Sebastian Schmidt
Student Number: 2925580

Terrorism and International Criminal Law

Supervisor: Prof L Fernandez

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I declare that *Terrorism and International Criminal Law* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Sebastian Schmidt

27 October 2009

Signed:.....

To

Lenny

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Introduction

Terrorism has become one of the major plagues of the international community[1]. Therefore, it is necessary to search for the most effective countermeasures in International Criminal Law (ICL).

Firstly, there is a need to formulate a generally acceptable definition of terrorism. This will permit an examination of whether a successful fight against terrorism and punishment of terrorism is possible under the existing ICL, or whether there is a need for a discrete crime of terrorism under International Law to label conduct as terrorism.

The aim of this paper is to extract a definition of terrorism and to examine whether terrorism can be subsumed under the existing crimes of ICL, or whether terrorism should be a free-standing crime of ICL, which explicitly declares an act as terroristic. Outstanding scholars like Antonio Cassese argue that there is indeed a discrete crime of terrorism under international customary law[2]. Therefore, this paper will analyse this view.

The changing character of terrorism has highlighted for the international community the necessity to find means to counteract this new kind of threat. The question confronting us is: which measures are currently available to combat terrorism are and which can be developed?

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[1] Cassese (*International Law* 2005), 463.
[2] Cassese (*Terrorism is Also Disrupting Some Crucial Legal Categories of International Law* 2001), 994.

The new execution of terroristic acts is characterised by organisations operating internationally and by the international division of labour amongst them. Therefore, international terrorism can be legally combated by the use of International Law. Granting the fact that ICL is a successful means of combating terrorism, many questions related to its feasibility and concrete application remain unresolved. These difficulties and the alleged lack of a generally accepted definition have, notably, led to the decision by States negotiating the Rome Statute to exclude "terrorism" from the International Criminal Court's jurisdiction in 1998[3]. The fact that several large-scale acts of terrorism have occurred since the Rome Conference[4] as well as the fact that the International Criminal Court (ICC) review conference is likely to revisit the issue have added to the topic's currency.

[3] Resolution E, annexed to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on an ICC, 17 July 1988, UN Doc A/Conf.183/10.
[4] For example. the September 11 Attacks in 2001 or the Madrid train bombing in 2004.

Part I - A Generally Acceptable Definition of Terrorism?

"We have cause to regret that a legal concept of terrorism was ever inflicted upon us. The term is imprecise; it is ambiguous; and, above all, it serves no operative legal purpose." [5]

Judge R Baxter[6]

A. Purposes for Defining Terrorism

The fact that a multiplicity of international legal instruments to fight terrorism was established[7] clarifies that terrorism has become a major concern for the international community. It shows that terrorism is no longer only a political catchword but also a legal term. Therefore, lawyers have to find an abstract definition of what should legally constitute terrorism.

Another reason for defining terrorism is its criminalisation. The *nullum crimen sine lege* principle[8] obliges the legislative to substantiate the prohibited conduct. One can argue that there is no need to criminalise

[5] Baxter (1974), 380.
[6] A former judge of the International Court of Justice (ICJ).
[7] E.g. International Convention for the Suppression of Terrorist Bombings of 15.12.1997, U.N. Doc. A/RES/52/164, Annex; International Convention for the Suppression of Acts of Nuclear Terrorism, UN GA Res. 59/290 of 15.04.2005; International Convention for the Suppression of the Financing of Terrorism of 09.12.1999, U.N. Doc. A/RES/54/109 (2000), Annex; European Convention on the Suppression of Terrorism of 27.01.1977, E.T.S. No. 90; 15 ILM, 1272; UN Declaration on Measures to Eliminate International Terrorism UN GA Res. 49/60 from 09.12.1994.
[8] Schaack and Slye (2009), 192.

and define terrorism as such since terrorism consists of a series of conducts already criminalised and defined under domestic law[9] (for example, murder, bodily harm or damage to property). On an international level, under certain circumstances, terroristic acts overlap with different categories of crimes (in particular war crimes and crimes against humanity)[10]. Consequently, the question arises whether there is an additional advantage gained by labelling criminal conduct as "terrorism" or as "terroristic".

Several reasons for labelling criminal conduct as "terrorism" have been identified. Firstly, a definition of terrorism would help to distinguish private from political violence. Secondly, a generally accepted definition would eliminate the overreach of the many regional anti-terrorism treaties and confine the scope of the Security Council's Resolutions since 11 September 2001. The international community's desire to condemn and stigmatise terrorism would be symbolically complied with by treating terrorism as a distinct crime. Thirdly, a definition might help to confine the misuse of the term by governments against their political opponents[11].

My new argument for labelling criminal conduct as terrorism accords with legal doctrine. Even though criminal conduct can be covered by

[9] Weigend (*The Universal Terrorist* 2006), 913.
[10] Saul (*Defining Terrorism in International Law* 2006), 10.
[11] Saul (*Defining Terrorism in International Law* 2006), 10.

existing crimes, there is reason to give the conduct a distinct label. This is the case when the degree of unlawfulness of the conduct would differ from the existing covering crime and the conduct violates different legally protected interests than the existing covering crime does. Depending on the definition of terrorism, the intent of the perpetrator is to compel the State or an international organisation to do something or to desist from certain conduct. Therefore, one could say that one of the legally protected interests against which the crime of terrorism is directed is the authority of the State or an international organisation to act in the interests of its citizens or members. Furthermore, terroristic acts are intended to intimidate a population. This intimidation of a population, as well as the compelling of a State or an international organisation, gives the crime of terrorism a distinct degree of unlawfulness.

B. Defining Terrorism

Having given reasons for defining terrorism, this paper will deal with the controversial question of determining the term "terrorism". A large number of scholars have worked out a plurality of different definitions to label conduct as terrorism[12]. Starting with the origin of the word, the paper will particularly focus on the definitions used by international legal instruments, dealing with terrorism.

[12] In 2005 a number of 203 different definitions were identified by (Alex Schmidt 2005).

I. Etymology

The word "terrorism" comes from the Latin word *terro*r which means "fear" or "scare". It can be found in all Indo-European languages[13]. The term was first used in the context of the radical republican regime of the Jacobins during the French Revolution. It described the violent treatment of the opponents of the revolution. Therefore, *regime de la terreur* was a means of maintaining political power[14].

II. Finding a definition of terrorism in international law

On the one hand, many scholars allege that there exists no general accepted definition of terrorism in international law[15]. This allegation is normally illustrated by the often cited but trite aphorism: "the one person's terrorist is another person's freedom fighter[16]". On the other hand, the thesis is proposed that, in fact a widespread consensus on a generally acceptable definition of terrorism has evolved in the international community[17]. This view is based on the idea that there is not a lack of definition but of an exception[18]. Therefore, it is worth

[13] Keber (2008), 1.
[14] Frohwein (2002), 384.
[15] Schaack and Slye (2009), 185; Golder and Williams (2004), 272; Lavalle (2007), 89; Arnold (*The Prosecution of Terrorism as a Crime Against Humanity* 2004), 980; Proulx (2004), 1030.
[16] George Galloway in a Sky News interview from 6th August 2006.
[17] Cassese (*International Law* 2005)499; Cassese (*International Criminal Law* 2008), 163.
[18] Cassese (Terrorism as an International Crime 2004), 214.

having a closer look at the international legal instruments and treaties which deal with the topic of terrorism.

1. The League of Nations Convention for the Prevention and Punishment of Terrorism (1937)

The first attempt of the international community to denounce terrorism, the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, was a reaction to the assassination by Croatian separatists of King Alexander I of Yugoslavia and the French Foreign Minister, Louis Barthou in October 1934. The international community still had the disastrous consequences for global peace in mind that the assassination of Archduke Franz Ferdinand in Sarajevo in 1914 had. Finally, the Convention never entered into force, not because there was no consensus about the definition of terrorism[19], but because the Second World War deflected attention from the convention[20]. Article 1 (2) of the Convention defines terroristic acts as:

"criminal acts directed against a State and intended or calculated to create a state of terror in the mind of particular persons, or a group of persons or the general public".

Criminal acts in the sense of article 1, namely crimes against persons and property, weapons offences and ancillary offences, were specified

[19] Saul (*Defining Terrorism in International Law* 2006) But there was dispute on extradition provision, which did not exclude terrorism from the political offence exception.
[20] Saul (*Defining Terrorism in International Law 2006*), 173.

in article 2. States were obliged to criminalise those acts. The definition consists of three elements: (1) the intended aim, which is a state of terror, (2) the target, a State and (3) the prohibit means, criminal acts as defined in article 2. This definition does not refer to any ideological intention.

The weaknesses of this definition are firstly its tautological character, which is caused by the description of the aim ("a state of terror"), which is not explained in the treaty[21]. It suggests that this term should mean extreme and continuing fear. Secondly, the definition of the target ("directed against a State") is on the one hand open to broad interpretation, but on the other hand excludes private persons and groups. The convention contains neither an international element nor does it answer the question whether the Convention is applicable in the context of armed conflicts[22].

Even though the League of Nations Convention never entered into force and its definition of terrorism suffers from some weaknesses, it can be said that the Convention offered the first definition of terrorism, thus serving as a benchmark definition of terrorism for many years[23]. For the first time it codified the customary rule that States are obligated to counteract terroristic preparation acts on their territory[24].

[21] Saul (*Defining Terrorism in International Law* 2006), 174.
[22] Keber (2008), 51.
[23] Saul (*Defining Terrorism in International Law* 2006), 175.
[24] Keber (2008), 51.

2. The "UN Anti-Terrorism Treaties"

The international community shied away from any attempt to fight terrorism on a general basis or as a deductive approach and followed a different line in dealing with the problem[25]. Instead of defining terrorism in general, the international community limited the scope of the conventions to specific acts of terrorism[26]. This so-called sectoral or inductive approach[27] produced a number of conventions and protocols[28], requiring states to prohibit certain physical acts. Only a few of them prohibit conduct as specifically "terrorist" offences. Most of them do not refer to a political motive or cause behind the act, or a *dolus specialis* to intimidate or terrorise[29]. This inductive model avoids the question of definition in order to achieve consensus on international

[25] Kolb (2004), 229.
[26] Kolb (2004), 229.
[27] Saul (*Defining Terrorism in International Law* 2006), 130.
[28] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005; Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980; Protocol on 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, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; 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; Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.
[29] (Saul, Defining Terrorism in International Law 2006), 131.

instruments fighting terrorism. On the one hand, this can be seen as a confirmation of the allegation that there is a lack of a generally accepted definition of terrorism. On the other hand, it also confirms the strong will of the international community to criminalise and banish the phenomenon of terrorism.

The inductive approach's shortcoming is obvious: New forms of technology will lead to new forms of terrorism not covered by the existing sectoral definitions[30]. New treaties must be developed, covering only acts committed after the adoption of the treaty, while the act that initially led to the new conventions does not fall within its scope. This illustrates the mere reactive character of this method[31]. Furthermore, the sectoral approach meets with criticism because it is questioned why a certain act is labelled as terroristic at all. If these acts have a common overreaching, defining feature, for which these acts are understood as terrorism, then this feature has to be formulated. This would enable the determination of a general definition of terrorism. Therefore, the sectoral approach is of no assistance for the purpose of developing a general definition of the term terrorism.

Nevertheless, there is one exception in this series of conventions, namely the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United

[30] Golder and Williams (2004), 287.
[31] Wolny (2006), 238.

Nations on 9 December 1999. This convention establishes, apart from a reference to the specific approach of conventions, a general definition of terrorism. Article 2 (1)(b) of this convention reads:

"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."

It should be noted on the one hand that this definition draws no distinction between politically motivated acts and acts motivated by private aims[32]. On the other hand a subjective element could be inferred from the wording "nature or context" of the act itself. This means that the actor does not have to be proven to intimidate a population intentionally, or to compel a government or an international organisation, but it has to be proven, on the *actus reus*, that the crime was committed in a "context" that is indicative of terrorism. As far as labelling conduct as terroristic depends on the special intent of the actor, this rule of proof appears to be unsuitable since the *mens rea* does not differ from ordinary crimes[33]. Nevertheless, the UN Security Council (UN SC) resolution 1373[34] transformed this Convention practically into applicable law[35].

[32] Arnold (*The ICC as a New Instrument for Repressing Terrorism* 2004), 26.
[33] Weigend (*The Universal Terrorist* 2006), 924.
[34] UN SC Res 1373 of 28th September 2001.
[35] Weigend (*Terrorismus als Rechtsproblem* 2006), 159.

3. Draft Comprehensive Convention on Terrorism

In 1996 the UN GA established by resolution 51/210 the UN Ad Hoc Committee on Terrorism. The task of the Committee is to draft a treaty containing a comprehensive definition on terrorism, to eliminate international terrorism by criminalising it. The informal text of article 2 (1) of the convention[36], which defines the offence of terrorism reads:

(1) Any person commits an offence within the meaning of the 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.

This definition uses the identical wording in regards to the intention requirements as the International Convention for the Suppression of the Financing of Terrorism. Consequently, there is also no element of subjective intention that the violent act was calculated to achieve a superior political aim[37]. Even though the Committee was very close to a

[36] Draft Comprehensive Convention on International Terrorism, UN Doc. A/59/894 App. II (12 August 2005).
[37] See B II 2 for critique.

consensus of a complete text of a convention[38] and there was basic agreement on the definition of offences[39] , there is no complete consensus reached yet and it does not appear that this will be the case in the short term. The deadlock originates from a proposal introduced by Malaysia, on behalf of the Organisation of the Islamic Conference (OIC)[40]. The aim of the proposal is to add to the draft convention a clause which excludes from the scope of application of the convention the acts of parties to an armed conflict in situations of foreign occupation aimed at liberation and self-determination. So far the only exemption envisaged was laid down in article 18 of the Draft Convention, where it is conceptualised to except armed forces in armed conflicts from the scope of the convention.

Therefore, the dispute firstly was, whether, as proposed by the OIC proposal, to exclude activities from "parties" instead of activities from "armed forces" in an "armed conflict". Such exception for "parties" rather than for "armed forces" would include organisations such as Palestinian Liberation Organisation, Hamas, Islamic Jihad or Hezbollah[41].

[38] Lavalle (2007), 111.
[39] Saul (Defining Terrorism in International Law 2006), 185.
[40] The proposal was not only supported by the 56 OIC Members States and Palestine, but also by the Non-Aligned Movement and the Arab League.
[41] The International Committee of the Red Cross advocated that „armed forces" should cover both, government forces as well organised armed groups. This appears to be a passable solution, since it includes „quasi-armed forces" without using a too broad term.

Secondly, the point of contention emerged, whether "situations of foreign occupation", in addition to "armed conflicts" should also be excluded from the scope of the Convention[42]. Broadening the scope of the exception to "situations of foreign occupation", in other words, to situations, which are not strictly armed conflicts in the sense of International Humanitarian Law (IHL), would, for example, exclude acts in the territories in Palestine, occupied by Israel, and in Kashmir, occupied by India. It appears that such a broad exception clause would thwart the purpose of the convention by disposing of the most relevant areas of its application[43].

The third controversial issue is the question whether military forces of a State are liable under the convention in cases of violating international law[44]. The OIC proposal supports the applicability of the convention to "State terrorism" and "State sponsored terrorism" albeit the already existing applicability of international law, namely the IHL. If this liability were included, the question arises why acts of non-State forces are not qualified in the same way when they violate international law.[45]

[42] Saul (*Defining Terrorism in International Law* 2006), 188.
[43] Saul (*Defining Terrorism in International Law* 2006), 188.
[44] In particular, ICL, IHL and the Law on State responsibility.
[45] Saul (*Defining Terrorism in International Law* 2006), 189.

4. 1994 Declaration on Measures to Eliminate International Terrorism[46]

The declarations of the UN General Assembly (UN GA) do not bind its members[47]. But they express, as far as they are accepted by a majority vote, the opinion of the international community and can prove the existence of customary rules. Therefore, it seems to be necessary to examine whether there are definitions of terrorism in these declarations. The 1994 Declaration on Measures to Eliminate International Terrorism, adopted by the Assembly without a vote, reads in paragraph 3:

"Criminal acts intended 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 [...].

This provision was not explicitly presented as a definition, but it can serve this function by implication. Consequently, this definition would encompass three elements: The *actus reus* requires (1) a (national) criminal act. The *mens rea* demands that (2) the act must be intended to provoke a state of terror[48] and (3) the purpose to provoke this state of terror must be political. The fact that paragraph 3 refers to political, philosophical, ideological, racial, ethnic, religious, or any other

[46] UN GA Resolution 49/60 (1994).
[47] Brownlie (2008), 15.
[48] See above the comments in respect to the League of Nations Conventions.

considerations is, strictly speaking, not part of the definition, but clarifies that these acts are not justifiable. Some authors hold the view that this declaration, including the clarification of the unjustifiable character of the described acts, has entered into customary law by annually "recalling" this declaration in the UN GA resolutions[49] on terrorism[50].

5. Terrorism in International Humanitarian Law

IHL contains several provisions that prohibit acts of terrorism. Article 33 of the Fourth Geneva Convention reads, *inter alia*, that *''[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited.''* Article 51(2) of Additional Protocol I to the four 1949 Geneva Conventions, which deals with international armed conflicts, and 13(2) of Protocol II, which deals with non-international armed conflicts, state that *''Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.''* Therefore, the Additional Protocols can be seen as to include a definition of terrorism. The *actus reus* of this definition is an act or threat of violence. Since the violent act is not specified, it also covers acts not directed against civilians. The *mens rea* requires that the primary purpose of the violent act was to spread terror among the

[49] UN GA Resolutions 50/53 (1995), 51/110 (1996), 52/165 (1997), 53/108 (1998), 54/110 (1999), 55/158(2000), 56/88 (2001), 57/27 (2002), 58/81 (2003), 69/46 (2004).
[50] Lavalle (2007), 101; Cassese (*International Criminal Law* 2008), 165, Against this view Saul (*Defining Terrorism in International Law* 2006), 210.

civilian population. The intention to spread terror among civilians is the determining element for defining acts of terrorism. This is due to the fact that in armed conflicts any use of deadly force may create fear among bystanders, albeit the attack may be lawful in the context of IHL.

III. Common Elements

After presenting some of the approaches that have been made to generally define international terrorism, I will examine whether there are common elements which can form the core of a definition of terrorism in International Law.

1. Objective Elements

The starting point of all definitions is a physical act. Some definitions, as in the League of Nations Convention, or the definition in the 1994 UN Declaration explicitly term the act "criminal". Others require an "*act intended to cause death or serious bodily injury" (Financing Convention)* or *"[a]cts or threats of violence" (*Additional Protocols to the Geneva Conventions). The Draft Comprehensive Convention also contains acts which are directed against public or private property and states that the acts have to be unlawful. Therefore, it can be held that all these definitions require a physical act that is committed to cause death or serious bodily injury.

The question arises as to why some definitions label the act as unlawful or even criminal and others not? On the one hand, it sounds logical that lawful acts cannot qualify as acts which constitute terrorism. On the other hand, it seems to be unclear which legal standard should determine an act as unlawful or criminal. In most legal systems, causing death or bodily injury to another person is unlawful. Therefore one can say that the physical act should be an act causing death or bodily injury which is "*normally criminalised under any national penal system*"[51]. The reason that the Additional Protocols to the Geneva Conventions do not refer to criminal acts is due to the fact that causing death or bodily injury to persons is not necessarily criminal in armed conflicts. Therefore, the definition of terrorism in IHL cannot been considered as a deviation from the rule but as an adjustment to the particular situation of an armed conflict.

The next element is the target against which the act is directed. The League of Nations Convention refers only to a State as a possible target of the criminal act. On the contrary, the Financing Convention refers "*to a civilian, or to any other person not taking an active part in the hostilities".* The 1994 UN Declaration as well as the Draft Comprehensive Convention and the Additional Protocols do not determine a specific target. Therefore one could say that they include unlawful acts directed against the State, including its armed forces, as well as acts directed

[51] Cassese (*International Criminal Law* 2008), 165.

against civilians. The League of Nations Convention, as mentioned above, was a reaction of the international community to the assassination of the King of Yugoslavia and the French Foreign Minister. One can argue that the definition was only established to cover acts directed against representatives of a State. Therefore the purpose of this Convention was not to cover all acts of terrorism but only terrorism against State representatives. Thus the League of Nations Convention follows a concept similar to the sectoral conventions and does not claim to cover all acts of terrorism. This argumentation is sound since most acts labelled as terroristic by the public and condemned as terrorism by the international community are directed against civilians[52]. Therefore, the League of Nations Convention was not intended to determine all possible targets of a terroristic act.

More debatable is the question whether only civilians and other persons not taking a direct part in armed hostilities or whether combatants, too, can be considered as targets of terrorist acts. The Terrorism Financing Convention excluded from its scope situations of armed conflicts (article 2 (1)(b))[53]. Therefore there was no need to include combatants as a possible target. Cassese points out that the general exemption of armed conflicts goes too far because it leaves military personnel unprotected from terroristic attacks by civilians[54]. The Draft Comprehensive

[52] For example the attacks in New York on 11. September 2001, the bombings in London on 7. July or the bombings in Madrid on11. March 2004.
[53] Because this situations are covered by IHL.
[54] Cassese (*International Criminal Law* 2003), 127.

Convention does not exclude the entire situation of an armed conflict from its scope of application, but only acts from armed forces in armed conflicts. Therefore, the wording of the Draft Comprehensive Convention also contains unlawful acts against combatants. The Additional Protocols to the Geneva Conventions do not require that terrorist acts necessarily or exclusively strike civilians or the civilian infrastructure[55]. According to the wording, even acts that are aimed at lawful targets can serve as a basis for terrorism in IHL. It remains in question why the definition of the Additional Protocols goes further than definitions covering terrorism in peace-times, where lawful acts cannot constitute acts of terrorism[56]. Finally, one can conclude that all modern definitions include civilians and persons not taking an active part in hostilities as possible targets against which the unlawful act of terrorism is directed.

2. Subjective Elements

The subjective element can be described as the "labelling element" since only the *mens rea* turns an ordinary criminal into a terrorist[57]. Apart from the intent regarding the performance of the violent act there appears to be a special intent requirement in nearly all definitions of terrorism. The League of Nations Convention requires that the act has to

[55] Gasser (2002), 556.
[56] The ICTY stated in Prosecutor v Galić, Case No. IT-98-29-T of 5. December 2003, para. 136:" With respect to the "acts of violence", these do not include legitimate attacks against combatants but only unlawful attacks against civilians".
[57] Weigend (*The Universal Terrorist* 2006), 924.

be *"intended or calculated to create a state of terror in the mind of particular persons, or a group of persons or the general public"*. The 1994 UN Declaration adopted almost the same wording. Similarly, the definition in the Additional Protocols requires that the primary purpose of the act is to spread terror among the civilian population. The Draft Comprehensive Convention requires as one variant of the *mens rea* that the purpose (by its nature or context)[58] to commit the act is to intimidate a population. The identical wording is used in the Terrorism Financing Convention. The latter two conventions alternatively require that the purpose of the act is to compel a government or an international organisation to do or to abstain from effecting any act.

On the one hand, all these definitions have as a common element, namely that the purpose of the act is to spread terror among the civilian population. On the other hand, some definitions alternatively require a subjective element of coercion. On closer examination of the relationship of the element of spreading fear and the element of coercion it becomes apparent that spreading fear and compelling are not alternative elements but relate to each other as means and end of an act. The spreading of fear among the population is the means for compelling a government or an international organisation to do or to abstain from doing any act. Means and end violate different legal interests. The coercion violates the authority of a State or an

[58] This wording makes this subjective element practically to an objective element, see above II 3.

international organisation to act in the interests of its citizens or members, whereas, spreading fear among the population violates the individual and collective peace among a population. Therefore, a comprehensive definition should require both elements cumulatively.

Another element, the existing of which deserves discussion, is the motive or superordinate aim. Only the 1994 UN Declaration refers to a superior motive by stating that the criminal act, which was intended to provoke a state of terror, has to be committed for political purposes. On the one hand, many scholars have pointed out that only the political or ideological motive turns an ordinary crime into a terroristic one[59], since it distinguishes terrorist offences from ordinary crimes (murder, hostage taking etc.) This is not entirely true, because, as mentioned above, the purpose to spread fear as well as the purpose to coerce is also a distinguishing feature of terrorism. On the other hand, it does not appear that a certain ideology which motivates the actor, lends the crime a higher degree of unlawfulness than it would have if the motive was to act for private ends. Furthermore, the requirement of such an element could meet critique because the existence of an ideological motive would establish the offence[60]. Thus, the absence of an ideological motive requirement in most conventions appears not as grave as claimed.

[59] Weigend *(The Universal Terrorist* 2006), 923; Cassese (*International Criminal Law* 2008), 167.
[60] As described by the German phrase „*Gesinnungsstrafrecht*".

3. A common definition of terrorism in International Law

Summarizing the above mentioned common elements of definitions of terrorism, it can be held that terrorism in International Law is:

(a) an act causing death or bodily injury to civilians and persons not taking an active part in hostilities (which is normally criminal under domestic law), (b) when the purpose of the conduct is to intimidate a population (c) as means to compel a Government or an international organization to do or abstain from doing any act. In conclusion, one can say there is a "lowest common denominator" determining the elements of terrorism which establish a general accepted definition.

IV. Scope of application

The question of the scope of the definition is, on the one hand, the question when terrorism can be considered international terrorism and, on the other hand, in which situations and to whom the definition should apply.

1. International Element

Terrorism is an issue of international concern inasmuch as it affects the interests of more than one State. Terrorism as a war crime would have an international element due to the context of organised violence as a

result of an armed conflict[61]. Terrorism in time of peace must be "transnational in nature" to qualify as international terrorism[62]. In the words of the Terrorism Financing Convention this means that "the offence" is not international as long as it is *"committed within a single state, the […] offender is a national of the State and is present in the territory of that State and no other State has a basis […] to exercise jurisdiction […]"*[63].

2. The question of a definition - a question of scope?

Cassese states that the alleged lack of a definition is indeed a lack of an agreement on the exception[64]. As mentioned above, this view is based on the idea that the scope of application in the Draft Comprehensive Convention is the only controversial point the international community is struggling with. Such an exception clause would not affect the definition as such. Others state that there is, strictly speaking, no exception to a definition[65]. In my opinion, both views have their merits. On the one hand, it appears that an exception of a definition naturally would be part of a definition. But, on the other hand, the exception in the Draft Convention does not affect the definition as such, but determines the scope of application of the specific Convention. The reason why the Draft Comprehensive Convention excludes some acts,

[61] Werle (2005), 29.
[62] Cassese (*International Criminal Law* 2008), 166.
[63] Article 3 of the Convention for the Suppressing of the Financing of Terrorist.
[64] Cassese (*Terrorism as an International Crime* 2004), 214.
[65] Lavalle (2007), 113.

which are covered by the definition, from its scope of application is that such acts of terrorism are already legally governed by international (humanitarian) law. This illustrates the main weakness of the OIC proposal, since it does not provide any alternative legal basis, which governs the terroristic acts that are proposed to be excluded.

Part II – Terrorism as a crime under International Law

„Terrorism is the war of the poor, and war is the terrorism of the rich. "

Sir Peter Alexander Ustinov[66]

After determining the object of investigation I will now move to the question whether international terrorism is banned by crimes under international law, namely war crimes and crimes against humanity and whether there is a crime of terrorism under customary international law.

A. International terrorism as a war crime

War crimes are violations of a rule of international humanitarian law, which creates direct criminal responsibility under international law[67]. Consequently, the first step is to have a look whether there are rules of international humanitarian law prohibiting terrorism. Secondly, one must examine whether such a rule creates direct criminal responsibility under international law.

[66] The original quote reads: "*Terrorismus ist der Krieg der Armen und der Krieg ist der Terrorismus der Reichen*."
[67] Werle (2005), 269.

I. Prohibition of terrorism in International Humanitarian Law

Article 33(1) of the Fourth Geneva Convention 1949 prohibits "collective penalties and likewise all measures of intimidation or of terrorism" against protected persons in international armed conflict. The term "terrorism" is not defined by the Convention. The prohibition in article 33 is understood as an addition to the "general prohibition" in article 27 of violence and inhumane treatment against civilians[68]. This protection extends only to persons "in the hands of a Party to the conflict"[69] This prohibition is an expression of customary international law[70].

Article 4(2)(d) of Additional Protocol II prohibits "acts of terrorism" against "all persons who do not take a direct part or have ceased to take part in hostilities" in non-international armed conflicts "at any time and in any place whatsoever", as well as threats to commit such acts.

As mentioned above, acts or threats of violence of which the primary purpose is to spread terror among the civilian population are prohibited by IHL, namely Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II. Protocol I applies to international armed conflicts as well as "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed

[68] Saul (*Crimes and Prohibitions of 'Terror' and 'Terrorism' in Armed: 1919-2005* 2005), 268.
[69] Article 4 of the Fourth Geneva Convention.
[70] Blaškić Appeal Judgment, para. 145; Krnojelac Appeal Judgment, para. 220.

resistance"[71], whereby Additional Protocol II applies to civilians in non-international conflicts. It is worth discussing when terrorist acts cross the threshold to trigger the application of humanitarian law. The International Criminal Tribunal for the former Yugoslavia (ICTY) has held that instances of "terrorist attacks" do not amount to an armed conflict[72]. Therefore, terroristic acts have to occur in the context of an armed conflict to be relevant conduct for IHL.

Furthermore, debatable is whether this norm is customary international law[73]. The prohibitions do not contain new principles but rather codify in a unified manner the prohibition of attacks on the civilian population.[74] These prohibitions reflect the basic principles of IHL. Therefore, these provisions dealing with terror and terrorism in the fourth Geneva Convention and the Additional Protocols reflect customary humanitarian law or turned into it[75].

II. Individual Criminal Responsibility

The provisions referring to terror or terrorism in the fourth Geneva Convention and the Additional Protocols are not labelled as crimes but

[71] 1977 Protocol I, Article 1(3).
[72] ICTY TC Prosecutor v Delalić et al, Case No IT-96-21-T, Judgment, 16 November 1998, para. 185.
[73] Article 51 of Additional Protocol I was adopted with 77 votes in favor, one against and 16 abstentions. No State that did not vote in favor expressed any concern as to the content of the prohibition contained in Article 51(2). Article 13 of Additional Protocol was adopted consensual.
[74] ICTY AC Prosecutor v Galić, Case No IT-98-29-A, 30 November 2006, para. 87.
[75] (Cassese, International Criminal Law 2008), 172.

as prohibitions[76]. They are not defined as grave breaches in article 147 of the fourth Geneva Convention, respectively, in article 85 of the First Additional Protocol. Therefore, one has to examine whether a customary international rule exists which leads to individual criminal responsibility. The ICTY decides *inter alia* by means of examining state practice, indicating an intention to criminalise the prohibition, including statements by government officials and international organisations, as well as punishment of violations by national courts and military tribunals whether a prohibition leads to individual criminal responsibility[77]. In March 1919 the so-called Commission on Responsibilities, a body created by the Preliminary Peace Conference of Paris to inquire into breaches of the laws and customs of war committed by Germany and its allies during the First World War, established a list of war crimes. The first listed crime was "murders and massacres; systematic terrorism" of civilians[78]. In the end, there was no one charged with the crime of "systematic terror" in the Leipzig War Crimes Trials. The Appeal Chamber of the ICTY lists in the *Galić* judgment a number of domestic provisions criminalising acts of terrorising civilians as a method of warfare[79]. Consequently, the Appeals Chamber found that customary international law imposes individual criminal liability for violations of the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional

[76] Saul (*Crimes and Prohibitions of 'Terror' and 'Terrorism' in Armed: 1919-2005* 2005), 272.
[77] ICTY AC Prosecutor v Galić, Case No IT-98-29-A, 30 November 2006, para. 92.
[78] Werle (2005), 4.
[79] ICTY AC Prosecutor v Galić, Case No IT-98-29-A, 30 November 2006, fn 297.

Protocol II[80]. Against the view that there is individual criminal responsibility under customary international law it could be argued that the Statute of the International Criminal Court (ICC) does not provide for any crime which specifically corresponds to the mentioned provisions of the Additional Protocols in article 8 (2)[81]. However, article 10 of the Statute reads "Nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". This means that the drafters of the Statute did not claim to incorporate all crimes under international law exhaustively. Therefore, international crimes outside the Statute may exist.

Strong indicators for the existence of individual criminal responsibility under customary international law can be found in the Statutes of the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). Article 4(d) of the ICTR Statute provides that the Tribunal has jurisdiction over violations of common article 3 of the Geneva Conventions as well as the Second Additional Protocol and explicitly provides for jurisdiction over "acts of terrorism". Article 3(d) of the SCSL Statute grants the Court jurisdiction over "acts of terrorism"[82].

[80] Against this view was Judge Schomburg. In the Trial Chamber Judge Rafael Nieto-Navia formulated a dissenting opinion regarding this question.
[81] Werle (2005), 344.
[82] See for example Count 1 in Prosecution's Second Amended Indictment in Prosecutor v Taylor, Case No SCSL-03-01-PT, 29 May 2007.

III. The *actus reus* of the war crime of spreading terror

The Additional protocols prohibit "*Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited''.* This must be understood as part of the superior prohibition of IHL to attack civilians. The definition uses the term "acts or threats of violence". Article 49 (1) of Additional Protocol I defines "attacks" as "acts of violence". The *actus reus* of the offence should be interpreted within the light of the general, superior prohibition. Therefore, the attacks must be directed against civilians. Thus, a lawful attack against a military target, even if its primary purpose was to spread terror among the civilian population, can not constitute the war crime of terror[83] Consequently, only attacks directed against civilians or other persons not taking an active part in the hostilities can constitute the crime. Furthermore, the question has to be answered whether the acts or threats of violence have *de facto* to cause "death or serious bodily injury". In the *Galić* case the Court did not have to decide this question, since the sniping of civilians in Sarajevo[84] caused actual deaths and serious bodily injuries.

It appears that there exists a threshold of *de facto* causing death or serious bodily injury. What speaks against the existence of such a threshold is that the war crime of terror is not a war crime against

[83] Against this view: ICTY AC Prosecutor v Galić, Case No. IT-98-29-A, 30 November 2006, para 102.
[84] This was the conduct that Galić was, *inter alia*, charged with.

persons but a war crime by employing methods of prohibited warfare. The prohibited method of warfare is the spreading of terror among the civilian population. Thus, the main element of wrongdoing is not a causing of death or serious bodily injury but the use of the prohibited method of warfare.

Nevertheless, article 85 (3)(a), of the First Additional Protocol expressly defines the act of making the civilian population or individual civilians the object of attack as a grave breach as long as it results in death or serious injury to body or health. Therefore, it appears that a violation of the prohibition only leads to individual criminal responsibility as long as the act of violence causes actual death or serious bodily injury.

The question whether mere "threats of violence" can constitute the crime also remained open in the *Galić* case. In the light of the above-mentioned this has to be negated, since a mere threat will not cause death or bodily injury.

IV. The *mens rea* of the war crime of spreading terror

The wording of Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II does not require that the acts of violence must have actually spread terror among the civilian population, but rather have the purpose to do so. The *travaux préparatoires* to Additional Protocol I illustrate that there had been attempts during the drafting to

replace the original wording from the purpose to spread terror among the civilian population to a *de facto* infliction of terror among the civilian population. Nevertheless, this proposed replacement was rejected[85]. In the light of the fact that that the waging of war leads to similar effects as the spreading of terror among the civilian population, it is sound that the purpose to spread terror intentionally was the decisive element for scrutinizing such acts. The ICTY holds the same view by stating "[t]he *mens rea* of the crime of acts of violence the primary purpose of which is to spread terror among the civilian population is composed of the specific intent to spread terror among the civilian population"[86].

The term "spreading terror" is undefined and deserves interpretation. As mentioned above, the word *terror* means scare or fear. The ICTY stated that terror means "extreme fear"[87]. The word "extreme" suggests that a certain magnitude of fear has been caused. Rather the actor has to have the intent to bring the civilian population in an extraordinary state of fear. This is certainly the case where the civilian population is in a state of mortal fear.

Further, the wording of the prohibition suggests that the purpose to spread terror among the civilian population need not to be the exclusive purpose to commit the acts of violence. Therefore, the question arises

[85] Travaux préparatoires, Vol. III, p. 203
[86] ICTY AC Judgment, Prosecutor v Galić, Case No. IT-98-29-A, 30 November 2006, para 104.
[87] ICTY TC Judgment, Prosecutor v Delalić et al, Case No IT-96-21-T, 16 November 1998, para. 137.

how purposes other than the leitmotif of terrorising the population carry weight. The prohibition uses the word "primary" purpose. Consequently, the existence of other purposes is innocuous as long as the spreading of terror was the major reason to commit the acts of violence. The ICTY stated that the intent to spread terror among the civilian population has to be principal among the aims and that such intent can be inferred "*from the circumstances of the acts or threats, that is from their nature, manner, timing and duration*"[88]. This rule of derivation is evocative of the term "*by its nature or context"* as used in some anti-terrorism treaties[89].

The definition of terrorism, as it has been developed above, requires intent to compel a government or an international organisation to take a certain action. This requirement is not included in the prohibition of the Additional Protocols, since the general aim of warfare is to defeat the enemy. Therefore, it can be held that latently all acts of warfare are intended to compel the enemy's government to capitulate.

V. Summary

The question whether there presently exists a war crime of spreading terror among the civilian population should be answered in the positive. The ICTY does neither use the term "war crime of terrorism" nor does it

[88] ICTY AC Judgment, Prosecutor v Galić, Case No. IT-98-29-A, 30 November 2006, para 104.
[89] See for example Article 2 (1)(a)International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

use the term "war crime terror" in its sentences[90]. The question looms large: is the war crime of spreading terror the equivalent of terrorism in an armed conflict?

A *petitio principii* would be to argue: since terror is an element of the crime the crime is terrorism. As defined above, terrorism requires three elements.

Firstly, there must be an act causing death or bodily injury to civilians and persons not taking an active part in hostilities. As clarified, not all acts or threats of violence lead to individual criminal responsibility. Rather, only acts (not threats) causing death or serious bodily injury do so. Furthermore, since attacks against lawful targets cannot constitute the crime, only attacks again civilians and persons not taking an active part in hostilities are elements of the crime.

Secondly, the purpose of the conduct is to intimidate a population. Spreading terror among the civilian population means to create a state of extreme fear among the civilian population. This is obviously intimidating the civilian population.

Thirdly, the spreading of extreme fear must be a means to compel a government or an international organisation to do or abstain from doing

[90] ICTY TC Judgment, Prosecutor v Delalić et al, Case No IT-96-21-T, 16 November 1998, para 769.

any act. As mentioned, there is no element of compelling required for the war crime of spreading terror. Rather, in all acts of warfare there is a latent intent to compel the enemy's government to capitulate.

Consequently, the spreading terror can be labelled as the war crime of terrorism, since it fulfils all elements of the definition developed above.

B. Terrorism as crime against humanity

The crime of terrorism, as it has been defined above, could also constitute a crime against humanity. It is therefore necessary to examine how different international legal bodies have dealt with this question. Consequently, what will be examined now is how crimes against humanity are defined, how different international tribunals, namely the ICTY and the ICTR, have reacted to this problem and whether terrorism is covered by the ICC Statute as a crime against humanity.

I. Definition of Crimes against Humanity

According to article 5 of the ICTY Statute, the *actus reus* elements of the crime against humanity are that (1) one or more of the listed crimes (2) have been committed in an armed conflict, (3) and were directed against any civilian population.

It should be noted that a nexus to an armed conflict is required. Nevertheless, the tribunal itself has stated that such a nexus is no longer required under customary law[91]. An attack is a course of conduct involving the commission of acts of violence[92]. The commission of such a crime is considered an attack. For this attack to be considered directed against a civilian population it must be widespread or systematic[93]. The underlying offence does not have to be an attack itself as long as it comprises part of a pattern of widespread and systematic crimes directed against a civilian population[94].

Similarly, according to article 3 of the ICTR Statute, the elements, which have to be met for the *actus reus* of the crime against humanity are that (1) the act must be part of a widespread or systematic attack, (2) the act must be committed against members of the civilian population, (3) the act must be committed on one or more discriminatory grounds, namely national, political, ethnic, racial or religious grounds, (4) the act must be inhumane in nature and character, causing great suffering or serious injury to body or to mental or physical health as enlisted in article 3.

What needs to be noted is that a nexus with an armed conflict is not required according to the ICTR Statute. On the other hand, the act must

[91] ICTY TC Judgment Prosecutor v Tadić, Case IT-94-1, 15 July 1999, para. 78.
[92] ICTY TC Judgment Prosecutor v Kunarac et al, Case No IT-96-23, 22 February 2001, para. 415.
[93] ICTY TC Judgment Prosecutor v Tadić, Case IT-94-1, 7 May 1997para. 646.
[94] ICTY TC Judgment Prosecutor v Kunarac et al, Case No IT-96-23, 22 February 2001, para. 417.

be committed on discriminatory grounds. Such an attack may be non-violent in its nature, like imposing a system of apartheid or exerting pressure on the population to act in a particular manner, if orchestrated on a massive scale or in a systematic manner[95].

We may note the fact, that the definitions of a crime against humanity according to the ICTY and the ICTR are concurrent, apart from the requirements of a nexus to the war and the commitment on discriminatory grounds, which were in each case introduced to limit the scope of the respective jurisdiction. Consequently, it is useful to examine the specific elements of these definitions in conjunction.

The key questions in regard to those definitions are whether there is a systematic and widespread attack and what elements constitute a civilian population.

1. "Widespread"

As regards the question of a "widespread occurrence", the ICTY has held that this term refers to the large-scale nature of the attack and the number of targeted persons[96] or large-scale attacks and a large number

[95] ICTR TC Judgment Prosecutor v Akayesu, Case No ICTR-96-4, 2 September 1998, para. 581.
[96] ICTY AC Judgment Prosecutor v Kordic, Case No IT-95-14-2A, 17 December 2004, para.94.

of victims[97]. In one of its judgment by the ICTR clarified that the concept of "widespread" indicates a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims[98].

2. „Sytematic"

As to the question of a systematic occurrence, the ICTY originally held that there needs to be a political objective, a plan pursuant to which the attack is perpetrated, or an ideology, in the broad sense of the word, to destroy, persecute or weaken a community, and 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, and the preparation and use of significant public or private resources, whether military or other, and the implication of high-level political and/or military authorities in the definition, and establishment of the methodical plan, whereas it suffices if individuals with *de facto* power or organised in a criminal gang can also be liable[99]. Similarly the ICTR has stated that "systematic" refers to thoroughly organised act, which follow a regular pattern on the basis of a common policy involving substantial public or private resources. This policy must, however, not

[97] ICTY TC Judgment Prosecutor v Kunarac et al, Case No IT-96-23, 22 February 2001, para 429.
[98] ICTR TC Judgment Prosecutor v Akayesu, Case No ICTR-96-4, 2 September 1998, para. 580.
[99] ICTY TC Judgment Prosecutor v Blaskic, Case No IT-95-14, 3 March 2000, para. 188.

be adopted formally as the policy of a state but there must be some kind of preconceived plan or policy[100].

Later, though, the ICTY as well as the ICTR both interpreted this element as to be defined as an organised nature of the acts of violence and the improbability of their random occurrence. The requirement of a policy or a plan was dropped[101].

3. „Civilian Population"

In regard to the term „civilian population" it is held that it includes members of the armed forces who have laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause[102]. In a context short of an armed conflict, this includes all persons, except those entrusted with the maintenance of order and those possessing legitimate means to exercise force, especially members of the police force and other representatives of the executive power[103]. Just as in regard to combatants the specific situation of the victim is decisive rather than its general status. The targeted population

[100] ICTR TC Judgment Prosecutor v Akayesu, Case No ICTR-96-4, 2 September 1998, para. 580.
[101] ICTY TC Judgment Prosecutor v Blaskic, Case No IT-95-14, 3 March 2000, para. 101; ICTR TC Judgment Prosecutor v Muvunyi, Case No ICTR-00-55-A-T, 12 September 2006, para. 512.
[102] ICTR TC Judgment Prosecutor v Akayesu, Case No ICTR-96-4, 2 September 1998, para. 582.
[103] ICTR TC Judgment Prosecutor v Kayishema and Ruzindana, Case No ICTR-95-1-T 21 May 1999, para. 127.

must only be predominantly civilian in nature. The presence of certain non-civilians does not change the character of the population[104].

Under both statutes the deciding mental element is the knowledge of the broader context in which the offence occurs[105]. Under ICTY a further motivation is irrelevant[106], while under ICTR the execution of crimes solely for personal motives is excluded[107]. The inclusion of a special mental element in ICTR is also a jurisdictional limitation[108].

4. Article 7 of the ICC Statute

Crimes against humanity are defined in article 7 of the ICC Statue. It has to be noted that, unlike under the ICTY Statute a nexus with a war is not required. The elements that qualify an act as a crime against humanity are: (1) The crimes have to be commissioned within the framework of a widespread or systematic attack (2) on the basis of a policy – be this state or non-state based, and (2) against a civilian population.

Such an attack does not need to be armed. The term "civilian population" may also encompass prisoners of war and former

[104] ICTR TC Judgment Prosecutor v Bagilishema, Case No ICTR-95-1A-T, 7 June 2001, para. 79.
[105] ICTY TC Judgment Prosecution v Kupreskic, , Case No IT-95-16-T, 14 January 2000, para. 556; ICTR TC Judgment Prosecutor v Kayishema and Ruzindana, Case No ICTR-95-1-T 21 May 1999, para. 134.
[106] ICTY TC Judgment Prosecutor v Tadić, Case IT-94-1, 15 July 1999, para. 251.
[107] ICTR TC Judgment Prosecutor v Kayishema and Ruzindana, Case No ICTR-95-1-T 21 May 1999, paras. 122 and 134.
[108] ICTR TC Judgment Prosecutor v Akayesu, Case No ICTR-96-4, 2 September 1998, para. 464.

combatants. Perpetrators can be civilians or military personnel, state or non-state representatives[109].

In regard to the *actus reus* of this crime, the ICC Statute lists eleven offences, including the open provision of inhumane acts, which must be of a similar character as the other enlisted conducts, aimed at intentionally causing great suffering, or serious injury to body or to mental, or physical health. The element of a discriminatory ground is only required in regard to the crime of persecution according to paragraph (1)(h).

The act being considered as a crime against humanity must occur as part of an attack[110]. An attack is a course of conduct involving multiple commissions of acts as referred to in Article 7(1)(a)-(k), which need not to be military, and therefore do not equate to an armed conflict in the sense of the IHL[111]. Such an attack must be widespread or systematic, meaning it that it has to involve multiple acts or emanate from or contribute to a state or organizational policy[112]. It also has been held that these elements are characterised either by their seriousness, or by their magnitude, respectively, which means by the fact that they were a part of a system designed to spread terror[113].

[109] Arnold (*The Prosecution of Terrorism as a Crime Against Humanity* 2004)992.
[110] (Dixon 2008), 174.
[111] Elements of Crime, UN Doc. PCNICC/2000/1/Add. 2, Introduction to Article 7.
[112] Dixon (2008), 177.
[113] Dutch Special Court of Cassations v. Albrecht, printed in Cassese/Gaeta/Jones, ICC-Commentary, 2002, Vol. 1, at 357.

Also, it is a moot point whether such attacks must always be based on a policy, which may be promoted both by state and non-state actors with *de facto* powers. As has been shown above such a requirement has been rejected by the ICTY and the ICTR, which have found a very similar definition for crimes against humanity as the ICC Statute. It therefore can be held that there is no requirement in customary international law that a crime against humanity be committed pursuant to or in furtherance of a plan or policy[114].

In regard to the *mens rea,* it suffices that the perpetrator knew about the widespread or systematic attack on the civilian population. His or her personal motives are irrelevant[115].

II. International Jurisprudence on Terrorism as a Crime against Humanity

Under the jurisprudence of ICTY the use of a policy of terror has been usually charged under the heading of persecution or inhumane acts[116]. For instance, the court noted in its judgment, while finding the accused guilty of persecution for having terrorised the Bosnian Muslim civilians in the enclave of Srebrenica that these acts were “crimes of terror” and

[114] Dixon (2008), 235.
[115] Elements of Crime, UN Doc. PCNICC/2000/1/Add. 2, Introduction to Article 7.
[116] Arnold (*The Prosecution of Terrorism as a Crime Against Humanity* 2004), 990.

"terrorisation"[117]. Furthermore, it was held that concentration camps for Muslims, Croats and other non-Serb detainees, were terrorist tools and were consequently considered a crime against humanity, specifically the crime of persecution[118]. It was furthermore held that even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution[119]. The Trial Chamber found that as regards the killing and wounding of the inhabitants of Ahmici and the destruction of a number of houses and mosques, which had had the ultimate goal to spread terror among the population so as to deter the members of that particular ethnic group from ever returning to their homes. It was concluded that this had amounted to the crime against humanity of persecution[120]. In other decisions acts like plundering and wanton destruction, when aimed at terrorising the population and based on a discriminatory intent, may amount to crimes against humanity[121].

ICTR rulings that reflect on the terroristic aspects of crimes against humanity are scarcer. Nevertheless, it has been held that non-physical aggressions such as the infliction of strong fear or strong terror,

[117] Prosecutor v Krstic, TC Judgment of August 2, 2001, Case IT-98-33, paras. 607 and 653.
[118] Prosecutor v Kvocka, TC Judgment of November 2, 2001, Case IT-98-30/1, para 117, Prosecutor v Tadic, Second amended Indictment of December 14, 1995, Case IT-94-1-I, para. 4.
[119] Prosecutor v Kupreskic, TC Judgment of January 14, 2000, Case IT-95-16-T, para. 550.
[120] Prosecutor v Kupreskic, TC Judgment of January 14, 2000, Case IT-95-16-T, paras. 749ff.
[121] Prosecutor v Kordic and Cerkez, TC Judgment of February 26, 2001, Case IT-95-14/2, para. 205.

intimidation or threat also cause serious mental harm. In the case in question the elements of serious mental and physical harm amounted to the finding that genocide had occurred, which is a special type of crime against humanity[122].

In conclusion, the ICTY as well as the ICTR have considered certain acts terrorising the civilian population to be breaches of the provisions on crimes against humanity. Nevertheless, the jurisdiction of those tribunals is limited in range and time and confined to the territories of acts that have occurred during the conflicts in Former Yugoslavia and Rwanda.

III. Terrorism as a Crime against Humanity under the ICC Statute

Since terrorism is not expressly mentioned in Article 7 and terrorism, as defined above, has to cause death or serious bodily injury, terrorism could be seen as being covered by the sub-categories of crimes against humanity pursuant to Article 7(1)(a), (b), (f) and (k). The most relevant provision that could cover terrorism is the one of murder as in article 7(1)(a).

The attacks of September 11 in New York, for instance, were constituted of multiple and co-ordinated attacks against a civilian population,

[122] Prosecutor v Kayishema and Ruzindana, TC Judgment of May 21, 1999, Case ICTR-95-1-T, paras 107, 110.

causing the deaths of thousands of people in furtherance of Al Qaeda's terrorist policy against the United States of America, which the perpetrators knew. Due to this furtherance of an organisational policy they were systematic. Since they were aimed at several targets and caused the death of many, they were also widespread. Consequently, these acts constituted a crime against humanity, article 7(1)(a) ICC Statute.

The question arises whether the September 11 attack against the Pentagon in Washington D.C. constitutes a crime against humanity. On the one hand, the Pentagon is the military headquarters of the United States. Therefore, it could be considered that it did not qualify as an attack against the civilian population. On the other hand, the victims in the airplane were civilians, therefore it could be argued, that this already qualifies the attack on the Pentagon as directed against the civilian population.

Other events such as the Lockerbie incident would not fulfill the elements to be considered a crime against humanity. In this incident 270 people were killed. Whether this incident was part of a plan to further a policy could not be determined, the circumstances being unclear. Therefore it cannot be determined whether the incident had been part of a systematic attack. Also, the incident was isolated and was not of a sufficient magnitude to be considered widespread.

Terroristic acts might also be considered an extermination as in article 7(1)(b). This would be the case, if there were a large number of victims and the act was aimed at a certain group[123]. In respect of modern acts of terrorism, the use of a nuclear device against a certain population could amount to crime against humanity by extermination.

A terroristic act could also be held to be torture as in article 7(1)(f), if there is a sufficient grave effect on the mental state of the civilian population.

To fulfil the requirements of an inhumane act as defined in article 7(1)(k), the perpetrator has to inflict great suffering or serious injury to body or to mental or physical health by means of an inhumane act, such an act being of a character similar to any other act referred to in article 7, paragraph 1 of the Statute, and the perpetrator had to be aware of the factual circumstances that established the character of the act. This clause could be applicable in the rare cases where serious bodily harm was caused but an intent to kill was not present, as long as the acts were intended to inflict the kind of damage envisaged by this provision.

[123] (Hall 2008) 191.

IV. Conclusion

Terroristic acts can be considered crimes against humanity under certain conditions. If such an act fulfilled the elements required to be considered a crime against humanity it would be considered as such by international courts. It also can be prosecuted as a crime against humanity according to the ICC Statutes.

Nevertheless, there are cases, especially if the question arises whether an act was widespread or systematic, when a terroristic act is not regarded as a crime against humanity. This is particularly the case if the terroristic act is an isolated act with a comparatively small number of victims and it cannot be determined if it was aimed at furthering an organisational policy, such as the Lockerbie incident.

While terrorism can in some instances be considered a crime against humanity, this does not express the specific degree of unlawfulness these acts have. Specifically, the intent to coerce the State to act or desist from acting in a certain manner is not a requirement of the act to be considered a crime against humanity. On the other hand, in some cases, even though there is intent to terrorise the civilian population, the acts might not be of sufficient magnitude as to amount to a crime against humanity.

In the case of genocide, which is an aggravated form of crime against humanity, a special intent to destroy, in whole or in part, a national, ethnic, racial or religious group, is necessary, whereas the crime against humanity requires proof that the crime was committed as part of a widespread or systematic attack on a civilian population[124]. Similarly, the crime of terrorism is also a special intent crime. There is no requirement of a systematic or widespread attack for the crime of genocide but instead the requirement of a special intent since this gives genocide its special degree of unlawfulness. In the case of terrorism, on the other hand, the special intent, which makes a crime terroristic in nature, finds no expression in the prosecution as a crime against humanity. Consequently, it is submitted that even though some terroristic acts are covered by the provisions on crimes against humanity, this does not lead to an adequate result in regard to the punishment of terrorism as an international crime.

C. Terrorism as a discrete crime under customary international law

As examined above, there is indeed a common definition of terrorism. But from the existence of a definition one cannot conclude that there is also a crime under customary law.

[124] Schabas (2008), 157.

There is a war crime of terrorism under international law, namely the war crime of spreading terror. Therefore, it will be examined whether there is a discrete crime of terrorism under customary international law in time of peace. According to article 38 of the Statute of the International Court of Justice "international custom, as evidence of a general practice accepted as law" is, *inter alia*, a source of law. International custom is constituted by two elements, namely State practice (*usus*) and the corresponding view of States (*opinio iuris*)[125]. Therefore, these are the criteria to determine whether there is a crime of terrorism under customary international law.

Most scholars understand terrorism as a transnational crime or treaty-based crime and not as a discrete crime under international law[126]. This view is based on the idea that there is no corresponding view of what is terrorism or that terrorism is no international crime *ipso iure.*

A common definition of terrorism has been developed, though. Therefore, the argument that terrorism is not a distinct crime because it lacks definition can be rejected.

Regarding the second argument, it has to be ascertained whether the crime of terrorism qualifies as an international crime *ipso iure*. Compared to the so-called core crimes, a crime has to qualify as one of

[125] Cassese (*International Law* 2005), 157.
[126] Werle (2005), 37; Saul (*Defining Terrorism in International Law* 2006), 270.

the most serious crimes of international concern to be considered a crime under international law[127]. The seriousness of the crime of terrorism can be illustrated by the UN World Summit 2005. There, nearly all heads of States had elaborated on the fact that international terrorism is one of the main problems of international concern. Nevertheless, they failed to agree on a general accepted definition but established a "strong political push for a comprehensive convention against terrorism"[128]. In doing so they implicitly stated that there is no *opinio iuris* regarding a crime of terrorism under international law yet. Therefore, it can be held that there is a common definition of terrorism, but there is no crime of terrorism in times of peace under customary international law yet. The hope of the international community to criminalise international terrorism is solely based on the Comprehensive Convention against Terrorism.

[127] Article 1 of the ICC Statute.
[128] 2005 World Summit Outcome, available at: www.un.org/summit2005

Résumé

Firstly, the large number of international legal instruments against terrorism, such as the UN counter-terrorism treaties shows that there are ambits of the international community to criminalise the phenomena of terrorism, since terrorism is a problem of international concern.

Secondly, there is a core definition of what can be understood as terrorism, as has been explained above. Nevertheless, there is still a disagreement regarding the scope of application of these instruments. This disagreement is due to the fact that a number of States propose to avoid the label of terrorism for the so-called "freedom fighters". Even though, the Secretary-General of the Arab League, Mr Moussa, has stated that the Palestinian struggle for self-determination did not imply that innocent civilians might be attacked[129], it appears contradictory that the Arab League advocates for an exclusion clause for the so called freedom-fighters in the Draft Comprehensive Convention. One argument supports the view of OIC proposal, though. One might understand terrorism in the context of conflicts like the Palestinian-Israeli conflict as an asymmetrical strategy of violence[130], where the one side has a modern armed force and the other bands of fighters with little organisation and lesser means. In my view, there is no reason to exclude members of a modern armed force from being labelled as

[129] See Cassese (*International Criminal Law* 2008), 162, fn 1.
[130] Daase (2007), 91.

terrorists when they commit terroristic acts only because they are ruled by IHL, while the members of the less structured party should be labelled as such. One finding of this research paper is the existence of the war crime of spreading terror, which can also be labelled as war crime of terrorism, since it is defined by the elements of terrorism. This war crime of terrorism has the potential to end the substantial inequality in labelling conduct as terroristic and the authors of the crimes terrorists. Therefore, including the war crime of terrorism, which is indeed a crime under international customary law, expressly into the Rome Statute would give a signal to the international community that terrorist conduct will always be labelled as such and strongly condemned.

Furthermore, the sound argument by States regarding the arbitrary labelling as terrorists, which is constraining the UN Comprehensive Convention on Terrorism, would be without foundation.

Therefore, the war crime of terrorism has the potential to lead the way out of the *cul-de-sac* of the international fight against terrorism and could lead to a broader agreement of the States concerning terrorism.

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Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
Draft Comprehensive Convention	Draft Comprehensive Convention on International Terrorism, UN Doc. A/59/894 Appendix II, 12 August 2005
Fourth Geneva Convention	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
ICC	International Criminal court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for the prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda or by Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Neighbouring States between 1 January and 31 December 1994
ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia.
IHL	International Humanitarian Law
League of Nations Convention	League of Nations Convention for the Prevention and Punishment of Terrorism, adopted by the League of Nations on 16 November 1937
Terrorism Financing Convention	International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999
OIC	Organisation of the Islamic Conference
SCSL	Special Court for Sierra Leone

UN GA	General Assembly of the United Nations