a war crime amounting to a "grave breach", homicide is referred to as "wilful killing". Grave breaches are formulated by common articles to the four 1949 Geneva Conventions and relate only to international armed conflicts. The offences within the grave breaches regime are ". . . those involving any of the following acts if committed against persons or property protected by the Convention: wilful killing . . .". See ICTY article 2, Rome Statute article 8(a). This use of wilful killing as a grave breach is replicated in s. 6.1(a)(i) of Regulation 15/2000.
- As a crime amounting to genocide, homicide is referred to as the "killing (of) members of the group" in the Genocide Convention.[245]

242 *Supra* note 24.

243 *Supra* note 27.

244 *Supra* note 37.

245 Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277.

> This clause has been replicated in article 4 of the ICTY Statute, article 2 of the ICTR Statute and article 5 of the Rome Statute. A provision in the same terms is contained in section 4(a) of Regulation 15/2000.

In *Celebici*, it was noted that undue regard should not be given to the difference between these alternative descriptions of homicide, and for the purposes of proof of the constituent elements of the substantive offence itself (as opposed to the context in which it occurs, as a crime against humanity or war crime), nothing turns on whether the offence is "murder" or "wilful killing".[246] Support for this proposition can be found in *Blaskic* where the Trial Chamber, agreeing with *Celebici*, held that the content of the offence of murder under article 3 is the same as for wilful killing under article 2.[247] Similarly, albeit in a different context, Judge Cassese, in considering the application of duress to the "killing of innocents", stated: "I do not consider that, as far as this issue is concerned, it makes any difference whether one refers to such an offence as 'killing', 'unlawful killing', or 'murder' provided that it is understood that it is the killing of innocents without lawful excuse or justification (except, possibly, the defence of duress) with which we are concerned".[248]

The homogenisation of murder and wilful killing, independently of whether it is as a war crime or crime against humanity, has been taken a step further in *Kordic*. Here the Chamber stated that the elements for murder as a crime against humanity "are similar to those required in connection to wilful killing under article 2 and murder under article 3 of the Statute, with the exception that in order to be characterised as a

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[246] The Trial Chamber, in *Prosecutor* v. *Delalic*, *supra* note 227, considered the definition of homicide for the purposes of "wilful killing" as a war crime constituting a "grave breach" (the French text version is "*l'homicide intentionnel*") and "murder" as a war crime within Common article 3 Geneva Conventions (the French text version is "*meurtre*"). The Chamber sought to determine whether there is a qualitative difference between the two terms (para. 421). It concluded that no difference of consequence flows from the use of "wilful killing" in place of "murder" for the purposes of prosecution of offences which incorporate these terms (para. 433). In the result, the Trial Chamber concluded that the *mens rea* required to establish the crimes of wilful killing and murder, as recognized in the Geneva Conventions, is the same (para. 439).

[247] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 181, following the Trial Chamber in *Prosecutor* v. *Delalic*, *supra* note 227, para. 422. Followed in *Prosecutor* v. *Kordic*, *supra* note 52, para. 229.

[248] *Prosecutor* v. *Erdemovic* (Case no. IT-96-22), Judgment, 7 October 1997, Separate and Dissenting Opinion of Judge Antonio Cassese, para. 12, fn. 8. The context of these comments was an indictment that charged the accused with a crime against humanity (murder) and, alternatively, a violation of the laws or customs of war (murder).

crime against humanity a 'murder' must have been committed as part of a widespread or systematic attack against a civilian population".[249]

This general relationship between the offences is consistent with earlier comments by the Trial Chamber in *Kupreskic* on the relationship between murder as a crime against humanity and murder as a war crime. The Chamber considered that the two offences are not in a relationship of "reciprocal speciality"[250] and that the prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime.[251] In considering the nature of the values that are protected by each offence the Chamber found that articles 3 and 5 of the ICTY Statute are part of the common general framework of the Statute. They share the same general objectives and protect the same general values in that they are designed to ensure respect for human dignity, whatever their specific aims and values may be.[252] Thus, the Chamber felt that the difference between the values protected by articles 3 and 5 would seem to be inconsequential.[253] It considered in all these circumstances that the prohibition of murder as a crime against humanity may only be found if the requirements of murder under both articles 3 and 5 are proved.[254] Accordingly once the core elements of the offence of murder as a war crime are established, the foundation is laid for proof of murder as a crime against humanity as long as the additional core element of widespread or systematic attack against a civilian population is established.

Notwithstanding the harmonisation of the international law of homicide, there has been controversy in the *ad hoc* Tribunals' jurisprudence arising from the use of the word "murder" in the English text of

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[249] *Prosecutor* v. *Kordic*, *supra* note 52, para. 236. As authority for this proposition the Tribunal referred to *Prosecutor* v. *Delalic*, *supra* note 227, para. 439, fn. 318.

[250] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 701: "while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated".

[251] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 701 noting at footnote 958 that this result is borne out by *Prosecutor* v. *Tadic*, *supra* note 48, para. 91, as to the scope and application of common article 3 quoted above (noted also in *Prosecutor* v. *Delalic*, *supra* note 227, paras. 125, 136).

[252] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 702.

[253] *Ibid.*, para. 703. See also on this issue Olivia Swaak-Goldman, *supra* note 16, pp. 164 *et seq.* for discussion as to the relative seriousness of crimes against humanity and war crimes.

[254] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 704. This is a brief (and incomplete) summation of the Trial Chamber's deliberations. The background of the formulation of the law concerning this issue and the terms used in this analysis is noted in *Prosecutor* v. *Kupreskic*, *supra* note 14, paras. 680–695.

the Statutes[255] and the use of the word "*assassinat*" in the corresponding French text. This has important implications for the *mens rea* requirement of murder as a crime against humanity. The problem as to the proper meaning of murder as a crime against humanity arises because of the different meanings in law of each of these terms. The central issue that has caused difficulty in the Tribunal's jurisprudence is whether it is only murder ("*meurtre*") as a crime of general intent, and not premeditated murder ("*assassinat*"), which must be the underlying offence of a crime against humanity.[256]

The nature of the problem was stated in *Kayishema*: "[T]he debate has arisen because the *mens rea* for murder, as it is defined in most common law jurisdictions, includes but does not require premeditation; whereas, in most civil law systems, premeditation is always required for *assassinat*".[257] As the Tribunal noted in *Blaskic*, "the French version of the Statute uses the term '*assassinat*' – a crime with a very precise meaning in French national law". According to article 221–223 of the French Criminal Code (*Nouveau Code Pénal*) "*assassinat*" means a premeditated murder – "*meurtre commis avec préméditation*"[258] – and corresponds to "*meurtre aggravé*" (aggravated murder).[259] The definition of premeditation in the Code is "the intention formed before the action to commit a crime of a given offense".[260] On the other hand, the English version adopts the word "murder" which translates in French as "*meurtre*".[261] The effect of the distinction is that if the *mens rea* element of "*assassinat*" is required for proof of murder as a crime against humanity then the application of section 5(1)(a) of Regulation 15/2000 would be restricted only to intentional premeditated killings, thus excluding "reckless" murder[262] as well as general intent murder. This is clearly contrary to the line of cases on the formulation of *mens rea* for murder noted above. The *ad hoc* Tribunals have taken different positions in relation to this issue and the outcome for the *mens rea* requirement is not clear.

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255 Article 3(a) of the ICTR Statute and article 5(a) of the ICTY Statute

256 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 216.

257 *Prosecutor* v. *Kayishema*, *supra* note 74, para. 137.

258 See article 221–223 of the *Nouveau Code pénal* of 1 March 1994: "Le *meurtre* commis avec préméditation constitue un *assassinat*". See also *Prosecutor* v. *Blaskic*, *supra* note 68, para. 216 fn. 414; *Prosecutor* v. *Kayishema*, *supra* note 74, para. 137, fn. 37.

259 Simon Chesterman, *supra* note 101, p. 329.

260 See article 132–172 of the *Nouveau Code pénal*: "La préméditation est le dessein formé avant l'action de commettre un crime ou un délit déterminé".

261 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 216.

262 Simon Chesterman, *supra* note 101, p. 329, draws this conclusion in relation to article 5(a) of the ICTY Statute and article 3(a) of the ICTR Statute.

In *Akayesu*, Trial Chamber I held that customary international law dictates that it is the act of "murder" ("*meurtre*") that constitutes a crime against humanity and not "*assassinat*". In a short explanation of its reasons, the Chamber considered that this position of customary international law meant that the inclusion of "*assassinat*" in the French version must have come about due to an error in translation. This constituted sufficient reasons in the opinion of the Chamber to find that the French text should not be followed.[263] This finding as to the customary international law on this issue was approved in *Rutaganda* and *Musema*.[264] The same conclusion was reached in *Blaskic*, where the Tribunal noted the decision of the Trial Chamber in *Akayesu*, and further that article 7(1)(a) of the ICC Statute and article 18 of the ILC Code of Crimes Against the Peace and Security of Mankind refer to murder ("*meurtre*"). The Trial Chamber concluded that it is murder ("*meurtre*") and not premeditated murder ("*assassinat*") which must be the underlying offence of a crime against humanity.[265]

In *Kayishema* however, in relation to the interpretation of the ICTR Statute, Trial Chamber II held, *inter alia*, that the solution in *Akayesu* that there was an error in translation was too simple and not convincing as both the French and the English versions of the Statute are originals.[266] The reasoning of the Chamber is opposed to that in *Akayesu* and the cases on this point are not reconcilable.[267] The Trial Chamber noted:

> When interpreting a term from one language to another, one may find that there is no equivalent term that corresponds to all the subtleties and nuances. This is particularly true with legal terms that represent jurisprudential concepts. Here, the *mens rea* for murder in common law overlaps with both *meurtre* and *assassinat* (that is, a *meurtre* aggravé) in civil systems.[268] The drafters chose to use the term *assassinat* rather than *meurtre*. As a matter

[263] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 588.

[264] *Prosecutor* v. *Rutaganda*, *supra* note 71, para. 79; *Prosecutor* v. *Musema*, *supra* note 72, para. 214. Both cases simply noted that "[c]ustomary international law dictates that the offence of 'Murder', and not '*Assassinat*', constitutes a crime against humanity".

[265] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 216. Simon Chesterman, *supra* note 101, p. 329 argues that this finding as to the requirement of customary international law is correct and notes as support for the proposition the fact that murder (*meurtre*) is used in article 7(1) of the Rome Statute.

[266] *Prosecutor* v. *Kayishema*, *supra* note 74, para. 138, fn. 40. Thus the French version is as authoritative as the English edition. The equal status of the English and French editions is noted by Simon Chesterman, *supra* note 101, p. 329, fn. 120. This is due to Rule 41 of the Provisional Rules of Procedure of the Security Council, as amended on 21 December 1982, U.N. Doc. S/96/Rev.7.

[267] See for a similar conclusion, Simon Chesterman, *supra* note 101, p. 329.

[268] Thus the Chamber explained at footnote 39 (para. 138): "For example, at the high end of murder the mens rea corresponds to the mens rea of *assassinat*, i.e., unlawful killing with

of interpretation, the intention of the drafters should be followed so far as possible and a statute should be given its plain meaning.[269]

According to the Chamber, contrary to the views expressed in *Akayesu*, the ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. Thus the Chamber found that it may be presumed that the drafters intended to use "*assassinat*" alongside murder, and by doing so may have intended that only the higher standards of *mens rea* for murder will suffice.[270] Further, the Chamber considered that when in doubt, a matter of interpretation should be decided in favour of the accused.[271] The Chamber continued:

> The Chamber finds, therefore, that murder and *assassinat* should be considered together in order to ascertain the standard of *mens rea* intended by the drafters and demanded by the ICTR Statute. *When murder is considered along with assassinat the Chamber finds that the standard of mens rea required is intentional and premeditated killing.* The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection.

In a footnote to the last sentence of this paragraph the Chamber noted: "This explanation conforms to the French jurisprudence of the criminal court and to the United States Supreme Court case law". The Chamber went on:

> The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.
>
> The accused is guilty of murder if he, engaging in conduct which is unlawful,
>
> 1. causes the death of another
> 2. by a *premeditated* act or omission
> 3. *intending* to kill any person or,
> 4. *intending* to cause grievous bodily harm to any person.

premeditation. Conversely, at the low end of murder where mere intention or recklessness is sufficient and premeditation is not required, the mens rea of murder corresponds to the mens rea of *meurtre*".

[269] *Prosecutor* v. *Kayishema*, *supra* note 74, para. 138. In explanation the Chamber noted, at footnote 40: "Notably the text was drafted in English and French, both being original and authentic. The Statute was then translated into the four remaining official UN languages. Therefore, between English and French there was no translation. Accordingly, there can be no 'error in translation' as such; there can only be a mistake in the drafting of an original text. Notably, the term used in the ICTY Statute is also *assassinat* (ICTY Statute article 5(a))".

[270] *Ibid.*, para. 138. The Chamber noted in this regard. at footnote 41: "Of course, in common law, there is no crime of unlawful killing that provides for a higher standard of mens rea than that of murder. Therefore, even if the drafters intended that only the standard of mens rea for *assassinat* would suffice, the drafters would still need to use the term murder in English". This is not completely correct since traditional common law knew the term "malice aforethought".

[271] *Ibid.*, para. 139.

Thus, a premeditated murder that forms part of a widespread or systematic attack against civilians on discriminatory grounds will be a crime against humanity. Also included will be extra-judicial killings, that is 'unlawful and deliberate killings carried out with the order of a Government or with its complicity or acquiescence'.[272]

In *Kupreskic*, the Trial Chamber followed the decision in *Akayesu* in confirming the constituent elements of the *actus reus* of murder under article 5(a) of the Statute. The Chamber then defined murder for the purposes of the ICTY Statute as follows: "It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person".[273] The Chamber, however, was ambivalent in relation to the definition of the *mens rea* of murder. Its primary definition is consistent with *Akayesu* and *Celebici* and the harmonisation of the definition of *mens rea* between murder and wilful killing as a crime against humanity or as a war crime. Thus, the Chamber said: "The requisite *mens rea* of murder under article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life".[274] However, the Chamber then specifically noted and apparently adopted the *mens rea* requirement in *Kayishema* without indicating explicit approval or rejection.[275] It said:

In *Kayishema* it was noted that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.[276]

The problem, as noted above, is that a premeditated act cannot also be reckless and requires more than a mere general intent. Hence the adoption of both positions by the Trial Chamber is problematic. Notwithstanding this apparently clear divergence in the meaning of *mens rea* for the purposes of murder as a crime against humanity, subsequently in *Kordic* an ICTY Trial Chamber maintained that "it is now settled that premeditation is *not* required in order to define the term 'murder' as it is used in article 5 ICTY statute".[277] This conclusion can only be reached by *not* following the clear articulation of the requirement of *mens rea* in *Kayishema* (and – though more ambiguously – *Kupreskic*), yet the Trial Chamber did not satisfactorily explain its reasons for not doing so. Rather, confusingly, the

[272] *Ibid*., paras. 139, 140 (emphasis added).
[273] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 560.
[274] *Ibid.*, para. 561.
[275] See on this issue the criticism of Simon Chesterman, *supra* note 101, p. 333.
[276] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 561.
[277] *Prosecutor* v. *Kordic*, *supra* note 52, para. 235. Emphasis added.

Trial Chamber cited *Kayishema* in support of its preferred statement of the law without attempting to explain or distinguish this decision. The Trial Chamber cited, as support for its proposition, the part of the *Kayishema* decision in which the Trial Chamber established its position *against* the reasoning of *Akayesu*.[278] The purported reliance upon *Kayishema* is therefore questionable. In relation to *Kupreskic*, the Tribunal distinguished the decision by noting that although the Chamber defined murder as an "intentional and premeditated killing, it did not refer to the latter element in its factual findings".[279] On the other hand, the Tribunal found support for its statement of the law in *Blaskic*.[280]

What is the result of this divergence? Writing before the Trial Chamber decision in *Kordic*, Chesterman suggests that the case law demonstrates that "for the purposes of the ICTY and ICTR statutes the act or omission must be premeditated".[281] This is not the current position of the law as stated in *Kordic* and is to this extent inaccurate. However, the exact position of the law is far from clear and the issue needs to be clarified by the Tribunals. It seems that the Tribunals will have to make an election as to which text and which meaning of homicide is preferred. Certainly, the English word "murder" provides a more flexible definition of homicide and to the extent that it embraces premeditation but is not restricted to it, is a preferable alternative. It is consistent with the formulation of "murder" as developed in international law since the Nuremberg trials and reflects the notion of homicide as understood within the world's major criminal justice systems.

Further, there may be a problem with the reasoning behind the Trial Chamber's formulation of "murder" in *Kayishema*, which suggests it should be limited to its own facts and not followed. It is questionable why an accused should be guilty of murder if the only premeditation is an intention to cause grievous bodily harm. There is an ambiguity here which is directly linked to the requirement of premeditation. If the intent to cause grievous bodily harm is formulated "after a moment of cool reflection" then the only *mens rea* that can be attributed to the accused is an intent to effect this purpose. The premeditated purpose will not be the death of the

278 *Ibid.* In support of its statement, the Trial Chamber notes the case law of the ICTY and ICTR, including *Kayishema*, but does not attempt to distinguish the different interpretation of the application of murder and *assassinat* used in this case. See footnote 314 which lists the case law without differentation.

279 *Ibid.*, fn. 314, referring to *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 818.

280 *Ibid.*, fn. 315, noting: "Most recently the Blaskic Trial Chamber held that 'it is murder ("*meurtre*") and not premeditated murder ("*assassinat*") which must be the underlying offence of a crime against humanity'."

281 Simon Chesterman, *supra* note 101, p. 334.

victim but the grievous bodily harm. This does not fulfil the requirements of premeditated murder.

For these reasons, the correct interpretation of the international law of homicide is achieved by the adoption of the English meaning of the word "murder". Thus the *mens rea* requirement of murder as a crime against humanity is the formulation originally conceived in *Akayesu* and subsequently adopted, approved and supplemented in the cases following it.

The jurisprudence of the *ad hoc* Tribunals has not been informed by statutory provisions as to the meaning of intent for the purposes of ascertaining *mens rea.* Unlike the Rome Statute and Regulation 15/2000, the ICTY and ICTR Statutes do not have a provision to this effect. For the purposes of ascertaining the international law of murder as a crime against humanity in East Timor, the Special Panel has to take cognizance of s. 18 of Regulation 15/2000.

This provision, however, is narrower than the case law developed by the Tribunals in two respects. First, as has been seen above, section 18 excludes recklessness or *dolus eventualis*. Second, the object of the mental element must be the death of the victim since the death (or the killing[282]) must be the result or consequence intended by (or known to) the perpetrator. This is the material element of murder in the sense of section 18.1 of Regulation 15/2000. Therefore it is not possible to consider the mere intent to cause grievous bodily harm sufficient for the commission of the crime of murder (it may constitute other inhumane acts, however; moreover, if the perpetrator is convicted for other inhumane acts the death of the victim can still be given due consideration in the sentencing stage[283]). Every other interpretation would turn murder into a strict liability crime punishing the mere creation of a danger (for the life of the victim) under the objective condition (*objektive Bedingung der Strafbarkeit*) that, regardless of the perpetrator's intent, it turns later into actual damage (death).

As to the requirement of premeditation, the situation is also different from that for the *ad hoc* Tribunals. The problem which sparked the debate, the formulation of the French version of the ICTY's and the ICTR's Statutes ('*assassinat*"), does not exist with regard to proceedings under

[282] The first Element to article 7(1)(a) of the Rome Statute, *supra* note 83, reads: "The perpetrator killed one or more persons".

[283] The harmfulness of the crime constituting the objective side of the crime's gravity is the most important sentencing factor, Jan C. Nemitz, *Sentencing in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and Rwanda*, in INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW. CURRENT DEVELOPMENTS 605, 616 (Horst Fischer, Claus Kress & Sascha Rolf Lüder, eds., 2001).

Regulation 15/2000 and the Rome Statute. This is because the French version of the Rome Statute does not use the term "*assassinat*" but the term "*meurtre*" (art. 7(1)(a) of the Rome Statute). With regard to Regulation 15/2000, a French version simply does not exist. Therefore, there can be no doubt that premeditation is not required for the crime against humanity of murder under Regulation 15/2000.

3. *Deportation or Forcible Transfer of Population (s. 5.1(d))*

Sections 5.1(d) and 5.2(c) have exactly the same wording as articles 7(1)(e) and 7(2)(d) of the Rome Statute. The latter provides the first codified definition of deportation or forcible transfer of population. As far as can be seen, deportation was first dealt with thoroughly in a criminal context in the *Milch case* of Nuremberg Military Tribunal II. In a concurring opinion, Judge Phillips considered that "[d]isplacement of groups of persons from one country to another is the proper concern of international law as far as it affects the community of nations. International law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during times of war becomes a crime".[284] Judge Phillips summarized these conditions holding that "deportation of the population is criminal whenever there is no [legal] title in the deporting authority or whenever the purpose of the displacement is illegal or whenever the deportation is characterized by inhumane or illegal methods".[285]

According to this definition – which was adopted by Military Tribunal III in the *Krupp case*[286] – forced transfer of persons is illegal only under special circumstances. However, under current international law this view must be considered too narrow. At present, forcible transfer is not only prohibited if additional conditions are present, rather it is generally prohibited and may be justified only under exceptional circumstances, *i.e.*, it must be shown that international law, explicitly or implicitly, permits it.

Humanitarian law expressly enumerates situations where such permission exists. Article 49 of the Fourth Geneva Convention provides that:

> total or partial evacuation of a given area [is permissible] if the security of the population or imperative military reasons so demand. [. . .] Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.[287]

Also, article 17 of Additional Protocol II provides that displacement of civilian population is permissible only if "the security of the civilians

284 *United States of America* v. *Milch*, 2 T.W.C. 355, 865 (1950).
285 *Ibid.*, Concurring Opinion by Judge Phillips.
286 *United States of America* v. *Krupp et al.*, 9 T.W.C. 1432 (1950).
287 *Supra* note 45.

involved or imperative military reasons so demand".[288] These exceptions must be applicable also with regard to the crime against humanity of deportation or forcible transfer. It would make little sense to permit conduct under humanitarian law and punish it as a crime against humanity. Moreover, as humanitarian law allows forcible transfer if the safety of the transferred persons is at stake, the same should also apply in time of peace, for example, when a natural disaster is imminent. In any case, the persons must be allowed to return if the reasons for the transfer have ceased to exist.

Finally, it is clear that a person's right to reside in a certain area can only be violated if it exists. Thus, the second Element of the Elements of Crimes[289] for article 7(1)(d) of the Rome Statute specifies that only "persons lawfully present in the area" can be victims of deportation or forcible transfer. The expulsion of other persons is not criminal unless the circumstances of the expulsion meet the requirements of a crime themselves (for example, torture). In any case, any (national) law prohibiting the presence of a person in a certain area or country must be consistent with international law (*e.g.*, article 13 of the Universal Declaration of Human Rights and article 12(1) of the International Covenant on Civil and Political Rights). Otherwise the provision could be easily circumvented by discriminating or otherwise internationally illegal national legislation.

A second issue with regard to the legality of forcible transfer is the way in which it is conducted. Article 49 of the fourth Geneva Convention provides that, if a transfer is exceptionally permissible, it must be ensured "to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated". Similarly, article 17 of Additional Protocol II requires that "[s]hould such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition". If the transfer takes place under circumstances which are worse than necessary, it is illegal despite the presence of a permissible purpose.

Judge Phillips' definition also requires that the victims must be transferred to the territory of another state. This element is no longer needed.

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[288] Protocol Additional to the Geneva Conventions of 12 Augusut 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609.

[289] Elements of Crimes, *supra* note 79.

The Rome Statute defines deportation or forcible transfer of population in article 7(2)(d) as "forced displacement of the persons concerned by expulsion or other coercive acts *from the area* in which they are lawfully present, without grounds permitted under international law" (emphasis added). Clearly, the word "area" cannot be understood to refer to a whole country. Von Hebel and Robinson explain that the words "forcible transfer of population" were inserted to clarify that movements of population within the borders of a country are also sufficient.[290] In addition, a footnote to the Elements of Crimes for article 7(1)(d) states that " '[d]eported or forcibly transferred' is interchangeable with 'forcibly displaced' ". The word "displacement", however, is found in article 17 of Additional Protocol II,[291] which contemplates internal displacement.

To date, the judges of the ICTY seem to have dealt with the crime of deportation or forcible transfer only once, in the *Nikolic* Rule 61 decision. *Nikolic* was charged with the unlawful transfer of detainees from Susica camp to Batkovic. Both places are situated within Bosnia and Herzegovina, *i.e.*, within the same country. The Chamber held: "that the [. . .] facts could be characterised as deportation and, accordingly, come under article 5 [crimes against humanity] of the Statute".[292]

Moreover, in the *Bosanski Samac* case the accused are charged with "the unlawful deportation and forcible transfer of hundreds of [. . .] non-Serb civilians [. . .] to other countries *or to other parts of the Republic of Bosnia and Herzegovina*" (emphasis added).[293] Finally, the official German Draft Code of International Crimes (Art. 1 sect. 7 No. 4)[294] also does not require that the victims be transferred to another state. Since the Draft Code provides for universal jurisdiction (Art. 1 sect 1) and, thus, presupposes that its crimes can be prosecuted regardless of the nationality of the perpetrator and the place of their commission, these crimes (including the crime of deportation or forcible transfer) must be considered to reflect customary international law.

In any case, even if one would (erroneously) hold that the law of deportation or forcible transfer does not apply to transfers within the borders of a state, this does not mean that such internal displacements

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290 Herman Von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court* in THE INTERNATIONAL CRIMINAL COURT. THE MAKING OF THE ROME STATUTE. ISSUES, NEGOTIATIONS, RESULTS 79, 99 (Roy S. Lee, ed., 1999); Christopher K. Hall, *Article 7*, in COMMENTARY ON THE ROME STATUTE, *supra* note 80, margin no. 33.

291 *Supra* note 288.

292 *Prosecutor* v. *Nikolic*, *supra* note 131, para. 23.

293 *Prosecutor* v. *Simic* et al. (Case no. IT-95-9), Second Amended Indictment, 25 March 1999, paras. 36–39.

294 Völkerstrafgesetzbuch-Entwurf, *supra* note 199.

do not constitute a crime against humanity. Such conduct constitutes persecution if committed with discriminatory intent and, in the case of Regulation 15/2000 and the Rome Statute, if the connection requirement (see below) is fulfilled.

The first Element of the Elements of Crimes to article 7(1)(d) of the Rome Statute, regarding deportation or forcible transfer, provides: "1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts". Thus it is clear that the perpetrator need only transfer *one* person. As to the force which must be applied a footnote to the word "forcibly" explains: "The term 'forcibly' is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or persons or another person, or by taking advantage of a coercive environment".

4. *Imprisonment or Other Severe Deprivation of Liberty (s. 5.1(e))*

Section 5.1(e) of Regulation 15/2000 has been adopted verbatim from article 7(1)(e) of the Rome Statute. It criminalises: "Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law". From the wording of the provision it is clear that only the liberty of physical movement is covered. The Tribunals have dealt with deprivation of liberty as a crime against humanity only in two decisions: *Kordic* and *Krnojelac*. In *Kordic* the Trial Chamber held that the same individual conduct is required for both, the crime against humanity of imprisonment or other severe deprivations of liberty and the war crime of unlawful confinement.[295] Thus, according to the Chamber, both crimes differ only with regard to the context required for their commission.

Dealing with the war crime of unlawful confinement, *Kordic* identified two issues with regard to the illegality of the deprivation of liberty: "Firstly, whether the initial confinement was lawful. Secondly, regardless of the legality of the initial confinement, whether the confined persons had access to the procedural safeguards regulating their confinement".[296] A deprivation of liberty can only be considered lawful if both questions are answered in the affirmative. Moreover, Section 5.1(e) of Regulation 15/2000 and article 7(1)(e) of the Rome Statute clarify that the legality of the deprivation of liberty must be determined according to *international* law.

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295 *Prosecutor* v. *Kordic, supra* note 52, para. 301.

296 *Ibid.*, para. 279.

The Trial Chamber in *Krnojelac* agrees that imprisonment as a crime against humanity is established when the requirements of unlawful confinement as a war crime as set out above are met. But it also considers that imprisonment as a crime against humanity cannot only be established if the requirements of unlawful confinement are met.[297] It held that, in contrast to *Kordic*, any form of arbitrary physical deprivation of liberty of an individual may constitute imprisonment as long as the other requirements of the crime are fulfilled. However, it concluded that the deprivation of an individual's liberty is only arbitrary if it is imposed without due process of law in light of the international instruments.[298] Therefore, analysing these instruments, both judgments finally come to the same result.

If Geneva law is applicable, article 42(1) of the fourth Geneva Convention governs: "The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary". Article 43(1) provides: "Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose". Guidance as to conditions of detention is also provided by article 5 of Additional Protocol II.[299]

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297 *Prosecutor* v. *Krnojelac*, *supra* note 97, para. 111.

298 *Ibid.*, paras. 112, 113.

299 Since Indonesia has not ratified Protocol II, it may provide only guidance but is not directly applicable. Article 5 reads: "1. In addition to the provisions of Article 4, the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained: (a) The wounded and the sick shall be treated in accordance with Article 7 [*i.e.*, 'they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones'.]; (b) The persons referred to in this paragraph shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict; (c) They shall be allowed to receive individual or collective relief; (d) They shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions; (e) They shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population. 2. Those who are responsible for the internment or detention of the persons referred to in paragraph 1 shall also, within the limits of their capabilities, respect the following provisions relating to such persons: (a) Except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision

Regardless of whether there exists an armed conflict, article 9(1) of the International Covenant on Civil and Political Rights provides: "No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law". With respect to procedural safeguards, paragraph (4) of the same provision declares: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful". The ICCPR's provisions on fair trial (art. 14) apply to both the initial decision to deprive a person of liberty and its subsequent review.[300] Moreover, if a person is not deprived of liberty as a result of criminal proceedings but for preventive reasons, the fourth Geneva Convention provides for periodic review (art. 43(1)). It is obvious that the same is also required under the Covenant, since an arrest which is no longer necessary is as arbitrary as an arrest which was illegal from the outset.[301]

Finally, it is very important to note that the Working Group on Arbitrary Detention of the Commission on Human Rights has pointed out that a deprivation of liberty is not only illegal if the procedural standards have not been observed but also if it is imposed solely because the victim exercised his or her human rights.[302] Thus, an imprisonment is illegal if the victim

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of women; (b) They shall be allowed to send and receive letters and cards, the number of which may be limited by the competent authority if it deems necessary; (c) Places of internment and detention shall not be located close to the combat zone. The persons referred to in paragraph 1 shall be evacuated when the places where they are interned or detained become particularly exposed to danger arising out of the armed conflict, if their evacuation can be carried out under adequate conditions of safety; (d) They shall have the benefit of medical examinations; (e) Their physical or mental health and integrity shall not be endangered by an unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances [. . .]".

[300] *Prosecutor* v. *Kordic*, *supra* note 52, para. 303, considered only the safeguards of Geneva law, as this was sufficient to deal with the case it had to decide.

[301] *Prosecutor* v. *Krnojelac*, *supra* note 97, para 114.

[302] Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment. Report of the Working Group on Arbitrary Detention, U.N. Doc. E/CN.4/1998/44, Annex I, para. 8: The Working Group stated that a deprivation of liberty is illegal if "the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights".

was imprisoned because he or she expressed a political opinion, within the limits of the law.[303]

Although not expressly required by *Krnojelac* and *Kordic*, a deprivation of liberty must be severe to be criminal under international criminal law. A first indication is given in section 5.1(e) of Regulation 15/2000 as well as article 7(1)(e) of the ICC Statute, which read: "imprisonment or *other* severe deprivation of physical liberty" (italics added). This implies that imprisonment is a severe deprivation of liberty. Imprisonment must be understood here to be of a duration which usually applies to criminal punishment, *i.e.*, it must be measured at least in weeks. Therefore, as a general guideline, any deprivation of liberty which is at least as grave as imprisonment meets the severity requirement.

However, a closer look reveals that a deprivation of liberty can be severe not only for the duration but also for the conditions of the detention. Article 10 of the International Covenant requires that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". A relatively short house arrest would, normally, not be "severe" whereas imprisonment under good conditions for a period measured in months or in years would clearly be sufficiently grave. Finally, a few days or even a single night in a prison camp with insufficient food and hygiene, no space to sleep and inhumane treatment (like rape or beatings) may constitute the crime of severe deprivation of liberty.

5. *Torture (s. 5.1(f))*

The definition of torture in section 5.2(d) of Regulation 15/2000 is taken verbatim from article 7(2)(e) of the Rome Statute: " 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions". However, apart from section 5.1(f), Regulation 15/2000 contains three other provisions on torture: sections 6.1(a)(ii) and (c)(i), governing acts of torture as war crimes, and section 7, providing an additional definition of torture taken from the Torture Convention.[304] Article 1(1) of the Convention reads:

> For the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such

[303] International Covenant on Civil and Political Rights, *supra* note 62, art. 19; Universal Declaration of Human Rights, U.N. Doc. A/810 (1948), art. 19.

[304] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 U.N.T.S. 85.

purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions (emphasis added).

The passage in italics was omitted from the text when incorporating it in section 7.1 of Regulation 15/2000. Moreover, s. 7.1 adds the word "humiliating",[305] before "intimidating or coercing". It must be noted that s. 7.1 does not create a third type of torture (apart from torture as a crime against humanity and as a war crime). It rather defines torture "[f]or the purposes of the present regulation". While the provision must be taken into account here, the war crime of torture is not considered in this paper and will only be considered as far as it may contribute to the understanding of the crime against humanity of torture. Finally, as mentioned in the introduction, sexual offences are beyond the scope of this paper and will not be dealt with here despite the fact that they may constitute torture.

The omission of the passage in the Torture Convention requiring that the torturous conduct must be committed, instigated etc. by a "person acting in an official capacity" is consistent with the most recent jurisprudence of the ICTY. Whereas the Chambers in *Akayesu*,[306] *Celebici*[307] and *Furundzija*[308] included the Torture Convention's official capacity requirement in their definition of torture, *Kunarac* held: "[T]he presence of a state official or of any other authority-wielding person in the torture process is not necessary".[309] This decision has recently been confirmed in *Kvocka*.[310] Equally, the definitions of torture in article 7(2)(d) of the Rome Statute and in section 5.1(e) of Regulation 15/2000 do not contain the official capacity requirement.[311] It may be argued that, in crimes against humanity, the need to link the crime of torture to some public authority is met by the context element (in war crimes the armed conflict would provide for the necessary international element). In contrast, torture under the Torture Convention does not require a context element.

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305 With regard to the war crime of torture, humiliation was been identified as a possible purpose in *Prosecutor* v. *Furundzija* (Case no. IT-95-17/1-T), Judgment, 10 December 1998, para. 162.

306 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 594.

307 *Prosecutor* v. *Delalic*, *supra* note 227, paras. 473–474.

308 *Prosecutor* v. *Furundzija* (IT-95-17/1-A), Judgment, 21 July 2000, para. 111.

309 *Prosecutor* v. *Kunarac, supra* note 81, para. 496.

310 *Prosecutor* v. *Kvocka*, *supra* note 234, paras. 138–139.

311 Herman Von Hebel & Darryl Robinson, *supra* note 290.

A more problematical issue is the question of whether the commission of torture requires a certain purpose. The drafters of the Rome Statute deliberately omitted the purpose requirement from the elements of the crime against humanity of torture.[312] The negotiations of the Elements of Crimes confirm this position[313] and a footnote to the Elements notes: "It is understood that no specific purpose must be proved for [the crime against humanity of torture]".[314] Instead, the Rome Statute introduces another element to distinguish torture from other attacks on physical or mental integrity, namely the control requirement.

In contrast to the Rome Statute, all relevant decisions of the *ad hoc* Tribunals[315] have referred to article 1(1) of the Torture Convention and adopted its purpose requirement with minor changes as part of the definition of torture under customary international law.[316] However, it has also been observed that the prohibited purpose need not be the sole or main purpose.[317] In any case, as section 7.1 of Regulation 15/2000 explicitly requires purpose, the matter is settled for proceedings under Regulation 15/2000 and needs no further consideration. It should be noted, however, that the *cumulative* requirement of purpose *and* control in Regulation 15/2000 is without precedent in codifications of torture. It is a result of the combination of the definition of torture in the Rome Statute and that of the Torture Convention. In contrast, all other international instruments merely require *either* purpose *or* custody or control over the victim.

As to the content of the purpose requirement, *Kunarac* held: "[T]he following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person".[318]

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312 *Ibid.*, p. 98. The German Draft Code on International Crimes, *supra* note 199, § 8 No. 5, does not provide for a purpose requirement either.

313 Wiebke Rückert & Georg Witschel, *Genocide and Crimes Against Humanity in the Elements of Crimes*, in INTERNATIONAL AND NATIONAL PROSECUTION, *supra* note 283, pp. 59, 79–80.

314 Elements of Crimes, *supra* note 79, article 7(1)(f), fn. 14.

315 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 593; *Prosecutor* v. *Delalic*, *supra* note 227, para. 456; *Prosecutor* v. *Kunarac*, *supra* note 81, para. 483.

316 *Prosecutor* v. *Akayesu*, *supra* note 63, para. 594; *Prosecutor* v. *Delalic*, *supra* note 227, para. 494; *Prosecutor* v. *Furundzija*, *supra* note 305, para. 111; *Prosecutor* v. *Kunarac*, *supra* note 81, para. 497. The latter decision, for example, required that the torturous conduct must "aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person".

317 *Prosecutor* v. *Delalic*, *supra* note 227, para. 470; *Prosecutor* v. *Kvocka*, *supra* note 234, para. 153.

318 *Prosecutor* v. *Kunarac*, *supra* note 81, para. 485.

The jurisprudence of the Tribunals is not clear as to whether this list of purposes is exhaustive or potentially unlimited. The list in *Akayesu* seems to be a conclusive one.[319] *Kunarac*, however, states at the end of the list: "There are some doubts as to whether other purposes have come to be recognised under customary international law". The Chamber left the matter open as it considered that "the conduct of the accused [was] appropriately subsumable under the above-mentioned purposes".[320] Finally, *Celebici* states explicitly: "The use of the words 'for such purposes' in the customary definition of torture, indicate that the various listed purposes do not constitute an exhaustive list, and should be regarded as merely representative".[321] The latter holding has been confirmed by the Trial Chamber in *Kvocka* which agrees that the list is not exhaustive.[322]

In our opinion, if purpose is required at all, the Torture Convention should be regarded as authoritative, since the Tribunals referred to it when developing the purpose requirement. As the Convention's language ("such purposes as") clearly supports the view that the listed purposes are only examples, this view should prevail. It is also shared by the German Supreme Court (*Bundesgerichtshof*).[323] Moreover it is supported by the fact that the drafters of Regulation 15/2000 considered it permissible to add a further purpose (humiliation) to the list.

Finally, if the purpose of the infliction of pain is the execution of a lawful sanction, the conduct does not amount to torture. To be lawful, a sanction must be imposed as a result of a fair trial according to the international minimum standards as codified, for example, in articles 14 and 15 of the International Covenant on Civil and Political Rights. Moreover, the sanction itself must comply with general human rights law including the minimum requirements for the treatment of detained persons (cf. for example, article 10 of the International Covenant on Civil and Political Rights[324]).

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[319] *Prosecutor* v. *Akayesu*, *supra* note 63, para. 594. Similarly *Prosecutor* v. *Furundzija*, *supra* Note 305, para. 111.

[320] *Prosecutor* v. *Kunarac*, *supra* note 81, para. 485.

[321] *Prosecutor* v. *Delalic*, *supra* note 227, para. 470.

[322] *Prosecutor* v. *Kvocka*, *supra* note 234, para. 140.

[323] German Supreme Court (Bundesgerichtshof), Judgment of 21 February 2001, Case no. 3 StR 372/00; 46 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 292, 303–304; reprinted in 54 NEUE JURISTISCHE WOCHENSCHRIFT, 2728, 2731 (2001); see also Kai Ambos, *Immer mehr Fragen im internationalen Strafrecht*, 21 NEUE ZEITSCHRIFT FÜR STRAFRECHT 628, 632 (2001).

[324] Article 10(1) reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

Section 5.2(d) of Regulation 15/2000 and article 7(2)(e) of the Rome Statute require that the torturer's victim must be "in the custody or under the control" of the perpetrator. The rationale of the control requirement is the particular helplessness of a victim, who has no possibility of escape. Thus, the requirement must be given a broad sense; it is, in particular, not synonymous with imprisonment.[325]

It is clear from the wording of section 5.2(d) of Regulation 15/2000 that torture requires a certain degree of severity with regard to "pain or suffering". The Trial Chamber in *Kvocka* stated that it is the level of severity which distinguishes torture from other similar offences.[326] On the other hand, torture is also characterised by the additional elements of purpose and control. Thus, in our opinion, to qualify as torture, an act need not necessarily be more serious than acts which can be subsumed under other inhumane acts (s. 5.1(k) of Regulation 15/2000). For example, the *Furundzija* appeal considered it "inconceivable that it could ever be argued that [. . .] the rubbing of a knife against a woman's thighs and stomach, coupled with a threat to insert the knife into her vagina, [. . .] are not serious enough to amount to torture".[327] This statement at the same time confirms that the infliction of physical pain is not a requirement of torture.[328] For example, it may be sufficient to be "forced to watch severe mistreatment inflicted on a relative".[329] In this context it must not be overlooked that "consciously attacking [a particular vulnerability] may well result in greater pain or suffering for that individual than for someone without that characteristic".[330] The fact that subjective criteria are relevant in assessing the gravity of the harm inflicted was confirmed in *Kvocka*.[331]

To conclude, torture under section 5.1(f) requires the infliction of physical or mental pain or suffering which is at least as severe as would be required for other inhumane acts. The victim must be under the control of the perpetrator, *i.e.*, in a situation from which there is no escape. The perpetrator must pursue a certain purpose. These purposes include but are not limited to, obtaining information or a confession, punishing, humiliating, intimidating or coercing the victim or a third person, and

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325 Christopher K. Hall, *supra* note 290, margin no. 105.

326 *Prosecutor* v. *Kvocka*, *supra* note 234, para. 142, referring to the *Prosecutor* v. *Delalic*, *supra* note 227, para. 468, which, however, is not as explicit.

327 *Prosecutor* v. *Furundzija*, *supra* note 305, para. 114.

328 *Prosecutor* v. *Kvocka*, *supra* note 234, para. 149; Andrew Byrnes, *Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person*, in I SUBSTANTIVE AND PROCEDURAL ASPECTS, *supra* note 16, p. 210.

329 *Prosecutor* v. *Kvocka*, *supra* note 234, para. 149.

330 Andrew Byrnes, *supra* note 328, p. 209.

331 *Prosecutor* v. *Kvocka*, *supra* note 234, para. 143.

discriminating, on any ground, against the victim or a third person. If the purpose was the execution of a sanction, the requirements of torture are not met, provided that the sanction was imposed lawfully and was compatible with general human rights law.

6. *Persecution (s. 5.1(h))*

The definition of persecution in Regulation 15/2000 is, again, taken almost literally from the Rome Statute (art. 7(1)(h) and (2)(g)). The relevant provisions of Regulation 15/2000 read:

> 5.1(h): Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in section 5.3 of the present regulation, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the panels.
>
> 5.2(f): 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.

In contrast, articles 4(h) of the ICTY Statute and 3(h) of the ICTR Statute simply provide that "[p]ersecution on political, racial and religious grounds" is a crime against humanity. Thus, the definitions of persecution in the Rome Statute and in Regulation 15/2000 include three important additions to the very short provisions in the Statutes of the *ad hoc* Tribunals: first, the requirement of a connection between the persecutory act and "any act referred to in this paragraph or any crime within the jurisdiction of the [respective court]"; second, the definition of persecution as "deprivation of fundamental [human] rights"; and third, a more comprehensive notion of possible discriminatory grounds – the Rome Statute explicitly includes all grounds which are "impermissible under international law".

The Rome Statute as well as Regulation 15/2000 require a connection between the persecutory conduct and "any [enumerated inhumane] act [. . .] or any crime within the jurisdiction of the [respective court]". This element is similar to the Nuremberg Charter's *nexus* with "any crime within the jurisdiction of the Tribunal" which, however, was required not only for persecution but for all crimes against humanity. Neither the Nuremberg Charter nor the Statutes of the Tribunals contain a special connection requirement for persecution. This connection requirement must be distinguished from the separate issue of which conduct can amount to persecution. Whereas this was done in *Kupreskic*,[332] *Kordic* apparently mixes both concepts:

[332] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 573–581.

Article 5(h) does not contain any requirement of a *connection* between the crime of persecution and other crimes enumerated in the Statute. The jurisprudence of Trial Chambers of the International Tribunal thus far appears to have accepted that the crime of persecution can also *encompass acts* not explicitly listed in the Statute[333] (emphasis added).

Another issue which was considered in particular in *Kupreskic* is whether, under customary international law, a connection between the persecutory act and war crimes is necessary. After a review of the available case law it concludes: "This evolution [. . .] evidences the gradual abandonment of the *nexus* between crimes against humanity and war crimes".[334] In a second step the Chamber considered whether the broader *nexus* required in the Rome Statute (and now in Reg. 15/2000) reflects customary international law. The Chamber held that "[a]rticle 7(1)(h) [of the Rome Statute] is not consonant with customary international law".[335] The judges summarised their analysis as follows: "[T]he Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal". The *Kordic* Chamber seems to agree[336] and most other decisions have not mentioned a connection, much less required one. Thus, it may be concluded that under customary international law a connection between a persecutory act and another crime or criminal act is not necessary. Nevertheless, as both Regulation 15/2000 and the Rome Statute require it, the scope of this requirement must be examined.

The connection requirement of the Rome Statute was the result of a compromise. As von Hebel and Robinson explain, some states held the view that a connection requirement had been included in the Nuremberg Charter and, thus, should also be included in the Rome Statute. Other states argued against the connection requirement on the basis that it had not been included in any of the subsequent codifications of crimes against humanity.[337] The compromise finally achieved resulted in a twofold connection requirement. With regard to war crimes and genocide, a link to a (complete) crime is required ("connection with [. . .] any *crime* within the jurisdiction of [the respective Court]" emphasis added). However, with regard to the individual criminal acts enumerated in article 7(1) of the Rome Statute (s. 5.1 of Reg. 15/2000), the connection required need not relate to another crime against humanity but only to "any *act* referred to

333 *Prosecutor* v. *Kordic*, *supra* note 52, para. 193.
334 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 577.
335 *Ibid.*, para. 580.
336 *Prosecutor* v. *Kordic*, *supra* note 52, para. 197.
337 Herman von Hebel & Darryl Robinson, *supra* note 290, p. 101.

in [art. 7(1) of the Rome Statute]" (emphasis added). Consequently, the persecutory conduct must only be connected to a (single) murder and not to a murder which is part of a widespread or systematic attack consisting of other enumerated inhumane acts. Rather, if the persecutory conduct is sufficiently widespread or systematic, the persecutory acts themselves can constitute the context element.[338] In other words, a multiplicity of grave human rights violations (which are not, as such, enumerated among the inhumane acts), *e.g.*, severe attacks on personal property, can be transformed into the crime of persecution by a single connected murder.

A special situation with regard to the connection requirement occurs if the persecutory conduct itself consists in one of the enumerated inhumane acts, for example, a murder committed with discriminatory intent. In such a case, the persecutory murder need not be connected to another murder since the connection requirement would be met by the identity of the persecutory act (murder) and the connected act (murder). As a consequence, there exist two types of persecution. First, persecution may be an autonomous crime, if it is committed through conduct which is not enumerated among the inhumane acts but it is connected with an enumerated inhumane act. Second, persecution can be an aggravated form of an enumerated inhumane act, if the act is committed with discriminatory intent; a further connection to yet another inhumane act is not required.

Considered as a whole, the connection requirement is highly questionable. In the first place, since the disappearance of the war *nexus*, there is no connection requirement in the elements of crimes against humanity and, thus, in persecution.[339] Moreover, the *ad hoc* Tribunals have rejected a connection requirement as inconsistent with customary international law. Finally, from a teleological perspective, a single and isolated murder or beating is hardly sufficient to change the character of conduct so fundamentally as to elevate its status from an ordinary offence to an international crime.

Nevertheless, the unambiguous wording of article 7(1)(h) of the Rome Statute and section 5.1(h) of Regulation 15/2000 requires the connection. Thus it is necessary to examine further what exactly is needed to fulfil this requirement. The connection requirement stems from the war *nexus*[340] which, in its time, constituted the international element of (all) crimes against humanity, *i.e.*, the element which rendered ordinary crimes

338 *Ibid.*, p. 102.

339 See the international law instruments referred to in *Prosecutor* v. *Kupreskic*, *supra* note 14, paras. 573–581.

340 Herman von Hebel & Darryl Robinson, *supra* note 290, p. 101.

international ones. As no other possible purpose can be identified for the connection requirement of the Rome Statute, it must be assumed that it has the same purpose, *i.e.*, to single out less serious crimes from the scope of persecution.

Thus the element, despite its inappropriateness must be interpreted in a way as consistent as possible with this purpose, while, at the same time infringing as little as possible on the main objective of crimes against humanity, namely the protection of human rights. Accordingly, the function of the connection requirement should be understood as to narrow the scope of persecution to cases which are sufficiently serious so that, at least on occasion, enumerated inhumane acts other than persecution occur in connection with them. Moreover, the connection between the persecution and the enumerated criminal act need not be a causal one, as this was not required for the Nuremberg *nexus*. It is sufficient that either the goal of the persecution is somehow objectively supported by the inhumane act or that, *vice versa*, the persecution supports the commission of the inhumane act.

A mental element with regard to an objective element is required if the culpability of a conduct depends, at least in part, on the existence of the element. However, under customary international law no connection is required for the crime of persecution and, as a logical consequence, a mental element is not required either. Thus, under customary international law, such a mental element is not necessary to establish the particular culpability of a perpetrator of the crime of persecution. Therefore, it seems adequate to take the view that the connection requirement serves the sole purpose of limiting the court's jurisdiction to forms of persecution which are of an elevated objective dangerousness. Such a view would be in accordance with the purpose of the connection requirement: if a persecutory conduct is dangerous enough to support the occurrence of, for example, a killing, it does not become less dangerous only because the perpetrator was not fully aware that the killing would occur. This view infringes as little as possible on the main objective of the criminalisation of crimes against humanity, namely the protection of human rights. It can also be reconciled with section 18 of Regulation 15/2000, as the provision requires a mental element only with regard to the material element of the respective crime and not with regard to mere *jurisdictional* elements (objective conditions of punishability).

Moreover, if a mental element were to be required for the connection requirement, it would be very difficult to determine the proper standard for this mental element. For example, if the perpetrator commits the perse-

cutory act before the inhumane act occurs, *e.g.*, a killing, he or she probably is not aware that the killing will occur "in the ordinary course of events", even if the possibility may have been considered. As the latter would not satisfy the requirements of section 18.2(b) of Regulation 15/2000, a perpetrator cannot be held responsible under the Rome Statute or Regulation 15/2000 despite the fact that his or her conduct was objectively connected to a killing. Thus, the connection must be interpreted to be a merely jurisdictional requirement. The perpetrator need not be aware that the connection exists.

Clearly, all of the inhumane acts enumerated in article 7(1) of the Rome Statute or section 5.1 of Regulation 15/2000 amount to severe deprivation of fundamental rights and can constitute persecution. The ICTY has held several times that acts enumerated in its Statute can be persecutory acts, if committed with discriminatory intent.[341] Finally, it has already been noted that, in such a case, the connection requirement is always fulfilled.

However, as indicated by the definition of persecution in article 7(2)(g) of the Rome Statute and section 5.2(f) of Regulation 15/2000, *any* "severe deprivation of fundamental rights" constitutes persecution[342] if it is committed "by reason of the identity of the group or collectivity". Both elements require consideration.

To constitute a "severe deprivation of fundamental rights" a persecutory conduct must fulfil two requirements. It must be in violation of international human rights law and, simultaneously, be severe. As to the first requirement, some decisions of the ICTY, in particular *Kupreskic*, have considered that "gross or blatant denials of fundamental human rights can constitute crimes against humanity".[343] The Chamber went on to state that "[d]rawing upon the various provisions of [human rights instruments] it proves possible to *identify a set of fundamental rights* appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity".[344] This jurisprudence is in full accordance with the purpose of crimes against humanity, the protection of human rights, and also with article 7(1)(g) of the Rome

[341] *Prosecutor* v. *Tadic*, *supra* note 9, para. 700; *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 605; *Prosecutor* v. *Kordic*, *supra* note 52, para. 202; *Prosecutor* v. *Kvocka*, *supra* note 234, para. 185.

[342] See on this issue also Olivia Swaak-Goldman, *Persecution*, in I SUBSTANTIVE AND PROCEDURAL ASPECTS, *supra* note 16, pp. 58–60.

[343] *Prosecutor* v. *Kupreskic*, *supra* note 14, paras. 621 and 627; affirmed by *Prosecutor* v. *Ruggiu*, *supra* note 178, para. 21; *Prosecutor* v. *Kordic*, *supra* note 52, para. 195; similarly: *Prosecutor* v. *Tadic*, *supra* note 9, para. 703.

[344] *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 621 (emphasis added).

Statute. The *Kupreskic* Chamber even referred explicitly to this provision to support its holding.[345]

The *Kupreskic* approach was considerably modified in *Kordic*. While agreeing with the finding in *Kupreskic* that persecution requires human rights violations,[346] when identifying persecutory acts the Chamber did not refer to human rights instruments but to acts enumerated in the ICTY Statute. Moreover, it also seemed to consider that *all* criminal acts of the Statute – including those contemplated by article 3 of the Statute (war crimes) – can amount to persecutory acts.[347] This approach is problematic because some war crimes are not of sufficient gravity to qualify as persecution.[348] For example, the destruction of a police car would qualify as a war crime (*e.g.*, under article 8(2)(b) (xiii) Rome Statute) whereas it would not meet the gravity threshold of persecution. Moreover, war crimes can only be committed in armed conflict. Consequently, the *Kordic* approach either excludes acts committed in (relative) peace or it factually applies war crimes in the absence of an armed conflict, to the extent that the perpetrator had discriminatory intent. In opting for this approach, the Chamber was probably trying to find a clear definition of persecutory acts. Indeed, the principle of legality requires a sufficiently clear definition of persecution. However, for the reasons outlined above, this goal cannot be reached by the Chamber's method.

As to the second requirement *Kupreskic* clearly states: "[C]rimes against humanity, far from being trivial crimes, are offences of extreme gravity".[349] And later emphasises: "[N]ot every denial of a human right

345 *Ibid.*, para. 617.

346 *Prosecutor* v. *Kordic*, *supra* note 52, para. 195.

347 *Ibid.*, last sentence of para. 198, paras. 202–207; also paras. 208–210, where all charged acts which were not enumerated in one of the Statute's provision are excluded from the scope of persecution.

348 This is in any case true for the war crimes governed by Reg. 5.1 because according to s. 6.1 of Regulation 15/2000 the jurisdiction of the serious crime panels with regard to war crimes is unlimited. In contrast, article 8(1), which has been deleted from section 6 of Regulation 15/2000, provides that the ICC "shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large scale commission of such crimes" (emphasis added). The meaning of this "jurisdictional threshold" remains unclear (see on this issue Timothy McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the International Criminal Court*, 23 MELBOURNE U.L. REV. 635, 662 (1999); it is the result of a problematic compromise achieved during the negotiations of the Rome Statute (Herman von Hebel & Darryl Robinson, *supra* note 290, pp. 107–108).

349 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 569.

may constitute a crime against humanity".[350] Applying the maxim *ejusdem generis*,[351] it holds that a human rights violation must be at least as grave as one of the other, more concrete enumerated inhumane acts.[352] Moreover, "acts of persecution must be evaluated not in isolation but in context, by looking at their *cumulative effect*. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be termed 'inhumane' " (emphasis added).[353]

This holding has been confirmed in *Kordic*,[354] *Kvocka*[355] and *Krnojelac*[356] and it appears to be in accordance with the opinion of the *Tadic* Trial Chamber that a repeated and constant denial of fundamental rights is required.[357] In this context it must be noted, though, that both *Kupreskic* and *Kordic* emphasise that, despite the general usage of "persecution" as denoting a series of acts, also "a single act [*e.g.*, a murder] may constitute persecution" if discriminatory intent exists.[358]

But a single act can only constitute persecution if it is, as such, of sufficient gravity. An act which would constitute persecution only if considered together with other similar acts in their cumulative effect cannot be considered persecution if the other similar acts do not exist. Therefore, in conclusion, three levels of seriousness of discriminatory acts may be distinguished: acts which are sufficiently serious to constitute persecution on their own even if only one act is committed; acts which are less serious but which, together with other acts, through their cumulative effect reach the necessary level of gravity; and acts which even cumulatively are not sufficiently serious to amount to persecution.

The phrase "by reason of the identity of the group or collectivity" in article 7(2)(g) of the Rome Statute and section 5.2(f) of Regulation 15/2000 might suggest that persecution can only be committed against a group which has constituted itself as such and has, as a group, a certain identity. However, such a narrow interpretation conflicts with article 7(1)(h) and section 5.1(h). Accordingly, persecution can be committed,

350 *Ibid.*, para. 617.

351 The Latin phrase means "of the same kind". The doctrine had been applied in this context for the first time in *United States* v. *Flick*, *supra* note 17, 1215.

352 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 620; also *Prosecutor* v. *Kvocka*, *supra* note 234, para. 197.

353 *Prosecutor* v. *Kupreskic*, *supra* note 14, paras. 622, 615.

354 *Prosecutor* v. *Kordic*, *supra* note 52, para. 199.

355 *Prosecutor* v. *Kvocka*, *supra* note 234, para. 185.

356 *Prosecutor* v. *Krnojelac*, *supra* note 97, para. 434.

357 *Prosecutor* v. *Tadic*, *supra* note 9, para. 703.

358 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 624; *Prosecutor* v. *Kordic*, *supra* note 52, para. 199.

for example, by reason of the victim's gender. Persecution of women, however, does not refer to a group in the narrow sense but rather to a group understood as a multiplicity of individuals which share a common feature. The same may be the case if a government persecutes all political opponents even if they have political backgrounds as different as, for example, communists and catholics.[359] In such a case, the only common characteristic of the victims is their opposition to the government. Therefore, the term "identity of the group or collectivity" must be interpreted in a broad sense referring to the common feature according to which the victims were singled out by the perpetrators.

Some of the possible forms of persecutory acts which have been named by the Tribunals are summarised in *Kordic*:

> '[T]he seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings'; 'murder, imprisonment, and deportation' and such attacks on property as would constitute 'a destruction of the livelihood of a certain population'; and the 'destruction and plunder of property', 'unlawful detention of civilians' and the 'deportation or forcible transfer of civilians', and physical and mental injury. In *Blaskic*, the Trial Chamber found that the crime of persecution encompasses both bodily and mental harm and infringements upon individual freedom.[360]

Importantly, *Kovack* added "psychological abuses", "humiliation", and "harassment",[361] holding, for example, that psychological abuse may be inflicted on detainees "through having to see and hear torturous interrogations and random brutality perpetrated on fellow inmates".[362]

The *Ruggiu* Chamber, in a particular context, declared as inhumane acts: "[D]irect and public radio broadcasts [. . .] aimed at singling out and attacking the Tutsi ethnic group and Belgians on discriminatory grounds, by depriving them of the fundamental rights to life, liberty and basic humanity".[363] On the other hand, the *Kordic* decision held that "[e]ncouraging and promoting hatred on political etc. grounds" was not sufficiently grave to constitute crimes against humanity. However, this holding does not necessarily contradict *Ruggiu*, since, In a footnote *Kordic* explains that an act which amounts to *incitement* to persecution may be sufficiently serious to be regarded as criminal under international law.[364]

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[359] In this context it should be noted, that *Prosecutor* v. *Kvocka, supra* note 234, para. 195, correctly stated that the criterion to single out the victims of a persecution may also be a negative one (*e.g.*, all non-Serbs).

[360] *Prosecutor* v. *Kordic*, *supra* note 52, para. 198 (footnotes omitted).

[361] *Prosecutor* v. *Kvocka*, *supra* note 234, para. 190; in para. 186 the decision provides a similar list to the one developed in *Kordic*.

[362] *Prosecutor* v. *Kvocka, supra* note 234, para. 192.

[363] *Prosecutor* v. *Ruggiu*, *supra* note 178, para. 22.

[364] *Prosecutor* v. *Kordic*, *supra* note 52, para. 209, fn. 272.

Kordic also excluded the removal of Bosnian Muslims from government positions from the scope of persecution, holding that, "[t]his act would have to amount to an extremely broad policy to fit within Nuremberg jurisprudence, in which economic discrimination generally rose to the level of legal decrees dismissing all Jews from employment and imposing enormous collective fines".[365] In fact, the Nuremberg judgment when considering these and other acts[366] based its evaluation on their cumulative commission, not on a sole persecutory act (such as, for example, the imposition of a collective fine).[367] Moreover, a later decision, the *Flick case*, applying CCL 10, held with regard to violations of industrial property: "A sale compelled by pressure or duress may be questioned in a court of equity. But, so far as we are informed, such use of pressure, even on racial or religious grounds, has never been thought a crime against humanity".[368] This decision excludes certain property violations completely from the scope of persecution, regardless of whether there is a cumulative effect or not.

The *Tadic* Chamber noted in this context that there is "a limit to the acts which can constitute persecution".[369] And *Kupreskic* held: "There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone's car (unless the car constitutes an indispensable and vital asset to the owner)".[370]

However, this is not the last word on the matter of property violations. The Military Tribunal in the *Flick case*, after ruling that industrial property is not protected by the prohibition of persecution, distinguished industrial property from "dwellings, household furnishings, and food supplies". Thus, it indicated that attacks on the latter forms of property may constitute crimes against humanity.[371] Accordingly, *Kupreskic* held that the "comprehensive destruction of homes and property" which "constitutes

365 *Ibid.*, para. 210.

366 *Prosecutor* v. *Tadic*, *supra* note 9, para. 704: "The Nürnberg Judgment considered the following acts, amongst others, in its finding of persecution: discriminatory laws limiting the offices and professions open to Jews; restrictions placed on their family life and their rights of citizenship; the creation of ghettos; the plunder of their property and the imposition of a collective fine" (footnote omitted).

367 See the citation in *Prosecutor* v. *Tadic*, *supra* note 9, para. 705.

368 *United States* v. *Flick*, *supra* note 17, p. 1214.

369 *Prosecutor* v. *Tadic*, *supra* note 9, para. 707.

370 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 631.

371 *United States* v. *Flick*, *supra* note 17, p. 1214.

a destruction of the livelihood of a certain population" may be sufficient to meet the elements of persecution.[372] Similarly *Kordic* opined: "[W]hen the *cumulative effect* of such property destruction is the removal of civilians from their homes on discriminatory grounds, the 'wanton and extensive destruction and/or plundering of Bosnian Muslim civilian dwellings, buildings, businesses, and civilian personal property and livestock' may constitute the crime of persecution".[373] In contrast, the *Blaskic* Chamber was less precise:

> In the context of the crime of persecution, the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily. In the same context, the plunder of property is defined as the unlawful, extensive and wanton appropriation of property belonging to a particular population, whether it be the property of private individuals or of state or "quasi-state" public collectives.[374]

However, this statement, despite a certain broadness, clearly contemplates very widespread violations of property and therefore may be considered to be in line with the holdings in *Tadic*, *Kupreskic* and *Kordic*.

The ICTY precedents are also supported by the consideration that there are two requirements which must be fulfilled in order to regard a certain conduct as persecution: it must be a human rights violation and must, alone or cumulatively, be of sufficient gravity. As to the first requirement, there is no doubt that, at present, the destruction of homes is a clear violation of international human rights law. The right to property has been acknowledged in major human rights instruments including the Universal Declaration of Human Rights.[375] Although the International Covenant on Civil and Political Rights does not enshrine the right to property, like most other human rights instruments[376] it protects the right of every individual not to be "subjected to arbitrary or unlawful interference with his [. . .]

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372 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 631; also: *Prosecutor* v. *Tadic*, *supra* note 9, para. 707.

373 *Prosecutor* v. *Kordic*, *supra* note 52, para. 205 (footnote omitted).

374 *Prosecutor* v. *Blaskic*, *supra* note 68, para. 234.

375 Universal Declaration of Human Rights, *supra* note 303; the right is also guaranteed, for example, in the following instruments: Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 149, art. 1; American Convention on Human Rights, 1144 U.N.T.S. 123, art. 21; African Charter on Human and Peoples' Rights, 21 I.L.M. 58, art. 14; Arab Charter on Human Rights, art. 25.

376 *E.g.*, Universal Declaration of Human Rights, *supra* note 303, art. 12; European Convention on Human Rights, *supra* note 149, art. 8(1); American Convention on Human Rights, *supra* note 375, art. 11(2); Arab Charter on Human Rights, *supra* note 375, art. 17.

home".[377] Thus, at least the property which constitutes a person's home is fully protected under human rights law.

As to the second requirement, it is necessary that such destruction of homes and property, which amounts to the destruction of the livelihood of a population, be of the same gravity as other crimes against humanity. Most crimes against humanity are extremely grave as they regard attacks on life or dignity. However, there are also crimes which are slightly less serious, like, for example, the crime of imprisonment, which requires only an unlawful deprivation of liberty, or other inhumane acts which may consist in severe beatings (cf. the examples given in *Kordic*). Compared to these crimes the destruction of a victim's dwelling and livelihood seems to be at least of a similar seriousness. This is confirmed by a hypothetical example, however gruesome: If a victim has to choose between the burning of his or her house and a severe beating or a year of unlawful imprisonment it is not at all clear which alternative would be considered the lesser evil. Moreover, it must be taken into consideration that in many cultures a home is much more important than it is in western societies.

It may be added that the *Blaskic* Trial Chamber also covered the protection of religious and other buildings. It followed the ILC in holding that the "systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group"[378] may constitute persecution. Indeed, whereas such conduct probably lacks the necessary gravity if committed alone, it may contribute significantly to the overall cumulative effect of persecutory conduct if committed in connection with other acts, such as the burning of houses.

Another example for persecutory human rights violations is forcible transfer of persons from their home area. It is a human right to live, within the respective state, in the area of one's own choosing. For example, article 13(1) of the Universal Declaration of Human Rights provides: "Everyone has the right to freedom of movement and residence within the borders of each State". Article 12(1) of the International Covenant on Civil and Political Rights reads: "Everyone lawfully within the territory of a State shall, within that territory, have the [. . .] freedom to choose his residence". Similar language is found in European, African, American and Arab human rights law.[379]

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377 International Covenant on Civil and Political Rights, *supra* note 62, art. 17(1).

378 1991 Draft Code, *supra* note 33, commentary to art. 18(9).

379 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2(1); African Charter on Human and Peoples' Rights, *supra* note 371,

Also, the *ejusdem generis* maxim is satisfied by forcible transfer. As has been argued above, the requirements of the doctrine are met if important personal property is destroyed. Clearly, it does not matter for the victim whether his or her property is destroyed if he or she is removed from it by forcible transfer. Thus, forcible transfer is as grave or even graver than the destruction of homes and dwellings. In fact, deportation and forcible transfer in itself constitute a crime against humanity. Therefore, the qualification of forcible transfer as persecution remains irrelevant, unless the crime of deportation and forcible transfer is understood as having an unduly narrow scope (see above).

In conclusion, a campaign of destruction of homes (which may be accompanied by the destruction of religious buildings, schools, etc.), as occurred in East Timor, would be of sufficient gravity. The same applies for forcible transfer of persons from the area where they live. If such conduct is connected with an intentional (s. 18 of Reg. 15/2000) killing or even an intentional severe beating it can amount to the crime against humanity of persecution. It does not matter if the killing or beating remains an isolated event. Moreover, if the campaign is broad enough it may, in itself, constitute the context element.

Like all other crimes the persecutory act must also be committed with intent (s. 18 of Reg. 15/2000). However, a mental element with regard to the connection requirement is not required since it is a merely jurisdictional element. In addition to the general intent with regard to the persecutory act, the crime of persecution requires a special mental element, namely discriminatory intent.[380] The *Kordic* decision clearly and convincingly states that this mental element must be present in every single individual perpetrator. It is not sufficient that only the widespread or systematic attack, as such, be based on a discriminatory policy. The Trial Chamber argued that otherwise the distinction between persecution and other enumerated crimes against humanity would vanish and that "[s]uch an approach also would dilute the gravity of persecution as a crime against humanity".[381]

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art. 12(1); American Convention on Human Rights, *supra* note 375, art. 22(1); Arab Charter on Human Rights, *supra* note 375, art. 20.

[380] *Prosecution* v. *Kordic*, *supra* note 52, para. 217; *Prosecutor* v. *Blaskic supra* note 68, para. 235; *Prosecutor* and *Krnojelac*, *supra* note 97, para. 435.

[381] *Prosecutor* v. *Kordic*, *supra* note 52, para. 217; *Prosecutor* v. *Kvocka*, *supra* note 234, paras. 199–201, states that discriminatory intent may be inferred "from knowingly participating in a system or enterprise that discriminates on political, racial or religious grounds". In our opinion, knowing participation may constitute (part of) the evidence necessary to prove discriminatory intent. This is not, however, *as such* sufficient to prove this specific

If, for example, a member of the persecuted group, during an attack on the group, burns a church with the sole intention to use the land to build a house, such conduct does not reach the gravity necessary for an international crime because it lacks discriminatory intent. A different case would be if the perpetrator uses the attack to disguise a killing. Such an act, regardless of whether it also amounts to persecution, would constitute the crime against humanity of murder, which is much graver in itself[382] and therefore can be committed without discriminatory intent.

The discriminatory intent required by articles 7(1)(h) and (2)(g) of the Rome Statute or sections 5.1(h) and 5.2(f) of Regulation 15/2000 must, in general, be interpreted in the same way. It should be noted, however, that these provisions are slightly broader than those of the Statutes of the *ad hoc* Tribunals. Under the Rome Statute and Regulation 15/2000 *any* ground "impermissible under international law" may constitute discriminatory intent, whereas the Statutes of the *ad hoc* Tribunals require that the persecutory act be committed on political, racial or[383] religious grounds.

Finally, the nature of the discriminatory intent must be understood as a prohibition to single out a victim on impermissible grounds. The decisive reason to choose a particular victim must have been the impermissible ground. In other words, if the perpetrator would have chosen a victim without the particular characteristic, there is no discriminatory intent. On the other hand, it does not matter if the perpetrator, in addition to the discriminatory intent also has, for example, the intent to steal.

Certain persecutory acts, on their own, are not sufficiently serious to amount to persecution, yet, through the cumulative effect together with other acts, may reach the necessary gravity. As the perpetrator can understand the gravity of such acts only if he or she knows about the other acts, the knowledge of these other acts is necessary for them to be culpable for a crime against humanity. As with the knowledge of the attack, the knowledge of details is not required.

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intent. If, for example, there are reasons to assume that the perpetrator acted with the sole purpose of personally enriching herself, his or her knowing participation could not prove his or her discriminatory intent. This seems to have been acknowledged in para. 203 of the decision.

[382] *Prosecutor* v. *Blaskic*, *supra* note 68, para. 233, seems to argue that a lack of the gravity of the *actus reus* of persecution is compensated by the discriminatory intent: "The Trial Chamber finds [. . .] that the crime of 'persecution' encompasses [. . .] also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community".

[383] In article 3(h) of the ICTR Statute and article 5(h) the ICTY Statute an "and" was erroneously inserted; on this matter, see *Prosecutor* v. *Tadic*, *supra* note 9, para. 713.

7. *Other Inhumane Acts (s. 5.1(k))*

"Other inhumane acts" is the catch-all provision among the individual criminal acts. It has been held that such a provision is important as "one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes" or, as another decision put it, an exhaustive enumeration of the individual criminal acts "would merely create opportunities for evasion of the letter of the prohibition".[384] Still, the *ad hoc* Tribunals have searched for a more specific and more practicable definition of "other inhumane acts".[385]

To this end several decisions employ the *ejusdem generis* maxim which is also used to determine the scope of persecution. The doctrine has been applied by the *ad hoc* Tribunals mostly in such a way as to require that violations must be as grave as the other inhumane criminal acts.[386] This approach is criticised in *Kupreskic* as too general.[387] In addition to a sufficient gravity of the crime, which is also required by the *Kupreskic*,[388] the decision refers to international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Thus, it holds that inhuman or degrading treatment, forcible transfer of groups of civilians, enforced prostitution and enforced disappearance may constitute other inhumane acts.[389]

The Rome Statute and Regulation 15/2000 govern the scope of other inhumane acts in a more detailed way than the Statutes of the *ad hoc* Tribunals. According to article 7(1)(k) and section 5.1 other inhumane acts are "acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health". The Elements of Crimes for article 7(1)(k) require that:

1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act.

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384 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 563.

385 "There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law. It is thus imperative to establish what is included within this category". *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 563.

386 *Prosecutor* v. *Tadic*, *supra* note 9, para. 729; *Prosecutor* v. *Musema*, *supra* note 72, para. 232; *Prosecutor* v. *Kordic*, *supra* note 52, para. 269; *Prosecutor* v. *Bagilishema*, *supra* note 81, para. 92; *Prosecutor* v. *Kvocka*, *supra* note 234, para. 206.

387 *Prosecutor* v. *Kupreskic*, *supra* note 14, para. 564.

388 *Ibid.*, para. 566.

389 *Ibid.*, para. 566.

2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.[390]

A footnote clarifies: "It is understood that 'character' refers to the nature and gravity of the act".[391] It is clear that the Preparatory Commission was of the opinion that the Rome Statute should be interpreted in such a way as to require acts of similar gravity. Moreover, it is also required that the acts must be similar in nature. As crimes against humanity protect human rights, acts similar in nature to the enumerated ones would be other violations of human rights (for example, the right not to be subjected to inhumane or degrading treatment (art. 7(1), International Covenant on Civil and Political Rights), such as beatings). This was also held in *Kupreskic*. Finally, the last requirement of other inhumane acts, as codified in the Rome Statute and Regulation 15/2000, is that the conduct in question must cause "great suffering, or serious injury to body or to mental or physical health".

As to the possible forms of other inhumane acts – in addition to the examples given in *Kupreskic* – *Kordic* lists several cases: "Acts such as 'mutilation and other types of severe bodily harm', 'beatings and other acts of violence', and 'serious physical and mental injury' have been considered as constituting inhumane acts".[392]

There are acts which under customary international law amount to torture but fulfil only either the control or the purpose requirement but not both. These acts do not meet the very restrictive torture definition of sections 5.2(d) and 7.1 of Regulation 15/2000. However, since they are of gravity similar to the rest of the enumerated inhumane acts, they must, under the *eiusdem generis* maxim, be regarded as other inhumane acts. This would be the case if severe pain or suffering were inflicted for prohibited purposes to a person not under control of the torturer or to a person under his or her control but without a specific purpose. Those crimes should be punished like torture, *i.e.*, more severe than the infliction of pain or suffering which is committed neither for specific purposes nor against a person under the control of the perpetrator.

390 Elements of Crimes, *supra* note 79, Elements 1 and 2 of article 7(k).
391 *Ibid.*, footnote 30 to Element 2 of article 7(k).
392 *Prosecutor* v. *Kordic*, *supra* note 52, para. 270.

ANNEX 1 – THE ELEMENTS OF CRIMES AGAINST HUMANITY

The following lists the elements of crimes against humanity under current international criminal law. Special forms of participation or indirect responsibility such as solicitation or attempt (cf. Sect. 14.3(b) and (f) of Reg. 15) are not considered.

(I) *The Requirements of the Context Element*

(1) Widespread or systematic attack
Attack is the multiple commission of inhumane acts enumerated in Sect. 5.1. A single individual can commit multiple acts through a single conduct. A military attack is not required.
The attack must be either widespread or systematic but need not be both.

(a) systematic attack
A systematic attack is one carried out pursuant to a preconceived policy or plan. The number of victims required is smaller than for a widespread attack.
(b) widespread attack
A widespread attack is an attack which causes a large number of victims. The number of victims required is larger than for a systematic attack.

(2) Civilian population
The term population refers simply to a multiplicity of victims which is already required by the element of the "attack".
A civilian is any individual who is not an active member of a hostile armed force, or a combatant who has laid down arms or has been rendered *hors de combat*. The victim's formal status as a member of an armed force – hostile or not – bears no relevance.
A civilian population is a multiplicity of civilians. The character of a predominantly civilian population is not altered by the presence of certain non-civilians in their midst.

(3) Policy

(a) the entity behind the policy (state or organization)
The entity behind the policy must be the state or organisation which exercises the highest *de facto* authority in a given territory and can – within limits – control all other bearers of power and all individuals.
(b) the content of the policy
The content of the policy must be to commit a multiplicity of inhumane acts against a civilian population.
(c) the form of adoption of the policy
An implicit *de facto* policy is sufficient. It need not be adopted formally nor need it be declared expressly or stated clearly and precisely.
(d) the implementation of the policy
A systematic attack requires active conduct from the side of the entity behind the policy. The active identification of possible victims, providing guidance to the perpetrators is sufficient.
The policy regarding a widespread attack can be implemented by deliberate non-interference. However, the entity in question must be under a legal obligation to interfere and must be able to do so.

(4) The link between the attack and the individual criminal act
An individual criminal act is objectively part of the attack if its dangerousness is elevated by the attack. *I.e.*, if it would be less dangerous for the particular victim, had the attack not existed.

(5) Knowledge of the attack
Knowledge of the attack is awareness of the risk that there an attack exists and that the perpetrator's conduct objectively forms part of it, *i.e.*, the perpetrator must be aware of the risk that certain circumstances of the attack render conduct more dangerous than if the attack would not exist or that her conduct creates the atmosphere for other crimes. The knowledge of (further) details of the attack is not required.

(II) *The Individual Inhumane Acts*

The following elements comprise only the objective or material elements of the respective inhumane act, unless a particular mental element is required. The general requirements of the mental element with regard to the inhumane acts are dealt with below (III).

(1) Murder (Sect. 5.1. (a))
The perpetrator must cause the victim's life to end.

(2) Deportation or forcible transfer of population (Sect. 5.1. (d))

(a) Deportation or transfer
The perpetrator must transfer one or more persons from his or her chosen area of residence. It is not necessary to transfer the person(s) across a national border.
(b) Forcible
The perpetrator must apply force, threat of force or coercion to cause the transfer.
(c) Legality of the transfer
The transfer must be unjustifiable under international law.

(3) Imprisonment or other severe deprivation of liberty (Sect. 5.1. (e))

(a) Deprivation of liberty
The perpetrator must restrict the victims liberty of physical movement.
(b) Severity
The deprivation of liberty must be severe either with regard to its duration or with regard to the conditions of detention or both. Imprisonment measured at least in weeks or a single night under inhumane conditions is sufficient.
(c) Illegality of the deprivation of liberty
The deprivation of liberty must be illegal under **international** law.

(4) Torture (Sect. 5.1. (f))

(a) Infliction of physical or mental pain or suffering
Torture requires the infliction of physical or mental pain or suffering which is at least as severe as would be required for other inhumane acts
(b) Control
The victim must be in the custody or under the control of the perpetrator, she must be in a situation from which she cannot escape.
(c) Purpose
The perpetrator must pursue a certain purpose. These purposes include but are not limited to:

– obtaining information or a confession,
– punishing, humiliating, intimidating or coercing the victim or a third person,
– discriminating, on any ground, against the victim or a third person.

(d) No legal sanction
The pain or suffering may not be the consequence of a lawful sanction. However, the sanction must be compatible with general human rights law.

(5) Persecution (Sect. 5.1. (h))

(a) Human rights violation
The persecutory act consists in a human rights violation.
(b) Severity
The human rights violation must be severe. The severity threshold may be reached either by a very serious single act or by a multiplicity of acts through their cumulative effect.
If the persecutory act reaches the necessary gravity only when seen cumulatively with other conduct, the perpetrator must be aware of this other conduct.
(c) Connection requirement
In connection with the persecutory conduct an enumerated inhumane act (not a multiplicity of acts), a war crime or genocide must be committed.
The connection between the act or crime and the persecutory conduct exists if the goal of the persecution is supported by the act or crime or if the persecution supports the commission of the act or crime. A causal link is not required.
(d) Discriminatory intent
The perpetrator must choose the victim on grounds impermissible under international law.

(6) Other inhumane acts (Sect. 5.1. (k))

(a) Human rights violation
The crime of other inhumane acts consists in a violation of human rights (*e.g.*, beatings which come under the purview of article 7 of the ICCPR).
(b) Suffering, or injury to body or to mental or physical health
The result of the human rights violation must be suffering or injury to body or to mental or physical health.
(c) Severity
The suffering or injury to body or to mental or physical health must be similar in gravity with other forms of enumerated inhumane acts.

(III) *The Mental Element Required for the Individual Acts*

(a) With regard to conduct
The person must mean to engage in the conduct.
(b) With regard to consequences
The person must mean to bring the consequence about *or* be aware that it would occur in the ordinary course of events.
(c) With regard to circumstances
The person must be aware that the required circumstances exist.

ANNEX 2 – SYNOPSIS OF SECTION 5 OF REGULATION 15/2000 AND ARTICLE 7 OF THE ROME STATUTE

Section 5, of Regulation 15/2000	Art. 7, Rome Statute
5.1 For the purpose*s* of *the present regulation*, "crime*s* against humanity" means any of the following acts when committed as part of a widespread or systematic attack *and* directed against any civilian population, with knowledge of the attack:	Art. 7(1). For the purpose of *this Statute*, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
(a) Murder;	(a) Murder;
(b) Extermination;	(b) Extermination;
(c) Enslavement;	(c) Enslavement;
(d) Deportation or forcible transfer of population;	(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;	(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;	(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;	(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in s. *5.3 of the present regulation*, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the *panels*.	(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in *paragraph 3*, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the *Court*;
(i) Enforced disappearance of persons;	(i) Enforced disappearance of persons;
(j) The crime of apartheid;	(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.	(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
5.2 For the purposes *of s. 5.1 of the present regulation*: [– *omitted* –]	(2) For the purpose of *paragraph 1*: (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack;

Section 5, of Regulation 15/2000	Art. 7, Rome Statute
(a) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;	(b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(b) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;	(c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
(c) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;	(d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
(d) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;	(e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
(e) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;	(f) "Forced pregnancy" means the unlawful confinement, of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
(f) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;	(g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
(g) "The crime of apartheid" means inhumane acts of a character similar to those referred to in s. *5.1*, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;	(h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in *paragraph 1*, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

Section 5, of Regulation 15/2000	Art. 7, Rome Statute
(h) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.	(i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
5.3 For the purpose of the *present regulation*, the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.	(3) For the purpose of *this Statute*, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Synopsis of section 7.1 of Regulation 15/2000 and article 1(1) of the Torture Convention

section 7.1, Regulation 15/2000	art. 1, of the Torture Convention
For the purposes of the present regulation, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from *him/her* or a third person information or a confession, punishing *him/her* for an act *he/she* or a third person has committed or is suspected of having committed, or humiliating, intimidating or coercing *him/her* or a third person, or for any reason based on discrimination of any kind. [*omission*]. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.	For the purposes of *this Convention, the term "torture"* means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, *when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Annex 487

Pigin, E.A. History and Trends of Development of Medium-Range Mobile Surface-to-Air Missile Systems for Anti-Aircraft Defense of the Infantry / Radio Engineering and Electronics, 2005

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

UDK 621. 396. 967

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The article provides analysis of different methods to improve medium range air defense complex (MR ADC) combat survivability. It is demonstrated that introducing systems that significantly lower informational capacity into medium range air defense complexes greatly increases their survivability while operating under counter fire.

Different methods analysis of MR ADC combat units vitality increasing. It is stated that introduction of systems, decreasing combat units informational capacity greatly increases their vitality at operation in fire counteraction environment.

The end of the twemtieth century can be characterized, in terms of military weaponry, by rapid development of air attack weapons: first and foremost, unmanned weaponry. Given that the probability of using nuclear weapons in local conflicts is very low, the top military command of every country pays special attention to the use of highly effective precision weapons that ensure that selective troops as well as facilities behind enemy lines are eliminated. These types of weapons include both tactical and prestrategic ballistic missiles, cruise missiles and air ballistic missiles of different types, air launched guided missiles, and bombs equipped with targeting systems based on various physical principles.

However, some types of high precision weapons can be used, as a rule, only within the effective range of MR ADC. Therefore, when selecting ADC features based on the need to defend against air attack weapons, one can conclude that it is possible to combat these weapons using one of two approaches. One is physical destruction of the carrier before the warhead is deployed, or destruction of the warhead itself; the other includes methods that ensure destruction or failure of the high precision weapons by disrupting their targeting system or removing the weapon's source of information. An intermediary approach is a mixed set of countermeasures by air defense systems, such as blinding the target laser illumination system as well as the laser target seeking device itself.

As the target seeking systems of precision weapons are based on a number of principles of physics, air defense methods must be comprehensive, and most important, clustered into a single system of defense against high precision weapons.

For example, given that ballistic missiles have an autonomous targeting system, they should be destroyed only prior to launch or in flight, since there is no way to affect them after deployment and disguising air defense radar installations and launch sites is not very effective.

At the same time, air to ground air launched missiles and guided aircraft bombs use a wide range of physics principles and design solutions for their target seeking systems, including receiving radar data as well as thermal, radio-thermal, and optical and electronic emissions, which provide both for commanded target seeking (guided bombs with a TV target seeking system) and for self-guidance (radar, infrared, laser, etc.). For that reason defense systems against high precision weapons should cover the entire range of electromagnetic emissions (including thermal, visible light and laser).

Passive methods for data distortion or disruption at the control center of the high precision weapons may be based on different methods of disguising or concealing the data source, including reduction in the level of energy emitted: thermal, radar and visual range emissions.

For example, intermittent modes of radar emission, deactivating radar station emissions prior to deploying the high precision weapons, and resolving combat tasks using passive methods significantly reduce the probability of impact to ground systems by high precision weapons. Diverting transmitters and other devices, as well as quick exchange of air defense system ammunition, has proved highly effective as a defense against antiradar site weaponry.

High precision weapons warheads can be destroyed by powerful ammunition of medium range air defense complex using its guided air defense missile that homes in on the attacking high precision weapon's warhead or carrier which may be a tactical aviation aircraft. However, a number of high precision weapon carriers deploy their weapons out of range of ADCs. For example, the antiradar site weapon "Harm" has a range of 80 km; therefore destroying this high precision weapon's warhead if used against a self-disguised complex can be only effected by the complex's own guided air defense missile; for that reason combating high precision weapons will lead to overuse of the ADC's guidance and control resources, which may in turn lead to the weapon reaching the protected facility.

"Radiotechnika", 2005, No. 2

Later the enterprises of the USSR Ministry of Electronic Industry supplied to the Scientific Research Insititute for Instrument Making Industry packaged TWT (travelling wave tubes) amplifiers with integrated magneto-electrostatic focusing of the electron ray.

The receiving channel (after the microwave receiver) for the products developed at the enterprise in the fifties consisted of a crystal mixer, an intermediate-frequency amplifier with a detector and a video amplifier. For noise level reduction, the receiver was supplied with an AGC on noise. The noise level of such receiver did not exceed 12 dB.

The main signal selection for frequency was maintained by an intermediate-frequency amplifier, the passband of which was matched with the received signal bandwidth with the selectivity at 60 dB. The selectivity along the mirror channel without a mirror frequencies channel (MFC) was zero. Installing a MFC in a radar station at SHF receiver reduced the sensitivity for another 1...2 dB. The receiving device protection from the transmitter permeating signal was achieved with a temporary automatic gain control system (AGCS).

In the second half of 60-ies – the beginning of 70-ies, in order to provide the operation of an aircraft radar station against the background of Earth and that of a land based radar station for low-flying targets, a necessity arose for development and creation of a radio receiving device, multi-channeled for frequency and timing. That became possible due to the development of the semiconductor technologies and frequency selection devices with quartz and electromechanical filters.

The receiving devices of that type had been developed for products “ZASLON” and “BUK” and contained a few hundreds of channels in their design.

With so many channels, alongside with the great amount of labor for the product, it was quite difficult to ensure the required reliability of operation.

In the second half of 70-ies multi-channel receiving devices had been equipped with digital signal processing units. That allowed to reduce the number of analog channels and raise the radio receiving devices reliability.

The “BUK” air-defense missile system radar station SHF receiver is equipped with additional devices:

controlled digital and (or) continuous attenuators installed in SHF amplifiers inputs and outputs (to increase the range of amplitudes of the processed signals);

switchboard for SHF receiver black-out to more depth (> 80 dB) during the radar station receiver operation;

pre-selector (narrowband filters within 30.. .40 MHz on SHF amplifier input).

The low frequency part of the “BUK” product receiver was intended for the maintenance of operation in the low repetition rate (LRR) mode and quasicontinuous emission (QCE) mode; application of radio impulses linear-frequency modulation (LFM) in the LRR operation mode, which led to creation of two processing channels for the signals reflected from a target - channel QCE and channel LFM.

Thus, a receiving unit operating in the QCE mode has 320 parallel channels various in frequency.
To implement all that, quartz filters had been designed and manufactured with the frequency selection within the required bandwidth of up to 60 dB and with acceptable physical dimensions. A complicated task had been fulfilled for the QCE channel reaching the dynamic range up to 90 dB along two signals different in frequency.

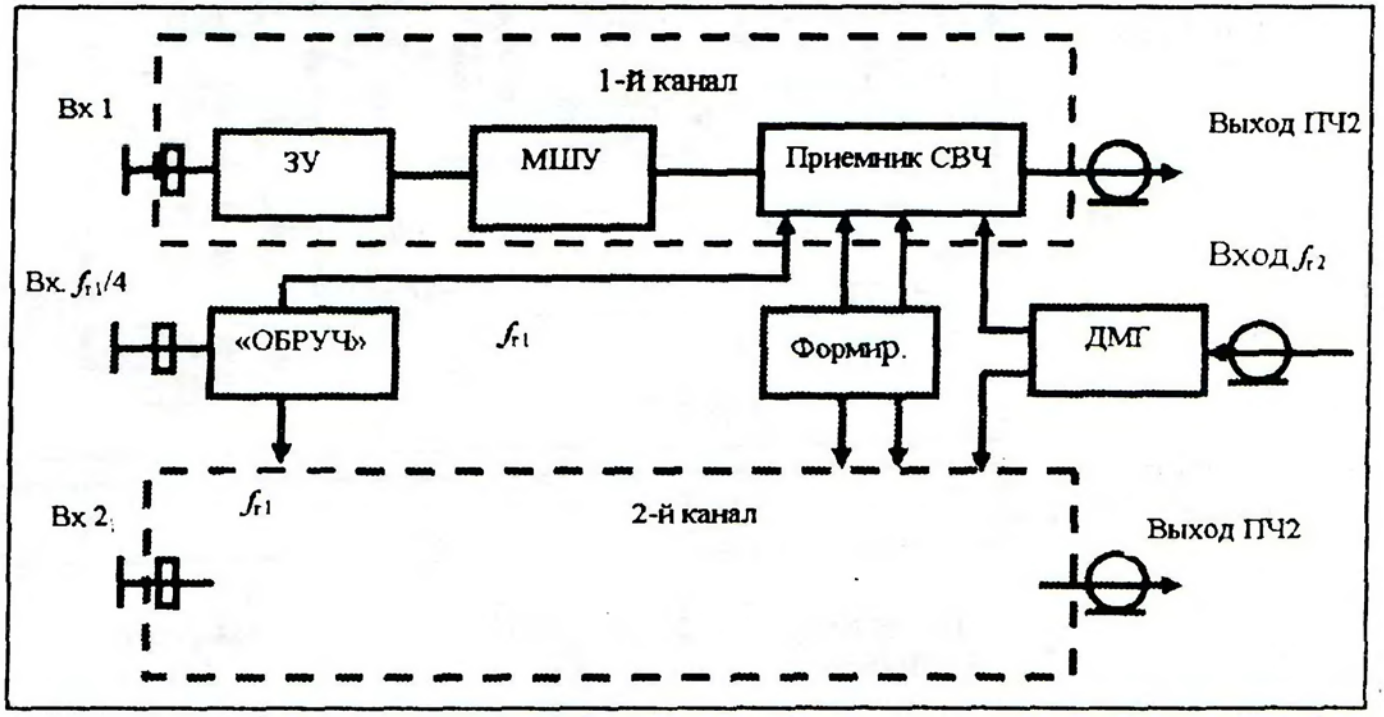
A SHF receiver with double frequency conversion had been developed for ACS (Armament Control System) “Zaslon”. The serial units Б3.07Б included waveguide devices basically. The number of waveguide devices in the Н73.07 units is approximately equal to that of the microstrip

devices. Although the degree of integration was still not high enough, that receiver had an electrically tunable input filter (ETF), which allowed tuning within the dedicated reception bandwidth with a customizable tuning step. The time of switching over from one letter to another was approximately 1,5...2 seconds.

The low frequency multi-channel receiver path of “Zaslon” product is based on digital devices, which allowed to drastically reduce the weight and dimensions, while keeping the high technical parameters.

The “Osa” product shows the greatest degree of integration, both in the SHF part of the receiving path (unit ЖР-7) and in the signal processing path (unit ЖР-3).

As shown on Figure 4, containing the “Osa” received SHF signal diagram, each signal processing channel in the unit ЖР-7 consists of 3 devices: PP-228A1 type protective device; low-noise amplifier (LNA) of own design; SHF receiver of own design.



To ensure the operation of both channels, the ЖР-7 unit includes the following devices: PS – power source; S – shaper; device “Obrouch” - frequency multiplier; second heterodyne attenuator (HE).

The “Obrouch” device input receives a signal with the frequency of ***f-fr***i/4, where ***f***-1 is the first heterodyne frequency, while a signal with the frequency of $f_{г1}$. is shaped on its three outputs.

“Radiotekhnika”, 2005, No 2

The shaper transforms digital control signals into analog ones for controlling the SHF receiver, which is a receiver with double frequency conversion and is made according to the hybrid-integration technology. It contains the first and the second intermediate carrier frequency amplifiers, carrying frequency

switchboard-attenuator (20 ±3 dB), three-cascade switchboard ПЧ1 (80 dB), discrete 4-digit attenuator ПЧ1 with the step of 1 dB (maximum inserted attenuation approximately 15 dB).
The first and the second heterodynes signal inputs are waveguide type. The waveguides communication with the symmetrical strip line is maintained through waveguide-microstrip passages. The inputs of the second heterodyne, those of the control signal, output ПС2 – coaxial connectors are part of coaxial-microstrip passages. Apart from that, a phase changer and a power amplifier may be used in the second heterodyne circuit.

Attenuators ВЧ and ПЧ1 are used for increasing the dynamic range. During the transmitter emission pulse the ЖР7 unit SHF receiver is blacked out to the depth of not less than 80 dB by a HF attenuator and a three-cascade board. The amplifiers ВЧ, ПЧ1 и 1142 have pass-band filters.

The block diagram of the receiver intermediate path of "OSA" radar targeting system (unit ЖР-3) is shown on Figure 5, where 84 MHz ±Ffl is the incoming signal frequency with Doppler increment; filters В-В and В-П – bandwidth filters providing the "air-to-air", "air-to-surface" modes; К - the key providing operation in one of the modes; ФД – phase detector; АЦП - analog-to-digital converter; MS – multiplexer; ППС – programmable signal processor; УФД – phase detective device; ФНЧ В-В and В-П – low frequency filters for the modes "air-to-air", "air-to-surface"; FT - analog-to-digital converter clock frequency; sin, cos - signal; +45°, -45° - phase-shifting circuits; МПИ - data mode and acquisition control system.

Main ЖР-3 unit specifications

No of channels 2
Intermediate frequency on outputs
1st and 2nd channels, MHz……..84 ± F_{fl}
Gain control on input, dB……..0.. .62
Operation modes: В-В "air-to-air"
В-П "air-to-surface"
Gain coefficient from input to analog-to-digital converter, dB…….30
Pass band on input:
mode В-В, MHz……. 3,3
mode В-П , MHz…… 6,9
Own noises level в Δf = 100 Hz, mkW……..0,3
Динамический диапазон по выходу блока в Δf = 100 Hz:
mode В-В, dB……95
mode В-П, dB…….50
Mirror component level, dB…….40
Harmonic signal level, dB……. 75
Масса кг, 11

Summarizing it all, the following achievements may be stated in the development of SHF signals receivers:

1. The noise coefficient (NC) has been reduced in SHF receivers from 8...8,5 dD in the product 2К12 to 4,5 dB in the product “OSA”. The work is underway for reducing the NC down to 3,0 dB in normal conditions and 3,5 Db in operation conditions;

2. The one-channel receivers mass has been reduced from 50 kg of 2К12 system to 9,5 kg of РЛПК “OSA”. At that the quality of the comparable parameters goes up significantly;

3. More than 7,5-fold reduction of the volume of one channel in a ЖР-7 unit with regard to the SHF receiver in the 2К12 product;

4. Улучшены параметры ЭМС и помехозащищенности за счет двойного преобразования частоты.

Main developments of secondary power sources

A whole series of secondary power supply units has been designed for the “KUB” product, the electrical circuits of which have been made with the use of continuous adjustment stabilizers based on electrical-vacuum devices and developed according to the structural diagram on Figure 6, representing the classical SPS (secondary power supply) circuit with the input voltage of 220V, 400 Hz (or 200V, 400 Hz) and consisting of Тр-р – insulating transformer; В - rectifier; Ф - filter; Ст-р – continuous adjustment stabilizer.

In these developments the unification principles have been used for the first time. Rectifiers and stabilizers, as a rule, were made as detachable units, which allowed to speed up the units designing and adjustment.

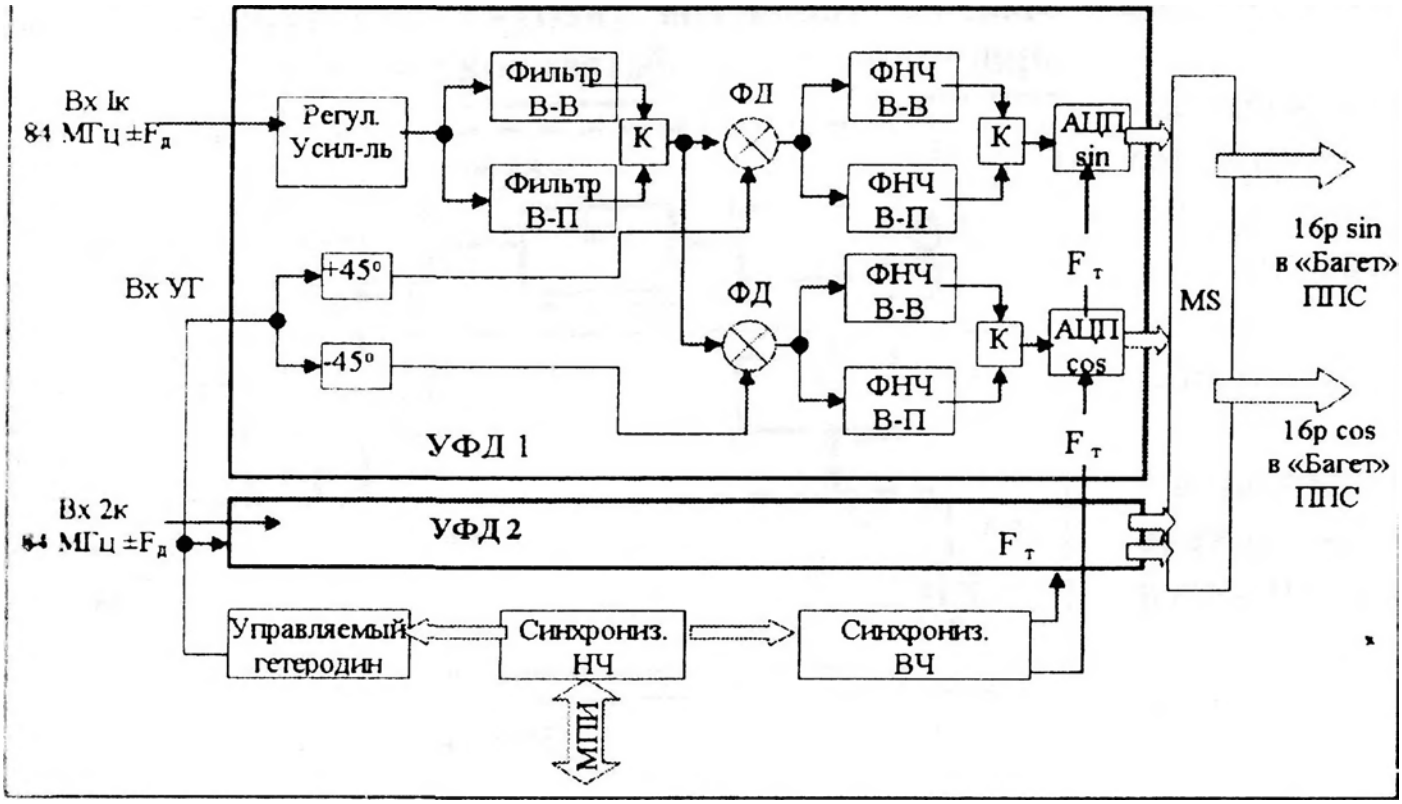


Figure 5

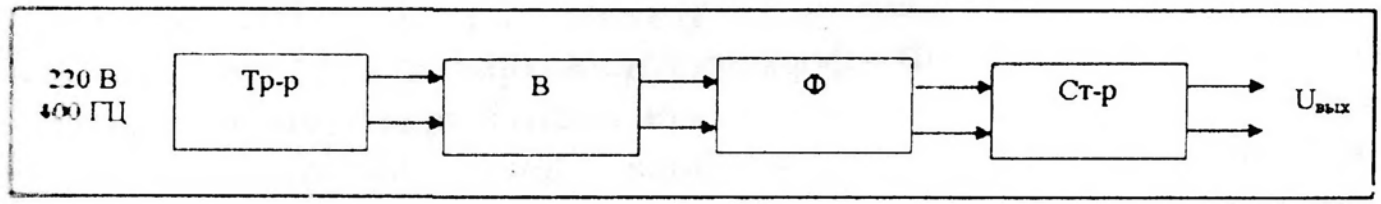


Figure 6

"Radiotekhnika", 2005, No 2

Annex 488

Zverev, V.I., et al. Weapons of radioelectronic divisions and units of the anti-aircraft defense forces. 9S18M1 radar station: Study manual. Kharkiv: KhUPS, 2005

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. The translated passages are highlighted in the original-language document. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Memorial, but stands ready to provide additional translations should the Court so require.

MINISTRY OF DEFENSE OF UKRAINE
Kharkiv Air Force University

WEAPONS FOR
RADIO-TECHNICAL
AND AIR DEFENSE UNITS

9S18M1 RADAR

Study Guide

Kharkiv
2005

UDK 623.76.621.396.6

V.I. Zverev et al.
Weapons for radio-technical
and air defense units.
Radar 9S18M1.
Study guide. –
Kharkiv:
Kharkiv Air Force University, 2005. – ?? pages.

This study guide considers the main tactical and technical characteristics of the 9S18M1 radar, its structural diagram, radar information transmission and processing tracks, as well as the composition, technical characteristics and functional principles of its main systems and tools.

The study guide is intended for students of military engineering subjects concerning the construction, operation and combat use of radar equipment, namely the 9S18M1 radar.

Illustrations to this study guide are presented in the album of diagrams and figures.

Authors: S.P. Volodko, D.A. Gryb, V.I. Zverev, A.A. Matsulevych,
I. M. Nevmerzhytsky, P.V. Ovsyannykov

CONTENTS

2. TACTICAL AND TECHNICAL DATA, TECHNICAL PARAMETERS OF A RADAR

2.1 Tactical and technical data of a radar

1. Detection zone characteristics.

The detection zone is formed by an antenna, which is a one-dimensional phased antenna grid in the location angle plane. The azimuth scan is sequential, via a rotating antenna with beam width $\Delta\beta_{0.5r} = 1.4°$; the angle location scan is sequential and discreet, moving a beam with the width $\Delta\beta\varepsilon_{0.5r} = 1.4–1.6°$ which is ensured by phased electronic scanning. This uses the location angle-row method which is explained in Figure 2.1. With the antenna rotating steadily, the beam in the location angle plane leaps (over one or several probe signal repetition periods) the width of the radiation pattern from the minimum location angle ε_{min} at the bottom to the maximum location angle at the top with the subsequent return of the beam to the bottom position.

The complete scan circle is ensured by an agreed selection of antenna rotation speeds in the azimuth plane and the scanning of the beam in the angle location plane.

The minimum value of the location angle detection zone is $\varepsilon_{min =} +0.7°$. Depending on the position, it is possible to set the minimum location angle discreetly at +0.5 or +1 of the radiation pattern width in the location angle plane in designated sectors with the automatic processing of set location angles. It is possible to pre-set up to 10 such sectors with different values of the minimum location angles.

The maximum value of the detection zone location angle $\varepsilon_{max} = 41°$ (in the initial basic mode, in which 30 angle location beam positions are formed), or $\varepsilon_{max} =55°$ in the designated missile defense (missile detection) zone with the width of up to 120°. This forms 40 location angle beam positions.

An azimuth scan in different operational modes (in various jamming situations) may be even or evenly changing with deceleration when scanning specific sectors.

Detection display range is 160 km. Detection range for MiG-21 type aircraft at 100 m is 35 km, and at 1 to 25 km – 100 km. The gap-free detection height for MiG-21 type targets is 25 km.

2. Make-up of output information.

Radars use manual (visual), semiautomatic and automatic methods of reading information. During visual reading, the operator measures the azimuth, the distance slope, the height and the friend or foe identification of the target. The semiautomatic reading of target coordinates in semiautomatic tracking strobes provides for the locking and tracking of no more than 6 targets at a time. During automatic reading, information about the air situation and the radar position is transmitted using data transmission equipment. The data transmission throughput capacity is 17 messages per second.

The range of data transmission to the plan position indicator repeater is up to 500 km, to the automated surface to air 9S470 command post – up to 5 km, and to the command post and launcher using the telecode comms line – up to 30 km.

3. Precision characteristics.

The standard deviations of coordinate measurements are as follows:

For X and Y plane coordinates – 600 m at 10–50 km distances, 1000 km at 60–90 km distances and 1100 m at 90–160 km distances and 1000 km height.

4. Differentiating power at 400 m distance, according to azimuth and angle location 3–4.5°.

5. Information output discretion is determined by the speed of the area scanning according to the azimuth and angle location and ranges between 4.5 and 18 c.

6. Jamming protection is provided by:

The high energy potential of the long-term probing signal;

using the wide-band chirp probing signal with the optimal processing (congestion) of echo signals;

protection from fixed stop and frequency-targeting interference – by automatically changing frequency according to the outcome of interference level analysis in the reception track with output to an interference-free frequency. If this is not possible, this is achieved by an incoherent accumulation of signals in designated sectors with scanning deceleration and emission of several probing impulses in the direction of each interference (n = impulse 2, 4, 8, 16 and 32);

with a high level of noise interference, when this is received by the lateral lobes of the antenna radiation pattern – by using a single-channel interference compensator. The autocompensator's interference suppression factor is 16 dB;

with insurmountable interference, if it exceeds its own noise by 20dB on the main channel, jamming detection is performed according to the azimuth and angle location and displaying the Detection mark on the display screen;

from fast-changing frequency-targeting jamming – by randomly changing the frequency or introducing a scan deceleration sector to the NS-1 (protection from changing interference) program with two probes in one location angle beam position with subsequent processing using the 1 of 2 criterion;

protection from respective impulse interference is provided by changing the radar's carrier frequency from impulse to impulse.

The following is used against non-synchronized jamming:

NS-2 scanning (protection from non-synchronized interference) in a designated sector with two probes in each location angle position with subsequent processing according to the 2 out of 2 criterion;

randomly changing the carrier frequency;

changing the frequency slope of the internal chirp impulse modulation of the probing signal to the opposite;

for any impulse interference, for which the internal impulse modulation law does not correspond to the echo signal modulation law, a rigid boundary is used in front of the optimum chirp signal filter, according to the “wide band – restriction – optimum filter” scheme.

Protection from passive interference is provided by the moving target selection scheme, which uses the coherent-impulse method with periodic signal compensation at the intermediate frequency. The moving target selection system works in two modes: S1 and S2.

The S1 mode is intended for suppressing signals from local objects. It is only used in the first (lower) beam throughout or in sectors according to the azimuth. The range of the S1 strobe is 40 km. The local object signal suppression factor is 40 dB.

The S2 mode is used for suppressing signals from local objects, mobile passive interference and weather formations. The mode is set in azimuth sectors, where there is interference. It is set automatically in lower beams (10 or 6 beams); for other beams the S2 mode is set manually by the operator according to the location angle. The passive interference suppression factor is 26 dB.

With intensive passive interference, protection modes may be provided in several repetition periods (2 or 4) for each location angle direction with the accumulation of echo signals after moving target selection. The S2 strobe range is 75 km.

The following is used to protect the radar from anti-radar missiles:

changing the frequency slowly using a specific program with the frequency change period 1–1.5 s;

switching emission on and off after the “flickering” scan period;

a ban on emissions in the sector.

7. Mobility.

It takes no more than 5 minutes to deploy and wind up a radar. Radars provide for the automatic deployment and winding up of the antenna device when changing positions from locked to standby and vice versa. If need be, the antenna can be deployed and wound up manually.

Highway speed – 65 km/hour, dirt road speed – 35–45 km per hour;

Surmountable wading depth – 1 m;

Surmountable moat depth – 1.5 m;

Reserve mileage per hour of gas turbine engine operation – 500 km;

Radar mass – 34 tons.

8. Viability is secured by ensuring personnel’s living conditions and is achieved as follows:

By providing collective personnel protection from radioactive, chemical and biological contamination;

Annex 489

Design, maintenance, and combat use of the combat control center of the Buk-M1 SAM system. Part II. 9S470M1 Combat Control Center: Study Manual / Zubrytsky, H.M., Kyryliuk, A.S., Lukyanchuk, V.V., Khil, P.Ya. // Kharkiv University of the Air Force. Kharki

This document has been translated from its original language into English, an official language of the Court, pursuant to Rules of the Court, Article 51.

Pursuant to Rules of the Court Article 51(3), Ukraine has translated only an extract of the original document constituting this Annex. In further compliance with this Rule, Ukraine has provided two certified copies of the full original-language document with its submission. The translated passages are highlighted in the original-language document. Ukraine has omitted from translation those portions of the document that are not materially relied upon in its Memorial, but stands ready to provide additional translations should the Court so require.

MINISTRY OF DEFENSE OF UKRAINE
KHARKIV AIR FORCE UNIVERSITY

G.M. Zubrytsky, A.S. Kyrylyuk, V.V. Lukyanchuk, P.Y. Khyl

CONSTRUCTION, TECHNICAL OPERATION AND COMBAT USE OF THE BUK-M1 SURFACE TO AIR MISSILE SYSTEM COMMAND POST

Part II

THE 9S470M1 COMMAND POST VEHICLE

Study Guide

Edited by P.Y. Khyl

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2005

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Reviewers: Prof I.O. Kyrychenko, Honored Scientist, Doctor of Military Science
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Construction, technical operation and combat use of the BUK-M1 surface to air missile system command post. Part II. The 9S470M1 command post vehicle: Study guide / G.M. Zubrytsky, A.S. Kyrylyuk, V.V. Lukyanchuk, P.Y. Khyl // Kharkiv Air Force University. – Kharkiv, 2005. – 75 pages.

The study guide is intended for those studying the command post tools of the BUK-M1 surface to air missile system and for those at university studying medium-range surface-to-air missile systems.

The guide describes the construction and functional principles of the 9S470M1 command post vehicle as well as the fundamentals of its operation and combat use.

The content of the guide corresponds to modules II and III of the subject syllabus “The construction, technical operation and combat use of information technology and target guidance tools in the BUK-M1 surface to air missile system.

During the study of the book it is advisable to use the album of figures and diagrams issued under the same title.

Illustrations: 68 (issued in a separate album), tables: 3, bibliography: 9 titles.

Approved for publication by Chair No 303, Kharkiv Air Force University.
Transcript No 8 of 9 December 2004.

GENERAL CHARACTERISTICS OF THE 9S470M1 COMMAND POST VEHICLE

1.1. CP purpose and tasks

The 9S470M1 command post vehicle is a component of the surface-to-air missile battalion command post armed with the 9K37M1 BUK-M1 surface to air missile system and intended to provide automated control over its combat operations both during autonomous operation and as part of a surface-to-air missile battalion.

The CP equipment is located in the cabin of the self-propelled tracked armoured vehicle GM-579A and provides automation of the following tasks:

putting the battalion's units into different stages of readiness to perform assigned tasks;

receiving, processing and displaying information about the airborne environment and combat management commands received from the brigade command post equipped with the Polyana-D4 automated system, or from the air-defense division command post (standard command staff vehicles MP22 and SM MP25);

receiving, processing and displaying information about the airborne environment received from the 9S18M1 acquisition radar and the SPM 9A310M1 launchers;

receiving and displaying data on missile presence on board SPM launchers and the 9A39M1 launcher-loaders;

receiving and displaying data on the location and condition of surface-to-air missile system tools;

control over SPM responsibility sectors according to azimuths and location angles;

target allocation and the formation and output of target guidance to SPM launchers;

control over fire assignments;

control over combat tool operational modes in the surface to air missile system and SPM emission in the presence of active enemy interference and anti-radar missiles;

organizing the system's operation under special operational conditions (when an SPM launcher is not fully operational, during the launch of missiles with "foe" illumination, when an SPM is operating as a launcher-loader);

reporting combat readiness and combat operations to command post;

geolocation preparations for the battalion's fire control;

documenting combat processes during enemy air attack;

simulating airborne environment for command post crew training;

monitoring the operation of CP combat tools.

1.2. CP composition and location. Combat crew.

The following equipment can be identified as part of the CP vehicle according to its functional purpose (Figure 1.1).

1. *Data processing and exchange tools* – a digital computer system including:

digital computing unit (two Argon-15A computers);

data input-output device (BDM1-01 cabinet);

interface between the data input-output device and the automated workstation controls (BD-2 unit).

The digital computer system is the main automation tool for the processing and displaying of the airborne environment and the condition of the surface-to-air missile battalion's fire tools, as well as for the formation and implementation of target allocation recommendations, the management of the SAM battalion's combat operations and the provision of guidance information exchange with external and internal system users.

2. *Information display and management tools:* four workstations - 1DM, 2DM and two 3DM. Each automated workstation (AW) contains a D-4T1 display unit, management controls, coordinate scanning and communication controls and the BD-5 command input-output units. In addition, the SAM battalion commander AW includes a D-12-1 digital dashboard displaying: missile presence on each SPM launcher and PZU launcher-loader, the illumination transmitter letters set and installed on the SPM, while the chief of command post vehicle AW includes the D-2-1 control for initial data input into the EOM long-term memory device with the possibility of data replacement.

The information display and management tools are intended for the visual displaying of information on the airborne environment, the location, conditions and combat operations of the SAM battalion fire tools, EOM recommendations on target allocation to SPM launchers and the commands and instructions received from the higher-level automated command post.

3. *The operational command communication and data transmission tools* are intended for exchanging operational and tactical information with the SAM brigade CP and with the battalion's units, conducting conversations with CP crew, exchanging bilateral telecode information with the brigade CP and the SPM launcher and receiving telecode information from the fire control radar.

Communication and data transmission tools include:

AI-011 data reception and transmission equipment and the mobile communication center radio station – for bilateral telecode information exchange with the SAM brigade CP;

AI-011 reception equipment for airborne environment data incoming from the fire control radar and the R-123MT (R-111) radio station;

the 9S624 telecode equipment – for the bilateral exchange of telecode information with the SPM launcher;

the 9S623 system for speech communication between the CP vehicle crew, the fire control radar and the SPM launcher – to ensure reception and transmission of verbal information by the two R-123MT radio stations, the reception and transmission of individual and circulated coded signals and the ALARM signal;

the 9S726 internal telephone communication system and switchboard – to support individual conversations between CP crew and to control the speech communication equipment during verbal information exchanges via radio and cable between the crew of the

SPM fire control radar and the SPM launcher. In addition, the internal communication system and switchboard records verbal information using the on-board recorders MS-61M and the AM3-92RK audio recording equipment;

the FL-92V antenna needle device;

cable communication lines.

4. *Navigation equipment for geolocation and orientation* comprising TNA-4-1 tank navigation equipment, the VOP-3-1 panoramic optical sight and the PAB-2M aiming circle.

The TNA-4-1 is intended for continuous calculation and display of current CP coordinates on the topographic map to 1:50 000 or 1:100 000 scale during transit, for the determination of the self-propelled vehicle's longitudinal axis direction angle and the destination point direction angle, for calculating the right-angled components of the CP parallax relative to the set starting (reference) point – the starting point in the battalion's unified coordinate system.

The VOP-3-1 and the PAB-2M are used for determining the self-propelled vehicle's longitudinal axis direction angle and inputting it into the TNA-4-1 equipment before transit.

5. *The documentation equipment* is intended for the recording and playback of information about the airborne environment and the condition of the SAM battalion's combat tools, the operational command information in the guidance grids, the registration of tracked target information on rolled paper, the coordinates of the SPM fire control radar and launcher, the SPM launcher's technical condition, missile presence on the SPM launcher and the launcher-loader, target reallocation results and the SPM launcher's fire assignments in real time.

The equipment comprises:

audio recording equipment AM3-92RK including two audio recording and playback devices - the 74A-100 units - and a remote control – the 74A-200 unit;

two MS-61M flight recorders;

the P-115P telegraphic letter printing device (RTA-7MK rolled letter-printing automated start-stop electronic telegraphy device)

6. The simulation equipment is intended for learning, practicing and improving main combat operations by CP crew. It supports CP crew training by simulating the airborne environment and the SPM launcher's combat operations.

To support CP crew learning and training, the mathematical support digital computer provides:

electronic simulation of airborne environment data received by the CP from the SPM fire control radar;

electronic simulation of SPM launcher operations in various operational modes;

re-enactment of actual airborne environment recorded in advance onto the AM3-92RK tape and supporting crew operations according to self-propelled fire control radar data (SIMULATION 1 mode);

re-enactment of the full airborne environment, the throughput of commands and reports and SPM launcher actions with missile departure simulation (SIMULATION 2 mode)

7. *The life support system* is intended to create the necessary air temperature, cleanliness and humidity in the CP vehicle in different climate conditions and to protect from WMD.

The system comprises:

filter and ventilation system FVU-200;

heating and ventilation system OV-65;

two MK-5 air conditioners;

individual fans;

radiation and chemical reconnaissance tool GO-27;

special treatment tool set DK-4;

fire extinguishing tools (UA PPO automatic air defense fire extinguisher)

In addition, the CP is equipped with the TNPO-168 observation tool and the TVNE-4PA night vision tool for local observation.

8. *The power supply tools* are intended for supplying power to CP equipment during the operation of the gas turbine engine, the self-propelled drive engine or an outside power source.

The power supply tools comprise:

two AC generators BG-31 (main and reserve) which can work both off the gas turbine engine or a self-propelled drive engine;

DC generator OG-10;

BU-31 rectifier;

remote controls, switches and power system protection equipment;

four 6ST-140P 24V batteries with the volume of 70A per hour;

gas turbine engine 9I56.

The CP equipment is located in the armored cabin of the self-propelled tracked vehicle GM-579A.

The location of the main CP tools and combat crew is shown in Figure 1.2.

Combat crew composition (Figure 1.2):

battalion commander (1);

CP crew chief (2);

senior operator (3);

Annex 490

Marja Lehto, Indirect Responsibility for Terrorist Acts (2009)

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
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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*

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.

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.