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The 'war on terror' and International Law

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4 Criminal justice

‘We will direct every resource at our command ... every instrument of law enforcement ... to the disruption and defeat of the global terror network.’

(President Bush, September 2001)¹

‘In undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law’

(US Supreme Court, *Hamdan v. Rumsfeld*)²

To the extent that acts of international terrorism constitute crimes under international – or relevant national – law, those responsible, directly or indirectly, are susceptible to international and/or domestic investigation and prosecution.³ States not only have the right under international law, but also the duty,⁴ to bring criminal law to bear on individuals who commit serious crimes.⁵ This corresponds to the right of victims of terrorism to have the violations of their rights investigated and those responsible held to account.⁶

Criminal law enforcement may serve multiple additional goals, ranging from those embraced by traditional theories of retribution, deterrence or redress,⁷ to providing historical narratives of wrongdoing and ‘debunking

1 Former U.S. President George W. Bush, ‘Address to a Joint Session of Congress and the American People’, 20 September 2001, available at: <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>

2 *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

3 Only individual criminal responsibility is addressed here. On state responsibility for internationally wrongful acts, see Chapter 3. On the controversial idea of ‘state crimes’, international law remains unsettled. See generally, *Oppenheim’s International Law* (Oxford: Oxford University Press, 2008), 9th ed., pp. 534–35. See also J. Dugard, ‘Criminal Responsibility of States’, in M. C. Bassiouni (ed.), *International Criminal Law* (New York, 1999), vol. I, 2nd ed., p. 239–53.

4 See, e.g., Preamble to the Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9 (hereinafter ‘ICC Statute’); Questions Concerning the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Judgment, 20 Jul. 2012; SC Res. 1373 (2001).

5 See Chapter 7.A.42 ‘Positive Human Rights Obligations’ and Chapter 7B.14.

6 *Ibid.*

7 Some query whether e.g. the ‘rational actor cost-benefit analysis’ of deterrence is apposite to international terrorism. The 2006 National Security Strategy of the United States notes that ‘the hard core of the terrorists cannot be deterred or reformed’. See also M. A. Drumbl,

the glorification of violence'.⁸ Directly and indirectly, the criminal process may contribute to the prevention of terrorism.⁹ Critically, while criminal law is only one of the international legal tools against terrorism, the expressive function of criminal trials can play a role in restoring or strengthening the rule of law.¹⁰ Conversely, the neglect of criminal law enforcement may itself have an expressive function in suggesting that counter-terrorism is less about 'justice' than it is about other goals.¹¹

The ability of criminal law to deliver on its 'rule of law promise' depends on it meeting certain conditions, a number of which have proved challenging in the counter-terrorism context post-9/11.¹² These include the challenge of effective criminal investigation and prosecution, including ensuring international cooperation and enforcement, in respect of international crimes. It depends also on criminal law being crafted, and implemented, within a rule of law framework that respects fundamental principles – legality, individual responsibility, the presumption of innocence and due process – upon which the legitimacy of criminal law enforcement depends.¹³

Individual criminal responsibility under international law, like terrorism itself, is not a new phenomenon.¹⁴ In recent decades, however, a system of international justice, with national and international components, has crystallised from the experience of addressing atrocities on the domestic and

'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law', 75 (2007) G.W.L.R. 1165.

8 For analyses of the range of functions performed by criminal justice systems, see Drumbl, *ibid.* See also A. du Plessis, 'A Snapshot of International Criminal Justice Cooperation in the Fight against Terrorism,' pp. 111-14, in L. van den Herik and N. Schrijver (eds.), *Counterterrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013).

9 It has also long been recognised that criminal law can be used to disrupt networks before they complete their crimes e.g. by prosecuting conspiracy. See the stretching of these concepts and preventive role of criminal law post-9/11, discussed in Part B.

10 See Drumbl, 'The Expressive Value', *supra* note 7; see also du Plessis, 'A Snapshot', *supra* note 8.

11 The implications of the neglect of criminal law in the aftermath of 9/11 are noted in Part B, below.

12 See B. Saul, 'Criminality and Terrorism', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 6.

13 On challenges to a rule of law approach post-9/11, see Part B.

14 In 1945, the Nuremberg Military Tribunal observed: 'That international law imposes duties and liabilities on individuals as well as upon states has long been recognised ... crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' Judgment of the International Military Tribunal, in *The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, Part 22 (London, 1950), p. 447.

international planes. The work of the International Criminal Court ('ICC')¹⁵ and the *ad hoc* international criminal tribunals for the former Yugoslavia ('ICTY') and Rwanda ('ICTR'),¹⁶ or hybrid national-international courts and bodies including the Special Court for Sierra Leone have been the principal contributors.¹⁷ These have been accompanied by innovations in domestic law¹⁸ and burgeoning practice.¹⁹ The experience of national and international justice in prosecuting apparently impenetrable networks engaged in organised crime as well as a growing body of practice on terrorism prosecutions specifically, leaves little doubt as to the viability (as well as the challenges) of prosecutions in the context of large scale international offences.²⁰ More recently, attention

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- 15 The ICC Statute provides more elaboration on crimes, legal principles and procedures than ever before on the international level. *See also* Report of the Preparatory Commission for the International Criminal Court, Addendum, Part I, Finalized draft text of the Rules of Procedure and Evidence ('Rules of Evidence and Procedure'), 2 November 2000, UN Doc. PCNICC/2000/1/Add.1; and Part II, Finalised draft text of the Elements of Crimes ('Elements document'). As of May 2013, 122 states are party to the ICC Statute.
 - 16 ICTY, established by SC Res. 827 (1993), 25 May 1993, UN Doc. S/RES/827 (1993); ICTR, established by SC Res. 955 (1994), 8 November 1994, UN Doc. S/RES/955 (1994). Also known as 'the *ad hoc* tribunals', the jurisprudence of which has made a detailed contribution to the codification and development of law in this area.
 - 17 The Statute of the Special Court for Sierra Leone (annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002), available at: <http://www.sc-sl.org/index.html>.
 - 18 Law reform efforts in national systems have been impelled in large part by ratification of the ICC Statute, *supra* note 4; *see e.g.* C. Kreß and F. Lattanzi (eds.), *The Rome Statute and Domestic Legal Orders: Volume 1* (Baden-Baden, 2000).
 - 19 There is an increasingly active role of national courts in the prosecution of international crimes based various forms of jurisdiction. Among many examples *see, e.g.*, 'The Spanish Indictment of High-Ranking Rwandan Officials', (2008) 6(5) *Journal of International Criminal Justice* 1003; Ugandan International Crimes Division of the High Court's prosecution of Thomas Kwoyelo, a member of the Lord's Resistance Army (Human Rights Watch, *Justice for Serious Crimes before National Courts: Uganda's International Crimes Division* (2012); the Argentinian officer convicted for crimes against humanity in Spain (A.G. Gil, 'The Flaws of the Scilingo Judgment', (2005) 3 *Journal of International Criminal Justice* 1082); Belgian prosecutions for the Rwandan genocide (L. Reydam, 'Prosecuting Crimes Under International Law on the Basis of Universal Jurisdiction: The Experience of Belgium', in H. Fischer, C. Kreß and S.R. Lüder (eds.), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin, 2001), pp. 799 ff. *See generally* W. Ferdinands, 'The Prosecution of Grave Breaches in National Courts' (2009) 7(4) *Journal of International Criminal Justice* 723; S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, 2006). There are also recent examples, including in Argentina and Guatemala, of trials within the state for atrocities committed many decades before. These developments have contributed to the body of international criminal law.
 - 20 Many international trials have ended in conviction for large-scale crimes in recent years. *See, e.g.*, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber), 18 May 2012; ICTY judgments include in respect of the Srebrenica massacre and genocide in the former Yugoslavia (*Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Trial Chamber), 2 August 2001). A former member of the Presidency of the Republica Srpska, Biljana Plavšić was convicted in 2003 following a guilty plea (*Prosecutor v. Plavšić*, Case No. IT-00-39

dedicated to enhancing cooperation has improved the prospect of meeting the international enforcement challenge.²¹ This is complemented by the human rights framework discussed in Chapters 7 and 8 which provides considerable experience in addressing rights applicable in the criminal process.

Part A of this chapter sets out the relevant legal framework that provides the basis for criminal law responses to terrorism. It sketches out crimes under international and national law that may be committed in the course of what we commonly refer to as acts of 'terrorism', relevant principles of criminal law, and where jurisdiction over such offences can be exercised. It will explore the extent to which the international community is armed with a substantial body of substantive and procedural international criminal law, and a range of jurisdictional options to implement it, as well as a framework for international cooperation in respect of domestic criminal laws, that provide an adequate framework for criminal law enforcement responses to the challenges of international terrorism.

Part B, as in other chapters that follow, explores the application of the legal framework in practice post-9/11. Despite the launch in 2001 of what was billed as the most significant law enforcement operation in history,²² resort to the criminal law framework in the wake of the September 11 attacks has taken a curious and circuitous path. As will be noted, criminal law was de-emphasised in the immediate aftermath of 9/11, but this neglect has gradually given way to an invigorated approach to using criminal law, not only as a tool to respond to but (increasingly) to prevent acts of international terrorism. Examples of practice and development are highlighted in three main areas: expanded terrorism related offences and modes of liability, modified principles and procedures in the investigation and prosecution of terrorism, and innovations in international cooperation. It will explore trends in the use of criminal law in the terrorism context, notably towards the preventive use of criminal law and exceptionalist approaches to law and process, and their implications for effective law enforcement and the rule of law.

Finally, the criminal law paradigm is, of course, relevant not only to acts of terrorism but also to responses to them, so far as they constitute crimes

& 40/1, Sentencing Judgment (Trial Chamber), 27 February 2003), while former Bosnian Serb politician Momčilo Krajišnik is currently serving a twenty year sentence for crimes against humanity (*Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Judgment (Appeals Chamber), 17 March 2009). Trials of former military and political leaders Mladić and Karadžić continue at time of writing in 2013. See also the ICTR judgment in the case of the former Prime Minister of Rwanda for genocide in that country (*Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23, Judgment (Trial Chamber), 4 September 1998). The first ICC judgment was handed down in 2012: *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment, ICC, 14 March 2012.

²¹ Addressed below, Section 4B3.

²² J. Harris, 'President Outlines War on Terrorism, Demands Bin Laden be Turned Over', *Washington Post*, 21 September 2001.

under international law for which individuals may be held to account.²³ The chapter concludes by highlighting the scant practice in the application of the criminal law framework to counter-terrorism, and the implications of the stark contrast to its application *vis-à-vis* terrorism itself.

4A THE LEGAL FRAMEWORK

4A.1 CRIMES, PRINCIPLES OF CRIMINAL LAW AND JURISDICTION

4A.1.1 Crimes under international and national law

Crimes under international law are particularly serious violations of norms that are not only prohibited by international law but also entail individual criminal responsibility.²⁴ Crimes can be established under customary or treaty law. Customary law is binding on all states and, so far as criminal responsibility is concerned, on all individuals.²⁵ Among the sources that can be looked to for the purposes of identifying the content of customary law in this field are the jurisprudence of international *ad hoc* tribunals, the ICC Statute and supplementary documents²⁶ and national court practice. Treaties by contrast are only binding on those states party to them.²⁷ Although treaties bind states, they may also, as in the case of treaties governing international criminal law, affect individuals. Although international tribunals usually prosecute for crimes considered prohibited by customary law, the ICTY has indicated that individuals may be convicted on the basis of treaty law.²⁸ The principles of legality and

23 See the many allegations of serious violations during the 'war on terror' that may amount to international crimes at Chapters 6-10; see specifically Chapter 7B14.

24 Only certain serious violations of human rights and humanitarian law carry individual criminal responsibility. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (hereinafter '*Tadić* Jurisdiction Appeal Decision'), paras. 94-5.

25 See Chapter 1 on customary law as general and consistent practice of states accompanied by a sense of legal obligation; Article 38 of the Statute of the International Court of Justice.

26 ICC Statute (1998), entered into force 1 July 2002. The ICC does not have jurisdiction to prosecute crimes committed before its entry into force (Article 11) but it may concerning terrorist attacks or crimes committed in response that fall within its jurisdiction. Negotiated over more than five years by some 160 states, the Statute may also provide guidance on customary law, although the negotiating process that gave rise to the Statute means that the instrument may in several respects be more restrictive than customary law. The Statute itself notes, at Article 10, that 'nothing in this part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute'.

27 'Treaty crimes' include terrorism and hijacking.

28 The Appeals Chamber of the ICTY has said that 'the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict

non-retroactivity require that the accused's conduct was clearly proscribed, under international or national law, at the time of its commission.²⁹

This part of the chapter will focus on crimes under international law that may, in certain circumstances, be committed when acts of terrorism occur. It focuses on core international crimes, notably crimes against humanity, war crimes and aggression, before returning to the question of 'terrorism' and its doubtful status as *per se* a crime under international law, discussed in Chapter 2, and concluding by reference to the most obvious basis for criminal responsibility, domestic crimes.³⁰

4A.1.1.1 Crimes against humanity

One question that arises is whether acts that we commonly refer to as terrorism can constitute crimes against humanity and if so in what circumstances. 'Crimes against humanity' consist of certain acts – such as murder, torture or inhumane acts – directed against the civilian population as part of a widespread or systematic attack. Although the first legal instrument referring to 'crimes against humanity' is the Nuremberg Charter of 1945, their prohibition in international law long predates the Second World War.³¹ It is now well established that crimes against humanity are crimes under customary international law, hence prohibited irrespective of the suspect's nationality or of national laws.³²

Unlike many other international crimes, such as war crimes or specific forms of terrorism, this group of crimes has never been the subject of a binding convention to which reference can be made to determine their specific content.

with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law'. *Tadić* Jurisdiction Appeal Decision, *supra* note 24, paras. 94-5. The ICTY affirmed in the *Galić* Judgment and Appeal decision that international criminal conviction may be based solely on the commission of treaty crimes, although see the dissenting judgment of Judge Nieto: *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, paras. 97-105; *Prosecutor v. Galić*, IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006, paras. 79 and 85. Complex questions as to how treaties become 'binding' on individuals provided one of the reasons why treaty crimes were ultimately excluded from ICC jurisdiction.

29 While jurisdiction over the crime can be conferred or established after the fact (see this Chapter 4A.1.3 below), *ex post facto* criminalisation would amount to a violation of the basic principle of legality – *nullum crimen sine lege* – enshrined in systems of criminal law and Article 15 of the ICCPR. See para. 4A.1.2 below and Chapter 7A.5.5.

30 The Chapter does not purport to address the full range of national and international crimes that may be committed in the course of terrorist attacks, still less in the responses thereto.

31 Bassiouni, 'Crimes against Humanity', *supra* note 3 at pp. 522 ff. See also D. Robinson 'Crimes against Humanity' in R. Cryer, H. Friman, et al., *An Introduction to International Criminal Law and Procedure*, 2nd ed. (Cambridge: Cambridge University Press, 2010). Robinson describes it as 'controversial' whether the Charter created new law in this respect.

32 *Ibid.*; see also, S.R. Ratner and J.S. Abrams, *Accountability for Human Rights Atrocities in International Law* (3rd ed. Oxford, 2010), Ch 3.

However, regard can be had to the ICC Statute, the first treaty to set out comprehensive definitions of these crimes³³ and to earlier international instruments.³⁴ There is also ample jurisprudence emanating from prosecutions for these crimes³⁵ that identifies key elements of the definition of crimes against humanity relevant to determining whether particular acts labelled international terrorism might amount to such crimes.

a) *Underlying acts: Murder, inhumane acts, persecution*

It is uncontroversial that there is a close link between terrorism and a number of the underlying acts that can, in certain circumstances, give rise to crimes against humanity. Murder, inhumane acts and persecution are among those acts.³⁶ Murder is a familiar term in domestic laws,³⁷ and has been held in an international context to consist of killing with 'an intention on the part of the accused to kill or inflict serious injury in reckless disregard of human life'.³⁸ 'Inhumane acts', a broad term found in various international instruments and domestic laws,³⁹ covers the infliction of severe bodily harm⁴⁰ and serious 'cruel treatment'.⁴¹ As the ICTY has noted, the 'terrorisation' of

33 The definitions of all ICC crimes are for the purposes of the Statute only. ICC Statute, *supra* note 4 at Article 10.

34 See, e.g., the ILC's Draft Code of Crimes against the Peace and Security of Mankind, Report of the ILC on the work of its 48th session, 6 May-26 July 1996, GAOR, 51st session, Supp. No. 10, 30, UN Doc. A/50/10, p. 97 (hereinafter 'ILC's Draft Code of Crimes').

35 See *supra* note 20 for examples of recent prosecutions. See also, e.g., the judgment and the proceedings of the Nuremberg International Military Tribunal, published in *Trials of Major War Criminals before the International Military Tribunal*, 42 vols., (Nuremberg, 1946-50).

36 For a full range of acts that may amount to crimes against humanity, including torture, enforced disappearance and persecution, see ICC Statute, *supra* note 4 at Article 7; Article 5 ICTY Statute and Article 3 ICTR Statute (which enumerate fewer acts than the ICC). Various such acts, such as torture and deprivations of liberty, are relevant to crimes committed in the 'war on terror'; see para. 4.B.5. below.

37 See Report of the ILC on the work of its 48th session, p. 96: 'Murder is a crime that is clearly understood and well-defined in the national law of every State'.

38 *Prosecutor v. Delalić et al.*, Case IT-96-21-T, Judgment, 16 November 1998, para. 439 and *Prosecutor v. Akayesu*, Trial Judgement, ICTR-96-4-T, ICTR, 2 September 1998, paras. 589-90; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment (Trial Chamber), 1 September 2004, para. 381; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T (Trial Chamber), 18 December 2008, para. 442.

39 Inhuman(e) acts or treatment are referred to in the four Geneva Conventions of 1949 (Article 50, GC I; Article 51, GC II; Article 130, GC III; Article 147, GC IV); in the 'International Convention on the Suppression and Punishment of the Crime of Apartheid', 30 November 1973, GA Res. 3068 (XXVIII); in the ICCPR (Article 7); in the ECHR (Article 4); in the Convention (No. 29) Concerning Forced Labour, adopted by the ILO on 28 June 1930, in the Slavery Convention of 25 September 1926; and in the ICC Statute, *supra* note 4 at Article 7.

40 Article 18(k) of the ILC's Draft Code of Crimes mentions severe bodily harm and mutilation.

41 The ICTY has stated that: 'the notions of cruel treatment within the meaning of Article 3 and of inhumane treatment set out in Article 5 of the Statute have the same legal meaning'. *Prosecutor v. Jelisić*, Case No. IT-95-10, Judgment, 11 December 1998, para. 52. The Tribunal

a group may also amount to persecution,⁴² which consists of fundamental rights violations on political, national, racial, religious or other grounds.⁴³

b) Widespread or systematic

One of the distinguishing features of crimes against humanity is that they are widespread or systematic. While this threshold has not always been considered necessary,⁴⁴ developments have confirmed and the vast majority of commentators now accept, that under current international law, crimes against humanity must take place in the context of a widespread and systematic attack or campaign.⁴⁵

It should be noted that the conduct of the particular perpetrator need not be widespread or systematic. Even a single act by a perpetrator may constitute a crime against humanity, provided it forms part of a broader (widespread or systematic) attack or campaign.⁴⁶ Conversely, the acts in question may themselves constitute the widespread or systematic attack; there is no requirement of a separate or pre-existing attack.⁴⁷ The requirement that the occurrence of crimes be widespread or systematic is disjunctive;⁴⁸ while either would suffice, 'in practice, these two criteria will often be difficult to separate,

refers to international standards on human rights, 'to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity'. *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16, Judgment, 14 January 2000, para. 566. The underlying act must be 'of a seriousness similar to that' of other crimes against humanity: *Prosecutor v. Lukić and Lukić*, Case No. 98-32/1-T, Judgement (Trial Chamber), 20 July 2009, para. 960.

42 *Prosecutor v. Popović et al.*, Case No. IT-05-88, Judgment (Trial Chamber), 10 June 2010, para. 999; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment (Trial Chamber), 17 January 2005, para. 589.

43 See ICC Statute, *supra* note 4 at Articles 7(1)(h) and 7(2)(g). Discriminatory animus is not required for crimes against humanity generally, but for persecution only.

44 This requirement was not included in the Nuremberg Charter, or other post Second World War legal instruments that provided the basis for prosecution of crimes against humanity.

45 The jurisprudence of the ICTY, the ICTR Statute, the ICC Statute and national laws implementing the Statute all confirm this requirement which was uncontroversial at the ICC conference; see D. Robinson, 'Developments in International Criminal Law: Defining 'Crimes against Humanity' at the Rome Conference', 93 (1999) AJIL 43 at 47 and in ICTY and ICTR jurisprudence: see *Prosecutor v. Akayesu*, *supra* note 38 at para. 579; *Prosecutor v. Kayishema and Ruzindana*, para. 123 and *Blaskić*, *supra* note 48 at para. 202.

46 *Prosecutor v. Mrkšić, Radić and Šljivančanin*, Case No. IT-95-13-R61, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996, para. 3; *Prosecutor v. Tadić*, Case No. IT-94-1, Judgment (Trial Chamber), 7 May 1997.

47 Dixon, 'Article 7. Crimes Against Humanity', p. 124.

48 ICC Statute, *supra* note 4 at Article 7 requires attacks to be widespread or systematic. As does ICTY jurisprudence: see, e.g., *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2, Judgment (Trial Chamber), 26 Feb. 2001; *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16, Judgment, 14 January 2000; and *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, para. 71, para. 207 (stating that for 'inhumane acts to be characterised as crimes against humanity, it is sufficient that one of the conditions be met').

since a widespread attack targeting a large number of victims generally relies on some form of planning or organisation'.⁴⁹

There is no one source that identifies a precise definition of these terms under customary international law, and the ICC 'Elements document', although providing detailed elements of the crimes, does not include a definition of the terms. However, they have been considered and applied in numerous cases, particularly by the ICTY and ICTR. As formulations vary somewhat within the jurisprudence, perhaps reflecting in part the particular factual circumstances to which they were applied, the key aspects of that jurisprudence are set out below. What is clear is that both the concepts 'widespread' and 'systematic' are intended to import a considerable element of seriousness,⁵⁰ and to 'exclude isolated or random acts'.⁵¹

The 'widespread' requirement may be satisfied in a range of ways.⁵² Most commonly, the term is understood to refer to the *scale* of the crime. An earlier formulation of this criterion referred to 'large scale' instead of 'widespread', defining it as 'meaning that the acts are directed against a multiplicity of victims'.⁵³ Following this approach, the ICTY has stated that 'widespread ... refers to the number of victims',⁵⁴ and has defined the term as meaning acts committed on a 'large scale' and 'directed at a multiplicity of victims'.⁵⁵ Consistent with this, the term as used in the ICC Statute has been described as follows: '[t]he term widespread requires large-scale action involving a substantial number of victims'.⁵⁶

While 'scale' will often involve a series of acts, it need not, as 'widespread' refers also to the *magnitude* of the crime. It is noteworthy that the ICC Statute contains an additional element requiring the commission of 'multiple acts' against the civilian population, but it is questionable whether this is a requirement of customary law in light of conflicting jurisprudence from the *ad hoc* tribunals suggesting that one single egregious act of sufficient scale or magnitude may suffice. As the ICTY noted, a crime may be 'widespread' by the 'cumulative effect of a series of inhumane acts or the singular effect of an

49 *Blaškić*, *supra* note 48 at para. 207.

50 *See, e.g.*, the Secretary-General's report, UN doc. S/25704, para. 48 (cited in *Prosecutor v. Tadić*, *supra* note 46, para. 646, n. 141), that crimes against humanity cover 'inhumane acts of a very serious nature'.

51 *Prosecutor v. Tadić*, *supra* note 46 at para. 646. *Prosecutor v. Dragan Nikolic*, Case No IT-94-2, Review of Indictment, para 26. *See also* Robinson, *supra* note 145 at p. 236. Dixon, 'Article 7. Crimes against Humanity', p. 123.

52 *See, e.g.*, the *Musema* and *Akayesu* cases of the ICTR which refer to widespread as covering 'massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims'.

53 ILC's Commentaries to the Draft Code of Crimes, Commentary to Article 18(4).

54 *Prosecutor v. Tadić*, *supra* note 46 at para. 648.

55 *Blaski*, *supra* note 48, para. 206. Situation in Darfur (Al Bashir arrest warrant case) ICC PTC-I, 4.3.2009, para. 81.

56 Robinson, *supra* note 45 at p. 47.

inhumane act of extraordinary magnitude'.⁵⁷ The *ad hoc* tribunals' jurisprudence therefore also indicates that 'widespread' does not necessarily imply geographic spread. This is supported by a finding in one case that crimes against humanity had been committed against part of the civilian population of just one town.⁵⁸

With regard to the requirement of 'systematicity', several cases have held that this can be satisfied by the repeated, continuous nature of the attack or campaign,⁵⁹ a 'pattern' in its execution⁶⁰ or the existence of an underlying plan or policy.⁶¹ The ICTY confirmed in 2010 that the organised, as opposed to random, nature of an attack will be critical to an assessment of its systematicity.⁶² The ICTY drew these factors together, noting that any of the following may provide *evidence* of a systematic attack: (1) the existence of a plan or political objective; (2) very large scale or repeated and continuous inhumane acts; (3) the degree of resources employed, military or other; (4) the implication of high-level authorities in the establishment of the methodical plan.⁶³ Consistent with this, it has been noted that the term 'systematic' in the ICC Statute 'requires a high degree of orchestration and methodical planning'.⁶⁴ The ICC, like the ICTR, has in recent years made clear that systematicity relates to the 'organized nature of the acts of violence and the improbability of their random occurrence'.⁶⁵

c) Attack against the civilian population and the controversial 'Policy Element'

The ICC Statute imposed a different threshold than found elsewhere in international law, by requiring that (in addition to being either widespread or systematic) there be an 'attack'⁶⁶ against the civilian population, involving a 'course of conduct' and 'multiple acts', carried out 'pursuant to or knowingly

⁵⁷ Blaškić, *supra* note 48 at para. 206.

⁵⁸ In *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment (Trial Chamber), 14 December 1999, the ICTY convicted the accused of crimes against humanity that were committed as part of 'the attack by the Serbian forces against the non-Serbian population in Brko' (para. 57).

⁵⁹ Tadić, *supra* note 46 at para. 648 (citing the ILC's Draft Code of Crimes).

⁶⁰ *Prosecutor v. Akayesu*, *supra* note 38 at para. 580.

⁶¹ Report of the ILC on the work of its 45th session, 51 UNGAOR Supp. (No.10), p. 9, UN Doc. A/61/10 (1996).

⁶² *Prosecutor v. Popović*, *supra* note 42 at para. 756.

⁶³ Kordić, *supra* note 48 at para. 179.

⁶⁴ Robinson, 'Developments in International Criminal Law', *supra* note 45, p. 67.

⁶⁵ *Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, ICTR, Appeals Chamber, 28 Nov. 2007, para. 920, and *Bashir* arrest warrant case, *supra* note 54 at para 81. Robinson suggests the exclusion of random attacks is more correctly seen as inherent in the concept of attack.

⁶⁶ The concept of 'attack' in relation to crimes against humanity (unlike in relation to the use of force, see Chapter 5B.2.1.1 below) has no technical meaning. See S. Boelaert-Suominen, 'Repression of War Crimes through International Tribunals', International Institute of Humanitarian Law, 77th Military Course (1999) (on file with author). See, however, the more restrictive approach taken to the interpretation of 'attack' in the ICC context, below. Robinson, *supra* note 45 at p. 235.

in furtherance of a governmental or organisational policy'.⁶⁷ In so doing, in practice the widespread or systematic test becomes less firmly disjunctive than it otherwise would be. As an innovation,⁶⁸ it is questionable to what extent this definition should be considered customary international law of relevance beyond the ICC context.⁶⁹

Even according to this quite stringent definition of crimes against humanity in the ICC Statute, there is no requirement that the acts be attributable to a state, but rather that there be a 'state or organisational' policy to commit an attack.⁷⁰ The 'policy' need not be formalised and may be inferred from all the circumstances.⁷¹ Some controversy surrounds the meaning of 'organisational policy' and the key question for present purposes is whether it may exclude acts of non-state actors, and specifically those of international terrorist groups.

Significant international authority supports the view that, in principle, non state actors may be responsible for crimes against humanity. This view is reflected on the work of the *ad hoc* international tribunals,⁷² the ILC Draft Code of Crimes against the Peace and Security of Mankind⁷³ and more recently the ICC's decision to open an investigation into crimes against humanity

67 Article 7(2)(a) ICC Statute defines 'attack' as 'attack directed against any civilian population' and as 'a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack'. This was introduced to satisfy certain states engaged in the ICC negotiating process (that wanted to see a conjunctive not a disjunctive standard). See Robinson, *supra* note 45 at p. 67.

68 The term 'attack' is not used either in Article 5 of the ICTY Statute, nor in Article 6(c) of the Nuremberg Charter. Although the word appears in Article 3 of the ICTR Statute, only in Article 7 of the ICC Statute, *supra* note 4, is it defined so as to raise the threshold in the manner explained in this paragraph.

69 In the *Kordić* judgment, and the *Kunerac* Appeal Decision, the ICTY specifically rejects the idea that there is no 'policy' requirement for crimes against humanity, despite the ICC formulation below. See *Kordić*, *supra* note 48 at para. 182; *Prosecutor v. Kunerac*, ICTY Appeals Chamber, 12 June 2002. See also G. Mettraux, 'Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda', (2002) 43 *Harvard Journal of International Law*, at 237-316.

70 ICC Statute, *supra* note 4 at Article 7.

71 See Report of the Preparatory Commission for the International Criminal Court, Addendum, Part II, Finalised draft text of the Elements of Crimes, 2 November 2000, PCNICC/2000/1/Add.2.

72 See reference to the position of the prosecutor and defence on terrorism as potentially within the scope of such crimes in *Tadić*, *supra* note 46. For a critical appraisal of the diminishing importance placed on the criteria this practice, see Kaul Dissenting Decision, below.

73 The Draft Code of Crimes against the Peace and Security of Mankind of the International Law Commission (ILC), notes that 'criminal gangs or groups' may constitute the collective entities behind crimes against humanity.

committed during the eruption of (essentially non-state actor) violence in post election Kenya.⁷⁴ The ICC's Decision in that case states that:

Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether the group has the capability to perform acts which infringe on basic human values.⁷⁵

The issue remains controversial, however, as seen from the dissenting opinion on this point,⁷⁶ and academic commentary,⁷⁷ whether a loose network like al Qaeda can have an organisational policy at all. This reflects, in part, a desire to ensure that crimes against humanity are distinguished from serious crimes under national law, which should be addressed at the national level.⁷⁸

What is clear is that, at a minimum, the policy element excludes the 'random' outbreak of crime, even on a massive scale; as such the requirement has been described as imposing a 'modest threshold that excludes random action'.⁷⁹ It is a question of fact whether a terrorist act would meet this thresh-

74 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, paras. 115-128. Those primarily responsible for widespread violence in Kenya in 2007-08 were described as gangs of young men with varied forms of support from leaders of, and businessmen associated with, the main political parties, 'quite distinct from state-like entities with some form of territorial control or at least with the minimal organizational structure of a party to a non-international conflict'. Claus Kress, *On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision* *Leiden Journal of International Law*, 23 (2010), pp. 855-873.

75 *Situation in the Republic of Kenya*, *ibid.*, paras. 90 and 93.

76 See dissenting Opinion of Judge Kaul, noting *e.g.* that 'a gradual downscaling of crimes against humanity towards serious ordinary crimes ... might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute'. *Ibid.*, para. 10.

77 In support of the majority approach, see D. Robinson, 'Essence of Crimes against Humanity Raised by Challenges at ICC', EJIL Talk, 27 September 2011, available at: <http://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc>. Against the majority approach, see Kress, *supra* note 74 at pp. 855-873. Van de Herik and Schrijver, *Counter-Terrorism and International Law*, *supra* note 8 at p. 70. More generally discussed in M. Di Filippo, 'Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes', (2008) 19 EJIL, 533, at 564-70; W. Schabas, 'State Policy as an Element of International Crimes', 98 J. of Crim. L. and Criminology 3; and W. Schabas, 'Prosecuting Dr Strangelove, Goldfinger, and the Joker at the International Criminal Court: Closing the Loopholes', 23 (2010) *Leiden Journal of International Law* 04, pp. 847-53.

78 The reasons given include that such acts can be, and are more appropriately, addressed on the national level (*e.g.*, Schabas and Kress, *ibid.*), or the relationship between crimes against humanity and human rights law, which non-state actors have no responsibility (Kress, *ibid.*).

79 Robinson, *supra* note 45 at p. 240.

hold: an organised and coordinated terrorist attack such as 9/11 is the antithesis of a random attack, but many if not most other terrorist acts may not meet the threshold.⁸⁰

Finally, while the meaning to be attributed to the term 'population' is open to question,⁸¹ it is well-established that crimes against humanity, unlike war crimes, must be directed against a *civilian*, as opposed to military, population.⁸² The ICTY has determined that a civilian population must be the 'primary' (as opposed to exclusive) object of the attack.⁸³ It has affirmed that non-civilians may also be victims of crimes against humanity, provided they are victimised in the context of an attack that is primarily directed against the civilian population.⁸⁴ Thus, while it has been pointed out that different considerations may therefore arise as between clearly civilian targets (such as the World Trade Center in New York), and those that may have a military role (such as the Pentagon), these various targets could be considered part of one attack, the primary object of which was the civilian population.⁸⁵

d) No link to armed conflict

Crimes against humanity can be committed in times of armed conflict or in times of 'peace'. While crimes against humanity originated as an extension of war crimes,⁸⁶ the idea that such crimes can only be committed in times

80 See Chapter 6 on the isolated nature of many terror-related attacks and the lack of apparent organisational command or control. Those unlikely to meet the 'attack' threshold may well not be widespread or systematic in any event.

81 The ICTY suggests crime against humanity involving attacks against 'identifiable populations', whereas the ICC Statute and Elements do not. Nuremberg treated the term as indicative of scale.

82 The population must be 'predominantly', not exclusively, civilian. See, e.g., *Naletilić and Martinović* (Trial Chamber), 31 March 2003, para. 235, and *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16 (Trial Chamber), 14 January 2000, para. 549. For standards applicable to determining the civilian nature of the population, reference can be made to IHL, see Chapter 6, para. 6A.3.1.

83 *Blaškić*, *supra* note 48 at para. 208, ff. 401, and para. 653.

84 *Prosecutor v. Martić*, Case No. IT-95-11-A, Judgment (Appeals Chamber), 8 October 2008, paras. 30, 313.

85 Questions may arise as to whether these were components of one (predominantly civilian) attack, or were separate attacks. In either case the 'means' of attack – using civilian aircraft as bombs – itself involved targeting civilians.

86 Bassiouni, 'Crimes against Humanity', *supra* note 3 at 524. The Nuremberg Charter (Charter of the International Military Tribunal, Annex to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis of 8 August 1945 (reprinted in 39 (1945) AJIL Supplement 258)) and Charter of the Tokyo Tribunal (Charter of the International Military Tribunal for the Far East, 19 January 1946) contained such a link.

of war has been unequivocally rejected through developments since Nuremberg.⁸⁷

In conclusion, whether acts of terrorism might amount to crimes against humanity is a question to be determined on the facts in a particular situation. While a coordinated, systematic attack as devastating in nature as 9/11 would appear to fit readily with the purpose and definition, many of the more isolated attacks that have unfolded since then may not meet the high threshold reserved for these serious crimes under international law.

4A.1.1.2 War crimes

Unlike crimes against humanity, war crimes must (as the name suggests) take place in association with an armed conflict.⁸⁸ Once there is an armed conflict, the basic principles of international humanitarian law, including accountability, must apply.⁸⁹ Serious violations of international humanitarian law carrying individual responsibility include deliberate or indiscriminate attacks against civilians, the use of weapons that cause unnecessary suffering, and torture or cruel treatment of persons taking no part in hostilities, as discussed more fully in Chapter 6.⁹⁰

The classification of acts of terrorism as war crimes depends on them constituting the initiation of, or taking place in the context of, an armed conflict. If they do, the rules of international humanitarian law apply to those acts – which has consequences for rules on permissible targeting and the detention of persons in connection with an armed conflict⁹¹ – and serious violations of those rules may be prosecuted as war crimes. As explained more fully in Chapter 6, however, acts of international terrorism will only rarely give rise to armed conflict. Armed conflict is defined by the ICTY as:

87 Neither the ICTR nor the ICC Statute contain this element and although the ICTY Statute does, as the Appeals Chamber has noted, this is merely a jurisdictional limitation on the tribunal.

88 See Chapters 6 (IHL) 7 (international human rights law and the interplay between the two bodies of law).

89 Long-established principles, reflected *e.g.* in the Martens Clause 1899 (Preamble to the Hague Convention Respecting The Laws and Customs of War on Land), provide that certain basic standards of conduct apply irrespective of the nature of the conflict.

90 For the most comprehensive list of war crimes, see ICC Statute, *supra* note 4 at Article 8, Articles 2 and 3 ICTY Statute.

91 If *e.g.* 9/11 had been considered to trigger an armed conflict, IHL considers legitimate the targeting of military objectives. The Pentagon attack is likely to fall into this category of legitimate target (though note it would still fall foul of the law in respect of the manner of its execution – see Chapter 6A.3.2 below).

resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.⁹²

While this definition was thought to be broad-reaching,⁹³ as explained in Chapter 6 it cannot be convincingly sustained that there is an 'armed conflict' between the United States and 'al Qaeda and associates', contrary to the position maintained by the US administration.⁹⁴ Had there been state responsibility for 9/11 for example,⁹⁵ the use of force involved may have given rise to an international armed conflict.⁹⁶ However, the structure, organisation and modus operandi of al Qaeda (and the associated groups or terrorist networks purportedly also engaged in the conflict with the US), suggest that it lacks the characteristics of an 'organised armed group' capable of itself constituting a party to a non-international armed conflict.⁹⁷ Attacks by al-Qaeda such as that of September 11, and the London, Bali or Madrid bombings that followed, are therefore not generally considered to have triggered an armed conflict or to constitute war crimes as such. While acts of terrorism by al-Qaeda cannot in general be referred to as acts of war, there is little dispute that armed conflicts arose for example in Afghanistan on 7 October 2001 and in Iraq on 20 March 2003. Acts committed in the context of those conflicts, by parties or others fighting alongside them, falls to be considered against IHL and serious breaches may constitute war crimes.

To the extent that there *is* an armed conflict properly so-called, particular acts within it that exploit 'terrorist' tactics or methods may amount to several

92 *Tadić* Jurisdiction Appeal Decision, *supra* note 24, para. 70.

93 This definition by the ICTY Appeals Chamber was thought innovative and sufficiently broad to cater for the full range of scenarios (given that the ICTY was addressing a conflict that had national and international components), thus ensuring the broadest application of international humanitarian law.

94 See Chapter 6.

95 This would have to be established according to the 'effective or overall control' test discussed at Chapter 31.1.1 – then September 11 may amount to the initiation of international armed conflict between states. If so, the acts of violence may amount to grave breaches of the Geneva Conventions, which consist of certain very serious crimes, including 'wilful killing', committed in international armed conflict against protected persons such as civilians.

96 The consequences would include that the obligations incumbent on all states in respect of grave breaches – to seek out those responsible for such breaches – would be triggered. GC I, Article 49 and Article 50; GC II, Article 50 and Article 51; GC III, Article 129 and Article 130; GC IV, Article 146 and Article 147. See M. Scharf, 'Application of Treaty Based Universal Jurisdiction to Nationals of Non-Party States', 35 (2001) *New England Law Review* 363. Instead the conflict began with the US intervention in Afghanistan.

97 See Chapter 6 on the nature of parties to a non-international armed conflict. Armed conflict must also be distinguished from a lesser level of sporadic violence. There is insufficient support at present in the overwhelming state practice rejecting the global conflict with al-Qaeda as set out at length in Chapter 6B.1.1.

war crimes. These may include ‘violence to life or person’,⁹⁸ ‘willful killing’, ‘willfully causing great suffering’ or ‘serious injury to body or health’, ‘extensive destruction of property’⁹⁹ or intentionally directing attacks against the civilian population or civilian objects.¹⁰⁰

Most obviously, they may also constitute ‘acts of terrorism’¹⁰¹ or ‘acts or threats of violence the primary purpose of which is to inflict terror on the civilian population’, specifically prohibited by IHL in respect of both international and non-international armed conflicts, as discussed in Chapter 6.¹⁰² The inclusion of this prohibition as a ‘war crime’ in international criminal instruments has, however, been irregular. It was notably omitted from the ICC Statute and the Statute of ICTY, yet included in the Statutes of the ICTR and the Sierra Leone Tribunal for example. Its omission from the ICTY Statute did not, however, preclude the ICTY from prosecuting this crime (for the first time in history), leading to the conviction of General Stanišić for inflicting terror on the civilian population in the context of the siege of Sarajevo.¹⁰³ The ICTY trial chamber did so based on terrorising the civilian population as an IHL treaty crime,¹⁰⁴ though on appeal, the tribunal held that it constituted a crime under customary international law, despite strong dissenting opinions on the issue at both Judgment and Appeal stages.¹⁰⁵ This view has been upheld since, at the ICTY¹⁰⁶ and in a series of cases from the Special Tribunal for Sierra Leone.¹⁰⁷ It would seem to now be well-established that the deliberate infliction of terror on the civilian population in armed conflict is a war crime under treaty or customary law.¹⁰⁸

98 ICC Statute, *supra* note 4 at Article 8(2)(c). Violations of Article 3 in non-international armed conflict.

99 *Ibid.* at Article 8(2)(a) on Grave Breaches.

100 *Ibid.* at Article 8(2)(b) and (e). Other serious violations in international armed conflict and non-international armed conflict respectively.

101 Art 33(1) GC IV; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. I (Cambridge: Cambridge University Press, 2005); *see also* and Chapter 6 International Humanitarian Law.

102 Art 51(2) API; Art 13 (2) APII; Henckaerts and Doswald-Beck, *ibid.*

103 *Prosecutor v. Galić*, *supra* note 28.

104 *See Galić*, *ibid.*

105 *See* dissenting opinion of Judge Nieto Navia to the Judgment, and Judge Schomburg to the Appeals Chamber decision in *Galić*, *supra* note 28. *See also* critique in A. Bianchi and Y. Naqvi, *International Humanitarian Law and Terrorism* (Hart, 2012), p. 222 et seq.

106 *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Judgment (Trial Chamber), 12 December 2007, paras. 873 et seq.

107 *Prosecutor v. Brima, Alex Tamba et al*, Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, para. 666; *Prosecutor v. Fofana, Moinina and Kondewa*, Case No. SCSL-04-14-T, Judgment (Trial Chamber), 2 August 2007, para. 169; *Prosecutor v. Seay Gallon and Gbao*, Case No. SCSL-04-15-T, Judgment (Trial Chamber), 2 March 2009, para. 112.

108 Henckaerts and Doswald-Beck, *supra* note 101, p. 8-11. Note this is not true of terrorism a crime *outside armed conflict* where greater diversity of opinion and practice remains. *See* below part 4A.1.1.4 and Chapter 2.

As regards the elements of the war crime, inflicting terror is a 'specific intent' crime, requiring that the primary (though not necessarily the exclusive) purpose was to spread terror among the population.¹⁰⁹ While some controversy surrounds the precise meaning of 'terror' in this context, it has been described as 'extreme fear' of a certain intensity or duration¹¹⁰ or 'intentional deprivation of a sense of security' from people who have nothing to do with combat.¹¹¹ The material element may consist of attacks directed against the civilian population, or those that are indiscriminate or disproportionate (provided the mental element is satisfied); it may therefore be identical to the material element of the other war crimes of direct or indiscriminate attacks against civilians. Terror in armed conflict has therefore been described as 'an aggravated form of unlawful attack on civilians'.¹¹²

In conclusion, for the purpose of accountability for terrorist attacks in the 'war on terror' context, the war crimes category is likely of very little relevance. Navigating these controversial waters is, in any event, unnecessary, to the extent that acts of terrorism amount to other crimes such as crimes against humanity (defined above) or crimes under domestic law (below). Serious terrorist attacks may well fall within these definitions, and can be prosecuted as such in an appropriate forum. By contrast, the commission of war crimes has been a key issue in the armed conflicts launched following 9/11 as discussed later in this chapter.¹¹³

4A.1.1.3 Aggression

Aggression was defined as a 'crime against peace' under the Agreements establishing the Nuremberg International Military Tribunal and the International Criminal Tribunal for the Far East,¹¹⁴ and described by the Nuremberg tribunal as 'the supreme international crime'.¹¹⁵ The status of aggression as a crime has been reiterated by the General Assembly¹¹⁶ and the Inter-

109 *Galić*, *supra* note 28 at paras. 103 and 104.

110 *Ibid.* at para 137. The Appeals chamber in that case described 'extensive trauma and psychological damage,' from the acts designed to inflict a state of terror (para. 102).

111 *Dragomir Milosević*, *supra* note 106 at para 886.

112 *Ibid.* at para. 882.

113 See Chapter 6B1 on armed conflicts post-9/11 and serious violations of IHL.

114 See Article 6 of the Charter of the Nuremberg Tribunal and Article 5, Charter of the International Military Tribunal for the Far East.

115 Judgment of the Nuremberg International Military Tribunal, 30 September 1946, reprinted in *The Trial of German Major War Criminals before the International Military Tribunal*, vol. 20 (Nuremberg, 1948), p. 411.

116 The 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations' (GA Res. 2625 (XXV)). See also UN GA Res. 3314 (XXIX), 'Definition of Aggression', 14 December 1974, UN Doc. A/RES/3314 (XXIX). The 'principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal' were also 'affirmed' in Reso-

national Law Commission.¹¹⁷ More recently, the ICC Statute allowed for ICC jurisdiction over aggression once an acceptable definition of the crime could be agreed.¹¹⁸ Such agreement was reached at the 2010 ICC Review Conference which adopted a new Article 8bis defining the crime of aggression,¹¹⁹ although ICC jurisdiction over the crime is not yet effective.¹²⁰

For ICC purposes, the proposed definition provides that an act of aggression is 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State'. The crime of aggression is committed by the 'planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression'.¹²¹

According to the ICC approach, a criminal act of aggression is therefore an unlawful use of force in violation of the Charter of the United Nations which necessarily involves force by or on behalf of a state, as opposed to non-state actors. As discussed in relation to state responsibility in Chapter 3, states may act directly, or indirectly through irregulars or others,¹²² but absent attribution to a state, terrorist attacks cannot properly be referred to as acts, or crimes, of aggression.

4A.1.1.4 Terrorism

The thorny issue of terrorism in international law is discussed in Chapter 2. Of note is the lack of a global terrorism convention and absence of an accepted

lution 95(I), 'Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal', 11 December 1946.

117 Article 16 of the ILC's Draft Code of Crimes. *See also* the ILC's Commentary to Article 16 of the Draft Code, in Report of the International Law Commission on the work of its 48th session, 6 May-26 July 1996, GAOR Supp. No. 10, UN Doc. A/51/10, at p. 83.

118 'The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.' ICC Statute, *supra* note 4 at Article 5(2).

119 RC/Res 6., 13th plenary meeting of the ICC Review Conference, 11 June 2010, Annex 1. on 11 June 2010, the Review Conference of Rome Statute (held in Kampala, Uganda between 31 May and 11 June 2010) adopted by consensus amendments to the Rome Statute which include a definition of the crime of aggression and a regime establishing how the Court will exercise its jurisdiction over this crime.

120 The conditions for entry into force decided upon in Kampala provide that the Court will not be able to exercise its jurisdiction over the crime until after 1 January 2017 when a decision is to be made by States Parties to activate the jurisdiction. The amendment allows for a state party to declare that it does not accept the ICC's jurisdiction over the crime of aggression.

121 ICC Statute, *supra* note 4 at Article 8bis, para. 2.

122 Chapter 3 on International Responsibility. *See also* UN GA Res. 3314 (XXIX), Article 3(g).

generic definition in customary law,¹²³ despite the issue having been the focus of international attention since long before 9/11 and with far greater intensity since.¹²⁴ As the previous section on 'war crimes' foreshadows, a distinction must immediately be drawn between the crime of terrorism in international law *per se*, and the war crime of inflicting terror on the civilian population. Inflicting terror on a civilian population in the context of conflict as a war crime is well established in IHL treaties, and international practice. Beyond the specific war crime, there remains relatively little practice in support of terrorism having attained the status of a crime under customary law.

The Statutes of the ICTR and of the Special Court for Sierra Leone¹²⁵ include terrorism as one of the crimes within their respective jurisdictions, but those provisions in fact cover the specific prohibition on terrorism in armed conflict.¹²⁶ The ICC negotiators for their part rejected multiple proposals to include 'treaty crimes' such as terrorism within its jurisdiction.¹²⁷

Indeed, the only international criminal tribunal to have jurisdiction over terrorist acts is the Lebanon tribunal, established specifically to investigate and prosecute a particular terrorist incident and with jurisdiction that in large

123 See Chapter 2 on the definition of terrorism and customary international law. See also Resolution E adopted by the Rome Conference on the ICC: 'Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion within the jurisdiction of the Court'. As noted above, the ICTY and other tribunals have noted on numerous occasions that individual criminal responsibility under international law can arise from certain serious violations of customary law or applicable treaty law.

124 See the Convention for the Prevention and Punishment of Terrorism (Geneva, 1937), League of Nations Doc. C.546M.383 1937 V. See also M.C. Bassiouni, 'International Terrorism', in Bassiouni *supra* note 3, pp. 765 ff, and the discussion of recent deliberations towards a global convention in Chapter 2, para. 1.2 above.

125 For the first judgment of the Sierra Leone tribunal, including on the crime of terrorism, see *Prosecutor v. Brima, Alex Tamba et al*, Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007, See also, *Prosecutor v. Charles Taylor*, Case No. SCSL-03-01-T, Judgment (Trial Chamber), 18 May 2012.

126 The Statute of the Special Court for Sierra Leone (annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), available at: <http://www.sc-sl.org/index.html>) and the Statute of the ICTR, in both cases in Article 3 ('Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II') at (d) cover 'acts of terrorism'. To date, there has been no judgment from the Rwandan Tribunal which interprets or further defines the word terrorism under Article 4(e). However, the Special Court has detainees awaiting trial charged with acts of terror under Article 3(e).

127 For a proposal by several states for inclusion see, e.g., UN Doc. A/CONF.183/C.1/L.27 (1998) and UN Doc. A/CONF.183/C.1/L.27/Rev.1 (1998), but these were rejected and the issue deferred for consideration by a future Assembly of State Parties (see Res. E appended to the ICC Statute).

part covers crimes under Lebanese law.¹²⁸ Likewise, the one example of international practice where terrorism has been held to constitute a crime under customary law is a decision of the Lebanon tribunal's Appeals Chamber.¹²⁹ However, that decision has been subject to considerable and detailed criticism, and to continuing challenge before that Tribunal itself.¹³⁰ Although some respected academic commentators assert that terrorism *is* a customary law crime (of whom Professor Cassese, who was also the President of the Lebanon Tribunal, stood out as the foremost proponent), others contest such a view.¹³¹

The existence of the crime of terrorism under customary law may well evolve in the future, perhaps impelled by ongoing developments on the national and international planes.¹³² So long as significant differences remain as to key elements of the definition of the crime, as sketched out in Chapter 2, it is difficult to assert, consistent with the cardinal principles of *nullem crimen sine lege* (requiring that crimes be defined with clarity and specificity, referred to below), that terrorism *per se* is currently a crime under international law.

As a matter of treaty law, it was noted in Chapter 2 that particular manifestations of terrorism or forms of support for it are defined in numerous specific terrorism conventions. These cover crimes ranging from attacks on internationally protected persons to terrorist bombings to the financing of terrorism for example, contain their own definitions of the acts covered by them and oblige states parties to criminalise the conduct in domestic law and, in certain circumstances, to exercise jurisdiction.¹³³ However, these treaties

128 The Special Tribunal for Lebanon was established at the request of the government of the Republic of Lebanon following attacks in Beirut on 14 February 2005. Its mandate is to prosecute persons responsible for the attack on 14 February 2005 that killed former Lebanese Prime Minister Rafiq Hariri and 22 others, and other connected attacks in Lebanon spanning 1 October 2004 and 12 December 2005. See Security Council Resolutions 1664 (2006) and 1757 (2007).

129 Special Tribunal for Lebanon (STL) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (hereinafter 'STL Interlocutory Decision'), STL-11-01-I, 16 February 2011; see discussion in Chapter 2.2.3.

130 B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', (2011) 24(3) *Leiden J. of Int'l Law* 677.

131 See, e.g., A. Cassese and P. Gaeta, *Cassese's International Criminal Law* (3rd ed., Oxford University Press 2013) at p. 139, and cf. B. Saul, *Defining Terrorism in International Law* (New York City: Oxford University Press, 2006); and Saul, 'Legislating from a Radical Hague', *ibid.* See also, e.g., J. Paust, 'Addendum: Prosecution of Mr. bin Laden *et al.* for Violations of International Law and Civil Lawsuits by Various Victims', *ASIL Insights* No. 77, 21 September 2001.

132 Since 9/11, and SC Res. 1373 (2001), (28 September 2001, UN Doc. S/RES/1373 (2001)), there has been intense activity on the national as on the international level – see Chapter 2.

133 See Chapter 2.1.3 and 2.1.4 regarding specific conventions. See also Bassiouni, 'International Terrorism' (referring to 16 Conventions dealing with specific means of terror violence). The Special Rapporteur on terrorism and human rights, Ms Kalliopi K. Koufa, in her Progress Report to the Fifty-Third Session Sub-Commission on the Promotion and Protection of Human Rights', UN Doc. E/CN.4/Sub.2/2001/31, 27 June 2001, cites 19 Conventions.

impose obligations on states party to them, rather than themselves establishing criminal responsibility. Unless the state has implemented the treaty provisions, it is subject to question whether individuals could be prosecuted on the sole basis of such a treaty. Thus, an important distinction is due between such crimes of international concern or relevance, which the state must criminalise,¹³⁴ and 'core crimes' (or *crimina juris gentium*) under international law.¹³⁵

However, where the specific terrorism treaty *has* been incorporated into the domestic law of a state with jurisdiction, this issue is avoided. On 28 September 2001 the Security Council called on 'all States to ... [i]ncrease co-operation and fully implement the relevant international conventions and protocols relating to terrorism'¹³⁶ and to ensure that 'terrorist acts are established as serious criminal offences in domestic laws and regulations'.¹³⁷ This call has led, in practice, to an increase in ratification and implementation of these conventions.¹³⁸ Domestic systems often therefore provide the basis for prosecution of these crimes, though significant gaps remain.¹³⁹ As noted above, one additional sub-category of treaties that give rise to criminal responsibility for terrorism under international law are those IHL treaties prohibiting 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population', in international and non-international armed conflict.¹⁴⁰

Finally, another offence of relevance to some terrorist attacks, notably including the 9/11 attacks, which is at times treated as a form of terrorism and at others as a separate treaty crime, is hijacking. There are a number of

134 Belonging to this category of treaties, for instance, are the conventions relating to the suppression of terrorism (above), and international instruments related to drug trafficking.

135 See R. Cryer, H. Friman, *et al.*, *supra* note 31. The core crimes concern conduct considered to amount to 'most serious crimes of concern to the international community as a whole,' embracing the crimes within the jurisdiction of the ICC Statute, as well as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (New York, 10 December 1984, UN Doc. A/39/51 (1984)) (hereinafter 'Convention Against Torture') for example.

136 SC Res. 1373 (2001), *supra* note 132 at para. 3.

137 SC Res. 1373 (2001), *ibid.*, also requires 'that the punishment duly reflects the seriousness of such terrorist acts'. This Resolution also established a Committee to monitor its implementation. SC Res. 1377 (2001), 28 November 2001, UN Doc. S/RES/1377 (2001), sets out the tasks for the Committee.

138 Chapter 2.

139 See du Plessis, 'A Snapshot', *supra* note 8. The non-retroactivity principle inherent in the *nullum crimen sine lege* principles precludes prosecution for offences that were not crimes at the time of commission but may permit conferral of jurisdiction *ex post facto*, see para. 4A.1.3 below. Regarding new terror legislation, much of it is problematic from the perspective of the *nullum crimen* principle and other human rights concerns. See Chapter 7A55 and 7B5.

140 Article 51 AP I and Article 13 AP II. See also Article 33(1) of the Fourth Geneva Convention which provides that 'terrorism is prohibited' without defining the phenomenon.

conventions relating to hijacking,¹⁴¹ some of which oblige states parties to enact legislation criminalising the conduct and to exercise jurisdiction over suspects in specified circumstances.¹⁴² Like the terrorism conventions, certain of those relating to hijacking have been incorporated into United States domestic law¹⁴³ and the US has in the past exercised jurisdiction in a number of cases on the basis of those treaty provisions as incorporated into domestic law.¹⁴⁴

4A.1.1.5 Common crimes

Finally, it should be noted that murder and the infliction of serious physical harm are crimes in most if not all domestic jurisdictions. The most straightforward approach in relation to these crimes is therefore prosecution in a domestic court as a common crime.¹⁴⁵

The fact that acts of international terrorism might amount to crimes under international law is however significant not only as an indicator of their egregious nature, and international character, but also as crimes under inter-

141 See, e.g., the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), 860 UNTS 105, in force 14 October 1971 ('The Hague Convention'), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), 974 UNTS 178, in force 26 January 1973 ('The Montreal Convention'). While these Conventions may be relevant to the hijacking and subsequent destruction of the four aircraft, as one commentator notes, 'extending the scope of these treaties to cover the destruction of the World Trade Center and part of the Pentagon, as well as the massive loss of life in those buildings and the causing of a state of terror in the general public, could only be done with difficulty'. A.N. Pronto, 'Terrorist Attacks on the World Trade Center and the Pentagon. Comment', *ASIL Insights* No. 77, 21 September 2001.

142 The states of nationality of the alleged perpetrator or the victim or the state of territory have jurisdiction under many of these treaties.

143 Paust, 'Prosecution of Mr. bin Laden', *supra* note 131, notes: 'Prosecution in US is also possible under US legislation implementing the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, (which in Article 7 thereof also requires all signatories to bring into custody those reasonably accused of international crimes covered by the treaty and either to initiate prosecution of or to extradite such persons, without any exception or limitation of such duty whatsoever)'.

144 *United States v. Fawaz Yunis*, 924 F.2d 1086 (DC Cir. 1991). The Court upheld the US court's subject matter jurisdiction, (924 F.2d at 7, 12-13), on the basis that the victim's state of nationality may exercise jurisdiction under the Hague Convention and the International Convention Against the Taking of Hostages. The Court held this to be consistent with customary international law (924 F.2d at 8).

145 Some assert that murder is a crime that attracts universal jurisdiction, and all states should be able to exercise their jurisdiction over international terrorism simply on this basis. Many states could exercise jurisdiction over mass murder based on other bases of jurisdiction set out below.

national law lay greater claim to be governed by relevant principles of international law, as highlighted in the following section.¹⁴⁶

4A.1.2 Relevant principles of criminal law

4A.1.2.1 *Direct and indirect individual criminal responsibility*

Criminal responsibility must be individual, based on the culpability of the particular person accused. That it cannot be 'collective', or 'objective', is an essential principle of criminal law in legal systems across the globe, as reflected in international law.¹⁴⁷ Thus, while for example the Nuremberg process extended responsibility to cover 'conspiracy' to commit crimes of peace (reflecting practice in common law states), and introduced the novel notion of 'membership' of a criminal organisation,¹⁴⁸ the fact of association with a prohibited group or organisation may raise concerns as a basis for criminal responsibility,¹⁴⁹ and cannot *per se* render the individual responsible for the actions of that group. Certain novel and expanded approaches to crimes and modes of liability introduced since 9/11, including crimes of 'association' or of 'expression'¹⁵⁰ such as 'material support' for or 'glorification' of terrorism, discussed under Part B, may further jeopardise this notion of individual criminal responsibility.

The individual should be punished only in respect of his or her own conduct, commensurate with his or her culpability. International criminal law

¹⁴⁶ The principles will generally be determined by the system in which jurisdiction is exercised. However, it can be argued that, for example, certain obstacles to jurisdiction must not apply to international crimes or to serious human rights violations discussed in Chapter 7A4.

¹⁴⁷ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Appeals Chamber), 15 July 1999, para. 186. This principle of criminal law is reflected in international human rights and humanitarian law. See 'Specific Human Rights Issues: New Priorities, in Particular Terrorism', Additional Progress Report by the Special Rapporteur on Terrorism and Human Rights, Ms Kalliopi Koufa, 8 August 2003, UN Doc. E/CN/Sub2/2003/WP.1, paras. 68 ff.; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, 22 October 2002, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., para. 227. On the prohibition on collective punishments in IHL, see Article 33 GC IV, Article 75 AP I, Article 6(2) AP II.

¹⁴⁸ See M. Lehto, *Indirect Responsibility for Terrorism Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (Leiden: Koninklijke Brill NV, 2010), p. 113 et seq.

¹⁴⁹ IACHR *Report on Terrorism*, *supra* note 147: 'no one should be convicted of an offense except on the basis of individual penal responsibility, and the corollary to this principle [is] that there can be no collective criminal responsibility ... This requirement has received particular emphasis in the context of post-World War II criminal prosecutions, owing in large part to international public opposition to convicting persons based solely upon their membership in a group or organization.' See also E. David, *Eléments de droit pénal international – Titre II, le contenu des infractions internationales*, 8th ed. (Brussels 1999), p. 362. See Chapter 4.B.2.1 below and Chapter 7B.8 on concerns where criminal organisations are 'listed' according to procedures that lack transparency and judicial supervision.

¹⁵⁰ See Saul, 'Criminality and Terrorism', *supra* note 12.

and practice reflects the fact that this responsibility may, however, be direct and indirect, and the participation of individuals in the commission of a crime may take many forms. Direct responsibility attaches to those who order, plan, instigate, aid and abet, or otherwise contribute to the commission or attempted commission of crime by a group acting with a 'common purpose'. It also involves the joint commission of the crime by multiple actors forming a 'joint criminal enterprise' and/or acting as co-perpetrators pursuant to a common plan.¹⁵¹ As regards acts of terrorism, those directly responsible are not only those who implement the attack (who in cases of suicide missions may obviously no longer be subject to criminal prosecution) but, potentially, also the full networks of persons involved in various ways in planning, orchestrating and assisting in their execution.

Through notions such as 'co-perpetration' or acting in 'common purpose' under the ICC regime,¹⁵² or the creative development of the notion of 'joint criminal enterprise' through ICTY jurisprudence,¹⁵³ international criminal law has developed to provide a spectrum of forms of responsibility. International criminal law therefore anticipates a potentially broad range of individuals who may contribute collectively to international crimes.¹⁵⁴ But as treaty and jurisprudential developments have expanded the net of inchoate crimes and accomplice liability, they have also limited their reach, by insisting for example

151 See Article 7(1) Statute of the ICTY; Article 6(1) Statute of the ICTR; ICC Statute, *supra* note 4 at Article 25. Formulations vary somewhat between statutes *e.g.* joint criminal enterprise has developed through practice, notably of the ICTY, and common purpose doctrine is enshrined in Article 25 of the ICC Statute. ICC nascent practice has developed the notion of co-perpetration (direct and indirect), structured around the elements of 'common plan' and 'joint control over the crime' (see *Prosecutor v. Lubanga*, *supra* note 20, paras. 976 et seq). Some modes of liability, *i.e.* conspiracy or direct and public incitement, apply only in respect of genocide, see Genocide Convention 1948, Art 111 (c). See Lehto, *Indirect Responsibility for Terrorism Acts*, *supra* note 148 at p. 120.

152 Article 25(3) (d) is akin to complicity and has been used in recent anti-terrorism conventions. The mental element requires a contribution 'to the commission or attempted commission' of a crime, made in knowledge of the criminal objective of the group. The nature of that potential contribution remains unclear, in particular whether such contribution must be 'significant' or whether any contribution made to the group with the requisite intent suffices. See *Prosecutor v. Mbarushimana*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the Confirmation of Charges', ICC-01/04-01/10 OA4, 30 May 2012, Separate Opinion of Judge Silvia Fernández de Gurmendi.

153 Joint criminal enterprise relates to a group of individuals with 'some kind of interaction,' acting pursuant to a joint criminal purpose, which actually results in the commission of a crime. It requires at a minimum recklessness as to the risk and a substantial contribution to the commission of an offence which (by contrast to conspiracy, for example) does in fact take place. See *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Judgement (Appeals Chamber), 3 April 2007.

154 For analysis of these developments see B. Goy, 'Individual criminal responsibility before the International Criminal Court. A Comparison with the *Ad Hoc* Tribunals' (2012) 12(1) *International Criminal Law Review* 1-70.

that accomplice liability requires a 'significant causal relationship' between the individuals accused's act and the commission of the crime, and rejecting the notion that any contribution whatever may draw the individual into the web of criminality.¹⁵⁵

National laws and doctrine vary considerably as to principles of criminal law and terminology used. There has been little attempt to develop a general approach to grounds of responsibility and modes of liability, other than for the purposes of international criminal jurisdictions, such as the codification of a 'general part' through the ICC Statute or through ongoing international criminal law jurisprudence.¹⁵⁶ While there is therefore much diversity on the national level, criminal law systems do, however, tend to encompass a range of forms of criminal responsibility. These commonly cover participation in the commission of a crime as well as planning and preparation, from common law notions of conspiracy to civil law doctrines of 'association de malfaiteurs' for example.¹⁵⁷

As discussed in Part B, since 9/11, new laws have been grafted onto domestic systems, expanding both crimes and modes of liability, so as to criminalise membership of terrorist organisations and various forms of association with, or expression for, certain terrorist activities, as well as more traditional forms of participation. It remains to be seen to what extent these 'preventive' criminal laws, the implications of which are discussed in Part B, may ultimately influence international legal standards.

In the context of international terrorism, and subsequently of allegations of criminal conduct in the context of the 'war on terror,' much attention has been focused on the need for a criminal law response that reaches behind the executioners to the architects, including those at the highest levels in the chains of command. Under international criminal law certain people may be responsible not only for what they do – such as ordering or instigating crimes – but also in certain circumstances for what they fail to do under the doctrine of 'superior responsibility'.¹⁵⁸ While this doctrine is most readily applied in the context of clearly established military structures, it applies to military or

155 See, e.g., *Prosecutor v. Tadić*, *supra* note 46 at paras. 670-672 rejecting the prosecution's arguments that any connection would suffice.

156 Lehto, *supra* note 148 at p. 109; Kai Ambos, *La Parte General de Derecho Penal Internacional*, 2010.

157 See, e.g., UNODC Handbook on Criminal Justice Responses to Terrorism 2009, available at: https://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf (focusing on the use of criminal law 'preventively'); K. Ambos, 'Article 25. Individual Criminal Responsibility', in Triffterer (ed.), *Commentary on the Rome Statute*, pp. 475 ff. Domestic legal orders may also include other forms not included specifically in the international documents, such as conspiracy (covered as such in ICTY and ICTR practice, and the ICC Statute, only in respect of genocide).

158 ICC Statute, *supra* note 4 at Article 28.

civilian leaders.¹⁵⁹ A military commander or a civilian in a position of authority may be liable if he or she knew or should have known that a crime would be committed by subordinates under his or her effective control, and fails to take necessary and reasonable measures to prevent or punish the crime, despite the material ability to do so.¹⁶⁰

This superior responsibility applies not only to those with formal legal authority, but also to superiors according to informal structures.¹⁶¹ The ICTY for example has made clear that non-state actors may in principle be liable as superiors on the basis of *de facto* authority,¹⁶² and 'effective control'.¹⁶³ The ICTR has likewise convicted non-state actors on this basis, in the *Musema*¹⁶⁴ and *Nahimana*¹⁶⁵ 'media' cases, and in the *Serashago* case which apparently concerned paramilitary leaders.¹⁶⁶ The Special Court for Sierra

159 *Prosecutor v. Delalić et al* ('*Celebici case*'), Case No. IT-96-21-T, Judgment (Trial Chamber), 16 November 1998, para. 214; *Prosecutor v. Delalić et al* ('*Celebici Appeal*'), Case No. IT-96-21-A, Judgment (Appeals Chamber), para. 266. The ICTY noted that control, not simply decisive influence, is required.

160 *Celebici case* at para. 256; *Celebici Appeal* at paras. 647, 378.

161 ICRC Commentary (Additional Protocol I), para. 3544, and case law below.

162 *Celebici case* at paras. 377-78. See also *Celebici Appeal* at paras. 189-94.

163 *Celebici Appeal* at paras. 196-98. Several other cases noted the key question of whether a superior's *de facto* is formal authority: see, e.g., *Prosecutor v. Aleksovski*, Case No. IT-05-14/1-T, Judgment (Trial Chamber), 25 June 1999, paras. 75-78; *Prosecutor v. Naletelić et al*, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, paras. 65-69; *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgment (Trial Chamber), 30 June 2006 ('*Oric case*'), paras. 309-311; *Prosecutor v. Musema*, ICTR-96-13-T, Judgment (Trial Chamber), 27 January 2000, para. 135; *Bagilishema AJ*, paras. 50-55; *Nahimana et al. AJ*, para. 605; *Kajelijeli AJ*, paras. 85-87.

164 *Prosecutor v. Musema*, ICTR-96-13-T, Judgment (Trial Chamber), 27 January 2000 ('*Musema*'), para. 143-44, paras. 936, 950-51 where the Director of Gisovu Tea Factory was guilty of genocide and crimes against humanity based upon *de jure* power and *de facto* control over his employees (para. 12). These findings were not appealed: *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment (Appeals Chamber), 16 November 2001.

165 *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment, 3 December 2003 ('*Nahimana TJ*'), paras. 973, 1063, 1081-1082, 1106, upheld on appeal. The ICTR Trial Chamber in the cases of *Musema* and *Nahimana* ('*Media case*') convicted the Director of a tea factory, managers of a Radio Station, and the leader of a political party, as superiors. All three cases relied upon the post-WWII cases of *Roechling* and *Flick* in which non-state civilian industrial leaders were found criminally liable for failing to prevent and punish their employees for their crimes, and provide rare examples of convictions of non-state actors pursuant to superior responsibility.

166 *Prosecutor v. Omar Serushago*, Case No. ICTR-98-39-S, Sentencing Judgment (Trial Chamber), 5 February 1999. Subject to the guilty plea, the accused was convicted of genocide and crimes against humanity pursuant to superior responsibility. Neither the Trial nor Appeals Chamber needed to determine whether the Interahamwe was a paramilitary non-state actor, or a state actor by virtue of its affiliation with the government.

Leone has also convicted paramilitary commanders of the ousted AFRC pursuant to superior responsibility.¹⁶⁷

Arguably, although the facts of these cases are all quite distinct, the same principle could potentially apply to persons in positions of authority within terrorist criminal networks. The requirements of a clear superior-subordinate relationship, with adequate control over subordinates that made it possible to prevent and to punish their criminality, may be unlikely to be met by an entity such as al-Qaeda, described as comprising a loose network of cells and individuals under a broad shared ideology.¹⁶⁸ Where such requirements are met, however, the experience of international criminal law suggests that this could become a relevant basis of liability for those who control terrorist organisations in different circumstances in the future. This may prove particularly important where access to evidence of high level orders sufficient to demonstrate the direct responsibility of those in the highest echelons proves elusive.

Clearly superior responsibility is also relevant to crimes committed in the context of state responses to terrorism. As noted below the dearth of such prosecutions to date means the application of the principles in this context remains unexplored.

4A.1.2.2 *Certainty and non-retroactivity in Criminal Law: nullum crimen sine lege*

As a fundamental principle of law, persons are protected from prosecution for conduct that was not criminal at the time of its occurrence. This principle, reflected in domestic and international criminal law and human rights, is enshrined in, for example, Article 15 of the ICCPR.¹⁶⁹ It explicitly does not, however, preclude the prosecution of conduct that was criminal under international but not domestic law at the relevant time.¹⁷⁰

The *nullum crimen* rule also requires that criminal conduct must be defined according to clear, accessible and unambiguous law. The definition of a crime must in turn 'be strictly construed and shall not be extended by analogy'.¹⁷¹ Any ambiguity should be interpreted in favour of the person being investi-

167 *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgement, 20 June 2007 ('*Brima TJ*'), paras. 2114, 2118 and 2122. The Trial Chamber's findings were upheld on Appeal. As a former government body, the AFRC had a functioning chain of command and structures to facilitate effective control. See also *Prosecutor v. Sesay*, Case No. SCSL-04-15-T, Judgement (Trial Chamber), 25 February 2009.

168 See Chapter 6 where the idea of al-Qaeda as an organisation that might constitute a party to a conflict, as claimed by the US administration, is questioned.

169 Article 15(1) of the ICCPR states: 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.' For a detailed discussion of the guarantees enshrined in Article 15, see below, Chapter 7A.4.3.4.

170 Article 15(2) ICCPR.

171 ICC Statute, *supra* note 4 at Article 22(2).

gated, prosecuted or convicted.¹⁷² Thus, for example, a person can be prosecuted for direct or indirect responsibility for crimes against humanity entailed in widespread or systematic terrorist attacks, even if there were no specific offence provisions in place under domestic law at the time of the commission of the offence. If domestic law requires a legislative base for the crimes or for jurisdiction, the necessary legislation can also be adopted with retrospective effect without any infringement of the *nullum crimen* rule as a matter of international law. By contrast, prosecution for membership of a terrorist organisation or rendering material support to terrorists – not themselves crimes under international law – is likely to fall foul of the *nullum crimen* rule unless that crime was proscribed in clear and accessible domestic law at the relevant time.¹⁷³

4A.1.2.3 Bars to prosecution: amnesty, immunity and prescription

Domestic legal systems may, and often do, impose obstacles to prosecution, among them amnesty laws or statutes of limitation that preclude criminal process. The legitimacy of such national measures depends on their consistency with international law obligations to effectively investigate and prosecute serious crimes.¹⁷⁴

Human rights bodies have consistently found measures that act as a bar to investigation or criminal process to be inconsistent with the positive obligations of the state under human rights treaty law to investigate and, if appropriate, prosecute serious rights violations.¹⁷⁵ This is reflected for example in statements of the UN,¹⁷⁶ the work of human rights bodies¹⁷⁷ and the

172 *Ibid.* at Article 22(3). The subsidiary principle of *nulla poena sine lege* (no punishment without law) demands that more serious penalties should not be imposed than those applicable at the time of the commission of the offence; see Article 15(2), ICCPR.

173 See, e.g., the US Supreme Court determination in *Hamdan*.

174 These obligations are found principally in human rights law, but reflected increasingly in international criminal law. Chapter 7A 'Positive Obligations'; ICC Statute Preamble, *Belgium v. Senegal*, *supra* note 4.

175 See Chapter 7A.

176 See, e.g., Seventh Report of the Secretary-General on the United Nations, Observer Mission in Sierra Leone, UN Doc. S/1999/836, 30 July 1999, para. 7; UN Commission on Human Rights Resolutions including 2004/72, 21 April 2004, para. 3; 2005/44, 19 April 2005, para. 7; 2004/72, 21 April 2004, para 3; 2004/48, 20 April 2004, para. 6 (adopted without a vote).

177 See, e.g., CCPR General Comment 20, HRI/GEN/1/Rev.1, p. 30; Human Rights Committee, General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 18, U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (2004); Bahrain (2005), CAT/C/CR/34/BHR, para. 6(g). Chile (2004), CAT/C/CR/32/5, paras. 6(b) and 7(b); Peru (2006), CAT/C/PER/CO/4, para. 16; Spain (2009), CAT/C/ESP/CO/5, para. 21; *Chumbipuma Aguirre et al. v. Peru*, Merits, Judgment of 14 March 2001, IACtHR, Series C, No. 75.

ICTY.¹⁷⁸ Momentum may be gathering behind the position that granting amnesty for serious crimes is now proscribed by customary law, such a development.¹⁷⁹ Linked to the inconsistency of broad amnesty laws with particular human rights obligations, international criminal law authorities increasingly recognise that, whatever the effect of amnesty or prescription in the home state as a matter of domestic law, it does not impede prosecution either before international or foreign courts.¹⁸⁰ Likewise statutes of limitations or rules on prescription that are a common feature of national systems, for common crimes, cannot however apply to core crimes under international law.¹⁸¹

While domestic laws and constitutions may also provide immunity from criminal prosecution – for example of heads of state, government officials or parliamentarians¹⁸² – the lawfulness of such measures is again limited by the international obligations referred to above. The Nuremberg Charter's recognition that 'the official position of defendants, whether as heads of state or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment'¹⁸³ is reflected in the statutes of subsequent *ad hoc* tribunals and of the ICC.¹⁸⁴ International law recognises certain immunities from prosecution by foreign courts, for

178 See *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T 10 (Trial Chamber), Judgment of 10 December 1998, para. 155: 'It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition on torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law.' More recently, the ICTY Appeals Chamber stated that 'Individuals accused of such crimes can have no legitimate expectation of immunity from prosecution.' *Prosecutor v. Radovan Karadžić*, Case No IT-95-5/18-AR73.4, Decision on Karadžić's Appeal of Trial Chamber decision on the alleged Holbrooke Agreement, 12 October 2009, para 50.

179 Cassese, *International Criminal Law*, *supra* note 131, pp. 314-15. State practice of granting amnesty may be becoming more restrictive over time, and accountability norms are strengthening, indicating a possible shift in customary law in this field. See e.g., Expert Opinion in *Garzon v Spain*, ECHR 2011, available at: www.interights.org/Garzon.

180 Article 10, Statute of the Special Court for Sierra Leone and Article 40, Cambodian Law for the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea expressly exclude the possibility of amnesty as a bar to prosecution. National court cases have likewise clarified that amnesty does not preclude prosecution abroad (see, e.g., references to the prosecutions of Chile's Pinochet and Argentina's Galtieri in Cassese, *International Criminal Law*, *supra* note 131, pp. 314-15) and in many cases at home (e.g., Guatemalan courts rejected amnesty in the Rios Montt case in 2012/3; see survey of earlier practice in *Garzon v. Spain* expert opinion, *supra* note 179).

181 *Furundžija*, TC 1998, para 157. *Barrios Altos v. Peru*, para. 41. See the survey of international and national sources on Amnesty and Prescription, in *Garzon v. Spain*, *supra* note 179.

182 See H. Duffy, 'National Constitutional Compatibility and the International Criminal Court', 11 (2001) *Duke Journal of Comparative and International Law* 5.

183 Article 7, London Agreement of 8 August 1945.

184 Articles 6(2) of the ICTY and ICTR Statutes. ICC Statute, *supra* note 4 at Article 27.

sitting heads of state or foreign ministers for example,¹⁸⁵ though the reliance on immunities to protect persons charged with the most egregious crimes against the human person is controversial.¹⁸⁶

The law relating to amnesty, and immunity may be of limited relevance to the prosecution of 'terrorist' networks such as al Qaeda that are unlikely to benefit from state-conferred protection from prosecution. It came briefly into the international frame in the context of purported offers of 'immunity' to Saddam Hussein in early 2003, and may revive in the context of for example state sponsored terrorism in the future.¹⁸⁷ Where it is likely to be of greater relevance is in respect of crimes committed in the name of the 'war on terror' where there has yet to be meaningful accountability of state agents, including high level officials, but where attempts to ensure their '*de facto*' immunity are already apparent.¹⁸⁸

4A.1.3 Jurisdiction to prosecute

International law and practice point to numerous possible fora for the investigation and prosecution of serious terrorist offence, or responses thereto that amount to serious offences under international law. This section will explore these jurisdictional possibilities, and the relationship between them.

185 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002. The case – concerning a Belgian arrest warrant issued against the incumbent foreign minister of the Democratic Republic of the Congo – found that the immunity of a sitting foreign minister from prosecution in domestic courts is absolute.

186 For a critique see A. Clapham, 'Human Rights, Sovereignty and Immunity in the Recent Work of the International Court of Justice', 14.1 (2002) *INTERIGHTS Bulletin* 29. The significance of the case is limited to prosecution before national (as opposed to international) courts and, most importantly, to sitting (as opposed to former) foreign ministers, providing at most partial, short-term refuge for persons who abuse high office to commit serious crimes. The judgment does not suggest that other high-ranking officials, or other ministers such as Defence Ministers, are similarly protected.

187 The law on amnesty brings into question, e.g., the lawfulness of reported offers of amnesty to Saddam Hussein made by the American administration prior to the Iraq invasion. Questions of immunities may also have arisen if a foreign national court had sought to prosecute him while a sitting head of state, but not once deposed, or if he had been tried by an international tribunal.

188 Immunities were argued in the Italian prosecution, in absentia, of several CIA officials in the Abu Omar case. See B.5 below 7B.14 and Chapter 10. The Military Commissions Act of 2006 (4) has been described as enshrining '*de facto* immunity', for U.S. officials' conduct that may violate Common Article 3 but that falls short of the MCA definitions of grave breaches'. For condemnation of a state affording impunity to its officials responsible for counter terrorism, see, e.g., Concluding observations of the Human Rights Committee: Russian Federation, UN Doc. CCPR/CO/79/RUS (2003).

4A.1.3.1 National courts and crimes of international concern

International law recognises the right of certain states to exercise criminal jurisdiction. These are principally the state where the crime occurred, the state of nationality of suspects, the state of nationality of the victims and, for certain serious international crimes, all states, based on universal jurisdiction.¹⁸⁹ To take the example of the September 11 crimes, the courts of the United States provide the natural forum, based on the fundamental principle that jurisdiction can be exercised by the state on whose territory a crime is committed. Nationals of several states are suspected of having been involved in the perpetration of the attacks and many other states lost nationals, in particular in the World Trade Centre attack, on the basis of which international law allows them to exercise nationality or passive personality (victim nationality) jurisdiction respectively.¹⁹⁰

Under international law, any state may exercise jurisdiction over certain serious crimes, such as crimes against humanity or war crimes, on the basis that they injure not only individual victims but the international community as a whole.¹⁹¹ Customary international law has long provided for jurisdiction over such crimes¹⁹² and certain international agreements explicitly so pro-

189 As noted below, under universal jurisdiction, a state can prosecute certain serious crimes irrespective of any link between the state and the offence. The principle *aut dedere aut judicare* – the obligation to extradite or prosecute – found in numerous treaties, is a sub-species of universal jurisdiction conditioned on the presence of the suspect on the state's territory. See generally Kress, 'Universal Jurisdiction over International Crimes and the Institut de droit international', (2006) 4 JICJ 561.

190 Some treaties embrace broad universal jurisdiction while numerous terrorism related treaties anticipate prosecution by states beyond the territorial state, such as the state of the perpetrator's or victim's nationality: see, e.g., the 1970 Hague Convention; the 1971 Montreal Convention; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; the 1994 Convention on the Safety of United Nations Peacekeepers, and the 1998 International Convention for the Suppression of Terrorist Bombings.

191 See C. Hall and H. deRelva, *Universal Jurisdiction: Updated preliminary survey*, Amnesty International, (IOR 53/019/2012), available at: <http://www.amnesty.org/en/library/info/IO53/019/2012/en> (providing a thorough survey of universal jurisdiction laws in states around the world).

192 Restatement (Third), Foreign Relations Law of the United States (1987), § 702, includes, as subject to universal jurisdiction, murder as well as causing the disappearance of individuals, prolonged arbitrary detention and systematic racial discrimination. O. Schachter, *International Law in Theory and Practice* (Dordrecht, 1991) (listing 'slavery, genocide, torture and other cruel, inhuman and degrading treatment' as falling into this category); see also Scharf, 'Application of Treaty-Based Universal Jurisdiction', at 363 (including piracy, war crimes and crimes against humanity). The 1949 Geneva Conventions provisions on universal jurisdiction are customary. See also Hall and Relva, *ibid*.

vide.¹⁹³ If terrorist attacks amount to crimes that carry universal jurisdiction, notably crimes against humanity or war crimes, states may exercise universal jurisdiction in respect of these serious offences. Many states have universal jurisdiction laws in place,¹⁹⁴ to ensure that they can exercise this form of jurisdiction.¹⁹⁵ National courts have relied on this jurisdiction to prosecute a range of crimes under international law, including war crimes and crimes against humanity.¹⁹⁶

Moreover, states that do not yet have such legislation in place¹⁹⁷ affording them jurisdiction when a major attack arises, could enact legislation to confer universal jurisdiction provided the conduct pursued was criminal at the date of commission. The cardinal human rights principle of legality and non-retroactivity in criminal law requires that the *conduct* be criminal at the date when it was carried out, not that *jurisdiction* over the conduct be established at that time.¹⁹⁸ The international criminal tribunals established *ex post facto* have themselves addressed this question and found that legality did not necessarily require that the court was 'pre-established' but that it was established 'in

193 See, e.g., the grave breaches provisions of the Geneva Conventions on 'the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches ... and ... bring such persons, regardless of their nationality, before its own courts Convention Against Torture.

194 Through the implementation of the ICC Statute, a number of states have enacted universal jurisdiction legislation which enables those that could not previously to exercise such jurisdiction over genocide, crimes against humanity and war crimes: see, e.g., International Crimes and International Criminal Court Act 2000 (New Zealand), available at: <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2000/an/026.html>; and Crimes Against Humanity and War Crimes Act 2000 (Canada), available at: www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C_19_C-19_4/C-19_cover-E.html.

195 See Amnesty International, *Universal Jurisdiction*, *supra* note 191. As a matter of international law, states can and in some cases must exercise jurisdiction, but domestic law may require a legislative basis for the exercise of jurisdiction.

196 See, e.g., *re Demjanjuk or United States v. Otto, Attorney General of Israel v. Eichmann*; case of Ntezimana, Higaniro, Mukangango and Mukabutera, decision of 8 June 2001 of the Court d'Assise of Bruxelles among others concerning the Rwandan genocide (http://www.asf.be/AssisesRwanda2/fr/fr_VERDICT_verdict.htm); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* [1999] 2 WLR 272 (H.L.), reprinted in 38 (1999) ILM 430; 'Universal Jurisdiction: Strengthening this essential tool of international justice', Amnesty International, 9 October 2012, IOR 53/020/2012, available at: <http://www.amnesty.org/en/library/info/IO53/020/2012/en>; see also 'Universal Jurisdiction in Europe: The State of the Art', HRW, 2006, available at: <http://www.hrw.org/reports/2006/06/27/universal-jurisdiction-europe>.

197 Amnesty International indicates that 166 of the 193 UN member states have defined one or more of four crimes under international law (war crimes, crimes against humanity, genocide and torture) as crimes in their national law. In addition, the update notes that 147 out of 193 states have provided for universal jurisdiction over one or more of these crimes. Amnesty International, *Universal Jurisdiction*, *supra* note 191.

198 See Article 15(2) ICCPR. See also *Streletz, Kessler and Krenz v. Germany* (App. Nos. 34044/96, 35532/97 and 44801/98), Judgment of 22 March 2001, ECtHR, *Reports 2001-II*. See Paust, 'Prosecution of Mr. bin Laden', *supra* note 131.

keeping with the relevant procedures' and that it 'observes the requirements of procedural fairness'.¹⁹⁹ The development of universal jurisdiction has not been linear, with periods of expansion and recent examples of a more restrictive approach to the circumstances in which this jurisdiction can or should be exercised by states.²⁰⁰

As reflected perhaps in the fact that universal jurisdiction has not emerged as a central theme in discussions around the prosecution of terrorism post-9/11, there is support, in principle, for the priority of the territorial state's right and responsibility to exercise jurisdiction. The relevance and utility of universal jurisdiction, like other jurisdictional bases, is most apparent in circumstances where the territorial state cannot or will not exercise jurisdiction,²⁰¹ or arguably where it cannot or will not prosecute according to basic standards of international justice that justify international support and cooperation.²⁰² As stated by the OAS '[T]he principle of territoriality must prevail in the case of a jurisdictional conflict, provided that there are adequate, effective remedies in that state to prosecute such crimes and guarantee the application of rules of due

199 See *Tadić* Jurisdiction Appeal Decision, *supra* note 24 at para. 45. For an analysis of the principle of the pre-established or 'natural' judge, including its historical development, see J.B.J. Maier, *Derecho Procesal Penal. Tomo I* (Buenos Aires, 1996), pp. 763 ff and Article 26(2) American Declaration of the Rights and Duties of Man.

200 On the 'decline of universal jurisdiction', see R. Cryer, H. Friman, *et al.*, *An Introduction to International Criminal Law and Procedure*, *supra* note 31 at p. 55-58 (noting the expansive approach taken by some states, such as Belgium and Spain, in recent years having lead to attempts to restrict the laws). A relevant factor for the former was the *Arrest Warrant* case, *supra* note 185. In October 2009 the Spanish Senate restricted the country's extra-territorial jurisdiction to crimes that have a demonstrated link with Spain and are not investigated or prosecuted by another competent country or international tribunal. See also 'Universal Jurisdiction: Strengthening this essential tool of international justice', Amnesty International, *supra* note 191.

201 Note that unlike the ICC, which will only exercise jurisdiction where no national court is willing or able to do so, there is no established rule of subsidiarity for universal jurisdiction. However, a similar approach is increasingly evident in practice. See, *e.g.*, OAS Resolution 1/03 notes 'that the principle of territoriality should prevail over that of nationality in the event that the state where the international crimes occurred wishes to bring them to justice, and that it offers due guarantees of a fair trial to the alleged perpetrators' (para. 5). See also the decision of the Criminal Decision of the Spanish National Court on genocide, terrorism and torture allegedly committed in Guatemala during the 1980s, and the comment by M. Cottier, 'What Relationship Between the Exercise of Universal and Territorial Jurisdiction? The Decision of 13 December 2000 of the Spanish National Court Shelving the Proceedings Against Guatemalan Nationals Accused of Genocide', in Fischer, Kreß and Lüder (eds.), *Prosecution of Crimes*, pp. 843 ff.; see also the *Princeton Principles on Universal Jurisdiction* (Princeton University, 2001), available at: http://www.princeton.edu/~lapa/unive_jur.pdf. On undue deference to US authorities on this basis in the war on terror context, see below and Chapter 7B14.

202 For discussion of the limits imposed by human rights law on cooperation in criminal matters see below, Chapter 7A.4.3.8.

process for the alleged perpetrators, and that there is an effective will to bring them to justice'.²⁰³

As discussed in the context of post-9/11 practice below and in other chapters, the neglect of criminal law in some contexts as well as the politicisation and lack of due process in terrorism trials may however serve as a reminder of the importance of such 'alternative' jurisdictions. Where denial of justice arises within the territorial state, prosecution of international crimes may arise before the courts of other states willing to see justice done or, as discussed in the next section, international alternatives.²⁰⁴

So far as national courts do exercise jurisdiction over international crimes under international law, it has been suggested that they are normally 'under an obligation to interpret the domestic provisions in accordance with the interpretation of equivalent international provisions, including those made by international criminal tribunals'.²⁰⁵ What has been described as a 'bizarre and unfortunate' exception to that is the US Military Commissions Act of 2006 which prohibits courts from relying on international legal sources in relation to war crimes.²⁰⁶

4A.1.3.2 *International alternatives*

Where national courts do not or cannot assume the investigative and prosecutorial role, recent history provides several alternative international, or quasi-international, models for the investigation or prosecution of international crimes.

a) *The ICC, terrorism and counter-terrorism*

The Statute establishing the International Criminal Court (ICC) was adopted in Rome on 17 July 1998, entering into force on 1 July 2002. The Court does not have retrospective jurisdiction, and cannot therefore prosecute crimes committed before the Statute's entry into force,²⁰⁷ although the Security Council could, at least theoretically, confer jurisdiction on the ICC over offences before entry into force, in accordance with its Chapter VII powers.²⁰⁸

203 Preamble OAS Resolution 1/03 on 'Trial for International Crimes', Washington DC, 24 October 2003.

204 See Chapters 10 and 7B14.

205 See Cryer & Friman, *supra* note 31 at p. 77 (citing the *Jorgic* case at the German constitutional court, 12.12.2000).

206 *Ibid.*, citing Matheson, 'The Amendment of the War Crimes Act', AJIL 2007.

207 ICC Statute, *supra* note 4 at Article 11.

208 This would mirror the establishments of *ad hoc* criminal tribunals in the past. If the Security Council so decided, it has been questioned whether the ICC would be able to accept such jurisdiction: see, e.g., C. Greenwood, 'International Law and the "War against Terrorism"', 78 (2002) *International Affairs* 301. In relation to 9/11, this was not a realistic option given *inter alia* US opposition and its veto power within the Council.

While the relevance of the ICC in the 'war on terror' is considered in Part B of this chapter,²⁰⁹ certain characteristics of the ICC, pertinent to an assessment of its relevance to terrorism and counter-terrorism in the post-9/11 world, are worthy of note here. The Court has jurisdiction over genocide, crimes against humanity and war crimes committed in international or non-international armed conflict and, with effect from 2017, the crime of aggression.²¹⁰ Moreover, while not presently covered by the ICC Statute, it is also at least conceivable that 'terrorism' as a specific crime, comprising a broader ambit of conduct, may come to be included within the ICC Statute at some future date.²¹¹

In order for offences to be tried by the ICC, however, the Court's jurisdiction must be triggered in accordance with the Statute, which can be done in several ways.²¹² The Security Council, which has repeatedly called for justice responses to international terrorism post- September 11, could confer jurisdiction on the Court as it has in other cases, unless the veto power prevented this.²¹³ Absent Council referral, the Court's jurisdiction depends on the state on whose territory the atrocities were committed, or a state whose nationals are suspected of responsibility, having ratified the Statute or accepted the Court's jurisdiction.²¹⁴ Nationals of a state party are therefore potentially subject to the Court's jurisdiction.²¹⁵ Jurisdiction over nationals of non-states

209 See Chapter 4, para. 4B.1.2.2 below.

210 See Article 8bis of the amended Statute. See above, para. 4A.1.1.3 for discussion of the exercise of jurisdiction over aggression. Although the ICC review conference approved the amendment, it requires a further decision to activate the amendment, which will take effect only after 1.1 2017. See also Article 15bis for the special conditions attaching to the exercise of jurisdiction over aggression.

211 SC Res. 1377 (2001) called for such inclusion; see 'The ICC: 9/11, Afghanistan, Iraq and Beyond', Chapter 4, para. 4B.1.2.2 below.

212 ICC Statute, *supra* note 4 at Article 13 'Exercise of Jurisdiction', which provides for referral by (a) the Security Council or (b) by a state party or (c) a *proprio motu* investigation by the Prosecutor as triggering jurisdiction. In respect of the last two, however, the 'preconditions for the exercise of Jurisdiction' in Article 12 must be satisfied, namely that the state of territory or of nationality is a state party.

213 ICC Statute, *supra* note 4 at Article 13. The Security Council used its powers to refer several situations to the Court in the first decade of its life: Libya (SC Res. 1970 (2011), 26 February 2011, UN Doc. S/RES/1970); and Sudan (SC Res. 1593 (2005), 31 March 2005, UN Doc. S/RES/1593). By contrast, the failure to refer Syria in 2011-12 has drawn harsh criticism. The Court does not depend on SC referral or approval (Article 13), provided there is a link via the state of territory or nationality as discussed below (Article 12: preconditions for the exercise of Jurisdiction).

214 ICC Statute Article 12. Cote d'Ivoire fell into the latter category, being the first non-state party to the state to accept the courts jurisdiction. See 'Declaration Accepting the Jurisdiction of the International Criminal Court', ICC, <http://www.icc-cpi.int/NR/rdonlyres/FBD2D966-93CF-4A86-B590-46293E819A65/279844/ICDEENG5.pdf>. For the Cote d'Ivoire litigation, see *Prosecutor v. Gbagbo*, ICC-02/11-01/11.

215 See P. Sands, 'Our Troops Alone Risk Prosecution', *The Guardian*, 15 January 2003.

parties would depend on the state on whose territory the crime is committed being a party or accepting jurisdiction.²¹⁶

Critically, however, ICC jurisdiction will only operate where the state itself does not take necessary and reasonable measures to investigate or prosecute allegations of serious crimes.²¹⁷ The design of the ICC regime is thus, in significant part, to act as a catalyst to effective national prosecutions.

b) The role of other international, regional or hybrid ad hoc tribunals

Under Chapter VII of the UN Charter, the Security Council has broad powers to take measures for international peace and security, as discussed in Chapter 5, below. In 1994 it exercised those powers to establish two international criminal tribunals for Rwanda and the former Yugoslavia. It is therefore possible for the Security Council to establish a tribunal or, as has been suggested, to extend the jurisdiction of an existing tribunal, to prosecute serious offences of international concern.²¹⁸

International experience also points to hybrid models of quasi-international justice that have emerged from negotiation and agreement. The approach of the Nuremberg tribunal suggests that several states can agree together to establish an international tribunal, conferring on it the power to do 'what any one of them might have done singly', namely prosecute on the basis of one of the grounds of jurisdiction mentioned above.²¹⁹ Similarly, an agreement between the UN and Sierra Leone led to the Statute of the Special Court for Sierra Leone,²²⁰ which combines elements of national law, procedure and personnel with international components.²²¹ Other examples that might be described as predominantly domestic tribunals, but with an international

216 As noted above, before the ICC can act, the state of territory or nationality of the accused must be a party to the ICC treaty or accept the Court's jurisdiction. Article 12, ICC Statute.

217 See the relationship of 'complementarity' between the ICC and national tribunals in ICC Statute, Preamble and Articles 17-19. Whether ICC jurisdiction should be conditioned on national courts meeting certain standards of justice is a matter for debate and subject of ICC litigation in relation to Libya. The '*ad hoc*' tribunals for the Former Yugoslavia and Rwanda, by contrast, established the 'primacy' of the international tribunals over national courts but they may have been premised implicitly on the unavailability or ineffectiveness of national courts in the former Yugoslavia and Rwanda at the time in question.

218 G. Robertson, 'There is a legal way out of this ...', *The Guardian*, 14 September 2001 (calling for an international or quasi-international tribunal abound in the context of Iraq). The ICC could also be afforded jurisdiction by the Security Council.

219 The Nuremberg Judgment reasoned that: 'The signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. *In doing so, they have done together what any one of them might have done singly*' (emphasis added), 'International Military Tribunal (Nuremberg), Judgment and Sentences', 41 (1946) AJIL 216.

220 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, 4 October 2000, UN Doc. S/2000/915.

221 See Statute of the Special Court for Sierra Leone, 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II.

aspect, are the human rights court established by the United Nations in East Timor²²² or the tribunal established by the Cambodian government to prosecute the crimes related to the Cambodian genocide.²²³

The Special Tribunal for Lebanon has a similarly hybrid nature, but is noteworthy as a tribunal established by agreement between the government and the Security Council to investigate and prosecute those responsible for a specific terrorist incident, namely the killing of former Prime Minister Hariri in Beirut on 14 February 2005.²²⁴

The *Lockerbie* court presents an unusual model that emerged from the diplomatic impasse over the refusal to extradite suspects in the 1988 bombing.²²⁵ It took the form of a national court sitting on foreign soil, applying mostly national law, with the exception that there was no jury. This arose as a compromise solution in the face of allegations as to the inability of the Scottish courts to dispense fair and impartial justice in the particular case. While unlikely to gain traction in practice in the future, this scenario could similarly be invoked to address concerns as to the potential prejudice to the fairness of trials, of relevance in a world where 'terrorism' trials have often come to be synonymous with abusive processes.²²⁶

Whether the establishment of any of the models of *ad hoc* jurisdiction remains a feature of international practice in the future is uncertain, as the rationale for them should in principle be undermined by functioning national courts capable and willing of doing justice, supplemented by a permanent ICC.

Other proposals for future jurisdictions have emerged, though these are of less apparent significance, at least as yet. Worthy of note are proposals for a future African regional criminal jurisdiction, an expansion of the nascent African Court on Justice and Human Rights, which have essentially been triggered by tension between the African Union and the ICC over the indictment of president Bashir of Sudan. Whether the proposal will survive and the expanded jurisdiction ever become a reality remains far from certain, but it is noted that terrorism is one of the crimes that proponents suggest would

222 The United Nations Transitional Administration in East Timor (UNTAET) established such a system in the Dili district to investigate international crimes that had occurred during 1999.

223 The Cambodian government agreed to create a hybrid court in which Cambodian judges would be in the majority, with international judges having a right of veto.

224 Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon, S/2006/176, 21 March 2006.

225 Flight Pan Am 103 was bombed in the airspace over Lockerbie, Scotland, killing 259 people on board and 11 residents of Lockerbie.

226 See Chapter 7 on fair trial and Chapter 8 on Guantánamo Bay and military commissions specifically.

fall within any such jurisdiction.²²⁷ While discussions have also unfolded in an academic context as to merits of an alternative 'international terrorism court', practice post-9/11 reveals little appetite for such a development, and tend by contrast to underscore the importance of the role of national courts, bolstered by more effective international cooperation, as discussed further in Part B below.²²⁸

4A.2 IMPLEMENTING JUSTICE: INTERNATIONAL COOPERATION AND ENFORCEMENT IN CRIMINAL MATTERS

The international criminal justice approach to international terrorism depends, naturally, on international enforcement.²²⁹ International cooperation, in matters of extradition and 'mutual assistance' between states, is essential for the purposes of, for example, arresting and transferring suspects, freezing assets and securing evidence.²³⁰ As discussed below, rules governing cooperation are, in general, set out in multilateral and bilateral arrangements. These are supplemented by other obligations – imposed for example by the Security Council or assumed in international treaties including the sectoral terrorism treaties. They sit alongside other provisions of international law, notably international human rights law which reflects such obligations, but imposes conditions on cooperation.

4A.2.1 Extradition

The duty to extradite may arise from bilateral or multilateral extradition treaties, which also enshrine exceptions to this duty.²³¹ Crimes under international law are considered so serious that states are obliged to extradite persons found on their territory, or to submit them for prosecution in their

227 D. Deya, 'Is the African Court worth the Wait', 22 March 2012, available at: <http://allafrica.com/stories/201203221081.html>. The AU has defined terrorism in its Counter-terrorism Convention, which may pave their way for agreement on the scope of the expanded jurisdiction of the Court in relation to terrorism in Africa.

228 See, e.g., discussion of proposals set out in E. Creegan, 'A Permanent Hybrid Court for Terrorism', 26 (2011) *American Univ. Int'l Law Rev.* 2, p. 237.

229 The enforcement considered here is for the purposes of ensuring effective criminal prosecution, as opposed to enforcement of judgments and sentences.

230 Cooperation arises also in relation to, for example, the transfer of sentenced persons, transfer of proceedings, protection of victims and witnesses and effecting compensation.

231 States may, and increasingly do, extradite on the basis of national law without a treaty or arrangement, in accordance with the desire to improve international cooperation in respect of serious offences.

own state (*aut dedere aut judicare*).²³² Several of the sectoral terrorism treaties similarly so provide.²³³ Moreover, Security Council resolutions dealing with counter-terrorism post September 11 asserted a clear duty on UN member states to deny safe haven to terrorists and to bring them to justice.²³⁴ In 2006 the UN General Assembly also reiterated this imperative in its Global Counter-Terrorism Strategy.²³⁵ As discussed further below, alongside this duty, is the duty under human rights law not to extradite where there is a real risk that the fugitive would be subject to certain serious human rights violations in the state requesting extradition.²³⁶ A state's obligations in respect of extradition must therefore be understood not only by reference to extradition treaties, but also to other provisions of international law.

4A.2.1.1 Key features of extradition law

Most problems with international cooperation relate to variable degrees of political will to cooperate. However, extradition regimes have also often been criticised for their complexity, resulting in obstacles, delay in justice enforcement, and potentially denial of justice, which in turn provide a disincentive to states to respect the legal process.²³⁷ Attempts to reform and modernise law and procedures, including the removal of domestic obstacles to extradition and streamlining procedures were underway before September 11 and were further impelled by those events, as discussed in part B of this chapter.²³⁸ Alongside these developments have been others in human rights law that seek to ensure protection for the person whose extradition is requested. Together

232 This duty *aut dedere aut judicare* – to extradite or prosecute – is enshrined explicitly in various human rights instruments, such as the Convention against Torture, Article 5, and interpreted as implicit in the positive duty to ensure rights under more general human rights instruments: see Chapter 7A.4 'Positive Obligations'.

233 The principle is also reflected in specific terrorism conventions: see, e.g., Article 7, Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970, 860 UNTS 12325, in force 14 October 1971); Article 5(2), Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971, 974 UNTS 14118, in force 26 January 1973); Article 7, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (New York, 14 December 1973, 1035 UNTS 15410, in force 20 February 1977); Article 8(1) International Convention against the Taking of Hostages (New York, 18 December 1979, 1316 UNTS 21931, in force 3 June 1983).

234 SC Res. 1373, *supra* note 132.

235 UN Global Counter-Terrorism Strategy, 8 September 2006, UN Doc. A/RES/60/288.

236 See this chapter, para. 4A.2.1.2.

237 For a discussion of some of those obstacles see Koufa, 'Progress Report', *supra* note 133, para. 127 (citing evidence requirements, '*forum non conveniens*' concerns, including defendants' rights issues). Generally, and on exceptions such as 'nationality' and 'political offences', see also C. Van den Wyngaert, *The Political Offense Exception to Extradition* (Dordrecht, 1980), pp. 148-9. For efforts to enhance cooperation see 'Developments' below; and du Plessis, 'A Snapshot', *supra* note 8.

238 See in particular para. 4B.2.

they have significantly changed the shape of extradition law in recent years; these developments are to be welcomed so far as they enhance effectiveness, minimise arbitrariness and safeguard essential human rights protection.

While multiple bilateral and multilateral extradition treaties exist, each with their own specific provisions, among the traditional principles of extradition law that can be identified from common features of extradition treaties and practice are the following.²³⁹

- *Double criminality and 'Extraditable Offences'*: most extradition arrangements have traditionally provided that an act is only extraditable if it is punishable as a crime according to the laws of both the requesting state and the requested state, or according to international law. In general, the crime need not itself be identical – if the request is for extradition for 'terrorism' offences for example the requested state need not also have an offence of terrorism in domestic law – but the conduct that forms the basis of the offence must be punishable in both states, often by a minimum specified penalty.²⁴⁰ It is open to debate whether this requirement poses an obstacle to efficient cooperation in terrorism matters, or an important safeguard against abuse in the context of the amorphous and/or politicised nature of some 'terrorism' prosecutions.²⁴¹
- *Specialty and re-extradition*: it is a general rule that, once extradited, a suspect must be tried only for the crime or crimes covered in the extradition request, and only in the requesting state, unless the consent of the extraditing state is secured.
- *Ne bis in idem* (double jeopardy): as a person may not be tried twice in respect of the same offence, in certain circumstances the state need not extradite if there has been a final judgment against the suspect in respect of the conduct in question. Different manifestations of this principle appear in extradition and human rights treaties.²⁴²

239 See also UN Model Treaty on Extradition, GA Res. 45/116, annex, UN Doc. A/45/49 (1990), 30 ILM 1407. For a discussion see R. Cryer, H. Friman, *et al.*, *An Introduction to International Criminal Law and Procedure*, *supra* note 31, pp. 89-93. Others, such as the non-extradition of nationals in some constitutions are not addressed here. Duffy, 'Constitutional Compatibility', *supra* note 182 at p. 20.

240 In recent years some States have moved from a 'list approach' to extradition which eliminates the need to set out all the relevant offences in a subsidiary document and replaces it with a test based on the applicable penalty.

241 See changes in 4B222. It would be important to have a substantive rather than listing approach if the principle is to protect from prosecuting legitimate activity, as discussed in Chapter 7B.11.

242 Surprisingly, human rights treaties would appear only to protect only against prosecution twice in the same state; see M.J. Bossuyt, *Guide to the 'travaux préparatoires' of the International Covenant on Civil and Political Rights* (Dordrecht, 1987), pp. 316-18 and the decisions of the Human Rights Committee in *ARJ v. Australia* (Comm. No. 692/1996), Views of 28 July 1997 and *A.P. v. Italy* (Comm. No. 204/1986), Decision of 2 November 1987, UN Doc. CCPR/C/31/D/204/1986. However, a broader application of the *ne bis in idem* principle to extradition

- *Non-extraditable offences and the political offence exception*: to protect against extradition for politically motivated prosecution, and the potential involvement of foreign states in domestic political entanglements, an exception to obligations to extradite developed for crimes considered to be political in nature.²⁴³ This exception has however increasingly been removed from international and national extradition provisions, in particular in respect of certain types of serious crimes such as the crimes under international law discussed above.²⁴⁴ In relation to terrorism specifically, modern treaties generally exclude the political offence exception,²⁴⁵ and indeed the Security Council, in Resolution 1373 (2001) insisted that states ensure 'that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists'.²⁴⁶
- *Prima Facie Evidence*: while extradition procedures vary considerably, not least between common law and civil law countries, often in extradition practice a request for extradition is accompanied by a warrant and basic evidence, sometimes referred to as '*prima facie*' evidence, or a showing of 'probable cause'.²⁴⁷ Extradition proceedings are not a mini-trial and the evidence required is clearly much less than would be required to satisfy the requested state of the guilt of the suspect; clearly the investigation need not be complete before the extradition is requested (nor need all available evidence be provided to the requested state). However, extradition (and the detention which accompanies it) should not be requested unless or until the evidence provides reasonable grounds to suspect the individual of having committed the offence,²⁴⁸ and the requirement of sharing a basic degree of evidence was considered

is contained in many extradition treaties including, for example, Article 9 of the European Convention on Extradition, Paris, 13 December 1957, ETS No. 24, in force 18 April 1960.

243 For background see Van den Wyngaert, *The Political Offense Exception to Extradition* (Dordrecht, 1980).

244 It is commonly recognised that the political offence exception does not cover crimes under international law, and international agreements expressly so provide. See, e.g., the 1979 Additional Protocol to the 1957 European Extradition Convention; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 8; UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, Principle 18; Inter-American Convention on the Forced Disappearance of Persons, Article 5. See generally, C. Van den Wyngaert, *The Political Offense Exception*, pp. 134 ff.

245 The European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, ETS No. 90, excludes the political offence exception as do the United Nations Convention for the Suppression of Terrorist Bombings and the United Nations Convention for the Suppression of the Financing of Terrorism, 9 December 1999, UN Doc. A/RES/54/109 (1999).

246 SC Res. 1373, *supra* note 132 at para. 3(g).

247 This is, traditionally, the position in common law countries while some civil law jurisdictions require a judicial order and sufficient information to establish dual criminality, rather than 'evidence' as such.

248 Proceedings must be consistent with the right to liberty and related safeguards, see, e.g., Article 9 ICCPR and Chapter 7A.5.3 and 7.7.

one way of ensuring that this is the case. However, as described in relation to developments post September 11 below, in certain contexts the requirement has been watered down in the name of streamlining the extradition process and effectively countering terrorism.²⁴⁹

– *Non-inquiry*: The principle that states will not inquire into the good faith of another state's request is long established in many states,²⁵⁰ but is subject to qualification as a matter of national and international law.²⁵¹ At its strictest, such a rule might preclude the requested state from considering any evidentiary questions and require it to be blind to the circumstances of the trial and treatment of the suspect in the requesting state, neither of which reflect current international law and practice. While domestic courts are not obliged (nor necessarily well placed) to actively engage in a detailed assessment of another state's system, they are obliged under human rights law not to extradite where there are substantial grounds for believing that the person's rights would be violated in the requesting state, as explained below.²⁵²

4A.2.1.2 Extradition and human rights

In its totality, the legal framework governing extradition seeks to accommodate the essential balance between ensuring an effective system of inter-state co-operation and protecting the rights of the individual.²⁵³

249 See Chapter 4B.2.3, in relation to the European Council Framework Decision on the European Arrest Warrant and the Surrender Procedure between Member States, 13 June 2002 (2002/584/JHA), OJ L 190/5, 18 July 2002 (hereinafter 'European Arrest Warrant'). See also the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America (Washington, 31 March 2003) (hereinafter 'US-UK Extradition Treaty').

250 It is described as a rule of customary law in I. Bantekas, M. Nash and S. Mackarel, *International Criminal Law* (London, 2001), p. 149. See Cryer & Friman, *et al.*, *supra* note 31 at p. 94 (describing it as a feature of common law states); and J. Dugard and C. van den Wyngaert, 'Reconciling Extradition with Human Rights', 92 (1998) *AJIL* 188, 190 (noting that the rule traditionally applied in, *e.g.*, US, UK and Canada, but not in continental European countries).

251 On national restrictions, see Dugard and Van den Wyngaert, 'Reconciling Extradition', *ibid.* at pp. 190-91. On international legal restrictions see Chapter 7A5.10.

252 When extradition is requested a minimal duty of inquiry may be implicit in human rights obligations to ensure the individual will not be transferred in face of real risks of serious violations. This duty may arise before extradition or – where extradition is granted subject to assurances for example – thereafter (see, *e.g.*, Concluding observations of the Human Rights Committee: Sweden, UN Doc. CCPR/CO/74/SWE (2002), para. 12; *Othman (Abu Qatada) v. UK*, (Appl. No. 8139/09), ECHR Judgment of 12 January 2012.

253 'To require such a review [by courts in the extraditing state] of the manner in which a court not bound by the Convention had applied the principles enshrined in Article 6 would also thwart the current trend towards strengthening international cooperation in the administration of justice, a trend which is in principle in the interests of the persons concerned. *The Contracting States are, however, obliged to refuse their cooperation if it emerges that the conviction is the result of a flagrant denial of justice.*' *Droz and Janousek v. France and Spain* (Appl. No.

While most general human rights treaties do not address extradition explicitly, it is well established that the obligations of states to protect and ensure the human rights of individuals within their jurisdiction extend to declining to extradite (or otherwise deport or expel) persons to states where certain of their rights are at serious risk of violation.²⁵⁴ As discussed more fully in Chapter 7, human rights treaties and the decisions of human rights bodies interpreting obligations on a case-by-case basis, indicate a prohibition on extradition where there is substantial risk of, *inter alia*, torture, inhuman and degrading treatment or punishment, in certain contexts the application of the death penalty, prolonged arbitrary detention or a 'flagrant denial' of fair trial rights.²⁵⁵

Many of these prohibitions have developed from violations arising commonly in the terrorism context. They may arise from the criminal process itself – the lack of fundamental fair trial guarantees or independence of the tribunal for example – or the conditions of pre-trial or post-conviction detention. It falls to be determined case-by-case whether there is a 'real and personal' risk of a serious rights violation in the receiving state.²⁵⁶

Extradition documents broadly reflect these obligations, although not consistently or systematically. The Inter-American Convention on Extradition, for example, precludes extradition 'when the offense in question is punishable in the requesting State by the death penalty, by life imprisonment, or by degrading punishment' unless sufficient assurances have been obtained previously,²⁵⁷ while the European Convention on Extradition makes explicit

12747/87), 26 June 1992, ECtHR, *Series A*, No. 240, para. 110 (emphasis added). The obligation not to transfer to flagrant denial of justice was found to constitute a violation in *Othman v. UK*, *supra* note 252.

254 This principle of 'non-refoulement' is discussed in detail in Chapter 7A.4.5.10 B5.10.

255 It remains open whether the same principle applies to other rights violations under these conventions, as discussed in Chapter 7. The express prohibition of extradition or surrender in cases where some of the rights protected would be likely to be infringed in the requesting state is also contained in certain human rights treaties or instruments. See, e.g., ACHR (Article 22(8)), UN Convention against Torture (Article 3), and European Charter of Fundamental Rights (Article 19). See also Art. 33 Convention Relating to the Status Refugees (Geneva, 28 July 1951, 189 UNTS 150, in force 22 April 1954) expressly prohibiting *refoulement* of asylum seekers to a country where '[their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion.'

256 See, e.g., *Othman*, *supra* note 252, where the ECHR found that the transfer to trial of the applicant in Jordan by a military commission which admitted evidence obtained through torture, would amount to a flagrant denial of justice. Cf extraditing terrorist suspects to imprisonment in a super-max prison in the US did not amount to inhuman treatment: *Case of Babar Ahmad and Others v. The United Kingdom*, Appl. Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment, 10 April 2012, paras. 200-215.

257 Inter-American Convention on Extradition, Caracas, 25 February 1981, *OAS Treaty Series* No. 60, in force 28 March 1992, Article 9 prohibiting transfer absent sufficient assurances that the death penalty, life imprisonment, or degrading punishment will not be imposed or, if imposed, not enforced.

reference only to the death penalty or discriminatory proceedings.²⁵⁸ The UN Model Treaty on Extradition suggests that extradition be precluded where the requested State has substantial grounds to believe human rights norms on (a) discrimination, (b) torture, cruel and inhuman treatment and punishment, (c) minimum guarantees in criminal proceedings as contained in the ICCPR would not be respected, or (d) that the judgment of the requesting State has been rendered *in absentia* without the accused having the opportunity to present a defence.²⁵⁹ While these provisions generally derive from – and must be interpreted by reference to – human rights jurisprudence, they may also include other issues, such as the ban on life imprisonment, peculiar to particular constitutional traditions.²⁶⁰

States may seek to reconcile their commitment and obligations in respect of cooperation with human rights protection in various ways. Not uncommonly, states seek ‘assurances’ from the requesting state that it will act or refrain from acting in a certain way, but as human rights bodies have recently noted, this only meets their obligations so far as accompanied, in all the circumstances, by genuine post-transfer safeguards for the persons extradited, including effective monitoring by the sending state. It is thus emphasised that the sending state’s responsibility for the rights of the person continues after extradition, by virtue of the act of expulsion. States may, alternatively, be in a position to prosecute rather than extradite, in accordance with the *aut dedere aut judicare* principle applicable to certain serious offences discussed above; to this end states may take legislative measures to ensure that domestic law recognises jurisdiction over serious crimes committed outside the state’s territory.²⁶¹

258 Article 11 of the European Convention on Extradition of 1957 addresses the right to refuse extradition in the context of the death penalty. See also Article 3(2) excluding extradition where it is ‘for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person’s position may be prejudiced for any of these reasons’.

259 See UN Model Treaty on Extradition 1990, Article 3, which precludes extradition where the requested state has substantial grounds to believe human rights norms on (a) discrimination, (b) torture, cruel and inhuman treatment and punishment, (c) minimum guarantees in criminal proceedings would not be respected or (d) ‘the judgment of the requesting State has been rendered *in absentia*, [and] the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence’. Article 4 adds optional grounds for refusing extradition including in relation to the death penalty.

260 For example, life imprisonment is prohibited in several constitutions, particularly but not exclusively in Latin America, so certain extradition treaties treat life imprisonment. See, e.g., Inter-American Convention on Extradition above. While not prohibited by human rights law *per se*, life imprisonment where there is no prospect of early release may raise an issue of inhuman treatment, e.g., under Article 3 of the ECHR: see *Einhorn v. France* (Appl. No. 71555/01), Admissibility decision, 16 October 2001, para. 27; *Babar Ahmed v UK* (Appl. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09)), 10 April 2012

261 See 4A.1.3 above.

4A.2.2 Mutual assistance

Mutual assistance is the process used to obtain evidence and other forms of information and legal cooperation from a foreign country, and as such is critical to effective international enforcement of criminal law in relation to terrorism. The broad legal framework of obligations incumbent on states to cooperate in criminal matters in respect of international terrorism is increasingly apparent through the Security Council's resolutions,²⁶² and through the specific terrorism conventions which commonly impose a general obligation of cooperation with the investigations of other states.²⁶³ This framework does not, however, provide specific modalities or procedures for such cooperation, and the challenges to effective cooperation in information and evidence sharing remain great.²⁶⁴ It has been suggested that the legal framework for cooperation in combating terrorism would benefit from strengthening through a multilateral convention on mutual assistance.²⁶⁵

Like for extradition, there are however mutual assistance treaties on a bilateral or multilateral basis which provide procedures for the exchange of evidence and examples of the grounds on which requests can be refused.²⁶⁶ These arrangements are often less formal or rigid than in the case of extradition, with states generally enjoying a larger measure of discretion to grant or decline requests for assistance.²⁶⁷ As discussed in the human rights chapter, the human rights obligations of states are less clear in respect of mutual assistance than they are in respect of extradition of persons physically present on the extraditing state's territory,²⁶⁸ although, arguably at least, the same

262 SC Res. 1373 (2001), *supra* note 136.

263 Cryer & Friman, *et al.*, *supra* note 31 at p. 103-04. *See also* Chapter 2.

264 *See* du Plessis, 'A Snapshot', *supra* note 8; Kim Prost, 'The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance,' in *Counterterrorism Strategies*, *supra* note 8.

265 Prost, 'Need for a Multilateral Cooperative Framework', *supra* note 264.

266 *See, e.g.*, Council of Europe Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959, ETS No. 30, in force 12 June 1962; Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, adopted by the European Council on 29 May 2000, OJ C 197/1 of 12 July 2000; Scheme Relating to Mutual Assistance in Criminal Matters between Commonwealth Countries; UN Model Treaty on Mutual Assistance in Criminal Matters, GA Res. 45/117, 14 December 1990, UN Doc. A/RES/45/117.

267 Mutual assistance may be rendered on the basis of domestic law without resort to a treaty. Whereas, traditionally, extradition was predicated on a treaty, the UK *e.g.* will in principle grant assistance to any requesting state: C. Nicholls, C. Montgomery and J. Knowles, *The Law of Extradition and Mutual Assistance in Criminal Matters: Practice and Procedure* (London, 2002)..

268 States have well-established duties to investigate violations within their territory or jurisdiction; *see* Chapter 7A.4.2. In *Rantsev v Cyprus & Russia*, the ECHR referred to the duty of Russia to *cooperate* in the investigation of crimes on Cypriot territory.

underlying principles may be held to apply.²⁶⁹ While still not the norm, several mutual assistance agreements do specifically exclude cooperation where, for example, the requested state has substantial grounds for believing that the request for mutual assistance has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion or that that person's position may be prejudiced for any of these reasons.²⁷⁰ Some others suggest that other human rights concerns,²⁷¹ including the death penalty,²⁷² also provide a basis for refusal to cooperate.²⁷³ The practice of states, and the reluctance of some to cooperate in the face of risks of rights violations in the war on terror is discussed at Part B.

4A.2.3 Cooperation and the Security Council

In certain circumstances, states may consider that such 'cooperative' procedures would be futile or ineffective. Examples may include where a state whose cooperation is needed is believed to be involved in committing or concealing the crimes in question (as addressed by the ICJ in *Lockerbie*),²⁷⁴ or where the urgency of the situation – due for example to well founded fear of repetition – demands swifter action than the normal cooperation process would provide. States may not however simply circumvent the cooperation process and unilaterally embark on coercive 'enforcement' action directly on another state's territory, without falling foul of international legal obligations owed to the

269 While extradition involves persons within the territory or jurisdiction of the extraditing state, in respect of mutual assistance the person affected may have not at any time been physically within the state's territory or subject to its 'jurisdiction,' upon which the applicability of human rights treaties depends: see Chapter 7A2. However, assistance rendered in the knowledge that it may contribute to a violation of human rights in another state may offend 'the general spirit' of human rights conventions (*Soering v. United Kingdom* (Appl. No. 10438/88), Judgment of 7 July 1989, *Series A*, No. 161, para. 87) or amount to aiding or assisting, as discussed in Chapters 3 and 10.

270 Article 8 of the European Convention on the Suppression of Terrorism confirms that there is no obligation to afford mutual assistance in these circumstances.

271 See also UN Model Treaty on Mutual Assistance in Criminal Matters, which envisages refusal to cooperate in case of persecution, double jeopardy (*non bis in idem*) and unfair measures to compel testimony, Articles 4(1)(c)-(e).

272 The commentary to Article 4 of the UN Model Treaty on Mutual Assistance in Criminal Matters notes that states may wish to add other grounds for refusal, e.g., 'the nature of the applicable penalty (e.g., capital punishment)'.

273 Some treaties and legislation have a much reduced basis for refusal in mutual assistance, limited solely to 'where execution of the request would be contrary to national security, public interest or sovereignty'.

274 *Questions of the Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Provisional Measures, Order of 14 April 1992, ICJ Reports 1992, p. 3.

other state (assuming it did not consent)²⁷⁵ and to individuals under human rights law.²⁷⁶ In such circumstances, it should be recalled that, if faced with a situation in which normal cooperation procedure would be ineffective, states can call upon the Security Council to authorise criminal law enforcement action in the name of international peace and security,²⁷⁷ including where necessary through the use of force.²⁷⁸ Force employed must always be no more than necessary to achieve the objective, in this case the apprehension of suspects or securing vital evidence.

The experience of the ICTY provides an example of Security Council authorisation for NATO enforcement of arrest warrants internationally. Although that experience concerned the transfer of persons to an international tribunal established by the Council, there is nothing to preclude the Council doing the same in the future in respect of another national or international court seeking to ensure that justice is done and international peace and security respected.²⁷⁹ In the context of international terrorism, in which the Council has called on all states to cooperate, such action would constitute a form of enforcement of its own resolutions.²⁸⁰

The enforcement of international law is never perfect, and international criminal law is no exception. However, the unprecedented international consensus generated post-9/11 as regards the need to combat international terrorism and render more effective international cooperation in criminal matters, if directed towards the apprehension of suspects and effective collective enforcement of international criminal law, could have had – or could yet have – potentially positive repercussions for the international legal order.

275 If a state seeks to effect law enforcement on another state's territory without its consent, it may violate the principle of non-intervention and the prohibition on the use of force: see Chapter 5. On the unlawfulness of such enforcement including 'hot pursuit' see *Oppenheim's International Law*, *supra* note 3 at p. 387.

276 If individuals are transferred for the purposes of criminal process in a way that simply circumvents the extradition process, violations of individual rights as well as obligations owed to other state parties to the extradition treaties may arise. See Chapter 10 for examples.

277 The exceptions or grounds for refusal in extradition proceedings do not apply to transfer to international tribunals. See Duffy, 'Constitutional Compatibility', *supra* note 182, p. 20.

278 The Council has authorised coercive action to apprehend suspects to the ICTY. See also SC Res. 837 (1993), 6 June 1993, UN Doc. S/RES/837 (1993) in relation to Somalia. See Chapter 5, para. 5A.2.2.

279 Alternative provision would be made by the Council for human rights protection if extradition were to be circumvented – as was the case, *e.g.*, to surrender before the ICTY.

280 See, *e.g.*, SC Res. 1373 (2001), *supra* note 132.

4B CRIMINAL JUSTICE AND INTERNATIONAL TERRORISM POST-9/11

The second part of this chapter sketches out international practice in relation to criminal law responses to international terrorism since 9/11.²⁸¹ In light of the legal framework set out in the first section of this chapter, it is indisputable that egregious crimes under international and national law were committed on September 11, 2001 and have been committed through other serious acts of international terrorism since then.²⁸²

Most straightforwardly, mass murder and other serious bodily offences contravened US and other domestic criminal laws. While dispute may arise as to whether certain acts of terrorism meet the criteria for crimes against humanity, it is submitted that attacks such as the September 11 attacks epitomise the sort of massive, systematic and ultimately devastating attack on civilians embodied in the concept of crimes against humanity.²⁸³ Much more doubtful is the possibility of them constituting war crimes, given the failure to establish or even assert an 'armed conflict' legally speaking,²⁸⁴ or even aggression, given the lack of state responsibility.²⁸⁵ However, specific treaty crimes, such as hijacking or terrorist bombing, may provide another source of applicable criminal law, at least so far as they are implemented into the prosecuting state's domestic law.²⁸⁶ Serious doubts would surround the legitimacy of any prospective prosecution for terrorism on the basis of its status as a crime under international – as opposed to domestic – law.²⁸⁷ Prosecution for terrorism offences may proceed under national law, though this depends

281 The criminal justice framework as set out in the foregoing chapter applies also potentially to serious crimes committed in the name of counter-terrorism. This chapter focuses on the prosecution of terrorism itself, *but see* 4B5 below and Chapters 6-10 for examples of criminality in the war on terror, especially 7B14 and 10.

282 Cf less serious acts that have been prosecuted as 'terrorism': *see* Chapter 2 on lack of clarity as to terrorism and Chapter 7B5 for examples.

283 Despite the controversies around the policy element discussed in Part A, it is submitted that the level of coordination and intent attending the September 11 attacks would meet any ordinary interpretation of the term 'organisational policy'. This may be less clear as regards disparate attacks in the name of a dissipated al-Qaeda more than a decade on, however, or the isolated acts of terrorism by individuals pursuant to the broad ideology underpinning al-Qaeda. *See* Chapter 6B.1.

284 *See* Chapter 6B.1 addressing in more detail the difficulty under current international law of conceptualising the relationship between states and international criminal networks as 'armed conflict', and on 9/11 as not initiating an armed conflict. On war crimes, *see* above A.1.1.2.

285 *See* Chapter 3 on the absence of state responsibility for these crimes. On aggression as a crime, *see* 4A.1.13 above.

286 *See* Chapter 2 for the treaty crimes relating to terrorism. *See also* *Galić Appeals Decision*, *supra* note 103.

287 On the lack of clarity around a definition, *see* Chapter 2. On the legality issues arising, *see* 'Nullem crimen sine lege', *see* Chapters 4A.1.2.2 and 7A.4.3.5. Issues relating to respect for human rights principles in the criminal context post-9/11 are highlighted in Chapter 7B.4.

on offences being clearly defined in domestic law, and the accused's individual responsibility being established.

As regards questions of jurisdiction, it is also relatively uncontroversial that many, or indeed all, states are entitled to exercise jurisdiction over certain acts of international terrorism that amount to crimes under international law.²⁸⁸ Various national and international jurisdictional possibilities exist for the prosecution of these crimes. Principles of criminal law preclude certain bars to prosecution, and facilitate the accountability of the full range of perpetrators of those attacks. In short, the normative framework highlighted in Section A provides a promising starting point for addressing crimes such as the September 11 atrocity through the international enforcement of criminal law.

The practice of criminal justice post-9/11 is as diverse as the legal systems within which it unfolds, and meaningful generalisations are, as ever, difficult. What this chapter seeks to do is to highlight developments in several states and on the international level which, it is suggested, may indicate certain features of the evolving criminal justice response to terrorism since the beginning of the 'war on terror,' and raise questions as to its implications.

It considers first the remarkable paucity of high level prosecutions and the apparent neglect of criminal justice in the immediate aftermath of 9/11, which has given way to a more active role for criminal justice, and a burgeoning body of terrorism trials, around the globe. The preference in practice for national over international judicial responses is explored together with the potential relevance of international justice for international terrorism in the future.

The changes and innovations in criminal laws around the globe, pursuant to an emphasis on the 'preventive' utility of criminal law in the struggle against terrorism, have included new terrorism and 'associated' offences (such as 'membership' of a terrorist organisation, 'support' or 'apology'), as well as the loosening of modes of liability, raising numerous questions regarding implications for the criminal law. These developments have been coupled by the introduction of exceptional procedures and approaches to principles of criminal law in the terrorism context. An area of considerable constructive legal industry, but where challenges remain acute, is in relation to the law and practice of international cooperation. These issues are considered in turn below.

Finally, contrasting starkly to the activity in relation to the prosecution of international terrorism stands the extremely limited application of criminal law to hold to account those responsible for crimes committed in the name of the 'war on terror'. The chapter ends with brief consideration of the 'other

²⁸⁸ See the various theories of jurisdiction discussed above, Chapter 41.3. Note also that in certain circumstances states may be obliged, not simply entitled, to exercise jurisdiction.

side of the coin' in terms of the application of criminal law to international crimes committed in the name of security and counter-terrorism.

4B.1 PROSECUTIONS IN PRACTICE POST-9/11

4B.1.1 Paucity of prosecutions post-9/11

Of the features of international criminal practice in the immediate aftermath of 9/11, perhaps the most noteworthy was its scarcity. In late September 2001 President Bush stated that: 'We will direct every resource at our command, every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war to the disruption and defeat of the global terror network.'²⁸⁹ Particular emphasis was lent by other leaders to the objective of ensuring that 'justice' is done.²⁹⁰ The Security Council, for its part, underscored the justice objective in the immediate wake of 9/11 and has reiterated it repeatedly since then.²⁹¹ However, despite the international commitment in principle and widespread detentions in practice, there were strikingly few prosecutions.

In the United States, the natural forum for criminal prosecutions in relation to 9/11, it is well known (and explored elsewhere in this study), that thousands of persons were detained pursuant to the broadly framed 'war on terror' and described, *inter alia*, as dangerous criminals,²⁹² yet in the years following 9/11 there were relatively few charges and less completed trials. It was several years after the attacks, in April 2004, that the first conviction in respect of 9/11 was handed down (which was subsequently quashed).²⁹³ At least at first,

289 J. Harris, 'President Outlines War on Terrorism, Demands Bin Laden be Turned Over', *Washington Post*, 21 September 2001.

290 See, e.g., the UK Prime Minister describing the UK's role as to 'construct a consensus behind a broad agenda of justice and security' (Speech in Sedgefield constituency, 5 March 2004). See T.R. Reid, 'Blair Embraces a New Role as a Chief of War on Terror', *Washington Post*, 9 October 2001, reporting UK Prime Minister: 'It is a fight for freedom ... And I want to make it a fight for justice, too' See the use of the language of 'justice' in the context of the Bin Laden killing at Chapter 9.

291 See, e.g., SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), para. 3, where the Security Council '[c]alls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks'.

292 See, e.g., Former Defense Secretary Donald Rumsfeld describing Guatánamo detainees as 'terrorists, trainers, bomb makers, recruiters, financiers ... would be suicide bombers, probably the 20th 9/11 hijacker'. See S. Taylor Jr., 'Opening Argument – Falsehoods About Guantanamo', 4 February 2006 (updated 22 March 2011), available at: <http://www.nationaljournal.com/magazine/opening-argument-falsehoods-about-guantanamo-20060204>.

293 Mounir al-Motassadek was convicted and sentenced in 2005 to seven years in jail for membership of al-Qaeda. He appealed, and in November 2006 was convicted of being an accessory to over 3,000 counts of murder. Abdelghani Mzoudi was cleared of all charges in 2004. 'Profile: Mounir al-Motassadek', *BBC*, available at: <http://news.bbc.co.uk/1/hi/>

it seemed that the criminal law had effectively been displaced by security detention as the normal procedure for dealing with persons suspected of involvement in international terrorism.²⁹⁴

A decade on, the picture is considerably different, with many terrorism trials underway or having concluded, as discussed in the next section. However, it remains the case that strikingly few of the many persons responsible for planning and executing the enormous and complex September 11 attacks, and none of the highest level architects, are among the persons prosecuted and convicted to date,²⁹⁵ either in the US or elsewhere. While the neglect of criminal law was far more pronounced in the first few years after 9/11, it would be overly optimistic to relegate the issue as one of purely historical significance.²⁹⁶

Many factors may contribute to the dearth of prosecutions, in particular at the highest levels. Among them are the undoubted investigative and evidentiary challenges that cases such as these pose. Illicit transnational networks are difficult to penetrate, and intelligence reports, gathered for different purposes, often lack the evidentiary credentials to prove guilt beyond reasonable doubt and pose security challenges. Other challenges relate to the international nature of the crimes and difficulties encountered in securing effective international cooperation, explored further below.²⁹⁷ However, at times questions have arisen as to whether all investigative and prosecutorial avenues have been exhausted. An example from within the US is in the 2010 'Guantanamo Task Force' report which highlighted various potential sources of evidence that had not been tested or evaluated in relation to 9/11.²⁹⁸ A key factor in the paucity of proceedings must surely be the apparent lack of political will – particularly evident at the early stages of the war on terror – to address international terrorism as a criminal law enforcement challenge, and the emphasis that has been placed on the military nature of the (thus named) war

world/europe/2223152.stm.

294 See comments on the relationship between criminal law and other areas below.

295 See, e.g., 'Khalid Shaikh Mohammed (Guantánamo 9/11 Attacks Trial)', *The New York Times*, available at: http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed.

296 See concerns regarding a de-emphasis of criminal law in resort to the 'alternatives' of targeted killings, military detention or other measures discussed below.

297 See 4.B.1. 2 'Terrorism Trials' below.

298 Guantanamo Task Force Report, 2010: '[T]he Task Force identified a number of avenues for strengthening important cases and developing them for prosecution. For example, the Task Force determined that there were more than a thousand pieces of potentially relevant physical evidence (including electronic media) seized during raids in the aftermath of the September 11 attacks that had not yet been systematically catalogued and required further evaluation for forensic testing. There were potential cooperating witnesses who could testify against others at trial, and key fact witnesses who needed to be interviewed. Finally, certain foreign governments, which had been reluctant to cooperate with the military commissions, could be approached to determine whether they would provide cooperation in a federal prosecution....'

on terror.²⁹⁹ Many of those suspected of involvement in the September 11 attacks were – and continue to be – treated as enemy combatants and either killed or subjected to ‘security’ detention on uncertain legal bases.³⁰⁰ Detention of allegedly high-level al-Qaeda operatives focused on intelligence gathering not on securing criminal trials,³⁰¹ in line with the priority role afforded to intelligence agencies rather than law enforcement agencies, with implications for admissible evidence.³⁰² This intelligence-gathering focus led one German intelligence source to note that ‘we are more focused on prosecuting terrorists while the United States is mainly concerned with preventing terrorism.’³⁰³

Although, as the practice below illustrates, there are now increasing attempts by the US to use criminal law in counter-terrorism, the military paradigm continues to cast a long shadow. Most obviously this is seen in the ‘military’ justice of military commissions in use in the US and a number of other states.³⁰⁴ It is also clear from the increasing numbers of targeted killings of alleged high-level al-Qaeda suspects, which suggests a continued de-emphasis, or a by-passing, of the criminal law enforcement machinery for those alleged to have the greatest level of responsibility for terrorism but will never be put on trial.³⁰⁵ Long term military or ‘security’ detention lurks as an alternative to criminal law where, as the ‘Guantanamo Task Force’ determined in 2010, prosecutions are not ‘feasible’ (in most cases, due to lack of available evidence, which would normally lead to an individual’s release, not indefinite detention).³⁰⁶ In the event that individuals are subjected to criminal process

299 This was particularly so post-2001 but remains the case to some extent at time of writing in 2013 light of widespread targeted killings. See, e.g., John Brennan, Assistant to the President for Homeland Security and Counterterrorism, ‘The Ethics and Efficacy of the President’s Counterterrorism Strategy’, April 2012, text available at: <http://www.cfr.org/counterterrorism/brennans-speech-counterterrorism-april-2012/p28100>.

300 This is the definition of the situation of the Guantánamo detainees given by the UK Court of Appeal in *R (Abbasi and another) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 159 (hereinafter ‘*Abbasi*’), para. 64.

301 For those detainees who may, eventually, be tried, the willingness to detain for extended periods without normal respect for the right to trial without undue delay has reduced the momentum that usually attends the criminal investigative and prosecutorial process.

302 See, e.g., Report of the Special Rapporteur, M. Scheinin, Intelligence agencies and their oversight in the fight against terrorism A/HRC/10/3 (paras. 25-78); and A/HRC/14/46, and ‘Assessing Damage, Urging Action’, Report of the Eminent Jurists Panel, 2009 (hereinafter ‘Eminent Jurists Report’). See also Chapter 10 on rendition and B.4 below on the implications of human rights abuses for the criminal process.

303 See ‘Terror Case sets Washington and Berlin at Odds’, *Christian Science Monitor*, 9 February 2004.

304 See 4B.2.2 below.

305 Chapter 6B.2.2.

306 ‘While the reasons vary from detainee to detainee, generally these detainees cannot be prosecuted because either there is presently insufficient admissible evidence to establish the detainee’s guilt beyond a reasonable doubt in either a federal court or military commission, or the detainee’s conduct does not constitute a chargeable offense in either a federal

and eventually released, official statements from within the US administration have made clear they may then still be subject to administrative detention as enemy combatants thereafter.³⁰⁷

Widespread use of detention without (or in lieu of) trial for suspected terrorists, and other non-criminal law 'alternative' preventative measures, has been pervasive far beyond the US, as explored in other chapters of this study.³⁰⁸ The side-stepping of criminal law and the protections that it entails has been criticized in numerous states in the context of counter-terrorism.³⁰⁹ Reflections of this approach are seen in Australia, where control orders have been used on an individual after his criminal sentence was served, raising questions of double punishment.³¹⁰

While criminal law is clearly not the only approach that may be used against terrorists, one of the implications of the overuse of a 'wartime' detention regime or other measures in lieu of criminal law has been a decline in the perceived significance of criminal law from both the authorities' perspective and that of affected individuals.³¹¹ If evidence is not (or not yet³¹²) available, or if individuals are found not guilty, or are sentenced and have served out their sentences, they have nonetheless been held, in some cases with less

court or military commission.' Guantanamo Task Force Report 2010, p. 24.

307 *E.g.*, Hamdan, who lent his name to the Supreme Court decision *Hamdan v. Rumsfeld*, *supra* note 2, was charged with 'conspiracy and providing material support for terrorism.' Charges were dropped on June 5, 2007 and he was then held, without being charged, as an enemy combatant. He was then re-charged on July 21, 2008, and found guilty of 'providing material support' to al-Qaeda, and was sentenced to five-and-a-half years of imprisonment, having already served five years of the sentence at the time, before this conviction was set aside. A Pentagon spokesman promptly noted that Hamdan may still be considered an 'enemy combatant' upon completing his sentence and detained indefinitely. Despite the threat to detain him indefinitely, the U.S. in November 2008 transferred him to Yemen to serve out the remainder of his sentence and he was released January 8, 2009. *See, e.g.*, 'Bin Laden driver could be held by U.S. after sentence', *CNN*, 7 August 2008, available at: <http://www.cnn.com/2008/CRIME/08/07/hamdan.trial/index.html>.

308 *See* Chapter 7B.7 'Detention' and 'Control Orders'.

309 *See, e.g.*, in the UK, speech by David Davis, MP in the House of Commons: 'Let me recap. Rangzieb Ahmed should have been arrested by the UK in 2006, but he was not. The authorities knew that he intended to travel to Pakistan, so they should have prevented that; instead, they suggested that the ISI arrest him. They knew that he would be tortured, and they arranged to construct a list of questions and supply it to the ISI ...'. ; *see also* 'Labour fixated on control orders, which operated like a sieve, and prolonged pre-charge detention which is unnecessary.' 'Terror Convictions Plummet', *The Independent*, 26 November 2010.

310 Former Guantanamo detainee, Australian David Hicks, who pleaded guilty and completed his sentence in Australia, discussed in Saul, 'Criminality and Terrorism', *supra* note 12.

311 *See e.g.* comment on perceived impurity in Chapters 7B.7 and 10. On the so-called war on al-Qaeda as not an armed conflict properly understood, *see* Chapter 6. For the implications more broadly than for criminal law, *see* 'War and Human Rights' in Chapter 7B.3.

312 Guantanamo Task Force Report, p. 22 (noting that individuals can continue to be held as persons 'designated for continued detention' while evidence is gathered through 'further exploitation of the forensic evidence' or 'other detainees may cooperate with Prosecutors').

protections and in worse conditions than if they were serving sentences pursuant to the criminal process.³¹³ The imperative towards prompt investigation is therefore diminished where individuals can be subject to prolonged detention until evidence is acquired. Practice continues to raise important questions as to the priority afforded to the pursuit of criminal justice, and its inter-relationship with other areas of the legal framework, in the fight against international terrorism.

4B.1.2 Terrorism Trials

Numbers of prosecutions for terrorism in the US, as elsewhere, have grown exponentially in recent years, as discussed in the next section.³¹⁴ Numbers of prosecutions or convictions do not themselves however reveal much as regards effective law enforcement for counter-terrorism. This is particularly so where the nature of new 'terrorism' laws around the globe, and their broad reaching use and abuse, have meant that terrorist convictions have been rendered for a broad range of conduct from bombing to blogging, some of which may not be a response to what we commonly understand by terrorism at all.³¹⁵

It is, however, undoubtedly the case that there has been a reinvigorated approach to the use of criminal mechanisms, and a burgeoning of terrorism trials. While it is impossible to do justice to the range of international practice here, some examples of state practice are worth highlighting.

313 There are other lawful bases for detention but these tend to be short term, *e.g.*, pursuant to deportation, or in a genuine armed conflict situation *see* Chapter 7A7 and for IHL detentions Chapter 6.

314 One survey cites 2,934 arrests and 2,568 convictions in the United States. 'Terrorist Trial Report Card-Center on Law and Security – NYU Law', The Center on Law and Security, New York University School of Law, available at: <http://www.lawandsecurity.org/Publications/Terrorism-Trial-Report-Card>; *see also* 'Introduction to National Security Division Statistics on Unsealed International Terrorism and Terrorism-Related Convictions', 26 March 2010, National Security Division, available at: <http://jnsfp.files.wordpress.com/2010/03/march-26-2010-nsd-final-statistics.pdf> (providing statistics on over 400 unsealed international terrorism and terrorism-related convictions from 11 September 2001 – 18 March 2010). *See also* AP report, 'Rightly or Wrngly, Thousands convicted', below.

315 'Rightly or wrongly, thousands convicted of terrorism post-9/11', AP, 9 April 2011, available at: http://www.msnbc.msn.com/id/44389156/ns/us_news-9_11_ten_years_later/t/rightly-or-wrongly-thousands-convicted-terrorism-post-/visited 12 December 2012. The report identifies 119,044 anti-terror arrests and 35,117 convictions in 66 countries; 'At least 35,000 people worldwide have been convicted as terrorists in the decade since the Sept. 11 attacks on the United States. But while some bombed hotels or blew up buses, others were put behind bars for waving a political sign or blogging about a protest.' *See also Terrorist Trial Report Card, September 11, 2001-September 11, 2009*, Center on Law and Security, New York University School of Law, January 2010.

In the United States, many terrorism trials are underway concerning involvement in al Qaeda or associated groups, with some trials completed and judgments rendered.³¹⁶ A striking characteristic of US criminal practice post-9/11 has been the resort to military commissions, as discussed in Chapter 8.³¹⁷ The rejection of the normal courts and generally applicable principles and procedures of criminal law is a common characteristic of post-9/11 terrorism trials globally, as discussed below.³¹⁸ However, despite questions about the suitability of United States' federal courts for trying international terrorism, trials have in fact also proceeded in regular courts.³¹⁹

One characteristic of note from this practice is the high number of convictions that have resulted from guilty pleas; on one estimate 80% of terrorism trials in the US involve such pleas.³²⁰ Trials then proceeded according to an expedited process, such that the normal evidentiary requirements for proving the case do not apply.³²¹ Examples have included the case against the so-called 'twentieth hijacker' who pleaded guilty to conspiracy in respect of the 9/11 attacks.³²² Questions have arisen as to the reliability of such pleas, particularly where the alternative for the individual is not a trial and the prospect of acquittal but arbitrary indefinite detention as an 'enemy combatant'.³²³

316 See, e.g., *US v. Abu Ali*, 528 F.3d 210, 269 (4th Cir. 2008); S. Vladeck, 'Terrorism Trials and the Article III Courts After Abu Ali', 88 Tex. L. Rev. 1501 (2010); 'Would-Be Plane Bomber Is Sentenced to Life in Prison', *New York Times*, 16 February 2012, available at: <http://www.nytimes.com/2012/02/17/us/would-be-plane-bomber-sentenced-to-life.html> (a life sentence was given for the attempt to blow up a Detroit-bound airliner with explosives concealed in his underwear on Christmas Day in 2009); *United States of America v. Abdulmutallab* (2012) US District Court Eastern District of Michigan Southern Division (Case No. 10-CR-20005).

317 See Chapter 8, military commission proceedings.

318 Section 4.B.2 on modified procedures below.

319 Bush and others asserted that regular courts were unsuitable. See debate in Stephen I. Vladeck, *Terrorism Trials and the Article III Courts After Abu Ali*, 88 Tex. L. Rev. 2010.

320 L. Dervan, 'The Surprising Lessons from Plea Bargaining in the Shadow of Terror', (2010) 27(2) *Georgia State University Law Review*, p. 239. The report indicates that a similar situation arises with terrorism trials in Israel.

321 See, e.g., 'Walker Lindh indicted on 10 counts', *CNN*, 6 February 2002; "'American Taliban' jailed for 20 years', *CNN*, 4 October 2002. Lindh was accused of being a terrorist trained by al-Qaeda, who conspired with the Taliban against Americans. He was not accused of conduct related directly to 9/11.

322 See, e.g., *United States of America v. Zacarias Moussaoui*, the 'twentieth hijacker' pleaded guilty to conspiracy and membership of an illegal organisation. See 'Suspected al Qaeda Operative Charged with Planning Terrorist Actions', US Department of State Press Release, 21 December 2001; J. Berger, 'First Man Charged for September 11 Attacks: Muslim Radicalised in London Faces Death Penalty', *The Guardian*, 12 December 2001, available at: <http://www.guardian.co.uk/world/2001/dec/12/september11.usa1>. For the indictment, see <http://www.justice.gov/ag/moussaouiindictment.htm>.

323 See, e.g., T. Yin, 'Coercion and Terrorism Prosecutions in the Shadow of Military Detention', 2006 BYU L. Rev. 1255; see also C. Takei, 'Terrorizing Justice: An Argument that Plea Bargains Struck Under the Threat of "Enemy Combatant" Detention Violate the Right to Due Process', (2006) 47 *Boston College Law Rev.* 3, p. 581 and L. Dervan, 'The Surprising

Another characteristic of the charges brought in the US, foreshadowed by the comments in the preceding section, is that with few notable exceptions, they have not related to direct involvement in the September 11 attacks themselves, and have rarely been brought against persons accused of being high level al-Qaeda operatives.³²⁴ Instead charges lodged in the US have related almost exclusively to broad forms of 'material support' for al-Qaeda³²⁵ (in most cases based on evidence of periods spent at 'training camps' in Afghanistan which has been found insufficient by German courts),³²⁶ and 'conspiracy' to commit acts of terrorism or conspiracy to provide material support for terrorist organisations.³²⁷

The issues this raises were highlighted when one of the first convictions before a military commission was subsequently overturned.³²⁸ In *Hamdan v. United States*, the accused had been prosecuted for 'material support for terrorism' as a war crime, yet the Appeal court found that no such crimes existed, in national or international law, at the time of the conduct in question.³²⁹

One example from US practice that may be illustrative both of the potential of terrorism trials, and some of the challenges arising, is the case of Ahmed Omar Abu Ali. Abu Ali was convicted by a US federal court of nine counts of membership of a terrorist organisation and planning terrorist attacks.³³⁰ The accused, a victim of extraordinary rendition who was allegedly interrogated and abused by Saudi Arabian officials in cooperation with US agents, first sought unsuccessfully to have his indictment dismissed due to delay in presenting him to a court.³³¹ The majority declined, as the relevant rules on

Lessons', *supra* note 320.

324 Only a few alleged of high-level involvement in al-Qaeda have been named for trial by military commission, in most cases almost a decade after their detention. 'Military Commissions', Human Rights First, available at: <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions>. The US Department of Defense announced that the Office of Military Commissions prosecutors have sworn charges against five individuals detained at Guantanamo Bay: Khalid Sheikh Mohammed, Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. 'DOD Announces Charges Sworn Against Five Detainees Allegedly Responsible for 9/11 Attacks', DoD Press Release, 31 May 2011, No. 458-11, available at: <http://www.defense.gov/Releases/Release.aspx?ReleaseID=14532>.

325 See discussion of broad reaching approaches to material support or conspiracy below.

326 See the case of *Mzoudi*, this chapter, para. 4B.1.1.1 above. See other US cases available at: <http://writ.news.findlaw.com/terrorism.html>.

327 *R v. Elomar & Others* [2010] NSWSC 10, paras. 147-78 (concerning Mohammed Omar Jamal)) is discussed in Saul, 'Criminality and Terrorism', *supra* note 12.

328 *Hamdan v. United States*, Case No. 11-1257, US courts of Appeal for the District of Columbia, 16 October 2012.

329 *Ibid.*

330 *US v. Abu Ali*, *supra* note 316. For discussion see Vladeck, 'Terrorism Trials and the Article III Courts after Abu Ali', *supra* note 316.

331 He alleged the lack of 'prompt presentment' violated the *Speedy Trial Act* and his Sixth Amendment right to a speedy trial.

'prompt presentment' were found only to apply to capture by domestic authorities. However, a dissent questioned whether the criteria was not met where the authorities were actively involved.³³²

As in many other cases post-9/11,³³³ this was followed by several other (ultimately unsuccessful) challenges. Petitions focused on the admissibility of evidence obtained through torture,³³⁴ and the lack of access to – and opportunity to confront – evidence against him.³³⁵ The court ruled that the Government could use the 'silent witness' procedure to disclose classified information contained in communications to the jury at trial, though Abu Ali himself would only be able to see the redacted version of the documents. The case highlights both procedural adaptations, such as the use of evidence by video link or more controversially 'silent witnesses' that arise in the cases, as well as the challenges that result from allegations of violations (torture and ill-treatment or undue delay) at the pre-trial stage.³³⁶ It also illustrates the difficult balancing determinations facing judges, and the momentous challenges facing an accused in cases of this nature, particularly where evidence is obtained at the hand of foreign officials.³³⁷

Looking beyond the US, several European criminal law systems have developed their experience of prosecuting international terrorism in the past decade. In the immediate aftermath of 9/11, it was Germany that took a leading role in promoting the criminal justice response to 9/11, reflecting the locus of much of the planning of 9/11 on German soil. The experience of German courts speaks both to the tenacity of the criminal process and to the challenges arising.³³⁸ In February 2003 the first conviction arising out of the September 11 attacks was handed down by a Hamburg court to a student for his role in supporting and organising logistics for the Hamburg branch of al-

332 It also held: '(1) U.S. law enforcement officials did not act in a 'joint venture' with Saudi officials in the arrest, detention, or interrogation of the defendant, and (2) Saudi law enforcement officials did not act as agents of U.S. law enforcement officials, and therefore *Miranda* warnings were not required.' See however the dissent of J. Motz in the appeal court (Judge Motz dissented saying that US officials proposing questions and being present when they are asked constitutes 'active' or 'substantial' participation). Note similar rationale refusing to dismiss the case based on the violations having been committed by foreign personnel in *R v. Ahmed* in English courts, below.

333 See Chapter 8 on military commissions and modified procedures at 4B2.3 below.

334 Judgment, p. 23. See 4B.2.3 below.

335 See 'Issues of Evidence and Procedure' at 4B.2.3 below; he challenged the 'silent witness' procedure where evidence was made available to the jury but not to him.

336 See 4B.2.3 below and 4B.2.4.

337 It is described as the first case in which US courts had to rely in large part on evidence obtained by foreign officials; <http://www.washingtonpost.com/wp-dyn/articles/A43940-2005Feb22.html>. Where recognised rights violations have arisen at the hand of other states, the accused is therefore denied the protections that would normally apply.

338 See, e.g., C. Safferling, 'Terror and Law: German Responses to 9/11', (2006) 4 *Journal of International Criminal Justice* 1152-165; T. Kost, 'Mounir El Motassadeq – A Missed Chance for Weltinnenpolitik?', *German Law Journal*, (2007) Vol. 08 No. 04.

Qaeda; the court found him guilty of membership of a terrorist organisation and 3,045 counts of accessory to murder in the September 11 attacks.³³⁹

However, the conviction was quashed by the Federal Supreme Court of Germany and the case remanded for retrial, on the basis that the US had refused to share crucial, potentially exculpatory evidence with the German courts.³⁴⁰ The Court famously highlighted what it described as the dangers of allowing the criminal process to be manipulated by a foreign state withholding intelligence information in circumstances where its own self-interest is at stake.³⁴¹ The US's unwillingness to share information that was critical to the trial of the individual was harshly criticised by lawyers and the courts.³⁴²

Motassadeq was re-tried and convicted of 'membership in a 'terrorist organization',³⁴³ but that conviction was also rejected on appeal, and Germany's Federal Constitutional Court ordered his release.³⁴⁴ It was extremely close to the end of the line for the criminal process when the German Federal Supreme Court ruled that the evidence available was sufficient to prove that Motassadeq knew about and was involved in the preparation of the plan to hijack the planes, and found him guilty of accessory in 246 counts of murder and he was sentenced to 15 years in prison.³⁴⁵ Another German trial had

339 Mounir Motassadeq, a 28-year-old Moroccan, was sentenced to 15 years' imprisonment in February 2003. See 'Motassadeq Convicted For Role in Sept. 11th Attacks', *Washington Post*, 20 February 2003. See discussion in C. Safferling, 'Terror and Law: German Responses to 9/11', (2006) 4 *Journal of Int'l Criminal Justice* 1152-65.

340 Decision of the Federal Supreme Court of Germany, 3 March 2004, Strafverteitiger (BGH), StV 4/2004, of February 7, 2006. The evidence withheld was witness testimony or transcripts of statements during interrogation by, among others, the person suspected of being the ringleader of the relevant branch of al-Qaeda.

341 *Ibid.*

342 Lawyers alleged that '[s]tatements [the US authorities] kept secret led to a guilty verdict'. See 'Judge frees 9/11 suspects in Germany. Ruling could undo only conviction', *Washington Post*, 12 December 2003. When some of the statements by key witnesses that had been withheld during trial were eventually disclosed – following the quashing of the conviction – they included statements that the accused had not been privy to the 9/11 plot: see M. Landler, 'U.S. Report Adds Fog to 9/11 Retrial', *New York Times*, 12 August 2004. On German frustration with US non-cooperation see e.g. '9/11 Suspect Could Face Reduced Charges', *Washington Post*, 5 February 2003; 'Judge Frees 9/11 Suspect in Germany', *Washington Post*, 12 December 2003; 'September 11 Terror Suspect Acquitted', *Deutsche Welle*, 6 February 2004.

343 *Motassadeq*, Judgment, Higher Regional Court of Hamburg, August 19 2005.

344 Federal Constitutional Court, (*Bundesverfassungsgericht* – BverfG), decision of 10 January 2007, Reg. no.2 BvR 2557/06, available at: www.bundesverfassungsgericht.de.

345 Decision of November 15, 2006. On January 8, 2007, he was sentenced by the *Oberlandesgericht* Hamburg to 15 years in prison. On May 2 the Federal Court of Justice of Germany rejected a plea for revision.

ended in acquittal one month earlier revealing similar challenges.³⁴⁶ On the basis of lack of evidence that the accused had any prior knowledge of the attacks, the Court acquitted, but took the unusual step of noting that it was not convinced of the defendant's innocence but unable to reach any other decision given the limited evidence available to it.³⁴⁷ These cases served as a critical early illustration of evidentiary challenges and the importance of improving intelligence sharing between the US and European states.

Spain, for its part, has a long tradition of terrorism trials stemming from its experience with the Euskadi Ta Askatasuna (ETA), with an estimated 140 convictions for terrorism each year.³⁴⁸ As regards efforts to pursue criminal proceedings in respect of the September 11 attacks, various international arrest warrants were issued by Spanish courts including some high level suspects – notably including Osama bin Laden.³⁴⁹ However, few cases proceeded beyond the warrant stage for want of international enforcement. Some that did, such as that of the al-Jazeera correspondent remanded in custody, related not to direct involvement in the attacks but to support or, membership of, or recruitment to, al-Qaeda.³⁵⁰

By contrast, the Spanish criminal process moved promptly in response to the attacks on Spanish soil, the so-called '11-M' attacks that claimed 191 lives and injured a further 1,856 victims on 3 March 2007. While not without its critics, that process involved a relatively prompt criminal investigation, and prosecution of complex terrorist crimes involving multiple accused (29 were brought to trial), which in most cases resulted in convictions.³⁵¹ In some cases,

346 Reportedly the evidence was made available to German authorities but permission to share with the court not granted. See P. Finn, '9/11 Suspect could face reduced charges. German judge says he understands alleged accomplice's claims of unfair trial', *Washington Post*, 5 February 2003; 'September 11 Terror Suspect Acquitted', *Deutsche Welle*, 6 February 2004.

347 Abdelghani Mzoudi, who was charged in a similar way to Motassadeq, was freed by a German court in December 2003 after a letter from the Federal Office of Criminal Investigation, the BKA, raised serious doubts that he had any prior knowledge of the attacks. See 'German Court Frees 9/11 Suspect', *BBC News*, 11 December 2003.

348 Associated Press Report on Terrorism Trials, 4 Sept. 2011.

349 See 'Spain Indicts Osama bin Laden on 9/11 Charges', *Associated Press*, 17 September 2003, reporting the indictment by investigative magistrate Baltasar Garzon of a total of 35 people for terrorist activities connected to al-Qaeda. The Spanish indictment (based on the principle of universal jurisdiction for acts such as those of 9/11) represents the first known indictment of bin Laden for the 2001 terrorist attacks, while in the United States, bin Laden was charged with the 1998 bombings of the US embassies in Kenya and Tanzania.

350 R. Tremlett, 'Al-Jazeera man faces terror trial', *The Guardian*, 12 September 2003. The suspect, Tayssir Alouni, conducted exclusive interviews with Osama bin Laden during the Afghanistan war and is reportedly accused of membership of a terrorist organisation.

351 On 31 October 2007, the 'Audiencia Nacional' acquitted eight and convicted the others for various levels of participation in the attacks, upheld on 17 July 2008. The judgement served the 'historical clarification' role of criminal trials, by clarifying the cause of the attacks, and e.g. the non-involvement of ETA, despite assertions to the effect by politicians in the immediate aftermath.

prosecutions have been overturned on appeal for lack of fair trial protections offered to the accused.³⁵²

The UK is another European state with a history of terrorism, and terrorism trials, and which also experienced direct attacks from al-Qaeda associated individuals in recent years. The relatively low prosecution rates in the UK have been criticised, contrasted against the broad-ranging investigative powers assumed in the decade following 9/11.³⁵³ However, high profile terrorism cases have been completed, including in respect of the London '7/7' bombings.³⁵⁴ In some cases, the legitimacy of the criminal process has been questioned in light of the abusive circumstances of the accused's pre-trial detention and torture,³⁵⁵ just as in the US cases discussed above. The evolving approach of UK courts occurs against the experiential backdrop of notorious miscarriages of justice in terrorism cases in the past, which have led to abuse of process objections being upheld and cases dismissed. While this has not occurred post-9/11, courts have indicated that the involvement of UK officials in serious abuse at the pre-trial stage could have this effect.³⁵⁶

Other European states, although not themselves the subject of attack, are playing a role in investigating and prosecuting related terrorist activity. In Italy, post-9/11 several cases promptly proceeded to trial under a 'fast-track' procedure whereby a limited amount of evidence is provided and reduced sentences are handed down if convictions are secured. Once again the charges

352 For example, the Spanish conviction of Hamed Abderrahman Ahmad was overturned on appeal for lack of respect for the presumption of innocence. (22 June 2006) Spanish Supreme Court; 'Spanish "al-Qa'eda fighter" set free', *The Telegraph*, 26 July 2006, available at: <http://www.telegraph.co.uk/news/1524882/Spanish-al-Qaeda-fighter-set-free.html>.

353 See, e.g., 'Terror Convictions Plummet', *The Telegraph*, 26 November 2010, available at: <http://www.telegraph.co.uk/news/uknews/law-and-order/8160214/Terror-convictions-plummet.html>. The report notes that in 2009 no convictions resulted from a stop and search power used more than 100,000 times. The number of people charged under counter-terror laws was reported as 12 in 2009/10 compared with 54 in 2006/07, of which five were prosecuted and three convicted.

354 For example, in January 2007, five men were sentenced to life in prison by the Central Criminal Court of London for plotting to bomb various targets in London. In July 2007, Muktar Said Ibrahim, Yassin Omar, Hussain Osman and Ramzi Mohammed were found guilty of conspiracy to murder in connection with the 21 July 2005 London bombings and each sentenced to life imprisonment. Many other cases concern terrorist plans (e.g., in April 2005, Saajid Badat was sentenced by the Central Criminal Court of London to 13 years in prison for planning to blow up a passenger plane) or possession (eg in September 2005, Andrew Rowe was sentenced by the Central Criminal Court of London to 15 years in prison for possessing items which could be used in terrorist attacks).

355 See, e.g., *R. v Ahmed (Rangzieb)*, *R. v Ahmed (Habib)*, Court of Appeal (Criminal Division), 25 February 2011, [2011] EWCA Crim 184; [2011] Crim. L.R. 734 concerning two British citizens convicted of terrorist offences after having been allegedly tortured in Pakistan, and challenged the case on abuse of process grounds. It was ultimately unsuccessful as UK authorities were not found themselves to have been involved. See 4.B.4 below on the strained inter-relationship between human rights and criminal justice.

356 *R v. Ahmed*, *ibid.* See similar rationale of the court in *Abu Ali*, above.

relate not to September 11 itself, but to falsifying documents, breaking immigration laws, and criminal association with the intent to obtain and transport arms.³⁵⁷ In France too, several trials have proceeded for various forms of support for al-Qaeda or plotting of terrorist attacks.³⁵⁸

A noteworthy example of the practice of criminal courts from the African continent is the case against those accused of the 'Kampala World Cup' bombings of 10 July 2010, heard before Ugandan courts in 2011. A number of the characteristics and challenges associated with terrorism trials are given graphic illustration by this case.³⁵⁹ At the outset, the process of investigation and transfer – via extra-legal rendition – is a reminder of the lack of due process in the handling of terrorist suspects.³⁶⁰ Among those ultimately detained and charged was a human rights activist, who had advised the other suspects and claimed he was being punished for his human rights work,³⁶¹ recalling the dangers of broad reaching approaches to 'association' with terrorism as a criminal offence.³⁶²

When brought before a criminal court and granted bail (a basic right absent exceptional circumstances such as fear of flight), there were huge public protests – a reminder of the political pressures within which judges operate in terrorism cases. Mirroring the discussion above on guilty pleas in the US, at the outset of trial two suspects pleaded guilty, reportedly in order to escape the application of the death penalty. At the trial of the remaining suspects, issues arose regarding the admissibility of evidence in light of human rights abuses surrounding the process. Charges against him and another four were dismissed for lack of evidence, albeit only after he had served a year in detention.³⁶³ Although some suggest the acquittals should be seen as a failure and they provoked protests, it should be recalled that it is ultimately to the credit

357 They are charged with supplying false documents, breaking immigration laws, and criminal association with the intent to obtain and transport arms, explosives and chemicals. See 'Terror suspects go on trial in Italy', *Associated Press*, 5 February 2002.

358 See, e.g., 'Former Cern scientist faces terror trial in France', *The Guardian*, 29 March 2012, available at: <http://www.guardian.co.uk/world/2012/mar/29/cern-scientist-terror-trial-france>; 'France Arrests al-Qaeda Suspects', *BBC News*, 6 June 2003, available at: <http://www.news.bbc.co.uk/2/hi/europe/2967202.stm>; and V. Von Derschau, 'France Detains Suspected Islamic Militants', *AP*, 15 September 2004.

359 'Kenya's world cup joy shattered by blasts', *BBC*, 12 July 2010, available at: <http://www.bbc.co.uk/news/10605457>

360 See Chapter 10 Extraordinary Rendition.

361 'Kenyan Rendition Accuser Framed', *BBC News*, 13 September 2011, available at: <http://www.bbc.co.uk/news/world-africa-14900624>. Kenyan high court advocate Mbugua Mureithi and Al Amin Kimathi, executive director of the Kenyan NGO, Muslim Human Rights Forum (MHRF) were both among the detainees. Trial observers were also later detained at the border. See A. Singh and P. Sands, 'Uganda Must Release Al Amin Kimathi', *Voices*, 25 April 2011, available at: <http://www.soros.org/voices/uganda-must-release-al-amin-kimathi>,

362 See Chapter 4B2 below and Chapter 7B.11 below.

363 'Ugandans jailed for Kampala World Cup bombing', 16 September 2011, *BBC News*, available at: <http://www.bbc.co.uk/news/world-africa-14944664>.

of a criminal court, and the rule of law it is charged with upholding, that it acquits those whose guilt has not been proved beyond reasonable doubt. This determination to resist political pressure may have been influenced by the recent establishment of a specialised international crimes division within the Ugandan High Court, illustrating the importance of such specialised provision within national courts and investigative bodies.³⁶⁴

Across the states of Asia and the Middle East, experience of terrorism prosecutions, like terrorism itself, is neither new nor a result of the so-called war on terror. There is abundant practice in terrorism prosecutions in recent years, however, such as the trial and conviction under ordinary criminal law, after a decade long investigation, of those found responsible for the Bali attacks.³⁶⁵ In many other states, terrorism trials have raised multiple issues concerning independence of the judiciary, use of special courts and procedures, and respect for the fundamental principles of criminal law.³⁶⁶

As a result, there is a vast and developing body of experience in terrorism trials on a global scale. It is difficult to identify trends from disparate practice, but even this snapshot illustration of cases begins to show both the potential and the challenges of using the criminal process to hold to account those who plan, support and carry out terrorist acts. The practical and legal challenges are compounded by political pressure on law enforcement authorities and the courts. Much of the practice of trials to date reveals resort to modified jurisdictions or criminal procedures, and questions regarding respect for principles of criminal law, that will be addressed more fully in the sections that follow.

364 The establishment of an International Crimes Division (ICAD) in the Ugandan High Court may have been instrumental in resisting the political pressure, highlights the importance of specialised units, better equipped to deal with the political pressure in most cases.

365 Umur Patek was sentenced to 20 years imprisonment on July 2012. He was not charged with terrorism, as an Indonesian court had previously ruled out the ex-post facto application of the 2003 terrorism law, but the trial proceeded on the basis of ordinary criminal law. See eg. Indonesian militant jailed for 20 years for role in Bali bombings. See <http://www.guardian.co.uk/world/2012/jun/21/indonesia-militant-bali-bombings>. On Indonesia courts more generally, see H. Juwana, 'Indonesia's Anti Terrorism Law', in V. Ramraj, M. Hor, et al., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 290-309.

366 See, e.g., special courts, commissions or procedures in Bangladesh, Jordan or Egypt. For controversies around trials and lack of independence in Pakistan, see, e.g., International Bar Association Human Rights Institute, *A Long March to Justice: A report on judicial independence and integrity in Pakistan*, September 2009, though similar issues arise elsewhere. The pressure to ensure speedy justice in terrorism trials has also been criticised as infringing on fair trial rights; see eg. Human Rights Council Working Group on the Universal Periodic Review, "Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: Pakistan", 25 March 2008, A/HRC/WG.6/2/PAK3, para. 37.

4B.1.3 International v. national models of justice post 9/11

4B.1.3.1 Focus on justice for terrorism at the national level

Increased focus on combatting international terrorism, and on the challenges in national systems' responses, raises questions as to the appropriate vertical and horizontal relationship between national and international courts. Do (or should) national courts *per se* take priority over international ones for crimes of this nature, or vice versa?³⁶⁷ What has been, and what should be, the role of international courts, including the ICC?

Proponents of an international tribunal in the aftermath of 9/11 suggested that justice, or indeed the perception of justice, favoured the prosecution of September 11 offences before an impartial court outside the US, preferably in an international tribunal that would reflect the international nature of these egregious crimes and that community's interest in seeing justice done.³⁶⁸ The other (predominant) view was that, provided national courts are able and willing to do justice, which the US courts (among other courts) appeared in principle to be, international alternatives were unnecessary.

It is noteworthy that despite the attacks occurring at the cusp of the development of the system of international criminal law, proposals for an international tribunal post-9/11 never really garnered support. The ICC would not have had jurisdiction over the September 11 attacks themselves, as the ICC Statute entered into force afterwards and has no retroactive effect.³⁶⁹ While theoretically possible if the Security Council had referred,³⁷⁰ the ICC therefore had no realistic impact on the prosecution of the September 11 attacks them-

³⁶⁷ The ICC is clearly bound by 'complementarity', but it takes a different approach from the *ad hoc* tribunals, *see above*. In addition to the vertical relationship between international courts and national courts, questions arise as to the horizontal relationship between national bases of jurisdiction: does or should territorial jurisdiction necessary prevail over universal jurisdiction? On uncertainty surrounding these issues, *see Framework, Section A above*.

³⁶⁸ *See* A.M. Slaughter, 'Terrorism and Justice', *Financial Times*, 12 October 2003, p. 23, arguing that an international tribunal comprising US and Islamic judges should be set up to try terrorists, which would not only add legitimacy to the proceedings but help overcome practical obstacles to effective prosecution. *See, e.g.*, M.A. Drumbl, 'Judging the September 11 Terrorist Attack', 24 (2002) HRQ 323; J. Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights', 14 (2003) EJIL 241, 261.

³⁶⁹ The ICC Statute did not enter into force until 17 July 2002; *see* Article 11.

³⁷⁰ The Security Council could, arguably, exercise its Chapter VII powers (*see* Chapter 5A.2.2) to confer jurisdiction on the Court to go beyond Article 11, but this was not a conceivable route at least as long as the US opposed the Court and has a Security Council veto.

selves, not least due to steadfast US opposition.³⁷¹ Nor has it been seriously considered to exercise jurisdiction over subsequent terrorist attacks.

In principle the emphasis on national courts is consistent with the ethos of the system of international justice,³⁷² including the 'complementarity' regime³⁷³ recognising the priority of domestic over international prosecution, and arguably at least also of the territorial state over other jurisdictions.³⁷⁴ Practice post-9/11 may indeed have a contributory role in consolidating this principle of the primacy of national courts. Primacy should not, however, be confused with exclusivity – deference lasts only as long as domestic courts are able and willing to ensure that justice is done in relation to the particular situation.³⁷⁵ The sovereign right of states to exercise their criminal jurisdiction is accompanied by their sovereign responsibility to do so respecting international fair trial standards as enshrined in applicable human rights law and IHL.

The minimum benchmarks of a fair trial also constitute prerequisites around which international support for and cooperation with criminal justice processes should take shape.³⁷⁶ If states cannot or will not meet the most basic international standards, arguably other foreign, international or quasi-international tribunals can and should be seized of jurisdiction to ensure that criminal justice can be done without justice being compromised.³⁷⁷ In the light of the many

371 President Clinton signed the ICC Statute shortly before leaving office on 31 December 2000 (see 'The Right Action', *New York Times*, 1 January 2001, at A6) but in May 2002, the Bush administration purported to 'undo' the signature and notified the United Nations that it did not intend to ratify. See Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, UN Secretary-General (6 May 2002), available at: <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

372 The relationship between the ICC and national tribunals is governed by the 'complementarity regime' in the ICC Statute. ICC Statute, *supra* note 4; see also Section 4A.1.3.2(a) above.

373 See, e.g., the ICC's deference to national courts that are investigating or prosecuting, provided they are willing and able to do so effectively. ICC Statute, *supra* note 4 at Articles 17-19.

374 See the 'vertical' complementarity principle in the ICC Statute; *ad hoc* tribunals and relationships between national jurisdictions, above 4A13. See also the Spanish rendition and Guantánamo cases under Chapters 4B6 (below) and 7B14.

375 For example, questions arose concerning the compatibility of the Iraqi Special Tribunal for Crimes Against Humanity with internationally accepted fair trial standards. See, e.g., P. Ford, 'Iraqi tribunal stirs fierce debate', *Christian Science Monitor*, 1 October 2003; C. Savage, 'Tribunal for Hussein Trial Criticized', *The Boston Globe*, 17 December 2003.

376 See, e.g., Chapter 7A5.10 and the law relating to extradition and mutual assistance 4A2, above. The conditions on which this priority depends include, as the OAS has suggested post-9/11, guaranteeing 'the application of rules of due process for the alleged perpetrators, and that there is an effective will to bring them to justice'. OAS Resolution 1/03 on 'Trial for International Crimes', Washington DC, 24 October 2003.

377 It has similarly been argued in the ICC context that even with its clear rule of complementarity, a state whose prosecutions would amount to flagrant denials of justice, should not be seen as meeting the test and justifying deference; see arguments in *Prosecutor v. Saif al-Islam Gaddafi and Al-Senussi*, ICC-01/11-01/11, and the prosecutorial position in *Senussi*, at http://icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/related

controversies surrounding the neglect- or the abuse- of the criminal process in relation to terrorism, and the corresponding impediments to cooperation that have arisen, it may again become pertinent to ask whether, in certain exceptional circumstances, foreign or international jurisdictional alternatives should be revived as a bulwark against ineffective or abusive national proceedings.

As noted above, terrorism was excluded from the ICC Statute primarily due to the lack of a definition, but also for other reasons, including a perception (which may have shifted since 9/11), that terrorism did not rank among the most serious crimes to which the ICC should direct its attention.³⁷⁸ It is conceivable that serious acts of international terrorism could fall within ICC jurisdiction in the future, as the office of the prosecutor has suggested in relation to the possible investigation of crimes by Boko Haram in Nigeria.³⁷⁹ Terrorist crimes that were part of a sufficiently widespread or systematic attack on a predominantly civilian population, such as those entailed in the September 11 attacks, could fall within the Court's jurisdiction, for example as crimes against humanity. ICC jurisdiction will generally depend (absent Security Council referral)³⁸⁰ on the state on whose territory the atrocities were committed, or a state whose nationals are suspected of responsibility, having ratified the Statute or accepted the Court's jurisdiction.³⁸¹ For crimes involving international networks of individuals, it is likely that a considerable range of states would satisfy the nexus requirement.³⁸²

Moreover, ICC jurisdiction over 'terrorism' specifically remains a possibility for the future if a definition can be agreed. However, it is noteworthy that the events of 9/11 and their aftermath have had less immediate impact on

<http://www.iccnij.org/cases/icc01110111/court%20records/filing%20of%20the%20participants/office%20of%20the%20prosecutor/Pages/321.aspx>.

378 As noted in Chapter 2, this crime was excluded in 1998 from the Statute primarily due to the lack of a definition, but also for other reasons, including a perception that terrorism did not rank among the most serious crimes to which the ICC should direct its attention. This perception may have shifted post-9/11, as reflected in the condemnation of terrorism post 9/11 as 'one of the most serious threats to international peace and security in the twenty-first century'. SC Res. 1377 (2001), 12 November 2001, UN Doc. S/RES/1377 (2001). Note also SC Res. 1373 (2001), *supra* note 132, which categorised 'all acts of international terrorism' as threats to international peace and security.

379 See in this respect, statement by the ICC prosecutor. 'As you know, these crimes may be called terrorists attacks but they could also qualify as crimes against humanity....' 'Terrorist attacks in Nigeria may constitute crimes against humanity – ICC', PANAPRESS, 4 July 2012, available at: <http://www.panapress.com/Terrorist-attacks-in-Nigeria-may-constitute-crimes-against-humanity---iCC---15-834146-32-lang2-index.html> last accessed at 12 December 2012.

380 ICC Statute, *supra* note 4 at Article 13 on Security Council referral and Article 12 on pre-conditions for the exercise of jurisdiction.

381 ICC Statute, *supra* note 4 at Article 12.

382 Among the states party to the ICC Statute are several whose nationals were suspected of involvement in the September 11 crimes for example.

the negotiations around a definition of terrorism, or on proposals for the Court to exercise jurisdiction over 'terrorism', than some may have anticipated.³⁸³ Limited support is also found for establishing a separate international terrorism tribunal.³⁸⁴ While the world's first terrorism tribunal has been established in relation to one specific incident, in the form of the Lebanon tribunal, for various (principled and pragmatic) reasons it may be doubted that such *ad hoc* responses are likely to frequently find favour in the future.³⁸⁵

4B.1.3.2 The ICC and State Responses: Afghanistan, Iraq and beyond?

ICC jurisdiction is also potentially relevant to measures taken in *response* to international terrorism, addressed below. This could include a number of practices addressed in this volume that may amount to crimes within the jurisdiction of the Court, which have unfolded after the Statute's entry into force.³⁸⁶ The ICC could for example have exercised jurisdiction over war crimes in association with the armed conflicts in Afghanistan, Iraq, or potentially crimes against humanity or acts of aggression of sufficient gravity committed elsewhere, provided the preconditions for the exercise of jurisdiction were met.³⁸⁷

In relation to Afghanistan for example, as a result of its ratification of the ICC statute on 10 February 2003, the ICC has jurisdiction over relevant crimes committed by the nationals of any state (including non-state parties such as the US) in Afghanistan.³⁸⁸ A practical impediment to the exercise of that juris-

383 Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18-26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III, pp. 65-66.

384 'The Case for Establishing an International Tribunal for International Terrorist Organizations', E. Ivanov, 2013. *Working Paper, International Institute for counter-terrorism proposes a tribunal under the auspices of the Security Council to determine terrorist organisations*. Cassese, *International Criminal Law*, *supra* note 131. See also unsuccessful Dutch proposal to amend the ICC Statute to include terrorism at the Kampala review conference: Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18-26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III at 65-66.

385 Principled concerns relate to the politicisation of the process and its selectivity which has affected the tribunal's credibility. Pragmatic concerns include the huge expense of establishing *ad hoc* tribunals, once a permanent tribunal exists in the form of the ICC.

386 Many calls for ICC engagement have been heard, including 'Blair should face war crimes trial over Iraq, says Desmond Tutu', *The Independent*, 2 September 2012, available at: <http://www.independent.co.uk/news/world/politics/blair-should-face-war-crimes-trial-over-iraq-says-desmond-tutu-8100798.html>.

387 As noted above, this requires that the state on whose territory the crime arises or the state of nationality has ratified or accepts the court's jurisdiction unless the Security Council refers the situation to the Court. ICC Statute, *supra* note 4 at Articles 12-13.

388 As noted above, before the ICC can act, the state of territory or nationality of the accused must be a party to the ICC treaty or accept the Court's jurisdiction. ICC Statute, *supra* note 4 at Article 12. The state can accept the Court's jurisdiction for a specific situation arising before ratification, but after entry into force of the ICC Statute.

diction arises, however, as regards US nationals as the US has negotiated special agreements with governments around the world, including with the government of Afghanistan, to the effect that those governments will not transfer US personnel to the ICC.³⁸⁹ One longer-term side effect of the abuses committed by the US in the course of the 'war on terror' may be an undermining of its ability to secure such agreements in the future.³⁹⁰ By contrast, despite the transitional government's brief expression of intention to ratify in 2005, Iraq has not ratified the Statute.³⁹¹ But the UK, for example, has been a state party since 4 October 2001, satisfying the alternative 'nationality' nexus³⁹² for UK nationals involved in conduct that might amount to war crimes or crimes against humanity after that date.³⁹³ Hundreds of submissions have been made calling for the investigation of crimes³⁹⁴ in Iraq including by UK nationals allegedly acting in 'common purpose' or 'joint criminal enterprise' with US nationals.³⁹⁵ A preliminary analysis done by the Prosecutor in 2006 led to the decision that on information available at that time, the gravity

389 On the agreements, *see generally* Human Rights Watch, 'United States Efforts to Undermine the International Criminal Court: Impunity Agreements', 4 September 2002, available at: <http://www.iccnw.org/documents/HRWArt98legalpaper.pdf>.

390 These so-called 'Article 98 agreements' were controversial before (*see ibid.*) but met with intensified opposition in light of evidence of US war crimes in Iraq. *See, e.g.*, Warren Hoge, 'Annan Assails US for Seeking Peacekeeper Immunity', *International Herald Tribune*, 19 June 2004. The US dropped its attempt to get UN backing for these agreements in light of the Iraq abuse scandals. *See* Warren Hoge, 'Prison Abuse Halts U.S. Bid for Troop Immunity', 24 June 2004. On the agreements, *see ibid.* On questions as to their lawfulness for parties to the Statute, *see* J. Crawford, P. Sands and R. Wilde, 'Joint Legal Opinion on bilateral agreements sought by the United States under 98(2) of the ICC Statute'. These documents and an updated list of 'Article 98 agreements' may be consulted on the website of the Coalition for the ICC, available at: <http://www.iccnw.org/documents/otherissuesimpunityagreem.html>.

391 In February 2005 the Iraqi transitional government announced its decision to ratify the ICC Statute, but promptly withdrew that decision. The Coalition for the International Criminal Court alleged this was due to pressure from the US. H. Rizvi, 'Groups Urge Iraq to Join ICC', 8 August 2005, available at: <http://www.commondreams.org/cgi-bin/print.cgi?file=/headlines05/0808-06.htm>.

392 The case of the United Kingdom is not however isolated, as the nationals of a number of other states party to the ICC Statute are currently taking part in the military operations in Iraq.

393 *See* P. Sands, 'Our Troops Alone Risk Prosecution', *The Guardian*, 15 January 2003.

394 While the majority related to war crimes, to which the prosecutor conducted a preliminary analysis (*see below*), some related to aggression over which the Court did not have jurisdiction. 'Communications received by the Office of the Prosecutor', ICC Press Release, 16 July 2003, available at: http://www.icc-cpi.int/NR/rdonlyres/F5470312-25C8-4432-81C4-8F08353BB5E5/277680/16_july_english1.pdf.

395 'Report of the Inquiry into the Alleged Commission of War Crimes by Coalition Forces in the Iraq War During 2003', *Peacerights*, 8-9 November 2003, pp. 14-20 (the report was commissioned by Peacerights and prepared by eight academics).

standard required by the Statute was not met.³⁹⁶ This determination could change in light of allegations of egregious crimes committed in Iraq.³⁹⁷ A key question in respect of Iraq on Afghanistan is likely to be whether or not domestic authorities themselves take appropriate measures to investigate thoroughly allegations on the national level.³⁹⁸

Multiple allegations have also arisen as to aggression having been committed in Iraq.³⁹⁹ Some of these were also submitted to the ICC Prosecutor for investigation, but were rejected as the ICC cannot (at least as yet) exercise jurisdiction over aggression. The Statute and subsequent negotiations clearly anticipate that in the future acts of aggression will fall within the Court's rubric, once agreement is reached on a definition and conditions for the exercise of jurisdiction.

Beyond the armed conflicts, the review of war on terror measures throughout this volume – such as with the extraordinary rendition programme,⁴⁰⁰ or, potentially, programme of targeted killings⁴⁰¹ – prompt the question whether they may amount to crimes against humanity. As noted in Chapter 10, rendition unfolded on the territory of several states parties. Where the preconditions for the exercise of jurisdiction are met, they could also conceivably be subject to ICC jurisdiction if no state ultimately proves willing or able to hold perpetrators to account.⁴⁰²

396 Articles 8(1), 17 and 53. See statement referring to 240 communications, ICC, Office of the Prosecutor, 2006, available at: http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf. 'The resulting information did not allow for the conclusion that there was a reasonable basis to believe that a clearly excessive attack within the jurisdiction of the Court had been committed ...'

397 See Chapter 6B and 7B6 on allegations of torture against UK personnel in Iraq.

398 See 'Statement on communications concerning Iraq', The Hague, 9 February 2006, pp. 8-9. 'Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute. In light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity.' See also F. Guariglia, 'The Selection of Cases by the Office of the Prosecutor of the International Criminal Court', in Stahn and Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden, 2009), pp. 209-17. 'Complementarity' of the ICC to national systems, see ICC Statute, *supra* note 4, Preamble and Articles 17-19.

399 See, e.g., 'Lawyers doubt Iraq war legality', *BBC News*, 7 March 2003, reporting a letter from UK law teachers on the unlawfulness of the prospective attack on Iraq, which described such an attack as an act of aggression. See also the interview with Saudi Arabia's Foreign Minister Prince Saud al-Faisal, Interview with BBC News Correspondent, John Simpson, available at: http://news.bbc.co.uk/1/hi/world/middle_east/2773759.stm (questioning whether it was 'a war of aggression rather than a war for the implementation of the United Nations resolutions').

400 See Chapter 10 on Extraordinary Rendition'.

401 See Chapter 7B3, 'War and Human Rights'.

402 Among the many obstacles is lack of Pakistani ratification, and the poor ratification rate in the Middle East, where only two states have ratified as of July 2012.

4B.2 THE CHANGING FACE OF CRIMINAL LAW AND TERRORISM

In the years following 9/11 the world witnessed a massive flurry of criminal legislative activity across the globe.⁴⁰³ In large part this followed the Security Council's call to states to ensure that terrorist acts and financing 'are established as serious criminal offences in domestic laws and regulations....'⁴⁰⁴ This was supplemented by subsequent international and regional impulses calling for example for criminalisation of incitement and provocation to terrorism.⁴⁰⁵

Legislation post-9/11 was often passed quickly, in part in response to the pressure on states to provide information to the Security Council regarding legislative changes within ninety days.⁴⁰⁶ Unsurprisingly, processes were at times criticised as lacking in-depth assessment of the sufficiency of existing laws, or the compatibility of the new laws with the underlying principles of criminal law in domestic systems.⁴⁰⁷ The same rushed-through approach is commonly seen in legislation passed following particular terror attacks, often in response to political pressure to be responding, and seen to be responding, to terrorism.⁴⁰⁸

Changes in national laws have also reflected the increased focus – on the international, regional and national levels – on the question of how to harness criminal law not only as a tool to *respond* to acts of terrorism after the fact, but to its *prevention*.⁴⁰⁹ Criminal law has long had a preventive dimension and experience shows the role that effective law enforcement plays in preventing terrorism and other serious crime.⁴¹⁰ The extent of this focus and its interpretation in recent practice, however, raises questions as to the limits of the preventive use of criminal law, as criminal anti-terrorism laws embrace an ever-broader range of prohibited conduct, reaching further back into preparatory acts and further out to the environment that sustains or 'supports' the terrorism.

403 See, e.g., Survey of the implementation of Security Council Resolution 1373 (2001), UN Doc. S/2008/379 (2008).

404 SC Res. 1373 (2001), *supra* note 132.

405 See SC Resolution 1624 (2005) calling on state to criminalise 'incitement', or Council of Europe Resolution 2007/8 relating to 'provocation' to commit terrorism. See below 4B21 in this section 'Incitement, Provocation, Glorification or Apology'.

406 SC Res. 1373 (2001), *supra* note 132. Confusion was generated by the UNSC 1373 pushing for criminalisation absent clarity, see Chapter 7B.1. Similar issues arose concerning UNSC 1267 and provisions on freezing of assets.

407 Eminent Jurists Report, *supra* note 302.

408 An example is the Indian *Unlawful Activities (Prevention) Amendment Act* 2008, adopted in haste following the November 2008 terrorist attacks in Mumbai.

409 For one manifestation on the international level, see the UNODC Handbook on Criminal Justice Responses to Terrorism, *supra* note 157, (focusing on the use of criminal law 'preventively').

410 See, e.g., Eminent Jurists Report, *supra* note 311, p. 123.

In addition, an increase in investigative, detention or other powers and a decline in oversight and procedural safeguards have been common, as have modifications in the normal rules of procedure and evidence.⁴¹¹ In some instances, these developments may respond to genuine challenges that terrorism poses to the criminal law, while in others they may reveal a certain opportunism facilitated by the 'war on terror'. In either case, developments in laws and practice around terrorism in recent years have led to wide-reaching approaches to substantive offences and modes of liability, as well as innovations in applicable procedures, as illustrated in turn below.

4B.2.1 Creation of new 'terrorism' and ancillary offences: widening the net

i) 'Terrorism'

As explored fully in Chapter 2, there is no internationally agreed upon definition of terrorism under treaty or customary law. When the Security Council nonetheless called on states to criminalise and punish terrorism severely, it fell to states to fill the legality gap and ensure that terrorism was defined with precision in national law. While some guidance was given, belatedly, at the UN level as to the components of such a definition,⁴¹² in practice there is great diversity in definitions of terrorism on the international, regional and national levels. Many of those definitions have been criticised for their breadth or lack of precision, with serious concern arising from a range of international authorities in respect of infringements of the cardinal principles of criminal law.⁴¹³ Of particular relevance are the principles *nullum crimen sine lege*, requiring clarity and specificity in criminal law.⁴¹⁴

Also central is the principle of individual responsibility, requiring that the law punish on the basis of the criminal conduct of the particular individual,

411 See Chapter 7 parts 7B.2.1. and 7B3.2 on detention, and other powers implicating human rights; on diminished judicial oversight see Chapter 11.

412 E.g., SC Res. 1566 'description' of terrorism in Chapter 2. The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (E/CN.4/2006/98), sec. III ('Reflections on the Issue of Defining "Terrorism"'), 28 December 2005 suggested that 'terrorist offences' should be confined to instances where the following three conditions are cumulatively met: (a) acts committed with the intention of causing death or serious bodily injury, or the taking of hostages; (b) for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act; and (c) constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

413 For examples see Chapter 2.2 'National Measures' and 7B.5; and Eminent Jurists Report, *supra* note 302 at pp. 124-27.

414 *Ibid.*

in line with their subjective fault and respecting the presumption of innocence.⁴¹⁵ Some of the developments considered below raise questions regarding one or both of the basic elements of any offence – that it must involve both criminal conduct and criminal intent. Indeed, questions arise as to whether some of the conduct embraced by terrorism and associated definitions is properly ‘culpable’ at all, and the appropriateness of engaging the sanction and stigma of criminal law.⁴¹⁶ The United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has noted that in defining the term ‘terrorism’ it is important to ensure that it is confined in its use to ‘conduct that is of a genuinely terrorist nature’.⁴¹⁷

Examples abound of basic criminal law principles being tested by approaches to the definition of the crime of terrorism.⁴¹⁸ Even relatively mainstream definitions that reflect closely international instruments have been under attack, such as where the Canadian Courts found that state’s definition to fall foul of human rights standards.⁴¹⁹ Specific human rights issues that have flowed from broadly defined ‘terrorism’ crimes being used to preclude freedom of association, expression of dissent or other disfavoured conduct are illustrated in Chapter 7.⁴²⁰

Closely associated with the cardinal principle of legality, is the principle of non-retroactivity. While most criminal laws post-9/11 did not have retroactive effect, some did. An example is Indonesia’s Anti-Terrorism law, which was struck down for affording retroactive effect to new terrorism crimes.⁴²¹ Related questions have also arisen as to whether prosecutions can proceed in relation to conduct that was criminal under international (but not national) law at the time of its commission. As a matter of international law, where the crimes are well established in international law at the time of their commission, there is no requirement that they also be enshrined in national law for the

415 On the nature of the presumption of innocence, see A. Ashworth, (2006) ‘Four threats to the presumption of innocence’, (2006) 10 *The International Journal of Evidence & Proof* 4, pp. 241-78.

416 See discussion on ‘status offences’ and guilt by association in K. Roach, ‘The Criminal Law and Terrorism’ in V. Ramraj, M. Hor, et al., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), p. 140.

417 U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, para. 42.

418 *Ibid.*; see further below for particular offences eg the scope of ‘material support’ for terrorism which has been held by US courts to be overly broad.

419 *R v. Khawaja* [2006] OJ 4245, at 73. The case is before the Supreme Court which, on 11 June 2012, heard arguments that the December 2001 Anti-terrorism Act violates the *Canadian Charter of Rights and Freedoms*.

420 For examples of prosecutions of indigenous groups, women’s groups and unions, See Chapter 7B.11 ‘Proscribing dissent – expression, association, assembly’.

421 See, e.g., H. Juwana, ‘Indonesia’s Anti Terrorism Law’, in V. Ramraj, M. Hor, et al., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005), pp. 290-309. See also sec. 38 of the Pakistani *Anti-Terrorism Act* at <http://www.fia.gov.pk/ata.htm>.

nullum crimen principle.⁴²² In relation to terrorism under international law, as discussed above, this is problematic however, as the predominant view is that terrorism is not a crime as such under customary law, nor is there a generic terrorism treaty that purports to criminalise terrorism.⁴²³ The specific conventions addressing particular forms of terrorism were not themselves intended to provide a basis for criminal prosecution, but to oblige states to criminalise in domestic law.⁴²⁴

The import of these issues is seen for example in the US Supreme Court case of *Hamdan v. Rumsfeld* in which the Petitioner successfully challenged the ability to prosecute him before a military commission for 'conspiracy to commit war crimes'.⁴²⁵ While 'war crimes' were enshrined in domestic law at the relevant time, the Court had good reason to ultimately consider that 'conspiracy to commit war crimes' was a separate crime not established in national or international law at the relevant time.⁴²⁶

ii) *Before the Crime? Conspiracy, Preparatory Acts, Planning, and Possession ...* Suggestions of a paradigm shift towards criminal law as a preventative tool is particularly apparent in relation to the prosecution of 'preparatory' or enabling acts. Post-9/11 legislatures have often created new specific offences, while established crimes have also been subject to new interpretations and approaches in the terrorism context. These developments generally seek to enhance the efficiency of the law, by enabling states to address terrorism, within a pre-established rule of law framework, before attacks materialise. In some cases however, tensions arise regarding compatibility with basic criminal law principles.

In many states, criminal laws have long provided the basis to prosecute 'preventively' in that the harmful act need not have been accomplished, or even necessarily attempted, for a common law concept of 'conspiracy' or a civil law 'association de malfaiteurs' to arise.⁴²⁷ In recent years, conspiracy

422 Article 15 ICCPR has an explicit exception for crimes under international law. Cf terrorism crimes in the sectoral treaties which do not themselves criminalise, but oblige states to do so. See the distinction in more detail in Cryer & Friman, *et al.*, *supra* note 31.

423 See Chapter 2 on the contrary (but isolated) view of the Appeals chamber of the Special Tribunal for Lebanon.

424 See above Part A.114 and Chapter 2; Saul, 'Legislating from a Radical Hague', *supra* note 130.

425 The Military Commissions Act 2006 establishes the crimes within the military commission's jurisdiction, including conspiracy is included in this list. It is treated as a death penalty offense if death results from the conspiracy. See Drumbl, 'The Expressive Value', *supra* note 7.

426 *Hamdan v. U.S.*, *supra* note 328; see majority Judgement of J. Stevens, and J. Thomas dissent, *ibid.*

427 The UNODC Handbook on Criminal Justice Responses to Terrorism, *supra* note 157, notes the offences of conspiracy and criminal association are obvious models for preventive intervention against the planning and preparation of criminal acts; both continental law concepts of elicited association and/or the common law concepts of 'conspiracy' relate to

laws have been used expansively, notably in the US, to prosecute from the earliest 'planning' stage of would-be terrorist activity.

One of the issues arising in practice has been an increasingly flexible approach to the interpretation of a criminal 'plan,' and to the connection between individuals required for a 'conspiracy,' raising doubts as to legal certainty in respect of the scope of the offence. For example, in the US case of *Rahman*, all the defendants were convicted of 'seditious conspiracy to levy war against the United States', involving numerous disparate acts whereby 'a number of rather tenuously connected behaviors' were charged as a single case of conspiracy.⁴²⁸ While a plan clearly does not have to be limited to a single act of violence, it has been suggested that it does require some definition beyond acts of violence within the United States generally.⁴²⁹ Under a flexible approach to the alleged plan a broad range of conduct, from completed crimes to 'schemes' were treated as part of a larger crime, with the ancillary effect of allowing a broad range of evidence being placed before the jury that would normally be considered irrelevant and inadmissible.

Conspiracy laws are also coupled with the introduction in some systems of crimes involving acts 'preparatory to terrorism' (or as discussed below material support for terrorism) where individuals are prosecuted for conspiracy to commit such preparatory or supportive acts.⁴³⁰ In many cases, traditional conspiracy laws required at least a preparatory step towards the commission of the crime, thus safeguarding the notion that prosecution must be based on the *conduct* of the individual.⁴³¹ By contrast, where the individual may not yet have actually *done* anything, these developments may represent a controversial move from criminalising conduct to criminalising intention or even thought.⁴³²

Another manifestation of the increasing emphasis on early intervention is criminalising 'possession' of articles that may ultimately be used in terrorist

agreements to commit crime.

428 W. McCormack, 'Inchoate Terrorism: Liberalism Clashes with Fundamentalism' (2005) 37 *Georgetown Journal of Int'l Law* 1: 'Some of these actions constituted completed crimes. Others were attempts. And yet others were unfulfilled plans or schemes. ... Evidence of all these various offenses was introduced in a single trial because they allegedly formed part of a single plan.'

429 *Ibid.*

430 In one Australian case, for instance, a 23 year prison sentence was imposed for a junior role in a conspiracy to commit acts in preparation for a terrorist act, where no specific act had yet been agreed upon and where there was not necessarily any intention to injure people. The case of *R v Elomar & Others* [2010] NSWSC 10, paras. 147-78 (concerning Mohammed Omar Jamal) discussed in Saul, 'Criminality and Terrorism', *supra* note 12; see also below on conspiracy to provide material support.

431 *Ibid.*

432 In the UK, see eg the prosecution of Samina Malik, discussed in Chapter 7B.11; see I. Bunglawala, 'Don't even think about it', *The Guardian*, 6 December 2007.

attacks.⁴³³ So far as possession might be seen as a first step towards carrying out an attack, it would often already be covered by conspiracy laws. Tensions again arise however where possession is dissociated from or too remote from the commission of a terrorist act. The issue was highlighted by the case of *R. v. Zafar* in the English courts⁴³⁴ where the appellants were convicted of possession of computer discs and hard drives containing extremist propaganda, the purpose of which – according to the prosecution – was to incite persons to travel to Pakistan to take part in ‘jihad’. The Court of appeal quashed the convictions, holding that there must be some direct connection between the article possessed and the act of terrorism alleged, of which there was no such evidence in this case.⁴³⁵

iii) Membership of terrorist organisations

A common addition to the legislative books post-9/11 has been the crime of membership of a terrorist organisation.⁴³⁶ The Security Council – in Resolution 1267, adopted before 2001, and subsequent resolutions adopted since then – provided the impetus by obliging states to criminalise membership of terrorist organisations on the domestic level. Prosecuting criminal organisations is nothing new, as noted in Part A: for many states, membership of a criminal organisation was already enshrined in domestic law, and the idea of prosecuting criminal organisations in international law dates at least back to Nuremberg. On one level, the fact that many more states have adopted such criminal laws post-9/11 should not then be surprising or necessarily controversial.

However, in practice, throughout history, controversy has surrounded the labelling of terrorist organisations, from Mandela’s ANC⁴³⁷ to Arafat’s PLO⁴³⁸

433 In the UK, *e.g.* the Terrorism Acts of 2000 and 2006 (TA 2000 and TA 2006) introduced offences of: possessing an article or record of information for a terrorist purpose (s.57, TA 2000) or possessing a record of information likely to be useful in committing an act of terrorism (s.58, TA 2000) as new terrorism offences. Others included failing to disclose information about a terrorist offence (s.38BTA2000), inciting an act of terrorism overseas (s.59, TA 2000), intentionally or recklessly encouraging an act of terrorism (s.1, TA 2006), disseminating a terrorist publication (s.2, TA 2006), preparing to commit a terrorist offence (s.5, TA 2006) and engaging in terrorism training (ss.6 and 8, TA 2006).

434 *R. v. Zafar* (Aitzaz) [2008] EWCA Crim 184; [2008] Q.B. 810 (CA (Crim. Div.)).

435 F. Galli, ‘Developments in the construction of criminal legislation – *R. v Zafar and Others*’, (2008) 172(33) *Justice of the Peace* 532-35.

436 While such crimes are widespread, some examples (Australia, Tanzania and Uganda and the U.K.) are discussed in the Eminent Jurists Report, *supra* note 302 at p. 134.

437 ‘I was called a terrorist yesterday, but when I came out of jail, many people embraced me, including my enemies, and that is what I normally tell other people who say those who are struggling for liberation in their country are terrorists. I tell them that I was also a terrorist yesterday, but, today, I am admired by the very people who said I was one’. Nelson Mandela, *Larry King Live*, 16 May, 2000.

and far beyond.⁴³⁹ Post-9/11, the same controversies surrounding terrorism appear but in heightened form, in light of the stretching of the terrorism label to reach diverse 'undesirable' conduct.⁴⁴⁰ As history attests, caution is due to avoid guilt by association, and to ensure that the individual is being prosecuted commensurately with individual criminal responsibility, as well to avoid the political manipulation of the criminal law against political opponents. The crime of membership of a terrorist organisation is blighted with all of the same definitional uncertainties as this definition of terrorism itself, with a few more added.⁴⁴¹

A first additional level of difficulty relates to what 'membership' means in the context of an entity such as al Qaeda, which has been described a 'loose network of cells,' or al Shabaab with its massive and diverse popular support base. How should 'membership' in these circumstances be understood or established? In unstructured movements where there is no system of membership as such, these concepts are not straightforward. As was noted in relation to the London 7/7 bombers, individuals that consider themselves members may be bound together by little more than broad overlapping ideologies.⁴⁴² Particular concerns arise where individuals have a role far removed from terrorist activity as such. The potential for slippage from punishing individual conduct to punishing ideology, or from individual responsibility to guilt by association, is clear.⁴⁴³

A second level of doubt that has arisen in practice relates to the role of the executive (nationally or internationally) in identifying proscribed organisations.⁴⁴⁴ The designation of 'terrorist' organisations by the executive under certain anti-terror legislation may in practice reduce the critical role of the crim-

438 'The difference between the revolutionary and the terrorist lies in the reason for which each fights. For whoever stands by a just cause and fights for the freedom and liberation of his land from the invaders, the settlers and the colonialists cannot possibly be called terrorist, otherwise the American people in their struggle for liberation from the British colonialists would have been terrorists; the European resistance against the Nazis would be terrorism, the struggle of the Asian, African and Latin American peoples would also be terrorism This is actually a just and proper struggle consecrated by the United Nations Charter and by the Universal Declaration of Human Rights the justice of the cause determines the right to struggle.' Arafat, Address to the UN, 1984.

439 See generally Chapter 2, and Chapter 7 on eg Proscribing Dissent. The Eminent Jurists panel notes that the now president of the Maldives was charged with terrorism in 2005 for leading a political protest. Eminent Jurists Report, *supra* note 311, p. 126.

440 See, e.g., Chapter 7B.11 'Proscribing Dissent' (referring to women's groups and indigenous groups being labelled terrorists).

441 A heightened standard of clarity and specificity is required under criminal law, and additional uncertainties arise regarding membership as highlighted in this section below.

442 See, e.g., Chapter 6B.1.

443 See Ch.7B.11 'Proscribing dissent' – expression, association, assembly.

444 Chapter 7B.8. Listing and Delisting.

inal courts in determining guilt and displacing the presumption of innocence.⁴⁴⁵ It has been noted as imperative that criminal courts can and do assess both the nature of the organisation in question – whether it amounts to a ‘terrorist’ organisation properly so called – and the role and culpability of the individual, in convicting and punishing under the criminal law.⁴⁴⁶ Deference to terrorist ‘lists’ drawn up internationally, regionally or nationally⁴⁴⁷ may challenge the presumption of innocence; innocence which must be dislodged only by a court of law, applying criminal law commensurately with individual criminal responsibility on a case-by-case basis, with doubt being resolved in favour of the accused.⁴⁴⁸

iv) Failing to provide information

Another development accompanying the preventative paradigm is the shift of focus from conduct to omission, criminalising those who fail to expose would-be terrorists. Once again, criminalising omission is of course not novel in criminal law, but it is exceptional, usually based on the particular responsibilities attaching to groups of individuals in law.⁴⁴⁹ Some new terrorism laws seek to intervene preventively by broadening the scope of persons considered to have such responsibilities, for example imposing a duty on all citizens (including family members) to report any information that might conceivably lead to the prevention of terrorism.

Questions regarding clarity of scope and the foreseeability of criminal law necessarily arise from provision – such as in UK anti-terrorism legislation – which provide that a person who ‘believes’ information ‘might be of material assistance’ in preventing terrorism or securing convictions commits an offence if he or she does not disclose the information to police as soon as reasonably practicable.⁴⁵⁰ Although it is rare for charges to be brought under this section,

445 See, e.g., India’s anti-terrorism law which allows the Home Ministry of the central government to declare a group to be a ‘terrorist organization’. See ‘Back to the Future: India’s 2008 Counterterrorism Laws’, Human Rights Watch, 2008, available at: http://www.hrw.org/sites/default/files/reports/india0710webwcover_0.pdf.

446 U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, para. 42.

447 Chapter 7.B.8.

448 See, e.g., Human Rights Committee General Comment 32, Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007), regarding the Presumption of Innocence.

449 See, e.g., above Superior Responsibility in International Criminal Law which requires a superior- subordinate relationship, with obligations that flow therefrom.

450 Section 38B of the Terrorism Act 2000 reintroduced the old section 19 of the PTA which had been limited to terrorism in the context of Northern Ireland and criticized for its impact on family life and society. The new act relates to information the person believes to assist in ‘(a) preventing the commission by another person of an act of terrorism or, (b) in securing the apprehension, prosecution or conviction of another person, in the UK, for an offence involving the commission, preparation or instigation of an act of terrorism’.

cases have been brought.⁴⁵¹ While the objective of these laws are legitimate, caution is due as regards the implications for legal certainty, as well as for the stigmatisation and penalisation of families and communities.⁴⁵²

v) Material Support for Terrorist Organisations

An important feature of criminal practice that raises related concerns is the adoption of laws criminalising various forms of 'support' for terrorism or for prohibited organisations. It is perhaps in this context that concerns regarding criminalisation of essentially non-culpable behaviour have been most acute. Although these laws have some reflection in existing criminal concepts such as aiding and abetting or the specific liability mode of 'intentionally contributing to the commission of a crime by a group' under the Rome Statute, their scope goes far beyond established modes of liability under international criminal law. Notably, the US laws on 'material support' incriminate support for a terrorist organisation of any form. While there is a limited exception for the provision of 'medicine and religious materials,' cases have demonstrated a very restrictive approach to the interpretation of even this narrow exception.⁴⁵³ Criminal laws cover not only support that contributes in some way to acts of international terrorism, the conduct which the criminal law seeks ultimately to repress and punish, but even innocent or well intentioned acts that support the non-terrorist roles that organisations on terrorism lists may, and in practice do at times, perform. Individuals may thus be prosecuted for conduct that is not in any way 'culpable,' and even paradoxically for conduct directed in some way at the prevention of terrorism.

This is illustrated in startling fashion by the 2010 decision of the US Supreme Court in *Holder v. Humanitarian Law Project*, where a divided court found that it was constitutional to criminalise support for a terrorist organisation (PKK), in respect of the advocacy and training of members of that

451 Yeshiemebe Girma and others were charged with and convicted of failing to provide information about acts of terrorism, contrary to section 38B (1) (b) of the Terrorism Act 2000; see C. Walter, S. Vöneky, V. Röben and F. Schorkopf, *Terrorism as a Challenge for National and International Law* (Springer, 2005), p. 613.

452 See Eminent Jurists Report, *supra* note 302, p. 134 citing the danger that media, defence lawyers, human rights groups and family members (especially children) are penalised. On the radicalizing potential of such measures, and the 'symbolic reminder of a group's shared circumstance vis-a-vis authorities and their agents of control', see C. Campbell, 'Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), pp. 255-82, p. 272.

453 *United States v. Shah*, 474 F. Supp 2d 492 (SDNY 2007), 499 and *United States v. Farhane* 634 F2d 127 (2 Cir.2011); see Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action, Kate Mackintosh and Patrick Duplat, July 2013, independent study commissioned by ODHA and the Norwegian Refugee Council ('Humanitarian Study 2013'), p. 40.

group to use international law to resolve disputes and obtain remedies.⁴⁵⁴ In the absence of subjective fault, one may ask on what basis the individual can properly be subjected to the criminal law. Such laws are not unique to the US. In other states, including Australia, Denmark and Canada, criminal laws allow for prosecution despite the lack of intention to contribute to a criminal act.⁴⁵⁵ The use of individuals as means, not ends, is anathema to the concept of individualised responsibility in criminal law.

The potential implications for a broad range of legitimate activity was acknowledged in a later case in lower courts in the US, where a federal judge reportedly struck down the legal provisions allowing for detention on grounds of 'material support' as 'unconstitutionally overbroad'.⁴⁵⁶ The judge recognised the legitimate fear of journalists, scholars and political activists that they could face detention for exercising their rights.⁴⁵⁷ The laws that have been most commonly been used to prosecute terrorism in the US are conspiracy laws (addressed above) and 'material support' laws. They have been used in combination to particularly broad effect, as 'conspiracy to provide

454 *Holder v Humanitarian Law Project* (2010) 561 US; See J. Fraterman, 'Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?', 14 January 2011, available at: <http://dx.doi.org/10.2139/ssrn.1750963>. U.S. District Judge Audrey Collins in Los Angeles ruled that the Patriot Act was 'impermissibly vague' in prohibiting individuals or groups from giving 'expert advice or assistance' to designated terrorist organizations. The crime may arise anywhere in the world if the suspect is a US national or resident or enters the US any time after the commission of the offence.

455 See Humanitarian Study, *supra* note 453, referring e.g., to 'low standards of intent' for such offences in Australia, Denmark and Canada for example. It notes that in some states knowledge that a group is listed would suffice to render any support a criminal offence while in the UK 'reasonable cause to suspect' such designation would suffice; pp. 41, 45. See eg Sn 114b Danish Criminal code on financial or other support to terrorism.

456 In September 2012, a federal judge struck down Section 1021(b)(2) of the National Defense Authorization Act for 2012 that allowed for indefinite detention for 'substantially' or 'directly' provides 'support' to forces such as al-Qaeda or the Taliban: *Hedges v. Obama*, 12 Civ. 331 (KBF) (2012) and opinion at: <http://www.lawfareblog.com/wp-content/uploads/2012/09/2012-09-12-permanent-injunction-order.pdf>. The judge noted the law was 'unconstitutionally overbroad' and recognised legitimate fears in claims by journalists, scholars and political activists that they could face indefinite detention for exercising First Amendment rights. 'Anti-terrorism law struck down by federal judge', *POLITICO*, 13 September 2012, available at: <http://www.politico.com/news/stories/0912/81169.html>. See also Judge Audrey Collins in the U.S. District Court in Los Angeles who ruled that the Patriot Act was 'impermissibly vague' in prohibiting individuals or groups from giving 'expert advice or assistance' to designated terrorist organizations. 'U.S. Judge Voids Portion of Patriot Act as Illegally Vague', *LA Times*, 30 July 2005, available at: <http://articles.latimes.com/2005/jul/30/local/me-patriot30>.

457 *Ibid.* Lawyers are also at risk from overbroad criminal notions of providing support. In 2012 a ten-year prison sentence was upheld in federal court for a 73-year-old attorney who was convicted in 2005 of 'providing aid to terrorism' for sharing statements from her client, Sheik Omar Abdel Rahman, with the media. See 'Why justice is at risk in the Babar Ahmad extradition case', *The Guardian*, 5 October 2012, available at: <http://www.guardian.co.uk/commentisfree/2012/oct/05/justice-risk-babar-ahmad-extradition>.

material support' further waters down and stretched the potential reach of criminal law.⁴⁵⁸

A particular form of support for terrorism that is typically criminalised, and which raises similar concerns, is the financing of terrorism. Combating the financing of terrorism and money laundering is a key priority in the international fight against terrorism, as well reflected in the legal framework,⁴⁵⁹ and one beset with real law enforcement challenges.⁴⁶⁰ Extremely broad-reaching criminal laws have been passed into law that cover any form of potential financial provision 'direct or indirect' to an individual or group designated terrorist. It is often irrelevant whether or not there is any intention to contribute to terrorism or this in fact results.⁴⁶¹ Similar concerns therefore arise as regards the potential to greatly widen the criminal net to cover innocent or legitimate activity.⁴⁶²

vi) Incitement, Provocation, Glorification or Apology for Terrorism

Another way in which inchoate offences have been expanded pursuant to the shift towards a preventive paradigm is in the trend to criminalise acts that encourage, incite or provoke acts of terrorism.

UN Security Council Resolution 1624 of 2005 called on states to prohibit incitement,⁴⁶³ marking something of a departure from international criminal law practice (where incitement is an established form of liability for genocide though not for other crimes).⁴⁶⁴ While clearly raising questions regarding free expression, there is nothing in human rights law that would preclude prosecuting those that incite violence; on the contrary, states may be obliged to do so.⁴⁶⁵ Provided the offence is clearly defined, and the restriction on

458 This basis for criminal prosecution has been common in the US in recent years.

459 See eg Articles 2 and 4 of the widely ratified 1999 International Convention for the Suppression of the Financing of Terrorism (Financing Convention), and SC Res 1373 which closely reflects the Financing Convention, both in Chapter 2.

460 See eg M.A. Drumbl, *Transnational Terrorist Financing, Criminal and Civil Perspective*, German Law Journal 2008.

461 See eg 'Interpretative Note to FATF Special Recommendation II: Criminalising the financing of terrorism and associated money laundering', FATF paras 3-8. The Note indicates that states should embrace a broad range of forms of responsibility for this offence.

462 See eg Humanitarian Study, *supra*, on the implications for humanitarian organisations of these crimes, and of FATF recommendations (including recommendation 8 on ensuring NGOs are not abused for terrorism).

463 SC Resolution 1624 (2005), 14 December 2005, UN Doc. S/RES/1624 (2005), called upon all States to 'adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to: (a) Prohibit by law incitement to commit a terrorist act or acts ...'.

464 See ICC Statute, *supra* note 4, Article 25. Incitement is included to reflect the Genocide Convention.

465 See positive obligations 7A.4.2, and human rights cases making clear that free expression is not absolute and can be restricted where incitement to violence is involved at 7A5.6; see also the practice at 7B.11.

rights necessary and proportionate, such laws provide an important tool in the prevention of terrorism.

Some innovations in criminal law strain these criteria however. For example, the obligation to penalise 'provocation' in Security Council resolutions appears to go further than existing international criminal law for example.⁴⁶⁶ While similar forms of liability are recognized in international criminal law (such as 'inducing' the commission of a crime or acting 'in common purpose', or as part of a 'joint criminal enterprise'), these require that the crime 'in fact occurs or is attempted'.⁴⁶⁷ By contrast crimes of incitement or provocation may however go further by criminalising expression which may not have contributed in any way to criminal activity or indeed been intended to have such an impact.

The Security Council's inclusion of 'provocation' was picked up in various forms, including in the Council of Europe Convention on the Prevention of Terrorism (2005), Article 5 which requires States parties to adopt such measures as may be necessary to criminalize 'public provocation to commit a terrorist offence'.⁴⁶⁸ This Convention limits the potential scope of provocation by imposing the 'double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed'.⁴⁶⁹ However, the Convention has been relied upon by states to justify wider-ranging measures that go beyond these parameters.

The UK notoriously included the crime of 'glorification of terrorism' in its anti-terrorism legislation, referring specifically to the Europe Convention on the Prevention of Terrorism as the basis for so doing.⁴⁷⁰ The glorification or encouragement offences, unlike the European Convention, did not require that the statement in fact encouraged any person to engage in a terrorist act – explicitly de-linking this form of encouragement from its actual effect.⁴⁷¹

⁴⁶⁶ S.C. Res. 1624, *supra* note 463.

⁴⁶⁷ See 'Indirect Criminal Responsibility' at Part A above.

⁴⁶⁸ Framework Decision 2002/475/JHA on combating terrorism was modified by Council Framework Decision 2008/919/JHA of 28 November 2008. The consequence is the introduction of three new offences: public provocation to commit a terrorist offence; recruitment for terrorism; and training for terrorism.

⁴⁶⁹ Council of Europe Convention on the Prevention of Terrorism: 'the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed'. The Special Rapporteur of the United Nations Human Rights Council on the protection of human rights and fundamental freedoms while countering terrorism has referred to Article 5 as 'a sound response which would respect human rights'. E/CN.4/2006/98, p. 17, par. 56c (citing the Convention as a model).

⁴⁷⁰ See Explanatory notes to the Terrorism Act of 2006

⁴⁷¹ S. Chehani Ekaratne, 'Redundant Restriction: The U.K.'s Offense of Glorifying Terrorism', (2010) 23(1) *Harvard Law School Human Rights Journal*, 205-22. It need only be 'likely' to be understood as encouraging terrorism.

Moreover, the person making the statement or publishing the document need not *intend* to incite the commission of a terrorist offence, with recklessness as to this result sufficing. There has been widespread criticism of the glorification provision, for its breadth, susceptibility to abuse, and disproportionate impact on freedom of expression, by among others by the UN Human Rights Committee.⁴⁷² Despite this, similar provisions on 'glorification' have been proposed, adopted and relied upon to prosecute in other states.⁴⁷³ The UN Human Rights Committee has called for the revision of legal provisions on 'encouraging' terrorism.⁴⁷⁴

The criminalisation of expression and opinion also takes the form of crimes that express sympathy, justification or 'apology' for 'terrorist' causes. One such broad reaching provision appears in the Russian Anti-Terrorism Act which includes the 'popularisation of terrorist ideas, dissemination of materials or information urging terrorist activities, substantiating or justifying the necessity of the exercise of such activity'.⁴⁷⁵ Another is the Turkish Counter-terrorism law that sanctions those who 'make propaganda for a Terrorist organization or for its aims'.⁴⁷⁶ As with all such associated offences, the wide-reaching scope of these terms must be seen alongside the expansive definitions of terrorism itself.

472 It was criticised for breadth, susceptibility to abuse, and disproportionate impact on freedom of expression. See U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, United Kingdom of Great Britain and Northern Ireland, ¶ 26, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008). See E. Barendt, 'Threats to Freedom of Speech in the United Kingdom?', (2005) 28 *University of New South Wales Law Review* 895.

473 Article 578 of the Spanish Penal Code prohibits 'glorification of terrorism'; see, e.g., the convictions in the "Esteban, Miriam and Valentina" case before the *Audiencia Nacional*: . See ICJ Terrorism Bulletin, No 51, April 2011. On Canada proposals, see C. Forcese, 'Criminalizing Glorification of Terrorism: Bad Idea on Stilts', National Security Law Blog, available at: <http://craigforcese.squarespace.com/national-security-law-blog/2011/11/18/criminalizing-glorification-of-terrorism-bad-idea-on-stilts.html>. See also F. Hassan, 'Do Anti-Terrorism Act Amendments Threaten Free Speech?', *Huffington Post*, 22 November 2011, available at: http://www.huffingtonpost.ca/farzana-hassan/anti-terrorism-act-canada_b_1104538.html and 'Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues', Government Response to the Seventh Report of the Standing Committee on Public Safety and National Security Subcommittee on the Review of the Anti-Terrorism Act, available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3066235&Language=E&Mode=1&Parl=39&Ses=1&File=15>.

474 UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Ninety-third session CCPR/C/GBR/CO/6, 21 July 2008.

475 Federal Law No. 35-Fz of March 6, 2006 on Counteraction Against Terrorism.

476 Turkish Counter-terrorism Law, 2006, Article 7 of Law 3713. On proportionality of penalties see Yilmaz and Kiliç v. Turkey, (Appl. No. 68514/01), Judgment of 17 July 2008.

4B.2.2 Penalties and Sentencing in Terrorism Cases

Resort to the criminal law is, in itself, intended to reflect the seriousness with which the state takes acts of terrorism. The imposition of proportionately tough sentencing for serious acts of ‘terrorism’ can be an important part of both the ‘expressivist’ and the ‘retributivist’ functions of criminal law in this field.⁴⁷⁷ Security Council in 1373 underlined the duty to ensure that ‘the punishment duly reflects the seriousness of such terrorist acts’.⁴⁷⁸

One tension that arises is that the tendency to impose ‘tough’ penalties for conduct that falls within the purview of ‘terrorism’ is out of sync with another tendency towards an overly inclusive approach to terrorism, associated crimes and modes of liability embracing a range of more and much less culpable behaviour. As such, sentences imposed may be out of proportion to the conduct of the individual. Cited as an example of this is the Australian case *R v Elomar & Others*, where a young man was sentenced to 23 years in prison for a relatively minor role in a conspiracy to commit acts in preparation for a terrorist act.⁴⁷⁹ Likewise, the imposition of serious sentences for terrorism and ancillary offences that cover mere expressions of support de-linked from the commission of a crime, have been found to give rise to particular concerns regarding proportionality. This is seen for example in the ECtHR case law condemning the lack of proportion in custodial sentences for terrorist offences that amounted to expressions of support for Abdullah Öcalan.⁴⁸⁰

It has been suggested that ‘special sentencing rules for terrorists’ are emerging.⁴⁸¹ Concern was expressed for example in a 2012 case before US courts, where a federal appeals court overturned a lower courts sentence,

477 See Drumbl, ‘The Expressive Value’, *supra* note 7; see also 7B.4.2 ‘Terrorism, penalties and *nulla poena sine lege*’.

478 SC Res. 1373 (2001).

479 No specific terrorist attack had yet been agreed upon still less effectuated, and it has been suggested that there was not necessarily any intention to injure people involved in the plot. See *R v Elomar & Others* [2010] NSWSC 10, paras. 147-78 (concerning Mohammed Omar Jamal), discussed in Saul, ‘Criminality and Terrorism’, *supra* note 12.

480 See, e.g., *Yilmaz and Kiliç v. Turkey*, *supra* note 476. The applicant’s three years and nine months prison sentence for ‘aiding and abetting an illegal organization’, a crime under the Prevention of Terrorism Act, was based on participation in demonstrations expressing support for Abdullah Öcalan. The European Court of Human Rights concluded that, even if the interference in the freedom of expression could be justified by the need to preserve public order, it was clearly disproportionate due to the severity of the sentences.

481 *US v. Ressaam*, 679 F. 3d 1069, 1106 (9th Cir. 2012) (dissenting Judge Mary M. Shroeder wrote: ‘Our courts are well equipped to treat each offense and offender individually, and we should not create special sentencing rules and procedures for terrorists’). See, e.g., ‘Appeals Court Overturns Millennium Bomb-Plot Sentence; Calls it Too Light’, *The New York Times*, 12 March 2012, available at: <http://www.nytimes.com/2012/03/13/us/appeals-court-overturns-millennium-bomb-plot-sentence.html>.

imposed on Ahmed Ressam the so-called 'millennium bomber',⁴⁸² on the basis of the undue leniency of a twenty two year prison sentence.⁴⁸³ A noteworthy dissent opined that the appeals court had overstepped its authority in overturning the sentence, instead of deferring to the lower court's assessment on the facts of the particular case, on the basis that 'the majority simply did not like the idea of a terrorist leaving prison after only 22 years'.⁴⁸⁴ The dissent noted that '[o]ur courts are well equipped to treat each offense and offender individually, and we should not create special sentencing rules and procedures for terrorists'.⁴⁸⁵

English courts, suggesting that heavy and indeterminate penalties may be justified by the unprecedented nature of current terrorist threats, set down stringent sentencing guidelines in the context of the criminal cases concerning the 7 July London bombings.⁴⁸⁶ A later case from the same courts cautioned however that 'whilst there is a need for deterrent sentencing in terrorism cases, if sentences are imposed in this area which are more severe than the case merits, this will be more likely to inflame rather than deter extremism'.⁴⁸⁷ An unduly punitive approach has likewise been described as 'counter-productive' to criminal law aims, as 'they may not only further radicalise offenders but also alienate the community from which they come, thus fuelling further discontent with the dominant legal and political order'.⁴⁸⁸

A case-by-case evaluation of sentencing is critical to ensuring proportionality. While sentencing guidelines may arguably erode this function, it is eviscerated by the imposition in some states of mandatory sentences for crimes such as terrorism. The established role of the judge in assessing the penalty, taking into account the facts and individual circumstances, is replaced by an abstract assessment of appropriate punishment by the executive and/or legislature.⁴⁸⁹ As mandatory sentences are intended in part to send a message

482 The Algerian national known as the 'Millennium Bomber' plotted to set off explosives at Los Angeles International Airport on 31 December 1999.

483 An 11-judge panel from the United States Court of Appeals for the Ninth Circuit ruled to send the case back to the district court for a tougher sentence.

484 Dissenting Judgement of Judge Mary M. Schroeder, *supra* note 481; *see also* the decision by the US Appeals Court in *US v. Abu Ali*, *supra* note 316, to overturn a thirty-year prison sentence followed by thirty years supervision on release as too lenient, and the dissent of J. Motz. The US Supreme Court denied the writ for certiorari in 2009.

485 Dissenting Judgement of Judge Mary M. Schroeder, *supra* note 481.

486 On sentencing guidelines in UK *see* landmark judgment of *R. v. Barot*, [2008] 1 Cr. App. R(S) 247(45), followed in *R. v. Ibrahim*, [2008] 4 All E.R. 208 concerning the London bombings.

487 *R. v. Rahman & Mohammed*, [2008] 4 All E.R. 661 CA (Crim. Div.).

488 Saul, 'Criminality and Terrorism', *supra* note 12.

489 Egypt had mandatory death penalty for terrorism, which was challenged in *Egyptian Initiative for Personal Rights and Interights (on behalf of Sabbah and Others) v Arab Republic of Egypt*, Communication No. 334/06, 13 February 2012, ACHPR, brief available at: <http://www.interights.org/taaba/index.html>. *See also*, for example, Human Rights Committee statement on the impermissibility of a mandatory death penalty: *Francisco Juan Larranaga*

regarding the seriousness with which crimes are regarded, they are generally severe. In some cases they even carry the death penalty. The increased resort to the death penalty in the context of terrorism trials has given rise to concern regarding proportionality.⁴⁹⁰ In particular its 'mandatory' application, irrespective of the circumstances of the accused brings the criminal process into conflict with the human rights framework's requirements regarding proportionate penalties and the protection of the right to life.⁴⁹¹

4B.2.3 Modified Procedures and Principles of Criminal Law

A further feature of criminal practice in relation to international terrorism are the jurisdictional, procedural or evidentiary rules that in some ways exempt terrorism investigations and trials from the normally applicable principles and processes of criminal law. It is imperative that states have the necessary powers to investigate effectively and prove criminal conduct beyond reasonable doubt. Making police powers 'more flexible and useful' and removing obstacles that impede investigation or trial, is a legitimate priority, provided it respects the legal framework, including the principle of legality, presumption of innocence and basic fair trial rights.⁴⁹²

It is well known that detention pursuant to the war on terror has involved prolonged arbitrary detention, abusive interrogation techniques, torture and inhuman treatment with confessions and incriminations of questionable reliability.⁴⁹³ Often these practices were aimed at unfettered intelligence gathering, unrelated to (but rather a side-stepping of) the criminal process. As these practices are addressed in other chapters they are not addressed specifically here, though their impact on criminal prosecutions is discussed below.⁴⁹⁴ They are, moreover, a reminder of the drift in the role of intelligence agencies in a number of states, which carry out arrest, detention and investigation, and

v. The Philippines (Comm. no. 1421/2005), Human Rights Committee, 24 July 2006, para. 7.2.

490 See Chapter 7B For example, Amnesty International notes the sharp increase in the number of death sentences passed in trials of people accused of having links to al-Qaeda, or to the Huthi armed group in Yemen. 'Yemen: Cracking Down under Pressure', Amnesty International, 2010, p. 22, available at: <http://www.amnesty.org/en/library/asset/MDE31/010/2010/en/da8bd0cc-37ab-4472-80b3-bcf8a48fc827/mde310102010en.pdf>.

491 See, e.g., HR Committee statement on the impermissibility of a mandatory death penalty: *Francisco Juan Larranaga v. The Philippines*, above, (Comm. no. 1421/2005), Human Rights Committee, 24 July 2006, para 7.2; see also Chapter 7 'Nullum Poena Sine Lege'. Where capital punishment is not abolished, it may be applied only for the most serious crimes, following a fair trial.

492 UNODC Handbook on Criminal Justice Responses to Terrorism, *supra* note 157.

493 See, e.g., case studies in Chapters 8 and 10 on Guantánamo and Extraordinary Rendition, respectively.

494 See 4B.4.

the importance of clarifying and distinguishing intelligence and law enforcement agencies respective roles, especially in relation to criminal justice efforts.⁴⁹⁵

Within the criminal law framework itself, there are myriad examples of the normally applicable rules and protections of criminal law being excluded or limited for terrorist suspects. These commonly include expanded periods of pre-trial detention,⁴⁹⁶ sometimes without the essential rights to consult a lawyer or to challenge lawfulness.⁴⁹⁷ Among the most striking examples of exceptionalism in the criminal sphere are the resort to special courts, and modifications to applicable evidentiary rules, addressed in turn below.

i) '*Special*' Jurisdictions

The creation of special courts and tribunals to try terrorism cases has been a feature of international practice in a surprising number of states.⁴⁹⁸ Most well known are the Military Commissions established by the US to try a relatively small percentage of the Guantanamo detainees, discussed in Chapter 8. President Bush justified their establishment by stating that 'Given the danger ... and the nature of international terrorism, ... it is not practicable to apply ... the principles of law and the rules of evidence generally recognized in the trial of criminal' cases.⁴⁹⁹ However, as seen above, federal courts have overcome these challenges in terrorism cases where they have had jurisdiction to do so. The intensity of the political debate was clear when President Obama's proposal to submit Guantanamo detainees to trial by normal federal criminal courts ultimately failed.⁵⁰⁰ After several constitutional challenges,⁵⁰¹

495 See, e.g., Scheinin Special Rapporteur Reports A/HRC/10/3 (paras. 25-78) and A/HRC/14/46.

496 See Chapter 7A5.3 and Chapter 8 in relation to Guantanamo detainees. In certain cases relatively extended periods may be justified by complex evidence gathering, sometimes internationally. Bail is often restricted in terrorism cases but pre-trial detention must be strictly necessary, and subject to safeguards including access to a lawyer and judicial oversight.

497 See Chapters 7A5.3, 7B7 and 8 on detention and fair trial rights.

498 See, e.g., military commissions and special security courts for terrorism in, for example, US, Egypt, Jordan, Pakistan, Syria. Many more states used such courts during repressive periods, but subsequently repealed (and sometimes banned) them, as the Latin American experience demonstrates. The Eminent Jurists panel notes that in addition there are states with use centralize or specialized courts for terrorism cases, such as Spain, France, Tunisia, Morocco and Yemen. Eminent Jurists Report, *supra* note 302, p. 141.

499 President Bush signed a Military Order on 13 November 2001 which noted that: 'Given the danger to the safety of the United States and the nature of international terrorism, ... it is not practicable to apply in military commission's under this order the principles of law and the rules of evidence generally recognized in the trial of criminal' cases in the United States district courts.' (para. 6).

500 See Chapter 8 on Guantánamo. 'Our courts and juries of our citizens are tough enough to convict terrorists, and the record makes that clear.' 'Remarks by the President on National Security', 21 May 2009, Office of the Press Secretary, The White House, available at: <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>.

new pieces of legislation and rules of procedure, the commissions are now functioning at 'Camp Justice' in Guantanamo Bay.⁵⁰²

The exceptionalist criminal law framework that accompanies terrorism charges have also provided the context for military commissions and special terrorism courts in many other states.⁵⁰³ Indeed post-9/11, the then Egyptian President Mubarak famously cited the US position on military commissions as indicating that the Egyptians were justified in their long having used such commissions.⁵⁰⁴ The Egyptian 'state security courts', whose introduction was justified by reference to a national security emergency but which remained a feature of terrorism trials in Egypt for thirty years,⁵⁰⁵ have recently been lacking the necessary independence and impartiality.⁵⁰⁶ New special condemned by the African Commission as courts have also emerged, as exemplified by the announcement in 2013 of the establishment of a new terrorism court in Bangladesh to respond to the backlog created by the number of cases filed under novel Anti-terrorism laws.⁵⁰⁷

Human rights bodies have often held that the use of special courts that depend on and are closely linked to the executive or the military lack the independence and impartiality required of a criminal court, a *sine qua non* upon

See also Vladeck, 'Terrorism Trials and the Article III Courts after Abu Ali', *supra* note 316.

501 The military commission convened to judge Hamdan was held unconstitutional by the US Supreme Court in *Hamdan v. Rumsfeld*, *supra* note 2 as it 'lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice and the Geneva Conventions.'

502 Following *Hamdan v. Rumsfeld*, *ibid.*, the law was changed by the Military Commission Act, which provided improvements to due process rights in the rules of evidence and procedure of the military commissions, though their compatibility with international requirements is still questionable – see Chapter 8. The shift, and eventual compromise, is reflected in e.g. the fact that evidence obtained through torture is inadmissible. But evidence obtained through methods in 'which the degree of coercion is disputed' may be admitted subject to certain conditions. See Drumbl, 'The Expressive Value', *supra* note 7, p. 12.

503 For examples, see eg in Yemen, the Specialized Criminal Court (SCC) was created in the name of 'countering terrorism' in 2004, and three additional SCCs were then established in 2009. The SCC has been used to convict people such as journalists covering the conflict in Sa'dah, or grievances expressed by the Southern Movement. Hundreds have been tried by the SCC since its establishment in 1999. See 'Cracking Down Under Pressure', *supra* note 604; see also *Sabbah v Egypt*.

504 'In the Name of Counter-Terrorism', Human Rights Watch, March 2003.

505 'The Emergency Law in Egypt', International Federation for Human Rights, 3 February 2011, available at: <http://www.fidh.org/the-emergency-law-in-egypt>.

506 *Sabbah v Egypt*, *supra* note 603.

507 In Bangladesh, a new Anti-terrorism law was introduced in 2009, and modified in 2011. Nearly 200 cases had been filed under it and the pace of such trials was subject to political criticism. On 13 February 2013 Law Minister Shafique Ahmed announced to parliament the prompt establishment of a special terrorism court. See 'Special tribunal planned to reduce 'terror trial' backlog', http://khabarsouthasia.com/en_GB/articles/apwi/articles/features/2013/03/06/feature-01

which the legitimacy of the criminal process depends.⁵⁰⁸ They have also emphasized, specifically, that military tribunals are in principle inappropriate fora to try civilians, including for terrorism.⁵⁰⁹

Special jurisdictions are often invoked precisely as they guarantee less due process rights, raising specific fair trial issues. In many cases resort to special courts or tribunals may be accompanied by closed trials, bail may not be permitted by law, access to counsel or to evidence may be curtailed and rules on evidence are generally more 'flexible'.⁵¹⁰ Unsurprisingly, they are often therefore found to fall short of specific fair trial guarantees. An example from Pakistan involved the establishment of special anti-terrorism courts on the basis of the need for 'speedy trial',⁵¹¹ or of the need for military jurisdiction over civilians accused of offences under the *Anti-Terrorism Act*.⁵¹² In practice these courts have been much criticised for undermining basic fair trial safeguards.⁵¹³

ii) Modified Approaches to Procedure and Evidence

Even in respect of terrorism trials before regular courts, many modifications to procedures have been introduced by anti-terror legislation around the globe. While in some cases the procedures are limited to terrorism, in others they are already used in other contexts but have been given public profile through the terrorism cases.⁵¹⁴ These have commonly included special measures concerning restrictions on access to classified or sensitive evidence, or differing

508 See Chapter 7 on 'Fair trial' and Chapter 8B.4.5 on US 'Military Commissions'. The African Commission has noted in clear terms in a decision of 2012 related to terrorism trials before Egyptian special courts; see *Sabbah v Egypt*, *supra* note 603

509 *Ibid.*

510 See Chapter 8B.4.5 on US 'Military Commissions'.

511 Section 13 of the Pakistani *Anti-Terrorism Act*.

512 For example, International Bar Association Human Rights Institute, *A Long March to Justice: A report on judicial independence and integrity in Pakistan*, September 2009, p. 65. Human Rights Watch, 'Destroying Legality: Pakistan's Crackdown on Lawyers and Judges', 2007, pp. 25-26. See also, Amnesty International, 'Human Rights in Hashemite Kingdom of Jordan', 2010.

513 Reported in Human Rights Council Working Group on the Universal Periodic Review, 'Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(c) of the Annex to Human Rights Council Resolution 5/1: Pakistan', 25 March 2008, A/HRC/WG.6/2/PAK3, paragraph 37. Under 2007 amendments to the *Army Act* 1962, the military may try civilians for a wide range of offences previously under the jurisdiction of Pakistan's civilian judiciary.

514 See, e.g., Terrorist Trial Report Card, September 11, 2001-September 11, 2009, Center on Law and Security, New York University School of Law, January 2010: 'Our research suggests that the techniques employed by prosecutors in terrorism-associated cases – notably the use of informants and lesser charges – do not differ markedly from those employed in prosecuting serious drug charges and organized crime. High-profile terrorism cases, in effect, have drawn greater attention to longstanding but little-noticed criticisms of well-established prosecutorial tactics.'

rules on admissibility. In the criminal context,⁵¹⁵ the burden of proving guilt beyond reasonable doubt and discharging the presumption of innocence, and the right to confront evidence against the accused, have long been held sacrosanct. Some of these modifications jar with traditional safeguards around which the criminal law is built.

As practice unfolds several examples emerge of courts having had to determine procedures and evidence that address various apparently competing factors: protection of sensitive information, ensuring that reliable evidence can be used, while guaranteeing basic rights such as fair trial and the integrity of the courts proceedings. A recurrent issue emerging in the context of the so called war on terror, is the admissibility of torture evidence that may be obtained through torture or ill-treatment. This was seen for example in the Ahmed Omar Abu Ali case referred to above⁵¹⁶ where a victim of extraordinarily rendition challenged the admissibility of the testimony of Saudi officers' and his own inculpatory statements made while in Saudi custody, on the basis of his alleged torture and ill-treatment. The Court found that evidence obtained through torture could not be admitted and the government must demonstrate the voluntariness of the evidence; however, on the facts of that case it found, controversially, that 'the government has met its burden of proving that Mr Abu Ali's statements were voluntary' and the Appeals Court upheld this decision.⁵¹⁷ This was one of many cases where issues regarding admissibility of torture evidence have arisen and the authorities have argued that the onus should lie with the accused to prove that the torture was obtained through torture.⁵¹⁸

Mr Ali also challenged his lack of access to – and opportunity to confront – evidence against the accused, another common feature of recent terrorism trials. The court ruled that the Government could use the 'silent witness' procedure to disclose classified information contained in communications to the jury at trial, though Abu Ali himself would only be able to see the redacted version of the documents. Dismissing a motion for complete disclosure, the district court concluded that the redacted version of the documents provided to Abu Ali therefore 'me[t] the defense's need for access to the information'.⁵¹⁹

515 The handling of such issues by human rights bodies have often related to other contexts, for example, the balancing by the courts re immigration procedures or special measures, as explained in Chapter 7 see the UK cases of *A & Others (derogation)* on access to evidence and *A & Others (torture evidence)* on admissibility in Chapter 11.

516 *United States v. Abu Ali*, note 325. See discussion of the case under 4B.1.2 'Terrorism Trials'; see also Vladeck, 'Terrorism Trials and the Article III Courts after Abu Ali', *supra* note 325.

517 Vladeck, *ibid.*, p.5

518 Chapter 7B5.3; The ECHR has found the onus should lie with the state to demonstrate that evidence was not obtained through torture, not vice versa.

519 *Ibid.*

Similar schemes have unfolded in states that limit the accused's access to evidence.⁵²⁰

As terrorism trials continue to unfold, and judges determine the right balance between protecting genuinely sensitive information and ensuring fair trial, internationally accepted standards in relation to evidence and procedure may be further clarified.⁵²¹ Ensuring that justice is done and seen to be done in terrorism cases is an essential aspects of the rule of law response to terrorism, as opposed to perceptions of a 'victors justice' or of a 'criminal law of the enemy'.⁵²²

iii) Principles of Criminal Justice and Terrorism trials

Basic principles of criminal law, including the presumption of innocence, have been challenged in the context of terrorism trials in diverse ways. Most obviously, public authorities have shown themselves particularly prone to vilify suspected 'terrorists' as criminals pending trial, partly in the context of touting their capture for political advantage.⁵²³ The Human Rights Committee has noted that adverse public comments about an accused person,⁵²⁴ like extensive negative portrayal in the media – another common feature in the terrorism context⁵²⁵ – may violate the accused person's right to be presumed innocence.

Political pressure on courts to convict those publicly declared 'terrorists' has at times given rise to concerns regarding the presumption of innocence; in other contexts the opposite pressure is apparent, and high acquittal rates has been attributed to intimidation of prosecutors and the judiciary by the

520 E.g. in Canadian courts see *Ahmed, Alizadeh, and Sher* criminal cases involving disputes regarding access to secret evidence; 'Terror suspect wants secret evidence against him revealed', *Globe and Mail*, 23 Aug. 2012 <http://m.theglobeandmail.com/news/national/terror-suspect-wants-secret-evidence-against-him-revealed/article1693369/?service=mobile>. For the issue in the military commissions Guantánamo see Chapter 8 and in the civil context elsewhere see 7B.7.3.

521 This will occur in the future as these cases proceed through the higher courts and on to human rights bodies, developing law and practice in this field.

522 On the link between the 'expressivist' function of criminal law and due process see, e.g., Drumbl, 'The Expressive Value', *supra* note 7. M. Tondini, 'Beyond the Law of the Enemy: Recovering from the Failures of the Global War on Terrorism through (Criminal) Law', in *Processi Storici e Politiche di Pace / Historical Processes and Peace Politics*, Vol. 3, No. 5, 2008, pp. 59-81

523 Note comments on allegations against Abu Zubaydah for example upon capture which were withdrawn once he had access to counsel, noted in Chapter 8 on Guantanamo.

524 Communication No. 770/1997, *Gridin v. Russian Federation* (views adopted on 20 July 2000), UN Doc. GAOR, A/55/40 (vol. II), paragraph 8.3 where high-ranking law enforcement officials had made public statements portraying an accused person of being guilty of certain crimes, there was a violation of the presumption

525 *Saidov v. Tajikistan* (964/2001), ICCPR, A/59/40 vol. II (8 July 2004) 164 at paras. 6.6-7, (where State-directed media extensively described an accused as a criminal).

accused.⁵²⁶ It goes without saying that the criminal law can only hope to meet any of its rule of law aims if courts and prosecutors are rigorously independent and fairly and dispassionately apply the criminal law.

Exceptionalist approaches to terrorism trials can also be seen in the application of the principles of criminal law in terrorism cases. The most troubling are those laws that effectively suspend the presumption of innocence by shifting the burden of proof to the accused to prove his or her innocence in terrorism cases.⁵²⁷ This is evident in terrorism laws in a number of states, as illustrated by the Indian Amendments to the Unlawful Activities (Prevention) Amendment Act, 2008, passed in response to the Mumbai attacks.⁵²⁸ The law provides that where some evidence indicates the involvement of the accused, the onus is on him to refute this, contrary to the generally applicable burden on the prosecution to prove guilt beyond reasonable doubt. Similar rules are found in the legislations of other states.⁵²⁹

A less striking yet noteworthy example of the suspension of normally applicable rules and standards lies in a piece of Spanish legislation from 2010 which treats murder that results from acts of terrorism, as opposed to other forms of murder, as 'imprescriptible'.⁵³⁰ The basis for the contrast in the Spanish order between its treatment of crimes of terrorism and other crimes in this respect is not readily apparent. It is particularly curious that crimes against humanity of the Franco-era to have not been declared imprescriptible (and the Judge who decided that they were he was criminally prosecuted), yet the legislature had no difficulty in exempting the crime of terrorism from the normal rules on prescription. These and other exceptional approaches are often justified by assumptions about the gravity of terrorism, an assumption which as explained above may or may not withstand scrutiny in the particular case.

526 See, e.g., 'Acquittals in terrorism cases: Prosecuting in fear, Metropolitan, Islamabad, Malik Asad', 15 August 2011, available at: <http://dawn.com/2011/08/15/acquittals-in-terrorism-cases-prosecuting-in-fear>.

527 See e.g. HRC General Comments 13 and 32, which make clear that the presumption of innocence is a fundamental human rights principle. See also Chapter 7A 'Fair Trial'.

528 See 'Human Rights Features', Asia Pacific Human Rights Network, 22 January 2009, available at: <http://www.hrdc.net/sahrdc/hrfeatures/HRF191.htm>. This provision removes the right to remain silent, but also effectively the presumption of innocence. During the parliamentary debates, the Home Minister Mr. P. Chidambaram justified this reversal of the burden of proof on the grounds that in the past, terrorists have evaded conviction because they were permitted to remain silent. Mr. Chidambaram stated that if evidence points to the accused 'then the accused has a duty to enter the box or let an evidence to say that I am giving contrary evidence'.

529 Eminent Jurists Report, *supra* note 311, p. 154 (referring to Australia, Pakistan, Tanzania, Uganda and the U.K as states where changes to ancillary terrorism place the burden on the accused to disprove certain elements of the charges).

530 The Ley Organica 5/2010, 22 June 2010.

4B.3 PROGRESS AND CHALLENGES IN INTER-STATE COOPERATION POST-9/11

One area of considerable legal industry in the field of counter-terrorism in recent years has been in relation to international cooperation. There have been significant normative, institutional and practical developments aimed at clarifying states obligations to cooperate in criminal matters in relation to counter-terrorism, and to enhance the capacity and efficiency of national systems to meet those obligations.

In the first few years after 9/11, practice was slow to develop. Relatively few formal requests for extradition and mutual assistance from the US appear to have been processed for example,⁵³¹ reflecting the lack of national prosecutions and the 'informal' or 'extraordinary' approach to some of the international cooperation at that time.⁵³² As the practice of extradition and mutual legal assistance requests has developed, it has exposed interesting challenges and tensions of a legal, political and practical nature.

4B.3.1 International standards and cooperation

The obligation to cooperate in the prevention and prosecution of serious crime was already well established long before 9/11. In numerous ways international, regional and national bodies responded to 9/11 with initiatives aimed at strengthening or clarifying those obligations. Resolution 1373 (2001), adopted by the Security Council on 28 September 2001, provided the most significant normative landmark.⁵³³ Going beyond earlier resolutions, it established the obligation of all states to, among other things, afford other states the greatest measure of assistance in connection with criminal investigations or proceedings in relation to terrorism.⁵³⁴ The Security Council called on states to ratify existing terrorism conventions which have been identified as hitherto lacking implementation.⁵³⁵ As a result, there has been a significant increase in the number of state parties to these conventions, which provide an important framework

531 It is noted that it is difficult to monitor practice in respect of mutual assistance, as requests are generally confidential.

532 As discussed at the start of Part B, it reflects the military as opposed to law enforcement focus of the 'war on terror,' as well as the troubling level of informal cooperation through, for example, the rendition programme discussed at Chapter 10.

533 SC Res. 1373 (2001); *see also* SC Res. 1368 (2001) noting the importance of cooperation as part of the collective framework for countering terrorism). The significant obligations were, however, imposed in SC Res. 1373 (2001).

534 The General Assembly has also called on states to take all necessary and effective measures to prevent, combat and eliminate terrorism. A Counter-Terrorism Sub-Committee was established by the Security Council, to which states report steps taken to comply with the resolution. *See* the reports to the 1373 Committee at www.un.org/Docs/SC/Committees/1373.

535 SC Res. 1373 (2001) at para. 3.

for cooperation in respect of specific forms of terrorism.⁵³⁶ While the Security Council also called for progress on a comprehensive terrorism convention,⁵³⁷ as discussed in Chapter 2 these developments have not borne fruit, and dispute continues as to the viability and desirability of such a convention, as well as the key elements of the definition of terrorism.

On the regional level, as the renewed focus on international terrorism has been the catalyst to measures to enhance cooperation.⁵³⁸ The European Union has been particularly prolific in this area in recent years: in addition to development of common definitions of crimes⁵³⁹ and common security strategy,⁵⁴⁰ there have been multiple terrorism-specific developments (such as the Framework Decision on Terrorism),⁵⁴¹ as well as others which, while proposed before 9/11 and going beyond cooperation on terrorism specifically, were impelled by the political imperative surrounding cooperation post 9/11. Shortly after 9/11 the introduction of a Pan-European Arrest Warrant in 2002, for example, streamlines and expedites the extradition procedure within Europe and removes certain traditional limits on the obligation to extradite, such as the political offence exception, rule of specialty and the double criminality requirement.⁵⁴²

As regards mutual legal assistance, a significant development within the European Union was the Framework Decision on the European Evidence

536 On these developments, see Chapter 2, in particular 2.1.2-2.1.5; see also report of the Counter-Terrorism Sub-Committee, *supra* note 534; and du Plessis, 'A Snapshot', *supra* note 8.

537 One advantage of such a Convention is that it could arguably provide a broader framework for international cooperation, though its desirability and viability remain controversial; see Prost, 'Need for a Multilateral Cooperative Framework', *supra* note 264.

538 For a more thorough overview of developments, see du Plessis, 'A Snapshot', *supra* note 8.

539 Framework Decision 2002/475/JHA on combating terrorism has been modified by Council Framework Decision 2008/919/JHA of 28 November 2008, introducing three new offences in EU legislation: public provocation to commit a terrorist offence, recruitment for terrorism, and training for terrorism. See 'The Changing Face of Criminal Law' above at 4B.2.

540 In February 2010, the EU issued its first internal security strategy, which highlights terrorism as a key threat facing the EU and aims to develop a coherent and comprehensive EU strategy to tackle terrorism and a wide range of organized crimes, cybercrime, money laundering, and natural and man-made disasters. See, e.g., K. Archick, 'US-EU cooperation against Terrorism', Congressional Research Service, May 2012, available at: <http://www.fas.org/sgp/crs/row/RS22030.pdf>.

541 See European Council Framework Decision on Combating Terrorism, 13 June 2002 (2002/475/JHA), OJ L 164/3 of 22 June 2002 (hereinafter 'European Council Framework Decision on Combating Terrorism'). See also the EU Action Plan on Terrorism (the 'roadmap') Commission document 10773/2/02/REV 2, 17 July 2002. This defines, shapes and provides for monitoring of the direction of joint action taken by European Governments and is frequently updated.

542 European Arrest Warrant, *supra* note 249, will abolish double criminality for numerous offences, the speciality principle and the political offence exception. France, Belgium, Portugal, Luxembourg and Spain have signed treaties to bring the new extradition procedures into effect by 2003. The UK intends to implement them in 2004.

Warrant (EEW),⁵⁴³ which like its extradition counterpart, is not terrorist-specific but its birth has been induced by the impetus around improving cooperation in the counter-terrorism field. The EEW sets up a system for securing prompt access to objects, documents and data for use in criminal proceedings from another member State.⁵⁴⁴ As such, it is considered by many as having important potential to enhance evidence gathering and transfer of evidence in criminal proceedings across borders. At the same time, the system exposes the challenge to ensure consistent levels of training and capacity and appropriate evidence gathering and handling, while safeguarding the rights of the defence.⁵⁴⁵

A range of other Framework Decisions have also been adopted. These cover for example the exchange of information between law enforcement authorities, the confiscation and freezing of assets and joint investigation teams,⁵⁴⁶ the application of the principle of mutual recognition of judgments in criminal matters, enabling sentenced persons to be transferred to another member State for enforcement of their sentences⁵⁴⁷ and the supervision of probation measures and alternative sanctions in other European states.⁵⁴⁸

Other regional cooperation measures have also been adopted and strengthened over time, within the Council of Europe,⁵⁴⁹ the Americas,⁵⁵⁰ Caricom and South Asia⁵⁵¹ for example. Within the African continent, inter-

543 See Council Framework Decision 2008/978/JHA of 18 December 2008, on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters.

544 This was originally proposed in a Commission Communication November 2003. COM(2003) 688 final.

545 'EU evidence exchange warning', *The Law Society Gazette*, 25 September 2008, available at: <http://www.lawgazette.co.uk/news/eu-evidence-exchange-warning>.

546 Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union OJ L 386/89, 29.12.2006; Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property OJ L 68/49, 15.3.2005; Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders OJ L 328 of 24.11.2006; and Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA) OJ L 162/1 20.6.2002. See also Council Framework Decision 2008/977/JHA of November 27th 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters has been adopted.

547 Council Framework Decision 2008/909/JHA of November 27th 2008.

548 *Ibid.*

549 See, e.g., Protocol amending the European Convention on the Suppression of Terrorism (Strasbourg, 15 May 2003), ETS No. 190, not yet in force), hereinafter 'Protocol to the European Convention against Terrorism'.

550 Inter-American Convention against Terrorism (Bridgetown, 3 June 2002, OAS Res. 1840 (XII-O/02), not yet in force).

551 In addition, the South Asian Association for Regional Co-operation (SAARC) adopted an Additional Protocol to the SAARC Regional Convention on Combating Terrorism, on 6 January 2004.

esting new developments have arisen on a pan-African basis,⁵⁵² which among other things make practical arrangements (such as the establishment of national contact points) to facilitate the timely exchange and sharing of information and cooperation in the suppression of terrorist financing, and provide a basis for extradition between African Union states.⁵⁵³ Sub-regionally, East African,⁵⁵⁴ ECOWAS⁵⁵⁵ and SADC states⁵⁵⁶ have all now reached sub-regional co-operation agreements.

Cooperation between other states and the United States has been the focus of particular attention post-9/11. For example, trans-Atlantic cooperation between European Union member states and US law enforcement and intelligence agencies has led to several – at times controversial – new measures.⁵⁵⁷ Several extradition and mutual legal assistance treaties have been concluded between the US and EU itself.⁵⁵⁸ These expedite the extradition process, facilitate access to information and the exchange of personal data and strengthen operational links between investigative and law enforcement agencies.⁵⁵⁹ These treaties are supplemented by bilateral agreements.⁵⁶⁰ Despite these developments, certain well known challenges in fostering closer US-EU counter-terrorism and law enforcement cooperation are however outstanding. Among them, US concerns regarding intelligence sharing on the one side has impeded prosecutorial efforts in many cases, related to terrorism and counter-terrorism,

552 Following the introduction of the 1999 Convention on the Prevention and Combating of Terrorism which calls for increased cooperation, the African Union produced the Decision on the Elaboration of a Code of Conduct on Terrorism (OAU Doc. Assembly/AU/8(II) Add. 11) and the Decision on Terrorism in Africa (OAU Doc. Assembly/AU/Dec.15 (II)). There is now a protocol too: Protocol to the OAU Convention on the Prevention and Combating of Terrorism Addis Ababa, Ethiopia, 08 July 2004.

553 Its main purpose is to enhance the effective implementation of the Convention and to give effect to Article 3(d) of the Protocol.

554 Note the importance of this breakthrough as regards the potential to combat the sort of 'informal' or extraordinary rendition witnessed in relation to the Kampala bombings, discussed above in this chapter, and not uncommon in broader practice.

555 Discussed in du Plessis and M. Ewi, 'Criminal Justice Responses to Terrorism in Africa: The Role of the African Union and Sub-Regional Organizations', in A. Salinas de Frías, K. Samuel, and N. White (eds.), *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012), Ch. 36.

556 *Ibid.*

557 At the EU summit in Copenhagen in September 2002, agreement was reached between the US and the EU on how to swiftly and effectively exchange information between their respective forces. See 'EU-US co-operation in fighting terrorism', EU Presidency Press release, 14 September 2002. See also 'Informal EU Justice and Home Affairs Council, 13-14 September 2002', *Statewatch News online*, September 2002.

558 See, e.g., Council Decision of 6 June 2003 concerning signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters; Agreement on extradition between the European Union and the United States of America, 7 July 2003; OJ L 181, 19 July 2003, 25 ff.

559 Eurojust (the provisional public prosecution agency of EU) and the US are to consider cooperation agreements. Joint Investigation Teams may be established where appropriate.

560 On related controversies, see 4B.2.2.2. below on the UK and US agreements.

as illustrated above.⁵⁶¹ Differences on data privacy and data protection,⁵⁶² detention policies and fair trial guarantees⁵⁶³ and differences in the US and EU terrorist designation lists,⁵⁶⁴ are also described as impediments to fuller cooperation.

Institutional developments have unfolded, aimed variously at facilitating cooperation, providing technical assistance and building capacity to enhance the investigation and prosecution of terrorism and inter-state cooperation. Examples, with divergent roles and capacity, range from Eurojust, a judicial coordination unit within the European Union,⁵⁶⁵ the Inter-american Committee against Terrorism of the OAS, to the intergovernmental Global Counter-Terrorism Forum established at the initiative of the US Secretary of State in 2011, with a 'primary focus on countering violent extremism and strengthening criminal justice and other rule of law institutions necessary to prevent and counter terrorism'.⁵⁶⁶ This complements the existing international and regional entities with a role in facilitating investigation and prevention of terrorism, such as Interpol and Europol.

To varying degrees these initiatives respond to at least some of the many real challenges that have hampered cooperation in the past, be they legal or procedural obstacles, lack of trust and understanding between states, lack of capacity, or lack of procedures or mechanisms in place domestically. Enhanced cooperation for bringing persons to justice and securing reliable evidence is essential if states are to meet their obligations to prevent and punish serious crimes such as those committed on 9/11. For the most part then the industry in this field – aimed at establishing clear obligations, efficient procedures for

561 Examples are given throughout this book of the refusal to cooperate with foreign proceedings in respect of investigation, justice and accountability for war on terror related offences, as well as in relation to the terrorism criminal cases highlighted above. *See, e.g.*, the Motasadeq case in Germany at 4B.1.2, the UK investigations at 7B.14 or non-cooperation with Polish investigation into renditions, at Chapter 10

562 *See* EU-US Cooperation against Terrorism Congressional Briefing which recognises that 'The negotiation of several U.S.-EU information-sharing agreements, from those related to tracking terrorist financial data to sharing airline passenger information, have been complicated by on-going EU concerns about whether the United States could guarantee a sufficient level of protection for European citizens' personal data.'

563 *See, e.g.*, Cooperation and Human Rights Concerns below.

564 'US-EU cooperation against Terrorism', *supra* note 540.

565 Although conceived previously, the Eurojust website describes 9/11 as the catalyst to its establishment, by Council Decision 187/JHA, as a judicial coordination unit on organised crime, including terrorism. Eurojust, available at: <http://eurojust.europa.eu/Pages/home.aspx>.

566 *See e.g.* Global Counter-Terrorism Forum, Factsheet, available at: <http://www.cfr.org/counterterrorism/fact-sheet-global-counterterrorism-forum/p28460> Although currently co-chaired by the US and Egypt, states not perhaps at the helm of best practice in relation to counter-terrorism within a rule of law framework, the 'primary focus on countering violent extremism and strengthening criminal justice and other rule of law institutions necessary to prevent and counter terrorism' is noteworthy.

giving effect to them and enhancing capacity to deliver – is, or at least should be, a positive development. However as highlighted below, questions arise as to some of these developments, in particular their compatibility with other international obligations, notably in the field of human rights.⁵⁶⁷

4B.3.2 Streamlining Cooperation and Relevant Safeguards?

The international standards mentioned above, aimed at strengthening obligations to cooperate, have not always developed in line with the co-existent obligations *not* to cooperate where there is a substantial risk of serious rights violation in the state requesting extradition or mutual legal assistance. In some situations, those obligations were apparently ignored, as in Security Council Resolution 1373,⁵⁶⁸ In others they were reflected selectively or restrictively as in the Protocol amending the European Convention on Terrorism, which referred to some of the rights that require to be protected through the obligation of non-refoulement, but not to others.⁵⁶⁹ This may have generated confusion as to applicable legal standards and rendered the rights vulnerable. It must be noted that, ultimately, both the Security Council and the Council of Europe for example have clarified that the obligations in respect of cooperation against terrorism must be interpreted consistently with international human rights.⁵⁷⁰ Human rights bodies, through jurisprudence, have in turn clarified the scope and nature of many of these obligations.⁵⁷¹ Another question is how these obligations are given effect in practice, or whether measures aimed at enhancing the process of cooperation have unduly jeopardized human rights protection.

Several of the innovations in cooperation mentioned above, such as the Pan-European arrest warrant ('European Arrest Warrant'),⁵⁷² procedures for

⁵⁶⁷ See 4B.4. More detail on their compatibility with obligations in the field of human rights is discussed at Chapter 7A.5.10 and 7B.10.

⁵⁶⁸ SC Res. 1373 (2001) imposed broad-reaching obligations e.g. of cooperation, without reference to human rights.

⁵⁶⁹ Protocol amending the European Convention on the Suppression of Terrorism, Strasbourg, 15 May 2003, ETS, No. 190 (not yet in force). The Protocol precludes extradition where there is a risk of torture but not inhuman or degrading treatment or denial of justice and fails therefore to reflect fully relevant human rights law. For discussion of the Protocol, see Chapter 7B.10 below.

⁵⁷⁰ See, e.g., SC Res. 1456 (2003), 20 January 2003, UN Doc. S/RES/1456 (2003); the Draft Explanatory Report on the European Convention on Terrorism as it will be revised by the Protocol amending the Convention upon its entry into force, adopted on 13 February 2003, text available at <http://conventions.coe.int/Treaty/en/Reports/Html/090-rev.htm>; and see generally Chapter 7B1.

⁵⁷¹ See refoulement in Chapter 7 – this has been an area of considerable jurisprudential development post 9/11; see also examples of cases in Chapter 11.

⁵⁷² See eg the European Arrest Warrant discussed above.

US-UK extradition,⁵⁷³ or African sub-regional regimes adopted under the auspices of SADC and IGAD,⁵⁷⁴ significantly change extradition practice and procedures between the states affected by them. While aimed at modernising and expediting notoriously tardy extradition procedures, they also curtail of the role of the judge in extradition proceedings, potentially dismantling essential human rights protection against unlawful transfer.⁵⁷⁵ Among the controversial aspects are those highlighted below.⁵⁷⁶

4B.3.2.1 Lowering evidentiary requirements in extradition proceedings

Among the steps taken in the name of expediting the extradition process are those that seek to remove the requirement that the requesting state provide a basic degree of evidence to the requested state.⁵⁷⁷ The European Arrest Warrant for example – initiated before the September 11 attacks but which advanced more rapidly thereafter – lowers the threshold, requiring only the provision of basic ‘information’ (as opposed to evidence) regarding the alleged offence, where it was committed and the involvement of the suspected perpetrator.⁵⁷⁸ While controversial, concerns about the adoption of the European Arrest Warrant were to some degree assuaged by the fact that it removes this requirement only as between EU countries, and proposals to do the same for other countries was rejected by the EU and opposed explicitly in the UK parliament at the time.⁵⁷⁹

573 Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, Washington, 31 March 2003 (hereinafter ‘US-UK Extradition Treaty’).

574 See du Plessis and Ewi, ‘Criminal Justice Responses to Terrorism in Africa’, *supra* note 555.

575 See ‘Mutual Recognition of final decisions in criminal matters’, *Statewatch*, at <http://www.statewatch.org/news/sept00/16ftamut.htm>; and JUSTICE at www.justice.org.uk/publications/listofpublications/index.html. The European Arrest Warrant, *supra* note 249, requires a judicial (as opposed to executive) decision in the issuing state (Article 1) and should be applied so as to ‘have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty of the European Union’. See also the Preamble setting out the possibility of refusing extradition if the prosecution is for discriminatory purposes. The question however is how these rights are safeguarded in practice given the streamlined procedure.

576 Also controversial are the restriction of the rule of specialty in the European Arrest Warrant and of the *ne bis in idem* principle (as regards third states) in the US-UK treaty.

577 Differences between civil and common law traditions is noted above in Part A. This change is more significant for common law than civil law countries.

578 Article 8, European Arrest Warrant, *supra* note 249.

579 At the time of the European Arrest Warrant, the EU refused to accept the lowering of this standard to non-EU countries. The UK parliament Home Affairs Committee at that time also ‘express[ed] concerns at proposals to relax the requirement that extradition requests from non-European countries must demonstrate that there is a *prima facie* case to answer’. See Home Affairs Committee, House of Commons Press Release 2002-03, 5 December 2002, No. 5 ‘Home Affairs Committee savages EU arrest warrant proposals’. Despite this, this was done in the UK-US bilateral treaty.

Despite this, the subsequent UK-US Extradition treaty also removed the requirement that a basic level of evidence⁵⁸⁰ be provided in requests from the US to the UK (but not vice versa).⁵⁸¹ While similar to the European Arrest Warrant procedure, greater controversy arises from the context of extradition requests emanating from the US. Specifically, there is concern that the arrangements allow for extradition requests to be made by the United States as a precautionary measure, prior to the establishment of sufficient evidence to justify submitting the suspect to criminal process.⁵⁸² For example, in the UK, the case of Lofti Raissi – an Algerian national detained at the request of the US on suspicion of involvement in training the September 11 pilots – resulted in his release from high security detention after five months, after the US authorities consistently failed to provide evidence to justify his extradition. Had this case, or others like it,⁵⁸³ unfolded after the entry into force of the new US-UK extradition treaty removing the evidentiary requirement, he would have been extradited despite the lack of evidence against him. Many other cases may likewise proceed without any evidentiary basis or this fact even coming to light. Pressure is growing for a reappraisal of the UK-US Extradition arrangements so the position may yet change.⁵⁸⁴

4B.3.2.2 Removal of double criminality and political offence exceptions

The European Arrest Warrant has drawn particular criticism for the removal of the double (or 'dual') criminality principle, by virtue of which a state does not extradite for conduct not punishable in its own law. This rule, which serves both to protect the state from embarrassing diplomatic difficulties and the individual from abusive prosecution,⁵⁸⁵ has often been described as a prin-

580 Previously, under the prior treaty, evidence sufficient for the committal of the individual in the UK was required.

581 Article 8(3)(c), US-UK Extradition Treaty. Whereas the US would provide basic statements of 'information' the UK would still have to demonstrate 'a reasonable basis to believe that the person sought committed the offense'. The differential is purportedly justified by reference to the US constitutional guarantee not to be extradited without judicial oversight of the evidence against him or her.

582 On the human rights standards applicable to arrest and the general prohibition on preventive detention, see Chapter 7A.53.

583 See for example the *Boumidiene* case, dismissed by the Bosnian Supreme Court due to lack of evidence, despite which the authorities transferred the suspect.

584 See discussion at e.g., 'UK-US extradition treaty overhaul urged' <http://www.bbc.co.uk/news/uk-politics-17553860>, or 'Wanted by the US? Brace for extradition', Financial Times, <http://www.ft.com/intl/cms/s/0/5c9825d2-1cfe-11e2-abeb-00144feabdc0.html#axzz2TT0GX4rK>, both 30 March 2012.

585 The principle remains relevant within the European context (particularly perhaps in an expanded Europe) so far as fundamental differences remain, e.g., in laws relating to abortion and homosexuality, which some states criminalise yet the prosecution of which would be considered by other states and human rights standards as to amount to a human rights violation. On the rationale as, in part, protecting the *nullum crimen sine lege* principle, see

ciple of customary law.⁵⁸⁶ Particular concern arose from the 'ill-defined nature of the 32 categories of offence which will be exempt from the dual criminality requirement',⁵⁸⁷ which include 'terrorism', 'participation in a criminal organisation' and 'racism and xenophobia'.⁵⁸⁸ Given the inherent susceptibility to abuse of broadly defined laws (including – as the work of human rights courts and bodies demonstrates – laws of 'terrorism'),⁵⁸⁹ the double criminality safeguard guaranteed an essential element of judicial oversight in the extraditing state.

Both the US-UK treaty and the European Arrest Warrant remove the 'political offence' exception. This exception has grown increasingly controversial (in particular as it came to be seen as providing a 'legal loophole for terrorists')⁵⁹⁰ has also been excluded by various extradition arrangements as regards serious crimes.⁵⁹¹ So far as its removal applies to serious crimes under international law, clarifying that they are neither 'political' nor justifiable, whatever their underlying ideology, it is to be welcomed as consistent with shifts in international law and practice in favour of accountability. However, the removal of this exception may enhance vulnerability in the context of broadly defined offences of terrorism and association therewith, which often cover more and less serious crimes and are susceptible to politicization. As such, in the absence of a political offense exception the importance of a broad and operational rule of non-refoulement,⁵⁹² to ensure that extradition is not

Dugard and Van den Wyngaert, 'Reconciling Extradition', *supra* note 250.

586 See I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), p. 313; I. Stanbrook and C. Stanbrook, *Extradition: Law and Practice* (Oxford: Oxford University Press, 2000), p. 20.

587 See Home Affairs Committee report on Extradition Bill, *supra* note 279. The Committee expressed concern at the erosion of the dual criminality principle, 'in particular' given the ill-defined nature of the offences.

588 Article 2.2, European Arrest Warrant, *supra* note 249.

589 See Chapters 2 and 7.

590 For an increasingly rare defence of this principle, see C.H. Pyle, *Extradition Politics and Human Rights* (Philadelphia, 2001), in particular ch. 15, 'Gutting the Political Offense Exception', pp. 197-206.

591 See Chapter 2 on terrorism conventions, and Chapter 4, para. 4A.2, as regards crimes under international law.

592 Note that the non-discrimination rule (which is included in the Preamble of the European Arrest Warrant) reduces the dangers of political abuse inherent in the application of the terrorism label and the European Arrest Warrant confirms that it does not affect the duties of states in respect of human rights. European Arrest Warrant, *supra* note 249. The challenge, however, will be to ensure that the protections that human rights law does afford are operational within the streamlined procedure envisaged. For the rule see Chapter 7A and for positive developments reasserting the rule and clarifying its scope in this context, see Chapter 7B.10 'Dispatching the Problem: Return and the Refoulement post 9/11'.

sought as a vehicle for political repression or other human rights abuse,⁵⁹³ is all the more important.

4B.4 THE IMPACT OF 'WAR ON TERROR' VIOLATIONS ON INTERNATIONAL COOPERATION AND CRIMINAL JUSTICE

The goals of preventing terrorism, prosecuting those responsible (with effective cooperation) and protecting human rights are compatible and mutually reinforcing.⁵⁹⁴ In practice, however, serious tensions have arisen. Abusive pre-trial detention and interrogation regimes, the erosion of the principles *nullum crimen sine lege*, presumption of innocence or the right to trial before an independent judiciary, among others, have raised questions about the fairness and indeed legitimacy of counter-terrorism criminal processes in many states. Developments in state cooperation, while generally positive, have also at times jeopardised respect for human rights protections.

The human rights deficit affects the legitimacy of the criminal process. As this section indicates, fundamental human rights violations have also impeded that process much more directly, by affecting the ability to access evidence, secure custody of suspects or to hold them to account.

4B.4.1 Inability to Secure Suspects: Extradition and Human Rights

Section A above records the obligations of states – by virtue of bilateral extradition and mutual assistance treaties as well as positive obligations in international human rights law – to cooperate with one another in the repression of serious crime and, in certain circumstances, and to *refrain* from providing such cooperation on human rights grounds.⁵⁹⁵ This corresponds to detailed rules on non-refoulement in human rights law. As regards the impact of these obligations on cooperation practice, the landscape is mixed. The work of the human rights bodies post 9/11 demonstrates numerous occasions on which states have shown little, or only selective, respect for these obligations by

593 The historical roots of the political offence exception relate principally in sovereignty and political expediency, to avoid one regime becoming embroiled in the political affairs of another, though it has since been used by individuals to challenge extradition. See Dugard and Van den Wyngaert, 'Reconciling Extradition', *supra* note 250, p. 188 (noting that this exception allows states to refuse extradition where the individual 'is engaged in the struggle for human rights in the requesting state').

594 See, e.g., the integrated approach in the Global Counter-Terrorism Strategy of 2006, *supra* note 235, Chapter 7B.1.

595 See also Chapter 7A.4.1.1, A.5.10 and B.10.

transferring suspected terrorists despite a substantial risk to their basic rights.⁵⁹⁶ At the same time there are many other examples of states being unable to meet extraditions requests in terrorism cases because of the risks to terrorist suspects in the requesting state.

An early example relates to the death penalty, where the practice of European states to require 'assurances' that the death penalty will not be applied as a pre-condition to extradition is well established. Unsurprisingly, then the EU states made clear that 'no EU country will extradite suspects to the US if the death penalty might apply'⁵⁹⁷ and the Council of Europe has likewise confirmed that all Member States should refuse to extradite in such cases.⁵⁹⁸ Consistent with this, cases such as that of Mamdouh Mahmud Salim – who faced charges of terrorist conspiracy in the US – proceeded on the basis of undertakings given by the United States to German officials that prosecutors would not seek the death penalty if the suspect were extradited to the US.⁵⁹⁹ Likewise, states have withheld extradition on grounds of the risk of torture or ill-treatment or a violation of related safeguards.⁶⁰⁰

Recent jurisprudence on non-refoulement in the counter-terrorism context has clarified the human rights obligations not to extradite where there are risks not only of torture and ill treatment, but of abuses in the criminal process so serious as to amount to a 'flagrant denial of justice'.⁶⁰¹ One issue that has caused states particular pause in their willingness to cooperate has been resort to military or special courts, of on-going relevance in several states around the world.⁶⁰² The UK was thus unable to extradite a terrorist suspect to Jordan to stand trial before a court which lacked independence and impartiality, or

596 The case work of the Human Rights Committee, for example, illustrates the piecemeal approach in state practice offering protection from certain rights and not others, at odds with the human rights obligations of the state. *See, e.g.*, Concluding observations of the Human Rights Committee: Portugal, UN Doc. CCPR/CO/78/PRT (2003), para. 12.

597 Statement by Danish Justice Minister Lene Espersen delivered during the Danish Presidency of the EU. *See* I. Black, 'Extradition of terror suspects ruled out. EU will not expose prisoners to US death penalty', *The Guardian*, 14 September 2002.

598 Council of Europe, Resolution 1271 (2002), 'Combating Terrorism and Respect for Human Rights'. This accords with the ECtHR's decision in *Soering v. United Kingdom*, *supra* note 269, (discussed above, Section A).

599 *See* 'Death Penalty Phase of Bombings Trial Begins', *CNN.com*, 30 May 2001, available at: <http://cnnstudentnews.cnn.com/2001/LAW/05/30/embassy.bombings.01>.

600 Whether it meets the high threshold for a violation of torture or inhuman treatment depends on the facts; *see* Chapter 7A52, and eg the extradition of terrorist suspects to trial which relied on evidence obtained through torture was precluded (in *Othman*, *supra* note 252), whereas extradition to confinement at a super-max prison in the US was not (*Ahmed v. UK*). *See* Chapter 7B.5.10.

601 *See, e.g.*, *Othman*, *supra* note 252; *see also* Chapter 7.

602 The use of military commissions, and the criticism of them for their due process deficit, are addressed at 4B.2.3, Chapter 7B3.1.

where evidence obtained through torture would be relied upon.⁶⁰³ While it is important that not any potential risk of violation of fair trial guarantees should impede international cooperation, lest the system grind to a halt, where violations of core fair trial rights (amounting to a flagrant denial of justice) are at stake, the legitimacy of the law enforcement process hangs in the balance. States cannot, and have not in practice, been able to extradite as a result of requesting states failure to respect basic fair trial rights.

On the same basis, it would appear that states could not extradite an individual to be held unlawfully in Guantanamo Bay, or to stand trial before a US established military commission, for example.⁶⁰⁴ An early harbinger of the cooperation impediment that military commission would become came in the form of a Spanish Foreign Ministry statement that Spain would not agree to a request to extradite eight alleged Islamist terrorists unless the United States agreed that they would be tried by a civilian court and not by the military commissions.⁶⁰⁵ The Spanish authorities are reported as having insisted that persons extradited would 'not be subject to military or special tribunals, or to summary justice' and they must be tried in public with the opportunity to confront one's accuser.⁶⁰⁶ Another example of a similar position appears in a later Dutch case, where the suspect was ultimately extradited from the Netherlands to the US but only on condition that he be neither labelled an enemy combatant nor tried by military commission, *and* that Dutch courts would be able to review and possibly modify his sentence upon his return.⁶⁰⁷

The impact of the inability of states to provide certain forms of cooperation in light of their human rights obligations is acknowledged in the US' 2010 Guantanamo Bay Task Force report. The report notes that states had been unwilling to cooperate with the military commissions scheme, but which would – the report suggested – have greater willingness to cooperate with federal prosecutions in regular courts.⁶⁰⁸

603 *Othman v. UK*, *supra*. Chapter 7B.5.10 on non-refoulement notes the practice of seeking assurances to enable to state to extradite where it otherwise could not.

604 As the majority of Guantánamo detainees were not formally extradited, there has been little practice testing this principle. *See* however *Ahmed v. UK* case noting that extradition could proceed as there was no such risk of rendition or detention at Guantánamo.

605 S. Dillon, 'A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions', *New York Times*, 24 November 2001, reporting that a spokesman for Spain's Foreign Ministry confirmed that Spain would only extradite detainees to countries that offer defendants the legal guarantees provided by Spanish courts. The Foreign Ministry spokesman said, 'if we're talking about a tribunal in the United States with summary procedures and military judges, then these are not the same conditions that would characterise a trial in Spain or France or England or anywhere else in Europe'.

606 J. Yoldi, 'España advierte a EEUU de que no extraditará a miembros de AlQaeda', *el Pais*, 23 November 2001.

607 *See* the case of *Al Delaema*, Supreme Court of The Netherlands, Judgment of 5 September 2006.

608 Guantanamo Task Force Report 2010, p. 20.

4B.4.2 Inability to Secure Mutual Legal Assistance

Practice is more difficult to assess in the field of mutual assistance cooperation, due to the confidentiality and relative informality of mutual assistance requests. It would appear, however, that in several cases since September 11 European states have indicated their unwillingness to provide other forms of cooperation including mutual assistance if the evidence would be used towards the application of the death penalty.

Examples of states having publicly informed the US that they would withhold evidence absent assurances that it would not be used to secure the death penalty, include statements from Germany and France in relation to the provision of documentary evidence against the alleged September 11 conspirator, Zacarias Moussaoui.⁶⁰⁹ The German statement emphasised that it was necessary to distinguish between sharing information with the United States that is necessary to help prevent another attack and handing over evidence that could help sentence a person to death.⁶¹⁰ This principle of non-cooperation in light of human rights concerns has also been reflected, to a limited degree, in mutual assistance arrangements entered into since September 11, as well as in earlier such arrangements.⁶¹¹

4B.4.3 Abuse of Process and Jeopardising Trial?

Perhaps the clearest counter-terrorism paradox would be if criminal trials simply could not proceed, not because of the challenges of investigation and prosecution but because of the nature of the abuses carried out in the name of counter-terrorism. Although the situation remains opaque, this may well be the case in respect of some of the detainees held at Guantanamo indefinitely, who the US claims are too dangerous to be released but who it is not 'feasible'

⁶⁰⁹ Germany's former Justice Minister, Herta Daeubler-Gmelin, said that Germany would provide documents only on condition that they 'may not be used for a death sentence or an execution' (*Associated Press*, 1 September 2002). Marylise Lebranchu, the then French Minister of Justice, stated that, under Article 6 of the treaty governing judicial cooperation between France and the United States, France could either refuse assistance, or make it conditional on certain demands. She confirmed that 'any document should only be passed on to the Americans to help them with their enquiries on condition that such document [is] not used to get a conviction carrying a death penalty' (statement reported at www.ahram.org.eg/weekly/2002/597/in4.htm).

⁶¹⁰ See the statement of the German Justice Minister, *ibid*.

⁶¹¹ See, e.g., the Inter-American Convention against Terrorism which specifically notes that the obligation of mutual assistance does not apply where there is a substantial basis for believing that the request has been made for the purpose of prosecuting on discriminatory grounds. Article 14 (Non-discrimination), Inter-American Convention against Terrorism. The Convention also reflects more generally the duty to interpret the convention in accord with, among other areas of international law, international human rights law. This reflects other pre-existing standards. See, e.g., Article 8, European Convention on Terrorism.

to prosecute.⁶¹² It is impossible to assess how many criminal cases, from Guantánamo or elsewhere around the world, are simply not being brought on the basis of what they may reveal regarding abuses, or the prospects of the trial being thrown out on abuse of process grounds.

The issue is increasingly live in terrorism trials. As the Australian Courts made clear in the *Banbrika* case, abuses resulting from conditions of detention and treatment pre-trial may themselves simply render a trial unfair.⁶¹³ International practice in other areas may support the view that, at a certain point, conduct such as prejudicial publicity may also render a fair trial no longer possible.⁶¹⁴

While cases in which such a drastic outcome remain rare, there are examples of this risk appearing in practice. An interesting example is where the Canadian Courts rejected a US extradition request for Abdullah Khadr,⁶¹⁵ as a remedy to 'distance' the courts from the grave violations and misconduct against Abdullah Khadr while he was detained in Pakistan. The first instance court had held that the extradition request could not be satisfied due to the gross misconduct of the US, contravening 'fundamental notions of justice'.⁶¹⁶ The ability to secure inter-state cooperation in criminal matters may therefore not only be affected by future risks of abuse in the requesting state (discussed under refolement), but also by the extent of violations of human rights in the past.

In other cases it has been argued that the level of abuse to which the individual has been subject, or the length of the pre-trial process, is such that the trial would be an 'abuse of process,' or inherently so tainted that it jeopardises the integrity of proceedings or could never be deemed fair. This was seen in US courts in the Abu Ali case cited above, for example, where the majority rejected the claim, on the basis that the harm alleged had been at

612 This leads to a vicious circle for detainees who continue to be victims of indefinite arbitrary detention, which may be based on the extent of their earlier torture. See Chapter 8.

613 *R v Benbrika (Ruling No 20)* [2008] VSC (20 March 2008).

614 *Prosecutor v. Lubanga*, *supra* note 20. Although the prejudice arising from the prosecutor's public statements regarding the accused were insufficient to stop the trial in that case, the decision makes clear that greater prejudice would indeed have had that effect. Instead, it was a factor taken into account in sentencing. *Prosecutor v. Lubanga*, No. ICC-01-04-01/06, Decision on Sentence, 10 July 2012.

615 *United States of America v. Khadr* (2011) ONCA 3582 0110506 Docket: C52633. Abdullah Khadr was apprehended in Pakistan in 2004 and held for 14 months without warrant or access to a lawyer. He was denied access to consular services, and his repatriation to Canada by the Pakistani authorities was delayed. Upon return to Canada, he was rearrested in December 2005 under the US extradition request, having been indicted in the US on charges of supplying weapons to al-Qaeda. The Court of Appeal of Ontario upheld the judgment of the Ontario Superior Court of Justice. The US was described as the driving force behind Abdullah Khadr's capture, on ransom, in Pakistan. See Chapter 6B.2.4. 'The Role of Rewards and the Bounty Hunter in IHL.'

616 *Ibid.*

the hands of foreign state officials.⁶¹⁷ This was reflected in the subsequent case of *R v Ahmed* before English courts.⁶¹⁸ On the facts of that case, the Court also refused to stay a criminal case, but in doing so noted that the allegations of torture or complicity in torture had not been substantiated, that there was no link between the allegations of abuse and the accused's trial and no evidence of wrong doing by UK authorities, either in his alleged torture or through the receipt of intelligence information.⁶¹⁹ The judgment suggests that, had there been any such link between the information received and his trial (either through capture of the individual or the reliance on evidence on which the prosecution was based), or had UK officials been involved in any unlawfulness, including indirectly through complicity under international law, a stay of proceedings may have been required.

As the Court made clear in *Ahmed*, not every allegation of rights violations can or should thwart the ability to hold to account for serious crimes, but certain abuses may affect the legitimacy of the criminal process itself. As terrorism trials continue to unfold, questions regarding the circumstances in which stay of proceedings are appropriate, or required – including the doubtful criteria of whether the abuse was at the hand of the prosecuting state as opposed to another⁶²⁰ – are likely to be further explored. The potential for human rights abuses in the war on terror to ultimately impede the ability to prosecute and punish terrorism in the future is striking.

617 The rule of prompt presentment to a court only applied to US officials not where the individual was detained by others abroad.

618 *R. v. Ahmed (Rangzieb), R. v Ahmed (Habib)*, Court of Appeal (Criminal Division), 25 February 2011, [2011] EWCA Crim 184; [2011] Crim. L.R. 734. The accused's allegations included of torture in Uzbekistan and Pakistan prior to his transfer to UK custody.

619 The difficult issue the court had to grapple with in that case was whether the receipt of information that may have been obtained through torture was itself a wrong that justified stay of proceedings. See chapter 3 on state responsibility through aiding and assisting under international law. The Court of Appeal found that the trial judge had thoroughly investigated whether the UK had connived at his unlawful rendition to the UK by the Pakistani authorities for the purpose of putting him on trial in the UK; on the controversial issues of complicity under international law that arise, see Chapter 10. Note footnote, *ibid*, on questions regarding the rationale for this distinction.

620 Note the distinction based on the the states *own* wrongs is controversial, and departs from the approach on admissibility of evidence in *A & Ors* (no. 2) in Chapter 11. The *Ahmed* case rightly rejected the idea that the purpose of stays was punishment of national authorities, and suggested that the rule serve to preserve the integrity of proceedings, which arguably applies irrespective of which authority is responsible for the abuse. Moreover, if the aim is even partly protection of individuals, avoiding 'encouragement' of torture (*A & Ors*, Ch 11), this rationale applies irrespective of the wrong doing state.

4B.4.4 Inadmissibility of Evidence

Finally, many of the criminal trials unfolding post 9/11 are hindered by questions regarding the admissibility of evidence illegally obtained.⁶²¹ Where evidence is obtained through torture or cruel treatment, it may well not constitute reliable evidence, but it cannot in any event be admitted in any criminal trial.⁶²² This may limit the basis for trial, or ultimately lead to cases being dropped or convictions being overturned.

In one of a growing number of examples, a French court overturned terrorist conspiracy convictions for five former Guantánamo detainees on the basis that information gathered by French intelligence officials in Guantánamo violated French evidentiary rules.⁶²³ Disregard for human rights may then ultimately come at a high price not only for the individual but for the criminal justice system which is curtailed in its ability to discharge its punitive and rule of law mandate.

4B.5 CRIMINAL JUSTICE FOR COUNTER-TERRORISM CRIMES: THE OTHER SIDE OF THE COIN

In the war on terror, criminal justice is a double-sided coin. On one, there is the role of criminal justice to prevent and punish terrorism, on which this chapter focuses. On the other is the role of criminal justice in addressing those crimes that have been committed in the name of counter-terrorism. But the practice set out above, from normative developments designed to stretch the web of criminal law to cover terrorism to burgeoning criminal terrorism trials, contrasts starkly with the dearth of activity in holding to account those responsible for violations on the other 'side'. The same legal provisions, and certainly the same rule of law perspective, demand that the law be brought to bear equally on serious crimes committed through terrorism or counter-terrorism.

621 *E.g.*, Among the many examples *see, e.g., US v. Abu Ali*, *supra* note 316, where the US courts referred to above, the Motassadeq case before German courts also discussed above, or the French Appeals Court decision to overturn a conviction on this basis. In *Othman*, *supra* note 252, the ECHR found that the likelihood of using evidence obtained through torture rendered the trial unfair.

622 Art. 15, Convention against Torture, Chapter 7A53 and Chapter 8.

623 'A French appeals court ... overturned terrorist conspiracy convictions for five former inmates of the Guantánamo Bay prison who were tried and convicted in 2007, after they were returned to France. The court ruled that information gathered by French intelligence officials in interrogations at Guantánamo Bay, Cuba, violated French rules for permissible evidence, and that there was no other proof of wrongdoing.' 'Terror Convictions Overturned in France', *The New York Times*, 24 February 2009, available at: <http://www.nytimes.com/2009/02/25/world/europe/25france.html>. This was also an issue in the *Mounir El Motassadeq Case* before the German Courts discussed above, *supra* note 339.

As noted above, it is now beyond reasonable dispute that measures taken in the name of the global 'war on terror' have amounted to crimes under both international and national law. One obvious example, addressed in detail elsewhere in this study, is the extraordinary rendition programme, involving systematic state practices of abduction, torture and secret detention in bespoke 'black sites', which could amount to many crimes including torture and enforced disappearance, and potentially also crimes against humanity and, for any detentions genuinely associated with an armed conflict, war crimes.⁶²⁴ Egregious acts of torture in Iraq, Afghanistan and beyond give rise to serious allegations of war crimes.⁶²⁵ Systematic prolonged arbitrary detention in violation of fundamental norms as seen in Guantanamo may, arguably, also amount to war crimes or crimes against humanity.⁶²⁶ The same has been alleged in respect of the systematic campaigns of targeted killings.⁶²⁷

The range of forms of individual criminal responsibility explored in this chapter suggest a range of potential charges, involving direct and indirect perpetration, such as ordering, instigation, aiding and assisting and co-perpetration against a range of the intellectual and material authors of these crimes. It is also clear that a range of states, at whose hands or on whose territory the crimes unfolded, share responsibility for the investigation and prosecution of those crimes, and cooperation in relation to the same.⁶²⁸

Yet practice of investigating and, in particular, prosecuting these crimes remains striking in its scarcity. The developments, or lack of developments, will be explored in subsequent chapters of this study.⁶²⁹ Suffice to anticipate here that accountability in respect of war crimes in Afghanistan and Iraq has been minimal, against low-level perpetrators, and in respect of isolated rather than systematic practices.⁶³⁰ There have been no US indictments for the widespread torture and abuse of detainees by the CIA and associates through the

624 Chapter 10 on Rendition.

625 See violations of IHL in Chapter 6, and Chapter 7B.14 'Justice and Accountability'.

626 ICC Statute, *supra* note 4, Article 7(1)(e) ...; crime against humanity of 'imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law'; see also Elements of the Crimes Doc, Art 7(1)(e).

627 See 'Ferencz Condemns Drone Attacks: "A Crime Against Humanity"' – 26 Bipartisan Congress Members, UN Question Unmanned Aerial Assaults', Peculiar Progressive, 19 June 2012, available at: <http://peculiarprogressive.blogspot.co.uk/2012/06/ferencz-condemns-drone-attacks-crime.html>.

628 Although lead by the CIA, a broad range of other states were involved either in hosting black sites for CIA interrogation, themselves detaining and interrogating detainees on their territory, see Chapter 10. Allegations of cooperation with ???????. See Chapters 6 (IHL) and 9 'Justice Done? The Killing of Osama bin Laden'.

629 Chapter 7B.14 'Justice, Accountability and Reparation' discusses whether human rights duty has been met, and Chapter 8 on Guantánamo and Chapter 10 on Rendition deal in more detail with particular justice developments in those areas. Some of the obstacles to justice are also highlighted in the context of human rights litigation (but in some cases relevant also to criminal investigation) in the chapter on the role of the courts, Chapter 11.

630 Chapter 7B.14.

extraordinary rendition programme or beyond,⁶³¹ and official 'review' has been closed.⁶³² There is no statement of intent to investigate and where appropriate prosecute or acknowledgement that there is a legal obligation to do so.⁶³³

Evidence is not scarce. President Bush, among others, has openly admitted authorising waterboarding,⁶³⁴ while the former head of counter-terrorism at the CIA acknowledges overseeing it and destroying 92 videotapes of interrogation sessions.⁶³⁵ Seen through the rule of law lens, torture and the destruction of evidence in relation to it are serious offences, yet the sense of impunity surrounding them, at least in the US, appears entrenched.⁶³⁶ Questions inevitably arise regarding the implications of the underuse of criminal law in this context, including for the deterrent and expressive functions of the criminal law outlined in the introduction to this chapter.

In the face of inactivity by the United States authorities, developments in the investigation and prosecution of war on terror crimes have however been unfolding elsewhere, as detailed in subsequent chapters. These processes have, unsurprisingly, met with intense challenges. These include investigative challenges,⁶³⁷ broad-reaching state secrecy,⁶³⁸ the refusal of US coopera-

631 Chapter 10.7.

632 *Ibid.*

633 As noted in Chapter 7, *ibid.*, Obama famously pledged to 'look forward as opposed to looking backwards' on various Bush administration programs but initially kept open the possibility of accountability of broken laws. 'Obama Reluctant to Look into Bush Programs', 11 January 2009, available at: <http://www.nytimes.com/2009/01/12/us/politics/12inquire.html>.

634 Previous President Bush admitted ordering waterboarding. The previous CIA head of counter-terrorism, Jose Rodriguez, admitted ordering it. Donald Rumsfeld stated that the US military did not waterboard, but remained silent on whether the CIA did.

635 See J. Rodriguez, *Hard Measures: How Aggressive CIA Actions After 9/11 Saved American Lives* (Threshold Editions, 2012).

636 See Chapter 10 for criticism that 'we don't put our torturers on trial. We put them on book tours.' C. Pierce, 'Waterboards, Drones and the Drones Who Love Them', Esquire Politics Blog, available at: <http://www.esquire.com/blogs/politics/jose-rodriguez-cia-book-8484289>.

637 Many of the crimes were subject to what has been described as a 'concerted cover up' and suffer from complete lack of US cooperation (see Council of Europe Second Report into Rendition (2007), and Commissioner Hammerberg's statement, in Chapter 10.7), making investigations challenging but not impossible.

638 See, e.g., the trial in the Abu Omar case in Italy or the Polish investigation, where broad reaching approaches to 'state secrecy' shrouded the investigation and limited the charges; see chapter 10.

tion,⁶³⁹ and the reported imposition of political pressure on states not to pursue the cases.⁶⁴⁰

Despite this, many states that cooperated with the US in alleged criminality have committed to undertaking some form of investigation, with varying degrees of force and success, and at various stages of development.⁶⁴¹ These include the first prosecutions that have also taken place (albeit in absentia), leading to convictions of Italian and CIA officials for Abu Omar's rendition in Italian courts.⁶⁴² Criminal investigations are open in several other states, including into allegations of systematic torture and ill-treatment in US detention facilities', and possible crimes committed by former government lawyers who provided the legal justification for torture and unlawful detention.⁶⁴³ In an interesting example of the 'horizontal complementarity' between national jurisdictions,⁶⁴⁴ in one case a Spanish judge in charge of the latter case ordered a 'temporary stay of proceedings', transferring the matter to the US Department of Justice 'for it to be continued urging it to indicate at the proper time the measures finally taken by virtue of the transfer procedure'.⁶⁴⁵ One might question the appropriateness of this deference in the absence of a firm commitment by the US to investigate, but it will be revealing to see what if

639 Non-cooperation is noted in the previous section. See also the el Masri case where the Minister of Justice announced that due to lack of cooperation from US authorities, it would not be pursuing the extradition requests. 'US rejects Germany bid for extradition of CIA agents in el-Masri rendition', *JURIST*, Saturday, September 22, 2007, available at: <http://jurist.org/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php>. UK prosecutors alluded to lack of cooperation in deciding that the Mohamdad case could not lead to prosecution of any individual. 'Joint statement by the Director of Public Prosecutions and the Metropolitan Police Service', CPS, 12 January 2012 at: http://www.cps.gov.uk/news/press_statements/joint_statement_by_the_director_of_public_prosecutions_and_the_metropolitan_police_service.

640 U.S. pressure on states not to investigate renditions has been reported and condemned by e.g. the European HR Commissioner on Human Rights. 'Wikileaks' documents also records US meetings with European counterparts to this end: e.g. 'Officials Pressed Germans on Kidnapping by CIA', *New York Times*, 8 December 2010, available at: <http://www.nytimes.com/2010/12/09/world/europe/09wikileaks-elmasri.html>; 'Garzon Opens Second Investigation Into Alleged US Torture of Terrorism Detainees', Cable from US Embassy Madrid, 5 May 2009, available at: <http://www.cablegatesearch.net/cable.php?id=09MADRID440>.

641 See, e.g., Chapter 7B.14 on justice and accountability failure generally and Chapter 10 and Chapter 8 discussions on failures in respect of rendition and Guantanamo abuse specifically. See e.g. Romania and Lithuania, cursory investigation into rendition or UK enquiries but no criminal prosecutions.

642 See Chapter 10 on Rendition.

643 See Chapter 8C3 on Spanish investigations into abuse at Guantanamo and elsewhere. See Chapter 10.7 on other initiative in eg Poland and elsewhere to hold officials of the US and other states to account for rendition.

644 Part 4.A.1.3 above.

645 A 'temporary stay of proceedings' was ordered as the case was 'transferred' to the Department of Justice, in an interesting example of horizontal complementarity between states. See further Chapter 8C3.

anything this invitation at accountability dialogue produces, and how the dynamics of deference will evolve should the US fail to take steps towards meaningful accountability.

Despite the difficulties, investigations and, gradually, prosecutions do seem to be gaining some momentum.⁶⁴⁶ The limited prosecutions to date means that issues around immunities, or permissible defences, have not arisen in practice. There have however been various attempts to confer immunities on US personnel who committed crimes against detainees,⁶⁴⁷ or to manufacture defences for interrogators and others involved in their mistreatment.⁶⁴⁸ These developments are themselves relevant to the perceived legitimacy and potential 'expressive' value of the criminal law in countering crimes, whether terrorist or counter-terrorist.⁶⁴⁹ Their full practical import remains to be seen if prosecutions for war on terror crimes gathers pace. Notably, in the one case where they have been raised internationally, concerning the CIA agents convicted in Milan, claims for immunity were rejected by the Court.⁶⁵⁰

While momentum may be gathering around accountability for some of the most extreme crimes outside the US, the results remain limited. The contrast of approach, as between the rigour, and perhaps at times over-zealous exuberance, with which criminal law responses to terrorism have been embraced internationally in recent years and the muted criminal justice response to the crimes of the war on terror is striking. The legitimacy, and hence the value, of the criminal law function can only be seriously diminished by such striking selectivity of its application.

4B.6 CONCLUSION

Acts of international terrorism constitute crimes under national and often also international law. A rule of law approach to counter-terrorism requires that they be prosecuted, in accordance with due process, and that those responsible be held to account with proportionate penalties. The lack of an internationally accepted crime of 'terrorism' should not impede this process: serious acts of terrorism constitute core crimes under international law, while national systems

⁶⁴⁶ These are supported and catalysed by international human rights cases, which seek, *inter alia*, to insist that the states in question meet their human rights obligation to investigate and prosecute. See Chapter 11.

⁶⁴⁷ Chapter 7B.14.

⁶⁴⁸ J. Resnik, 'Detention, the War on Terror, and the Federal Courts' (2010) 110 *Columbia Law Review* 579.

⁶⁴⁹ Chapter 7B Introduction.

⁶⁵⁰ See *eg* Chapter 10; *Abu Omar* case; 'Convictions in Abu Omar rendition case a step toward accountability', Amnesty International, 5 November 2009, available at: <http://www.amnesty.org/en/news-and-updates/news/convictions-abu-omar-rendition-case-step-toward-accountability-20091105>.

have increasingly incorporated forms of terrorism, among other relevant crimes, in domestic law. While there may be some gaps and areas of tension, a detailed body of international law and practice exists in relation to crimes, principles of law, jurisdiction and cooperation which, if applied effectively, equips the international community in its criminal response to international terrorism.

The immediate wake of 9/11 saw unprecedented international solidarity with the United States and a shared global commitment to justice. Remarkable unity of purpose attended international dialogue on combating terrorism post 9/11. Questions arise as to the extent to which the opportunity to improve the system of international criminal justice, and international cooperation in the enforcement of law, has been seized or squandered.

In the immediate aftermath of 9/11, there seemed relatively little role for criminal process. The goal of terrorism prevention involved the massive detaining [of] *potential* terrorist threats⁶⁵¹ but principally with a view to intelligence gathering rather than seeing criminal justice done against those responsible for serious crimes. Many of those responsible have been put on kill lists rather than subject to arrest warrants. Cooperation was often 'informal' and transfers extra-legal, as epitomized by the extraordinary rendition programme. Alternative measures prevailed around globe, from preventive detention, sanctions, control orders and other measures. Many of these had a similar effect on the individual as a criminal conviction but without the rights associated with it.

It may be, however, that over time the pendulum has begun to swing back towards a more central role for criminal law enforcement, as states, international institutions and commentators acknowledge the limitations and the implications of undue focus on military responses to terrorism. The relationship between military and criminal law responses remains an uneasy one in some states, notably in the US. There is, however, a shift of emphasis towards greater priority afforded to criminal justice and to strengthening international criminal cooperation.⁶⁵² Extensive developments in the fabric of criminal laws, increasing experience of terrorism prosecutions in practice, and concerted international attention to enhancing international cooperation may suggest that the opportunity was not squandered as hopelessly as may have been thought.

Yet as the experience of terrorism prosecutions unfolds, domestic criminal processes and international cooperation reveal serious tensions within the rule of law edifice. Expanded criminal offences and modes of liability enhance the

651 Testimony of Attorney-General John Ashcroft before the US House of Representatives, Committee on the Judiciary, 5 June 2003, available at: <http://www.usdoj.gov/ag/testimony/2003/060503aghouseremarks.htm>.

652 Criminal justice has certainly received increased visibility over time and is now strikingly present in international discourse around effective counter-terrorism, as seen for example in the centrality afforded to it in the coordinated UN Global Counter-Terrorism Strategy and the range of international initiatives to enhance cooperation set out above.

preventive potential of the criminal law, yet they have lead to prosecutions of individuals far removed from the 'genuinely criminal conduct' that is the normal reserve of criminal law.⁶⁵³ Adapted approaches to procedure and evidence may seek to meet security challenges, but jeopardize the right to trial before an independent and impartial tribunal, or the ability to mount a meaningful defence. The ever-expanding reach of criminal norms and adaptation of criminal process puts real strain on the most basic criminal law principles – legality, individual responsibility, the presumption of innocence, the independence of the judiciary and due process – upon which the legitimacy of the criminal law depends.

The experience of national courts post 9/11 also reflects in part a failure of international cooperation, despite the emphasis placed on enhancing cooperation in criminal matters post 9/11. The examples explored above, and others, illustrate the unwillingness on the part of some states, notably the US, to share information with courts in other states, impeding international justice efforts.⁶⁵⁴ In what has been described as a 'bitter irony in the global war against terrorism',⁶⁵⁵ the US stands accused of hampering proper convictions, but also withholding potentially exonerating information from criminal courts.⁶⁵⁶

Practical, political and legal obstacles to effective extradition and mutual legal assistance remain.⁶⁵⁷ It is increasingly evident that poor human rights practices at the investigative stage have impeded international cooperation and/or effective prosecutions, the full extent of which remains to be seen. Even some of those standards and procedures advanced in the name of enhancing cooperation and the international justice it serves, have undercut judicial safeguards that are all the more critical post 9/11.

As noted in the introduction, the criminal law holds real promise in combating terrorism within a rule of law framework. Meeting the challenge of using it effectively, while upholding rather than undermining the rule of law, remains a work in progress. By contrast, meeting the parallel challenge of ensuring accountability also for those that commit crimes in the name of counter-terrorism is a far more remote ideal.

653 U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, E/CN.4/2006/98, para. 4.

654 See eg the German example leading to the the Mzoudi acquittal outlined at 4B12.

655 See 'Terror Case sets Washington and Berlin at Odds', *Christian Science Monitor*, 9 February 2004.

656 See eg Criticism by German prosecutors at 4B.1.2 above.

657 Prost, 'Need for a Multilateral Cooperative Framework', *supra* note 279.