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ANDA BIMBERE

# International terrorism: Problems and solutions with regard to prosecution of suspected terrorists

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**About the author:**

**Anda Bimbere** graduated from the Department of Law of University of Hertfordshire in 2000 and obtained her LL.M in International and European Law from the Riga Graduate School of Law in 2002. She is working in the Riga Graduate School of Law as an assistant lecturer in International and Human Rights Law.

The RGSL's Working Papers under the rubric 'New Authors, New Topics' introduces the work of Anda Bimbere. The current publication is based on her Master Thesis submitted in fulfilment of requirements of the Masters' Degree in International and European Law at RGSL.

The aftermath of 11 September 2001 witnessed an increase in research and publications on different issues related to the problem of terrorism in international law. The author has also been influenced by the events and the world-wide debate on this problem. This is her contribution to the debate. The specific issue tackled in the Master Thesis and the current publication is of particular importance. The question is: In the absence of agreement on a general definition of international terrorism, can individuals suspected of committing acts of terrorism be prosecuted under international law? Having addressed the problems of the definition of terrorism and examined the available domestic and international mechanisms, the author comes to the conclusion that "it would seem that international criminal law contains no clear answers as to how to deal with the problems related to international acts of violence commonly attributed to terrorism. However, such a view is neither appropriate nor desirable".

Even if the focus of attention is legal definitions and procedures, a broader perspective remains on the author's mind: What are the causes of acts of international terrorism?

RGSL is pleased to present this academic contribution to the current debate in international law on the problem of international terrorism.

**Ineta Ziemele**

*Söderberg* Professor of  
International Law and Human Rights at the RGSL

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## INTRODUCTION

International law, so the argument goes, is relatively incapable of supplying justice, which is understood as having three forms - retributive, corrective and distributive.<sup>1</sup> It is further claimed that international peace and security is put in jeopardy because international law is unable to supply corrective justice (which requires that the wrongdoer compensate the victim for the wrong inflicted). This assertion allows the suggestion that:

[...] nationalists, terrorists and guerrilla fighters are behaving perfectly logically and consistently from their own point of view. They are responding to the inadequacies of the international legal system.<sup>2</sup>

This leads one to the understanding that until international law finds a way to supply this 'corrective justice', the world of 'underdogs' (including terrorists) will thrive.

It may very well be that international law in its present state cannot, indeed, supply corrective justice, which raises the question: Can international law supply any justice at all?

The response of the US to the 11<sup>th</sup> September attack triggered lively debate as to its appropriateness. Some of the questions that were raised in this debate were: Was there no other way to deal with those who masterminded the attack? Could they have been punished according to existing legal norms? What norms, indeed, are there to deal with such attacks?

The purpose of this work is to address some peculiarities of that branch of international law referred to as 'international criminal law'. What exactly is terrorism? Is it an international crime? What legal problems does terrorism create? The first part of this work will look briefly at these questions to set a background for the discussion which follows in the second part.

This second part will be devoted to an assessment of the adequacy of the mechanisms for punishing those who perpetrate acts of terrorism in the international

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<sup>1</sup> For a thought-provoking insight into this argument, see L.Brilmayer, "International Justice and International Law", *98 W.Va.L.Rev. (West Virginia Law Review)*, p.611.

<sup>2</sup> *Id.*, p.653.

arena. It will be suggested that there are two options available for prosecution. One of these is the option of domestic prosecution, while the other is international prosecution. These two options will be discussed, and the problems relating to each will be illuminated. The work will conclude with a recommendation as to the most suitable avenue for prosecution of those who commit acts of international terrorism in the future.

This work should be read with the following reservation in mind. The provision of retributive justice is, no doubt, an important part of international law, and international justice for that matter. However, it is clear that punishing terrorists will not, of course, eradicate the problem of terrorism. What is required to reduce terrorist acts is a whole complex of measures both domestic and international, the assessment of which is far beyond the scope and purpose of this paper; many indeed, outside the legal sphere.

## PART ONE. IDENTIFYING THE PROBLEM

The precise scope and definition of international criminal law is under some dispute.<sup>3</sup> However, regardless of the precise definition of international criminal law, the nucleus of it is the notion of criminal responsibility.

### International criminal law

#### i) Criminal responsibility

Generally, the notion of criminal responsibility of States is rejected.<sup>4</sup> When one speaks of State responsibility, one usually refers to civil responsibility, namely, a breach of a legal duty on the part of a State vis-à-vis another State<sup>5</sup> - the classical theory of State responsibility. The developing theory of State *criminal* responsibility is much more controversial and there seems to be no clear agreement as to whether or not a State can be criminally responsible for an international crime, despite the suggestion of the International Law Commission (ILC) to that effect.<sup>6</sup> Apart from sporadic suggestions by academics<sup>7</sup> there seem to be no sources of international law that would point towards the existence of criminal responsibility of States.<sup>8</sup>

The main idea behind the denial of State criminal responsibility is the fact that crimes are committed by people, not by abstract entities. The principle of individual responsibility is a general principle of criminal law and, by analogy, this extends to

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<sup>3</sup> See, for example, L.S.Sunga, *The Emerging System of International Criminal Law*, The Hague, Kluwer Law International, (1997). For a slightly different perspective, see E.M.Wise, "Terrorism and The Problems of an International Criminal Law", in J.Dugard and Ch. van den Wyngaert (eds), *International Criminal Law and Procedure*, Aldershot, Dartmouth (1996); G.Schwarzenberger, "The Problem of an International Criminal Law"; S.R.Ratner, "The Schizophrenias of International Criminal Law", *Texas International Law Journal*, Spring 98, Vol. 33, Issue 2, p.251.

<sup>4</sup> See, for example, G.Lysén, *State Responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, Uppsala, Iustus Förlag AB, (1997).

<sup>5</sup> See generally, *id.*

<sup>6</sup> Article 19, *Draft Articles for a convention on State responsibility provisionally adopted by the International Law Commission on first reading during its session in 1996*, UN GA, Official Records, Fifty-first Session, Supplement No.10 (A/51/10). This is especially so in the light of the *Draft articles on Responsibility of States for internationally wrongful acts*, 2001, where any reference to 'criminal responsibility' has disappeared. UN GA, Official Records, Fifty-sixth Session, Supplement No.10 (A/56/10).

<sup>7</sup> B.E.Berg, "The 1994 I.L.C. Draft Statute for an International Criminal Court: A Principled Appraisal of Jurisdictional Structure", *Case Western Reserve Journal of International Law*, Spring 1996, Vol. 28, Issue 2, p.221.

<sup>8</sup> M.C.Bassiouni, "The Sources and Content of International Criminal Law: A Theoretical Framework" in M.C.Bassiouni (ed), *International Criminal Law. Crimes*, Ardsley, New York, Transnational Publishers, Inc. (1999), pp.27-31 [hereinafter "The Sources and Content of International Criminal Law"].

international criminal law. The first to expressly pronounce this was the International Military Tribunal (IMT) who recognised that the only way to enforce international criminal law was to punish individuals. The principle is now clearly established in international criminal law and there is no ambiguity about it.<sup>9</sup>

A much more ambiguous question is that of international criminal responsibility of groups and organizations, especially so in the light of the ongoing 'war against terrorism'. The IMT recognised international criminal responsibility for groups and organizations, but it required either 'a commission of a criminal act by the individual member or that the membership was with the knowledge that the organization was used for the commission of crimes'.<sup>10</sup> To hold an individual criminally responsible for passive membership of an organization implies guilt by association, a principle that is rejected by most legal systems as 'fundamentally unfair'.<sup>11</sup> Apart from the IMT approach, which is an academic point of reference today<sup>12</sup>, there is no clarity yet as to whether or not a group or organization can be held criminally responsible. Indeed, taking into account the principle that criminal guilt is personal and, by analogy, adding the arguments voiced against criminal responsibility of States, it is difficult to see why individual criminal responsibility would not suffice for international criminal law purposes. In addition, the problem with criminal responsibility of States as well as groups and organizations is more evident when one assesses the substance of 'international crime'.

## ii) 'International crime'

'The purpose of any definition of criminal behaviour is to clearly state the proscribed conduct for which a sanction is to be applied in order to prevent and control such harmful behaviour'.<sup>13</sup> So, we need a 'proscribed conduct' and a 'sanction' for a definition of a crime to be established.<sup>14</sup> This straightforward concept becomes slightly more complicated when applied to international criminal law.

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<sup>9</sup> M.C.Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague, Kluwer Law International, (1999), pp.510-556.

<sup>10</sup> M.C.Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, p.24.

<sup>11</sup> Id.

<sup>12</sup> The IMT was created for a specific purpose and was not meant to be applied to future crimes.

<sup>13</sup> M.C.Bassiouni, "International Terrorism", in M.C.Bassiouni (ed), *International Criminal Law. Crimes*, supra note 8, p.781.

<sup>14</sup> This will be a rather technical description of crime, avoiding philosophical discussion on the nature of criminal law and penal theories. For an interesting account on these, see, generally, L.Brilmayer, "International Justice and International Law", supra note 1, p.611.

First, two alternative elements need to be added: an international element, where the conduct in question reaches a level of seriousness that affects the world community; or a transnational level, where the conduct in question affects more than one State.<sup>15</sup> Both of these elements can be broadly included under the description of an 'interest protected by international law'.<sup>16</sup>

Second, it is asserted that not only must the prohibited act violate or threaten an interest protected by international law, but it also 'must be committed with intent to violate the interests involved [...], and with knowledge that the violation was prohibited by law'.<sup>17</sup> This complicates the issue greatly, especially with regard to terrorism, as illustrated in the discussion below. *Mens rea* is difficult to prove in any (domestic) criminal law and the same applies to international criminal law. Moreover, with regard to 'international terrorism' *mens rea* has sometimes been confused with the issue of motivation - another subjective state of mind that, it is suggested, should be abandoned with regard to international terrorism.<sup>18</sup>

To sum up, for conduct to be deemed an 'international crime' the following requirements ought to be met: (1) clearly stated (2) proscribed conduct, committed with (3) intent, affecting either (4) international or transnational interests with (5) a sanction to be applied.<sup>19</sup> This simplified definition includes the principles of legality<sup>20</sup> required in the observation of fundamental justice, which, arguably, is the primary purpose of criminal law.<sup>21</sup>

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<sup>15</sup> M.C.Bassiouni, "The Penal Characteristics of Conventional International Criminal Law", in J.Dugard and Ch. van den Wyngaert (eds), *International Criminal Law and Procedure*, supra note 3, p.330.

<sup>16</sup> For a more detailed breakdown of internationalisation of crimes, see M.C.Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, p.96.

<sup>17</sup> Q.Wright, "The Scope of International Criminal Law: A Conceptual Framework", 15 *Va.J.Int (Virginia Journal of International Law)*, p.569.

<sup>18</sup> M.C.Bassiouni, "International Terrorism", supra note 13, p.783

<sup>19</sup> There are other definitions of an 'international crime', for instance, by the International Law Commission omitting elements (1), (3), (5), in E.M.Wise, "Terrorism and the Problems of an International Criminal Law", supra note 3, p.55. Yet another definition, a broader one, can be found in M.C.Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, p.98. Bassiouni defines international crimes as "[t]hose international criminal law normative proscriptions whose violation is likely to affect the peace and security of human kind or is contrary to fundamental humanitarian values, or which is the product of a State action or State-favouring policy".

<sup>20</sup> Namely, *nullum crimen sine lege* or no crime without a law and *nulla poena sine lege* or no punishment without a law.

<sup>21</sup> For another discussion on what is an international crime and how an international crime is created, see M.C.Bassiouni, "The Penal Characteristics of Conventional International Criminal Law", in J.Dugard and Ch. van den Wyngaert (eds), *International Criminal Law and Procedure*, supra note 3, pp.330-331. This analysis also implies that the first two elements described above are necessary conditions for the existence of an international crime.

This leads us to the next part of this discussion, namely, to the problems related to terrorism. First, it will be assessed, whether, according to the definition above, terrorism is an international crime, and some conclusions will be put forward. Next, the issue of definition of terrorism will be discussed. Finally, a crystallization of the problems related to terrorism will be presented with a view to addressing those problems in the second part of this work.

## Terrorism

### i) Is terrorism an international crime?<sup>22</sup>

A large number of crimes are deemed 'international crimes'.<sup>23</sup> It is noted that all these offences have certain things in common. Namely, in the criminalization process of the prohibited conduct, the international instruments follow a three-step process:<sup>24</sup> first, the crimes are defined; second, criminal responsibility is placed on the perpetrator; and third, there is an authorization of all States to prosecute the crime and often the formula 'either prosecute or extradite' is employed.

The question then arises: how does the above process, in addition to the definition of 'international crime' apply to terrorism? The answer is simple indeed, perhaps the only simple answer in relation to the problems caused by terrorism. Except for the European Convention on the Suppression of Terrorism<sup>25</sup>, there does not seem to be a single agreed-upon definition of terrorism in any of the international instruments thus far.<sup>26</sup> Applying two of the fundamental legal principles of criminal law<sup>27</sup>, namely,

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<sup>22</sup> It should be understood that the term 'international crime' is used here for its convenient form. In actual fact, none of the international instruments actually refer to 'international crime'. Some contain references to 'crime under international law'. For further reference, see M.C. Bassiouni, "The Sources and Content of International Criminal Law", *supra* note 8, p.55.

<sup>23</sup> Bassiouni has identified 25 such categories of offences that could be called international crimes. *Id.*, p.48.

<sup>24</sup> D.G. Partan, "Terrorism: An International Law Offence", *19 Conn.L.Rev. (Connecticut Law Review)*, p.768

<sup>25</sup> It is difficult for a number of reasons to take this Convention as conclusive evidence of an international agreement or customary law to the effect that 'terrorism' is an international crime. First, it is binding only on the European States that have ratified it; thus it reflects the opinion of only a handful of States. Second, it refers to certain prohibited acts that are normally regarded as terrorist acts in the context of extradition, noting that the crimes listed in article one are not to be regarded as political offences. (For a more detailed discussion of terrorism and extradition, see *infra*.) Third, it does not make an explicit reference to terrorism as prohibited conduct, thus leaving it to be inferred from the specific acts listed in article one. Finally, the acts given do not contain an exhaustive list of possible terrorist acts.

<sup>26</sup> In international treaties pertaining to terrorism the problem of defining terrorism is sidestepped by listing specific prohibited acts. See, for example article 2(b) of the International Convention for the Suppression of the Financing of Terrorism, 1999; article 1 of the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; or article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971.

no crime without law or *nullum crimen sine lege* and, no punishment without law or *nulla poena sine lege*, we can draw the conclusion that terrorism is not an international crime.

Perhaps at this point the following argument could be raised. That is, those who perform acts usually considered as terrorist acts are, arguably, aware that their conduct is in breach of the law. Thus, for example, following the Nuremberg precedent,<sup>28</sup> one might argue that to 'terrorist' crimes the above mentioned principles have no application since the persons committing them are fully aware of the illegality of their actions. While this line of argument is understandable as far as common decency and humanity are concerned, the argument should be sustained by more than sentimental references to humanity.<sup>29</sup> Two points can thus be presented here.

The first is a counterargument that might go as follows. It seems incontrovertible that any reasonable person would know that murder, whether by stabbing or by blowing up via detonating a bomb, is a crime, prohibited by domestic criminal law and thus punishable under it. In the same way, it should be clear to any reasonable person that murder, however committed, is a crime and also prohibited and punishable under international law.

The question here is - can the same analogy be applied to the 'crime' of terrorism? No doubt, as far as domestic criminal law is concerned, the analogy is valid, at least in those States that have expressly incorporated the prohibition of terrorism in their legislation. However, as far as international criminal law is concerned the validity of this analogy is arguable.

First, it is not agreed between lawyers themselves whether or not terrorism is an international law crime. Second, the States cannot agree upon a single definition of terrorism. Thus, it seems unreasonable to conclude that 'terrorists' (who are unlikely to be legal experts) would know that their act of terrorism is in breach of international law,

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<sup>27</sup> These two principles of legality are expressly acknowledged as part of the fundamental principles of international criminal law, too. See *infra*.

<sup>28</sup> For doubts raised in connection to the IMT and the some of criticisms it has received, see, generally, S.R.Ratner and J.S.Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford, Oxford University Press, (2001). For some specific criticisms with regards to *nullum crimen sine lege* and *ex post facto* application, see G.A.Finch, "The Nuremberg Trial and International Law", *41 Am.J.Int. (American Journal of International Law)*, p.20.

<sup>29</sup> It is acknowledged here, of course, that it is precisely those kind of sentiments that are the *raison d'être* of international criminal law. However, international criminal law has developed beyond the level of uncertainty it was in fifty years ago and now, it is argued, should be supported by references to sources

or even more so, 'customary international law'. Therefore the argument used by the IMT at Nuremberg in response to the plea of *nullum crimen sine lege*, namely: "They must have known that they were acting in defiance of international law..."<sup>30</sup> should not be applicable to those who commit international acts of terrorism.

Second, one can make a reference to what arguably constitutes the strongest representation of international criminal law - namely, the Rome Statute creating the International Criminal Court. This Statute represents undoubted universal agreement, despite some arguments to the contrary. Article 22 of the Statute is a clear acknowledgement of a widespread agreement among States as to the application of *nullum crimen sine lege* to international criminal law. In light of this, and in the absence of a definition of the crime of terrorism, one conclusion that can be drawn is that, indeed, there exists no crime of 'international terrorism'.<sup>31</sup>

Another conclusion that can logically be reached is that no person at this point in time may be arrested, indicted and prosecuted for the crime of 'international terrorism' if the principles of legality contained in international criminal law are to be observed.<sup>32</sup> And the principles of legality ought to be observed, because otherwise it "[...] reduces us to arguing that better reasons or higher motives justify or excuse that which others have also done, for different reasons or motives".<sup>33</sup>

## ii) Terrorism and the problem of definition

Various writers have remarked that the use of the term 'terrorism' is in a sense unfortunate, since, instead of being helpful in describing a legal category of crimes or the actual crimes themselves, it has become diffused. Although one generally has an image of what kind of conduct is attributable to terrorism, it should be noted that there is no agreement as to exactly what acts can be considered to be terrorist acts. In

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not sentiments. For a discussion on what constitutes a source of international criminal law, see, M.C. Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, pp.14-17.

<sup>30</sup> G.A. Finch, "The Nuremberg Trial and International Law", supra note 28, p.33.

<sup>31</sup> There is an argument, though, that at least trans-national, State-sponsored or State-condoned terrorism amounts to an international crime. See A. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", *EJIL (European Journal of International Law)*, Vol. 12, Number 5, p.994. Cassese acknowledges, however, the lack of recognition of terrorism as an international crime, id.

<sup>32</sup> See to the contrary, "The Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism", 13<sup>th</sup> November 2001. <http://www.fas.org/sgp/news/2001/11.bush111301.html>, visited on 23/05/02.

<sup>33</sup> M.C. Bassiouni, "Crimes Against Humanity: The Need for a Specialized Convention", *31 Colum.J. Transnat (Columbia Journal of Transnational Law)*, p.472

addition, the term is vulnerable to exploitation for political ends, as has been demonstrated both by recent events and in the past.<sup>34</sup>

Moreover, it is still a debated issue as to whether or not terrorism should be defined at all. First, it is argued that it is better for the enforcement of international criminal law that terrorism be left undefined. Instead, there is a proposal to identify those particular acts that are prohibited by international law and to require cooperation from States in the prevention, control and suppression of those acts.<sup>35</sup> An example of this approach is demonstrated by the conventions on hijacking, kidnapping of diplomats, civilian hostage-taking, and unlawful use of mail.<sup>36</sup>

Second, it is acknowledged that the definition of terrorism might, indeed, be an impossible task, for there is no 'internationally agreed upon methodology for the identification and appraisal of [...] "terrorism", including: causes, strategies, goals and outcomes of the conduct in question.'<sup>37</sup> This lack of consensus contributes to openness to exploitation for political ends, for instance by governments looking for an excuse to eradicate unwanted political opposition.<sup>38</sup>

Many scholars and organizations have attempted to define terrorism, selecting different approaches, yet as far as international law is concerned, no clear definition has emerged. So the question arises: why have all attempts to define terrorism failed, despite indications that there is widespread condemnation of terrorist violence? It has been suggested that the answer to this question is twofold.<sup>39</sup>

First, there are a number of States (especially those sympathetic to the Palestinian cause) insisting that any definition of terrorism must clearly distinguish between terrorist groups and national liberation movements. Second, some States (examples include the USA and Israel) argue that terrorism can never be committed by a State, only by non-State actors. These are mutually irreconcilable arguments, yet they

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<sup>34</sup> See, for example, L. S.Sunga, *The Emerging System of International Criminal Law*, supra note 3, pp.192-194. For an interesting comment on the psychology behind the 'war on terrorism', see S.Fish, "Condemnation Without Absolutes", *The New York Times*, 15<sup>th</sup> October 2001. For another excellent analysis, see F.Mégret, "War? Legal Semantics and the Move to Violence", *EJIL*, Vol 13, No 2.

<sup>35</sup> M.C.Bassiouni, "International Terrorism", supra note 13, p.780.

<sup>36</sup> For a full list of international documents pertaining to these crimes, see M.C.Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, pp.83-87.

<sup>37</sup> M.C.Bassiouni, "International Terrorism", supra note 28, p.771.

<sup>38</sup> See, e.g., J.Mariner, "Good and Bad Terrorism?", 7/01/02, at <http://www.writ.findlaw.com/mariner/20020107.html>, visited on 15/08/02.

<sup>39</sup> Id.

share the same unacceptable ground: both would allow atrocities to be committed and go unpunished as long as committed by favoured groups.

These two arguments illustrate the core of the problem in relation to the definition of terrorism; namely, that the primary focus of definitions of terrorism is usually upon motivation.<sup>40</sup> The problem with including motivation as a primary element of terrorism is twofold: first, it can not only be ideological, but also political motivation, and this presents difficulty in terms of the definition of 'political' motivation. Second, it is not always possible to assess what the motivation of the perpetrators of certain acts is. There are, however, two ways that the problem of definition might be solved.

One way is to avoid defining terrorism at all. It has been suggested by distinguished scholars that crimes like the 11<sup>th</sup> September attack are, in fact, crimes against humanity.<sup>41</sup> This approach will be looked at in more detail in the second part of this work in relation to the International Criminal Court. A second option is to concentrate upon the core of the criminal element of 'terrorist' crimes. It is proposed that the criminal element of 'terrorist' attacks does not lie in the motivation, values or goals of terrorist groups, but in the specific acts themselves.<sup>42</sup> Accordingly, the argument goes:

[...] the task of international law is not to define and punish certain groups as terrorists as measured by the political motivation of their acts; it is to define certain acts as offences against the law of nations [...].<sup>43</sup>

In essence, then, this option corresponds to the first one in so far as they both are concerned with the end result of the crime rather than the subjective, motivational aspect. The second approach, however, does not necessarily assume that such terrorist acts would amount to crimes against humanity. Instead, it simply proposes reliance on 'fundamental principles of criminal responsibility that have long been recognised and applied in every legal system of the world'.<sup>44</sup>

It would be appropriate to assess what norms international law contains with regard to terrorism. And if there are any norms, then what is the reason for the common

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<sup>40</sup> For an insight as to what characteristics determine why one act is a 'terrorist' act whilst another is simply a common crime, see M.C.Bassiouni, "International Terrorism", *supra* note 13, p.782. Bassiouni lists seven criteria, the first of which is 'motivation'.

<sup>41</sup> A.Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", *supra* note 31, p.994.

<sup>42</sup> D.G.Partan, "Terrorism: An International Law Offence", *supra* note 24, p.754.

<sup>43</sup> *Id.*

<sup>44</sup> M.C.Bassiouni, "International Terrorism", *supra* note 13, p.783.

perception that international law in its present state is incapable of dealing with terrorism.

Under the auspices of the United Nations<sup>45</sup>, between 1963-1999 sixteen conventions were created pertaining directly to 'terrorism'.<sup>46</sup> In addition to these conventions that deal specifically with means of terrorism, other international instruments indirectly apply to acts associated with terrorism.<sup>47</sup>

This number is impressive, but unfortunately, the enforcement of these conventions is less so. The main problem with regard to enforcement is to be found in the 'indirect' enforcement mechanism that international criminal law uses in cases of international conventions.<sup>48</sup> Namely, it relies upon voluntary cooperation between States, and as such, concerns the six modalities identified by Bassiouni: extradition; mutual assistance; transfer of criminal proceedings; transfer of prisoners; seizure and forfeiture of assets; and recognition of foreign penal judgments.<sup>49</sup>

Two possible ways to try to solve the problem of the inability of international law to deal effectively with terrorism are: to create a comprehensive convention on terrorism and to obtain widespread acceptance of that treaty; or to create a 'direct' enforcement system, similar to the IMT. Neither of these options is perfect, of course, but they do both have valuable elements, and the task here could be that of weighing and measuring the effectiveness of these proposals. This, together with the appraisal of some other options, will be dealt with in the second part of this work.

### iii) The problem crystallized

Unlike the case with piracy, the international system has not had a long period over which to develop an agreed response to acts of international terrorism. Unlike aircraft hijacking or hostage-taking, governments have not been able to formulate a clear and precise objective definition of the prohibited conduct. Unlike hostage-taking, governments have not been willing to agree that acts of international terrorism ought never to be excused by asserted political motivations. Finally, unlike the case of torture under the claim of official authority,

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<sup>45</sup> Regional documents are not considered here, as international conventions can be argued to represent values common to all nations, whereas regional documents represent the viewpoint of that region, which sometimes differs from other regions, especially in the case of European States and some other regions.

<sup>46</sup> For a full list of these, see M.C.Bassiouni, "International Terrorism", supra note 13, p.767.

<sup>47</sup> Id.

<sup>48</sup> For a deeper insight, see M.C.Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, specifically p.14.

<sup>49</sup> Id.

governments have not been prepared to renounce support for international terrorism in all cases.<sup>50</sup>

This quote presents a fair summary of the problems posed by terrorism. There is widespread agreement that terrorism should be subject to international criminal law, yet there is no agreement as to what acts specifically are 'terrorist' acts. The main problem with defining terrorism is the issue of motivation, which is a subjective state of mind and does not reflect that element of terrorism that makes it criminal - namely, violence. For it is not the ideological, political, or any other motive that should distinguish the *crime* of 'terrorism'. It is the end result - the prohibited act - that should be criminalized, notwithstanding the motives of the perpetrator of that act.

The reluctance on the part of governments to settle upon an acceptable definition of terrorism should in no way hinder the criminalizing of violent acts and making the perpetrators accountable for those acts. The second part of this work will thus be devoted to evaluating the options available to the international community for punishing those who carry out terrorist acts, in the absence of any internationally agreed definition of 'terrorism'.

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<sup>50</sup> D.G.Partan, "Terrorism: An International Law Offence", supra note 24, p.776.

## PART TWO. THE SEARCH FOR A SOLUTION

Two enforcement methods of international law have been identified, with the International Criminal Court creating a third, hybrid, method.<sup>51</sup>

One of the methods is the 'direct' enforcement method that was represented by the IMT and the IMTFE (the International Military Tribunal for the Far East). This system exists where 'an internationally created organ enforces the *ratione materiae* (norms) of [international criminal law] to the *ratione personae* (subjects) of [international criminal law]'.<sup>52</sup>

The second is the 'indirect' method - the most common enforcement method. This relies on the voluntary cooperation of States,<sup>53</sup> and the success of this method depends largely on the willingness of States to apply the 'either extradite or prosecute' (*aut dedere aut judicare*) maxim.<sup>54</sup>

This part of the work will be devoted to analysis of the options that are currently available for the punishment of those who perpetrate terrorist acts, assessing both international and domestic prosecution options. The system used for the evaluation will be three-tier - the appropriateness, the effectiveness and the practicability of the court in question.

### Prosecution before domestic courts

#### i) The preliminary questions

##### a) Jurisdiction

The first question that needs to be resolved by any national court is that of jurisdiction. Five internationally agreed-upon principles exist under which jurisdiction can be established.<sup>55</sup> In terrorist cases jurisdiction is usually based on the territoriality or nationality principles. The passive personality principle has, however been employed by States, though not so frequently. With regard to the principle of universal jurisdiction by

<sup>51</sup> M.C.Bassiouni, "The Sources and Content of International Criminal Law", supra note 8, pp.13-14.

<sup>52</sup> Id.

<sup>53</sup> See supra note 49 and the accompanying text.

<sup>54</sup> For an explanation of how this maxim was derived from Grotius' *aut dedere aut punire*, see M.C.Bassiouni, *Crimes Against Humanity in International Criminal Law*, supra note 9, p.218.

<sup>55</sup> The territoriality principle, the nationality principle, the passive personality principle, the protective principle and the universality principle.

virtue of which any State could prosecute 'international terrorists', scholars disagree as to whether or not this principle is firmly established in international law with regard to all international crimes.<sup>56</sup>

Normally, however, jurisdiction should not present too great a problem for the prosecuting State, since either the territoriality or the nationality principle will be relied upon.

### **b) Extradition**

Once the jurisdiction to try a suspect is established, the next question that needs to be resolved is how to obtain custody over the suspect. It is accepted here that the only legitimate means of securing transfer of a person from another State is the process of extradition. This is so, despite the irregular means of transfer that are not infrequently used by States - most notably by the United States - instead of the extradition process. The practicality of the alternatives, such as exclusion, expulsion, special arrangements, abduction and kidnapping and informal transfer is not disputed here. What is disputed, however, is the argument that this practicality, coupled with the drawbacks of the extradition process, outweighs the need to contribute to the world order; the necessity to preserve the judicial integrity of States; and the universal requirement to observe human rights.<sup>57</sup>

Usually, there is a treaty regulating extradition processes between States, or else an international convention that provides for extradition procedures. In addition, it has been argued that international crimes impose the obligation *aut dedere aut judicare* on all States. There is, however, no firm duty to either extradite or prosecute in international law, and some 'terrorists', no doubt, will find haven in countries that are unlikely to grant extradition.

The problem of obtaining custody over the suspect is enhanced by the application of the 'political offence' exception to the extradition procedure. The problem that this exception is causing with regard to terrorism is largely due to the common and unfortunate insistence on prescribing motivation to be a primary distinguishing factor of

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<sup>56</sup> See, for example, K.C.Randall, "Universal Jurisdiction Under International Law", *66 Tex. L. Rev.*, p.785. Randall argues that there is no universal jurisdiction for terrorist crimes. For an opposing view, see F.L.Kirgis, "Terrorist Attacks on the World Trade Center and the Pentagon", *ASIL Insights*, at <http://asil.org/insights/insigh77.html> and Kirgis, F.L., "Indictments Regarding the Bombing of U.S. Quarters in Saudi Arabia", *ASIL Insights*, at <http://www.asil.org/insights/insigh74.htm>, both visited on 17/06/02.

terrorist crimes. 'Political offence' is not defined anywhere, so it has been open to different interpretations.<sup>58</sup> However, from case law a division of 'political offences' has emerged. First, there are the 'pure political offences' that include treason, sedition and espionage. A 'relative political offence', on the other hand, is characterised by the existence of one or more common crimes associated with a political act.<sup>59</sup> Terrorism has been classified as the latter, and thus three slightly differing tests have been applied to it by various courts.<sup>60</sup>

The outcome of those tests could be summed up in the following three-tier test.<sup>61</sup> First, it is determined whether or not there is a connection between common crime and some political act. Second, the degree of connection is assessed. Finally, the courts look at the proportionality between the means used and the end sought. In applying this test, in some instances the court has determined that, either the connection between the crime and the political act is too remote, or else the common crime is grossly disproportionate to the end sought.<sup>62</sup> A theoretical possibility exists, however, that the political offence exception could cause problems in cases of suspected terrorists.

One of the options for avoiding the problem the political offence exception is to remove the requirement of motivation of the offenders. If the act is distanced from any kind of political background, it is less likely to amount to a political offence exception, especially so in the light of reluctance on the part of some countries to consider terrorist acts under this exception.<sup>63</sup>

Another way to eliminate the problem is demonstrated by the European Convention on the Suppression of Terrorism, where article 1 simply lists acts which are not to be considered as political offences for the purposes of extradition. The main objection to the listing of specific prohibited acts is the impossibility of foreseeing *all*

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<sup>57</sup> For a detailed analysis of irregular rendition devices see M.C.Bassiouni, "Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition", 7 *Vand. J. Transnat*, p.25.

<sup>58</sup> For a detailed analysis of the three existing approaches, see V.P.Ravaschiere, "Terrorist Extradition and the Political Offence Exception: An Administrative Solution", 21 *Va. J. Int.*, p.163. and M.R.García-Mora, "The Nature of Political Offences: A Knotty Problem of Extradition Law", 48 *Va. L. Rev.*, p.1226, specifically pp.1240-1256.

<sup>59</sup> See, for example, M.R.García-Mora, "The Nature of Political Offences: A Knotty Problem of Extradition Law", *supra*, p.1239.

<sup>60</sup> *Id.*

<sup>61</sup> M.R.García-Mora, "Crimes Against Humanity and the Principle of Nonextradition of Political Offenders", 62 *Mich. L. Rev.*, p.927, specifically, p.944.

<sup>62</sup> V.P.Ravaschiere, "Terrorist Extradition and the Political Offence Exception: An Administrative Solution", *supra* note 58, p.175.

<sup>63</sup> Especial reluctance is demonstrated by Swiss courts see M.R.García-Mora, "The Nature of Political Offences: A Knotty Problem of Extradition Law", *supra* note 58, p.1253.

acts that might be committed. This may well pose a problem in the future, when an act is committed that is not included in the list - especially if drawing an analogy is prohibited, as it is, for example, in the Rome Statute.<sup>64</sup>

Moreover, the process of extradition contains additional practical drawbacks. For instance, a large number of States grant extradition only on the basis of an existing treaty, not on the basis of reciprocity or comity; the requesting State's network of treaties has gaps that can be known and exploited by a person sought for extradition and so on.<sup>65</sup> Taking into consideration these practicalities it is possible to have some room for sympathy with regard to those States that do not always comply with the official process of extradition.

## ii) Civilian courts

One of the options open to States in their fight against terrorism is prosecution before national courts. There are a number of issues to consider when assessing this option. First, how appropriate is it? In the absence of any factors that would distinguish terrorists from common criminals,<sup>66</sup> it would seem most appropriate as long, of course, as there are laws against terrorism in a country wishing to prosecute for terrorist offences. Even in the absence of a specific law against terrorism, most countries have laws prohibiting murder and the destruction of property, so the offenders could be prosecuted under those laws.

Another question is that of the effectiveness of domestic prosecution. The basic idea of criminal law is that a State has enunciated a system of values and, as a matter of social control, is empowered to use legitimate or justifiable means to protect legitimately determined interests of society.<sup>67</sup> This postulate has been used as a basis for heavy criticism in relation to terrorist crimes. If one proceeds from the premise that criminal law is sustained by penal theory that essentially is founded upon two elements - retributive and utilitarian<sup>68</sup> - then indeed, the criticisms are well directed.

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<sup>64</sup> Article 22(2) of the Rome Statute of the International Criminal Court.

<sup>65</sup> For these and additional examples see M.C.Bassiouni, "Unlawful Seizures and Irregular Rendition Devices as Alternatives to Extradition", *supra* note 57, p.63.

<sup>66</sup> G.P.Fletcher, "On Justice and War: Contradictions in the Proposed Military Tribunals", *25 Harvard Journal of Law and Public Policy*, Issue 2, p.645.

<sup>67</sup> M.C.Bassiouni, "International Terrorism", *supra* note 13, p.791. The following analysis is drawing generously on the principles enlisted in Bassiouni's article, specifically pp.791-794.

<sup>68</sup> For a brief of the two historical theories of punishment, see G.S.Yacoubian Jr., "Sanctioning Alternatives in International Criminal Law: Recommendations for the International Criminal Tribunals for Rwanda and the Former Yugoslavia", *World Affairs*, 1998, Vol. 161, Issue 1, p.48.

The main criticism is based upon the idea that criminal law treats crime as a “deviation from the domestic legal order, not fundamentally an attack upon the very basis of that order”<sup>69</sup>, which is what terrorists allegedly do. In addition, it has been questioned as to whether the rest of criminal law rationale, e.g., deterrence, retribution and incapacitation, would apply to terrorists and have the intended effects. The deterrent effect is discredited because, in the eyes of a committed ‘terrorist’ (with an ideological or political motivation), the threat of imprisonment is counterbalanced by the objective that the ‘terrorist’ strives to achieve. The retributive aspect is considered more effective (in fact, the only effective aspect of a sanction), yet its inherent danger of turning into repressive injustice might be unleashed, when faced with a huge crisis or public outcry.

Incapacitation, which is seen as the most rational explanation for a punishment, often does not have the intended effect in light of sentences that have to be handed down for offences that are committed, not for those that might be foreseeable. Besides, incapacitation is effective only for the period of its duration. As far as the death penalty is concerned, its finality has been one of the reasons behind its increasing abolition worldwide. In addition, it is argued that it tends to create martyrs; therefore it would be particularly counterproductive in ‘terrorism’ cases. It is (arguably) offensive to public morality and, most importantly, it “diminishes the moral authority of the State that seeks to enlist public support against violence”.<sup>70</sup>

The last issue to look at is the issue of practicality. The relevant points that might downplay the practical side of domestic prosecution of ‘international terrorists’ are the issue of extradition, discussed above, and, sometimes, the issue of jurisdiction.

However, it may be useful to remark here, that: first, if a State really wished to prosecute someone whilst relying upon the principle of disputed universal jurisdiction, it is likely that it will do so, by arguing that there *is* universal jurisdiction over the crime in question.<sup>71</sup> Secondly, if a State was prepared to prosecute for an act of ‘international terrorism’ whilst claiming universal jurisdiction, it might be prepared to extradite the

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<sup>69</sup> K.Anderson, “What to do with Bin Laden and Al Qaeda Terrorists? A Qualified Defence of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base”, *25 Harvard Journal of Law and Public Policy*, Issue 2, p.610. [Hereinafter: “What to do with Bin Laden and Al Qaeda Terrorists?”]

<sup>70</sup> M.C.Bassiouni, “International Terrorism”, *supra* note 13, p.794.

<sup>71</sup> An example of this kind of action is the widely debated *Eichmann case*. For a commentary, see M.C.Bassiouni, *Crimes Against Humanity in International Criminal Law*, *supra* note 9, p.237. Another example mentioned by the same author is the case of *Demjanjuk v Petrovsky*, *Id*, p.238. Also, see *id*, note 203 for further examples.

offender to a State that would have jurisdiction under the territoriality or nationality principles.

In summary, whilst domestic criminal proceedings in ordinary or civilian courts could be described as appropriate means to punish 'international terrorists', there are doubts as regards their effectiveness and practicality. This, at least, has been the position of those scholars that seek to defend the second option of domestic prosecution, namely, military tribunals.

### iii) Military tribunals

This option calls for an evaluation because it is precisely the option chosen by the US with regard to the persons detained at the Guantanamo Bay Naval Base. Normally, persons could be tried in front of a military court if there were some distinguishing features that put them on a different footing than that of common criminals. The discussion of the option of military courts will, therefore, be based on the premise that some perpetrators of terrorist acts (usually with regard to State-terrorism) will qualify for trial before military courts.

The first aspect to discuss is the issue of appropriateness. Accepting the premise that some international terrorists will qualify for military courts, this option is not so inappropriate as has been suggested by some writers.<sup>72</sup> Having said this, there are some qualifications to the appropriateness of this option. First, although the very idea of military courts suggests different procedures, the international standards of due process should be observed.<sup>73</sup> This might present some difficulty with regard to European States. In some countries military courts are part of the executive (for instance, the UK), while in others they form a part of the judiciary (e.g. Russia). If they are a part of the executive, problems may arise with respect to impartiality, since there is an implicit assumption of partiality:

When active duty military officers assume the role of judges, they remain subordinate to their superiors in keeping with the established military hierarchy. The manner by which they

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<sup>72</sup> See, for example, L.K.Donohue, "Bias, National Security and Military Tribunals", *1 Criminology and Public Policy*, No.3, p.339.

<sup>73</sup> See P.R.Williams and M.P.Scharf, "Prosecute Terrorists on a World Stage", *Los Angeles Times*, 18<sup>th</sup> November, 2001, p.5. Although this article is aimed at the situation with regard to the specific proposal of the USA concerning suspected international terrorists associated with the 11<sup>th</sup> September attack, there is no valid reason why this should not be applied in a case where the status of the suspects is not questioned.

fulfil their assigned task might well play a role in their future promotions, assignments and professional rewards.<sup>74</sup>

Second, the trials should be conducted in public, as far as possible. There are two reasons for this. One of them is the fact that this would secure an accurate perception of fairness in eyes of the public.<sup>75</sup> The other reason is that this would follow the Nuremberg model, which exposed horrendous crimes and by doing so offered some comfort to the families of victims that saw justice being done. To put it in other words, there is some merit to the claim that '[t]he administration of justice should both comfort and warn'.<sup>76</sup>

The third qualification is a warning that '[t]he more you use ad hoc procedures, the more it looks like you're structuring the procedure to bring about a certain result'.<sup>77</sup> It has been argued that military tribunals have inherent bias against the presumption of innocence.<sup>78</sup> This would be a blatant breach of due process provided for in humanitarian law, which is the law that would apply to military courts.<sup>79</sup>

Fourth, is the question of effectiveness. Whilst the supporters of military courts attack the option of 'civilian' courts on the basis of their impracticality and ineffectiveness, they fail to produce convincing evidence as to the effectiveness of military courts. As well as this they actually fail to prove the ineffectiveness of civilian courts, the basis of which shares the same theories of punishment as military courts.<sup>80</sup> In fact, they seem to either mistake effectiveness for practicality,<sup>81</sup> or else fail to discuss effectiveness in the same way that they discussed it when criticizing civilian courts.<sup>82</sup>

Last is the issue of practicality. Here the same arguments apply as with respect to civilian courts - namely, the jurisdictional and extradition problems. As far as the latter

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<sup>74</sup> D.F.Orentlicher and R.K.Goldman, "When Justice Goes to War: Prosecuting Terrorists Before Military Commissions", *25 Harvard Journal of Law and Public Policy*, Issue 2, p.660.

<sup>75</sup> Id.

<sup>76</sup> R.Teitel, "What Standards Should be Applied in Al Qaeda members' War Crimes Proceedings?: Lessons From The Nuremberg Trial.", at [http://www.writ.findlaw.com/commentary/20020320\\_teitel.html](http://www.writ.findlaw.com/commentary/20020320_teitel.html), visited on 17/06/02.

<sup>77</sup> L.Tribe, quoted in L.K.Donohue, "Bias, National Security and Military Tribunals", *supra* note 72, p.343.

<sup>78</sup> Id.

<sup>79</sup> Id. In the case of proposed military tribunals by the Bush administration, the supporters of this idea have been pointing out the same serious flaw that has been created by the Military Order, *supra* note 47. See, for example, K.Anderson, "What to do with Bin Laden and Al Qaeda Terrorists?", *supra* note 69, p.618. The requirement of presumption of innocence is Stated in article 75 (4)(d), Protocol I: Protocol Additional to the Geneva Convention of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts.

<sup>80</sup> For an excellent analysis of the options available for prosecution for the perpetrators of the 11<sup>th</sup> September attack, see K.Anderson, "What to do with Bin Laden and Al Qaeda Terrorists?", *supra* note 69.

<sup>81</sup> P.R.Williams and M.P.Scharf, "Prosecute Terrorists on a World Stage", *supra* note 73.

is concerned, however, in the context of military tribunals it is likely that the State wishing to prosecute will already have acquired custody over the suspects, since the situation is likely to involve international armed conflict thus giving the possibility to capture the wanted persons.

In addition, it has been pointed out that military courts are more practical because they introduce more lax procedures thus greatly speeding up the trials.<sup>83</sup> This is seen as a positive practical issue, especially in cases where a large number of suspects are to be tried. Of course, this practical advantage has to be weighed against the possible increased likelihood of incarceration of innocent persons due to those more lax procedures.

In summary, from the point of view of fighting international terrorism, military courts are not in a very different position to the civilian courts. It can be argued that, with possible differences in practicality, they both share the same appropriateness level and the same issues of effectiveness. An additional drawback of military courts is their inherent danger of abuse of due process, which has caused considerable debate with regard to the current US proposal.<sup>84</sup>

The next step, therefore, is to look at possible international forums for prosecuting 'international terrorists' and assessing their appropriateness, efficiency and practicality.

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<sup>82</sup> K. Anderson, "What to do with Bin Laden and Al Qaeda Terrorists?", *supra* note 69.

<sup>83</sup> L.K. Donohue, "Bias, National Security and Military Tribunals", *supra* note 72, p.341.

<sup>84</sup> *Id.* Also, see R. Teitel, "What Standards Should be Applied in Al Qaeda members' War Crimes Proceedings?: Lessons From The Nuremberg Trial.", *supra* note 76; L.K. Donohue, "Bias, National Security and Military Tribunals", *supra* note 72; D.F. Orentlicher and R.K. Goldman, "When Justice Goes to War: Prosecuting Terrorists Before Military Commissions", *supra* note 74; G.P. Fletcher, "On Justice and War: Contradictions in the Proposed Military Tribunals", *supra* note 66.

## Prosecution before an international tribunal

A number of suggestions have been made as to how to deal with international terrorists outside of domestic courts. Having international prosecution would avoid some problems commonly associated with domestic prosecution proceedings,<sup>85</sup> but yet other problems arise.

### i) The International Criminal Court

One of the suggested options for trying persons suspected of 'international terrorism' acts is the International Criminal Court [the ICC].

The appropriateness of the ICC seems obvious. The States have consented to the jurisdiction of the Court, there are extensive safeguards in place against politically motivated prosecutions, the Court will be composed of the most highly qualified and respected lawyers<sup>86</sup> and, finally, it will be the only truly international criminal court.<sup>87</sup>

The effectiveness of the ICC, as with other international tribunals, should be assessed in a slightly different light when compared to the domestic court system. Whilst there is no doubt that the very basis of the prosecution is still the same penal theories, two major practical aspects come into play, especially with regard to terrorist offences. First, countries may feel more compelled or more willing to surrender a suspect to a global court than to a potentially biased, unknown court of another country. And secondly, the judgment of the ICC would, arguably, be easier to enforce, which is particularly problematic in cases of domestic prosecution, when enforcement is left entirely up to the court of another, possibly not so friendly, country. These issues could contribute greatly to the effectiveness of the ICC, albeit they are, of course, rather speculative.

In so far as the practical side of the ICC is concerned, the following argument has been put forward. This is on the lines that the ICC is not empowered to try the crime of

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<sup>85</sup> For some examples of problems associated with domestic prosecution, see L.K.Donohue, "Bias, National Security and Military Tribunals", *supra* note 72, p.340.

<sup>86</sup> Despite the assurance that this will, indeed, be the case, some writers still doubt the integrity and moral validity of the ICC on a philosophical level. See A.P.Rubin, "Some Objections to the International Criminal Court", *12 Peace Review*, Issue 1, p.45.

<sup>87</sup> See, generally R.S.Lee, (ed), "*The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*", The Hague, Kluwer Law International, 1999. More specifically, see W.Allmand, "The International Criminal Court and the Human Rights Revolution", *46 McGill L. J.*, p.263. A brief but good overview of the ICC and its functions is also found in P.Kirsch, "The International Criminal Court", *46 McGill L. J.*, p.255, and M.C.Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court", *32 Cornell Int.*, p.443.

'terrorism', which was not included in its jurisdiction for a number of reasons, one of those being that States could not agree on an acceptable definition of terrorism.<sup>88</sup> Whilst this is true, a counterargument can be and has been raised. In order to be an international crime, terrorism has to contain an international element, namely, it has to hurt internationally protected interests. And, whilst a single bomb placed by a person in another State might not be considered grievous enough, there are other situations, such as the 11<sup>th</sup> September attack, where a crime undoubtedly could qualify as a crime against humanity - which *is* within the ICC's jurisdiction.<sup>89</sup>

The reasons for this are as follows. First, the definition of a crime against humanity<sup>90</sup> requires no nexus to armed conflict, so even if a country where an attack takes place did not consider it to be an armed attack, it could still qualify as a crime against humanity. Second, the requirement that an attack be 'widespread or systematic' is a disjunctive test, so the attack has to be: either widespread, which is commonly taken to refer to the scale of the crime; or systematic, which is recognised as having a 'high degree of orchestration and methodological planning'<sup>91</sup>. Third, the attack needs to be directed against the civilian population. Applying these criteria to attacks like 11<sup>th</sup> September, it is clear that such terrorist acts would undoubtedly qualify as crimes against humanity.

It would seem, therefore, that the International Criminal Court is one possible avenue for prosecuting criminals who have committed 'terrorist' acts that could qualify as crimes against humanity. The definition of a crime against humanity is quite wide; however, it still contains a high threshold of gravity<sup>92</sup>, since the ICC was created to deal only with the most serious crimes.

## ii) The International Criminal Tribunal for the Former Yugoslavia

It has been suggested that another possible option for prosecuting terrorists, especially those who masterminded the 11<sup>th</sup> September attack, would be the International Criminal

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<sup>88</sup> See the Report of the Preparatory Committee of 1996, Volume 1, paras. 106-107, found at [gopher://gopher.icc.apc.org/00/orgs/icc/undocs/prepcom2/prepcom\\_report.txt](http://gopher://gopher.icc.apc.org/00/orgs/icc/undocs/prepcom2/prepcom_report.txt), visited on 10/09/02.

<sup>89</sup> For the support of this argument, see G.Robertson, "There is a legal way out of this...: as long as it is handled as an act of international crime, not one of war", [hereinafter "There is a legal way out of this..."] *The Guardian (London)*, 14<sup>th</sup> September, 2001, p.22. F.L.Kirgis, "Terrorist Attacks on the World Trade Center and the Pentagon", *ASIL Insights*, supra note 56. For a more detailed analysis, see H.Duffy, "Responding to September 11: The Framework of International Law", *Cairo Institute for Human Rights Studies*, at [http://www.cihrs.org/conference/duffypaper\\_e.html](http://www.cihrs.org/conference/duffypaper_e.html), visited on 17/06/02.

<sup>90</sup> Article 7 of the Rome Statute of the International Criminal Court.

<sup>91</sup> H.Duffy, "Responding to September 11: The Framework of International Law", supra note 89.

Tribunal for the Former Yugoslavia [the ICTY].<sup>93</sup> However, with regard to the three criteria put forward in this work the following criticisms could be voiced.

First, the ICTY has no jurisdiction over the crime of terrorism. It does have jurisdiction over crimes against humanity but there has to be a nexus to an armed conflict.<sup>94</sup> In most cases involving terrorist attacks the conflict does not get out of hand and usually does not result in armed conflict.

Second, the ICTY is an *ad hoc* tribunal. It has jurisdiction over crimes committed on the territory of the Former Yugoslavia, not elsewhere. Of course, there is a possibility, however remote, of adapting the Statute establishing the ICTY to suit other situations.

Third, the ICTY has a rather poor record of prosecutions. As of 31<sup>st</sup> July 2002, there were 15 completed cases, 12 cases on appeal, with 75 persons indicted.<sup>95</sup> The suggestion that this Tribunal is equipped for the prosecution of international terrorists does not seem to be a responsible one.<sup>96</sup>

This is a serious drawback as far as effectiveness and practicality are concerned. It is possible to adapt this tribunal, as has been suggested, to suit the requirements of punishing international terrorists. However, considering the amount of time and resources that would be involved in this process, it would probably be more efficient to create a new independent tribunal.

### iii) International Court/Tribunal/Commission on Global Terrorism

There have been calls to establish a separate international body that would be created for the specific purpose of combating terrorism. One proposal is to set up an International Commission on Global Terrorism, working 'under the authority of a re-energized and revitalised United Nations'.<sup>97</sup> It is proposed that this Commission be modelled on the Nuremberg and Tokyo war tribunals, and have far-reaching powers to impose economic, political and military sanctions.

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<sup>92</sup> See article 7 of the Rome Statute of the International Criminal Court.

<sup>93</sup> P.R.Williams and M.P.Scharf, "Prosecute Terrorists on a World Stage", *supra* note 73.

<sup>94</sup> Article 5, the Statute of the International Tribunal for the Former Yugoslavia (1993).

<sup>95</sup> <http://www.un.org/icty/glance/index.htm>, visited on 05/08/02.

<sup>96</sup> Especially so in the light of the fact of the slow process of indictment - it took seven years to indict Slobodan Milosevic - and the high cost of this tribunal, discussed in K.Anderson, "What to do with Bin Laden and Al Qaeda Terrorists?", *supra* note 69, p.603, visited on 30/05/02.

<sup>97</sup> D.Held, "Violence and Justice in a Global Age", *Open Democracy*, at <http://www.opendemocracy.net>, 14/09/2001, visited on 30/05/02.

This proposal certainly would rank high as far as appropriateness and effectiveness are concerned. This Commission, as proposed, would amount to a 'direct enforcement' system with the consequence that it would incorporate investigation, prosecution, adjudication and sanctions, thus avoiding the practical problems that haunt domestic courts.

On the practical side this proposal is, unfortunately, seriously flawed. One cannot avoid drawing on the experience of trying to establish the ICC, which is nowhere near as comprehensive a system and yet took around fifty years to be established with enormous effort on the part of those dedicated to the idea.<sup>98</sup> It is difficult and, in fact, unreasonable to be optimistic with regard to the possibility of establishing such Commission with such wide powers that would try a crime, the definition and existence of which is under serious dispute.

This criticism can equally be applied to the other proposals for an international tribunal, whether permanent or *ad hoc*. The latter, however, would not necessarily require the arduous process of creating a multilateral treaty, since it could be established by virtue of a Security Council resolution, as was done when creating the ICTY.

An *ad hoc* tribunal was, for instance, suggested for the prosecution of 11<sup>th</sup> September attackers.<sup>99</sup> This proposal received some heavy yet fair criticism, especially with regard to the proposed incorporation of an official recognition of Islamic law.<sup>100</sup>

An *ad hoc* tribunal is, no doubt, appropriate for a specific situation, since it would be modelled to suit the specifics of that situation. In addition, the practicality of an *ad hoc* tribunal is not disputed, because there is a pattern of establishment one could look at and follow. The main problem with this kind of tribunal is related to its effectiveness. Like the ICTY, the ICTR and the IMT, all of which were created for specific situations, an *ad hoc* anti-terrorism tribunal could not solve crimes outside the scope of its mandate, so its validity as a long-term solution is doubtful.

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<sup>98</sup> To gain some idea of the difficulty in establishing the ICC, see generally R.S.Lee, (ed), "*The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*", supra note 87; M.C.Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court", supra note 87, p.443; M.C.Bassiouni, "Establishing an International Criminal Court: Historical Survey", *149 Mil.L.Rev.*, p.49.

<sup>99</sup> A.M. Slaughter, "Terrorism and Justice", *The Financial Times (London)*, 12<sup>th</sup> October 2001, p.23.

<sup>100</sup> Id. For criticism, see K.Anderson, "What to do with Bin Laden and Al Qaeda Terrorists?", supra note 69, specifically pp.600-606.

In summary, it could be argued that all of the proposed international tribunals have drawbacks and none of them is an ideal solution. However, it is premature to reject an idea on the grounds that it fails to be ideal. This is especially so with international law where many considerations, apart from the purely legal ones, have a role to play. The ICC, therefore, could be the preferred option for a number of reasons. First, it is established (although not in a physical form yet). Second, despite objections from countries like the US, China and Libya, it does represent a universal agreement, thus it is a truly international court. Fourth, although its mandate does not cover terrorism, it is empowered to try crimes against humanity, the scope of which most certainly would cover attacks like 11<sup>th</sup> September. The other two proposals, the ICTY and an International Anti-Terrorism Court, have serious drawbacks on the practical side, the importance of which cannot be underestimated. Many international bodies, whilst created with admirable intentions, fail to fulfil their mandate because of practical issues, such as organization and, most importantly, funding.<sup>101</sup>

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<sup>101</sup> See, for example, criticisms directed towards the ICTR in M.C.Bassioni, *Crimes Against Humanity in International Criminal Law*, supra note 9, p.195, note 42; For critique directed towards the Human Rights Commission, the Human Rights Committee, the African Commission see G.Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, London, The Penguin Press, 1999, pp.40, 46-50, 58, respectively.

## CONCLUSION

One problem with regard to terrorism, it was argued in the first part of this work, is the lack of definition of the term 'terrorism', with the consequence that there exists no international crime of 'terrorism'. This is because international criminal law contains certain principles of legality, one of which is *nullum crimen sine lege*, or no crime without a law. The corruption of international criminal law by virtue of ignoring the principles of legality is not acceptable by standards set in human rights law.

Another problem, also related to the definition, is the unfortunate insistence on the inclusion of motivation in attempted definitions. This is the very core of the problem of defining terrorism, and, because of an inability to accept another way (e.g., abandoning the requirement of motivation), there still exists no definition of 'terrorism' in international law. This opens the door for political exploitation of this term with some highly regrettable consequences, as demonstrated most recently by the 'war on terror' declared by the Bush administration.<sup>102</sup>

The second part of this work turned to evaluation of existing mechanisms for prosecuting those who commit acts of terrorism in the international arena. Both the domestic and international prosecution options were discussed. The conclusion that can be drawn from that discussion is the following. Whilst domestic prosecutions are hindered by practical considerations, they are the most widely used for the simple reason that there is no effective international forum for the prosecution of suspected 'international terrorists'. The proposed international avenues that might be used for this purpose, whilst arguably more appropriate and effective, are disadvantaged by the difficulty of setting them up. The existing international tribunals, the ICC and the ICTY, are not empowered to try 'terrorist' crimes, as well as simply not being equipped for this purpose. However, it was suggested that the ICC would be more appropriate considering the wide acceptance it has gathered.

It would seem that international criminal law contains no clear answers as to how to deal with the problems related to international acts of violence commonly attributed

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<sup>102</sup> For an in-depth analysis of how the US is exploiting the terms 'terrorists' and 'those who harbour them', also by constructing them akin to 'fascism, Nazism and totalitarianism', see F.Mégret, "War? Legal Semantics and the Move to Violence", at supra note 34, also B.J.Foley, "Avoiding War: Using International Law to Compel Rational Problem-Solving", *Cairo Institute for Human Rights Studies*, at [http://www.cihrs.org/conference/foleypaper\\_e.htm](http://www.cihrs.org/conference/foleypaper_e.htm), visited on 05/09/02.

to terrorism. However, such a pessimistic view is neither appropriate nor desirable. A number of acts are criminalized by international treaties: such acts include hijacking of planes, kidnapping, and hostage-taking. These conventions support the argument that a clear definition of terrorism is not necessary. All that is required is a proscribed course of conduct that is clearly stated in a treaty, with adequate sanctions, plus widespread acceptance of that treaty. This would be a large leap towards solving some of the problems related to the enforcement mechanism.

It has to be recognized that the issues described and analysed in this work form a very specific, and rather small - although none the less important - part of the problems related to terrorism.<sup>103</sup> Punishment - upon which this work has mainly concentrated - is an accepted *consequence* of breaking the rules. However, punishment alone will not eradicate terrorism. The question that needs to be answered, most importantly by States themselves, is: what is the root *cause* of people breaking the rules?

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<sup>103</sup> For a wide range of measures design to combat the problems of terrorism, see the website of the UN Office for Drug Control and Crime Prevention, at [http://www.undcp.org/odccp/terrorism\\_measures.html](http://www.undcp.org/odccp/terrorism_measures.html), visited on 05/09/02.

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