

Judges gone astray: The fabrication of terrorism as an international crime by the Special Tribunal for Lebanon

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'The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed'.¹

In an interlocutory decision rendered on 16 February 2011 the Appeals Chamber of the Special Tribunal for Lebanon held that terrorism has evolved into a crime under international customary law. The following comment will show that the decision is based on two major errors: First, it can be shown that for the tasks at hand it was absolutely unnecessary for the Appeals Chamber to resort to any endeavour to establish whether terrorism was a criminal offence under international customary law or not (III.). Second, the finding that a customary rule of international law regarding the international crime of terrorism had emerged is based on insufficient grounds and cannot be upheld (IV.). Rather than triggering speculation as to what caused the judges to be led astray to such a significant extent, the decision will hopefully serve to stimulate a discussion that is long overdue and goes to the heart of international criminal law, namely the legitimacy and reach of customary international criminal law (V.).

I. Background

The Special Tribunal for Lebanon was established by the Security Council, acting under Chapter VII of the UN Charter, after the Lebanese Parliament had failed to formally ratify an agreement between the UN and the Lebanese Government setting up an international tribunal to try all those allegedly responsible for the attack, and related killings, on the former Lebanese Prime Minister Rafiq Hariri in February 2005. In Resolution 1757 (2007) the Security Council decided that the provisions of the agreement on the establishment of a Special Tribunal that was annexed to the resolution² and the tribunal's Statute attached to the agreement³ would enter into force on 10 June 2007, unless the Government of Lebanon notified the UN that the legal requirements for entry into force had been complied with before that date. With such a

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¹ Levitt, 'Is "Terrorism" Worth Defining?' (1986) 13 OHIO N.U.L.Rev. 97.

² Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon, SC Res 1757, UN Doc S/RES/1757 (30 May 2007) (Annex). All documents relating to the STL to which reference is made are available at <www.stl-tsl.org>.

³ Statute of the Special Tribunal for Lebanon, SC Res 1757, UN Doc S/RES/1757 (30 May 2007) (Attachment).

notification absent, the Special Tribunal, which has its seat in the Netherlands, became operational on 1 March 2009 - the date set for its commencement by the UN Secretary-General and the day after the UN Commission that had been assisting the Lebanese authorities' investigations closed its doors.

The jurisdiction of the Special Tribunal covers the prosecution of persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Hariri and in the death or injury of other persons, but could be extended if the Tribunal finds that certain other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005 are connected, in accordance with the principles of criminal justice, and are of a nature and gravity similar to the attack of 14 February 2005. Crimes that occurred after 12 December 2005 may also be included in the Tribunal's jurisdiction under the same conditions if it is so decided jointly by the Government of the Lebanese Republic and the UN and with the consent of the Security Council (Art. 1 STL-Statute). The Statute further establishes that the Tribunal shall apply the 'provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crimes and offences, including the rules regarding the material elements of a crime, criminal participation and conspiracy as well as Articles 6 and 7 of the Lebanese law of 11 January 1958 on "Increasing the penalties for sedition, civil war and interfaith struggle"' (Art. 2 STL-Statute). Consequently, the STL is the first international criminal court which will try persons who are accused solely of violating domestic, not international, criminal law.⁴

The procedure before the Special Tribunal is regulated by the Rules of Procedure and Evidence adopted by the judges⁵ on 20 March 2009. On 10 November 2010 the judges issued the third revision of the Rules of Procedure and Evidence and amended Rule 68, which deals with the submission of the Indictment by the Prosecutor. They included a new paragraph (G) stating that the 'Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment'. In line with this amendment the judges also inserted Rule 176 *bis* setting out that the 'Appeals Chamber shall issue an interlocutory decision on any question raised by the Pre-Trial Judge under Rule 68(G), without prejudging the rights of any accused'.⁶ As set out in the Explanatory Memorandum by the Tribunal's President of 25 November 2011, this procedure aims at 'ensuring consistency in applicable law throughout the legal proceedings and at speeding up pre-trial and trial deliberations'.

After having received an indictment filed by the Tribunal's Prosecutor on 17 January 2011, the Pre-Trial Judge took advantage of the new procedure and submitted fifteen

⁴ Milanovic, 'An Odd Couple – Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon' (2007) JICJ 5, 1139. See also Aptel, 'Some Innovations in the Statute of the Special Tribunal for Lebanon' (2007) JICJ, 1107 (1108).

⁵ Cf. Article 28 STL-Statute. The judges of the Special Tribunal are both Lebanese and international judges (Cf. Art. 8 STL Statute).

⁶ Art. 176 *bis* (C) was corrected on 29 November 2010. Cf. STL/BD/2009/01/Rev.3/Corr. 1.

questions of law to the Appeals Chamber.⁷ With regard to the notion of terrorist acts, the Pre-Trial Judge requested a decision on the following issues:

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

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

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

On 16 February 2011 the Appeals Chamber, having heard the Prosecutor, the Head of the Defence Office and *amici curiae* via an expedited filing schedule, issued its 153 page decision.

II. The Appeals Chamber decision

In light of the fifteen questions submitted by the Pre-Trial Judge, the decision⁸ contains legal reasoning regarding manifold issues such as Crimes and Offences against Life and Personal Integrity, Conspiracy, Modes of Responsibility, Multiple Offences and Multiple Charging. As a consequence, a lot could be said about those points. For example, it is likely that the Appeals Chamber's sideswipe⁹ at the International Criminal Court's rejection to make use of the shaky concept of joint criminal enterprise (JCE)¹⁰ will not only meet with applause. However, this comment will merely focus on what is presumably the most remarkable aspect of the decision: The pronouncement that terrorism has emerged as a crime under international customary law.

The decision includes a headnote, which does not constitute part of it, but

*has been prepared for the convenience of the reader, who may find it useful to have an overview of the decision.*¹¹

⁷ Order on preliminary questions addressed to the Judges of the Appeals Chamber pursuant to Rule 68, paragraph (G) of the Rules of Procedure and Evidence, 21.1.2011 (STL-11-01/I),

⁸ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16.2.2011 (STL-11-01/I) (Hereinafter: "Decision").

⁹ Decision, para. 255: "The problem with the doctrine of perpetration by means is that it is not recognized in customary international law [...]".

¹⁰ Cf. Robinson, 'The two liberalisms of international criminal law' in: Stahn / van den Herik (eds.), *Future Perspectives on International Criminal Justice*, The Hague 2010, 115 (120).

¹¹ Decision, Headnote, note 1.

Although only the text of the decision itself is authoritative, the headnote's authenticity justifies reprinting the passage of it concerning terrorism.

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

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

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

Although Article 2 of the Statute enjoins the Tribunal to apply Lebanese law, the Tribunal may nevertheless take into account international law for the purpose of interpreting Lebanese law. In this respect, two sets of rules may be taken into account: the Arab Convention against Terrorism, which has been ratified by Lebanon, and customary International law on terrorism in time of peace.

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

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

On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (dolus) of the underlying crime and (ii) the special intent (dolus specialis) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational. The very few States still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary

international law shows that the latter notion is broader with regard to the means of carrying out the terrorist act, which are not limited under international law, and narrower in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element.

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

This interpretation does not run counter to the principle of legality (nullum crimen sine lege) because (i) this interpretation is consistent with the offence as explicitly defined under Lebanese law; (ii) it was accessible to the accused, especially given the publication of the Arab Convention and other international treaties ratified by Lebanon in the Official Gazette (none of which limits the means or implements by which terrorist acts may be performed), (iii) hence, it was reasonably foreseeable by the accused.

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

The following analysis will show that the Appeals Chamber's reasoning with regard to the notion of terrorism to be applied by the tribunal contains two major flaws. First, it will be demonstrated that for the tasks at hand it was absolutely unnecessary for the Appeals Chamber to establish whether terrorism was a criminal offence under international customary law or not. Second, the finding that a customary rule of

international law regarding the international crime of terrorism, at least in time of peace, had evolved is based on insufficient grounds and therefore cannot be upheld.

III. The superfluous resort to Customary International Law

To arrive at the conclusion that Art. 314 of the Lebanese Criminal Code does not contain an exhaustive list of means and therefore covers terrorist acts carried out by means that are not specifically mentioned in the provision, such as hand guns or machine-guns,¹² it was pointless for the Appeals Chamber to resort to International Law.

Legal interpretation is generally based on the ordinary meaning to be given to the terms of a text¹³ in their context and in the light of its objective and purpose¹⁴. Turning to Art. 314 of the Lebanese Criminal Code in its English translation, however, there cannot be the slightest doubt that the enumeration introduced by the words “such as” is not an exhaustive enumeration.¹⁵ Of course, the fact that a literal interpretation of Art. 314 allows to cover terrorist acts carried out by means liable to create a public danger - including those that are not explicitly mentioned in the text - does not in itself lead to the conclusion that such an interpretation is preferable, and it would have been indeed an interesting exercise for the Appeals Chamber to explore why Lebanese courts have followed a more narrow interpretation of the “means” element. But absent any compelling reason to apply a more restricted interpretation, the Appeals Chamber was utterly free to base its decision on the ordinary meaning of Art. 314 without any need to resort to International Law. Therefore, the most remarkable aspects of the decision are purely *obiter dicta*. Nevertheless, the Appeals Chamber tries to conceal this fact by repeated references to the relevancy of International Law.

As correctly identified by the Appeals Chamber, resort to International Law might only have been necessary if Lebanese Law could be ‘held to have been overridden’¹⁶ by specific provisions of the Statute which are based not on the domestic law of Lebanon but on principles of international criminal law. However, with regard to the substantive criminal law to be applied by the Special Tribunal, no such provisions exist.

The Appeals Chamber further submitted that the Special Tribunal had been free to depart from the application of national law when such application appeared to be ‘unreasonable, or may result in a manifest injustice, or is not consonant with international principles and rules binding upon Lebanon’.¹⁷ Irrespective of whether this approach can be upheld, the Chamber itself found no need to depart from Lebanese law for any of these reasons.¹⁸ Nevertheless the Appeals Chamber

¹² Cf. decision, para. 145. See also Decision, para. 125 et seq.

¹³ Cf. decision, para. 38 (‘One begins with the words, ...’).

¹⁴ Cf. Art. 31 of the Vienna Convention on the Law of Treaties. See decision, para. 28.

¹⁵ The same applies to the French translation of Art. 314. Cf. Decision, para. 50.

¹⁶ Decision, para. 15.

¹⁷ Decision, para 39.

¹⁸ Decision, para. 41.

submitted that a general principle of interpretation common to most States of the world is that

*one should construe the national legislation of a State in such a manner as to align it as much as possible to legal standards binding upon the State.*¹⁹

In search of such binding standards however, the Tribunal correctly found that the Arab Convention for the Suppression of Terrorism of 22 April 1998 does ‘not intend to substitute its own definition of terrorism for those contained in the national law of each contracting party’.²⁰ As to customary international law of whatever substance, the Appeals Chamber correctly noted that

*the text of Article 2 of the Tribunal’s Statute makes clear that codified Lebanese law, not customary international law, should be applied to the substantive crimes that will be prosecuted by the Tribunal.*²¹

But the judges did not give up that easily and as a last resort tried to justify the recourse to international law by taking into account the ‘unique gravity and transnational dimension of the facts at issue’²² which in their view justifies interpreting and applying Lebanese law on terrorism ‘in light of international standards on terrorism, given that these standards specifically address transnational terrorism and are also binding on Lebanon.’²³ However, it remains mystifying what these international standards are and how they add to the well established standards of legal interpretation set out above.

After all, one can only wonder why the judges went all that way to come back with so little. This is even more surprising since both the Prosecution and the Defence Office had submitted their position that international law was not material to the interpretation or application of the Lebanese law on terrorism.²⁴ In light of the recent amendment to the Rules of Procedure and Evidence however, one does not need not to be extraordinary gifted to understand that all those methodological twists and turns were only meant to set the stage for a really big coup: The fabrication of terrorism as an international crime.

IV. Terrorism under customary international law

The Appeals Chamber’s claim that terrorism constituted an international crime is indeed revolutionary and highly inventive to an extent which makes it particularly difficult to follow the Court’s reasoning in this matter. As the Defence Office, the Prosecutor, and ‘many scholars and other legal experts’²⁵ have already stated, we find a vast agreement as to the disagreement: currently no universal definition of terrorism

¹⁹ Decision, para. 41.

²⁰ Decision, para. 80.

²¹ Decision, para. 123.

²² Decision, para. 124.

²³ Decision, para. 124.

²⁴ Cf. decision, para. 61.

²⁵ Cf. decision, para. 83.

exists.²⁶ This agreement not only applies to international treaty law, but also to customary international law. Notwithstanding more general objections that have been raised against the value of custom as a source of international law,²⁷ we shall see that the conditions for a rule establishing a definition of terrorism under customary criminal international law have not been met in the case of terrorism.

The essence of custom, according to article 38 of the Statute of the International Court of Justice, is that it should present ‘evidence of a general practice accepted as law’. In order for a rule of customary international law to exist, two requirements need to be fulfilled:

- the material element, i.e. there must be a widespread repetition by States of similar international acts over time (state practice), and
- the psychological or subjective element, i.e. the belief that such behaviour is ‘law’, i.e. legally binding (the formation of an *opinio iuris sive necessitatis* in the international community), as opposed to a mere moral or social obligation or usage.²⁸

It is noteworthy that there is an academic debate on which of the two elements – *opinio iuris* or state practice – is the dominant one for establishing customary international law. Traditionally, customary law was described to consist of state practice, to be confirmed by the general opinion of the states that they were bound to the said practice. However, in view of various human rights violations committed by a vast number of States, and the consequent impunity of the responsible actors, it is increasingly difficult, if not impossible, to prove a consistent state practice criminalizing human rights violations.²⁹ Moreover, with the establishment of more and more international bodies, above all the U.N. General Assembly, which led to a permanent, intensive communicative flow, a new approach was formed by international legal scholars, advocating an *opinio iuris*-based custom as opposed to the traditional state practice-based one.³⁰ This development has been described as the transition from *la coutume sage* to the *coutume sauvage*.³¹ This ‘modern’ approach is particularly popular in the area of international criminal law, where the actual practice

²⁶ Cf. e.g. E. Stubbins Bates et al., *Terrorism and International Law*, Oxford 2011, 1 ff; Saul, *Defining Terrorism in International Law* (2008), p. 191 ff; Bassiouni, ‘Terrorism : the Persistent Dilemma of Legitimacy’ (2004) 36 CWRJIL 2&3, 305; *Amicus Curiae* brief on the question of the applicable terrorism offence in the proceedings before the Special Tribunal for Lebanon, with a particular focus on a ‘special’ *special intent* and/or a *special motive* as additional subjective requirements, Institute for Criminal Law and Justice of Georg-August Gottingen University, at 6 with further references; Wony, *Die völkerrechtliche Kriminalisierung von modernen Akten des internationalen Terrorismus*, (2008), 25, with further references; Wardlaw, *Political Terrorism*, 2nd ed. (1989), 3; Doucet, in: Doucet (ed.), *Terrorism, Victims, and International Law* (2003), 277 (277); Oehmichen, *Terrorism and Anti-Terror Legislation: The terrorised legislator?* Antwerp 2009, 5.

²⁷ See e.g. Friedmann, *The Changing Structure of International Law*, New York (1964) pp. 121-3; see also De Lupis, *The Concept of International Law*, Aldershot (1987) 112-6 (both cited by Shaw, *International Law*, 6th ed. (2008), 73, note 11).

²⁸ Cf. Shaw loc. cit. 75.

²⁹ Ambos, *Internationales Strafrecht*, 2nd ed (2008), p. 85.

³⁰ Simma / Alston, ‘The Sources of Human Rights Law: Custom, Jus Cogens, And General Principles’ (1988-1989) 12 Aust. YBIL 82, p. 89.

³¹ See Dupuy, R.J., *Coutume sage et coutume sauvage*, in: *La communauté internationale. Mélanges offerts à Charles Rousseau* (1974), p. 75.

of gross human rights violations of some states made the evidence of a settled practice nearly impossible. The promoters of this view thus suggested reversing the requirements of customary international law in the area of international criminal law. In their view, the existence of an *opinio juris* as evident in official declarations of States should suffice to create legally binding customary law.³²

The Chamber seems to follow this latter approach. It states:

*As we shall see, a number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged.*³³

We should therefore start by testing whether a general *opinio juris* can be identified, and, subsequently, check whether this general opinion is accompanied by a consistent state practice. In light of the clear result of this analysis, only a few words need to be added with regard to the question of individual criminal liability.

Opinio juris sive necessitatis

Opinio juris sive necessitatis ('an opinion of law or necessity') or simply *opinio juris* ('an opinion of law') reflects the States' belief that they acted in a certain manner because they were legally obliged to do so. The psychological element, the *opinio juris*, is thus satisfied if states are convinced that they are bound to a particular practice.³⁴ Their conduct must be the evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.³⁵

In order to establish this general opinion (i.e. *in casu* the consensus of the international community on how to define international terrorism), the Appeals Chamber starts in a rather unconventional fashion, namely by citing a few - to be exact: five - selected decisions of different national courts which are found to have acknowledged the existence of a common definition of terrorism under customary international law.³⁶ Nevertheless, the Appeals Chamber is not blind to the fact that these decisions do not, as such, suffice to establish a rule under customary law:

*However significant these judicial pronouncements may be as an expression of the legal view of the courts of different States, to establish beyond any shadow of doubt whether a customary rule of international law has crystallised one must also delve into other elements.*³⁷

³² See, e.g. Bin Cheng, 'Custom: The Future of General State Practice in a Divided World' in Macdonald and Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1986), p. 513.

³³ Decision, para. 85.

³⁴ Shaw (loc. cit.), p. 84.

³⁵ *Nicaragua v United States*, ICJ Reports, 1986, pp. 108-9; 76 ILR, pp. 442-3.

³⁶ Decision, para. 86.

³⁷ Decision, para. 87

Subsequently, the Appeals Chamber considers definitions provided by international and multilateral treaty law.³⁸ It enumerates some elements of different definitions of terrorism evident in international treaties, stressing that certain elements are common in most of them (e.g. the existence of a criminal act and the intention to intimidate a population or compel an authority).³⁹

The Appeals Chamber notes that the United Nations General Assembly has insisted since 1994 that

*criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable.*⁴⁰

However, this general condemnation can hardly be put on a par with a legally binding definition establishing criminal liability under international law. In addition, it can hardly be considered as proof for *opinio juris*. General Assembly resolutions normally have no binding legal effect under the Charter, nor do they give rise to ‘instant custom’.⁴¹ States do not necessarily vote because they feel legally obliged to do so, and the General Assembly is rather a political body expressing political opinions than creating legal rules.⁴² Thus, supposing that the Assembly provided a clear definition of terrorism, this would by no means prove that it was generally accepted as customary law.

While the Appeals Chamber points out that there is ‘a large measure of approval in the Ad Hoc Committee tasked to draft a Comprehensive Convention on Terrorism’,⁴³ it seems to deliberately ignore the fact that one important characteristic of this very Ad Hoc Committee is that it has – thus far – not agreed upon common defining elements. The General Assembly of the United Nations created an Ad Hoc Committee in its resolution 51/210 of 17 December 1996 with the aim of drafting a comprehensive convention on international terrorism. However, the Ad Hoc Committee has not achieved to come up with such a comprehensive convention so far. Precisely because of this failure, pursuant to General Assembly resolution 64/118 of 16 December 2009 the Sixth Committee decided, at its first meeting on 4 October 2010, to establish a working group with a view to finalizing the draft comprehensive convention on international terrorism. Notwithstanding, there are still substantially differing views on several issues, and not minor ones either. The pending issues of constant disagreements include: (a) whether the Draft Convention should adopt an armed conflict or law enforcement approach to counter-terrorism; (b) whether a definition of terrorism should include or exclude ‘state terrorism’, and whether it

³⁸ Decision, para. 88.

³⁹ Decision, paras. 88 ff

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

⁴¹ Saul, loc. cit., p. 191.

⁴² Saul, loc. cit. p. 192 with further references.

⁴³ Decision, para. 88.

should include or exclude the acts of state armed forces; and (c) whether armed resistance to an occupying regime or to colonial or alien domination should be included or excluded from the Draft Convention's definition.⁴⁴

Irrespective of that, the Appeals Chamber holds that the 1999 International Convention for the Suppression of the Financing of Terrorism

*provides the UN's clearest definition of terrorism, which includes the elements of (i) a criminal act (ii) intended to intimidate a population or compel an authority, and is limited to those crimes containing (iii) a transnational aspect.*⁴⁵

Art. 2(1) of the said Convention stipulates:

Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

However, one must bear in mind that the definition provided under the said Convention only refers to financing offences and does not comprise any general definition of terrorist offences, so that it is unable to serve for such purpose.⁴⁶ Moreover, considering that international treaties provide for more and partially differing definitions,⁴⁷ it is hard to see why the definition provided by the Convention on Terrorist Financing, in particular, should become authoritative for a rule under customary international law.

In fact, struggles of the international community to provide a comprehensive definition of terrorism date back as early as the beginning of the 20th century. Yet, up to date they have been to no avail. The first international efforts to delineate terrorist acts took place in the 1920s and 1930s. Already in 1926, Romania asked the League of Nations to consider drafting a 'convention to render terrorism universally punishable', but the request was not acted upon.⁴⁸ The most significant early attempt to internationally define terrorism can be found in the League of Nations' draft of the

⁴⁴ *Stubbins Bates* (loc. cit.), 2; Cf. UN GA 6th Committee Report of the Working Group on Measures to eliminate international terrorism, 3 November 2010, UN doc. A/C.6/65/L.10.

⁴⁵ Decision, para. 88 ff.

⁴⁶ *Saul*, loc. cit., p. 211.

⁴⁷ See, e.g., the International Convention for the Suppression of Terrorist Bombings of 1997, cited by *Stubbins Bates* (loc. cit.), p. 3-4, as well as regional instruments such as the European Union's Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, as amended by Framework Decision 2008/919/JHA.

⁴⁸ League of Nations (LoN), Committee of Experts for the Codification of International Criminal Law, Replies of Governments 1927, LoN Doc. C.196.M.70.1927.V, p. 221, cited after: *Saul*, Attempts to define 'terrorism' in international law, NILR (2005) 57-83 (59).

‘Geneva Convention for the Prevention and Punishment of Terrorism’⁴⁹ from 1937, which in fact never entered into force.⁵⁰ In the late 1960s and 1970s a wave of hijackings and other international terrorist incidents triggered the United Nations to address the problem again. In 1972 the UN General Assembly created an ad hoc Committee on International Terrorism to draft a convention, but it was impossible to reach an agreement on the definition of terrorism.⁵¹ The main problem was that opinions within the United Nations were divided as to whether national liberation movements should be excluded from the definition of terrorism.⁵² As this conflict seemed difficult to resolve, attention shifted from the attempt to agree on a definition of terrorism to a more functional approach, that is, addressing specific acts of violence committed with a specific terrorist intent.⁵³ In this manner, from 1963 until 2005 thirteen conventions have been adopted in the framework of the UN, each of them addressing specific manifestations of terrorism but avoiding defining terrorism as such. These treaties covered a range of different actions, including aircraft security,⁵⁴ protection of diplomatic agents,⁵⁵ the taking of hostages,⁵⁶ protection of nuclear material,⁵⁷ acts of violence at airports,⁵⁸ maritime safety,⁵⁹ the safety of fixed platforms located on the continental shelf,⁶⁰ plastic explosives,⁶¹ terrorist bombing,⁶² terrorist financing,⁶³ and nuclear terrorism.⁶⁴ In addition, the General Assembly

⁴⁹ They defined terrorism as ‘all criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public’ (Art. 1.1.); see: League of Nations, Convention for the Prevention and Punishment of Terrorism, O.J. 19 at 23 (1938), League of Nations Doc. C.546 (I).M.383 (I). 1937, V (1938), cited in Bassiouni, *International Terrorism, in International Criminal Law*, Crimes 765 (M. Cherif Bassiouni, ed., 2d ed., 1999).

⁵⁰ India was the only country that signed this instrument.

⁵¹ *Guillaume*, Terrorism and International Law, 53 INT’L & COMP. L. Q. (2004) 537 (539).

⁵² *Greenwood*, War, Terrorism and International Law, in *Essays on War in International Law* 409–10 (Christopher J. Greenwood ed., 2006).

⁵³ *Id.*, at 411.

⁵⁴ Convention on Offences and Certain Other Acts Committed On Board Aircraft, 20 UST 2941; TIAS 6768; 704 UNTS 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 UST 1641, TIAS 7192; and the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 24 UST 564; TIAS 7570.

⁵⁵ Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 28 UST 1975; TIAS 8532; 1035 UNTS 167.

⁵⁶ International Convention against the Taking of Hostages, U.N. GA Res. 34/146 (XXXIV), 34 U.N. GAOR Supp. (No. 46) at 245, UN. Doc. A/34/46 (1979); TIAS 11081; 1316 UNTS 205; 18 ILM 1456 (1979).

⁵⁷ Convention on the Physical Protection of Nuclear Material, TIAS 11080; 1456 UNTS 1101; 18 ILM 1419 (1979).

⁵⁸ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 UNTS 177; 24 UST 564; 10 ILM 1151 (1971).

⁵⁹ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 ILM 668 (1988); 1678 UNTS 221.

⁶⁰ Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, and the 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 304; 27 ILM 685 (1988).

⁶¹ Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 ILM 721 (1991).

⁶² International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164; 2149 UNTS 256; 37 ILM 249 (1998).

⁶³ International Convention for the Suppression of the Financing of Terrorism, U.N. Doc. A/RES/54/109; TIAS No. 13075; 39 ILM 270 (2000).

condemned acts of terrorism in a number of resolutions, again without defining the term.⁶⁵ But despite these attempts and the growing perceived threat of international terrorism, it has not yet been defined by the international community; not even the Ad Hoc Committee established by virtue of GA/res/51/210 of 17 December 1996, nor the Working Group created for this purpose have been able to finalise the draft comprehensive convention on international terrorism defining it.

As to academic writings, the work of Schmid and Jongman⁶⁶ best illustrates the difficulty of a common and generalised approach to terrorism. They have analysed 109 different definitions of terrorism and isolated 22 different elements characterising terrorism, but not one of them appeared in all of the examined definitions⁶⁷. Four years later, in 1992, Schmid suggested in a report for the then UN Crime Branch a definition that became famous due to its simplicity: acts of terrorism were defined as ‘peacetime equivalents of war crimes’.⁶⁸

From the above it becomes certain that neither an international treaty law nor a general legal opinion expressed by sovereign states exists that agrees upon a common definition of terrorism. Notwithstanding that, the Appeals Chamber elaborates upon the allegedly identified third element provided under the financing Convention, i.e., the transnational aspect. It argues that this element was necessary in order to distinguish international terrorist offences from domestic terrorism.⁶⁹ The Appeals Chamber states:

Regarding this transnational element, it will typically be a connection of perpetrators, victims, or means used across two or more countries, but it may also be a significant impact that a terrorist act in one country has on another—in other words, when it is foreseeable that a terrorist attack that is planned and executed in one country will threaten international peace and security, at least for neighbouring countries. The requirement of a transnational element serves to exclude from the definition of international terrorism those crimes that are purely domestic, in planning, execution, and direct impact.⁷⁰

But is it really transnationality that serves to distinguish international crimes from domestic ones? Of course, there are a variety of cross border offences that are dealt with only by national courts and it would be almost absurd to imagine that the case of a bike stolen in Belgium and resold in the Netherlands by a national of a third country

⁶⁴ International Convention for the Suppression of Acts of Nuclear Terrorism, U.N. Doc. A/RES/59/290 (2005).

⁶⁵ See, e.g., in the Declaration on Principles of International Law concerning Friendly Relations between States (U.N. G.A. res. 2625 (1970)), it was provided that every state had the ‘duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State.’ See, e.g., also G.A. res. 34/175, 38/130, 40/61, 42/22, 42/159, 44/29, 46/51, and 49/60.

⁶⁶ Schmid, Jongman et al., *Political Terrorism – a new guide to actors, authors, concepts, data bases, theories and literature* (1988), p. 5 et seq.

⁶⁷ Statistically, the most common elements were those of violence, force, political, and fear, emphasis on terror (however, despite the obvious etymological relation with the notion of terrorism, only 51 per cent of the definitions contained this element).

⁶⁸ United Nations Office on Drugs and Crime: Definitions of Terrorism (http://web.archive.org/web/20070527145632/http://www.unodc.org/unodc/terrorism_definitions.html, last visited on 27 April 2011).

⁶⁹ Decision, para. 90.

⁷⁰ Decision, para. 90.

could deserve the attention of an International Criminal Tribunal. On the other hand however, it is difficult to accept that ‘purely domestic’ crimes are irrelevant with regard to international peace and security as the protected interests of international criminal law, and the prosecution of crimes against humanity, genocide and war crimes in non-international conflict clearly shows that ‘transnationality’ never served as a criterion to distinguish crimes under international law from purely domestic crimes. Therefore it remains unclear whether the Appeals Chamber introduces the transnational aspect as a means to substantiate individual criminal responsibility under international law or whether it uses this facet only as a means to limit such (pre-existing) responsibility in order to safeguard national judicial sovereignty.⁷¹

Irrespective of that, the Appeals Chamber goes on to claim that

*the national legislation of countries around the world consistently defines terrorism in similar if not identical terms to those used in the international instruments just surveyed.*⁷²

However, even if consistent national legislation for itself was accepted to be a source of international custom, in the particular case of terrorism as a criminal offence no such consistency can be discovered. Based on UN Security Council Resolution 1373, states are obliged to report to the Counter-Terrorism Committee on their efforts to criminalise terrorist acts at the domestic level as from late 2001.⁷³ In probably the most comprehensive study on defining terrorism under international law Ben Saul identified three main patterns in domestic criminal legislation on terrorism: 87 States do not provide any special legislation and apply ordinary offences to terrorist cases; 46 States have simple generic terrorism offences; and 48 States have composite generic terrorism offences. In addition, it is important to note that 15 States did not provide sufficient information to categorise their criminal laws on terrorism and that 18 States did not clarify in their reports how terrorism was defined in their national law.⁷⁴ The number of 87 States without any specific domestic terrorist offences clearly evidences that the Appeals Chamber’s claim of a vast consensus of domestic legislation is shaky. Moreover, in spite of the European Framework Decision on Combating Terrorism even within the European Union the national definitions of terrorism as a criminal offence do still considerably differ.⁷⁵ Needless to say, the

⁷¹ Cf. Kirsch, ‘Two Kinds of Wrong: On the Context Element of Crimes against Humanity’ *Leiden Journal of International Law*, 22 (2009) 525, reasoning that the context element of crimes against humanity is not an aggravating circumstance in respect of the material facts of the case that define the wrong of the act (*Unrecht*) or the offender's blameworthiness (*Schuld*), but a jurisdictional element which is a mere precondition for prosecution only.

⁷² Decision, para. 91.

⁷³ UNSC Res. 1373 (2001) para. 2 (e).

⁷⁴ Saul (loc. cit.), p. 263 ff.

⁷⁵ Council Framework Decision (EC) 2002/475/JHA on combating terrorism of 13 June 2002. For instance, the German law on terrorism does not require the element of ‘spreading terror or fear amongst a population.’ (S. 129a of the **German** Criminal Code stipulates:

(1) *Whosoever forms an organisation whose aims or activities are directed at the commission of*
1. *murder under specific aggravating circumstances (section 211), murder (section 212) or genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law); or*
2. *crimes against personal liberty under section 239a or section 239b,*
3. *(repealed)*

purported ‘consensus’ is even less existent at the global level.⁷⁶ Notwithstanding that, the Appeals Chamber cites a number of definitions under national laws, identifying

or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

In addition, not under the label of terrorism but clearly introduced in order to implement the EU Framework Decision, s. 89a of the German Criminal Code defines the “serious violent offence endangering the state” as “*an offence against life under sections 211 or 212 [murder or intentional homicide] or against personal freedom under sections 239a [abduction for the purpose of blackmail] or 239b [taking hostages], which under the circumstances is intended to impair and capable of impairing the existence or security of a state or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany.*” The German legislation thus requires the commission or the intended commission of specific serious offences.

Under s. 1 of the Terrorism Act 2000 of the **United Kingdom**, terrorism is defined as follows:

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

In contrast, in **France** a list of certain acts is included in the terrorist definition, thus limiting the scope of law to these listed acts (Art. 421 (1) of the French Criminal Code, as amended by Law 1062/2001) reads as follows: “*The following offences constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror: wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also as the hijacking of planes, vessels or any other means of transport (...)*”.

In contrast to both definitions, the law of the United Kingdom requires a political, religious or ideological cause, cf. s. 1 of the Terrorism Act 2000: *In this Act “terrorism” means the use or threat of action where: (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause. (2) Action falls within this subsection if it: (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person’s life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system (...).*

⁷⁶ A vast survey of definitions in national legislation has been conducted by Ben Saul. By analyzing the State reports submitted to the Counter-Terrorism Committee (CTC) since late 2001 on basis of UNSC Resolution 1373 (2001) para 3 (2), he found that 87 States lack special terrorism offences and hence use ordinary offences, 46 States have simple generic terrorism offences, and 48 States have composite generic terrorism offences (Saul, *Defining Terrorism in International Law* (2008), 264 ff). To give an example for the differences, cf. e.g. Article 3 (3) of the Federal Law No. 35-FZ on Counteraction of Terrorism (2006) of the **Russian Federation**: “*terrorist act shall mean making an explosion, arson or other actions connected with frightening the population and posing the risk of loss of life, of causing considerable damage to property or the onset of an ecological catastrophe, as well as other especially grave consequences, for the purpose of unlawful influence upon the adoption of a decision by state power bodies, local self-government bodies or international organisations, as well as the threat of committing the said actions for the same purpose*”. Thus under the Russian definition an especial level of gravity is required, which is rarely required (as such) in other legislations. Under the **Turkish** law, instead, an organizational element is needed: Thus Article 1 of the Turkish Anti-Terror Law of 1991 (Act No. 3713), defines terrorism as “*any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by*

common or similar elements. By doing so, it seems to deliberately confuse the fact that certain national definitions share certain elements with the existence of a general consensus as to one single comprehensive definition.

The Chamber further tries to substantiate its view by returning⁷⁷ to the five national court decisions that seem to have recognised the existence of the crime of terrorism under customary international law. By the way these decisions are presented, the reader is led to believe that these five courts, together with an unpublished judgment of the Belgian Court of cassation of 2006, present the vast majority of the over 190 nations of the world:

*In recent years courts have reached concordant conclusions about the elements of an international crime of terrorism. They have either explicitly referred to a customary international rule on the matter [reference to the five aforementioned national decisions is made again], as noted above, or have advanced or upheld a general definition of terrorism that is broadly accepted [reference to the aforementioned Belgian decision is made]. Judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminishes each year.*⁷⁸

It remains a miracle to us how the fact that the vast majority of national courts have not discussed the question of defining terrorism under international customary law can be interpreted as meaning that the few national courts that did allegedly recognise such a rule under international law are proof of an existing rule under customary international law. In addition, it should be noted that the Canadian Supreme Court's decision in *Suresh v Canada (Minister of Citizenship and Immigration)*⁷⁹ concerns an immigration law question and not criminal law.⁸⁰ Similarly, one should be attentive to the fact that the Mexican 'Judge of Amparo' purportedly recognises the States' obligation to prevent, prosecute and punish those culpable of the commission of terrorist acts, but does not refer to any established definition of such a crime under customary international law.⁸¹ Furthermore, in the case *Almog v Arab Bank*, the term 'terrorism' is not even used.⁸² Thus out of the five cited national cases, only two (Italy and Argentina) remain which seem to claim the existence of an international terrorist offence. Needless to say those two solitary decisions cannot be considered representative for general *opinio juris*.

In conclusion, the reasoning provided by the Appeals Chamber is inept to show the existence of a general consensus of the international community as to the elements of

means of pressure, force and violence, terror, intimidation, oppression or threat. An organization for the purposes of this Law is constituted by two or more persons coming together for a common purpose." A comprehensive collection of contemporary national counter-terror legislation has been gathered by the OSCE Office for Democratic Institutions and Human Rights and can be retrieved online at: <http://www.legislationline.org/topics/topic/5> (last visited on 27 April 2011).

⁷⁷ Cf. Decision, para. 86.

⁷⁸ Decision, para. 100.

⁷⁹ 2002 SCC I, [2002] S.C.R. 3, at paras 96 and 98.

⁸⁰ Cf. Saul (loc. cit.), p. 259 f.

⁸¹ Mexico, Supreme Court, Cavallo Case, No. 14012002, 10 June 2003.

⁸² 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007), cf. note 134 of the Appeals Chamber's interlocutory decision.

a criminal law definition of terrorism under customary international law. No such *opinio juris* can be identified.

State practice

The actual practice states engage in constitutes the second element to be considered when assessing customary international law. Relevant factors to be measured are the duration, consistency, repetition and generality of the particular practice.⁸³ As the ICJ declared in the *Asylum* case in 1950, which laid down the basic rule as regards continuity and repetition,⁸⁴ a customary rule must be in accordance with a constant and uniform usage practised by the States in question.⁸⁵ In *the Nicaragua v United States* case, the ICJ further stated that in order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.⁸⁶ The threshold that needs to be attained in order to be legally binding thus will depend both on the nature of the alleged rule and the opposition it meets.⁸⁷

Unfortunately, the Chamber does not submit any evidence of such state practice at all. Only with reference to the few national decisions, it concludes that

*the courts thereby intend to apply at the domestic level a notion that is commonly accepted at the international level.*⁸⁸

With unprecedented audacity the Court then turns the tables, claiming that even supposing that *opinio juris* could not be established, this was not necessary as existing state practice would suffice for the establishment of international customary law:

*We shall add ad abundantiam another argument to support the Appeals Chamber's finding based on convergent national judgments. Even if the view were taken that those national judgments do not advert, not even implicitly, to a customary international rule nor explicitly note that they reflect an international obligation of the State nor express a feeling of international legal obligation, nevertheless our conclusion stands. It is supported by the legal criteria suggested on the basis of careful scrutiny of international case law by a distinguished international lawyer, Max Sørensen. According to him one should assume as a starting point the presumption of the existence of *opinio juris* whenever a finding is made of a consistent practice; it would follow that if one sought to deny in such instances the existence of a customary rule, one must point to the reasons of expediency or those based on comity or political convenience that support the denial of the customary rule.*⁸⁹

⁸³ *Shaw* loc. cit. 76.

⁸⁴ *Shaw* loc. cit. 76.

⁸⁵ ICJ Reports, 1960, pp. 276-7; 17 ILR, p. 284.

⁸⁶ ICJ Reports, 1986, p. 14 (98); 76 ILR, p. 349 (432).

⁸⁷ *Shaw* (loc. cit.), 78.

⁸⁸ Decision, para. 100.

⁸⁹ Decision, para. 101.

It is respectfully submitted that contrary to the Appeals Chamber's decision no such 'consistent practice' exists.

Individual criminal liability

Having established that 'a customary rule has evolved in the international community concerning terrorism',⁹⁰ the Appeals Chamber turns to set out whether the existence of a customary rule outlawing terrorism means that terrorism is a criminal offence under international law. In order to resolve this issue the judges refer to the decision in *Tadic*⁹¹, which determined that one criterion to give rise to individual criminal responsibility at the international level is that the violation of an international rule entails the criminal responsibility of the person breaching that rule.⁹²

Given that no such rule can be identified, it is not surprising that the Appeals Chamber is unable to submit any example demonstrating the requisite practice and legal view that it is necessary and indeed obligatory to bring to trial and punish the perpetrators of terrorist acts. But the judges did not allow themselves to be stopped with the finishing line almost in reach and set out to demonstrate individual criminal liability by comparing terrorism to the evolution of war crimes, and by referring to the UN Security Council's condemnation that terrorism constitutes a 'threat to international peace and security'.⁹³

Indeed, the formation process of the international criminalisation of terrorism is similar to that of war crimes...the domestic criminalisation of breaches of international humanitarian law led to the international criminalisation of those breaches and the formation of rules of customary international law authorising or even imposing their punishment. Similarly, criminalisation of terrorism has begun at the domestic level, with many countries of the world legislating against terrorist acts and bringing to court those allegedly responsible for such acts. This trend was internationally strengthened...As a result, those States which had not already criminalised terrorism at the domestic level have increasingly incorporated the emerging criminal norm into domestic penal legislation and case-law, often acting out of a sense of international obligation. The characterisation of terrorism as a threat to international peace and security through UN Security Council "legislation" strengthens this conclusion. It is notable that the Security Council has generally refrained from characterising other national and transnational criminal offences (such as money laundering, drug trafficking, international exploitation of prostitution) as "threats to peace and security". The difference in treatment of these various classes of criminal offences, and the perceived seriousness of terrorism, bears out that terrorism is an international crime classified as such by international law, including customary international law, and also involves the criminal liability of individuals.⁹⁴

⁹⁰ Decision, para. 102.

⁹¹ ICTY, *The Prosecutor v Dusko Tadic* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995.

⁹² Decision, para. 103.

⁹³ Decision, para. 104.

⁹⁴ Decision, para. 104.

It is respectfully submitted that without any practice and legal view neither the comparison of terrorism with the evolution of war crimes, nor the UN Security Council's expression that terrorism constitutes a 'threat to international peace and security' are competent to support the conclusion that terrorism individual criminal responsibility exists at the international level.

V. Future perspectives

Based on the foregoing analysis, the Appeals Chamber's decision of 16 February 2011 turns out to be a deliberate attempt of judicial law-making. In fact it shows an unwarranted assumption of legislative power which has never been given to the Tribunal by any authority. As such it must be strongly rejected. However, the decision will hopefully serve to inspire discussions and exchange about various issues that are touched upon by its flaws.

First, the decision will hopefully fuel an intensified discussion on the notion of terrorism as a legal concept as opposed to a social phenomenon.⁹⁵ Although there is a global consensus that terrorism is a threat to society, legal concepts as to how terrorism can be defined still differ to a large extent. There can be no doubt that it is highly desirable to bring to justice the perpetrators of attacks such as the bombings of September 11th 2001. Bearing in mind, however, that counter-terror legislation tends to disregard human rights,⁹⁶ it is of utmost importance that any definition of terrorism as a criminal offence complies with general principles of law such as the principle of legal certainty. Certainly, the definition suggested by the Appeals Chamber falls short of this standard.

Second, it is to be hoped that the decision of 16 February will trigger a debate on the indispensable professional education and qualification for judges to serve at International Criminal Tribunals and especially at the International Criminal Court.⁹⁷ Of course it is naïve to believe that judges are solely acting as '*bouche qui prononce les paroles de la loi*'⁹⁸ and modern legal theory leaves no doubt that the application of a norm involves a lot more than only mechanically adding two and two. However, this insight should not lead to dispose of the idea of a separation of powers between the legislator and the judiciary, and a professional judge should always be mindful of this separation. For that reason it is simply unacceptable that the members of the Appeals Chamber overstepped this limit in such a blatant manner, thereby playing into the

⁹⁵ Cf. Kirsch, 'The two notions of genocide: Distinguishing macro phenomena and individual misconduct' in: Safferling / Conze (eds.), *The Genocide Convention Sixty Years after its Adoption*, The Hague 2010, 141.

⁹⁶ Cf. e.g. Oehmichen, loc. cit., 384; Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (International Commission of Jurists), Geneva 2009.

⁹⁷ Cf. Bohlander, *Separation of Powers and the International Judiciary – a vision of institutional Judicial Independence in International Law*, in: Shetreet / Forsyth (eds.), *The Culture of Judicial Independence*, Leiden (forthcoming), p. 269 (note. 5).

⁹⁸ Cf. Montesquieu, *De l'esprit des lois*, 1748.

hands of critiques of the International Criminal Court that will use the fear of judicial tyranny⁹⁹ as a welcomed argument to oppose the court.

Third and most important, the decision will hopefully serve to stimulate a discussion that is long overdue and goes to the heart of international criminal law, namely the legitimacy and reach of customary international criminal law.

Absent any other source of law providing for individual criminal responsibility, it was essential for the *ad hoc*-Tribunals to rely on customary international law. Nevertheless, there should be no doubt that the insistence on customary international law was always rather a stopgap solution and the famous ‘*Tadic*-conditions’¹⁰⁰ were nothing more than fairly reasonable, but wholly unsupported assertions. As set out correctly by Zahar and Sluiter the ‘aspiration to fill gaps in the law – to legislate from the bench – is often the only method discernible in the tribunals’ efforts to prove the existence of a rule of customary law’.¹⁰¹

Although the principle *nullum crimen sine lege parlamentaria* might not be directly applicable in International Law, at the very least it should serve as an important reminder that the separation of powers between the legislator and the judiciary is an essential standard that should be respected in the future development of international criminal law. Apparently, with the coming into force of the Rome Statute, an International Jurisdiction¹⁰² has been set up that will allow to give up the defective concept of customary international criminal law.

Apart from that, there can be no doubt that because of its serious shortcomings, the Appeals Chamber’s decision of 16 February 2011 itself cannot serve as a precedent for the establishment of terrorism as a discrete crime under customary international law. To be certain, the Appeals Chamber was not successful in the quest for the Holy Grail.

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⁹⁹ See e.g. Kissinger, *The Pitfalls of Universal Jurisdiction*, in: *Foreign Affairs* 80, no. 4 (July/August 2001), 86.

¹⁰⁰ Cf. ICTY, *The Prosecutor v Dusko Tadic* (IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2.10.1995, para. 94.

¹⁰¹ Zahar / Sluiter, *International Criminal Law*, Oxford 2008, p. 99. See also Spiga, ‘Non-retroactivity of Criminal Law’ (2011) *JICJ* 9, 5 (12): ‘Reference to international law, especially when international customary rules are at stake, as well as to general principles of law, may easily become a Pandora’s box in the hand of a tyrannical judicial power’.

¹⁰² With regard to the question whether the Rome Statute is binding on individuals, i.e. whether its provisions which define international crimes are substantive or jurisdictional in nature (Cf. *Milanovic*, *Is the Rome Statute Binding on Individuals?*, in: *JICJ* 9 (2011), 25), it is submitted for discussion that the provisions of the ICC are binding in the same way as the Criminal Code of any national state that might use its jurisdiction to enforce and adjudicate over third country nationals who have never consented to be bound by this code. For that reason, it might not become necessary to rely on customary criminal law even when a particular situation has been referred to the Court by the Security Council or by a non-state party.