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Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?

KAI AMBOS*

Abstract

On 21 January 2011, the pre-trial judge of the Special Tribunal for Lebanon (hereinafter 'STL') posed several questions to the Appeals Chamber ('Chamber')¹ pursuant to Rule 68(G) of the Rules of Procedure and Evidence.² Three of these questions dealt with the crime of terrorism.³ (i) Should the Tribunal take into account international notions on terrorism even though Article 2 of the Statute only refers to the Lebanese Criminal Code ('LCC')? (ii) If so, is there an international definition of 'terrorism' and how should it be applied? (iii) If not, how is the Lebanese definition of 'terrorism' to be interpreted by the Chamber? Both the prosecution and defence submitted extensive briefs dealing, inter alia, with these questions.⁴ Additionally, two *amicus curiae* briefs were submitted.⁵ On 16 February 2011, the Chamber issued its (interlocutory) decision pursuant

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¹ STL, *Le Juge de la Mise en État, Ordonnance relative aux questions préjudicielles adressées aux juges de la Chambre d'Appel conformément à l'Article 68, paragraphe g) du Règlement de Procédure et de Preuve*, 21 January 2011 (STL-11-01/I).

² Rule 68(G) is quite unique in international criminal procedure in that it gives the pre-trial judge the possibility of clarifying fundamental questions by way of an interlocutory procedure involving the Appeals Chamber: 'The Pre-Trial Judge may submit to the Appeals Chamber any preliminary question, on the interpretation of the Agreement, Statute and Rules regarding the applicable law, that he deems necessary in order to examine and rule on the indictment'.

³ The fourth question referring to terrorism ('If the perpetrator intended to kill a certain person but caused injury or death to other persons, how is his criminal responsibility to be defined?') is irrelevant for our purpose, since it deals with the general issue of the subjective attribution of unintended consequences.

⁴ Defence Office's submission pursuant to Rule 176 *bis* (31 January 2011), available online at www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/Defence/20110131_STL-11-01_R176bis_F0004_DO_Submissions_R176bis.pdf, paras. 8–125 (hereafter, 'Defence submission'); Prosecutor's Brief filed pursuant to the president's order of 21 January 2011. Responding to the questions submitted by the pre-trial judge (Rule 176 *bis*) (31 January 2011), available online at www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/Prosecution/20110131_STL-11-01_R176bis_F0003_OTP_Brief_EN.pdf, paras. 6–31 (hereafter, 'Prosecution submission').

⁵ One brief was submitted by the War Crimes Research Office of American University, *The Practise of Cumulative Charging before International Criminal Bodies*, STL-11-01/I/AC/R176bis (11 February 2011), available online at www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/Registry/20110211_STL-11-01_R176bis_F0008_Amicus_Curiae_Cumulative_Charging_Filed_EN.pdf. A second brief was submitted by the author of this paper: *amicus curiae* brief on the question of the applicable terrorism offence in the proceedings before the Special Tribunal for Lebanon, with a particular focus on a '*special*' *special intent* and/or a *special motive* as additional subjective requirements, STL-11-01/I/AC/R176bis (11 February 2011), available online at www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/Registry/20110211_STL-11-01_R176bis_F0009_Amicus_Curiae_Ambos_Filed_EN.pdf ('Ambos Brief'); both briefs are to be published in (2011) 22 *Criminal Law Forum*, issue 3.

to Rule 176 *bis* (A).⁶ The Chamber argues, in a nutshell, that terrorism has become a crime under international law and that the respective international definition influences the (applicable) Lebanese law. In the first part of this paper, I will argue that the Chamber's considerations, albeit innovative and creative, are essentially *obiter*, since the applicable terrorism definition can be found, without further ado, in the Lebanese law. There is no need to internationalize or reinterpret this law; it should be applied before the STL as understood in Lebanese practice. As to the Chamber's affirmation that there is a crime of terrorism under international law, I will argue, in the second part of the paper, that the available sources indicate, at best, that terrorism is a particularly serious transnational, treaty-based crime that comes close to a 'true' international crime but has not yet reached this status. Notwithstanding, the general elements of this crime can be inferred from the relevant sources of international law.

Key words

elements of terrorism; international crimes; Special Tribunal for Lebanon; terrorism; treaty-based crimes

I. THE APPLICABLE LAW AT THE STL AND THE ROLE OF INTERNATIONAL LAW

I.1. Lebanese criminal law in action and its limits

While the STL may be characterized as an international or mixed court due to its establishment by Security Council Resolution 1757 and its international composition,⁷ it is quite different from other international and mixed tribunals in that its subject-matter jurisdiction and applicable law 'remain national in character'.⁸ Article 2 of the Tribunal's Statute unambiguously states that only 'the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism' are applicable. Thus, 'the Lebanese criminal law is the applicable law', except certain penalties that have been considered too cruel to be included in a United Nations-backed court (e.g., death penalty and forced labour).⁹ The drafters deliberately omitted the inclusion of international crimes, such as crimes against humanity,¹⁰ as well as a reference to the Arab Convention against terrorism.¹¹ The international features of the Tribunal are limited, in normative terms, to high 'standards of justice' and 'highest standards of international criminal procedure'.¹²

Against this background, there are only two questions with regard to the applicable law. First, what does 'provisions of the Lebanese Criminal Code' exactly mean? Second, is there still a way in which international law can influence the applicable Lebanese law? As to the first question, there are two possible answers: this

⁶ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1/AC/R176bis, 16 February 2011 ('Decision').

⁷ M. Ch. Bassiouni, 'Mixed Models of International Criminal Justice', in M. Bassiouni (ed.), *International Criminal Law, Vol. III, International Enforcement* (2008), 155, at 189.

⁸ Report of the Secretary-General on the establishment of a special tribunal for Lebanon, S/2006/893, 15 November 2006, para. 7. See also *ibid.*, at 189; N. Jurdi, 'The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon', (2007) 5 JICJ 1125, at 1126; M. Milanovic, 'An Odd Couple: Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon', (2007) 5 JICJ 1139, at 1140.

⁹ Report of the Secretary-General, *ibid.*, para. 22.

¹⁰ *Ibid.*, paras. 23 ff.

¹¹ Jurdi, *supra* note 8, at 1128.

¹² Report of the Secretary-General, *supra* note 8, para. 7.

formulation only refers either to the positive, written law (the ‘law in the books’) or to the Lebanese law as interpreted by Lebanese jurisprudence and possibly doctrine (the ‘law in action’). Intuitively, one may think that the second option is the correct one, since, in any legal system, be it of common or civil law or any other origin, the ‘law’ is never limited to the positive, written law alone. Even in still quite positivist systems in which the judge is almost not much more than the famous ‘bouche de la loi’, as once coined by Montesquieu against judicial arbitrariness,¹³ judges apply and thus interpret the law. Thus, the question is not about pure or interpreted positive law, but about more or less interpreted law with interpretation by case law in all systems and additional interpretation by doctrine in some of the more developed civil-law systems.¹⁴ Thus, the recourse to Lebanese criminal law is to this law in action (with the exception of the already-mentioned excluded penalties). The Appeals Chamber takes the same view, holding that the Tribunal should generally apply the national law as understood by Lebanese courts.¹⁵ The Chamber does not, however, limit this interpretation to past national jurisprudence, but pretends to ‘stand back and identify the principles that express the state of the art in Lebanese jurisprudence’.¹⁶

There is, however, one caveat and this brings us to the second question. An international or mixed tribunal can only apply law that is compatible with international law. The STL must conform to the ‘high standards of justice’ mentioned in the Secretary-General’s report.¹⁷ Thus, international law, including general principles of law, may operate as a corrective in order to avoid ‘unjust’ or ‘unreasonable’ national law. For an international tribunal, including the STL, this means, as correctly held by the Appeals Chamber, that it must not follow the interpretation of domestic law by national courts if such interpretation is ‘unreasonable’, results in a ‘manifest injustice’, or is inconsistent with principles and rules of international law binding upon the respective national jurisdiction.¹⁸

1.2. The role of international law: directly applicable or at least an interpretative aid?

The Chamber does not, however, limit the function of international law to correcting ‘unreasonable’ or ‘manifestly unjust’ national law. Rather, it seems to give international law an autonomous role with regard to the interpretation of the Statute.¹⁹ Rejecting the prosecution’s argument that there is no need to apply international law,

¹³ Montesquieu, *L’esprit des lois* (1748, reprint 1961), livre XI chap. 6 (‘la bouche qui prononce les paroles de la loi; des êtres inanimés qui n’en peuvent modérer ni la force ni la rigueur’). See also M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967), 88 ff.; C. Möllers, *Die drei Gewalten* (2008), 20 ff.

¹⁴ About the sources of law, especially scholarly authority as a ‘residual third source’, see recently G. Fletcher, ‘New Court, Old Dogmatik’, (2011) 9 JICJ 179, at 180; in greater detail, see G. Fletcher, ‘Truth in Codification’, (1998) 31 *University of California Davis Law Rev.* 745, at 746, 750.

¹⁵ Decision, para. 35.

¹⁶ Decision, para. 36.

¹⁷ Report of the Secretary-General, *supra* note 8, para. 7.

¹⁸ Decision, para. 39, with various references in footnotes 58–60.

¹⁹ Decision, paras. 17 ff.

since there is no lacuna in the applicable (Lebanese) law,²⁰ the Chamber holds that legal norms are always open to interpretation because words have many different meanings, especially if there are a number of them,²¹ and because the (internal and external) context of norms must be taken into account.²² Thus, according to the Chamber, the process of construing a legal provision is to read it in context from the start instead of in a two-step process, determining first whether there is a lacuna and then, if there is one, trying to close it by interpretation.²³ In this sense, the principle of teleological interpretation, or, more concretely, the principle of effectiveness, has overturned the infamous *in dubio mitius* rule,²⁴ paying deference to state sovereignty.²⁵ The latter principle has increasingly been set aside by universal values and human-rights interests promoted by inter-governmental organizations and the ‘world community’.²⁶

This position of the Chamber can be challenged on various grounds. First, its approach to the process of legal interpretation is questionable. While most words have several different meanings when considered in isolation, there are only a few plausible meanings once they are combined with other words to form a sentence. The process of reading legal provisions not just word for word, but as sentences and as part of a whole statute – that is, considering the ‘internal context’ – may indeed lead to a relatively clear meaning that makes recourse to a further (‘external’) context superfluous.²⁷ Thus, while it is quite obvious that the ‘description “unclear” is the *result* rather than the *occasion* of . . . [a] method of interpreting statutory texts’,²⁸ this does not exclude the possibility that this very process of interpretation can lead to a sufficiently ‘clear’ provision and thus the absence of a lacuna. Indeed, the prosecution has not argued with the *in claris non fit interpretatio* rule, as insinuated by the Chamber,²⁹ but only concluded, on the basis of and *after* an interpretation of Article 314 LCC, that this provision does not contain a lacuna. Second, it is not clear how the state sovereignty of Lebanon can be set aside in our context. While one can certainly make the case for a gradual displacement of state sovereignty in light of the increasing importance of the individual in international law, especially expressed by the ‘human-being-oriented approach’ of international humanitarian and criminal law,³⁰ I fail to see how this should play out against the deference to

²⁰ Defence submission, *supra* note 4, paras. 86–89, 125; Prosecution submission, *supra* note 4, paras. 13 ff., especially at 15; concurring Ambos Brief, *supra* note 5, para. 3.

²¹ Decision, para. 19.

²² Decision, paras. 19–21.

²³ Decision, para. 19, and also para. 37.

²⁴ Literally, ‘in case of doubt less’, i.e., the less intrusive, more favourable interpretation (to state sovereignty) should be chosen (cf. L. Oppenheim, *International Law: A Treatise*, Vol. 1 (1905), 561; recently, J. Larouer, ‘In the Name of Sovereignty? The Battle over *In Dubio Mitius* Inside and Outside the Courts’, *Cornell Law School Inter-University Graduate Student Conference Papers*, (2009) paper 22, at 1 ff.).

²⁵ Decision, paras. 29–30; contrary to Defence submission, *supra* note 4, paras. 40–41.

²⁶ See also Decision, para. 29.

²⁷ K. Larenz, *Methodenlehre der Rechtswissenschaften* (1979), S. 307 ff.; F. Müller and R. Christensen, *Juristische Methodik* (2004), marginal number (‘mn.’) 480.

²⁸ R. Dworkin, *Law’s Empire* (1998), 352 (emphasis in original); quoted in Decision, para. 19, with footnote 31.

²⁹ Decision, para. 19.

³⁰ Cf. ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.IT-94-I, 2 October 1995, para.97 (hereafter, ‘*Tadić*’); see also K. Ipsen, *Völkerrecht* (2004), §2, mn. 66 ff., at 40.

the sovereignty of Lebanon as explicitly demanded in Resolution 1757.³¹ After all, the reference to international law in our context, as an instrument of interpretation of national Lebanese law, is not a question of human rights or any other individual values – as opposed to collective values – but only concerns the question of the correct applicable law of a mixed international tribunal.

Notwithstanding these rather abstract considerations, for many observers certainly more appropriate in an academic setting than in a court decision, the Chamber finds, as to the concrete issue at hand, that the clear wording of Article 2 of the STL Statute was unaffected by context and therefore did not allow for anything but the application of Lebanese law with respect to terrorism.³² While the Lebanese law does not know a provision, of constitutional or other origin, that provides for the domestic application of customary international law,³³ Lebanese courts usually apply it, albeit not in criminal matters.³⁴ With regard to the status of international vis-à-vis domestic Lebanese law, the Chamber considers that it possesses at least the same rank as ordinary national law, with the consequence that general principles, such as *lex posterior derogat priori* and *lex specialis derogat generali*, apply in case of concurrence of international and national law.³⁵ These international-law-friendly considerations are not so much based on hard Lebanese law, but on judicial interpretation and public international law, especially human-rights considerations. They suggest that a domestic court has, at least, the power to interpret national law by taking recourse to customary law if a corresponding rule exists. Yet, even if, *arguendo*, this were admitted, it would not help much with regard to the interpretation of criminal-law offences, especially terrorism. First, there is, to the best knowledge of this author, no rule in Lebanese law – as a civil-law system based on the Romano-Germanic tradition – that allows for the application of customary international law with regard to criminal-law offences; such a rule would, however, be necessary in order to avoid a violation of the *nullum crimen* principle. For this very reason, the Appeals Chamber admits that customary international law ‘may not be applied in penal matters absent a piece of national legislation incorporating international rules into Lebanese criminal provisions’.³⁶ Second, even if Lebanese courts were allowed to apply customary international law in criminal matters, this would not, as correctly acknowledged by the Chamber, be possible for the STL, since Article 2 of the Statute refers only to a provision of the Lebanese Criminal Code (Article 314), not to any other source, especially not to customary international law.³⁷

Absent the possibility of a direct application of customary international law, the STL can only argue, and indeed argues, that international law may serve as an aid

³¹ ‘Reiterating its call for the strict respect of the sovereignty . . . of Lebanon’ (preamble, para. 3, emphasis in original). See also M. Wierda, H. Nassar, and L. Maalouf, ‘Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon’, (2007) 5 JICJ 1065, at 1066.

³² Decision, paras. 43–44.

³³ Decision, paras. 115, 119.

³⁴ Decision, paras. 114, 117.

³⁵ Decision, para. 122.

³⁶ Decision, para. 114.

³⁷ Decision, para. 123.

to interpreting the relevant Lebanese criminal-law provisions.³⁸ For the Chamber, this is justified by the fact that the respective events in Lebanon have been regarded as ‘threats to international peace and security’ by the Security Council. Further, these events have been brought before the STL as acts of transnational terrorism for which only international law offers the appropriate standards, which, in addition, are binding upon Lebanon.³⁹ This, again, is a questionable line of argument. The fact that the Security Council qualified the relevant acts as ‘threats to international peace and security’ served only as a trigger to establish the STL under Chapter VII of the UN Charter in the first place but it has not made the Council include crimes under international law (which ones?) in its Statute. Quite to the contrary, as we have already stated above, the reference to international crimes has explicitly been omitted. Similarly, the argument of the alleged transnational nature of the (terrorist) acts does not make international law, without further ado, applicable, not even as a means of interpretation. The acts have been committed on the territory of Lebanon; thus, Lebanon has territorial jurisdiction over them and the applicable (criminal) law is that of Lebanon. This is so in this case as in all other cases of apparently transnational terrorist offences committed in national jurisdictions. The fact that a terrorist act may threaten international peace and security does not change the applicable national law. Indeed, it is up to the territorial state to decide, pursuant to its domestic rules, whether it applies its national terrorist offences (if there are any) or takes recourse to international law. It could only be otherwise if the Security Council had expressly said so. But it has not done so here and indeed it could not have done so, since there is no internationally agreed definition of ‘terrorism’. We will return to this point after dealing with the (applicable) Lebanese terrorism definition.

1.3. The Lebanese terrorism definition

1.3.1. *The objective elements (actus reus)*

The objective part of the terrorism offence of Article 314 LCC consists of two components, namely (i) the commission of ‘any act’ and (ii) the application of ‘means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents’. In Lebanese practice, the first requirement has been interpreted broadly,⁴⁰ covering *any act* notwithstanding its criminal character.⁴¹ In contrast, the means component has been interpreted restrictively, requiring either one of the enumerated means or another means capable of creating a public danger (*danger commun*), namely an uncontrollable threat to an uncertain number of third (‘neutral’) persons.⁴² Thus, while a hand grenade would constitute a listed means (‘explosive device’), a machine gun would not and

³⁸ Decision, paras. 124 ff.

³⁹ Decision, para. 124.

⁴⁰ In the original Arabic version, it is *faa’el* or *afaa’al* (‘every act’); cf. Jurdi, *supra* note 8, at 1130.

⁴¹ Cf. Decision, para. 145; Jurdi, *supra* note 8, at 1130.

⁴² Cf. Decision, paras. 51–54, quoting several domestic decisions.

would not amount to another means either, since it is not uncontrollable per se.⁴³ On the other hand, to use an aeroplane as an (uncontrollable) weapon and fly it into a skyscraper could be considered as employing another (similar) means within the meaning of the provision.

The Chamber does not agree with this restrictive interpretation of the means requirement and suggests, on the basis of its international-law interpretation of the applicable law,⁴⁴ a broader understanding of public danger.⁴⁵ In its view, it suffices that persons not directly targeted are at the same location as the direct target of the terrorist attack and thus become exposed to the adverse consequences of the attack.⁴⁶ Going even further, the Chamber deems it sufficient that a terrorist attack entails certain indirect consequences leading to public danger, such as, as a result of the killing of a political leader, his supporters' resort to violence.⁴⁷

The Chamber's view can be challenged on various grounds. First of all, it leads to a limitless expansion of the offence. Given the structure of Article 314 LCC and the broad interpretation of its act requirement, a restriction of the otherwise far too broad *actus reus* can only be achieved by the means requirement.⁴⁸ While the list of the means is not exhaustive ('such as'), the means listed share a common characteristic and that is the fact that, once they are employed or activated, they cannot be controlled. All the means are, as to their effects, uncontrollable per se. Their use entails uncontrollable risks for an undetermined number of persons and objects. Indeed, this is the justification to qualify the respective acts, on the objective level, as 'terrorist' and the perpetrators as 'terrorists'. After all, 'terrorism' means to spread terror and fear in the population at large.⁴⁹

For the interpretation of the additional means not listed, this implies that they must be comparable to the means listed, namely they must also cause uncontrollable risks. If one severs the link between the listed and the additional means, as in fact suggested by the Chamber, the latter ones can no longer be reasonably defined. Ultimately, such a 'liberal' interpretation of the means requirement violates the *lex certa* element of the principle of legality (*nullum crimen sine lege*).⁵⁰ Admittedly, Article 314 has an 'inbuilt' certainty problem for the very fact that the means list is not exhaustive. However, once the national case law has clarified the meaning of an open-ended formula like 'such as', it is part and parcel of the national criminal law

⁴³ Court of Justice, *Assassination of Sheikh Nizar Al-Halabi*, Decision No. 1/1997, 17 January 1997 (use of Kalashnikov assault rifles); quoted according to Decision, para. 52, with footnote 71.

⁴⁴ Decision, para. 129.

⁴⁵ Decision, paras. 125–129.

⁴⁶ Decision, para. 126.

⁴⁷ Decision, para. 127.

⁴⁸ This is also acknowledged by the Chamber, Decision, para. 55.

⁴⁹ 'Terrorism' derives from the Latin word 'terror', which means 'great fear'. The term was first used in English in the sense of 'systematic use of terror as a policy' in 1798, following the French term *terrorisme*, used in the sense of 'intimidating a government during the Reign of Terror' in 1795 (D. Harper, *Online Etymology Dictionary*, available online at www.etymonline.com).

⁵⁰ On *lex certa* and the other three elements of *nullum crimen (lex praevia, lex stricta, lex scripta)*, see K. Ambos, 'Nulla poena sine lege in International Criminal Law', in R. Haveman and O. Olusanya (eds.), *Sentencing and Sanctioning in Supranational Criminal Law* (2006), 17, at 21.

and therefore compatible with *lex certa*, at least in the sense of a relative certainty (*Bestimmbarkeit*).⁵¹ It is, however, an entirely different matter if an international tribunal reinterprets an element of an offence, explicitly going beyond long-settled national practice. In such a situation, it can hardly be expected that the citizens of the respective state could follow this new interpretation; most probably, they would not even be aware of it. Apart from that, it would be an *ex post facto* interpretation of crimes already committed and would therefore also conflict with the *lex praevia* rule.

The Chamber itself sees that its interpretation broadens the offence definition and therefore conflicts with the principle of legality.⁵² Yet, as a result, it sees no violation of this principle because, in essence, it considers that only foreseeability is required and that this standard is fulfilled if a certain judicial interpretation, including by an international court, was settled.⁵³ Thus, concretely speaking, any Lebanese national could be expected to foresee 'that *any* act designed to spread terror would be punishable' as terrorism 'regardless of the kind of instrumentalities used as long as such instrumentalities were likely to cause a public danger'.⁵⁴ The flexibility with regard to the 'instrumentalities' follows, according to the Chamber, from the international instruments binding upon Lebanon that do not restrict the means employed, especially the Arab Convention against Terrorism.⁵⁵ In addition, the fact that Lebanon had ratified all UN terrorism conventions seems to allow, in the view of the Chamber, the drawing of certain analogies as to the punishable behaviour. Thus:

an individual . . . knowing that shooting passengers onboard an aircraft for the purpose of hijacking the plane was a prohibited terrorist act, can *safely [sic]* be expected to conclude that the *same* behaviour with the *same* intent to spread fear in *other* circumstances would also be regarded as terrorism.⁵⁶

It is clear from this cursory summary of the Chamber's position that it indeed takes quite a flexible stance as to the principle of legality. Yet, the recourse to international (criminal) law, which has converted the rather formal legality rule to a mere principle⁵⁷ of justice⁵⁸ and, at best, requires 'accessibility' and 'foreseeability' of

⁵¹ Cf. *Kokkinaskis v. Greece*, (1994) 17 EHRR 397, para. 40. From the abundant literature, see V. Krey, *Studien zum Gesetzesvorbehalt im Strafrecht: Eine Einführung in die Problematik des Analogieverbots* (1977), 113 ff.; A. Ashworth, *Principles of Criminal Law* (2009), 64; C. Roxin, *Strafrecht. Allgemeiner Teil*, Vol. I (2006), §5, mn. 28.

⁵² Decision, para. 130.

⁵³ Decision, paras. 135 ff.

⁵⁴ Decision, para. 138 (emphasis added).

⁵⁵ Decision, paras. 139–140.

⁵⁶ Decision, para. 141 (emphasis added).

⁵⁷ As to the distinction between principles and rules, I follow here R. Alexy, *Theorie der Grundrechte* (1986), at 71 ff. (English translation by J. Rivers, *A Theory of Constitutional Rights* (2002), 44 ff.), according to whom principles and rules are two types of norm that both give reasons as to what should happen but that differ in a qualitative sense: principles demand that something must be realized to the greatest extent possible, they are 'optimization requirements' (*Optimierungsgebote*) that can only be satisfied to a certain extent, their actual fulfilment depends on the factual and legal possibilities; rules can either be fulfilled or not, they contain determinations (*Festsetzungen*, English translation, at 48: 'fixed points') within the factually and legally possible.

⁵⁸ See K. Ambos, *Internationales Strafrecht* (2011), §5, mn. 6, with further references.

punishability⁵⁹ explicitly allowing for ‘the progressive development of the criminal law through judicial law-making’,⁶⁰ is not particularly helpful in our context. First of all, it presupposes that the applicable law, namely the Lebanese law, adopts the same flexibility as to the principle of legality. I have already stated in my *amicus curiae* that this is not the case, since the Lebanese legal system, as a civil-law jurisdiction, in principle, does not admit the ‘internationalization’ of domestic criminal-law offences.⁶¹ In addition, in such a legal system, *nullum crimen* is understood strictly and therefore only allows for an *ex post facto* interpretation or analogy in *bonam partem*, that is, restricting the offence definition in favour of the accused.⁶² This also applies for an interpretation based on international law.⁶³ Even if one were, *arguendo*, to follow the Chamber’s internationalist approach, it is by no means clear whether, let’s say, the European Court of Human Rights would agree with the Chamber as to the foreseeability of its reinterpretation of the means requirement of Article 314 LCC. After all, we are not talking here about the punishability of an international core crime within the meaning of Article 15(2) ICCPR and Article 7(2) ECHR, but about the correct interpretation of one single (objective) element of a mere treaty-based crime (on this distinction, see subsection 2.2). Thus, the gist of the matter as to foreseeability is whether one can really expect a citizen to be aware of a possible

⁵⁹ *Achour v. France*, Judgement of 10 November 2004, ECHR, Application No. 67335/01, para. 33. See also Ambos, *supra* note 50, at 22, with further references to the case law of the European Court of Human Rights in footnotes 37, 38.

⁶⁰ *S.W. v. UK and C.R. v. UK*, Judgments of 22 November 1995, ECHR (Ser. A. Nos. 335-B and 335-C), para. 36. See also Decision, para. 135, quoting ICTY, *Vasiljević* Trial Judgement, 29 November 2002, para. 196.

⁶¹ Ambos Brief, *supra* note 5, para. 3, with reference to Defence submission, *supra* note 4, paras. 60 ff., especially at 71.

⁶² The *bonam partem* exception is generally recognized in civil-law jurisdictions; see, as representative works, for France: F. Debove, F. Falletti, and T. Janville, *Précis de droit pénal et de procédure pénale* (2010), at 74–5; for Germany: Roxin, *supra* note 51, §5, mn. 44 (analogy in *bonam partem*), 50 (custom in *bonam partem*), 62 ff. (retroactivity in *bonam partem*); for Spain: S. Mir Puig, *Derecho Penal: Parte General* (2010), 116; J. P. Montiel, *Analogía favorable al reo: Fundamentos y límites de la analogía in bonam partem en el derecho penal* (2009), 321 ff. (on the recognition of supra-legal causes of justification on the basis of an analogy *bonam partem* that is based on customary law or general principles). The exception is also recognized in the relevant codifications; see, e.g., Art. 112(1) French CP (‘retroactivité *in mitius*’), §2(3) German StGB and Art. 2(2) Spanish CP. In Italy, the majority doctrine admits the analogy *bonam partem* on the basis of Art. 25(2) of the Constitution and Art. 14 of the preliminary disposition of the *Codice Civile*, which refers to criminal law; see F. Palazzo, *Corso di diritto penale: Parte generale* (2006), at 142 ff. with further references on the rich scholarly debate. For Lebanon, see Art. 3 LCC: ‘Any statute that amends the definition of an offence *in a manner that benefits the accused shall be applicable* to the acts committed prior to its entry into force, unless an irrevocable judgement has been rendered’ (emphasis added). On the Lebanese law, see also Defence submission, *supra* note 4, para. 74: ‘reliance upon customary law for the purpose of interpreting the requirements (e.g., a lowering of the applicable *mens rea*).’

⁶³ The argument is based on the assumption that Lebanese criminal law is derived from, and still quite close to, French criminal law (see also Defence submission, *supra* note 4, para. 73). While French law does not provide for a particular rule or procedure to ‘import’ customary international law into the domestic legal order, the Constitutional Council (*Conseil Constitutionnel*) examines the compatibility of national law with customary international law and thus recognizes the (de facto) precedence of the latter (cf. Conseil Constitutionnel, Décisions n° 75-59 DC of 30 December 1975; n° 82-139 DC of 11 February 1982; n° 85-197 DC of 23 August 1985; n° 92-308 DC of 9 April 1992; summarizing www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/pdf/conseil-constitutionnel-17499.pdf, No. 9). Thus, it can safely be argued that the Lebanese legal order, too, absent any opposing constitutional or other provision, would accept this precedence and therefore also admit a *bonam partem* amendment of its criminal law brought about by international (customary) law.

broader *international* interpretation of an element of a particular national offence and, in addition, of the direct applicability of this interpretation in his domestic legal order. Indeed, the Chamber itself does not seem to be entirely sure as to what can be expected or not with regard to ‘internationalized’ national criminal law. In one and the same paragraph,⁶⁴ it states, on the one hand, that ‘international criminalisation alone is not sufficient for domestic legal orders to punish’ but, on the other, that ‘individuals were expected and required to know that certain conduct is criminalised in international law’, although this is apparently not enough for punishment, since it shall only apply ‘at least from the time that the same conduct is criminalised in a national legal order’.

1.3.2. *The subjective elements (mens rea)*

Article 314 LCC requires the intent ‘to cause a state of terror’, namely to cause a substantial impact of fear and insecurity upon the population at large or a significant group thereof.⁶⁵ This is a special subjective element, more exactly, a here so-called ‘special general intent’ as opposed to a ‘special special intent’ aimed at certain political goals. We will return to this distinction when analysing a possible international offence of terrorism (see section 2). As the Chamber did not take issue with this element, suffice to say that the Lebanese courts have proposed certain facts to more precisely determine this intent.⁶⁶

As to the general *mens rea* with regard to the objective elements of the offence, one must first recall that the acts required need not be criminal by themselves; that is, for the general mental element, it suffices that the respective (neutral) acts are carried out consciously and willingly by the perpetrator.⁶⁷ Clearly, if an act constitutes a criminal offence, such as a killing, the perpetrator must act with the respective mental element of this offence. As to the means requirement, the perpetrator must be aware of their characteristics, particularly that they are ‘liable to create a public danger’.

1.4. **Intermediate conclusion**

According to the Lebanese law, terrorism is the commission of *any* act by means that are *per se* liable to create a public danger with the intent to cause a substantial terrorizing impact upon the population or a significant group thereof. Neither is this definition unreasonable, nor does it result in apparent injustice, nor is it inconsistent with international principles of law. Thus, there is no reason for the Tribunal to depart from it. Article 314 LCC can and should be applied as understood in Lebanese practice.

⁶⁴ Decision, para. 133.

⁶⁵ See also Prosecution submission, *supra* note 4, para. 29: intent ‘to have a substantial impact upon the population or a significant group thereof.’

⁶⁶ According to the Prosecution submission, *supra* note 4, para. 30, these factors are: ‘the social or religious status of the principle target; the commission of the attack in daylight in a street full of people; the collateral killing of bystanders; the use of explosives; and the destruction of residential and commercial buildings.’

⁶⁷ Cf. also Art. 210 LCC: ‘No one shall be sentenced to a penalty unless he consciously and willingly committed the act.’ The different *mens rea* standards are defined in Arts. 188, 190, 191 LCC.

2. THE SUBSTANTIVE ISSUE: TERRORISM AS A CRIME UNDER INTERNATIONAL LAW?

2.1. The Chamber's view: terrorism as a crime under customary international law

For the Chamber, a number of treaties and UN resolutions, and the legislative and judicial practice of states,⁶⁸ indicate that a customary rule of international law on the crime of terrorism has emerged.⁶⁹ There is 'a settled practice concerning the punishment of acts of terrorism' and 'this practice is evidence of a belief of States that the punishment of terrorism responds to a social necessity (*opinio necessitatis*) and is hence rendered obligatory by the existence of a rule requiring it (*opinio juris*)'.⁷⁰ The existing rule imposes three obligations on states and non-state actors and grants them one right: (i) the obligation to refrain from engaging in acts of terrorism; (ii) the obligation to prevent and repress terrorism, particularly to prosecute and try alleged perpetrators; and (iii) the right to prosecute and repress the crime of terrorism committed on their territory by nationals and foreigners and the correlative obligation of third states to refrain from objecting to such prosecution and repression against their nationals.⁷¹ As to the definition of 'terrorism', the rule provides for three elements: (i) the perpetration or threatening of a criminal act, (ii) the intent to spread fear among the population or coerce a national or international authority to take some action or to refrain from taking it, and (iii) a transnational element as part of the act.⁷² With this definition, the Chamber rejects the so-far dominant view in the academic literature,⁷³ including by this author,⁷⁴ that there is no universally agreed definition of 'terrorism'.

While it is difficult to disagree with the Chamber as to a customary rule outlawing terrorism and the ensuing obligations of states in its prevention and repression (the right to prosecute exists anyway on the basis of the territoriality principle and the Chamber stops short of imposing more far-reaching obligations on states, such as an obligation to co-operate in the fight against terrorism⁷⁵), it is a different matter to infer from this prohibition, without further ado, the existence of an international crime of terrorism. Indeed, the Chamber itself acknowledges that a customary prohibition does not automatically turn into an international criminal offence.⁷⁶ Taking recourse to the seminal ICTY Tadić Appeals Chamber jurisdictional

⁶⁸ Decision, paras. 88–89 (international and multilateral instruments), 92 (SC resolutions, also para. 110), 93–97 (national legislation), 99–100 (national case law).

⁶⁹ Decision, paras. 85, 102.

⁷⁰ Decision, para. 102.

⁷¹ Decision, para. 102.

⁷² Decision, paras. 85, 111.

⁷³ For references, see Decision, para. 83, with footnote 127. See also E. Wilmshurst, 'Transnational Crimes, Terrorism and Torture', in R. Cryer et al. (eds.), *An Introduction to International Criminal Law and Procedure* (2010), 342 ff.; E. David, *Éléments de droit pénal international et européen* (2000), 1100–1. Cf. A. Cassese, *International Criminal Law* (2008), 162 ff., especially at 177.

⁷⁴ Ambos Brief, *supra* note 5, para. 7.

⁷⁵ The Chamber considers that this obligation is not yet part of the rule but already 'plausibly nascent' (Decision, para. 102 *in fine*).

⁷⁶ Decision, para. 103.

decision,⁷⁷ the Chamber argues that ‘individual criminal liability at the international level’ presupposes the ‘individual criminal responsibility’ of the perpetrator.⁷⁸ Either this comes close to a *petitio principii*, since it equates an assumption to be proven (‘individual criminal responsibility’) with the actual conclusion (‘individual criminal liability at the international level’),⁷⁹ or the argument is nonsensical because assumption and conclusion cannot be equal. Thus, what the Chamber apparently really means to say or should have said is that the Tadić criteria, proposed to assimilate violations of international humanitarian law in international and non-international armed conflicts by also criminalizing the latter,⁸⁰ should be applied with a view to test whether the prohibition of terrorism has indeed risen to an international crime. Unfortunately, the Chamber does not pursue this methodologically more reasonable path, but directly jumps at the criteria for determining the existence of such a criminalization: the intention to criminalize the breach of the rule must be evidenced by statements of government officials and by punishment for such violations by national courts.⁸¹ The Chamber claims to demonstrate this evidence in one paragraph (*sic!*),⁸² pointing to the widespread domestic criminalization of terrorism, which, similarly to the case of war crimes, constitutes the basis for the (subsequent) internationalization of the offence. For the Chamber, this trend was indeed ‘strengthened by the passing of robust resolutions by the UN General Assembly and Security Council condemning terrorism, and the conclusion of a host of international treaties’.⁸³ The Chamber places a particular emphasis on the fact that the Security Council has characterized terrorism, as opposed to other transnational offences (e.g., money laundering and drug trafficking), as a ‘threat to peace and security’.⁸⁴ This special treatment of terrorism and its ‘perceived seriousness’, the Chamber concludes, ‘bears out’ that it ‘is an international crime classified as such by international law, including customary international law, and also involves the criminal liability of individuals’.⁸⁵ As a consequence, the customary rule identified by the Chamber has not only a collective dimension (addressed to states and state-like entities), but also an individual one, imposing on individuals the ‘strict obligation’ to refrain from terrorism coupled with the correlative right of any state

⁷⁷ *Tadić*, *supra* note 30, *in casu* paras. 94 ff.

⁷⁸ Decision, para. 103.

⁷⁹ The argument only comes close, but does not amount, to a *petitio principii* (circular reasoning) because it does not assume as true what is to be proved (see on this fallacy R. J. Aldisert, *Logic for Lawyers: A Guide to Clear Legal Thinking* (1997), 27, 208; J. Joerden, *Logik im Recht* (2005), 334–5).

⁸⁰ *Tadić*, *supra* note 30, para. 94, proposes four criteria for the criminalization of IHL violation in non-international armed conflict: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be ‘serious’, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

⁸¹ Decision, para. 103, referring to *Tadić*, *supra* note 30, paras. 128–137, in footnote 203.

⁸² Decision, para. 104.

⁸³ *Ibid.*

⁸⁴ *Ibid.*; also para. 110.

⁸⁵ *Ibid.*

'to enforce such obligations at the domestic level'.⁸⁶ The only limitation of this bold rule consists, according to the Chamber, of its application in times of peace, its extension to armed conflict being *in statu nascendi*.⁸⁷

2.2. The more convincing view: terrorism as a particularly serious treaty-based crime coming close to a 'true' international crime

Current international criminal law ('ICL') makes a distinction between mere treaty-based crimes and 'true' or core international/supranational crimes.⁸⁸ Examples of the latter are mainly the core crimes of Articles 5–8 of the ICC Statute,⁸⁹ while treaty-based crimes are essentially transnational crimes, objects of the so-called suppression conventions, such as the UN Torture Convention,⁹⁰ the Terrorist Bombing Convention,⁹¹ or the UN Drugs Conventions.⁹² The essential legal difference between these types of crime is that the treaty-based crimes can only be enforced by states at the domestic level – indeed, the suppression conventions provide for just that: the criminalization and suppression of these crimes at the domestic level by the competent state parties⁹³ – while true international crimes create a proper international individual criminal responsibility (i.e., they are binding upon individuals)⁹⁴

⁸⁶ Decision, para. 105.

⁸⁷ Decision, paras. 107 ff., especially at 109.

⁸⁸ Cf. C. Kress, 'International Criminal Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (2008), online edition, available at www.mpepil.com, paras. 6 ff. (transnational and supranational international criminal law *stricto sensu*); R. Cryer and E. Wilmshurst, 'Introduction: What Is International Criminal Law?', in Cryer et al., *supra* note 73, at 4–5 (transnational and international crimes); P. Gaeta, 'International Criminalization of Prohibited Conduct', in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice* (2009), 63, at 69 (international crimes proper and treaty-based crimes); D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 569, at 572 (treaty-based transnational and pure international criminal law); M. Milanović, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)', (2011) 9 JICJ 25, at 28, with footnote 7. See also Ambos, *supra* note 58, §7, mn. 117, vs. 275.

⁸⁹ See Ambos, *ibid.*, §5, mn. 3, §7, mn. 117; G. Werle, *Principles of International Criminal Law* (2009), at 29; Kress, *ibid.*, para. 15; Cryer and Wilmshurst, *ibid.*, at 4; Gaeta, *ibid.*, at 66 ff.; Cassese, *supra* note 73, at 12, extends this list to torture and 'some extreme forms of international terrorism'. R. Kolb, *Droit international pénal* (2008), 68–9, recognizes, in addition to the ICC core crimes, 'international crimes' because of their 'nature intrinsèque' distinguishing between public (state) and private (ordinary) crimes; yet, he does not provide criteria of delimitation to transnational crimes.

⁹⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 of 10 December 1984, 1465 UNTS 85 ('Torture Convention').

⁹¹ International Convention for the Suppression of Terrorist Bombings, UN Doc. A/RES/52/164 (1997), 2149 UNTS 256 ('Terrorist Bombing Convention').

⁹² Single Convention on Narcotic Drugs, 30 March 1961, 250 UNTS 151 ('Single Convention'); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 20 December 1988, 1582 UNTS 95 ('Vienna Drug Convention').

⁹³ See, e.g., Arts. 1(1) and 4 of the Torture Convention, *supra* note 90: 'State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'; 'shall ensure that all acts of torture are offences under its criminal law'; 'shall make these offences punishable.' In a similar vein, Art. 4 of the Terrorist Bombing Convention, *supra* note 91: 'Each State Party shall adopt such measures as may be necessary: (a) To establish as criminal offences under its domestic law . . . ; (b) To make those offences punishable by appropriate penalties'; Arts. 2 and 3 of the Vienna Drug Convention, *ibid.*: 'the Parties shall take necessary measures, including legislative and administrative measures, in conformity with the fundamental provisions of their respective domestic legislative systems'; 'adopt such measures as may be necessary to establish as criminal offences under its domestic law.' See also Wilmshurst, *supra* note 73, at 335–6; Gaeta, *supra* note 88, at 63.

⁹⁴ Cf. Werle, *supra* note 89, at 29; Kress, *supra* note 88, para. 10; Cryer and Wilmshurst, *supra* note 88, at 8 (with reference to the seminal quote of the Nuremberg IMT judgment).

with the correlative right of international enforcement by a supranational institution (such as the ICC) or by states, independent of domestic criminalization⁹⁵ and traditional jurisdictional links (replacing territoriality, nationality, and the protective principle by universal jurisdiction *stricto sensu*).⁹⁶ Sometimes, this difference is clearly expressed by the law. Compare, for example, Article I of the Genocide Convention ('crime under international law') with Article 4(1) of the UN Torture Convention ('Each State Party . . . offences under its criminal law').⁹⁷ Still, even such clear-cut provisions do not settle the matter entirely, since it can always be argued, as indeed does the Chamber, that an originally treaty-based crime has risen to a true international crime by way of customary international law. Thus, for example, the fact that the torture prohibition has nowadays even attained the status of *jus cogens*⁹⁸ and must therefore be treated in the same way as the *jus cogens* prohibition of genocide⁹⁹ may lend support to the view, recently expressed by the Institute of International Law,¹⁰⁰ that torture has risen from a mere transnational to a truly international crime. Similarly, one may point to some suppression conventions that echo, albeit only in the preamble, international concern regarding 'their' crimes¹⁰¹

⁹⁵ See Werle, *ibid.*, at 29; Kress, *ibid.*, para. 10; Gaeta, *supra* note 88, at 65, 69–70.

⁹⁶ Cassese, *supra* note 73, at 11–12; Gaeta, *ibid.*, at 72. If universal jurisdiction in a pure or absolute sense (as opposed to relative or subsidiary universal jurisdiction (*in absentia*), which often only carries the name but not the substance of universal jurisdiction) shall ever apply, it must do so for true international crimes; see, e.g., §1 of the German Code of International Criminal Law; for the theoretical foundation, see Ambos, *supra* note 58, §3, nn. 94; K. Ambos, 'Prosecuting Guantánamo in Europe: Can and Shall the Masterminds of the "Torture Memos" Be Held Criminally Responsible on the Basis of Universal Jurisdiction?', (2009) 42 Case WRJIL 405, at 443 ff., both with further references. Absolute universal jurisdiction, albeit theoretically sound, is, however, the exception; normally, 'universal jurisdiction' is limited in various ways, such as by the presence requirement; for an overview, see, on the basis of a worldwide six-volume study, H. Kreicker, 'Völkerstrafrecht im Ländervergleich', (2006) 7 *Nationale Strafverfolgung völkerrechtlicher Verbrechen* 191.

⁹⁷ For full text, see Art. 4 of the Torture Convention, as described in note 93, *supra*.

⁹⁸ *Prosecutor v. Furunzija*, Judgement of 10 December 1998, Case No. IT-95-17/1-T, paras. 153–157.

⁹⁹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, ICJ, para. 161, with further references.

¹⁰⁰ See Art. I of the 2009 Institute's Resolution on Immunity and International Crimes according to which torture belongs, besides genocide, crimes against humanity, and war crimes, to the 'serious crimes under international law' (quoted in A. Bellal, 'The 2009 Resolution of the Institute of International Law on Immunity and International Crimes', (2011) 9 JICJ 227, at 233); concurring Cassese, *supra* note 73, at 12; cf. Gaeta, *supra* note 88, at 68–9.

¹⁰¹ In the International Convention for the Suppression of Acts of Nuclear Terrorism, UN Doc. A/RES/59/290 (2005), 2445 UNTS 89 ('Nuclear Terrorism Convention'), the acts are considered a 'threat to international peace and security'. In some conventions, they are considered 'a matter of grave concern to the international community as a whole' (Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, UN Doc. A/RES/584 (1988), 1678 UNTS 201 ('Maritime Convention'); International Convention for the Suppression of the Financing of Terrorism, UN Doc. A/RES/54/109 (1999), 39 ILM 270 ('Terrorism Financing Convention')) or 'a matter of grave concern (to the international community)' (Convention for the Suppression of Unlawful Seizure of Aircraft, 16 December 1970, 860 UNTS 106 ('Hijacking Convention'); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 974 UNTS 178 ('Civil Aviation Convention'); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 September 1971, 1589 UNTS 474 ('Airport Protocol'); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 14 December 1973, 1035 UNTS 168 ('Diplomatic Agents Convention'); Convention on the Physical Protection of Nuclear Material, 26 October 1979, 1456 UNTS 125 ('Nuclear Materials Convention'); International Convention against the Taking of Hostages, of 17 December 1979, 1316 UNTS 206 ('Hostages Convention'). All terrorism conventions can be found at www.un.org/terrorism/instruments.shtml.

and/or give prevalence to *judicare* (prosecute) over *dedere* (extradite) obligations,¹⁰² following the so-called Hague model of the Hijacking Convention¹⁰³ and thereby expressing a recognition of a genuine universal interest in the prosecution of the respective offences.¹⁰⁴ The problem with this, similarly to any customary international-law approach – as evidenced by the Chamber’s considerations – is that it rarely produces unambiguous results. One should therefore stick to the more cautious and, in any case, more certain approach of requiring a clear statement of the law, such as Article I of the Genocide Convention. To be sure, such a statement is no substitute for the development of substantive criteria regarding ‘internationalization’¹⁰⁵ – we will come to these in a moment – but it makes unambiguously clear whether states want to ‘internationalize’ a crime at all.¹⁰⁶ What should be required at least, before starting a discussion about the possible internationalization of a crime, is an unambiguous declaration in soft law, such as in a General Assembly resolution or an authoritative statement of the ICJ to that effect. Otherwise, the alleged internationalization of a prohibited criminal conduct, such as by a ‘unilateral’ declaration of an international tribunal, will have little effect; it may even turn into a pyrrhic victory if states persistently object and fail to enforce it.

It is surprising that the ICL literature, apart from some notable exceptions,¹⁰⁷ hardly discusses in a systematic way the criteria that determine whether an offence has turned into a crime under international law. Indeed, the Appeals Chamber itself builds its argument around quite a confusing mix of a reference to the Tadić jurisdictional decision (albeit not the substantive criteria developed in this decision) and declarations expressing the seriousness of terrorism, especially contained in Security Council resolutions, without, however, presenting and discussing the possible criteria for internationalization in a systematic way.¹⁰⁸ This is all the more surprising since the president of the Tribunal himself is one of the notable exceptions mentioned above, having proposed several criteria in his leading textbook on ICL.¹⁰⁹ Be that as it may, taking into account the foregoing considerations, especially

¹⁰² Cf. Art. 5(2) of the Hostages Convention, *ibid.*; Art. 6(4) of the Maritime Convention, *ibid.*; Art. 6(4) of the Terrorist Bombing Convention, *supra* note 91; Art. 7(4) of the Terrorism Financing Convention, *ibid.*; Art. 9(4) of the Nuclear Terrorism Convention, *ibid.*

¹⁰³ Hijacking Convention, *supra* note 101, Art. 7 (prosecution by the apprehending state, *forum deprehensionis*, in case of no extradition, independent of a prior extradition request and denial by the state with jurisdiction).

¹⁰⁴ Cf. Kress, *supra* note 88, para. 8.

¹⁰⁵ In this sense, critically of a pure treaty approach, Gaeta, *supra* note 88, at 70.

¹⁰⁶ See also Kress, *supra* note 88, para. 8: ‘true test . . . whether States agree to the internationalization of the criminal law rule and hereby create a crime under international law.’

¹⁰⁷ Cf. Cassese, *supra* note 73, at 11–12 (four requirements); Werle, *supra* note 89, at 29 (three requirements); too broad: M. Ch. Bassiouni, *Introduction to International Criminal Law* (2003), at 114–15 (omitting the actual criminal responsibility). See also implicitly Cryer and Wilmshurst, *supra* note 88, at 4 ff.

¹⁰⁸ See discussion by the STL Appeals chamber and its explanations regarding the development of international crimes as referred to in notes 82 ff., *supra*, and the main text around those footnotes.

¹⁰⁹ Cassese, *supra* note 73, at 11–12.

the Tadić criteria,¹¹⁰ three criteria must be met in order to speak of a crime under international law:

1. the respective underlying prohibition (primary norm) must be part of international law;¹¹¹
2. a breach of this prohibition must be particularly serious, namely it must affect important universal values;¹¹² and
3. the breach must entail individual criminal responsibility¹¹³ in its own right, namely independently of any criminalization in domestic criminal law.¹¹⁴

If one applies these criteria to terrorism, the first and second are clearly met – indeed, the Chamber uses the same criteria¹¹⁵ and convincingly demonstrates that terrorism is an attack on universal values¹¹⁶ – yet the third, certainly the crucial one, deserves closer consideration. The Chamber itself acknowledges that the internationalization of a domestic offence requires ‘that States and intergovernmental organisations, through their acts and pronouncements, sanction this attitude by clearly expressing the view that the world community considers the offence at issue as amounting to an international crime’.¹¹⁷ In other words, a clear declaration as to the international criminalization of the respective offence is required. This comes close to the view expressed above¹¹⁸ that the international criminalization must be clearly stated by the law. Such a clear statement is, however, missing. Indeed, the fact that terrorism is not part of the core offences of the ICC Statute and that it has so far not been possible to adopt a *comprehensive* terrorism convention¹¹⁹ is rather evidence to the contrary, namely that terrorism is not (yet) recognized as an international crime in its own right.¹²⁰ The Chamber itself refers to the (indirect) enforcement ‘at the

¹¹⁰ See note 80, *supra*.

¹¹¹ Werle, *supra* note 89, at 29; Cassese, *supra* note 73, at 11 (focusing on international customary law).

¹¹² Cf. Cassese, *supra* note 73, at 11, requirements nos. 2 and 3; Bassiouni, *supra* note 107, at 114–15 (especially peace and security); Werle, *ibid.*, at 31–2; Kress, *supra* note 88, paras. 10, 11; Cryer and Wilmshurst, *supra* note 88, at 6–7; Wilmshurst, *supra* note 73, at 335; Gaeta, *supra* note 88, at 66.

¹¹³ See Decision, para. 103; Werle, *supra* note 89, at 29; Kress, *supra* note 88, para. 10; Cryer and Wilmshurst, *supra* note 88, at 8; and main text.

¹¹⁴ See Werle, *supra* note 89, at 29; Kress, *supra* note 88, para. 10; Gaeta, *supra* note 88, at 65, 69–70; and main text.

¹¹⁵ Cf. Cassese, *supra* note 73, at 11, requirement nos. 2 and 3; Decision, para. 91: ‘needs to be regarded by the world community as an attack on universal values . . . or on values held to be of paramount importance in that community.’

¹¹⁶ Decision, paras. 88–89 (international and multilateral instruments), 92 (SC resolutions, also para. 110), 93–97 (national legislation), 99–100 (national case law); and main text.

¹¹⁷ Decision, para. 91.

¹¹⁸ See note 96, *supra*, and main text.

¹¹⁹ Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210, A/58/37 (2003); Decision, para. 88, with footnote 138.

¹²⁰ This is also the dominant view in the literature; see Werle, *supra* note 89, at 30; Cryer and Wilmshurst, *supra* note 88, at 4–5; Wilmshurst, *supra* note 73, at 338. The Institute of International Law, *supra* note 100, also does not include terrorism in its (albeit not exhaustive) list of ‘serious crimes under international law’. Cf. Cassese, *supra* note 73, at 12, 162 ff., arguing that ‘some extreme forms of international terrorism’ are international crimes (at 12) and that terrorism is ‘a discrete international crime perpetrated in *time of peace*’ (at 177, emphasis in original). Leaving it open, Gaeta, *supra* note 88, at 69, on the one hand including terrorism under the crimes that are not international, on the other hand perceiving ‘a clear trend’ towards the supranational criminalization in peace time.

domestic level'¹²¹ and thus confirms the general view that terrorism is only part of the suppression conventions that provide for implementation obligations of states. This, in turn, demonstrates that there is indeed no such offence as an international crime of terrorism independently of domestic criminal law (or, for that matter, domestic enforcement). Also, the Chamber's argument of a special treatment of terrorism as compared to other transnational offences¹²² only demonstrates that terrorism is a 'special' transnational offence that may come closer to a true international crime than 'ordinary' transnational offences. This special status of terrorism is indeed confirmed by the result of our three-pronged 'international crime test'. The fact that terrorism fulfils the first two but not the third criterion shows that it stands between an ordinary transnational, treaty-based offence and an international crime proper; it is, so to say, on its way to the supreme level of a true international crime.

There is still another issue of principle that the Chamber does not address. As terrorist offences are typically committed by non-state (i.e., private) actors, their international criminalization would entail a qualitative shift from the hitherto international criminalization of 'crimes of state' to crimes of private individuals. This is not per se a fatal argument against such a criminalization but it would entail 'a third generational step' moving international criminal law 'into the area of transnational conflicts between states and destructive private organisations'.¹²³ The consequences of such a move deserve careful consideration.

2.3. Future prospects: the elements of an international crime of terrorism

The elements of an emerging international crime of terrorism may be inferred from the various definitions of international and national sources by way of their systematic comparison. In this sense, the Chamber's overview of the several sources of national and international law¹²⁴ is a useful contribution to the international debate on a terrorism definition.

2.3.1. *The objective elements (actus reus)*

The relevant regional conventions,¹²⁵ UN General Assembly resolutions (since 1994),¹²⁶ Security Council Resolution 1566 (2004),¹²⁷ the 1999 Financing

¹²¹ Decision, para. 105; and main text.

¹²² Decision, paras. 104, 110; and main text.

¹²³ See Kress, *supra* note 88, para. 37, who sees ICL of the first generation 'inextricably linked to the existence of war' (para. 23) and the second generation in the criminalization of serious violations in non-international armed conflict (para. 25) brought about by jurisdictional decision in *Tadić* (*supra* note 30) and completed by the codification of aggression (para. 37).

¹²⁴ Decision, paras. 83 ff. See also Ambos Brief, *supra* note 5, paras. 6 ff. (referred to in the Chamber's Decision at para. 84).

¹²⁵ Decision, para. 88, with footnote 135.

¹²⁶ Decision, para. 88, with footnote 136.

¹²⁷ Decision, para. 88, with footnote 137. Subsequent resolutions do not provide exact definitions but only declare that terrorism constitutes one of the most serious threats to international peace and security (e.g., Res. S/RES/1617 (2005)). Sometimes, a particular attack, such as the one in London, is characterized as 'terrorist' (Res. S/RES/1611 (2005)).

Convention,¹²⁸ and the draft Comprehensive Convention on Terrorism¹²⁹ all provide for the *commission of a criminal act* causing harm to life, limb, and property,¹³⁰ including a concrete threat¹³¹ or an attempt¹³² to commit such an act, as the only objective element of the offence.¹³³ The act requirement is also part of the national law as surveyed by the Chamber.¹³⁴ One can also safely assume that most national laws will cover preparatory acts, by way of either general-attempt provisions or the inclusion of preparatory acts in the actual offence definition.¹³⁵

A number of specialized UN conventions go beyond the general-act requirement and criminalize specific acts of terrorism¹³⁶ such as the taking of hostages,¹³⁷ the hijacking of planes,¹³⁸ violent acts on board an aeroplane,¹³⁹ and the attacking of diplomatic representatives.¹⁴⁰ In addition, these conventions require a *transnational element*, which is the involvement of at least two countries in terms of territory and perpetrators/victims;¹⁴¹ yet, this element is not part of the offence definition, but rather a jurisdictional rule that limits the application of the respective convention to terrorist offences with a cross-border dimension.¹⁴² The Chamber comes to the

¹²⁸ Terrorism Financing Convention, *supra* note 101, Art. 2(1) (referring, as underlying acts, to the acts of the other terrorist conventions (lit. (a)) and to '[A]ny other act intended to cause death or serious bodily injury' (lit. (b))); referred to in Decision, para. 88, with footnote 139.

¹²⁹ Decision, para. 88, with footnote 138. See thereto also David, *supra* note 73, at 1125 ff.

¹³⁰ Para. 1 of the respective Article of the Draft Convention, *supra* note 119, states: 'Any person commits an offence within the meaning of this Convention if that person, by any means, *unlawfully* and intentionally, causes (a) death or serious bodily injury to any person; or (b) serious damage to public or private property' (emphasis added). See also Art. 2(1)(b) of the Terrorism Financing Convention as quoted in note 128, *supra*.

¹³¹ Para. 2 of the respective Article of the Draft Convention, *supra* note 119, speaks of a 'credible and serious threat' to commit such an act.

¹³² Art. 2(2) of the Terrorist Bombing Convention, *supra* note 91, Art. 2(3) of the Terrorism Financing Convention, *supra* note 101, Art. 1(a) of the Hijacking Convention, *supra* note 101, Art. 2(1)(d) of the Diplomatic Agents Convention, *supra* note 101, Art. 1(2) of the Hostages Convention, *supra* note 101, Art. 7(1)(f) of the Nuclear Materials Convention, *supra* note 101, and Art. 3(2) of the Maritime Convention, *supra* note 101, criminalize the attempt to commit the respective acts.

¹³³ Decision, para. 88.

¹³⁴ Decision, paras. 91 ff., especially at 97.

¹³⁵ Either national systems provide for a general punishability of attempt in case of serious offences (felony, crime, *Verbrechen*) and qualify terrorism as such a serious offence (e.g., Sections 12(1), 23(1), 129a German *Strafgesetzbuch* ('StGB'); Arts. 121(4), 421(1) French *Code pénal* ('CP'); Arts. 15, 571 ff. Spanish *Código Penal*; Arts. 29, 30, 205 Russian Criminal Code) or they directly punish attempted terrorist acts (e.g., Chapter C-46(2) terrorism offence (d) Canadian Criminal Code; §2332(b) USC, USA; Chapter 11 Part 1 Terrorism Act 2006, United Kingdom).

¹³⁶ See Decision, para. 89, with footnotes 140 ff.

¹³⁷ Hostages Convention, *supra* note 101, Art. 1: 'seizes or detains and threatens to kill, to injure or to continue to detain another person.'

¹³⁸ Hijacking Convention, *supra* note 101, Art. 1(a): 'unlawfully . . . seizes, or exercises control of, that aircraft.'

¹³⁹ Civil Aviation Convention, *supra* note 101, Art. 1(1): 'violence against a person on board an aircraft in flight' 'destroys an aircraft in service.'

¹⁴⁰ Diplomatic Agents Convention, *supra* note 101, Art. 2(1): 'murder, kidnapping or other attack', 'violent attack upon the official premises.'

¹⁴¹ See, e.g., Art. 3 of the Terrorist Bombing Convention, *supra* note 91: 'This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State.' See also Decision, paras. 89–90; Bassiouni, *supra* note 107, at 115; Wilmshurst, *supra* note 73, at 344; Cassese, *supra* note 73, at 165.

¹⁴² See Art. 3 of the Terrorist Bombing Convention, *supra* note 91: 'Convention shall not apply.' Such a transnational element is a prerequisite for supranational competence; see the most far-reaching competence of the EU (European Parliament and Council) to 'establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particular serious crime with a *cross-border dimension*', Art. 83

same result, stating that this element ‘goes not [*sic*] to the definition of terrorism’¹⁴³ but its reasoning is unclear.¹⁴⁴ Also, one wonders how this element can be part of the customary rule suggested by the Chamber¹⁴⁵ if it shall not be part of the definition of the offence but, at the same time, this rule pretends to establish the actual elements of this definition.¹⁴⁶

The Chamber’s further *objective* qualification of the act requirement, on the basis of its analysis of national legislation, namely that it must be ‘a threat to the stability of society or the State’,¹⁴⁷ is, in fact, not supported by this analysis. The Chamber seems here to confuse the objective and subjective sides of the offence – indeed, the Chamber does not clearly distinguish between these two sides in its presentation – since what it qualifies as objective is in fact subjective, given that any reference to the destabilizing effect of a terrorist act is normally linked to the (special) intent of the perpetrator (see sub-sub-subsection 2.3.2.1).¹⁴⁸ The only possible objective qualification of the act requirement following from some, albeit a limited number of, national legislations¹⁴⁹ refers to the specific means or devices (e.g., explosives, toxic products; see Article 314 LCC quoted in sub-subsection 1.3.1) applied in carrying out the act.

In sum, the relevant sources indicate only one objective element of a possible international crime of terrorism, namely the commission, including a concrete threat, of a criminal act; this act must be of a serious nature.¹⁵⁰ While the act requirement corresponds to the first element of the Chamber’s customary rule,¹⁵¹ its generality highlights the very problem of this rule: the available sources allow one, at best, to infer, in the sense of the smallest common denominator of customary international law, an objective element so general that it can hardly conform to the *lex certa* requirement of the principle of legality.¹⁵² While, in domestic legal systems, the definition of a criminal act follows from national criminal codes, statutes, or, exceptionally, deeply enshrined common-law crimes, namely a criminal act is what

of the Treaty on the Functioning of the European Union, Official Journal of the EU C 83/47 of 30 March 2010 (emphasis added).

¹⁴³ Decision, para. 89 *in fine*.

¹⁴⁴ The Chamber states that this transnational element goes to the ‘character [of the offence] as *international* rather than *domestic*’ (emphasis in original), that is, it is not clear on the jurisdictional nature of the element explained in the text.

¹⁴⁵ Decision, paras. 85, 111; and main text.

¹⁴⁶ Even more explicitly, Decision, para. 111: ‘The crime of terrorism at international law of course requires as well that (ii) the terrorist act be transnational.’

¹⁴⁷ Decision, para. 97.

¹⁴⁸ Cf. European Council, Framework Decision on Combating Terrorism, 13 June 2002, (2002/475/JHA), Art. 1: ‘Each Member State shall take the necessary measures to ensure that the intentional acts . . . where committed with the *aim* of: . . . seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation, shall be deemed to be terrorist offences’ (emphasis added). Several states, e.g., Austria (§278c *StGB*), Belgium (Art. 137(1) *CP*), Germany (§129a(2) *StGB*), the Netherlands (Arts. 83 ff. *Wetboek van Strafrecht*) and Denmark (§114(1) *CC*) have adopted this definition almost literally.

¹⁴⁹ Cf. Decision, para. 95.

¹⁵⁰ Concurring and stressing the seriousness of the act, Wilmshurst, *supra* note 73, at 344–5; too broad for any criminal act provided for in national law, Cassese, *supra* note 73, at 165, 166, 177.

¹⁵¹ Decision, paras. 85, 111; and main text.

¹⁵² Critically also David, *supra* note 73, at 1100–1.

the national criminal law says it is, international law does not provide for such criminal acts. The qualification of the act as a serious one mitigates but does not resolve the issue.

2.3.2. *Subjective elements (mens rea)*

2.3.2.1. *General and special intent.* According to the Chamber, the available sources indicate a twofold subjective element: on the one hand, the perpetrator must act with the general intent with regard to the underlying criminal act, such as killing, injuring, or the taking of hostages. On the other hand, a special intent to spread fear or coerce an authority is required.¹⁵³

With regard to the general intent, the above-mentioned problem arises: if an international crime of terrorism only refers to a criminal act but this act is not specified, as in national law, by concrete offence definitions, the intent's object of reference is lacking. As to the special intent, I have already demonstrated in my *amicus curiae* brief¹⁵⁴ that the relevant sources generally provide for a 'general' (normal) special intent, as contained in Article 314 LCC ('intended to cause a state of terror'),¹⁵⁵ while a 'special' special intent, namely a special intent that, going beyond the 'general' special intent of causing terror, requires a particular political or ideological purpose, such as 'the purpose of coercing a state, or international organisation to do or refrain from doing something',¹⁵⁶ is only provided for, if at all, in the alternative in the relevant instruments. Thus, the first part of the Chamber's special-intent definition (spreading fear among the population), referring to a 'general' special intent, has a solid basis in customary international law, while the second part (coercing an authority), referring to a 'special' special intent, may, at best, be provided for as an alternative requirement.

2.3.2.2. *Relevance of political or ideological motive.* According to the Chamber, relying on some selective sources,¹⁵⁷ the special intent 'would often derive from an underlying political or ideological purpose'.¹⁵⁸ To be sure, the Chamber does not speak here of the 'special' special intent discussed just a moment ago, but of a possible 'underlying political or ideological purpose', namely the motive or motivation of the perpetrator. While such a motive may exist in some cases (where the terrorist indeed pursues certain political aims) but not in others (where the terrorist just pursues the aims of an ordinary criminal under the guise of an alleged political agenda), the crucial question with a view to the elements of the terrorist offence is whether such a motivation can belong to the offence definition at all. The Chamber seems to think so, since it says a few lines later that 'it remains to be seen whether one day it [the said purpose requirement] will emerge as an *additional element* of the

¹⁵³ Decision, paras. 85, 111; concurring Cassese, *supra* note 73, 166 ff., especially at 168, 177.

¹⁵⁴ Ambos Brief, *supra* note 5, paras. 6 ff., especially at 19.

¹⁵⁵ Concurring Wilmshurst, *supra* note 73, at 347 (mentioning 'spreading terror' as the general special intent).

¹⁵⁶ A. Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law', (2006) 4 JICJ 933, at 957.

¹⁵⁷ Decision, para. 106, with footnotes 204–7.

¹⁵⁸ Decision, para. 106.

international crime of terrorism'.¹⁵⁹ Apart from the fact, recognized by the Chamber itself a few paragraphs earlier,¹⁶⁰ that the overwhelming number of the relevant sources indicate just the opposite, namely that motives should play no part in the offence,¹⁶¹ the Chamber here seems to ignore – on the face of its considerations – the difference between intent and motive in criminal law. I have tried to explain this difference in my *amicus curiae* brief,¹⁶² essentially arguing that the possible motive, namely the reason *why* a perpetrator performed a certain act, is irrelevant to his intent ('irrelevance thesis');¹⁶³ a motive may only be taken into account at the sentencing stage as a mitigating or aggravating factor. Exceptionally, though, a legislator may make certain motives part of the *mens rea* element of the offence, particularly of a special intent.¹⁶⁴ Maybe the Chamber had this in mind when mixing up intent and motive and making the latter part of the offence definition. Given the expertise and writings of its president,¹⁶⁵ it is difficult to believe that the Chamber ignored the underlying categorical questions but, in any case, the lack of clarity in this part of the decision certainly gives rise to confusion.

3. CONCLUSION

While the STL Appeals Chamber goes too far with its claim of an existing international crime of terrorism, it has indeed made an important contribution with a view to the emergence of such a crime and to its definition. To be sure, at this juncture, one may consider terrorism, at best, as a particularly serious transnational, treaty-based crime that is – probably comparable to torture – on the brink of becoming a true international crime. Also, extreme forms of terrorism may amount to war crimes or crimes against humanity and thus be punishable under international law.¹⁶⁶ While the elements of terrorism as suggested by the Chamber, *a grosso modo*, have a solid basis in customary international law, their lack of precision (especially the objective element of a criminal act) is proof of the lack of consensus of the international community as to the details of the definition of an international crime of terrorism.

¹⁵⁹ Decision, para. 106 *in fine* (emphasis in original); see also Cassese, *supra* note 73, at 165 ('politically or ideologically motivated').

¹⁶⁰ Decision, para. 98.

¹⁶¹ Cf. Ambos Brief, *supra* note 5, paras. 20 ff.; concurring Wilmshurst, *supra* note 73, at 347.

¹⁶² Ambos Brief, *ibid.*, paras. 4–5, with further references (here omitted) in the corresponding footnotes.

¹⁶³ The irrelevance thesis is not affected by the scholarly debate on a possible ground for excluding responsibility for the '*délinquant par conviction*' ('*Gewissenstäter*'); see Ambos Brief, *ibid.*, para. 5.

¹⁶⁴ See, e.g., Council Framework Decision, *supra* note 148, Art. 1: 'committed with the aim of: . . . (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.'

¹⁶⁵ Cassese, *supra* note 73, at 167 ff., clearly recognizes the distinction between intent and motive, the irrelevance of the latter (at 168) and the difficulty to prove motive (at 169); yet, he still thinks that motive should be an element of the offence (also at 177), although 'by itself [it] may not suffice for the classification of a criminal act as terrorist'.

¹⁶⁶ Cf. Ambos, *supra* note 58, §7, mn. 275, with further references; see also Wilmshurst, *supra* note 73, at 349 ff.; Cassese, *ibid.*, at 171 ff., especially at 177; critically Kress, *supra* note 88, para. 37.