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INTERNATIONAL CRIMINALISATION OF TERRORISM

This article examines the concept of terrorism in international law and highlights its relevant contemporary developments, paying particular attention to its criminalisation under international criminal law. To this end, the problem of definition is approached and the basic distinction between terrorism as a treaty crime and terrorism as an international crime under universal jurisdiction is proposed and analysed. An evolutionary theoretical approach to the criminalisation of international terrorism is supplemented with a more practical one which aims to offer a brief overview of the normative measures taken within the European Union and their inclusion in the legal order of the Republic of Slovenia.

I. INTRODUCTION

The aim of this paper is to offer an overview of the development of the concept of terrorism in international law and to highlight some contemporary developments with an emphasis on aspects relevant to international criminal law. A practical dimension is given using the example of regional (EU) and national (Slovenia) legal normative measures in the wake of the September 2001 attacks. Particular focus is placed on the understanding of the term and the consequences arising from its diverse perception, especially in the light of some basic categories of international criminal law. After laying out an elementary approach to the concept, international terrorism is presented as a (potential) international crime falling into different categories (diversified contextually, jurisdictionally and on the basis of sources). Treatment of terrorism as an international crime seems relevant not only in the light of the progressive development of international criminal law, but also given the attention the concept has received in the aftermath of the events of September

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2001, and following the nascent attempts at its international regulation since 1937. An evolutionary approach to its criminalisation is then supplemented with a more practical one which aims to offer a brief overview of the normative measures taken within the European Union and their incorporation into the legal order of the Republic of Slovenia. The conclusion alludes to the global prevalence of the *aut dedere* principle and points to the related problems of the enforcement of normative anti-terrorist measures which are, however, beyond the scope of this article.

II. TERROR VIOLENCE, TERRORISM, TERROR – UNDERSTANDING THE TERMS

A. Contextualising “terror” – a wide meaning in international law

A preliminary interdisciplinary remark seems appropriate from the outset. In contrast to the perspectives of political science, international relations or other social sciences, where descriptive approaches to the understanding of many various forms of terrorism or terror-violence are plausible, the normative purpose of law and the legal effects of the application of its rules require a strict and precise definition of terms.¹ However, as is often the case in international (criminal) law, consensus has not been found on what is understood when two interrelated concepts – terrorism or terror-violence – are applied. Not only do international legal scholars widely agree that there is no undisputed or universally accepted definition of international terrorism,² an inconvenient fact that hampers the effectiveness of internationally coordinated anti-terrorist measures and international judicial cooperation,³ but they also add to the confusion with the interchangeable and sometimes superficial usage of the terms *terrorism*, *terror-violence* and *terror*. Furthermore, taking into consideration the somehow inconsistent terminology of legal instruments (either within the international counter-terrorism framework⁴ or those which

¹ Sassòli, M. ‘Terrorism and War’, 4 *Journal of International Criminal Justice* 959–981 (2006) at 961.

² For instance Blakesley, C. L. ‘Ruminations on Terrorism and Anti-Terrorism’, 57 *University of Miami Law Review* 1041-1035 (2003) at 1073; Scalabrino, M. ‘Fighting Against International Terrorism: The Latin American Response’ in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 163-210 at 163.

³ Bianchi, A. ‘Security Council’s Anti-terror Resolutions and their Implementation by Member States’, 4 *Journal of International Criminal Justice* 1044-1073 (2006) at 1048.

⁴ Above all, the 13 universal legal instruments developed under the auspices of the United Nations and its specialised agencies since 1963 and numerous resolutions, reports and studies. For global conventions, see *infra* note 32.

only indirectly tackle the issue, such as the Geneva Conventions of 1949) and especially the highly politicised and often abusive use of the term terrorism in the aftermath of the September 2001 terrorist attacks,⁵ the vague broadness of international legal discourse on terrorism does not seem surprising at all. Moreover, some authors, consistent with this line of reasoning, are of the opinion that terrorism is a term without legal significance and merely a “convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.”⁶

B. Is a definition needed?

Recognising the notorious difficulties⁷ of defining terrorism in international law, which supposedly cause never-ending, redundant debates and impede international cooperation, the following question arises: is a universally accepted definition necessary? From the perspective of international criminal law and its basic and non-derogable principles, the core requirements are clear: the principle of legality, *nullum crimen sine lege*, has to be satisfied.⁸ In other words, as there is no crime without law, it is consequently “not possible to talk about the suppression of a criminal act by the exercise of criminal jurisdiction if the act in question is not properly defined.”⁹ Furthermore, the efficiency argument, which is unanimously supported by the international community,¹⁰ seems to offer an additional confirmation, an *opinio juris*, that a definition is not only needed, but is also desired. Nevertheless, desire does not seem to be enough to reach consensus.

Keeping in mind the basic argument for a joint definition, and in order to further specify the current status of international law’s definition of terrorism, the problem should be rephrased. It is not the scarcity but rather the abundance

⁵ See, for example, Gearty, C. ‘Terrorism and Morality’, 2003 European Human Rights Law Review 377-383 (2003) at 383.

⁶ Higgins, R. ‘The General International Law and Terrorism’ in R. Higgins and M. Flory (eds.), *Terrorism And International Law* (London: Routledge, 1997) at 27-28.

⁷ Neuman, G. L. ‘Humanitarian Law and Counterterrorist Force’, 14 European Journal of International Law 283-298 (2003) at 288.

⁸ Bassiouni, C. ‘Introduction to International Criminal Law’ (New York: Transnational Publishers, 2003) at 63.

⁹ Kolb, R. ‘The Exercise of Criminal Jurisdiction over International Terrorists’ in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 227-281 at 227.

¹⁰ The UN General Assembly noted already in 1991 that the “effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism” (UN doc. A/RES/46/51 December 9 2001).

of definitions that poses the problems. Indeed, many definitions exist, firmly set up in various legal instruments, for different purposes and within different forums.¹¹ They are in most cases functional (or working) definitions, but valid only in a specific context and fail to achieve the status of universality that is undisputed by states or groups of states. This diversity on the international level corresponds to a wide palette of domestic definitions, differing significantly from one another and reflecting the specific focus that each of these domestic entities prescribes for individual elements of the definition. In dealing with terrorism, each state, in passing legislation on the matter, may and actually does define terrorism as it pleases. But, considering the transnationality of the phenomenon, multiple states which are duly affected are compelled to cooperate to repress it. Hence, as Cassese writes, “however imperfect and incomplete, a common working definition is necessary so that all states concerned may agree on the target of their repressive action: how can states work together for the arrest, detention or extradition of alleged terrorists, if they do not move from the same notion?”¹² Nevertheless, the seventy years of terrorism as an issue on the international agenda and dealt with by international law¹³ seem to oppose the widely accepted belief that a universal definition is crucial.

C. Elements of a definition - sources of the problem

Instead of furthering the discourse on the need for a universal definition of terrorism, it might be preferable and prove more fruitful to indicate typical elements which define the range of the discourse and which provide a measuring tool for the phenomenon. Given the extraordinary variety of acts under scrutiny when terrorism is mentioned, the deconstruction of approaches reveals that definitions of terrorism combine different elements, either cumulatively or alternatively.¹⁴ It is agreed that the substance of some elements is

¹¹ For the time being, it is sufficient to say that the international community has approached terrorism sectorally rather than generally, producing a series of conventions and other legal instruments, globally and regionally (see details relevant for the purpose of the paper below). More general assessments of individual processes and outcomes are widely covered in the international law literature and are not reproduced here. For comprehensive coverage, see, for example, Kolb, *supra* note 10, at 229-233 (footnotes 9-30).

¹² Cassese, A. ‘The Multifaceted Criminal Notion of Terrorism in International Law’, 4 *Journal of International Criminal Justice* 933-958 (2006) at 934.

¹³ The first multilateral attempt, not only to define but also to tackle the issue, was the 1937 Anti-terrorist Convention, signed under the auspices of the League of Nations. The convention has never entered into force.

¹⁴ Kolb, *supra* note 10, at 234.

less contentious than that of others. They are alluded to below, and some of them will be dealt with in more detail in the subsequent part of the paper.

With respect to *objective*¹⁵ elements, the following is widely agreed: international terrorist acts relate to *conduct*, which is *already criminalised* under any national body of criminal law, such as murder, mass killing, bombing, hijacking, etc., although with the rider that in exceptional instances such conduct is lawful *per se*. An example of the latter is the financing of an organisation, a pervasive activity which, to become criminal, is to be conducted only with the aim of providing or channelling means to an organisation that is terrorist in nature. The conduct, furthermore, produces *victims* who may include either private individuals or the civilian population at large, as well as state or international officials, including members of enforcement agencies. The nature of the victim is, however, one of the disputed elements in defining terrorism, particularly with respect to the context at hand. During times of armed conflict or liberation struggles,¹⁶ this is transposed through the continuing dilemma of freedom fighters,¹⁷ a variation of the Machiavellian question about whether the means are justified by the end. A further element is the scope of activity: the nature of the conduct is to be *transnational*, therefore not limited to the territory of one state with no foreign elements or links whatsoever. Lacking the latter element, the conduct would fall exclusively under the domestic criminal system of the state. In this case, the terrorist acts would not concern international law.¹⁸

For international terrorism to materialise, two *subjective* elements are required: intent, as in the case of any underlying criminal offence, and the “*specific intent* of compelling a public or a prominent private authority to take, or refrain from taking, an action.”¹⁹ Thus, the act, as objectively qualified above, has to be instrumental, conducted with a certain purpose in mind. In this light, spreading terror among the population or destabilising or destroying the institutional structure of the country is not the primary aim of the act itself. The

¹⁵ Cassese, *supra* note 13, at 938.

¹⁶ On the other hand, it is undisputed that the civilian population may, by no means, be a legitimate target, as provided by numerous bodies of international human rights law in general, or international humanitarian law in relation to armed conflict (Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) Articles 4 and 33).

¹⁷ The dilemma on how to distinguish between a ‘freedom fighter’ and a ‘terrorist’ is not new, as the international community has faced the dilemma since ancient times (Bassiouni, C. ‘Terrorism: The Persistent Dilemma of Legitimacy’ 36 *Case Western Reserve Journal of International Law* 299-306 (2004) at 299. The same author also coined the often quoted phrase “what is terrorism to some is heroism to others.”

¹⁸ Murphy, J.F. ‘Defining International Terrorism: A Way Out of a Quagmire’, 19 *Israel Yearbook on Human Rights* 13-37 (1989) at 16.

¹⁹ Cassese, *supra* note 13, at 940.

central focus is on the effect of a terrorist act – “[t]he spreading of fear or anxiety is only *a means* ... it is never an end in itself.”²⁰ Additionally, the *motive*²¹ for criminal conduct must not be a personal end, but must be based on political, ideological, or religious considerations to be classified as international terrorism. The latter helps differentiate between terrorism as a manifestation of *collective criminality* and a criminal offence indicative of individual criminality. A terrorist act itself may be conducted by an individual acting alone, even without affiliation to any terrorist groups. But the act would be considered an act of terrorism if it was influenced or stimulated by a collective set of ideas that caused the individual to subjectively identify himself or herself with a group performing or supporting similar, not personally motivated, action.²²

Various combinations of some (or all) of these elements and their substantial variations have produced multiple definitions of terrorism relevant for the discipline of international law, either in the form of academic texts, international treaties and conventions, various forms of soft law (resolutions and working documents of international organisations) but also definitions from domestic legislation.²³ This multiplicity, which can be generally criticised for being either over-inclusive or under-inclusive,²⁴ therefore raises two broad observations: an allusion to the complexity of the issue, and a warning against cautiousness in its practical application. It is the latter, through the perspective of international criminal law, whose various possible forms are discussed in more detail in the following section.

III. INTERNATIONAL TERRORISM AS AN INTERNATIONAL CRIME – EVOLUTION AND IMPLICATIONS

Despite the conceptual difficulties with a universally harmonised understanding of the phenomenon of international terrorism, the 20th century witnessed its general condemnation by the international community, materialised through international criminal law. However, this materialisation took a unique evolutionary form. On the one hand, it was largely based on the pre-existing

²⁰ Ibid.

²¹ Although the clause “regardless of motive”, evident in some attempts at a definition, shows different modern tendencies. See, for example, the Resolution of the Sixth Committee of the UN (19 November 2001), A/C.6/56/L.22, para 2.

²² But see Dinstein, Y ‘Terrorism as an international crime’, 18 Israel Yearbook on Human Rights 55-72 (1989) at 57.

²³ For an extensive overview of one/two/three/multi-dimensional definitions based on various combinations of these elements, see Kolb, *supra* note 10, at 234-246.

²⁴ Soll, G. ‘Terrorism: The Known Element No One Can Define’ 11 Willamette Journal of International Law and Dispute Resolution 123-168 (2004) at 137.

customary and treaty rules of international law that dealt with acts which could be classified either as terrorist or which shared some elements with it. On the other hand, it devoted considerable attention to the development of new rules which eventually resulted in a wide array of international legal instruments dealing initially mostly with sectoral aspects of international terrorism, but also increasingly applying a more comprehensive approach. This section of the paper attempts to systematically demonstrate how international terrorism can be conceived as an internationally criminalised act in various forms. It also points to the crosscutting of these forms and draws attention to some disputable categories and cases.

The vagueness of the definition of international terrorism is only an initial problem when its criminalisation is at stake. It is succeeded by questions of criminal liability (who is liable for the act?), matters of jurisdiction, obligations of states and other international actors, the scope of international cooperation in criminal affairs, etc. These modalities depend heavily on the classification of the type of the internationally criminalised act. It seems preferable from the outset to define these acts as international crimes rather than as international delicts²⁵ due to the threat they pose to international peace and security²⁶ and their countering of fundamental humanitarian values.²⁷ However, even if the scale of violence is assumed to be trivial in the classification above, the distinction still does not sufficiently categorise the concept, since typical definitions of international crimes²⁸ have left open the questions of *which specific acts* are considered and *whose assessment* counts in this regard. A further distinction is therefore needed between international *treaty crimes* and international crimes, for which there exists individual criminal liability

²⁵ Based on a distinction by Bassiouni, *supra* note 9, at 121-122, but contrary to his opinion. The same author recognises that placement into one of the two categories is indeed a “value judgment”. One can argue that the acts, despite not necessarily fulfilling the criteria of being “a product of state action or state-favouring policy” (*ibid*), are increasingly seen as international crimes, confirmed by states’ *opinio juris* and the amount of attention devoted to the criminal regulation of international terrorism (the argument is further developed below).

²⁶ Confirmed by numerous international bodies, especially after September 2001.

²⁷ A test for this would be the fact that the majority of acts of international terrorism violate the non-derogable human rights that are widely conceived as peremptory norms of international law.

²⁸ One of the first definitions by the Nuremberg tribunals in 1948, stating that an international crime is “such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances” (*US v. List et al*, 19 February 1948, *Trials of War Criminals Before the Nuremberg Tribunals under Control Council Law No. 10* (Washington, DC: US Government Printing Office, 1950) Vol. IX 1230, 1241).

under international law.²⁹ Since the latter group may be further classified (in respect of the scope and time of application according to different jurisdictional rules), for the purpose of the systematisation of this paper it will be divided on the basis of the existence and non-existence (or better, possible existence or emergence) of the sources of international criminal law.

A. Terrorism as a treaty crime

Some acts, which by particular treaties are removed from the exclusive jurisdiction of the state that would normally have control over them, do not give rise to international criminal responsibility, although they are demonstrably grave matters of international concern. Rather, the general effect of these treaties is that states parties are obliged to proscribe certain acts – treaty crimes – as criminal offences under their national law, and cooperate with other states parties with regard to their investigation and punishment. Therefore, treaty crimes entail, on the basis of the *aut dedere aut prosequi* principle – to extradite or prosecute –, criminal liability within a wide array of national legal systems. But “from this it does not necessarily follow that such crimes entail international criminal liability.”³⁰

International terrorism can be conceived as a treaty crime on the basis of several anti-terrorist conventions concluded at the global level after 1963,³¹ which, among other things, specify certain terrorist acts.³² Almost all of these

²⁹ Based on Marks, S. and Clapham, A. ‘International Human Rights Lexicon’ (Oxford: Oxford University Press, 2005) at 226.

³⁰ Ibid at 226.

³¹ The three Conventions on the Safety of Civil Aviation of Tokyo (14 September 1963, Convention on Offences and Certain Other Acts Committed on Board Aircraft), The Hague (16 December 1970, Convention for the Suppression of Unlawful Seizure of Aircraft) and Montreal (23 September 1971, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, with a supplementing protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation signed at Montreal, 24 February 1988); the UN Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted as a UN resolution 3166 (XXVIII), 14 December 1973); the New York Convention against the Taking of Hostages (17 December 1979); the Vienna Convention on the Physical Protection of Nuclear Material (October 26 1979); the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol on the Safety of Fixed Platforms Located on the Continental Shelf (10 March 1988); the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991); the International Convention for the Suppression of Terrorist Bombings (UN GA resolution, 25 November 1997) and the International Convention for the Suppression of the Financing of Terrorism (UN GA resolution, 9 December 1999). The International Convention for the Suppression of Acts of Nuclear Terrorism adopted in 2005 is not yet in force.

³² See Cassese, *supra* note 13, at 942.

conventions are based on similar or only slightly varying jurisdictional systems. The jurisdictional titles for the states parties fall into two categories:³³ (1) a series of specific titles – territoriality, personality (active and passive), state of registration of a vehicle/carrier, state security, etc., for which states are either allowed or obliged to establish jurisdiction, and (2) a general clause stating that in all cases where the offender is found on the territory of one of the states parties, this state shall in any case exercise jurisdiction if it does not extradite the offender to a more convenient forum (*aut dedere* principle).³⁴

With regard to the former (special titles), they vary slightly in the different conventions, according to the subject matter (for example, the jurisdictionally wide Terrorist Bombing Convention in contrast to narrower conventions directed at certain defined persons). All of these conventions include clauses by which they do not hinder any criminal jurisdiction exercised in accordance with states' domestic laws,³⁵ meaning that prosecution may be based on them quite independently of specific conventional provisions. In legal terms, this means that "the titles provided for in the conventions are not exclusive but complementary to those of national law."³⁶ The difference, however, is the extent to which the conventions oblige a state to exercise jurisdiction under some titles (when it becomes mandatory, whereas the jurisdiction based on municipal law is optional). This two-tier distinguishing approach is a rather new technique.

The latter jurisdictional title (the *aut dedere aut prosequi* principle),³⁷ being specific to international crimes, has been popularised and marked by anti-terrorist conventions. It can be understood as a type of universal conventional jurisdiction. It seems plausible to first refer to the universality principle which "assumes that every state has an interest in exercising jurisdiction to combat egregious offences that states universally have condemned,"³⁸ resulting in universal jurisdiction and providing for criminal prosecution regardless of any special link to the crime or the offender (if the alleged author is in the

³³ Kolb, *supra* note 10, at 247-248

³⁴ The exception is the 1963 Tokyo Convention which lacks the *aut dedere* principle.

³⁵ Subject to the condition that there are further jurisdictional titles provided by national criminal codes and that they are not contrary to international law.

³⁶ Kolb, *supra* note 10, at 248

³⁷ Also *aut dedere aut iudicare*, but less preferable, since the obligation of the state is usually (in the case of anti-terrorist conventions and some other instruments) not to try, but to submit the case to the competent authorities in view of prosecution. See, for example, Article 7(2) of the International Convention for the Suppression of Terrorist Bombings; for non-terrorist related instruments containing the principle, see, for example, Article 7(1), but also the Convention Against Torture and Other Inhumane and Degrading Treatment.

³⁸ Randall, K. 'Universal Jurisdiction under International Law' 66 *Texas Law Review* 785-842 (1988) at 788.

custody of the state). As a traditional customary principle of universal jurisdiction³⁹ would apply to all states, the convention could therefore not create true universal jurisdiction,⁴⁰ but (in many ways resembling) quasi-universal jurisdiction,⁴¹ with these conventions having the effect of obliging states parties to *establish* such jurisdiction in domestic laws. The conventional universal jurisdiction principle⁴² and the incorporation of the *aut dedere* principle therefore create a system of mandatory but subsidiary universal jurisdiction – exercised by the state and softened by the alternative of extradition. The following differences to the customary understanding of universal jurisdiction (crucial also for the next subpart of the paper) are constitutive:⁴³ *First*, the *aut dedere* principle is not universal, but limited to the parties to the convention; *second*, it is a duty, whereas universal jurisdiction is an entitlement; *third*, it is an alternative, whereas universal jurisdiction is the title to try; and *fourth*, universal jurisdiction applies to a very limited number of crimes, while the *aut dedere* principle is contemplated in a number of conventions for a larger category of crimes.

The conventions against terrorism therefore impose on parties the obligation to establish jurisdiction over the suspect present on their territory.⁴⁴ Criminal proceedings must be initiated and carried out against the individual by judicial authorities competent to deal with the case, which is an important provision given the contemporary *war on terrorism*. The obligation to prosecute is therefore primary, since it is independent of the existence of the request to extradite. Which course is to be followed is a highly contextual question. One might argue that prosecution is preferred since there could technically be no extradition without prosecution. However, it could also be said that the former is theoretically and practically dominant to ensure prosecution at the most convenient location (where the crime was committed) and that a state not otherwise linked with the offence would have difficulties in prosecuting without legal aid.

Several conventions include a clause similar to the “national treatment” standard, whereby prosecution (if extradition is refused or does not take place)

³⁹ Further developed below, see part II B.

⁴⁰ Higgins, R. ‘General Course on Public International Law: International Law and the Avoidance, Containment and Resolution of Disputes’ 230 *Recueil des Cours de L’Académie de Droit International* 9-341 (1991-V) at 98. For an opposite opinion, see Randal, *supra* note 39 at 833.

⁴¹ Shaw, M.N. ‘International Law’ 5th ed. (Cambridge: Cambridge University Press, 2003) at 598.

⁴² The concept is, as shown in Kolb, *supra* note 10, at 251-251, adopted by many authoritative authors.

⁴³ *Ibid.*

⁴⁴ For example, Article 6 of the International Convention on the Suppression of Terrorist Bombings: “Each State party shall take such measures as may be necessary...”

should be conducted according to the standards of municipal law.⁴⁵ The clause may hamper the effective application of the conventional obligations due to differences in national standards, especially if the national judiciary is for whatever reason reluctant to exercise its right to prosecute.⁴⁶ Clauses of this type may therefore severely weaken states' obligation to prosecute,⁴⁷ although an opposite argument could be used, according to which the state's ratification of or accession to the convention establishes "a prevailing duty to investigate the case in good faith according to a minimum standard of diligence."⁴⁸ An arbitrary prevention of prosecution for political reasons can circumvent the object and purpose of the convention, amounting to a breach of states' obligations under international law.⁴⁹ Problems may further arise in connection with the presumed expectation that no reasonable prosecution can be expected due to the states' protection of the alleged person⁵⁰ or, in other words, in resolving the problems of determining which are the most appropriate remedies, who is to determine them, and what action can be taken either preventively or after the failure to adequately prosecute. Practice has shown that even the action of the UN Security Council is not excluded,⁵¹ although it remains questionable to what extent such pressure is desirable, especially if the *good faith* presumption of states under international law is taken into consideration.

The anti-terrorist conventional system has suffered from a number of general problems hampering its effectiveness, most notably: (a) the insufficient number of ratifications or accessions to the conventions to fulfil their purpose to close down any safe havens;⁵² (b) the insufficient application of the treaties;

⁴⁵ For example, Article 7 of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, or Article 8(1) of the International Convention on the Suppression of Terrorist Bombings (1998).

⁴⁶ The reasons may be various, such as the states' fear of reprisal from terrorist groups, the subordinate role of the judiciary, or the abusive intervention of the executive, etc.

⁴⁷ Kolb, *supra* note 10, at 261.

⁴⁸ *Ibid* at 261.

⁴⁹ See, for instance, the provisions of the Vienna Convention on the Law of the Treaties (1969), such as Article 26 (the *pacta sunt servanda* principle), Article 27 ("A party may not invoke the provisions of its internal law as justification for its failure to perform") or Article 60(3)(b) (defining violations of provisions which are essential for the accomplishment of the object or purpose of the treaty as a material breach of the treaty). The principle is further confirmed by international adjudication, such as *Military and paramilitary activities in and against Nicaragua* (Merits), ICJ Rep 1986, para 135.

⁵⁰ As it was, for instance, denounced by the Western states in the *Lockerbie* case. See, for example, Placht, M. 'Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*' 12 *European Journal of International Law* 125-141 (2001).

⁵¹ Which, in the *Lockerbie* case, imposed the obligation on Libya to extradite under Chapter VII of the UN Charter, overriding its *aut dedere aut prosequi* option under the Montreal Convention on the basis of Charter Article 103. See also Placht, *supra* note 51.

⁵² Although the post September 2001 era has been marked by a tremendous increase in the number of ratifications and accessions.

and (c) the existence of too many loopholes. In addition to these problems, there are the political offence exceptions or loosened duties to search for or arrest suspects.⁵³ The events of September 2001 have triggered action within the international community for a new and comprehensive international instrument,⁵⁴ the Draft Framework Convention on International Terrorism. Although some of the shortcomings tackled before have been dealt with again during the drafting process of the new convention,⁵⁵ there are still areas in which progress is rather slow, most notably the perpetual problem of defining international terrorism and its scope of application.⁵⁶ Besides overcoming these obstacles, the convention would “need to establish a tighter network of international cooperation for preventing, suppressing, and prosecuting the newly defined crime of terrorism, not only in terms of best efforts ... but also of obligations to achieve certain results.”⁵⁷ The latter entails the creation of international institutional arrangements indispensable for effective management and implementation vested in the necessary powers. A possible example of this is the International Criminal Court whose jurisdiction could be extended to cover conventionally defined crimes of international terrorism. Such measures would “contribute to the budding system of individual criminal responsibility and would tighten the obligations of States in the field of judicial cooperation and assistance.”⁵⁸

B. Terrorism as an international crime under universal jurisdiction

We now examine acts of terrorism through the scope of jurisdiction which is potentially wider than that prescribed by the conventional system analysed

⁵³ Cassese, A. ‘The International Community’s Legal Response to Terrorism’ 38 *International and Comparative Law Quarterly* 589-608 (1989) at 593-595.

⁵⁴ Bianchi, A. ‘Enforcing International Law Norms Against Terrorism: Achievements and Prospects’ in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 491-535 at 495.

⁵⁵ Such as the exclusion of the category of tolerable political offences (Article 14 of the Draft), stricter obligation provisions (Article 10(1)), etc. One of the most significant achievements has certainly been the fact that the draft is based upon the inclusion of the *aut dedere* principle for all terrorist acts. For details, see for instance the work of the Ad Hoc Committee established by the General Assembly Resolution 51/210 of December 17 1996 at <http://www.un.org/law/terrorism/index.html> (last accessed on 11 May 2007).

⁵⁶ Some authors believe, however, that the current lack of definitional consensus is greatly exaggerated. The latter problem (scope of application) concentrates on the inclusion of the activities of parties during an armed conflict, including in situations of foreign occupation. See Bianchi, *supra* note 55 at 496.

⁵⁷ Abi-saab, G. ‘The Proper Role of International Law in Combating Terrorism’ in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) XII-XXII at XXI.

⁵⁸ *Ibid.*

above. In brief, the universality principle bestows upon each state the jurisdiction to try a particular crime regarded as offensive to the international community as a whole. The listing of crimes that belong to the sphere of universal jurisdiction is, however, far from clear, as this jurisdictional principle is often disputed. But there seems to be little controversy in the statement that war crimes and crimes against humanity, of which crimes of international terrorism can be a sub-group, may amount to crimes entailing international criminal liability⁵⁹ or universal jurisdiction.⁶⁰ A bone of contention, however, does exist with regard to whether international terrorism under customary international law may be seen as an international crime under universal jurisdiction.

1. Terrorism as a war crime or a crime against humanity

A preliminary remark is needed: while war crimes are a category limited to armed conflict, the same is not necessary true for crimes against humanity. This aspect will, however, be dealt with later, as for the time being we will limit ourselves to situations of armed conflict.⁶¹

Both international humanitarian law and international criminal law already cover acts of terrorism during times of armed conflict. They are indisputably banned in international⁶² or non-international⁶³ contexts by provisions which “reflect, or at least have turned into customary law.”⁶⁴ As for the question of criminalisation of terrorism, the following can be said: attacks on civilians

⁵⁹ Marks and Clapham, *supra* note 30 at 226-227.

⁶⁰ Enache Brown., C and Fried, A. ‘Universal Crime Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law’ 43 McGill Law Journal 613-633 (1998) at 621.

⁶¹ Gasser notes that acts of terrorism are usually part of, or indirectly linked in some way to, an armed conflict (Gasser, H-P ‘Acts of terror, “terrorism” and international humanitarian law’ 84 International Review of the Red Cross 547-570 (2002) at 548.

⁶² Article 33(1) of the Fourth Geneva Convention of 1949, a provision of general purport, applicable in any situation (whether in the territory of one of the belligerents, in the combat area, or in an occupied territory (ICRC, *Commentary, Fourth Geneva Convention, 1958* at 225-226)), clearly states that “all measures of ... terrorism are prohibited.” Furthermore, the First Additional Protocol prohibits in Article 51(2) “acts or threats of violence the primary purpose of which is to spread terror among the civilian population.”

⁶³ Second Additional Protocol to the Geneva Conventions (1977) in Articles 4(1) and 4(2)(d) combined prohibit “acts of terrorism” against all persons who do not take a direct part or have ceased to take part in hostilities, whether or not their liberty has been restricted. Furthermore, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited” (Article 13(2)).

⁶⁴ Cassese, *supra* note 13, at 945, referring to ICTY jurisprudence, 1977 Geneva Diplomatic Conference statements, *opinio juris* and ICRC research.

and other protected persons in the course of an armed conflict, which aims at spreading terror, may amount to war crimes as indicated by international jurisprudence⁶⁵ or statutes⁶⁶ of some international courts. The ICC statute fails to mention terrorism as one of the war crimes, which should, however, not be seen as contrary proof, since the statute is not exhaustive in the sense of spelling out the existing rules of customary law.⁶⁷ To resort to the provisions of the Geneva Conventions of 1949 would, however, confirm the war crime nature of terrorist acts, although its implications are not undisputable with regard to jurisdictional issues. The view may be held that the Geneva provisions imply mandatory universal jurisdiction only when acts amount to grave breaches of the Geneva Conventions,⁶⁸ which, according to some authors,⁶⁹ is not the case since the “acts or measures of terrorism” are not explicitly mentioned. But it may also be argued that the formulation of Article 147 of the Geneva Convention which alludes to the “wilful killing ... of protected persons” includes acts of terrorism and therefore amounts to great breaches of the Convention.⁷⁰ Two further remarks are in place,⁷¹ concerning so-called *state terrorism* and the *motive* element, both being legally less crucial in the situation of armed conflict. Even if the terrorist act is performed by the state, it can only occur if the belligerent party engages in an unlawful act, which, as shown above, is punishable as a war crime of terrorism. As for the motive, it becomes immaterial in terrorist acts as war crimes, since those crimes are always ‘public’ in nature at the time of armed conflict, and any personal motives do not acquire legal relevance.

Terrorist acts can, subject to a number of conditions,⁷² amount to crimes against humanity, whether perpetrated in time of war or peace. They must, however, meet the basic requirements of the category. These include taking part in a widespread or systematic attack against a civilian population, and the perpetrator must have knowledge of his involvement in the said widespread or systematic attack. Furthermore, the victims of such crimes may be comprised

⁶⁵ For example the Galić case (ICTY, Judgement, Galić (IT-98-29-T), Trial Chamber, 5 December 2003), where the Court referred to the acts of terrorism pre-existent in international law entailing individual criminal responsibility (paragraphs 113-129).

⁶⁶ ICTR statute, Article 4(d); Article 3(d) of the 2000 Statute of the Special Court for Sierra Leone.

⁶⁷ See Article 10 of the ICC Statute. It has to be noted, though, that inclusion of terrorist provisions was explicitly opposed during the negotiations of the Statute.

⁶⁸ In the Fourth Geneva Convention these are stipulated in Article 147.

⁶⁹ Cassese, *supra* note 13, at 946.

⁷⁰ Similar argumentation in Gasser, *supra* note 62 at 556.

⁷¹ Cassese, *supra* note 13, at 944 and 948.

⁷² They must cause (or consist of) conduct such as murder, great suffering, serious injury to body, physical or mental health, or take the form of torture, rape or enforced disappearance. Cassese, *supra* note 13 at 948.

of both civilians and officials, including members of armed forces, although the statutes of international criminal tribunals seem to limit the victims of such crimes to civilians. The reasoning that supports the more comprehensive inclusion is that customary law does not provide such limitations – it would, generally speaking, be “contrary to the whole spirit and logic of modern international human rights law and humanitarian law to limit to civilians (especially in the time of peace) the international protection of individuals against horrendous and large-scale atrocities.”⁷³ Crimes against humanity are, as war crimes, also deemed to amount to *jus cogens* crimes.⁷⁴ This characterisation leads us, once again, to the unresolved debate in international law on the implications of *jus cogens*. An authoritative author⁷⁵ is of the opinion that those are of duty and not of optional rights, otherwise *jus cogens* would not constitute a peremptory norm of international law. The implications for recognising certain international crimes as part of *jus cogens* consequently carries the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universal jurisdiction over such crimes, irrespective of the venue, the actor, the category of victim or the context of their occurrence. Furthermore, it could be argued that the *obligatio erga omnes* is placed upon the states.

2. Terrorism as a crime under customary international law

After recognising the possibility to understand international terrorism as an international crime under universal jurisdiction, if seen as a sub-group of war crimes and crimes against humanity, the question arises whether we can speak of international terrorism as a crime under customary international law. The quest for an answer can be approached from different directions, the first being the *conventional* approach, and the second a more general one.

As seen in part III A above, a series of international conventions form a broad international anti-terrorist legal framework. However, the question remains whether they can also have normative effects on the states not party to them, even outside the realm of customary law. Contrary to what has been presented above, there are many arguments that refer to conventional principles as part of existing or at least emerging international customary law. An example is the “extradite or prosecute” principle, supported by *opinio juris* and a

⁷³ Ibid at 949.

⁷⁴ Bassiouni, *supra* note 9 at 141 and 142.

⁷⁵ Ibid at 168-169.

series of similar treaties which reproduce the same principle.⁷⁶ Furthermore, it can be argued that the conclusion of a series of substantially similar treaties is evidence of the recognition by a large part of the international community that it is urgent and legitimate to facilitate repression of a particular crime on the basis of universal jurisdiction.⁷⁷ Conventions could also be conceived as declaratory instruments instituting universal jurisdiction, acknowledged by the international community, where the “agreement serves ... as a catalyst, instantly crystallizing the rule into custom.”⁷⁸ This argumentation could be confirmed by recent trends in *opinio* of the international community, supported by a number of recommendations and declarations of international political organs (UN Security Council or the General Assembly), regional organisations and states (individually or jointly at summits), judicial precedents, texts of organs such as the International Law Commission, doctrinal opinion etc., which all stress the importance of the effective fight against terrorism and which link the principle of universality to the suppression of terrorist acts almost without dissent.⁷⁹ An additional indicator of this stream might also be the quasi-legislative activity of the UN Security Council since its famous resolutions 1373 (2001) and 1540 (2004).⁸⁰

The other direction is to approach international terrorism as a crime under customary international law. The initial, and also greatest, drawback of this approach is the lack of any universally accepted definition of terrorism. This, however, is challenged since some authoritative authors⁸¹ believe that a generally accepted definition of terrorism as an international crime, which has evolved in the international community at the level of customary law, does exist, at least during times of peace.⁸² General recognition of the two-tier definition approach (one limb covering conventionally listed acts, the other being centred on three elements of violent act/terror(intimidation)/coercion) indicates certain consensus, although lying closer to the desirable *de lege ferenda* and short of undisputed universality. Some authors who give great sig-

⁷⁶ Freestone, D ‘International Cooperation Against Terrorism and the Development of International Law Principles of Jurisdiction’ in R. Higgins and M. Flory (eds.), *Terrorism and International Law* (London: Routledge, 1997) at 50.

⁷⁷ Randall, *supra* note 39 at 821-831.

⁷⁸ Kolb, *supra* note 10, at 274.

⁷⁹ *Ibid* at 275.

⁸⁰ More on these aspects in Talmon, S. ‘The Security Council as World Legislature’ 99 *American Journal of International Law* 175-193 (2005); Fassbender, B. ‘The UN Security Council and International Terrorism’ in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 83-102.

⁸¹ Cassese, *supra* note 13 at 933.

⁸² And possible disagreements in armed conflict continue to exist only with regard to some exceptions to the existing definition. See the ‘freedom fighter’ problem in Cassese, *supra* note 13 at 950-957.

nificance to the absence of any clearly defined and accepted definition hold that only some specific terrorist crimes give rise to universality under customary international law. Crimes of aerial hijacking, hostage taking and terrorist bombings are the most often mentioned offences that have achieved the status of universality under general international law.⁸³ This has been continuously confirmed by national jurisprudence,⁸⁴ which also did not refrain from calling international terrorism a crime under universal jurisdiction.⁸⁵

Even if one can speak of universality for international terrorism, a few brief remarks on its drawbacks are useful.⁸⁶ First of all, it potentially gives rise to conflicting claims of jurisdiction; further, prosecution standards differ from state to state and problems of fair trial and objectivity (see also note 50 above) may occur; finally, the jurisdictional title could also be easily abused.

IV. EU AND INTERNATIONAL TERRORISM AFTER 11 SEPTEMBER 2001

A. A brief overview of the measures taken by the European Union

Participation in the fight against terrorism has proven to be a challenge for the European Union (EU), not so much politically – since preventing and combating crime is one of its tasks⁸⁷ - but rather legally, as the EU is only slowly retaining genuine powers to tackle the problem. The legal basis falls within the Third Pillar of the Amsterdam Treaty (Police and Judicial Cooperation in Criminal Matters),⁸⁸ which provides for certain harmonisation powers, such as the possibility to adopt framework decisions.⁸⁹

The EU response to the attacks of 11 September 2001 was prompt. A day after the attacks the EU Foreign Ministers reaffirmed their solidarity with the government and people of the USA.⁹⁰ More concrete action took place on

⁸³ Freestone, *supra* note 77 at 60.

⁸⁴ See Shaw, *supra* note 42 at 602, ff 138.

⁸⁵ For example, the US District Court stated in *Flatow v. Islamic Republic of Iran* that “international terrorism is subject to universal jurisdiction.” *Ibid*.

⁸⁶ Kolb, *supra* note 10 at 278.

⁸⁷ Article 29 of the EU Treaty.

⁸⁸ Article 29 of the EU Treaty identifies areas of closer cooperation such as cooperation between police forces, customs authorities and other competent authorities, including Europol; closer cooperation between judicial and other competent authorities of the Member States; and the approximation of rules on criminal matters.

⁸⁹ By the Council, unanimously, on the initiative of any Member State or of the Commission. Those framework decisions are binding, but the methods of their implementation are left open to the Member States (Article 34(2)(b) of the EU Treaty).

⁹⁰ Special Council Meeting, General Affairs, 12 September 2001, 11795/01 (Presse 318).

21 September 2001 when the European Council at its extraordinary meeting adopted the EU Action Plan, composed of various measures, and containing a precise legal agenda:⁹¹ (1) the introduction of a European arrest warrant and the adoption of a common definition of terrorism; (2) the identification of presumed terrorists in Europe and of organisations supporting them in order to draw up a common list; (3) Member States sharing with Europol, systematically and without delay, all useful data regarding terrorism; (4) a call for the implementation of all existing international conventions on the fight against terrorism; (5) combating the funding of terrorism as a decisive aspect of the fight against terrorism; (6) measures to strengthen air transport security, classification of weapons, technical training for crews, checking and monitoring of hold luggage, protection of cockpit access, quality control of security measures, etc.; (7) the General Affairs Council to assume the role of co-ordinator and provide impetus in the fight against terrorism. Three months later the Common Position on combating terrorism was adopted,⁹² reiterating measures of UN Security Council Resolution 1373. The position required the Member States or the Community to take appropriate action, of which the following fields and actions were of greatest importance:⁹³

- a) *Freezing accounts and assets.* Existing legislation to specifically target Al-Qaeda was amended repeatedly by Council Regulations⁹⁴ or by the Common Foreign and Security Policy Pillar Common Positions.⁹⁵ Legislation was prepared for the freezing of general assets based on the December 2001 Common Position, which included an annex listing persons, groups, and entities involved in terrorist acts. The freezing of all funds and financial assets was first provided by Council Regulation 2580/2001 (the most recent Decision amending the Regulation and which is still in force is that of 17 October 2005).⁹⁶
- b) *Measures to prevent funds from being made available for terrorist acts.* In December 2001 the Council adopted (co-decision of the Parliament)

⁹¹ Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001, Press Release 21/9/2001 No. 140/01, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/140.en.pdf (14 May 2007).

⁹² 2001/930/CFSP, OJ L 344/90, 27 December 2001

⁹³ Based on Reinisch, A. 'The Action of the European Union to Combat Terrorism' in A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) 119-162.

⁹⁴ Various regulations targeting the Taliban regime, for example Council Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons or entities; or Council Regulation (EC) No. 467/2001 prohibiting the export of certain goods and services to Afghanistan.

⁹⁵ For example the Council Common Position, 27 May 2002, 2002/402/CFSP, OJ L139/4.

⁹⁶ 2005/722/EC: Council Decision of 17 October 2005 implementing Article 2(3) of Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism. OJ L272, 18 October 2005.

Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on the prevention of the use of the financial system for the purpose of money laundering, which extended reporting obligations to certain non-financial professions and sectors and widened the definition of laundering. Furthermore, the EU recommended that all Member States ratify the UN Convention on the Suppression of the Financing of Terrorism and that they follow the recommendation of the Financial Action Task Force.⁹⁷

- c) *Establishing terrorist acts as serious criminal offences and ensuring that terrorists are brought to justice.* The action taken within the EU (to the extent of its powers) has concentrated on the adoption of the Framework Decision on combating terrorism,⁹⁸ on a European arrest warrant, and agreement on the definitive creation of EUROJUST, establishing cooperation between national judicial authorities. Although the Council had already reached a political agreement on a Framework Decision in December 2001,⁹⁹ it took another 6 months for the adoption of relevant legal texts. The main bone of contention was the appropriate definition of terrorist offences. Extensive debate also developed around the issue of criminal sanctions. In addition to the standard phrase that the offences should be “punishable by effective, proportionate dissuasive criminal penalties,” a clause was inserted according to which the terrorist offences should be “punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special [terrorist] intent.”¹⁰⁰ The Framework Decision on the European Arrest Warrant¹⁰¹ in essence provides that terrorism is one of the offences for which arrest warrants can be issued in one of the Member States of the EU and expeditiously executed in another Member State;¹⁰² furthermore, when entering into force, it replaced the provisions of various existing legal instruments.¹⁰³ Equally crucial for effective cooperation¹⁰⁴ and the applicability of the Arrest Warrant was the list of 32 offences¹⁰⁵ – a

⁹⁷ Reinisch, supra note 94 at 139.

⁹⁸ Adopted on 13 June 2002, 2002/475/JHA, OJ L 164/3.

⁹⁹ EU report to the UN Counter-Terrorism Committee (CTC) 28 December 2001, UN Doc. S/2001/1297.

¹⁰⁰ Supra note 99, Article 5(2).

¹⁰¹ 13 June 2002, 2002/584/JHA, OJ L 190/1, entered into force on 1 January 2004.

¹⁰² Ibid, Article 2(2).

¹⁰³ Such as the 1957 European Extradition Convention, the 1977 European Convention on the Suppression of Terrorism, the 1995 Convention on the Simplified Extradition Procedure, the Convention of 27 September 1996 relating to Extradition between the Member States of the EU and the relevant provisions of the Schengen agreement (Reinisch, supra note 94 at 153-154).

¹⁰⁴ Cassese, supra note 13 at 934.

¹⁰⁵ “[I]ntentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an in-

working definition of terrorism incorporated into the Framework Decision on combating terrorism.

After the 25 March 2004 attacks in Madrid, the European Council declaration set out seven objectives for the EU Action Plan against terrorism,¹⁰⁶ five of which addressed internal aspects of the EU counter-terrorism strategy: (1) to reduce the access of terrorists to financial and economic resources; (2) to maximise the capacity within EU bodies and Member States to detect, investigate, and prosecute terrorists and prevent terrorist attacks; (3) to protect the security of international transport and ensure effective systems of border control; (4) to enhance the capability of the European Union and of Member States to deal with the consequences of a terrorist attack, and (5) to address the factors which contribute to support for, and recruitment into, terrorism. The Action Plan was further revised in June 2005¹⁰⁷ and supplemented with (but not replaced by) the EU Counter-Terrorism Strategy of December 2005 adopted by the JHA Council.¹⁰⁸ The former continues to exist, is to be updated every 6 months, and offers technical details and the chance to check the fight against terrorism as conducted after the March 2004 bombings, while the aim of the latter is to take the agenda of work set out at the March 2004 European Council into the next phase.¹⁰⁹ Also as a direct consequence of the 2004 attacks, the EU Counter-Terrorism Coordinator was appointed with the main task of coordinating the work of the Council of the EU in combating terror-

ternational organisation where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; (i) threatening to commit any of the acts listed in (a) to (h).” Article 1(1), supra note 99.

¹⁰⁶ Amended by the EU Plan of Action on Combating Terrorism, 15 June 2004, 10586/04; and Update, 14 December 2004, 16090/04.

¹⁰⁷ EU Plan of Action on Combating Terrorism, 10 June 2005, 9809/1/05 REV 1 ADD 1.

¹⁰⁸ The EU Counter-Terrorism Strategy, 30 November 2005, 14469/4/05 REV 4.

¹⁰⁹ European Commission – Justice and Home Affairs – Terrorism – Strategies and Action Plan (http://ec.europa.eu/justice_home/fsj/terrorism/strategies/fsj_terrorism_strategies_en.htm), 14 May 2007)

ism, to maintain an overview of all the instruments at the Union's disposal, to closely monitor the implementation of the EU Action Plan on Combating Terrorism, and to secure the visibility of the Union's policies in the fight against terrorism. The Coordinator, however, has no power to coordinate with the Commission or among EU bodies. Furthermore, some authors argue that the Coordinator should have a clearer job description which would identify his primary role as an internal coordinator rather than as an external representative.¹¹⁰

A. Counter-terrorism legal framework and the implementation of the EU normative regulations in Slovenia

Since the ratification of the Convention for the Suppression of the Financing of Terrorism in 2004, Slovenia is party to 12 of the 13 global anti-terrorist conventions.¹¹¹ The country does not have a special legal framework for anti-terrorist legislation. Crucial normative changes adopted for the purpose of fighting terrorism (direct or indirect consequences of the needs to fulfil its international legal obligations and to comply with the relevant EU regulations) have taken the form of changes in the Criminal Code and measures for the adoption of the new Act on the Prevention of Money Laundering and Financing of Terrorism, which, at the time this article was written, was undergoing its second reading in the National Assembly.¹¹² The amended Criminal Code,¹¹³ which already deals with international terrorism in Articles 388, 389 and 390 (Chapter 35), has been harmonised with the provisions of the above-mentioned Convention for the Suppression of the Financing of Terrorism with the inclusion of Article 388a, which defines the criminal offence of financing terrorist activities. As for the state of the implementation of the EU Plan of Action on Combating Terrorism, the following can be inferred (according to the fields):¹¹⁴ Slovenia has implemented and adopted the necessary legislation as provided by the Framework Decision (FD) on the European Arrest Warrant,

¹¹⁰ Lugna, L 'Institutional Framework of the European Union Counter Terrorism Setting' 8 *Baltic Security and Defence Review* 101-127 (2006) at 120.

¹¹¹ See supra note 32. International Convention for the Suppression of Acts of Nuclear Terrorism is to be ratified after the appropriate amendments of the Criminal Code.

¹¹² In accordance with the Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (2001/500/JHA, OJ L182/1).

¹¹³ Act Amending the Criminal Code, Official Gazette of the RS, No. 95/04.

¹¹⁴ State as on 30 May, 2005, based on the EU Plan of Action on Combating Terrorism – Scoreboards, Justice and Home Affairs Council meeting, Brussels 1 December 2005, available at http://ue.eu.int/uedocs/cms_Data/docs/pressdata/en/jha/87255.pdf (14 May 2007).

although the legislation adopted did not fully comply with the FD.¹¹⁵ Measures taken as requested by the Framework Decision on Combating Terrorism have also not been fully in compliance with the Decision,¹¹⁶ as was also the case with the Framework Decision on Joint Investigation Teams.¹¹⁷ Slovenia's Legislation is in compliance with the Decision on Establishing EUROJUST, to which it appointed a national correspondent for terrorist matters pursuant to the Council Decision of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism.¹¹⁸ Furthermore, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and its Protocol of 16 October 2001 was ratified, as was the Protocol of 30 November 2000 amending the Europol Convention, the Protocol of 28 November 2002 amending the Europol Convention and the Protocol on the privileges and immunities of Europol, and the Protocol of 27 November 2003 amending the Europol Convention. The implementation of the Framework Decision of 22 July 2003 on the execution of orders freezing property or evidence has not yet been completed.

V. CONCLUSION

This paper has focused on the concept of international terrorism, presented through the prism of the various forms it can take as an internationally criminalised act, and on the consequences these different forms entail in terms of jurisdiction, procedures, liability, etc. Although a vast array of academic and legal arguments supporting each of the presented options can be found, a final assessment would probably lead to the recognition of the primacy of the conventional (treaty crime) approach as opposed to one seeing international terrorism as a crime of customary international law evoking universal criminal jurisdiction. This conclusion seems to be well founded given the continuing reluctance of states to actually reach consensus on the issue of the definition of international terrorism, which, after all, is a precondition for the principle of legality. The conclusion also stands following the states' persistence to base future international agreements on the *aut dedere* principle, founded on the co-existing jurisdictions of the states parties to the agreement at stake. It

¹¹⁵ Commission submitted a report on the implementation of the FD on the EAW (doc. 6815/05 COPEN 42 + ADD1)

¹¹⁶ Report of the Presidency to the Council (doc. 11687/2/04 DROIPE 40 REV)

¹¹⁷ Framework Decision on Joint Investigation Teams, 28 November 2001, 14242/01; Report of the Commission, January 2005, (doc. 5448/05 COPEN 10 + ADD 1).

¹¹⁸ Council Decision of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism (2003/48/JHA, OJ L 16/68).

is unlikely that a future Comprehensive Framework Convention will include any shift in jurisdictional issues that would include the establishment of new international judicial bodies to prosecute and try international terrorists. As for the use of existing bodies, the prospects for universal jurisdiction also do not seem bright, especially when the complementary nature of the International Criminal Court's jurisdiction is borne in mind. Nevertheless, it still seems only a matter of time before the Court exercises its adjudicative functions related to terrorist activities during armed conflict.

A brief overview of the normative response of the EU following the events of September 2001 presents a concerted regional normative response which, however, faces a set of problems different from those presented above. Although the EU Member States had initial problems in reaching consensus on the normative issues of their joint anti-terrorist fight (postponing decisions due to the lack of a common definition), these were eventually overcome in a relatively short period. The problems persist with the implementation and enforcement of commonly accepted commitments and obligations. Reports show the great difficulties that the majority of EU Member States face even at the stage of harmonising their national legislation with numerous decisions and provisions at the European level. These problems stem from and are connected to the international standards imposed by global bodies such as the UN Security Council. As one author puts it, "the complex equilibrium of competences between the Union and its Member States in the implementation of Security Council resolutions as well as the somewhat fragmented normative framework of the European Union does not in itself favour smooth enforcement."¹¹⁹ The problem of the enforcement of normative anti-terrorist measures, however, is beyond the scope of this article.

¹¹⁹ Bianchi, *supra* note 55 at 531.

Summary

INTERNATIONAL CRIMINALISATION OF TERRORISM

This article examines the concept of terrorism in international law and highlights its relevant contemporary developments, paying particular attention to its criminalisation under international criminal law. A more practical dimension is presented using the example of regional (EU) and national (Slovenian) normative measures following the terrorist attacks of September 2001. Initially, focus is placed on the understanding of “international terrorism,” its definition and the consequences of diverse interpretations of the term, especially given some basic categories of international criminal law. After laying out an elementary approach to the concept, international terrorism is presented as a (potential) international crime that falls into different categories: diversified contextually, jurisdictionally and on the basis of sources. This paper aims to explore the international criminalisation of terrorism (theoretical framework applied in the first part of the article), where the basic distinction between terrorism as a treaty crime and as an international crime under universal jurisdiction is proposed in the light of the progressive development of international criminal law. Given the attention the concept has received following September 2001, subsequent legal responses are briefly reviewed at regional and national levels. An evolutionary theoretical approach to the criminalisation of international terrorism is therefore supplemented with a more practical one which aims to offer a brief overview of the normative measures taken within the European Union and their inclusion in the legal order of the Republic of Slovenia. The conclusion alludes to the global prevalence of the *aut dedere* principle and points to the related problems of enforcement of normative anti-terrorist measures which lie, however, beyond the scope of this paper.