SHADOW LANDS

Responding to
Terrorism in the International Community

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Abstract of

Shadow Lands
-Responding to Terrorism in the International Community-

The discussion is focused on the problematic relationship between a new level of threat from international terrorism, and international law as it is shaped today. A basis for the discussion is the assumption that international law does not provide applicable tools for an international counter terrorism.

The static focus on inter-state relations and wartime offences leaves a wide grey area where both international terrorism and counter terrorism can evolve in uncontrolled conditions. Matters are complicated further by the changing nature both of war and terrorism. It is a “Shadow Lands” of sorts, where the demarcations between international terrorist and counter terrorist, as well as between combatant and non-combatant, could become blurred beyond distinction.

International law has come to rely on national legislation to take care of perpetrators of international terrorism. This dependency has created a situation where states not willing, or able, to stop terrorists operating from bases in their territory become safe havens. There appears to be a change to this on the rise, but it is a change driven onwards by states powerful enough to take action, not the international community itself.

The underlying thesis is that international law needs to adapt to this new reality. The discussion attempts to answer the question how this can be achieved by examining the tools and conventions available today and discuss approaches and solutions to problems not covered by, or originating in, these. Finally, there is suggested a type model for a court on international terrorism as a constructive way to bring the situation under the control of the international community before either terrorism, or counter terrorism, spins out of hand.
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**Abbreviations:**

- CIS: Commonwealth of Independent States
- FBI: Federal Bureau of Investigation
- IAEA: International Atomic Energy Agency
- ICAO: International Civil Aviation Organization
- ICC: International Criminal Court
- ICJ: International Court of Justice
- ILC: International Law Commission
- ITO: International Terrorist Organization
- NGO: Non-Governmental Organization
- OAS: Organization of American States
- OAU: Organization of African Unity
- OIC: Organization of the Islamic Conference
- PFLP: Popular Front for the Liberation of Palestine
- RAF: Rote Armee Fraktione (Red Army Faction)
- SAARC: South Asian Association for Regional Cooperation
- TCO: Trans-national Criminal Organization
- UK: United Kingdom
- UN: United Nations
- US(A): United States (of America)
- VCLT: Vienna Convention on the Law of Treaties
Shadow Lands – Responding to Terrorism in the International Community

1. Introduction

The term, terrorism, has invoked strong emotion for many years. There are and have been many debates over what constitutes this ambiguously defined word. The increased level of attacks combined with intense global coverage has initiated countless household discussions concerning terrorism. These discussions stir up a whole range of emotions and opinions among individuals just as they do among nations.

During a composed discussion on this topic, I was asked the question:
“Can terrorism never be morally right and justified?”

The example presented was whether it would have been morally acceptable to kill 200 fully civilian Germans (women and children) in an act of violence if that could have brought the Holocaust to an end, and whether that would have been Terrorism?

This question is quite hard to answer. I found myself asking how such an act would have stopped the Holocaust. As far as I know, no act of Terrorism has ever had the effect of stopping a highly repressive state from committing atrocities, any more than it has stopped any state from trying to fight terrorism.

Furthermore, how does one know that this would stop the Holocaust before the act is committed? There are plenty of people who firmly believe that bombing a bus station or hijacking a plane will make occupying powers go away, a Revolution among workers begin, or bring about the coming of some Higher Being. None of these attempts, however, seem to produce the result desired by the perpetrators. Still, many are convinced that it would be a successful strategy and many reach the same conclusion again and again.

The answer to the question of whether killing two hundred civilian Germans would be morally right and whether it should be viewed as terrorism is complicated and thus, so is the answer. The answer became: Yes, and no. Yes, it would be morally justified according to a simple cost-benefit analysis to kill 200 in order to save six million or more other people. No, it would not have been considered terrorism.

The logic behind the latter part is simple. Germany was in a state of war, and according to the definition of terrorism that I will better define and explain later in this paper; it is not terrorism if it occurs in war. Rather, it is subject to the Laws of Land Warfare and the Rome
Statue of the ICC, e.g. war crimes and crimes against humanity depending on the scale, purpose and coordination of said actions.

Furthermore and more importantly, I do not think a genocide could ever qualify as anything else than a state of war so even if there had not been an external war in which Germany was a party it would still be judged according to the same scale. Genocide would have to be considered as an intrastate conflict whether it takes the shape of industrialised mass murder, as in Nazi-Germany, or the more primitive but equally effective killings of the 1994 Rwanda Genocide.

The question, with its implications that terrorism may sometimes be morally right and acceptable, raised additional questions. **Why** would it not be possible to codify international law against terrorism? Setting boundaries of when and what type of violence is acceptable, and when non-state entities and their possible state financial supporters have officially crossed the line would set a clear precedent. **But how** should such a law be constructed?

Not all cases, seen through a codified approach to terrorism in International Criminal Law, are as relatively clear as the Genocide example above, however that is what courts are for. To determine the facts of the case, interpret the law, to judge action taken and its effects and, ultimately, decide on the issues of guilt and justice.

There is a “War on Terror” being fought in the World and it is a war, to a large extent, fought with *ad hoc* rules governing the process. The selectiveness and particular interests of individual states are guiding means and methods and secret “evidence” is used to motivate action taken. It is a war of little transparency and of considerable confusion which risks alienating whole segments of World population.

In these days of high-speed and often oversimplified media-coverage it also risks identifying entire religious, political or national groups as terrorists. If not explicitly, then implicitly by presenting a simplistic, format-suited picture that leaves the "man on the street", lacking a deeper understanding of the circumstances, to draw his/her conclusions from faulty information or incomplete material.

We are now in something of a "Shadow lands" where sometimes it is law-enforcement and other times military regulations that apply. It is State responsibility in one instance and, in the next, individuals as subjects to domestic courts. In short, we lack a common framework to deal impartially with international perpetrators of acts of terrorism. It is felt by many states
that terrorism is an offence that should be dealt with at the national level as it is imprecisely defined in international law. There are advantages in allowing an international judicial body to pass judgement, among them ensuring respect both for the principle of impartiality of courts and the rights of the accused (Cassese, 2003:745).

Despite the differences in opinion, interests and commitment of different nations, it is possible to reach a working order of international counter-terrorist law with a common and more precise definition. It would have to be partly based on compromise and require sacrifices by the different parties in the discussion. It would also require some degree of sacrifice of principles of international law ranging from sovereignty-issues to matters concerning the status of individuals. This, ultimately, is the premise of my thesis.

The discussion is founded in the firm conviction that there has been a change in how war is fought. A change in who does the fighting and who the victims are as previously discussed by, among others, Mary Kaldor¹ and Charles Tilly². This has blurred the line between terrorism and warfare even more than before. Governmental and Para-military combat units commit acts of aggression against civilian populations not accepted previously, and terrorists execute operations on a scale matching the capacity of military forces.

The fragmentation of threat leaves international law behind, its current format unsuited to meet the threat as it stands. A set of tools devised for warfare, primarily as it was known around WWII, is now trying to deal with warfare as we saw it in the 1990’s in Bosnia, Rwanda and any number of other places. Even as this happens, warfare has expanded its scope. The trend of semi-official militias beyond the command and control governments are supposed to have over their regular forces continue, as does the trend of transnational criminal links funding private wars. International Law needs to adjust to the new conditions of warfare and, to a certain extent, it has.

The creation of the International Criminal Court (ICC) in 1998 for example, is a step in that direction addressing crimes committed against a civilian population by individuals in a conflict. Unfortunately, the powers and jurisdiction of the court are limited and the ICC itself

¹ see Kaldor, Mary, *New and Old Wars*, 1998, Blackwell Publishers
² see Tilly, Charles, *Coercion, Capital and European States*, 1992, Blackwell Publishers
is a highly controversial subject. The court is contested by several states, not the least of which is the US, who are thereby undermining its authority even before its work has begun.

If the international conflict management tools are unable to effectively meet the new types of warfare emerging, they are even more inadequate to meet the rise of a more effective international terrorism. The dividing lines between warfare and crime have become increasingly blurred and international terrorism has also moved on with new objectives, new ways of funding and new means of attack. This evolution of a “new” terrorism has been pointed out by a number of observers, e.g. by RAND (Lesser et al, 1999).

International Law has failed to meet it.

1.1 The Problem

The international community has adopted a number of conventions over the years that address international crimes type-specific to acts of terrorism, such as attacks on maritime vessels and aircrafts. Yet it seems today that it is still impossible to coordinate a unified effort to combat terrorism on a routine basis. For short-term goals and limited operations, it is possible to gather or strong-arm a “coalition of the willing”, but the long-term institutionalization of a framework and a toolbox for the international community seems far-fetched. There is a risk that the ad hoc quality of international counter-terrorism could result in friction, distrust, misunderstandings and mistakes. Such effects could be counter-productive to a level of disrupting and halting any prolonged, unified effort and, in the extension, even instigate and fuel new grievances leading to new conflicts and attacks.

There are a number of road blocks relating specifically to the controversy that terrorism is surrounded by. One of the leading problems is defining terrorism. Although, most agree on record that terrorism is a negative thing, the rejection depends on semantics.

To overstate the point:

If one agrees that terrorism is negative, and considers the art of mime to be an act of terror, it is possible to sign any and all treaties renouncing terrorism. This is still possible even though one considers blowing up buses acceptable. As long as what is signed does not define terrorism as something other than the personal definition, it is possible to agree to it.

Furthermore, I can sign any treaty and make reservations excluding some of its functions from

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3 “Conventions” is to be understood as treaties or regimes that are bi- or multi-lateral
what I consider to be my interests. There is, for example, a discrepancy in opinions on whether state action, e.g. air bombings, can be considered terrorism or not. The fact that there is no accepted universal definition of terrorism certainly raises a few questions as to the commitment of those signing a convention or resolution rejecting terrorism. What are they really signing and with what motives?

From this perspective of an international community losing the initiative and ability to act, or react, to international terrorism, the main question addressed is:

*How can area-specific public International Criminal Law adapt to the new reality of Terrorism?*

Area-specific public International Criminal Law will henceforth be known as: International Law. In this context it is to be understood that the scope of international law will not be included in its entirety, but a narrower field of the parts explicitly addressed in the paper. The discussions offered can potentially be transferred to other areas to widen the implications of proposed changes. However, for the purposes of the current discussion, this is not the intention.

I intend to examine what measures and conventions are available to the international community today. To outline what changes are needed in the approaches to issues related to terrorism. Finally, to provide concrete suggestions on how International Law can be altered and developed to provide a functioning framework allowing for a reasonably fair, unbiased, yet forceful response in international counter terrorism.

The motive for investigating this is the idea that International Law cannot be left to lag behind, thereby allowing individual initiatives from states or terrorists alike that threaten to widen and increase divisions between peoples. There has to be a conscious choice in the international community to define and renounce violence, intentionally directed against civilian targets, as being unacceptable.

This discussion attempts to provide a common ground for such an effort.

### 1.2 Theory

This is a *constructive* discourse on an international policy level, focusing on what changes can be made to allow for action to be taken, and/or restricted, within a framework of
international law. The point of departure is a distinctly liberal position, more specifically a position most closely related to neo-Liberal Institutionalism\(^4\). It acknowledges power politics and national security concerns, but it also departs from the assumption that norms and domestic policy have an influence on the international anarchy (Baylis, 2001:263).

Cooperation is a possibility under current international conditions, especially since the common interests in the field of counter-terrorism is of a security nature. Regardless of whether emphasis is put on national security interests or international security, the threat of international terrorism is now so potentially lethal that cooperation should be a realistic alternative. In fact, one might say that the international nature and mobility of the perpetrators make cooperation a necessity.

In part the discussion finds its base in the thought of Collective Security and in the normative effect of international law. The original collective security theory was formulated post World War I, and essentially held that in a system where all states committed themselves to defending each other, no state would dare to resort to force. If a state chose force, all other states would turn on it (Nye, 2003:86).

The collective security thought was also the basis for the post WWII formation of broad international coalitions. These were formed for the specific purpose of dealing with a breach of the non-aggression obligation stipulated in article 2(4) of the United Nations charter. Examples of this include; the Korean War in the 1950’s (although controlled ultimately by the United States (Malanczuk, 1997:392)) and Operation Desert Storm where a coalition of forces ousted Iraqi forces from Kuwait (Malanczuk, 1997:396).

For the purposes of this discussion however, collective security is not to be understood as a deterrent to aggressive action between states in the same sense as articulated in the original theory. Instead, it is primarily meant as a way to achieve a higher degree of transparency, legitimacy, and operational capability among those engaged in fighting terrorism.

It does retain the deterrence-idea in relation to state sponsorship and state employment of terrorism, but holds it unlikely that a collective security formation among states would deter terrorists in any substantial way. The collective response idea is however vital to an effective counter-terrorism campaign of international proportions. While one powerful state may act unilaterally and simply ignore other nations, there are limits to any nation’s amount of money,

\(^4\) For further reading on neo-liberal institutionalism see for example Baylis, 2001
manpower, and resources available for spending on such action. An international consensus or near consensus on terrorism would make it harder for international terrorists to operate and find sanctuary, as well as clearly define the possibilities and limits of coalition building.

Collective security theory involves two main components; _sovereignty _and _international law _(Nye, 2003:86). This paper may challenge state sovereignty and the rights of states to a certain extent, but it is firmly founded on the idea of international law and the _obligations _of states. It also departs from the conviction that, as rights are being used, obligations should be met. Claiming one and refusing the other should simply not be considered acceptable.

The normative effect of international law denouncing a _defined _form of violence should also not be underestimated.

In order to get to the constructive part I intend to pass through two sections, one empirical and one normative. The purpose here is to use the empirical block (what is) and the normative block (what should be) as the foundation on which to build the constructive section (how do we get there). This approach has its foundations in the theory that there exists interdependence between the three components and that in order to reach a constructive result, the empirical and the normative have got to be examined as well as how they interact (Lundquist, 1993:85).

To make the discussion ahead less complicated and to avoid misconceptions deriving from the spread and scope of the term “International Law”, it is necessary to briefly define and set boundaries for its use.

**1.3 International Law**

There are a number of issues surrounding International Law that give rise to questions regarding its usability and level of universalism. Furthermore, taking in the full scope of International Law with treaties, customary law, conventions, etc, it is necessary to briefly define its meaning as well as explain the terms used.
It is necessary to acknowledge that there is no consensus on whether international law matters in international relations or not. It would, however, be safe to say that although there are severe problems regarding enforcement of international law in comparison to municipal law (Malanczuk, 1997:7), there is a normative factor that tells states how they should behave. This has been evident several times in the “War on Terror”. The most apparent is the lengths that the US and the UK have gone in order to prove to the international community that an invasion of Iraq was necessary and justified. Regardless of what position one holds on the invasion itself, there were serious attempts to argue its legality. If international law has no relevance whatsoever, this would not have been necessary.

As it were, the US and the UK, together with allied forces, did invade Iraq despite the scepticism of several states and without the authorization of the UN Security Council. But as noted, the legal arguments before the invasion still go to illustrate the point that, difficult to enforce as international law may be, it does have an influence on state behaviour.

While national laws can be traced through references to a constitution or judicial case law, international law is a bit more challenging. The most important source of international law is customary law (Malanczuk 1997:35), which evolves from the practise of states, i.e. when a way of conducting affairs between states has come to be viewed as common practise among states, it is regarded as customary law. There is a, sometimes disputed, list of sources in the Statue of the International Court of Justice (ICJ) under article 38(1) naming

\[ a) \text{ international conventions, whether general or particular, establishing rules } \]
\[ \text{expressly recognized by the consenting states; } b) \text{ international custom, as } \]
\[ \text{evidence of a general practise accepted as law; } c) \text{ the general principles of law } \]
\[ \text{recognized by civilized nations; } d)...\text{ judicial decisions and the teachings of the } \]
\[ \text{most highly qualified publicists of the various nations, as subsidiary means for } \]
\[ \text{the determination of rules of law” (Malanczuk 1997:36).} \]

Conventions are relatively easy to trace and interpret. They are treaties and regimes agreed upon by two or more nations, bi- or multi-lateral.

The “general principles of law recognized by civilized nations” is a provision intended to fill in any gaps that may be discovered in the process of international relations where, by oversight or other reason, international law fails to cover the issue. There are several interpretations as to what exactly this entails (Malanczuk, 1997:48-9) but in short, it could be
said to call for “creative thinking”, either by extending principles in existing measures, or by transferring domestic principles of law generally applied, to the international arena. International custom, state practise and general principles of law can be surmised from the study of the actions of states and statements made. A much harder task since there is no clear guidelines as to when an action becomes custom, or how to weigh “general principles” against each other. I have selected to include the UN Security Council resolutions pertaining to terrorism, and the UN General Assembly resolutions on the same subject, since they provide hints on what states agree the boundaries to be at the time of the resolution’s introduction. In these resolutions it is possible to detect changes in state rationale regarding issues of international terrorism and state responsibility.

United Nations resolutions are not international law. The Security Council can punish violations through a number of actions ranging from harsh words to the use of force. These punitive measures have quite an impact on customary rules in state behaviour, since they set a type of precedent. The veto-right allocated to the five permanent members\(^5\), which enables them to block any resolution not in their own interest or that of their allies, make the precedents of the Security Council highly selective. The General Assembly resolutions are not truly enforceable but are advisory in nature. They can, however, be regarded as an indicator on where the international community stands on an issue.

Judicial decisions of international concern can be found in such institutions as the International Court of Justice (ICJ) or, for example, war crime tribunals. Focus has been given to how the Rome Statue of the International Criminal Court (ICC) has been formulated bearing in mind that the crime-definitions and organization of the ICC is the result of the experiences from previous tribunals such as the Nuremberg-tribunal, the Tokyo-tribunal and the tribunal to the Former Republic of Yugoslavia.

This discussion will primarily be based in codified international law such as the ICC statue, and a number of resolutions and treaties on issues directly related to the subject at hand. It will touch upon customary law concerning for example state practise as it stands in the codification process performed by the International Law Commission (ILC)\(^6\).

\(^5\) China, France, Russia, Britain, the United States
The scope of what International Law encompasses in the present day is extremely wide. International terrorism has ramifications in several areas including economy, environment, power and energy, transportation as well and more. Some of these will be briefly addressed in the first part of the paper on current international agreements. The areas of international law in focus in the normative chapter will be primarily state responsibility and war crimes as well as the right to self defence.

*Jus cogens (meaning: compelling law)* is an important principle in international law worth noting here. The term is defined in article 53 of the Vienna Convention on the Law of Treaties (VCLT). This article stipulates that a treaty is null and void if “it conflicts with a peremptory norm of general international law” at its conclusion (Shelton, 2003:150). In essence, what this means is that no state can, by way of agreement, bargain their way out of respecting some specific norms. This includes such atrocities which in no way and under no circumstance can be considered allowable, such as Genocide.

Henceforth in this paper, the use of the term “International Law” is intended to signify the parts of international law dealing with terrorism or related subjects addressed here and not international law as a whole.

### 1.4 Method

The method is largely qualitative spanning from the study and comparison of existing International regulations to a more speculative normative ideal-construction.

*The Empirical section* will present the conventions agreed upon internationally regarding terrorism. It will highlight differences and problems in views expressed through the reservations made against specific articles in those conventions. Included are all UN resolutions from both the Security Council and the General Assembly, on terrorism specifically, that have been presented since 1960. The chapter is divided into decades with short introductions on contemporary terrorist attacks in order to provide an overview and a link between incidents and what measures have been introduced in the international arena.
The Normative section discusses and suggests solutions to the problems facing an international counter-terrorism act. Definitions and applications of the concepts of terrorism, responsibility and self-defence, are discussed and suggested in order to pave the ground for the construction of an international legislation against acts of terrorism. These discussions rest upon the ongoing scholarly debates as well as the different approaches chosen by authorities and governments. In the normative section, I furthermore intend to suggest concrete changes to the framework today and policy-approaches aimed at honing the counter measures allowed and available to states against international terrorists.

Finally, in the constructive section I will suggest how such a document could be formulated by adapting the discussed points of the normative chapter to the framework of the ICC statute. The necessary alterations and additions are explained as each key function is discussed.

1.5 Material

I will examine the United Nations Security Council and General Assembly resolutions as well as regional conventions, particular to terrorism, as listed by the UN. A compilation of literature, articles, and research in the field of terrorism/counter terrorism will be sited throughout the paper. Not wanting to rely on speculative and unsubstantiated literature, most of the books, studies and reports used to formulate opinions were from material pre-9/11 2001 or from established, unbiased researchers, post 9/11 2001.

Regarding international law there are other problems relating to source-availability. Much of international law is customary law and as such not actually written down but rather the result of practise and rulings. The part of international law that most applies to the subject of terrorism, international criminal and public law, has however been rather extensively codified in the International Law Commission draft articles on State responsibility and other documents used. In addition, I have chosen to rely on well establishes and extensive textbooks on international law for interpretations and comments beyond the scope of a layman.

My hope is this thesis will demonstrate that it is possible to join international law, although modified, to resolute action against individuals threatening the lives of civilians globally and that international peace, security and stability will benefit as well.
II. Empirical Section

2.1 Chapter Introduction

This section of the paper is an empirical study of what conventions, resolutions and treaties exist within the framework of international law today relevant to the problem of international terrorism. By necessity it is a rather brief presentation of what tools are available within the range of international law and will focus on what type of acts respective text addresses, what reservations have been made and what problems are identifiable. Primarily, it is focused on codified law and the use of state practise. The potential establishing of such practise regarding self defence will instead be addressed in chapter three.

The chapter is divided into chronological parts, starting with the 1960’s. A short account of terrorist attacks in each decade will be given in order to provide an insight into the historical setting of each measure as they were introduced. The reason for choosing a chronological presentation is that it helps the understanding of the developments in international law regarding terrorism. It also shows the link between international law and developments in international terrorism. There are attacks and conflicts that are of interest before 1960 as well, but as this is not a historical overview of terrorism as an occurrence, they will not be included here.

Another point of importance is that there has been no specific reference made to prolonged conflicts containing acts of terrorism. Such conflicts include the Liberation Tigers of Tamil Eelam’s (LTTE) armed struggle in Sri Lanka where they have been one of the most frequent employers of suicide tactics in the World; and the Israel-Palestine conflict starting with Jewish groups using terrorist tactics to force the British out and, subsequently, Palestinian groups employing terrorist tactics against the state and population of Israel. Instead, focus has been intentionally given selectively to large attacks scale or casualty-wise or of a high profile character. Included is also a very general description of the World situation concerning terrorism.
There are twelve major multilateral conventions relating to state responsibilities in countering terrorism listed by the UN[^7]. These concern aviation safety, safety of internationally protected persons, hostage taking, nuclear material protection, maritime safety, off-shore platform safety, the marking of plastic explosives, the financing of terrorism, and terrorist bombings. They will be presented here in short. It is important to remember that these agreements do not extend to criminal responsibility of the individual perpetrators. Rather, they concern what duties and rights befall any state party to the convention who has a connection to the incident, either as victim or otherwise.

Each short presentation will also contain what this writer perceives as interesting reservations or declarations made by the parties to the convention regarding the content and its implications. The reservations illustrate quite clearly the different perceptions of, and approaches to, the problem of international terrorism.

There are also a number of Security Council and General Assembly resolutions pertaining to the issue of terrorism that will be presented, as will several regional agreements of interest. The purpose of this part of the paper is to lay a ground for the discussion in the next chapter on problems and weaknesses in the current set of tools available to the international community.

Central to the use of force in international relations is chapter 7 of the UN charter with the articles contained therein (art. 39-51). I have therefore seen fit to include chapter 7 as appendix A for reference and review by the reader. It can be found just before the literature list in the end of the paper.

### 2.2 1960-1969

The 1950’s and 1960’s saw the liberation struggles of a number of areas colonized by other states, primarily in Africa and South East Asia. There had been a number of violent attacks and struggles between 1945 and the 1960’s but with the accelerating de-colonization process and struggle for liberation, a large number of predominantly rural guerrilla-wars erupted. Some campaigns of liberation during this period were more violent than others, e.g. the

[^7]: These conventions can be found at [http://untreaty.un.org/English/Terrorism.asp](http://untreaty.un.org/English/Terrorism.asp)
Algerian war between 1954-1962 where Europeans were randomly and indiscriminately targeted in bloody bombings that killed not only the intended targets, but a number of Algerians as well (Crenshaw, 2003:51). This urban campaign of the Algerian liberation movement was a prelude to the emergence of urban terrorists in Europe in the mid-1960’s (Laqueur, 2002:20)

By the late 60's and early 70's, "extremist political violence had become a truly prominent feature of the international system" (Chalk, 1999:151) with the 1968-movement giving rise to a number of predominantly leftist terrorist groups in Europe (Fritzsche, 1989:466) parallel to the developments in former colonies and violent insurgencies in South America.

The tactics of attacking civilians, as well as assassinating key societal figures, were employed in nations and territories around the world. In South America and Uruguay, the *Tupamaros* toppled one of the most liberal governments on the continent destroying in the process the democratic system of that country and in the end them selves (Laqueur, 1999:28).

A number of guerrilla movements also employed the tactics of attacking civilians in public places creating the difficulties in distinguishing between terrorist and guerrilla that still give rise to discussions on how to label an organization.

In the US there arose the “New Left” groups like *The Weathermen*; Japan saw the rise of the *Japanese Red Army* (JRA), Europe of the *Rote Armee Fraktion* (RAF) and other left-wing terrorist groups as well as nationalist groups such as the *Irish Republican Army* (IRA) with its offshoots. In the Middle East, although present before, it was the 1967 war against Israel that sparked a major terrorist campaign (Laqueur 1999:30).

During this decade there were several attacks against diplomats and heads of state but it was an offence that had first been committed in 1930 that was the subject of the first convention relating to terrorism listed by the UN. In 1930, the first ever aircraft hijacking occurred and was subsequently followed by a number of such incidents over the years. In the 1960’s, a quite remarkable rise in this type of offence occurred with around 30 incidents recorded (Hoffman, 1993:13).

Concern over this type of terrorism led to the development of the *Convention on Offences and Certain Other Acts Committed On Board Aircraft* (“Tokyo Convention”, 1963). The convention deals with state parties responsibilities in relation to offences or acts committed by an individual.
It regulates what parties have a right to interfere with such an aircraft and under what circumstances. Article 6 regulates the commander of the aircraft's right to impose reasonable measures including restraint which are necessary (art 6, §§1-2).

Furthermore it determines that any Contracting State shall take all appropriate measures to restore control of the aircraft to its lawful commander (art.11, §1)

and also allow the commander to disembark any person having committed, or suspected of being about to commit, an unlawful act on board an aircraft from another Contracting State.

According to the International Civil Aviation Organization (URL 2), the group of states that are party to this convention has risen from the original 13 signatory states to the current number of 178. There are a number of reservations on different issues, most notably the dispute arbitration procedure addressed in article 24, §1 (which stipulates that a case can be brought before the International Court of Justice (ICJ) for arbitration). There is also the clarification from several states that signing the document in no way is to be interpreted as recognition of the state of Israel.

During the period between 1960 and 1969, the UN is remarkably silent presenting no declarations or resolutions despite the high level of violence directed at civilians and a continuous terrorist threat seen since WWII. It is not entirely clear why this is, but a possible cause may have been the fact that much of the violence was part of liberation struggles, hence seen as having a degree of legitimacy. There was a lack of regional initiatives as well but this too was to change in the decades to come.

2.3 1970-1979

The 1970's saw a continued rise of terrorist violence on a global level including a number of well-publicized attacks and hijackings committed by different groups, either separately or in cooperation. In 1972 a group of Palestinians calling themselves the "Black September" took
11 Israeli athletes hostage at the Munich Olympic Games (an incident that led to the formation of formal counter-terrorist forces in Germany and elsewhere after the disastrous ending leaving nine hostages and five terrorists dead) (Howard and Sawyer, 2002:579).

In 1973, Rome Airport was hit in an attack killing 29 at the airport, one subsequent hostage that tried to flee and, after hijacking a plane and flying to Athens, another hostage to make Greek authorities release two prisoners. In the end, the terrorists flew to Kuwait having achieved none of their demands and no group claimed responsibility for this attack (URL 4).

In June 1976 members of the German Rote Armee Fraktion (RAF) together with the Palestinian Popular Front for the Liberation of Palestine (PFLP) hijacked a plane in an attempt to achieve the release of prisoners found guilty of terrorist crimes. The hijackers forced it to land in Entebbe, Uganda where it was subsequently stormed by Israeli commandos. This counter-raid by the Israelis has been an issue of controversy. Although many states had sympathy for the Israeli position in claiming a right to protect its nationals abroad, most states did not accept the actual legality of the intervention since it constituted a breach of Ugandan sovereignty (Gray, 2003:603)

All through the 1970's there were numerous kidnappings and attacks on diplomats culminating in the seizing of the US Embassy in Teheran in 1979, which did not end until 1981. An American attempt at forcibly rescuing the embassy staff in April 1980 was aborted after civilians had wandered into the secret desert base and a transport plane had collided with a helicopter leaving a number of US casualties.

During this period, there were several measures introduced by the international community starting with the Convention for the Suppression of Unlawful Seizure of Aircraft ("Hague Convention", 1970). This convention is primarily targeting aircraft hijacking as a specific event and regulates the contracting states’ responsibilities towards one another. It also regulates what rights and duties states have, should a hijacking occur on an airplane registered in a contracting state. Hijacking is defined as

[…]any person who on board an aircraft in flight: a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform such an act…commits an offence (hereinafter referred to as “the offence”) (art.1)
The convention further states that

[…]each Contracting State undertakes to make the offence punishable by severe penalties (art.2)

and that it is an offence leading to extradition. The different opinions regarding capital punishment sometimes lead to a situation where national law prevents extradition to a nation where such a penalty is likely to be the end result of a trial. The convention allows for this but regulates that any contracting state where an offender is found but who does not wish to extradite that person shall

[…]be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution (art.7).

ICAO again lists 178 states as being contracting parties to this convention (URL 2) as opposed to 47 signatories at the first formation of the convention. Reservations were made similar to those regarding the previous convention, namely concerning a possible arbitration procedure and the status of the state of Israel.

In addition, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (“Montreal Convention”, 1971) was also introduced. In summary, this convention defines an offence as committed by a person if that individual:
performs an act of violence against a person in flight if it is likely to endanger the safety of the aircraft; or destroys an aircraft in service or endangers its safety; or places a device likely to destroy, cause damage that makes it incapable of flight or endanger the safety of the aircraft in flight; or destroys or damages air navigation facilities if it is likely to endanger the safety of an aircraft; or endangers the safety of an aircraft by communicating information he/she knows to be false. Attempting this, or being an accomplice to a person perpetrating or attempting this, is also considered an offence by the convention.

The rest of the convention follows the pattern set by the previous conventions regarding responsibilities on extradition and prosecution as well as jurisdiction.

At present, 180 nations are party to this convention (URL2) compared to the 80 original states/signatories. The reservations in the ratification of this convention are again numerous.
Apart from the repetitive reservations of the previous conventions, there is a reservation in which Venezuela declares that if no financial or bodily harm has come to pass, and the motivation for the offence is political, Venezuelan asylum-rules will outweigh this convention and no prosecution will take place (URL 1).

Reflecting the previous attacks on diplomats and heads of states, the **Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973)** also came into effect. In article 1, the term “internationally protected persons” is defined as a head of state, head of government, or minister of foreign affairs as well as their family members when in another country. This protection furthermore extends to other representatives entitled to international protection by agreement.

The offence addressed by this convention is defined as

\[ \text{the intentional commission of:} \]
\[ a) \quad \text{a murder, kidnapping or other attack upon the person or liberty of an} \]
\[ \text{internationally protected person;} \]
\[ b) \quad \text{a violent attack upon the official premises, the private accommodation or the} \]
\[ \text{means of transport of an internationally protected person likely to endanger his} \]
\[ \text{person or liberty[...]} \text{](art.2)} \]

This also includes the attempt at, threat of, or complicity in, such an attack.

There are 146 parties to this convention, with 25 original signatory states (URL 1). The reservations to this convention are numerous and rather interesting. I have chosen to highlight a few in order to illustrate some of the issues that arise when approaching the subject of terrorism.

There are several reservations made regarding the status of Israel as well as arbitration possibilities for the ICJ. Furthermore, Iraq makes the following reservation regarding art. 1, §1b:

\[ \text{Sub-paragraph (b) of paragraph (1) of article 1 of the Convention shall cover} \]
\[ \text{the representatives of the national liberation movements recognized by the} \]
\[ \text{League of Arab States or the Organization of African Unity.} \text{](URL 1)} \]

and thereby extends the protection intended by the convention to organizations deemed by the League of Arab States and/or the Organization of African Unity to be liberation
movements but who are potentially at the same time judged by other nations to be terrorist organizations.

The reservation made by Burundi stipulates that

In respect of cases where the alleged offenders belong to a national liberation movement recognized by Burundi or by an international organization of which Burundi is a member, and their actions are part of their struggle for liberation, the Government of the Republic of Burundi reserves the right not to apply to them the provisions of article 2, paragraph 2, and article 6, paragraph 1. (URL 1)

The articles that Burundi reserves itself against states that

Each state party shall make these crimes punishable by appropriate penalties which take into account their grave nature (art.2, §2)

and article 6 concerns the measures to be taken by the state to ensure a suspected offender’s presence for extradition or prosecution as well as what notifications are to be made. With these reservations Burundi reserves the right to not criminalize, not prosecute and not notify anyone of a suspected offender’s presence if that offender falls under the label of national liberation movement recognized by Burundi or any organization to which Burundi is a part. This calls to mind the discussion of one man's terrorist being another man's freedom fighter (e.g. Kennedy, 1999:1) and effectively raises doubts as to Burundi's level of commitment.

The International Convention Against the Taking of Hostages ("Hostages Convention", 1979) was also introduced in response to a mounting number of hostage-situations.

The offence addressed by this convention is defined as

Any person who seizes or detains an threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages...within the meaning of this convention. (art.1)

An article of interest is article 12 that says
Several states, among them for example Chile, have reserved themselves against this formulation and declared hostage taking to be a crime under any circumstance. (URL 1) The reservation made by Chile is somewhat dubious considering that under the rule of Augusto Pinochet (1973-1990) several thousand civilians “disappeared”. This again provides an example of the discrepancy between voluntary conventions and reality. There are 138 parties to this convention with 39 original signatories. The remaining reservations are mainly along the same lines as the reservations made in the previous conventions.

Hence the reservations are mainly regarding the status of Israel and the arbitration of the ICJ but the Lebanese reservation contains a point of interest, more specifically point two which reads:

*The provisions of the Convention, and in particular those of its article 13, shall not affect the Lebanese Republic's stance of supporting the right of States and peoples to oppose and resist foreign occupation of their territories.* (URL 1).

Article 13 of the convention stipulates:

*This convention shall not apply where the offence is committed within a single State, the hostage and the alleged offender are nationals of that State and the alleged offender is found in the territory of that State* (art. 13)

In 1972, the UN General Assembly (UNGA) adopted *resolution 3034* which illustrates the problem of defining and pin-pointing international terrorism. Apart from setting up a 35 member committee on International Terrorism (§9) it also expresses deep concern over acts of terrorism occurring. Of special interest are §§3 and 4 where the UNGA states that it:

*Reaffirms the inalienable right to self-determination and independence of all people under colonial and racist regimes[...]and upholds the legitimacy of their struggle, in particular[...]national liberation movements[...]”* (§3);and that it

*“Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self determination and independence and other human rights and fundamental freedoms* (§4).
Bearing this in mind, the UNGA invites all states to work at a national level to solve the problem of international terrorism.

It could certainly be argued that the UNGA has chosen to focus the problem to states more than individuals as the perpetrators of acts of terrorism. This is followed up by resolution 31/102 in 1976 which reaffirms the previous position and in essence is a repetition of the text in resolution 3034.

In resolution 31/103, adopted at the same session, the UNGA decides to appoint a committee to prepare a draft resolution for the above convention on crimes against internationally protected persons.

In 1977, the UNGA adopted resolution 32/147 which again constitutes a repetition of previous resolutions on measures to prevent international terrorism, but it also, in resolution 32/148, decides on a committee to prepare the convention against the taking of hostages.

In 1979, with resolution 34/145 something obviously has happened in the approach by the UNGA since it has added a couple of paragraphs of interest to the recurring resolutions on measures to prevent international terrorism. Of particular interest are §§3, 7, 10 and 11 where in §3 the UNGA declares that it

\[\text{Unevocally condemns all acts of international terrorism which endanger or take human lives or jeopardize fundamental freedoms (§3)}\]

which is a change compared to the previous resolutions focused on the actions of states.

In §7 the issue of state sponsored terrorism and insurgencies in other countries is addressed and the UNGA

\[\text{calls on all states to fulfil their obligations[...] to refrain from organizing, instigating, assisting or participating (§7)}\]

in such acts.

The UNGA furthermore extends a recommendation to all concerned agencies and regional organizations to

\[\text{consider measures to prevent and combat international terrorism within their respective spheres of responsibility and regions (§10)}\]
and urges all states to co-operate[...]more closely, especially through the exchange of relevant information[...] (§11).

During the same period the Security Council (UNSC) adopted no resolutions directly applicable to the issue of international terrorism (URL 1). As the problem, or perception of the problem, grew in the 1980’s however, this was to change.

2.4 1980-1989

The 1980’s certainly didn't bring fewer casualties to terrorist attacks. In 1981, Egyptian President Anwar Sadat was murdered and in 1982 Lebanese President Bashir Gemayel was killed by a bomb. In April 1983 the US Embassy in Beirut was bombed killing 63 and in October both the French and the US barracks, part of the UN forces there, were targeted by suicide bombers leaving 242 American and 58 French troops dead (Howard and Sawyer, 2003:581) leading to a complete withdrawal of UN troops from Lebanon. Responsibility for the three attacks was claimed by the Islamic Jihad.

In 1985 an Indian airliner is bombed out of the sky killing all 329 onboard and later the same year, the Achille Lauro cruise ship in the Mediterranean was seized by terrorists leaving 700 passengers as hostages. The latter incident was resolved with only one death, the execution of a US citizen in a wheelchair, after the Egyptian government promised the terrorists safe haven in exchange for the hostages (URL 4).

There are a number of incidents since the 1960’s that have been more or less concretely linked to state sponsors of groups, i.e. that states have used the groups as an alternative means to regular forces. One incident where state agents have been found guilty occurred in 1988 when, according to the court findings, two Libyan agents placed a bomb on-board Pan American flight 103. The plane was exploded in midair and crashed into the Scottish village of Lockerbie killing a total of 270 people, 259 passengers and eleven on the ground (URL 6).

There were a number of international measures against terrorism introduced in the 1980’s starting with Convention on the Physical Protection of Nuclear Material (“Nuclear Materials Convention”, 1980) The primary purpose of this treaty, while recognizing the right
of every nation to pursue peaceful nuclear power, is to set stringent rules regarding the transfer, storage, physical protection of peaceful nuclear material while in international transfer, or in transit through said state’s territory.

The convention also dictates that the same rules and regulations apply to the domestic handling of such material.

The actual offence according to this act is described as:

[...]the intentional commission of:

(a) an act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property[...] (art. 2§2)

It then goes on to define any unlawful attempt at gaining control over nuclear material as an offence as well.

This convention has 106 parties including the 45 signatory states according to the depository organization, the International Atomic Energy Agency (URL 3).

In the wake of several attacks at airports in the 1980's there was an addition made to previous conventions on aviation safety in the shape of the *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 (1988)*. This protocol is a complement to the 1971 Montreal convention on suppression of unlawful acts against the safety of civil aviation presented above. A person is committing an offence as defined by this protocol if that person

[...]a) performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or

b) destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport. (art. 2§II)

The protocol thus simply extends the provisions and arrangements of the 1971 convention to include acts committed against airport facilities, persons in such facilities and also aircraft not in service at the time of the act.
According to ICAO, there are currently 148 parties to this protocol with 11 original signatories (URL 2).

It would not be unlikely that the 1985 seizing of the *Achille Lauro* weighed in heavily in the negotiation of the next convention to be introduced, the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA, 1988)*

This convention does not apply to warships, ships owned by a state when used for naval auxiliary, customs or police purposes, or a ship that has been withdrawn from navigation or laid up (art. 2§1).

The offence targeted by this convention is committed by any person who

\[\ldots\text{unlawfully and intentionally:}\]
\[a) \text{seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or}\]
\[b) \text{performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or}\]
\[c) \text{destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or}\]
\[d) \text{places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or}\]
\[e) \text{destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or}\]
\[f) \text{communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or}\]
\[g) \text{injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f). (art. 3§1)}\]

Article 3§2 further extends the meaning of this convention to include the attempt of and the abetting of any of the acts in article 3§1 as well as threatening, with or without conditions, someone to do or refrain from doing something, or to force someone to commit an act as described in subparagraphs (b), (c) and (e) above, if that threat is likely to endanger the safe navigation of the ship in question.
Any state party to this convention furthermore agrees to take into custody and accept any person delivered by the master of a ship whom he has

[...] reasonable grounds to believe has committed one of the offences [...] (art. 8§1)

In essence, it is an adaptation of the conventions on air traffic safety to the sea.

According to the International Maritime Organization (IMO) there are 113 parties to this convention (URL 7) with 16 original signatories.

Additionally, oilrigs and similar installations were added as protected in the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (SUA Protocol, 1988) which is an extension of the convention on Maritime Safety presented above. The definition of the offences targeted by this protocol shares the definitions in sub-paragraphs (a), (b), (c), (d) and (g) of article 3§1 of that convention with a simple change in the wording to "fixed platform" instead of "ship".

According to the IMO, there are now 101 parties to this protocol with 16 original signatories.

The UN Security Council (UNSC) addresses the issue of plastic explosives in its resolution 637 (1989) and calls for all states to co-operate with the ICAO and devise an international regime for the purpose of marking such explosives. This would later result in the convention presented below.

Previously though, in 1985, the UNSC had adopted a decision to condemn terrorism in all its forms regardless of who the perpetrators were. This was the first unconditional condemnation of international terrorism by the UN in its then 40-year history (Romanov, 1990:297).

UNGA resolutions 36/109 (1981) and 38/130 (1983) contain no major changes in the focus and language of previous resolutions, but resolution 39/159 (1984) is of greater interest and is a strengthening of the previous statements on state sponsored terrorism in that it focuses solely on this problem and

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8 Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991) see p.16
In December 1985, the UNGA adopted resolution 40/61 which

resolutely condemns policies and practices of terrorism between states[…] (§1).

as well as urging all states not to let anything impede the application of appropriate laws and conventions on such acts (§7).

Resolution 42/159 is by large a repetition of previous resolutions but contains a clarification of what obligations befall a state, namely:

a) to prevent the preparation and organization in their respective territories, for commission within or outside their territories, of terrorist acts[…]; b) to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts; c) to endeavour to conclude special agreements to that effect on a bilateral, regional or multilateral basis; d) to co-operate with one another to exchange relevant information[…]; e) to harmonize their domestic legislation with the existing international conventions[…] to which they are party. (§5)

Responding to the numerous hostage-situations around the world during the 1980’s, resolution 44/29 (1989) specifically addresses this problem in §§7-8 calling for the release of all hostages and all states to work against, by using any and all influence, hostage taking. The resolution also expresses UNGA concern with

…growing and dangerous links between terrorists and drug traffickers and their paramilitary gangs (§9)

which is a new feature compared to the texts previously adopted by the assembly.

2.5 1990-1999

The main change in the 1990’s according to some observers is a considerable increase in the number of recorded incidents as well as the lethality of the incidents occurring compared to the average of previous years. Between 1968 and 1989 there were 35,150 domestic and
international incidents recorded while there were 30,725 recorded between 1990 and 1996 alone (Chalk, 1999:152). The statistics vary however depending on the source relied on.

Bruce Hoffman argues that there is some evidence of a "new" terrorism emerging during the 1990's represented by a new structure and motivation, a shift from the nationalist and politically motivated terrorists previously active to an increase in Millenarian cults and religiously and ethnically motivated terrorism. After increasing both in number and lethality in the 1980's (Hoffman, 1993:14-15), the number of incidents has gone down in the 90's according to the statistics Hoffman relies on for his analysis while the lethality has increased further (Hoffman, 1999:10-11).

Several high profile attacks took place in this decade with mass casualties as a result, either in death toll or injuries. To mention a few, there was the 1993 bombing of the World Trade Center in New York with six dead and 1,000 injured, perpetrated by what has been described as "amateurs" (Hoffman, 1999:21-22);

the 1995 nerve gas attack against the Tokyo subway by Millenarian sect Aum Shinrikyo killing 12 and injuring 5,700 (Howard and Sawyer, 2003:584);

the bombing of the Federal building in Oklahoma City a month after Tokyo by right-wing Millenarian Timothy McVeigh and Terry Nichols killing 166 and injuring hundreds; and the 1998 coordinated bombing of the US Embassies in Tanzania and Kenya killing a total of 301 and injuring around 5,000 (Howard and Sawyer, 2003:589), an attack not claimed credit for but determined by the US to be the work of Al Qaeda.

In the wake of attacks on aircrafts in the 1980's, the international community introduced the Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991). This convention is intended to improve and encourage measures for detecting and tracing explosives used in attacks primarily against air traffic. By adding distinguishing features in the manufacturing of the explosives, it is possible to trace its origins and make detection easier. Because of the original focus on air transportation, it is the ICAO that is the main depository for this convention.
The convention makes a serious attempt in article 1 at encompassing as many aspects of plastic explosives as is possible. Article two then proceeds to call upon the parties to the convention to take measures to "prohibit and prevent" the manufacturing of unmarked explosives in their territory and article three applies the same rules to the movement of such explosives out of the territory of any party.

Article four states that any party to this convention shall take the necessary means to

1) [...] exercise strict and effective control over the possession and transfer of possession of unmarked explosives (art. IV§1);
2) ensure that all stocks of those explosives [...] not held by its authorities [...] are destroyed or consumed for purposes not inconsistent with the objectives of this Convention, marked or rendered permanently ineffective within a period of three years (art. IV§2);
3) ensure that all stocks of those explosives [...] not incorporated as an integral part of duly authorized military devices [...] are destroyed or consumed [...] marked or rendered permanently ineffective [...] within a period of fifteen years [...] (art. IV§3).

There are currently 113 parties to this convention (URL 2) and not many reservations compared to other conventions.

The high profile bombings of the first half of the 90's and the perceived "worldwide escalation of acts of terrorism" (convention preamble) spurred on the development of an International Convention for the Suppression of Terrorist Bombings (1997).

This convention draws on previous resolutions in the UN General Assembly, specifically resolutions 49/60 which contains a condemnation of all terrorist acts, and 51/210 with a supplementary Declaration annexed to it on measures to eliminate International Terrorism, both of them from 1994.

The offence is defined as such:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:

a. with the intent to cause death or serious bodily injury; or
b. with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss. (art. 2§1)

Article two also defines the attempt, aiding, planning and organizing of such an act to be an offence.

There are 58 signatories and 123 parties according to the UN (URL 1). Notably, not many countries in the Middle East are parties to the convention, only three to be exact; Brunei, Israel and Kuwait. On the other hand, several nations in the proximity of that area are parties to it, e.g. Libya and Sudan.

Article 19§2 clearly states that activities of armed forces during armed conflict as these terms are understood under international law, are *not* governed by the convention as they are covered by other conventions.

This is nevertheless challenged by Cuba in its reservation that reads:

The Republic of Cuba declares that none of the provisions contained in article 19, paragraph 2, shall constitute an encouragement or condonation of the threat or use of force in international relations, which must under all circumstances be governed strictly by the principles of international law and the purposes and principles enshrined in the Charter of the United Nations[…]

[…]In addition, the exercise of State terrorism has historically been a fundamental concern for Cuba, which considers that the complete eradication thereof through mutual respect, friendship and cooperation between States, full respect for sovereignty and territorial integrity, self-determination and non-interference in internal affairs must constitute a priority of the international community […]

[…]The Republic of Cuba also interprets the provisions of the present Convention as applying with full rigour to activities carried out by armed forces of one State against another State in cases in which no armed conflict exists between the two. (URL 1)

Article five is of particular interest in the way it has been formulated. The text leaves no room in itself for interpretations that allow for a selective approach to if and when it is allowed to bomb the type of targets defined in the opening text of the convention.

The article stipulates that:
Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature. (art. 5)

As straightforward as this may seem to some observers, it is challenged by Pakistan who makes the reservation that:

The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. […] (UN, 2004-11-13)

This is once again the discussion of one man's terrorist being another man's freedom fighter (e.g. Kennedy, 1999:1) and the reservation made by Pakistan is challenged by no less than 21 nations considering this reservation to be an attempt to undermine the convention.

Two years later the International Convention for the Suppression of the Financing of Terrorism (1999) was finalized. This convention was created in recognition of there being no international tool to get to financial transfers intended to finance terrorist activities and the recognition that the seriousness of attacks and affiliated crimes could be traced to the financial means available to a terrorist group.

The offence under this convention is defined as thus:

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

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

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. (art 2§1)
Article 2§3 states that an offence according to 2§1 is in effect even if the funds in question were not used to finance a specific operation. Hence it makes all funds going into an organization engaged in activities within the scope of the convention illegal rather than linking specific funds with a specific attack.

In article eight, the convention calls on all parties to take appropriate measures for the identification, seizing, freezing and forfeiting of funds connected with any violation of the convention and national laws in the same area. It also provides the opportunity for a nation taking such a measure to share the funds among other parties to the convention or to distribute the funds among the families of victims of the organization to which the funds belong. Article eighteen calls on the parties to develop tools within their banking and monetary systems to detect and seize funds suspected of going to terrorism or to and from criminal activity.

According to the UN, there are currently 132 signatories and only 117 parties to this convention which makes an interesting change since the number of state parties to other conventions have been higher than the original number of signatories. (URL 1)

There are a number of reservations made against article 2§1a in where nations clarify what treaties of the annex they are not a party to and hence will not come into a judgment according to this convention. The Democratic People's Republic of Korea (North Korea) has on the other hand gone as far as to reserve against the sub-paragraph in full including conventions they are part of since before.

The Korean reservation has raised several objections from a number of states who feel that it is intended to seriously limit the scope of the convention.

During the 1990’s, the increased focus on terrorism is evident also in the resolutions of the UNSC. In response to the implication of Libyan government agents in the bombing of Pan Am flight 103 over Scotland in 1988, the UNSC issued two resolutions: resolution 731 (Jan, 1992) which calls on the Libyan government to co-operate fully in the investigation, and resolution 748 (March, 1992) which strengthens the tone towards Libya, demanding its complicity, and sets up sanctions towards the country to enforce the demands made.
**Resolution 1044** (1996) is a response to the attempted assassination in June 1995 of the President of Egypt, where the three suspects were believed to be hiding in Sudan. It calls on the government of Sudan, as resolution 731 did on Libya, to fully co-operate and extradite the suspects. Sudan’s failure to comply with this led to resolution **1054** which sets sanctions in place against the Sudanese government.

The 1998 bombings of US Embassies in Africa resulted in a condemnation of those attacks by the UNSC and a call for co-operation from all states in bringing the perpetrators to justice (resolution **1189**, 1998).

The ongoing conflict in Afghanistan provided international terrorists with possibilities to sustain training bases in that country and a safe haven for terrorist operatives according to UNSC resolution **1214** which also calls on the Taliban regime to stop providing such possibilities for terrorists (§13). The failure by the Taliban regime to comply is noted in UNSC resolution **1267** which insists that the Taliban stop providing sanctuary for terrorists (§1), demands that the Taliban extradite Usama Bin Laden since he had been implicated in the 1998 bombings in Africa (§2), and continues by invoking sanctions against Afghanistan (§4). It also determines the failure by the Taliban regime to comply with the resolutions of the Security Council to constitute a threat against international security.

In 1999, the UNSC adopted resolution **1269** which is in effect more or less a repetition of the UNGA resolutions on the fight against terrorism.

The UNGA adopted resolution **46/51** in 1991 which contains little new and the only major change in the next resolution, **49/60** of 1995, is a call on all states to not grant asylum unless provisions have been taken to make sure the asylum seeker is not a terrorist (II§5f).

**Resolution 49/185** (1996) focuses on the Human Rights violations by terrorists and also reminds states of their obligation to implement Human Rights in their policies. The resolution contains a series of declarations on the importance of the observance of Human Rights by all and this is repeated with little variation in two more resolutions⁹.

The apparent lack of definition of terrorism in previous resolutions is somewhat amended in resolution **51/210** (1997), which states that the UNGA

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⁹ Res. 52/133 (1997), 54/164 (1999),
reiterates that criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them (I§2).

This at least approaches a definition of terrorism as a crime with all that entails. This is a progressive development since previous resolutions had contained nothing of the sort. In addition, the resolution calls on all states to further develop counter-measures to prevent acts of terrorism (I§3).

The next to last UNGA resolutions of the 1990’s, 52/165 (1997) and 53/108 (1998) are in essence re-affirmations of previous positions on terrorism. The last, resolution 54/109, declares the adoption of the international convention for the suppression of the financing of terrorism.

2.6 2000-2004

The worldwide image of terrorism in the last four years is arguably dominated by the September 2001 hijacking, and subsequent crashing, of four planes in the US. This is the largest scale terrorist attack of all times with more than 2,000 dead and enormous amounts of destruction. The attack led both directly and indirectly to international conflicts, i.e. Afghanistan and Iraq, that disturbed the delicate balance of the world order in several ways. The Hegemonic power, the US, set its own precedence from the perspective of self defence (Falk 2003:97).

But there have been other spectacular and bloody attacks perpetrated during the early part of the new Millennium that have resulted in reactions of varying degree from the international community. In 2002, an Islamic group detonated a bomb in a crowded night club district in Bali, Indonesia provoking outrage across the World.

That same year, close to 900 Moscow theater visitors and cast were taken hostage by a Chechnyan group resulting in several hundred casualties when the theater was stormed.

In Kenya, a hotel with predominantly Israeli guests was bombed on the same day that a missile was fired at an El Al (Israeli airline) flight from the same country. 2003, among other incidents, saw bloody attacks in Colombia and Turkey both (URL 4) and in 2004 four trains
were simultaneously bombed in Spain by Islamic extremists killing close to 200 and injuring around 1,000 commuters (URL 5).

In 2000, the UNSC stepped up the language against the Taliban regime of Afghanistan through resolution 1333 (2000) which, apart from re-enforcing the previous demands made against Afghanistan, also calls for increased sanctions and the freezing of private funds belonging to Usama Bin Laden or anyone within the Al Qaeda network (§8c). The UNSC also expressed its readiness to “consider the imposition of further measures” (§25).

In July 2001, resolution 1363 was introduced calling for the establishment of extended monitoring functions in order to supervise the complicity of UN member states in the sanctions against Afghanistan pending that state’s compliance with the demands made against it to deliver Usama Bin Laden, close down terrorist training camps and halt all drug trafficking from its territory. In this resolution, the UNSC again determined the situation in Afghanistan to constitute a threat to international peace and security in the region.

The next resolution, 1368, is adopted on September 12 the same year and is a condemnation of the above mentioned September 2001 attacks. Resolution 1368 calls for

\[
\text{[...] all states to work together urgently to bring to justice the perpetrators, organizers and sponsors of these attacks (§3)}
\]

and

\[
\text{[...] expresses [the UNSC’s] readiness to take all necessary steps to respond (§5).}
\]

In November the same year, resolution 1377 was adopted which was basically yet another declaration on measures to eliminate terrorism. Resolution 1438 is a condemnation of the Bali-bombings and resolution 1440 a condemnation of the hostage crisis at a Moscow theater, both of them in October 2002. They were then followed by resolution 1450 which was a condemnation of the November 28 bombing of a hotel and firing of a Surface-to-Air Missile at an Israeli flight in Kenya.

Resolution 1455 (2003) is a re-affirmation of previous measures and recommendations by the UNSC and resolution 1456 of that same year is another declaration on measures to combat terrorism. The two last relevant resolutions of that year, resolution 1465 and 1516 are
condemnations of a February bombing in Colombia and two November bombings in Turkey respectively.

Resolution 1526 (2004) was an attempt to improve the measures taken against the Al Qaeda network and related finances and organizations, reminding all member states of their obligations in this matter and was followed in March the same year by resolution 1530 (2004) which was a condemnation of the Madrid train bombings that claimed mass casualties. The condemnation names ETA, after the Spanish government had pointed them out, but it was later revealed to be the work of Islamic radicals with suspected links to Al Qaeda.

The last to resolutions to date, 1535 and 1566, concerns the formation and work of the UN Counter Terrorism Committee and calls on all states to co-operate fully with the working groups of said committee.

The UNGA resolutions since the year 2000 have been to a large extent similar to each other with little variation in their contents. There have been four resolutions presented on measures to prevent terrorism which in essence reaffirms previous positions and declarations; three on terrorism violating Human Rights, i.e. terrorism violating the freedom and rights of the people being targeted; two on measures to prevent terrorists from obtaining weapons of mass destruction (WMD); and two on the importance of observing Human Rights in Counter Terrorism action.

In addition, there was issued resolution 56/1, a condemnation of the attacks in the US September 2001. Resolution 57/220 condemns all taking of hostages (§2) and calls for the immediate release of all hostages world-wide (§3).

These conventions and resolutions constitute the brunt of the international community’s response to an escalating terrorist activity globally since 1960 as represented by the UN. In addition to this, there have been a number of initiatives among the regional organizations to confront and deal with terrorism as it evolves.

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13 WMD: Nuclear, Biological and Chemical weapons (Lesser et al, 1999:36)
2.7 Regional initiatives

There are seven regional initiatives in place (URL 1). These will be chronologically presented here in brief with a general outline and specific points of interest. Again, the presentations are short with a general oversight of how they define and address international terrorism.

2.7.1 1971 Organization of American States (OAS)

The OAS adopted the “Convention to prevent and punish the acts of terrorism taking the form of crimes against persons and related extortion that are of international significance” in 1971. The convention is essentially a tool to promote cooperation between the contracting states and stipulates that

[…]kidnapping, murder, and other assaults against[…]persons to whom the state has the duty to give special protection according to international law[…]shall be considered common crimes or international significance, regardless of motive (§2).

Hence, political asylum is not to be granted to any person committing such a crime since it would put them beyond the possibility of extradition.

2.7.2 Council of Europe

The 1977 Council of Europe European Convention on the suppression of Terrorism regulates the rights and duties of the contracting states in the same manner as the conventions presented above. The convention is focused on the act of terrorism and excludes a number of offences from the asylum-protection by defining them as non-political crimes for the purposes of extradition between the contracting states (art.1§a-f).

The listed offences lean heavily on the international conventions in place at that time and include kidnapping, hostage-taking, bombings, hijackings and attacks on protected persons. Article two further gives the option of the contracting states to extending this list of offences at their leisure.
An interesting reservation is the one made by Sweden which reserves the right to refuse extradition if it considers any of the offences listed in article one as a political offence. Hence, Sweden reserves the right to proclaim on a case to case basis a singular incident where such a crime has been committed to be of a political nature. Sweden can thereby extend political asylum to the perpetrator in contradiction with the explicit purpose of the convention.

2.7.3 SAARC

The 1987 South Asian Association for Regional Cooperation (SAARC) Convention on Suppression of Terrorism mimics the previous conventions in the focus on the act (with an extended definition of acts), making the offender eligible for extradition regardless of the motive. The convention also explicitly defines the listed offences as “terroristic” (art. 1).

2.7.4 The League of Arab States

The Arab Convention for the Suppression of Terrorism was adopted by the League of Arab States in 1998. The convention defines terrorism as

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources (art. 1§2)

It also includes offences as defined by the six UN conventions on terrorism presented between 1963 and 1979, as well as the Law of the High Seas (art. 1§3a-f).

An exception is however made for the opposition against

[…] foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law […] (art. 2§a)

an exception also made in the 1999 convention of the Organization of the Islamic Conference presented below, and presenting the same potential loop-hole in the obligations depending on how an opposition is judged.

15 The presentation here is based on the document recovered from edoc.mpil.de/conference-on-terrorism/index.cfm which lists the translator of the document as the UN English Translation Service (Unofficial translation) done in May 2000.
None of the crimes above or any of a number of additional offences against rulers and protected persons listed under article two is to be considered political crimes even when committed for political purposes. Included in the additional list is also

\[\text{the manufacture, illicit trade in or possession of weapons, munitions or explosives, or other items that may be used to commit terrorist offences} \] (art. 2§h).

This additional definition increases the potential use of this convention for the purposes of regional counter terrorism compared to the previously presented agreements.

2.7.5 The Commonwealth of Independent States

In 1999, the Commonwealth of Independent States (here: CIS) concluded their *Treaty on Cooperation among the State Members of the Commonwealth of Independent States in Combating Terrorism*. Terrorism is defined by this treaty as

\[\text{[…] an illegal act punishable under criminal law committed for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population […]}.\] (art.1)

The article then defines the form of such offence as, in summary, violence or threats against any person, causing substantial material damage or any other act classified as terrorist under national legislation by any of the contracting parties or under recognized international legal instruments aimed at countering terrorism.

It is a quite detailed document on what provisions the parties to it have to take and also allows for “interested parties” to send, by agreement, specialized forces to give practical assistance (art.5§1g).

2.7.6 Organization of African Unity

In 1999, the Organization of African Unity (OAU) adopted the *OAU Convention on the Prevention and Combating of Terrorism*. The definition of terrorism for the purposes of the
convention follows the same pattern as the previous although this belongs to the more explicit and detailed one’s.

An interesting addition is found in article 3§1a (iii) where creating “general insurrection in a state” is included in the definition of terrorist offences. This potentially means that any armed resistance against a government is terrorism, a feature certainly possible under all of the conventions because of the lack of more specific target definitions, but more explicitly so.

2.7.7 Organization of the Islamic Conference

The Organization of the Islamic Conference (OIC) adopted its Convention of the [OIC] on Combating International Terrorism, an annex to its resolution no 59/26-P in 1999 which has several interesting features. Apart from similar definitions of terrorism as seen previously, it also adds as terrorist crimes the “imperiling” of people’s

[…]lives, honour, freedoms, security or rights or exposing the environment or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States

(art.1§2)

The convention is also very explicit regarding measures to be taken by the parties to the convention. This includes not allowing access or safe haven for terrorists, the mapping of terrorists and ensuring their prosecution. The OIC convention is one of the more detailed and far reaching regional agreements but it comes with a twist. Excluded from terrorism is

[p]eople’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law (art.2a).

This could well be intended to mean that a legitimate opposition to an oppressive government should not be considered terrorism, but it could also be interpreted as opposition to any of the occurrences listed, no matter how they are defined, can never be terrorism no matter what the methods of opposition.

In short, by defining a country as aggressor and/or oppressor would then allow for any means of attack on that country no matter what was targeted or who was killed. The end justifies the means.
2.8 Chapter Summary

Over the years there have been a number of resolutions and conventions introduced on the subject of terrorism. Regarding the conventions, most of these are focused on specific acts and defining them as international crimes. However, they all have in common that they deal with the responsibilities, duties and rights of states in relation to these crimes. Individual responsibility is left to the national legislation of the states party to respective convention. This means that for the purposes of prosecution there exist a number of black holes globally where individuals violating these conventions can not be touched by international law as it stands today unless one stretches the interpretations to fit.

In the case of the resolutions of the UN Security Council and General Assembly, they reflect a changing attitude over the years from the member states. Starting out in the 1960’s with defining state behavior as terrorist they have evolved into an approach where terrorists are not defined specifically but certainly primarily viewed as non-state actors whereas governments either are in support of these groups or fighting them. Either way, there is concern about the observance of Human Rights both in terrorism and counter terrorism.

Despite all these initiatives, conventions, resolutions and agreements, little has actually happened when it comes to any unified efforts to combat terrorism which leaves us with the situation we face today; that unclear rules and a framework not designed to deal with this problem create a vacuum filled by ad hoc interpretation by individual states.

Part of this failure to reach any distinct agreement on terrorism as an occurrence is the possibility to make reservations against a convention. States can be very select about what parts they think apply to them. Certainly, there is an indistinct limit when the reservations are declared unacceptable and other states certainly do protest some reservations. But the fact is that it is possible to avoid much of the core purpose of the conventions.

Another part is that entering into a convention is a voluntary act. States not interested in participating can effectively become safe havens for terrorists or indeed actively support them. To overcome this problem, a number of questions would have to be resolved that are central to the debates on terrorism. Among these are the definition of terrorism, the right to self defence, and state vs. individual responsibilities since they are key issues. This leads us to the normative section which will attempt to resolve some of these questions.
III. Normative issues

3.1 Section Introduction

In a perfect world, terrorism would not occur. In a next to perfect world, it could be argued that all states would fight terrorism aimed at innocent people together, in full co-operation and with an open agenda.

In this world however, it is argued here that the international community needs to confront terrorism, state sponsorship, and related issues with a unified and codified international criminalization. This is not to say that possible root causes of terrorism, as well as injustices, deprivation and perception of threat should not be met with other measures aimed at solving, mitigating and helping. But the fact of the matter is that these are long-term questions often of a normative/utopian quality and that international terrorism as it exists needs to be met now, not tomorrow or the day after, in order to ensure stability and international security. In the words of Valentin Romanov:

*The gradual development of the process directed towards the reduction of the underlying causes of international terrorism should not prompt us to conclude that the measures aimed at preventing and suppressing the very acts of terrorism should be in some way gradual as well. International terrorism must be eradicated as soon as possible* (Romanov, 1990:300).

The normative focus here will be on solving a few of the key issues perceived by this writer as being obstacles to a working agreement on international terrorism that leaves no room for interpretations and the wilful ignoring of it.

These are not by far the only obstacles and issues that would have to be resolved, but they are certainly at the core of the problem. This section is an attempt at reasoning around these issues in order to reach a distinction that could work from the perspective of international law. It is not a moral discussion or politically value-based, and hence will attempt the elimination of political or other concerns in the approach to terrorism, to construct a relatively neutral and clinical description that severely narrows down the scope of terrorism as a crime A definition of the act, the perpetrators and the victims rather than an unspecific description interpreted at the leisure of the onlooker.
As will be evident from the discussions it is not likely to become possible to have everyone agree, which should come as no surprise. But the nature of terrorism as defined below and the relative urgency for the international community as a whole to retain a grip on the evolution of state practice makes it necessary to straighten out some of the rather crooked arguments aimed at either including or excluding different factors. These word-games have effectively made any attempt at agreements on this issue blunt and rather ineffective. This writer would be inclined to suggest that the pathetic lack of global results to date from previous agreements have shown this to be the case.

3.2 What is Terrorism?

There is no definition of terrorism universally accepted. Below there are a number of definitions presented but these are a mere selection of the definitions that exist. The selection used here is the result of there being two main driving forces in the current “war on terror”, the United States (US) and the United Kingdom (UK).

Defining terrorism in a way that pleases everyone is not an easy task but that is not the purpose here. Finding a definition suitable for international law is the purpose and hence I have come to rely on definitions that lie in the direction of where I believe international law must go. In order to actually create international law on international terrorism that it is possible to use for something, the crime of terrorism must be established within defined frames. Without a definition it is impossible to legislate, hence the rather narrow individual conventions seen to date that each concern one or a few specific type acts.

The complexity of the issue is well illustrated by the case of the American governmental/law enforcement definitions at the national level where there are at least three. The US State Department defines it as

*premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents, usually intended to influence an audience* (Hoffman, 1998:38).

The Federal Bureau of Investigations (FBI) defines terrorism as

*the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives* (Hoffman, 1998:38).
The US Department of Defense (USDoD) identifies it as

*the calculated use of violence or the threat of violence to inculcate fear,*

*intended to coerce or intimidate governments or societies as to the pursuit of*

*goals that are generally political, religious or ideological* (Whittaker, 2003:3)

Of these three definitions, it has been argued that the USDoD definition is the most complete in that it includes both the physical as well as the threatened violence (the psychological effect), it includes societies as well as governments and ideological and religious motivation as well as political; and it incorporates the calculated (premeditated) aspect (Hoffman 1998:38-9). It lacks however the distinction between combatants and non-combatants (hence, an attack against troops could be considered terrorism), as well as a definition of the perpetrator. Taking the USDoD definition to its limit, any military force attacking another military force with the intent to coerce the government controlling that force to withdraw its troops, would be perpetrators of an act of terrorism.

The FBI definition also lacks a division into non-combatants and combatants. This may be an oversight due to the fact that the FBI is largely an internal federal police force, but considering the bureau’s growing importance in international investigations (for instance in attacks against US interests abroad), perhaps an oversight that needs to be amended.

The US State Department issues the most applicable definition in this writer’s opinion since it defines the targets as non-combatants, the perpetrators as sub-national, and incorporates the wider influence (psychological) aspect as well as the premeditation of the act. Unfortunately it is a bit too narrow in that it defines the act as politically motivated when ethnical (including racist), religious, ideological or just plain millenarian, “doomsday-vision” reasons also occur as driving forces behind terrorist attacks.

The British definition is very wide indeed as observed by Whittaker (2003:4).

*The use of threat, for the purpose of advancing a political, religious or ideological cause, of action which involves serious violence against any person or property* (Whittaker, 2003:3)

does include the motivational aspect but nothing on the specific nature of the perpetrators (anyone), the victims (anyone) or the nature of the target (anything). Nor does it include an aspect of premeditation.
In the academic world, there are a wide variety of definitions as well. Terrorism contributes the illegitimate use of force to achieve a political objective when innocent people are targeted according to Walter Laqueur; is

a strategy of violence designed to promote desired outcomes by instilling fear in the public at large according to Walter Reich;

the use or threatened use of force designed to bring about political change in Brian Jenkins words; and

the threat or use of violence for political purposes when 1) such action is intended to influence the attitude or behaviour of a target group wider than its immediate victim, and 2) its ramifications transcend national boundaries according to Peter Sederberg (Whittaker 2003:3-4).

If possible, these definitions are even wider and less distinct than the governmental definitions above. Hence, they are helpful in providing input but not sufficient for constructing a definition of terrorism applicable by law. After all, the counter-terrorism efforts today are based on how terrorism is defined by authorities, not scholars.

There are several factors that would have to be fulfilled in order for a crime of terrorism to have been committed. First there is the intent to commit the crime. An accidental causing of destruction or death should under no circumstance qualify to be an act of terrorism (say by forgetting to turn off the gas stove). This is not to say that the bombing of an office block at night is not terrorism just because there allegedly was no intent to kill (a “we struck at night when the place was supposed to be empty” type of rationale) but rather the placing and detonating of explosives in such a manner should be understood by anyone to be likely to cause destruction and possible death and hence being a terrorist crime if it meets additional criteria. An act of terrorism is a premeditated act.

Furthermore, in order to make it terrorism we return to the previous definitions mentioned and arrives at the rather established factor of the purpose behind the intentional act, the operation rationale. In the changing characteristics of terrorism (Hoffman, 1999:9) it is necessary to look beyond the motivations of political or nationalist character predominant in
for example the 1970’s and include ethnic, religious and similar motives for the violent act. The scope has to be widened to include the new ideological foundations of contemporary terrorism to be an effective and credible instrument. In short, in order for a crime to be of a terrorist nature, it would have to have some sort of rationale of ideology and purpose whether it is anything from political change to the destruction of mankind.

These points are nicely covered by the USDoD definition above and so, borrowing its characteristics, our first part of a definition will be:

*Terrorism is the premeditated use of violence or the threat of violence intended to provoke fear to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological…*

Next on the list would be the definition of the perpetrators.

3.2.1 Who are the terrorists?

There have been discussions for a long time around this question. Freedom-fighters or not, legitimate targets or not, states as perpetrators or not, etc.

For the normative purpose of this section, to devise a definition able to work in the framework of international law, this writer is inclined to exclude states from the definition of perpetrators on the simple grounds that there is in place an international framework on state responsibility as well as other aspects of the state. Other writers do not agree and try to place states as the major perpetrators of terrorist crimes (e.g. Chomsky 2002:128-140 and, Ahmad and Barsamian, 2003:49-50).

The purpose of any legal development in international counter-terrorism must however be to focus on the grey area where non-state operatives act, i.e. terrorist organizations, and their ability to find staging areas and safe havens in states not interested in, or capable of, ousting them. State responsibility, either in employing such groups or in state action is further discussed below.
As stated, there exists a framework to deal with state responsibility and illegitimate state action\textsuperscript{17}. Granted this framework works less than satisfactory and making state compliance with international rules on state behaviour a condition for the right to invoke the type of initiative suggested here would perhaps be worth some consideration. The problem however is that while states continue to violate such frameworks, so do terrorists perpetrate attacks. But regardless of state violations, transgressions and crimes, is it really a condition that all state violations must end at the same time, or before, terrorist attacks do?

On the same note, the US State Department include clandestine agents in their definition of the perpetrators. The Libyan agents found guilty of the Lockerbie-bombing in 1988 spring to mind but should then, by the reasoning here, not be included but rather be subject to the existing framework on state responsibility since they are agents of a state. On the other hand, as some observers point out, it has been the practise of among some states, among them the US, to employ clandestine agents and sub-national groups in their involvement in other countries (Pillar, 2003:27). Such involvement is, regardless of whether or not the groups involved use terrorist tactics, not allowed under international law since it violates the sovereignty of the state in which that group is active.

Along the same reasoning as above, the state employing such a group is not included in the definition of terrorists. The sponsoring and encouragement of sub-national groups operating in another country is solely a matter of state responsibility. Along the same line, any State where a sponsorship of terrorism can be concluded to exist (as for example the case is claimed to be with Iran) should fall under state responsibility. The organization employed, however, should be subject to an international framework on terrorism.

The definition then of the perpetrators of terrorism will be \textit{non-governmental entities} including basically all organizations with little to no governmental affiliation. This does not mean that terrorist organizations employed in any sense of the word by governments are to be considered agents of the state, but rather the rule should be that agents of established governmental institutions such as security services or intelligence bodies are considered agents of the state, while temporary business affiliations in terrorist networks are not. Another important point to remember is that the rules of land warfare require combatants to openly identify themselves either by wearing a uniform or an identifying distinctive mark of

\textsuperscript{17} International Law Commission (ILC) draft resolution on State Responsibility will be discussed below.
some sort that shows them to be combatants. Failure to comply with this is a violation of said laws and is the basis of the US argument on Al Qaeda fighters not being granted prisoners of war (POW) status but rather labelled with the term “unlawful combatants”. This placed them firmly in a rather grey area of rules that in the view of the US means they can be held indefinitely under, mildly put, straining conditions. A view challenged by a number of states and scholars globally (Falk, 2003:35).

We thereby expand the definition to read:
_Terrorism is the premeditated use of violence or the threat of violence, by a non-
governmental entity, intended to provoke fear to coerce or intimidate governments or
societies as to the pursuit of goals that are generally political, religious or ideological…_

Lacking from this definition however among other things is a definition of targets that narrows the definition of terrorism further to a useable level. To include any and all targets pose yet another obstacle to a definition of terrorism. Hence, a definition of what targets are “off-limit” for violence is needed.

3.2.2 Who are the victims?

Is it terrorism to attack an army-base or military troops in their performance of duties? The answer to this would have to be no. There are two main reasons for this: 1) military personnel have firearms and a military organization behind them to back them up; and 2) any conclusion in favour of defining attacks on armed forces as terrorism would eliminate the option of armed resistance against an oppressive regime by a guerrilla force and certainly make any form of international agreement on terrorism completely unattainable.

Any legal initiative aimed at terrorism should be focused on protecting those not able to protect themselves. An armed force capable of returning fire and consisting of trained soldiers is certainly a body of combatants. On the other hand, striking against military personnel that are off duty and hence unarmed should perhaps be seen as an act of terrorism, i.e. that off-duty personnel are non-combatants (Pillar, 2001:26). The dividing line is then that the engaging in armed combat with combatants capable of defending themselves would not be terrorism, and the engaging in attacks upon people not capable of defending themselves, i.e. civilians, would be acts of terrorism.
Another breaking point which resides firmly in a grey-area is the role of police and “security forces”. This is a complicated question to resolve since police and especially “security forces” in some countries have weaponry and tactics more commonly associated with military units and open conflict than with maintaining the internal peace of society.

In general though, the police should be regarded as a non-combatant agent of the state (although armed in many countries) with specific peace and order duties. Both the police and “security forces” can be used in a Para-military capacity and be instrumental in a repressive regime’s efforts to control and oppress the population. Where such a case can be argued, it should be argued in front of, and judged by, a court of some sort rather than by the bombing of a police station or the assassination of random officers. The actions of such an agent of the state, again falls under state responsibility and as such should be judged by the international community within either existing framework or a framework created for that specific type case. However, the issue of security forces has little bearing on the countering of international terrorism. A non-governmental body acting internally in their country of origin against police- or security-forces come under the legislation of that country. A non-governmental group operating against police- and security-forces in another country would have difficulties explaining their actions under the heading of those security-forces being repressive in the group’s country of origin.

State leaders and governmental or parliamentary representatives are already defined as protected persons under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons from 1973 for the purposes of international terrorism and similar attacks against them.

In addition there is the type of attack aimed at civilian infrastructure or buildings. Turning to the 1997 International Convention for the suppression of Terrorist Bombings we find a helpful passage on buildings as targets that can be incorporated in this definition. The conventions stipulates that

\[ \text{a} \text{ny person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:} \]

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18 See section II:1970-1979
By including then both the nature of the victims and targets into our definition, it reads: *Terrorism is the premeditated use of violence or the threat of violence, by a non-governmental entity against non-combatant targets, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, intended to provoke fear to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological.*

Thus we have incorporated three main elements identifying the crime of international terrorism as;

1) being a crime under most national legislation;
2) being aimed at spreading fear by violence or threat thereof; and
3) being politically or religiously motivated.

(Cassese, 2003:752)

### When is it Terrorism?

This is however not sufficiently narrow in the opinion of this writer. Taking into account the Laws of Land Warfare, the codification process through the Rome Statue of the ICC and the several tribunals (e.g. Nuremberg, Tokyo, Former Yugoslavia, Rwanda tribunals) that have been erected to deal with atrocities and crimes committed during wartime, it would certainly be helpful to draw a line between war crimes and crimes of terrorism however alike they are from an objective perspective. Crimes committed in war are addressed within existing frameworks. Crimes of terrorism lack that all-encompassing cover in international law and hence, to further move away from the blurring of lines and confusion that tends to surround the subject, it would be beneficial to define terrorism as a crime in peace.

The definition would thus read:

*Terrorism is the premeditated peace-time use of violence or the threat of violence, by a non-governmental entity against non-combatant targets, or against a place of public use, a State*
or government facility, a public transportation system or an infrastructure facility, intended to
provoke fear to coerce or intimidate governments or societies as to the pursuit of goals that
are generally political, religious or ideological.

The last factor for the purposes of this discussion is the international dimension. Although
not included in the definition as such, I include a brief explanation here in order to define the
difference between domestic terrorism or not.

International terrorism would be an act in line with the above description with international
ramifications, i.e. when they are 1) not limited in their effects to one state only as far as
perpetrators, victims or means are concerned; 2) carried out with the support, toleration or
acquiescence of another state; 3) threat to the peace; and/or 4) very serious or large scale
(Cassese, 2003:753).

3.3 Responsibilities

The ambiguous position of international law in regards to non-state actors is certainly a
problem when it comes to how to confront terrorism as it is, by the definition argued for here,
performed by such actors specifically. It is an open subject whether non-state actors are
subjects of international law and it is also doubtful whether it could be said that there has
evolved a general regime of responsibility to cover them (Crawford and Olleson, 2003:447).

There is established a working order where the responsibility of a state for the actions of
people in its service is clear and there have been several examples of ad hoc courts and
tribunals to address individual responsibility19 at least during times of war. In addition to this
the Rome Statue of the ICC20 is a codification of the principles enshrined by this type of war
crime tribunals.

Hence it would seem productive to look at terrorism from two angles; the responsibility of
the state and the responsibility of the individual/non-state actor. By approaching it from two
angles, it is possible to keep separate and intact the different levels of measures available to
address breeches by either and yet, by incorporating them both in the same legal framework,
to use them in combination.

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19 e.g. the Nuremberg, Tokyo, Yugoslavia and Rwanda war crimes tribunals
20 see 3.3.2 Individual Responsibility below for a further discussion on the ICC statue, p. 44
3.3.1 State Responsibility and failure to “play by the rules”.

Apart from the calls of Professor Chomsky (e.g. in Booth and Dunne, 2002:128-140) and others to proclaim western states, predominantly perhaps the US, as the greatest terrorists of all times, there is also a call to label states sponsoring or harbouring terrorist groups as terrorists themselves. As argued previously, the state should rather be subject to rules on state responsibility than any rules on terrorism in both of the mentioned situations.

Both in the case of a state sponsoring terrorism and a state acting in another state, the rules are clear that encouraging groups or in any other way meddling in the internal affairs of a country is a breach of sovereignty without international authorization, for example through the UN Security Council. The International Law Commission (ILC) of the UN has, among other documents, prepared draft articles on state responsibility that is a codification of international state practise on the subject, but this needs a certain amount of rework to incorporate a situation where the operations of a group or a state are not in the country against whom the attack is directed, but rather undertaken in a third country, e.g. the attacking of nationals of one country, taking place in another country, by operatives based in a third country.

There are several articles of interest in the *ILC Draft Articles on Responsibility of States for internationally wrongful acts*\(^{21}\) (URL 8) when considering the responsibility of states in sponsoring and/or encouraging terrorism in or against other countries.

Two criteria have to be met to qualify as an internationally wrongful act by a state. These criteria are filled when conduct consisting of an action or omission a) is attributable to the state under international law and b) constitutes a breach of an international obligation of that state (art. 2) irrelevant of whether the conduct is legal in national law (art.3).

Returning to the question of whether to include agents of a governmental institution in the definition of terrorism, which was argued against previously, we find in article four that an action taken by any organ of the state whatever position, task, power or other circumstance, or of an organ of a territorial unit of that state, shall be considered an action by that state. Article five also declares that an action by any person or entity “empowered by the law of that state”

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\(^{21}\) adopted by the ILC at its 53\(^{rd}\) session (2001)
(art.5) shall also be considered to be an action of the state if that person was acting in its capacity.

Examples of this are the Libyan agents accused of bombing the 1988 Pan Am flight over Lockerbie, Scotland, and the French agents that bombed the Rainbow Warrior, the Greenpeace vessel, as it lay in port in New Zealand in 1985. The Libyan case was ruled on by a Scottish court in “neutral” territory, Holland, (Lowe, 2003:331) acceptable to all parties. The French-New Zealand case was referred to the Secretary General of the UN for a ruling (Malanczuk, 2001:98) and in both cases the respective states were found responsible leading to negotiations on compensation.

The above mentioned rules also apply if the organ, person or entity has exceeded its authority, i.e. it is still to be considered an action of the state with the belonging responsibility (art.7).

The relationship between state sponsor and terrorist group, and where responsibility falls is made clear by article eight which states that

\[
\text{The conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (art.8).}
\]

An interesting case with bearing on the responsibility of the state for actions by non-governmental actors is the ICJ ruling on the occupation of the US Embassy in Teheran by Iranian students which stated that 1) the Iranian state had failed its obligation under international law to protect the US embassy and consular personnel; and 2) by later endorsing in a speech the actions of the students, Iran had translated the acts of the students into acts of Iran as a state (Crawford and Olleson, 2003:456).

By this logic, it would not seem far fetched to lay responsibility of actions by a terrorist group sponsored or protected in any way by a state at least partially with that state. Although individual responsibility for the acts themselves should be claimed, there exists also the potential for exercising pressure on states based on this.

This is exactly what happened in the case of Afghanistan’s Taliban regime and its failure to deliver Usama Bin Laden to face trial for the 1998 bombings of US Embassies in Africa and
its continued willingness to provide a safe haven for terrorist training bases. The UNSC demanded action to be taken by Afghanistan in resolutions 1214 and 1267 (both in 1998) and repeated this demand in several subsequent resolutions. The UNSC judged the situation and behaviour of Afghanistan to be a threat to the international peace and security of the region in resolution 1267 in 1998 and then again in resolution 1363 in 2001. In fact, it would seem that many states have now accepted as established that a state targeted by terrorists have a right to action under self defence against a state harbouring the responsible terrorist organization (Gray, 2003:604)

As for “failed states”, where governmental powers are not exercised in full or at all, any movement or group exercising any part of that governmental power is considered representing the state and held responsible for its conduct under international law (art.9).

3.3.2 Individual Responsibility

Having then addressed the responsibility of states as it stands and/or may stand in the future, we should also have a look at the responsibility of the individual.

There is one international convention in particular of major interest regarding this, the Rome Statue of the International Criminal Court of 1998.

The crimes addressed by the statue are crimes that are considered to be of international importance and interest. It is the “breaching of international rules entailing the personal criminal liability of the individuals concerned” (Cassese 2003:738) and focuses on crimes such as war crimes, crimes against humanity and Genocide among other of similar dignity. The statue can be considered to be a codification of the Laws of War applied to a court or tribunal, but certainly beyond it as well in scope.

Just as crimes such as rape, murder and other war time occurrences are illegal in peacetime in most societies, so are most features of terrorism as defined, and noted, above. The ICC addresses crimes committed during a state of war or almost war (e.g. ethnic cleansing campaigns in an area where no open hostilities, i.e. actual combat operations occur) that can not be touched by national legislation for various reasons such as the government being the perpetrators or an all out intra- or inter-state war has broken out.

22 henceforth ”the statue”
Terrorism, having been defined as a peace-time offence, would certainly be considered outlawed in national legislation around the world, but *international* terrorism has implications on several levels. There is the target state, the state where the attack occurs, possible state sponsorship, possible sanctuary states, suppliers of arms and explosives, state of origin of the perpetrator, etc. In addition there is the problem previously discussed with the different views on the same groups as to whether they are terrorists or not. Furthermore, bearing the controversy around terrorism in some quarters in mind, there is an issue with transparency of the judicial process, the protection of the fundamental human rights of suspects.

Many of the problems concerning international terrorism are shared by the crimes addressed by the ICC and thus the statute of that court is of significant interest when discussing an international counter-terrorist convention. The controversy surrounding the ICC on the other hand makes it necessary to separate any counter-terrorist effort from that court on the grounds that affiliation would hurt the effort more than help it.

The ICC is set up as a permanent court, a sort of permanent universal tribunal, where crimes of these specific types are to be prosecuted but it is stressed in the preamble to, and article one of, the statute that it is to be considered complementary to national criminal jurisdictions.

Its organization is in four organs; a) the Presidency; b) an appeals division, a trial division and a pre-trial division; c) the office of the prosecutor; and d) the registry (art. 34).

In addition there is an Assembly of State Parties where each party to the statute has a representative. In its duties are deciding the budget, provide management oversight, consider and adopt recommendations of the Preparatory Commission and any other function consistent with the statute (art. 112§2a-g).

The jurisdiction of the ICC is accepted by any state signing the statute (art. 12§1) but it is limited to

*the most serious crimes of concern to the international community as a whole*

(art. 5§1)

These crimes are defined as

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23 E.g. the US refuses to be a part of the ICC on the grounds that it may be used as a political court against US military personnel. This position has been questioned before and certainly so after the disgraceful behaviour of some US troops in Iraqi detention centres.
a) the crime of Genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression

Articles 6-8 defines the elements of the crimes subject to the court, i.e. what type of acts and in what situations sort under what heading. These elements of Crimes shall assist the court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of State Parties. (art. 9§1).

The jurisdiction of the court is regulated in articles 12 and 13. Article 12 contains the preconditions, in short, that for the court to have jurisdiction, the concerned state must be a party to the statue or have accepted jurisdiction of the court by registered declaration. Article 13 states that the court may exercise its jurisdiction when a situation has been referred to the prosecutor by a state party, the UN Security Council under chapter VII of the UN charter or if the prosecutor has initiated an investigation based on information received in accordance with article 15§1.

A case is inadmissible if the case in question is being, or have been, investigated or prosecuted by a state which has jurisdiction over it unless the State is unwilling or unable genuinely to carry out the investigation or prosecution (art. 17a-b)

or; the person has already been tried; or the case is not of sufficient gravity to justify further action by the court (art. 17§1c-d).

The criminal responsibility of the individual is defined in article 25. This stipulates that the court has jurisdiction over “natural persons pursuant to the statute” (art. 25§1) and that a person committing a crime within the jurisdiction of the court shall be individually responsible (art25§2).

Regarding the suspected perpetrator’s relationship to the crime, the statue is quite explicit in its definitions. I have chosen here not to include the text but suffice to say it has direct bearing on the possible construction of an international counter terrorism act in its scope and theoretical application. Hence it will be returned to in the constructive chapter and recounted in full where it is applicable for the suggested statue.
In short, there is very little room for claiming innocence on the basis of not having done the actual deed and the affiliation with and/or assistance to a crime under the jurisdiction of the court is effectively included as a crime as well.

Notably though, in article 25§3f, a person who aborts an attempt or otherwise prevents its completion will not be held responsible for an attempted act.

The statue goes on to declare it applicable equally to all persons regardless of their official capacity including heads of state (art. 27§1) a group which usually is able to claim immunity as do diplomats. In respect to the crimes under the jurisdiction of the court however, these immunities are of no value and “shall not bar the Court from exercising its jurisdiction over such a person” (art. 27§2).

According to article 30 of the statue, a person shall only be held responsible for an act if, unless otherwise provided, they have committed that act with intent and knowledge (art. 30§1). The definition of the intent is that the person in question means to engage in the conduct or cause the consequence (art. 30§2a-b) and the definition of knowledge that the person is aware that a circumstance exists or a consequence will occur (art. 30§3).

### 3.4 Self Defense under article 51

The UN Charter article 2(4) contains a general prohibition against the use of force in international relations and the article calls on all states to refrain from using force in their international disputes (Malanczuk, 2001:273). There are exceptions to this prohibition however and the main exception is article 51 of the charter which states that

\[
\text{Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security[...]} \text{ (art.51).}
\]

Of course, this text is the object of numerous interpretations and opinions vary on how and when a state is allowed to act. It continues, and is likely to continue, to be a point of controversy. The main argument revolves around whether this is a narrow or wide right of self defence (Gray, 2003:599). The narrow interpretation is that the statement in article 51 is exhaustive, i.e. that self defence can only be claimed after an armed attack has occurred (Malanczuk, 2001:311).

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24 Henceforth in this chapter “the charter”
The wider interpretation allows for pre-emptive self defence, the right to strike in anticipation before an armed attack has occurred but also against other forms of attack and other circumstances (Gray, 2003:600), e.g. humanitarian interventions. The wider interpretation is contested by the majority of the international community.

3.4.1 Pre-emptive Self Defence

To strike in anticipation of an armed attack is called a “pre-emptive” self defence. One example is the 1967 Israeli attack occupation of the Sinai, after Egypt had blockaded the Gulf of Aqaba and troops moved on Israel’s borders. The application of self-defence in that case is not that hard to argue for seeing that there was a blockade in place and an apparent imminent threat, and it was and is seen by many as a legitimate response (Malanczuk, 2001:313). There remains, however, a certain amount of discussion as to whether this was in fact pre-emptive in nature since hostilities could be argued to have commenced with a blockade in place (ibid.).

In 1981 Israeli airplanes bombed an Iraqi Nuclear Reactor on the grounds that it was intended to produce nuclear weapons for use against Israel. Thus, Israel considered itself to be within its rights to take pre-emptive action (ibid.). Though it may be doubtful whether any state or leader, in the region or globally, would have wanted to see nuclear weapons in the hands of the Iraqi dictatorship the Israeli initiative has still come under a lot of criticism having been condemned by both the UN Security Council and the UN General Assembly. The US and the UK both criticized Israel on the grounds that Israel could not have known on beforehand that the Iraqi reactor would have produced nuclear weapons for the specific use of against Israel. The Israeli position was that they were not prepared to wait and find out.

The lack of the imminent threat factor more likely qualifies the Israeli attack under a line of reasoning currently being debated internationally; the concept of preventive attacks, i.e. attacking to prevent the possibility of future attacks. This concept was brought to life by the statement of the US\textsuperscript{25} that it was prepared to use force against other nations besides Afghanistan. This interpretation of the right to self defence is by no means accepted by the

\textsuperscript{25} in its letter to the UN Security Council invoking the right to self defence against not only Afghanistan in response to the 2001 Sept. 11 attacks, but also to use force against other nations.
international community. As has been observed by some writers (e.g. Gray, 2003:605), unless a state is involved in an imminent attack, this is an extreme stretch of the right to self defence. Arguably, the failure to conclusively link Iraq to any *imminent* threat of terrorist or other nature would make the invasion of that country a preventive attack.

A large problem with both pre-emptive and preventive strikes is that it is action based on assumption of intent. In 1988 a US Navy vessel responded to what it perceived to be an imminent air attack, part of an otherwise ongoing attack on the convoy the vessel was in. The aircraft was destroyed but turned out to be a civilian Iranian Airbus (Gray, 2003:601). None of the cases above have resulted in a firm ruling on the general application of pre-emptive self defence even if some cases, e.g. the Israeli strike against the Iraqi reactor, have been condemned as such. The question is therefore still open for wide interpretation (Gray, 2003:601)

### 3.5 Self defence against Terrorism

The use of force against terrorism can be divided into three levels;

1) the domestic level where it should ideally be practised exclusively by law enforcement units or special military units with counter terrorist abilities. This use of force is found within national legislation and is of no particular significance for this discussion.

2) Reactive use of force at the international level which would include such operations as the 1976 Entebbe aircraft hostage liberation by Israeli commando units.

3) Pro-active or pre-emptive use of force in anticipation of an imminent attack by terrorists based in another country. By this is to be understood for example the elimination of key operatives in an attack about to be perpetrated. The wider meaning of pre-emptive use of force as it is employed today tends towards a very general application where suspected key operatives are routinely eliminated when a window of opportunity presents itself, up to invading another country. Imminent threat of attack does not seem to play into the considerations but more of an *ad hoc* “somewhere in the future, along the line” attitude.

Setting the domestic level aside and focusing on the international bit, we stumble on several key criteria and contemporary debates that are important for any counter-terrorist action as well as any use of force both domestically and internationally.

Three key conditions for the use of force within the frame of self defence internationally are:
1) **Proportionality.** The reactive force should be in proportion to the force originally directed at the responding state. This is not a criteria explicitly expressed in the UN Charter but considered to be a part of international customary law (Gray, 2003:600). For instance, if a state is attacked by another state the proportionate response would be the ousting of the attacker from the territory attacked. But there is controversy on this point as well. It remains unclear whether proportionate means stopping an ongoing attack or if it also includes securing against its repetition. An example of disproportionate response would for example be the 1993 Israeli seven-day bombing of South Lebanon in response to sporadic Hizb’allah rocket attacks from the area (Malanczuk, 2001:317).

This presents a problem regarding international terrorism. Terrorists do not claim territory in the way a nation or guerrilla-movement does when engaged in conflict (Hoffman, 1998:41). Nor do they often possess a piece of territory readily identifiable as their base. Instead, terrorism is a hit and run tactic, a covert attack aimed at the civilian populace of the target state by operatives hidden among their potential victims. What then is a proportionate response? As mentioned, the US bombed Libya in 1986 after a discothèque bomb in Germany had killed US servicemen off duty and German civilians. The UN General Assembly had declared in 1970 that “states have a duty to refrain from acts of reprisal involving the use of force” (Malaczuk, 2001:316) and instead of claiming armed retaliation, the Reagan administration argued that the attack on Libya was a pre-emptive strike against Libyan “terrorist installations” in order to put them out of use and thus justified under article 51 of the UN Charter (ibid). This argument is not consistent with the prevailing view of the international community on self defence under article 51.

2) **Necessity.** The action taken should be necessary to achieve the result desired. The razing of villages, shelling of cities and summary executions are actions that certainly can be questioned both in proportionality as well as necessity given that the objective of a counter-terrorist strike is likely to be the prevention of new attacks or continued attacks, not targeting bystanders.

3) **Immediacy.** The response should be in time proximity to the original attack. This rule came into being to avoid the employing of the pretext of self defence long after hostilities have ceased (Malanczuk, 2001:317). In regards to terrorism this of course presents another problem since the origin or even the immediate perpetrators, although suspected,
cannot be ascertained without investigation if one would wish to uphold the demand of evidence. Hence a varying degree of time will certainly pass before the origins of an attack can be determined. It may be of some assistance at this time to use the example of the British response in the opening of the Falklands war. Although it took a month for the British forces to be ready for a counter attack, the geographical distance and the fact that the Royal Navy was ordered immediately to leave for the Falklands Islands, meant that the requirement of immediacy was fulfilled (Malanczuk, 2001:317).

The application of these conditions to international counter-terrorism is complicated but essential to maintain a standard of legitimacy.

The 1998 bombing of two US embassies in Africa was traced back rather quickly to the Al Qaeda and Usama Bin Laden. In response, the Clinton administration fired a number of cruise missiles at suspected terrorist training camps in Afghanistan and a factory suspected of producing chemical weapons in Sudan.

The efficiency or non-efficiency of the attack set aside, as well as the respect for another country’s sovereignty, the immediacy criteria could possibly be considered to have been fulfilled since the counter-strike came the just later in the month of the embassy bombings (Malvesti, 2002:404) allowing time for an investigation as to who the perpetrators were. On the other hand, immediacy should indeed mean instant or near instant. In the case of terrorism however, where attackers are less readily identifiable than an attacking state is, time is needed to assert who committed the offence.

The question also becomes if a terrorist campaign is an ongoing attack or not. If not, then a state would never be allowed to strike at the bases of terrorists. If it is an ongoing attack, targeting the bases to break their capacity would be within reasonable limits. These are problems inherent with a global terrorist threat and uncooperative states that harbour them.

The nature of the Al Qaeda network and their proven ability to execute attacks globally against targets of opportunity meant that the US perceived the Al Qaeda as a continuing threat against them. The only way to stop new attacks was to damage the infrastructure of the organization, their training camps, in order to disrupt their activities. This fulfils, arguably, the necessity criteria if co-operation from the Taliban regime of Afghanistan was impossible to obtain. If the co-operation of the host state had been a possibility, the necessity of the attack would certainly fall.
When it comes to proportionality, it is conceivable to agree with an assessment that the attacks on the training camps were proportionate. The participants in these camps had certainly, by action, expressed a shared goal with the organization. In addition they were training for an armed struggle through terrorist methods.

The factory in Sudan on the other hand turned out to be the sole producer of medicine for the Sudanese market, a pharmaceutical plant, and had nothing to do with the production of chemical weapons. Its destruction quite possibly could have created serious problems for the civilian population of Sudan and in hindsight it should perhaps not have been struck.

This writer is inclined to lean towards a modified application of the three criteria when it comes to international terrorism. The purpose of using the criteria at all is to bring international counter terrorist responses under some control and the scrutiny of the international community. Otherwise any regime, no matter what its nature, can use counter terrorism as a pretext for pretty much any action or atrocity. The purpose of a modification of how the criteria are applied is that the current format is between states whereas a terrorist organization is obviously not a state. Normatively speaking then:

*The rule of proportionality* should ideally be observed in counter terrorism since disproportionate responses on the weak side will likely encourage terrorists whereas disproportion on the strong side will create a general hostility, be likely to produce innocent victims, martyrs, and thereby help the regeneration of recruiting. Besides the moral arguments of observing Human Rights and the rights of the accused, a simple cost-benefit analysis of disproportionate responses on the strong side should conclude that overly strong and inaccurately targeted responses would do more harm than good. It is worth considering at this point that a logic of terrorism is to strike fear, “send a message” by indiscriminate attack. The question becomes whether counter terrorism should really apply that logic. The question should certainly be answered negatively.

Proportionality has implications on interstate relations as well as intrastate conditions through on the one hand international self defence and on the other hand, domestic police action. Neither the annihilation of a city in another country or the destruction of a block of housings full of civilians could be considered anything other than retaliation. Targeting civilians is
certainly not a proportionate response to a terrorist attack of any kind seen to this date and counter terrorism can not allow itself to adopt the logic of terrorism.

The necessity of the action should have to be considered as well. If the 2002 invasion of Afghanistan was necessary to disrupt the continued threat from the Al Qaeda because the Taliban refused to extradite Usama Bin Laden, then with the co-operation of the Taliban the invasion would have been unnecessary. But necessity goes further than this; was it truly necessary to invade Afghanistan to disrupt the Al Qaeda?

The failure of the cruise missile strikes directed at the networks bases in 1998 certainly seem to narrow the options, but whether or not one agrees with the course taken, the question of the necessity should have to be asked by anyone undertaking a counter terrorist action. The judging of the action after it has been taken, on the other hand, should be left to a court.

As mentioned above, it would seem that most states have accepted that a terrorist attack on one state permits that state to take action against a state harbouring the perpetrators.

The immediacy of counter action is a slightly more difficult discussion. The reason for this guideline in international relations, the avoidance of retaliatory politics a long time after the actual event, is adequate for counter terrorism as well but there is a rather serious problem. Terrorists usually do not work in the open, they do not display colours and one of the trends of the “new terrorism” is that the groups do not claim credit (Hoffman, 1999:9). Hence there is the burden of proof and the time needed to investigate the origins of an attack to take into account. In the interest of due legal process and the rights of potential suspects, any legislative measure on self defence against terrorism should allow for a longer time than what is customary for interstate aggression.

Furthermore, for the purposes of terrorism an ongoing aggression cannot considered to be a single attack, i.e. that the right to self defence is restricted to the one attack only. Instead terrorism should be viewed in a wider perspective where an ongoing terrorist campaign equals the threat, i.e. there exists a right to self defence against the campaign in addition to the singular attacks within it.

By imposing these three ground rules on counter terrorism it is hopefully possible not only to influence decision makers to apply them before taking action, but also to question and judge
the validity and legality of the action in question. It is neither fair to assume that states should sit back and watch as terrorists operate against them nor to allow states to freely act in any way they want under the heading of counter-terrorism. Balance has to be maintained and ideally that would happen through a court.

This approach has been argued previously (e.g. Arend, 1998) but although it could be said that the decision on a swift, effective and balanced response either pre-emptively or in response to an attack should be left to a state leader (who then by default bears responsibility for the action taken), that decision should also be examined by a court retrospectively at least.

On the choice of method one has to observe that: *if* one accepts international self defence applicable to counter terrorism and; *if* one accepts the rules of proportionality, necessity and immediacy and; *if* one accepts the right of a state to exercise this self defence against non-state actors within the jurisdiction and sovereignty of another nation, *then* one also have to accept a smaller scale violence as a state alternative.

The ideal would be if such action could be tried, investigated and decided upon previously to its initiation, but very likely concerns regarding time, evasion of suspects, leaks, and more will make this ideal little more than a Utopia. The normative or corrective effect of a later possible court investigation is perhaps the best one can hope and aim for realistically.

In any case, possible concerns about the correctness of judgement, the application of force and the estimate of the threat would perhaps be fewer if handled by an independent court rather than by a state protecting not only its interests but basis for action as well.

### 3.5.1 Counter Action

Considering then counter action through the lenses of self defence of a state against a non-state entity, the escalation of violence used in counter action has to begin with non-use and end in a full use. An ideal model could look something like below.

If it is an arrest matter, i.e. the bringing to justice of perpetrators and/or instigators this must first be attempted with the assistance of nations where these suspects may be. If this cooperation is unattainable for reasons like lack of competence or resources to perform the arrest, assistance should be offered. If it is unattainable for political reasons, i.e. the “host”
refusing to co-operate, that state should be reported to the UN and any other available instances for investigation into the behaviour and possible sanctions.

Regarding the suspects, measures to secure them through a very limited military or police operation should be taken if there is an active threat. Such an operation would ideally first be presented to, and sanctioned by, an international court. In effect an international warrant of sorts providing the right, i.e. international backing, for cross border arrest-operations without consent of the host.

Closely related to this are hostage-rescue operations such as Entebbe 1976 or the failed US attempt in Iran 1980. Without the consent of the host states, troops were sent in a limited operation with the specific goal to liberate and evacuate the hostages.

If limited operations are not possible, i.e. the risks and likely costs too high to justify this option, and there could be said to be an ongoing campaign of terrorism against one or more states, it should be possible for said state/states to have their case tried by the international community. If the community agrees, for example though a court decision, UNSC resolution or similar, then offensive action should be allowed against a non-governmental entity operating from an uncooperative host’s territory.

This position could be argued to have been taken by the UNSC when they linked the failure of Afghanistan to deliver Usama Bin Laden with declaring the situation in that country a threat to international peace and security and thereby opening it up for action in accordance with chapter seven\(^26\) of the UN charter.

The issue here is avoiding if possible the invasion of a country unless it is strictly speaking necessary in order to stop a continuing threat coming from the territory of that state. A preferred option would rather be to allow limited action against a non-state organization in that territory. It would certainly be a violation of state sovereignty but perhaps less so and less costly for all involved than an all out invasion.

This in turn implies the legalization of for example individual assassinations of key operatives and air strikes against training camps. But in order for this type of measures to be introduced, a sound and firm check has to be in place.

\(^{26}\) See Appendix A
The potential problems related to extreme measures against individuals is another point in favour of an international court, but a court with the option of effectively passing a capital punishment sentence against individuals threatening the international security and order. The use of assassinations internationally is sensitive and rightfully so. But with the increased capabilities of non-governmental individuals and organizations, and the increased threat against international order that they are capable of presenting, perhaps limited violence like an assassination in self defence should be made an available option when the only other option is a full scale invasion.

Proportionality to the threat the individual presents, necessity of the action, and the individual posing an immediate threat would fill the criteria for self defence and certainly spare many lives over what an invasion or letting the individual continue its operations does. There may be a prohibition against assassinations in international law (Pickard, 2001:528) but there is a right to self defence as well. Evolving now is a practise where that self defence is practised with the full might of the armed forces.

This application of full military force would be more easily avoided if, after a full trial, although in their absence, specific terrorists were declared hostes humani generis. The grounds for such a labelling could be the conclusion that they were posing a particularly serious threat to international security, peace and order. This is not too far from the policy once held on piracy and indeed, there are several commonalities between pirates and international terrorists such as 1) failing to recognize or act within the laws of nations; 2) using violence against innocents to intimidate and coerce governments; 3) their actions undermine the legal rules developed to guide the conduct of nations (Pickard, 2001:528-9).

In the case of Afghanistan, the sheer number of Al Qaeda operatives present and in addition the Taliban forces, meant that an arrest operation was not an option. Hence in order to stop the on-going threat against international peace and security as well as break the capabilities of the organization, an invasion of the un-cooperating country of Afghanistan was arguably necessary and proportionate.

27 Common enemies of Human Kind
3.6 The Role of a Court

The nature of the subject of Terrorism is, as we have seen, complicated to say the least and so is the nature of the related topics in international law. Unfortunately, this means that the nature of any convention or court has to be complicated as well.

The role of an international court in these matters should ideally cover at least the three types of direction that a case can take or originate in:

1) Long term situation: A State or the prosecutor bringing to the attention of the court an incident, a suspected campaign, or similar, of international terrorism that is within the jurisdiction of the court and needs to be investigated. Likewise, this applies when a suspect has been arrested and is brought before the court. Such a case would mean that it is a situation that allows for some time for proceedings, i.e. the crime has been committed; or the campaign is ongoing but there is no immediate threat; or the suspect/s are in custody, and the court will have time to pass a sentence before counter-action is taken;

2) Short term situation: A State or the prosecutor bringing to the court a case where the suspect/s pose an immediate threat to the state involved. In such a case, a chamber of judges should be able to hear the case presented by the target nation in order to give preliminary judgement on whether there is a right to pre-emptive self defence against the individual/s in question. Despite such a hearing having taken place, the case then should go on to;

3) Post action trial: A State, an international organization or the prosecutor bringing to the attention of the court an act of counter terrorism that involves cross-border operations without the authorization of the court. Such action, be it in self defence or not, should be investigated and tried by the court in order to ensure that there was sufficient facts to base the operation/s on, that it was necessary, proportionate, and that there existed an immediate threat that did not allow for a delay. If not, the state action should be referred to the UN for an investigation into the responsibility of the state concerned.

In the first situation, the trial is held as normal with, if possible, the suspect present. The court would however also have the right, should the need arise, to try one or more suspects in
their absence. The statue of the court should then provide for a right of the accused to, although not present, choose his legal representative at the proceedings. If no such requests are made or the suspect is not possible to reach, a representative should be appointed for him.

In the second, short-term situation, a pre-trial chamber of judges can, by request of urgency, hear a state present its case for pre-emptive action against either an imminent attack or when there is not enough time for a full scale trial due to the perceived threat. In this case, the judges hear the evidence the target state bases its assumptions on and give preliminary advice as to the legality and implications of the suggested response intended by the state bringing the case against the individual/s involved. The case shall nevertheless be subject to trial afterwards in order to ensure the legality of the action taken and that it was performed as stated before the pre-trial chamber.

The third alternative is a post-action investigation when a state either has taken cross border action in self defence or has taken such action under the guise of self defence. Which ever the case, the court shall investigate and hear the evidence.

If it is concluded by the court that the state has acted wrongfully, it is to turn the matter over to the UN Secretary General, the UN Security Council and the International Court of Justice since these bodies exist to deal with inter-state matters in a state-state sense. An international court on terrorism should rather deal with individual responsibility of terrorists.

As for the individual responsibility of counter terrorist operatives and commanders, it would be nice to able to say that the ICC covers that, but of course, that is not the case not least since the participation in the ICC is voluntary and the court’s jurisdiction is severely limited. It would therefore be necessary to either include counterterrorism in the agenda of the court discussed here, the ICC (including non-signatory states) or just treat it as a state responsibility and let the UN sort it out through the Security Council or the ICJ.

3.7 Chapter Summary

It is possible to reach a working definition of terrorism by eliminating the motivation as a mitigating factor. This focus is supported by UN General Assembly resolution 51/210 which explicitly states that no reason whatsoever justifies an act of terrorism. Furthermore, this is the
approach chosen by authorities when defining terrorism. As it is treated and defined as a crime, the motivational aspect is of no interest as a permitting factor. It is, however, interesting to a prosecution since it instead becomes one of the factors defining it as terrorism.

There are two levels of responsibility, the state- and the individual levels, and they should each be addressed through different approaches. The subject here is terrorism and international law, and I have argued for a right to invoke self defence against individuals or organizations committing acts within the definition in the first part of the chapter. It is important to stress that while self defence allows for the use of force, it does not always have to be lethal. A cross-border arrest operation is also a use of force and a breach of state sovereignty, just as much as an assassination or an air strike against a training camp.

While the United Nations Security Council and the International Court of Justice would still be handling the parts of cases concerning the actions of states, it would be beneficial if a permanent court on international terrorism would handle the issues of guilt or innocence of individuals. Hence, it would also be necessary for such a court to authorize cross-border operations, i.e. breaches of sovereignty, in order to serve an international arrest warrant.

The authorization of cross-border use of force must however be dependant on the fulfilment of three criteria defined above; proportionality, necessity and immediacy. If the host state of a threat is cooperative, such a breach is not necessary. If the operation is not proportionate such an operation is not allowed, and if the timeframe is off or an investigation inconclusive, a cross border operation is out of the question.

It would also be beneficial to the international community if action taken by a state in claimed self defence could be reviewed by a court retrospectively. The courts jurisdiction should however not extend to the responsibility of states and any findings that a state had acted in error would be turned over to the proper authorities, i.e. the UNSC, the UN Secretary General and the ICJ for further consideration. The court deals with individuals.

But how should a court on international terrorism be constructed and what should its duties, rights and limitations be? This question will be addressed in the next, constructive section through a number of suggestions on how key articles could be designed.
IV Constructive Section

4.1 Section Introduction

This section is entirely devoted to the construction of a document addressing international terrorism by ways of a court. The document uses the Rome Statue of the ICC as a blueprint but differs in significant ways. I have chosen not to address here such matters as concerns for example extradition, financing or similar issues\textsuperscript{28}. Instead, the focus is on key functions and elements such as the crime, the criminal, the jurisdiction and the powers of the court.

The reader will have to allow for my lack of legal training and expertise. The aim of this part is to illustrate a type example for what this writer considers to be key articles of such a statue, not to create an actual full and working legal document.

Each part contains a suggested text as well as reasoning around the choice of words and the function of the paragraph. As stated, this is a constructive suggestion, an example of how such a document and court could be organized, not in any way a complete solution. Furthermore, some issues that need to be addressed in a complete document have been passed over but some of these will at least be mentioned in brief here.

In order to allow for these gaps, I have chosen to not number the articles written down here and instead they have all been labelled “Article X”. This is to be interpreted as “unknown number” and not the Roman number ten.

For convenience, the court suggested will be henceforth referred to as “the court” or the International Terrorism Tribunal (ITT) which will be the name used here.

4.2 Establishment of the Court

The court itself would have to have a large degree of independence from any type of power or influence by any one nation or international organization. This in itself is a problem since much of the material the court would have to rely on would be intelligence material obtained

\textsuperscript{28} For further readings and a wider scope of what the organization of a court requires this writer recommends reading the Rome Statue of the International Criminal Court which provides a full account of what provisions have to be made when setting up an international court.
by national security services which by nature immediately creates a form of dependence. This problem will be addressed later\textsuperscript{29}.

Furthermore, the court would have to be a permanent installation since the continuing nature of terrorism, the suddenness of reactive action and the continuous evolution of the situation would require focused, specialized and well-briefed court members able to appreciate and evaluate any given situation.

Unlike the ICC statue which is considered a complementary document to national legislation, the ITT statue would have to be of a supra-national character for several reasons, e.g. sovereignty-issues, reservations, non-compliance and simply not a willing party to the document. In this context, supra-national is to be understood as the court not being subjected to any jurisdiction or national boundaries but able to authorize action against any individual regardless of circumstances as long as he or she fills the necessary criteria for trial or self defence. Bearing these points in mind the first article of the ITT Statue could read:

\textbf{Article X}

\textbf{The Court}

A permanent International Terrorism Tribunal (ITT) is hereby established. It shall have the power to exercise its jurisdiction over persons for crimes of International Terrorism as defined by this statute, regardless of nationality or location. The jurisdiction of the court shall be regulated by this statute.

\textbf{Article X}

\textbf{Independence of the Court}

The Court shall be independent from the control of any state, group of states, or organizations of any kind. The Court shall however have advisory committees, as regulated by this statute, appointed by the United Nations.

The ICC statue then addresses the seating of the court (ICC art.3) but this is however of minor importance here. It is a point worth considering though since the seating of a court of this nature will throw a shadow over its work. Hence, countries not affected in any major way by international terrorism and beyond any serious doubt as to their motives and methods should be considered suitable places to seat the court. We therefore leave article three unwritten here.

\textsuperscript{29} See 4.6 The Trial, pp71-73
The legal status and powers of the court would have to be quite extensive and the court would need to have international legal personality. The ICC statue limits the powers of the court to the territory of any state party to the statue or a non-party state by agreement. The nature of the crime, the organizational form of groups and the fact that a terrorist, while not being a state, may well pose a threat to international security and the national security of a state, should focus the powers of the court in this case on the individual rather than the state.

Hence, by allowing jurisdiction over persons rather than territory, a court ruling would potentially violate the sovereignty of a state not willing to act on a person subject to a court sentence. However, allowing for a right to self defence by a state against an individual, a court ruling would be likely to be more proportionate and balanced than would a full scale invasion intended to secure a suspect or eradicate an organization and hence a preferable option.

Article X
Legal Status and Powers of the Court
1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its powers and functions, as provided in this statue, over any individual, regardless of nationality, status or location.

4.3 Jurisdiction, Admissibility and Applicable Law

This concerns the crime or crimes over which the court has jurisdiction. Since the purpose of an international court on terrorism would be to address the problem of international terrorism, not to override domestic legislation on purely domestic crimes, the statue would have to define 1) the crime of terrorism and 2) define what is meant by international terrorism.

The thought here is that when an act of terrorism has no international implications, the court should have no jurisdiction. But when the results of a terrorist act or campaign affects a nation other than the base of operations for the terrorists, a region or even further, the court should be involved. If a domestic situation is deemed by the UNSC to be a threat against international security, this should bring the situation under the jurisdiction of the court. Likewise, as will be discussed under enforcement, the court should be able to refer cases to the UNSC for enforcement.
In the case of the ITT, an article on its jurisdiction and the crime would possibly read:

**Article X**

**Crimes within the jurisdiction of the Court**

The jurisdiction of the Court shall be limited to
(a) crimes of terrorism with international elements as set forth by this statute.
(b) acts of terrorism within a nation if the situation is determined by the United Nations Security Council to be a threat to international security.

**Article X**

**International Terrorism**

For the purpose of this Statue:

a) the crime of Terrorism shall be understood to be the premeditated, peace-time use of violence or the threat of violence, by a non-governmental entity against non-combatant targets, intended to provoke fear to coerce or intimidate governments or societies as to the pursuit of goals that are generally political, religious or ideological.

b) International Terrorism shall be understood as an act or campaign of Terrorism with international implications.

c) international implications shall be understood as an act of Terrorism or a campaign of Terrorism directed from, controlled from, originating in or affecting other nations than the nation towards which the act or campaign is directed. Furthermore, an act of Terrorism or a campaign of Terrorism determined by the United Nations Security Council to be a threat to international security shall also be considered to be International Terrorism.

Determining when the court has the right to exercise its jurisdiction is not an all together easy task given the infected debate on terrorism and the widely differing views on what it is. There exists also a widespread suspicion between states as to their motives and approaches and hence, it is important that the court is allowed to impartially and without prejudice examine the information given.

Referral of cases or situations to the court for investigation should be open to any state and the United Nations Security Council since these bodies represent either their population or the international community respectively. There should however also remain the possibility for the prosecutor’s office of the tribunal to initiate its own investigation based on information
received from other sources than the ones mentioned. This could include international organizations and, possibly, individuals. Hence:

Article X  
Exercise of jurisdiction  
The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statue if:

a) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State  
b) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a body of the United Nations  
c) the Prosecutor has chosen to initiate an investigation based on information received in accordance with this statue.

The jurisdiction of the court should be limited to judging the actions of individuals since there are several instances that judge the behaviour of states. Therefore, should a state be implicated in the investigation into a case, the prosecutor may well, if the situation and quality of the evidence is such that it is possible, choose to bring charges against an individual state leader for crimes of terrorism.

Just as the tribunal is permanent, so should the prosecutor’s office be a permanent installation. The reason for this is the workload expected as well as the fact that the highly difficult circumstances regarding evidence against terrorist organizations as a whole, seeing how it is mainly based on intelligence-information, requires a level of experience and specialization beyond what could perhaps be called the average of a prosecutor.

I will not go into the organization of the prosecutor’s office here, but in addition, and for reasons of maintaining credibility, it would be a necessity to have an impartial organ that has a reviewing function of the choices made by that office. Partly a continuous monitoring function but also the possibility of investigating the prosecutor choices based on complaints received. Such an organ could be appointed by, for example, the UN General Assembly.

Looking to the Rome Statue of the ICC there are a number of issues on admissibility and inadmissibility among other things that need to be addressed. These are however not of sufficient interest for the point here and will be left without further comment. The ICC statue goes on to address the challenging of the jurisdiction of the court and the admissibility of the
case under investigation. Without formulating the paragraph here, there are some important points to make.

1) the nature of the court, being supra-national and focused on individual responsibility, cannot be allowed to go unchallenged. Therefore it shall be the right of any state, be they involved in the case or not, to challenge a case addressed by the court. Furthermore, it shall be the right of any individual or organization involved as possible suspects in the investigation to challenge it. A challenge can only occur once in any given investigation by the court and shall be noted in the case files. Although the court is not a voluntary institution it has the authority to make some severe violations of state sovereignty and has large implications for the life and freedom of individuals. Hence, it cannot be deaf to the protests of those implicated by an investigation but rather very attentive to any progress and positive developments.

2) since any court decision is likely to have an effect on the national sovereignty of states, a challenge must be given due consideration and time for cooperation from said state be allowed. There should also be time allowed for a suspect to deliver himself to the court for trial. The nature of the crime of international terrorism does not allow for any larger timeframes however. It should therefore be restricted to a suitable number of days where perhaps 30 would be sufficient if the threat is not imminent. If it is imminent, it would be likely that the state under threat had already taken action.

Regarding what law is applicable, the court should be restricted to the statue itself since it covers the type of incidents that come into question but should the need arise it should also be able to look to other international conventions and treaties. Such an example could be the Rome Statue of the ICC where the court could seek guidance in situations close to war.

4.4 General Principles of Criminal Law

There are a number of general principles in criminal law that should be observed by this international tribunal as it is by the ICC. These principles include:

1) Nullum crimen sine lege – Without a law, there is no crime. This means that if there is no specific law against an act or behaviour, it is not criminal. This also has the implication that something that is not within the jurisdiction of the court is not a crime in the eyes of the court and hence not admissible for charges.
2) *Nulla poena sine lege* – Without a law, there can be no punishment. This has the implication that the court is restricted by the punishments available through the laws applicable. This in turn means that this has to be defined in a clear, explicit manner in the statue of the ITT since the measures allowed by invoking a UN Charter article 51 self defence is in the extreme.

3) *Non-retroactivity ratione personae* – This means that no person can be held responsible under this statue for acts committed before the statue entered into force. If nothing else, it could certainly be considered fair warning to those who practise terrorism that it would be a good time to break the cycle.

As for the nature of individual responsibility there is a need to “cover all bases” in order to avoid loop-holes that permit aspects of the crime to go unpunished thus giving for instance financial contributors to go free.

As noted in the normative section, the ICC definition of criminal responsibility lends itself very well for the purposes of this statue as well. The definition leaves little room for loopholes regarding the criminal responsibility of individuals engaging in activities within the jurisdiction of the court.

I have chosen to adopt the article from the Rome Statue of the ICC (art. 25) concerning this but have removed art25§3(e) that concerns Genocide specifically. Hence it would read:

**Article X**

**Individual Criminal Responsibility**

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

e) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

Article X
Exclusion of jurisdiction over persons under eighteen
The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Since there allegedly is a practise among some states to encourage or organize terrorism, there have to be made provisions regarding the relationship between the court and states suspected of involvement.

Should there arise suspicions or complications towards one or more states during the course of an investigation by the court, this would fall outside the jurisdiction of the court since the court deals with individual responsibilities. As previously noted, there exists several international instruments to deal with grievances between states and while the court may well investigate a state leader, being an individual, the actions of the nation under that leader should be referred to the International Court of Justice and/or the UN Security Council depending on the nature of the suspicions.

The investigation by the prosecutor's office of the court should however be concluded in full before the case is handed on to these other office's. This since it is likely that 1) the court has special expertise regarding this type of crime; 2) because it is more likely that an investigation
by the court is less tainted by special political motives; and 3) because it is likely that the state involvement part will be investigated as an integrated part of the rest of the investigation. The part concerning the possible involvement of a state shall be admissible as evidence in the court but the court shall not pass any sentence against a state involved since it is beyond its jurisdiction.

This is an important demarcation line regarding the jurisdiction, capacity and scope of the tribunal. Again, the Rome Statue of the ICC lends itself perfectly to the purposes of this statue and hence it is possible to adopt without change the article as it stands in the ICC statue (art.27). The article provides that no head of state, Member of Parliament, official or otherwise shall be exempt from criminal responsibility and that no immunities usually associated with people in these capacities apply in the case of the crimes addressed above. On how the court should handle states suspected of involvement in the crimes of terrorism investigated, i.e. where a state is implicated as organizer, instigator or financier the articles could look something like:

**Article X**

**On the Involvement of States**

Should a State be implicated as involved in a crime, as defined by this statue, that part of the investigation shall on completion be handed over to:

a) the Secretary of the United Nations; and  
b) the President of the United Nations Security Council; and  
c) the offices of the International Court of Justice

for further processing by these offices. The Court shall under no circumstances commit itself to bringing charges against a state beyond the scope of providing investigation results to the above mentioned offices investigation, but the findings on state involvement may be used in evidence at a trial against a person.

These external offices can then, in concert or separately, decide on possible measures against the state/s involved or suspected of involvement.

**4.5 Composition and Administration of the Court**

Following our ICC blueprint, the organization of the court is next on the agenda. I do not intend to go into detail here but some points are important to mention:
1) The ICC is organized into six parts; the Presidency, the Appeals Division, the Trial Division, the Pre-Trial Division, the Office of the Prosecutor and the Registry. This format is suitable for the ITT as well but the pre-trial division fills the additional important role of holding the short-term hearings and giving their preliminary ruling on the right to invoke self defence against an individual as described previously in the normative section.

2) The qualifications of the judges would have to be outstanding considering the extreme nature of both the cases and the available counter measures. The responsibilities of the court are likely to weigh heavy and the impartial position of the judges cannot be allowed to be questioned on any serious ground although questioned they will most likely be. The format of this, the selection process and how to ensure and monitor the integrity of the judges is something that perhaps should be left to for example the UN General Assembly and the Security Council in concert.

3) To maintain the independence of the judges, they are to serve on a full time basis and not be allowed to engage in any activities that could raise doubts as to their integrity in their role with the court. If the suspicion should arise that the integrity of a judge is not intact, that judge should be put on immediate suspension and the suspicions investigated. If they are confirmed, the judge should be dismissed immediately.

4.6 Investigation and Prosecution

It is the prosecutor who decides whether or not to initiate an investigation either by own accord or brought to the court by a state. A decision by the prosecutor not to investigate should be communicated to the pre-trial chamber and the state making a referral to the court. This decision can then be reviewed by the pre-trial chamber either by own initiative or the initiative of the state and, if found to be a doubtful or poorly based decision, the pre-trial chamber should be able to instruct the prosecutor to review the findings.

The rights of suspects are of paramount importance and must be observed at all times. As stated previously, the ITT would have the possibility of holding a trial with the accused absent on grounds of either not being able to secure the suspect or because said individual poses an immediate threat that does not allow the time for his/her apprehension. Hence the observation of the rights of the accused must be beyond reproach since the sensitive nature of the court would not allow for any mistakes in this regard. The implications for the integrity of the court
would be immense. Again the Rome Statue of the ICC has a fitting definition (art.55) that is suitable for this court as well but with small amendments. Thus the right of the accused could be formulated along the lines of:

Article X
Rights of persons during an investigation

1. In respect of an investigation under this Statute, a person:
   a) Shall not be compelled to incriminate him or her self or to confess guilt;
   b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
   c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
   d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities, that person shall also have the following rights of which he or she shall be informed prior to being questioned:
   a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
   b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
   c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
   d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

3. Where there are grounds to believe that the rights of the accused have not been fully observed by the court, the Presidency and the Court of Appeals shall be informed and, if they find this to be the case, a re-trial ordered.
The role of the pre-trial chamber in the ICC is quite extensive including among many other things the protection of witnesses and victims if required, assisting in the preparations of defence and more. In addition the pre-trial chamber may also authorize the prosecutor to take investigative steps in a state without having secured the cooperation of that state as it is defined in part nine the Rome Statue. It is also the pre-trial chamber that issues a warrant of arrest or an order to appear before the court but for the pre-trial chamber of the ITT there would be yet another addition which is highly controversial.

As described in short previously, there may appear situation where an imminent threat is posed by an individual or individuals against a state, but based in another state, and it has yet not come into being. The perceived timeframe until the threat is executed is however not long enough to permit for arrest- and trial proceedings.

In such a case it should be possible for a state to bring its evidence before the pre-trial chamber and state their case for invoking self defence strikes. The chamber could then either dismiss the claim or authorize it and in the latter case, effectively legalizing the extra-territorial arrest or assassination of a key operative. The article for this could be constructed as such:

Article X
Authorization of self defence measures by the pre-trial chamber

At any time a State may bring before the pre-trial chamber a request to invoke the right to self defence against an individual posing an imminent threat to:

i. the national security of that State; or
ii. International Security, Peace and Order;

The pre-trial chamber can authorize this without the consent of the state in which territory the suspect is currently located when it is satisfied that:

a) the cooperation of the state in which territory the suspect is located in unobtainable within a reasonable time
b) there are reasonable grounds to believe that the person accused is the person posing the threat
c) there are reasonable grounds to believe that the threat is imminent
d) that the perceived threat is of sufficient gravity to necessitate the right to self defence
e) that the proposed measures are proportionate to the threat posed
f) that the information and evidence presented is of high integrity and quality
g) that no other options to prevent the imminent attack exist and that the measures to be taken are strictly necessary.

Approximately the same scale should be used for cross-border arrest operations where the cooperation of the terrorist host state is unobtainable or when the time factor does not allow for negotiations on that cooperation.

4.7 The Trial

The ICC statute declares that an accused has to be present at the trial (art.63) but as stated previously, this may not always be possible for the ITT. Although this solves some problems regarding the need to obtain and arrest a suspect, it also creates a massive problem regarding the so important rights of the accused. If the accused is not allowed to give his or her evidence or hear the evidence brought against them, how can a fair trial be ensured?

There are several ways to work around this problem, among them video-feed, audio-witnessing, telephones etc. In addition there is an obligation by the court to provide for the defence of the accused. The holding of a trial without the accused present certainly goes against much of traditional western court tradition, but new times, new problems and new solutions to those problems.

The nature of international terrorism makes it hard to notify, secure and bring to court the suspected perpetrators. The principle cannot be “no address, no crime” or “no arrest, no crime” but at the same time it is vitally important to observe the rights of the accused for the legitimacy and credibility of the court as well as for more general Human Rights values.

It could be a worthwhile thought to organize a review board consisting of established Non-Governmental Organizations in the Human Rights sphere as well as within law, e.g. Lawyers Without Borders, the Red Cross/Red Crescent, and Human Rights Watch etc. The objective of this board would be to monitor the proceedings of the court to ensure that the rights of the accused were being observed and the article could read as such:

Article X

Rights of persons Review Board

There shall be organized a Rights of persons Review Board consisting of seven leading members of non-governmental organizations working with Human Rights or Law. These members shall be in good standing and possess a
demonstrated expertise pertaining to International Terrorism, Human Rights and/or Law.

(a) The prosecutor shall inform the Rights of persons Review Board (RRB) as soon as an investigation is complete and the prosecutor has decided to bring the case before the court

(b) The RRB shall be allowed full access to the investigation

(c) The RRB shall be a party to appointing counsel for the accused if the accused does not wish, or is not capable of, doing so for him- or herself

(d) The RRB shall be allowed full access to observe the trial regardless of whether the accused is present or not

(e) If the RRB is in doubt regarding the integrity, quality or otherwise of the defence’s ability to perform its functions in the interests of its client, the RRB shall be able to intervene on behalf of the accused by notifying the Presidency and the Court of Appeals.

There are a number of other issues surrounding a trial that have to be defined in the statute but they are of no consequence for the current discussion and, hence, left out.

Another major problem of counter terrorism, and especially pre-emptive counter terrorism, is the nature of evidence. Without the act having taken place, it is basically assumptions and speculations as it is with all pre-emptive action. It all boils down to intelligence information and how to value and interpret that information.

The court therefore walk a fine line of dependence since it requires corroborating intelligence information in order to judge the accuracy of the information initially presented to them while at the same time, much of the intelligence community has a sharing tradition which means that no matter the source, several intelligence agencies have the exact same information and most likely got it from the same source or from another agency. The case of the latest Iraq war is a good example of good intelligence being mixed up with, and I use this term out of curtsey, poor intelligence. Both types were still part of the argument for an invasion.

In addition, much of the intelligence information is of a sensitive nature in the sense that it reveals the capabilities of the intelligence community and possibly exposes and endangers operatives in the employment of intelligence agencies. Perhaps here it is possible to learn from law enforcement who have had years of experience with sting operations, under cover work, infiltration, the use of informants etc and still manages to go to trial.

These problems require a paper of their own to solve if even that is enough. To raise a suggestion, there are several major research and policy institutes around the World who,
although sometimes in frequent contact with intelligence networks, are not a part of them. In addition, there are a number of scholars who have the practise, experience and ability to evaluate and compare intelligence material to a far greater extent than I, perhaps in error, assume most lawyers have. It should therefore be in the interest of the court to organize an “evidence-review” board which, without passing judgement on the admissibility or importance of a piece of evidence, at least can advise the court as to the accuracy and the value of the information.

The board could also function as a screener for sensitive information on what can be taken out and what could be left in to maximize security for field operatives, informants and intelligence- and police agencies. In concert with trained attorneys, they could together find a balance where the value of the evidence is not watered out but the security and integrity of intelligence networks not compromised either. Such a board must at all times furthermore bear in mind the rights of the accused and to not let censorship and security turn the process into a Franz Kafka model of a court.

4.8 Penalties

I will not go into detail on the nature or the level of penalties since this is something best left to those trained for it. I will however make a few points regarding this court and the measures available to it since they are controversial in part:

1) The purpose of a court such as this would not be to turn the world into a free-for-all on suspected terrorists. Extreme measures such as selective elimination or bombing raids are at the extreme end of the scale. They occupy some space in this discussion because they are more controversial and needs more attention than does for example five years in prison for attempting to blow up a bus.

2) The goal should always be to arrest and sentence to prison, but sometimes this is not possible. The right to self defence for a state is being invoked today but under uncontrolled circumstances. This would be an attempt to bring it into line.

3) The format of the ICC regarding sentencing and the serving of sentences should work perfectly for this court as well. Since there are no state parties in the same sense as there is in the Rome Statue, there would have to be drawn a list of states volunteering to receive for the serving of a sentence, convicted terrorists.
This of course is another problem since it may provoke attacks, make the country where the prison is located the target in hostage situations for the release of prisoners and induce increased security costs. If the alternative is constant elimination of suspects however, I believe several states would agree to receive such prisoners anyway. There is still generally a belief in the rule of law.

4.8.1 Enforcement

It should be a standard that the state bringing the complaint to the court is the state that enforces the sentence or indeed the self defence authorization. This is however not always possible. It may be that the state lacks the resources to achieve the goal or it may be for instance that the proceedings were investigated by initiative of the court.

In such cases, it must be allowed for a state, or the court, to request the help of states willing and capable to offer such help. Under the UN charter it is allowed for a state to ask for help from other states to perform an act of self defence. Such should also be the case with the court and with states authorized by the court to take such measures in a case.

4.9 Other Provisions

There are a number of other provisions that need to be included in order to have a full scale, working court. They are however not of enough importance to warrant a place here since they fall short of the issue at hand. Much of this consists of the formal contents of requests, special rules, contents and transfer regulations.

This concludes the constructive suggestions. As mentioned, it is not intended to be a complete solution to any and all problems related to the subject of terrorism in international law, but rather a suggested approach to how international counter terrorism can be brought under at least some control of the international community.

It is by no means complete but focused on what this writer perceives to be the most important issues to find a solution to.

With the three blocks of empirical, normative and constructive nature, we now move on to the last section; the conclusions.
V. Conclusions

The question that was to be answered was:

*how can area-specific International Criminal Law adapt to the new reality of Terrorism?*

In order to provide an answer to this question, we have gone over the instruments in place today and looked at what resolutions have been passed in the UN since 1960 regarding terrorism. Furthermore, we have looked at ways to eliminate some of the problems in defining terrorism, implementing self defence and the responsibility of states and individuals. Finally, we have looked at how key paragraphs of a court statute on terrorism could be constructed in order to make it a working tool in international counter terrorism.

Based on these empirical, normative and constructive blocks, we can now draw some conclusions.

As seen there have been quite a large number of measures adopted over the years since 1960, aimed at curtailing terrorist violence. The language has changed quite dramatically from a focus on “racist and colonial regimes” (e.g. UNGA resolution 3034, 1972) as perpetrators in early resolutions, to a two-pronged focus where concerns about terrorist violence and state sponsorship are one part, and the importance of observing Human Rights in counter terrorism action the other.

Despite these numerous conventions and resolutions, there have been little progress and a somewhat tedious repetition of declarations on a yearly basis. The lack of significant results is likely to derive from the failure by nations globally to comply in action with what they have declared in words, and an apparently mysterious failure by the problem of terrorism to magically disappear of its own accord.

There are several problems at the root of this failure of international law to make the crimes defined in adopted conventions universally applicable:

1) Non-compliance; that states simply do not comply with the conventions

2) Reservations; that states make reservations that put key paragraphs out of play

3) Non-signatory states; signing is voluntary. The conventions do not apply if you have not signed them.
4) Not ratified; this is the case for example with the convention of terrorist financing where the number of signatory states are more than the actual parties to it. If it is not ratified, it does not apply.

5) Enforcement; international law is hard to enforce given that there is no authority above and beyond states. We see now a new application of, among other things, article 51 of the UN charter under evolution, but for it to be under the control of the international community that community has to offer credible enforcement options.

The same problems apply to the regional agreements where the lack of a universal condemnation and definition provides ample loop holes in what appears to be sound and straight forward conventions and treaties but which turns out to be, by reservations or design-flaws, intentional or unintentional, little worth when the reality of terrorism and separate-interest politics come into the picture.

The function of reservations in conventions is one of these inherent problems. It would be hard to do without reservations since after all some of international law is in conflict with national legislation. There is also a “safety-catch” in the Law of Treaties article 19c which provides that a state cannot submit a reservation that is incompatible with the object and purpose of the treaty (Fitzmaurice, 2003:192). If the reservation is deemed to be of such nature, it is considered null and void. There is however controversy surrounding how to weigh a reservation and what criteria defines it as incompatible. Hence, each nation is essence has to decide on an ad hoc basis what reservations it can agree to and whether to observe and respect a reservation or not.

Furthermore in the interaction between states, it is possible that a convention is considered to be applicable between several of the nations involved but considered null and void in relation to a reserving party by one or several of these states. With this in mind it is certainly understandable to doubt and question the use of international conventions, if it is possible to make such reservations that the convention or important parts of it are neutralized. The existence of such reservations means it is necessary to treat a subject, otherwise covered by a convention, on a case-to-case basis with individual agreements. This goes to illustrate the difficulties and obstacles at every turn of international law.

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30 Vienna Convention on the Law of Treaties (VCLT), 1969
Regarding the subject of terrorism and international law specifically, there are several problems. One of them is the inherent difference in opinions on whether there are times and situations where terrorist offences are justifiable.

Assuming that the UNSC and UNGA resolutions over the years reflect the concerns of the international community *vis à vis* counter-terrorism, some conclusions can be reached.

1) There is no universal definition of terrorism. This is most likely due to the very different approaches to the subject not only globally but within societies as well. The result of this shows in that the international community’s attempts at controlling terrorism have had to take small steps, focusing on one type of offence at the time, thus resulting in a number of conventions. Considering that the conventions focus explicitly on the *act*, disregarding in full the motive, it should be possible to construct a definition of terrorism that does the same thing. The intentional targeting of civilians in war by military forces is prohibited in the Laws of Land Warfare, i.e. International Humanitarian Law. There are no reasons why it should be allowed when it is committed by non-military groups in peacetime.

Furthermore, by eliminating the motivational factor as a mitigating circumstance, the freedom fighter-terrorist discussion is avoided. A terrorist is a person who commits acts of terrorism. It may be a one-time event (e.g. Timothy McVeigh in Oklahoma City, 1995), it may be only a part of a wider guerrilla campaign (e.g. LTTE in Sri Lanka) or it may be the sole operational method of those involved (e.g. Al Qaeda). They are still acts of terrorism. This discussion has attempted to achieve a definition focused on the act by adopting and combining features of existing definitions.

2) There is concern and a safe-guarding attitude among many nations for the right of any people to seek their freedom through a war of liberation. This right is explicit in some conventions and resolutions and implicit in others. Taking a historical view, most states have a record of having supported in word or action “liberation”-movements of varying sorts. It would be necessary to include and affirm this right of opposition in any international tool of counter terrorism. This is another case in point for the focus to be on the nature of the acts committed, not on the overarching goal of the organization in question, i.e. their operational

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31 e.g. The League of Arab States' *Arab Convention on the suppression of Terrorism*, art. 2§a (see above)
rationale. An organization engaging combatants in a guerrilla war would not be terrorists. If they employed terrorist attacks as part of their campaign, however, they would be. It is possible to support a goal but condemn the means.

3) There are increasing concerns over how Human Rights and the freedom of the individual are treated in the “War on Terror”, and it is a concern that has been evident for a long time, e.g. in the resolutions adopted by the UNGA. An affirmation of the commitment to Human Rights by the states willing to sign a convention on counter-terrorism would be necessary but also to include measures to uphold and guarantee the rights of the individual within the mechanisms of such a convention. In the case of a court, it would have to be included in the statue to ensure the consideration of Human Rights issues.

4) The principles of law regarding the nature of evidence may not be as easy to fulfill and could perhaps not be held to the same standards as in a normal domestic court. Such is the case in war crimes as well and this does not seem to present a major obstacle to the formation of tribunals. Hence, the application of a different evidence-standard for the purposes of international law regarding individual as well as state responsibility should not be perceived as a problem. This is in no way to suggest that the standard of evidence in domestic courts should in any way be decreased.

5) The principle of state sovereignty has been a fundamental part of international relations since the Peace of West Phalia in 1648 (Neff, 2003:38) and is jealously guarded. It should not be the purpose of a convention on terrorism to infringe state sovereignty more than is absolutely necessary since this would create a massive and, very likely, unanimous rejection. Instead, any restrictive measures on the options of states have to be heavily regulated and connected to immediate problems such as imminent threats towards international security. The situation in Afghanistan when the Taliban Regime refused to extradite Usama Bin Laden was judged to be such a threat in UNSC resolution 1267 (1999) as noted above. While state sovereignty is something that needs to be observed, it can not be observed to absurdity. If a state is unwilling or unable to cancel a threat originating in its territory, the right to self defence should certainly be possible to invoke against the non-state entities posing that threat. Such limited breaches of state sovereignty should be more acceptable than an all out invasion, both to the state performing the counter action and the state running the risk of being invaded.
It is entirely possible under international law today to lay the responsibility of terrorism on the host state, if that state remains passive. Such was the case with Iran during the hostage-crisis in the American Embassy and such was the case with the latest invasion of Afghanistan. This rule has to be codified however to 1) make it clear to any aspiring terrorist support states that they share responsibility and 2) that the application of these rules do not slide out of hand and get so widened it becomes a “free-for-all” to use in any interest.

6) The nature of a convention on international terrorism can not be allowed to be such that it can be undermined or neutralized by reservations. It must be clear what the intent of the convention is and what rights and obligations befall states party to it.

7) There are severe problems regarding the invocation of self defence under article 51 against a non-state actor in another state’s territory. This has to be addressed by any new initiative. Since the September 2001 attacks on the US, many states have accepted a wider right to self defence (Gray, 2003:604) but the limitations of this new self defence seems to be set on an *ad hoc* basis. In order to maintain control of the development, the right to self defence against terrorist attacks should be codified and limited with the help of the three guidelines, proportionality, necessity and immediacy. This is to ensure a measure of legality in an attempt to prevent states from using the guise of self defence to achieve hidden agendas.

Where do we go from here?
By establishing an international court whose jurisdiction is decided by the nature and the implications of the *act* of terrorism which no nation can bargain their way out of or escape through a reference to sovereignty, we find new potential ways to effectively counter international terrorism. These ways would not be under the control of any state or organization, but certainly under the scrutiny of every single state in the international community.

The judgement of whether the criteria of self defence in international counter terrorism are fulfilled or not should ideally be made by an international court specialized in the area of terrorism and not by one state or group of states. By bringing countermeasures under the investigation of an independent court it may be possible to ensure proportionality. Although it sometimes is necessary to fight fire with fire, setting fire to civilians and non-combatants is not acceptable regardless of whether it is done in a terrorist or counter-terrorist operation.
It would also be necessary to arm the court with a jurisdiction extending over all individuals who commit acts of terrorism with international implications. Hence, it should be within the powers of such a court to authorize cross-border self defensive action against individuals or organizations posing a threat to either the security of a state, international or regional security. The nature of the United Nations Security Council with its veto-rights and dominance of the five permanent members make it unsuitable for making these decisions since there is a need for unobstructed deliberations and a distanced view of the case. Furthermore, the role of the Security Council is, or should be, mainly an inter-state role whereas a court on terrorism should be concerned mainly with the responsibility of individuals engaging in terrorist acts.

The court should have an absolute authority to judge upon situations and the role of the individual, as well as to declare specific individuals to be a threat to international peace and security. An international court on terrorism would also be in a position to judge the necessity and proportionality of a proposed, or taken, course of action. This means that the court would add the options of cross border arrests and assassinations to the toolbox of international counter terrorism and perhaps make the calls for full scale invasions less urgent.

It would be necessary to make the authority of the court unconditional and supra-national. There is absolutely no point to establish the court at all if it is allowed to fall on the failure of one or more states to sign or ratify the statue, or to undermine it through reservations. It would be necessary to award the court the same level of powers within its jurisdiction that the United Nations Security Council enjoy. It would also have to be created by a majority agreement, not dependent on the signing of any document by all states.

A supra-national nature of the court would also eliminate the problems of non-compliance and non-participation. In addition, it would allow for stringent enforcement where a court decision would be in effect a backing by the international community and, in a sense, a “collective force” backing.

There is also the issue of what measures are allowed. It would seem that we are entering a stage where self defence in accordance with UN Charter article 51 is possible to claim when countering terrorism. Although it is a positive sign that the debate has not abandoned international law all together, the tools available when article 51 is invoked are designed for inter-state conflict and hence, it becomes quite inevitable that if sanctions show no results, the ensuing use of force will be rather up-scale as was the case in Afghanistan.
Preferably smaller scale measures, e.g. selective assassinations and air strikes, could be employed under article 51 against individuals and organizations posing the actual threat rather than invading a country. This would then open for long time sanctions and measures against a country that harbours terrorists while the immediate threats could be eliminated with minimal if any damage to the civilian population. In effect this means that despite letting long-term measures work in their own time, a nation under threat is not required to sit in silence and passivity waiting for the next attack. In addition, it would mean that no state could claim the need to invade another state in order to eliminate the threat unless it was truly necessary.

Since it is a court there is the nature of evidence and investigation to take into account. The timeframe for immediacy would have to be expanded to allow for an investigation into an incident. An ongoing campaign against a nation should be considered a continuing attack and hence counter measures under article 51 allowed. This would in effect mean that a state was engaged in a low-intensity conflict with a sub-state actor located in another nation’s territory. By using the Rome Statue of the International Criminal Court as a blue print and then changing it in accordance with the ideas presented in the normative section, it is possible to outline some key paragraphs that would be of use for an international tribunal on terrorism.

The answer to the research question thus becomes:

Area-specific International Criminal Law can adapt to the new reality of terrorism only through rather radical changes. In order to be in control of the development, the international community, bearing in mind the toothless nature of conventions in place, needs to codify and institutionalize changes that allow for the invocation of self defence; by states, against individuals, in another country. It furthermore needs to consider the legalization of assassinations against individuals posing an immediate threat as well as other cross-border operations. Such measures would preferably be controlled by an international court with supra-national jurisdiction extending to any and all individuals committing acts of international terrorism. As noted above, much of the concerns evident in international law today would have to be observed by the statue of such a court.

In order to be able to consider any of the above, terrorism must first be defined and declared a universal crime. In addition, the harbouring of terrorists must result in a “responsibility by association”-rule regarding states.
It is the claim of this writer that such a statue is possible in theory, but is it conceivable in reality? The answer would sadly have to be: No, not now. The wide ramifications of the changes implicates that they would have to be made in very small steps. The effects they would have on the right of self defence, state sovereignty, the rights of individuals, allowed counter measures and the threat that they pose to the interests of states means that resistance will be intense.

Bearing in mind that it took the United Nations 40 years to renounce terrorism in any shape or form explicitly, this level of change is not likely to come easily. But there is a sense of urgency to take into account as well as a result of the increased scale and lethality of attacks.

The role and nature of the aspects of international law that have been discussed are changing. The international community can either stand by and protest or try to hold to proverbial reins of the development and seize the initiative.

Considering the types of attacks that have been committed since the 1990’s, there certainly is a new level of threat and international law has not found a conclusive way in which to meet it. States targeted for attack, new or renewed, can not be expected to sit and watch in silence and, hence, the evolution of state practise in this area will be controlled by those that have the power to take action. The international community needs to assume that control.

In the opinion of this writer, this is best achieved by creating an international tribunal on terrorism with extensive jurisdiction and powers, controlled by no organization or nation but under the constant scrutiny of everyone, as outlined by the discussion.

Regardless of whether an international tribunal on terrorism is realized or not, the future developments in international relations, and the continued evolution of the terrorist threat, will be interesting. The massive opposition to any changes in the application of the right to self defence indicates that any revision of existing law will be propelled by threat perception rather than level-headed deliberations and considerations. This is not a good thing since it may provide us with a wider interpretation of applicable international law than anyone would really wish for. It may even, finally, render it completely or partially irrelevant.

The suggestions here are controversial to say the least, but for those trying to face a new level and structure of threat by stubbornly applying old rules even as they fail, it would be worthwhile to remember this:

Sometimes, to find the solutions to problems, it is necessary to step outside the box.
Appendix A

UN Charter

CHAPTER VII

ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40
In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43
1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44
When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

32 From www.un.org 2004-11-03
Article 45
In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46
Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47
1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48
1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49
The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50
If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51
Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.
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