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Extension of international jurisdiction over crimes committed by international terrorist organisations²

In this article we analyse threats to international security posed by international terrorist organisations and main approaches to combating their criminal activities at the national and international levels. We offer our own concept of responsibility of international terrorist organisations under international criminal law and establishment of an International Tribunal on Crimes of International Terrorist Organisations as a possible solution.

Keywords: international terrorism, international terrorist organizations, international criminal law, International Tribunal on Crimes of International Terrorist Organisations, responsibility of states.

JEL Classification: K33.

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1. Modern terrorism.

1.1. Definition of terrorism.

Experts in criminology, criminal law and international law from different countries, as well as legislators have been working on the definitions of terrorism and international terrorism for many years. At present there are more than a hundred definitions describing different aspects of terrorism³.

We can identify the following common elements in a number of definitions for terrorism:

- Acts of terrorism directed against lives, health, rights and legitimate interests of different subjects in order to coerce a third party⁴;
- Political goals of terrorists⁵;
- The public nature of acts of terrorism, unlawful use of force or violence to intimidate or coerce a government or the civilian population⁶.

We feel that, the definition of terrorism should include two additional important elements: identification of subjects of terrorism and description of terrorism not only as acts of terrorism but also as other ancillary criminal activities of these subjects.

Realising that it is probably impossible to develop a perfect definition, we nonetheless would like to give our own criminological definition of terrorism for purposes of this study.

In our view, terrorism may be defined as the activity of terrorist organisations and individuals, in some cases with the support of states, with intent to achieve political goals, and involving any acts causing or threatening to cause harm to general public, placing their lives, health, rights and legitimate interests in danger in order to coerce a third party (government or international organisation) to make decisions dictated by terrorists, as well as other ancillary criminal activities of such organisations and individuals.

International terrorism may be defined as the activity of international terrorist organisations, in some cases with the support of states, across several states or territories with international

³ Kim Jin-Gi Staatliche Teilnahme am Terrorismus als Problem des Völkerrechts. Berlin, 2009, S.18-23; Schmid A. Political terrorism: A Research Guide to Concept, Theories, Data Bases and Literature. 1984, P. 119-152; Zöller M. Terrorismusstrafrecht: ein Handbuch. C.F. Müller Verlag, Heidelberg 2009, S. 100; Нетаньяху Б. Война с терроризмом. М.: Альпина паблишер, 2002, с.89; Салимов К.Н. Современные проблемы терроризма. Москва: Щит-М, 2000. с. 91

⁴ Организованный терроризм и организованная преступность. М.: 2002, с.5-6

⁵ Laqueur W. The Age of Terrorism. 1987. p. 72.; US Department of State, Patterns of Global Terrorism. 1988, P. v; Кабанов П.А. Политический терроризм: Криминологическая характеристика и меры сдерживания, Нижнекамск, ИПЦ «Гузель», 1998, с.8;

⁶ Van Krieken P.J. Terrorism and the International Legal Order, The Hague, 2002, P. 18.

regime with intent to achieve political goals, and involving any acts causing or threatening to cause harm to general public, placing their lives, health, rights and legitimate interests in danger in order to coerce a third party (government or international organisation) to make decisions dictated by terrorists, as well as other ancillary criminal activities of such organisations.

In reviewing modern international terrorism we should agree with a number of analysts who believe that there is a convincing threat of international terrorist organisations accessing weapons of mass destruction⁷.

Another serious issue in our view is that growing economic and military resources accumulated by international terrorist organisations may, when being sufficient, enable them to seize power in certain states and conduct local hostilities.

In international law, all attempts to develop and adopt a comprehensive convention on combating international terrorism have been unsuccessful. The main reason for this is lack of agreed definition of international terrorism that would be satisfactory to all states.

In the Report of the IBA Task Force on Terrorism three points of disagreement were summarized:

- First, whether the Draft Convention should adopt an armed conflict or law enforcement approach to counter-terrorism;
- Second, whether a definition of terrorism should include or exclude 'state terrorism', and whether it should include or exclude the acts of state armed forces; and
- Third, whether armed resistance to an occupying regime or to colonial or alien domination should be included or excluded from the Draft Convention definition of terrorism⁸.

However, under international law states are responsible for preventing and suppressing terrorism, with such responsibilities being provided for in 15 comprehensive conventions and protocols against different forms of terrorism, 9 regional conventions and additional protocol and a significant number of resolutions adopted by the UN Security Council and General Assembly. The existing international regulations govern cooperation of states in combating different forms

⁷ Preventing Nuclear Terrorism: The Report and Papers of the International Task Force on Prevention of Nuclear Terrorism/ edited by Leventhal P., Alexander Y. 1987. P.7; US-National Research Council, Committee on Science and Technology for Countering Terrorism. Making the Nation Safer. 2002. P. 39-40; Wolny K. Die völkerrechtliche Kriminalisierung von modernen Akten des internationalen Terrorismus. Berlin: Duncker & Humblot. 2008. S. 21.

⁸ Terrorism and international law: accountability, remedies and reform. A Report of the IBA Task Force on Terrorism. New York: Oxford University Press. 2011. P. 2.

of terrorism and set forth obligations to subject terrorism to criminal liability under local laws, conduct investigations, administer justice over or subject terrorists to extradition, issue freezing injunctions on assets of those involved in terrorist activities⁹.

Analysis of the UN Security Council Resolutions indicates a trend towards recognition of terrorism as a crime under international customary law.

For the first time in international judicial practice, in the Interlocutory Decision on the applicable law of 16 February 2011¹⁰, the Appeals Chamber of the Special Tribunal for Lebanon, with Antonio Cassese, a famous international lawyer, acting as the presiding official, declared terrorism in time of peace as already recognized crime under customary rule of international law. Even if not all states agree with this position, it is an important step towards recognizing terrorism as a crime under international customary law.

At the national level states enacted special anti-terrorism legislation, legislation for prevention of financing of terrorism and norms of criminal law, based on international agreements. In implementing counter-terrorism rules of international law states also shall take into account rules of international humanitarian law, regulations on protection of human rights and rights of refugees.

1.2. Distinctive features of modern terrorism.

Since the end of 20th century international terrorism has become a global threat to international peace and security. There are two major distinctive features of modern terrorism.

The first distinctive feature is the emergence of international terrorist organisations. International terrorist organisations pursue their own economic and political interests and often act independently of any states. They have resources that enable them to control certain territories, get involved in armed conflicts in different parts of the world, collaborate with transnational criminal corporations and, in certain cases, influence political decisions of states. International terrorist organisations have become an independent force comparable to some states being involved in international conflicts. According to K. Wolny, non-state terrorism demonstrates an increased potential and has as much power as a state¹¹.

⁹ *ibid* P. 1-2.

¹⁰ STL Appeals Chamber Interlocutory Decision on the applicable law: terrorism, conspiracy, homicide, perpetration, cumulative charging 16.02.2011 STL-11-01/I/AC/R176bis // <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule>

¹¹ Wolny K. Die völkerrechtliche Kriminalisierung von modernen Akten des internationalen Terrorismus. Berlin: Duncker & Humblot. 2008. S. 57.

After World War II, the main focus of international law, particularly, international security law and international humanitarian law, was to regulate relationships between states, including cooperation in preventing armed conflicts and during such conflicts. At the end of the 20th century states were unprepared for conflicts with involvement of international terrorist organisations.

The second distinctive feature is that certain states and international terrorist organisations started to cooperate in a way that makes such cooperation invisible and hardly provable.

We see the types of relations between states and international terrorist organisations as follows:

Active support. According to K. Wolny, state-supported terrorism is distinctive in that it is backed by states assisting non-state organisations in planning and implementing terrorist attacks, providing logistic or material support¹².

States maintain contacts with international terrorist organisations through third parties and give them funds, weapons, organisational and other forms of support. Such cooperation is based on common political interests that states and international terrorist organisations may have. However, states do not control acts of terrorist organisations. Lack of control is exactly the difference between this and the following form of cooperation.

Use of international terrorist organisations as method of warfare. This form of cooperation occurs when states not only support international terrorist organisations but exercise direct effective control over their activities as well. International terrorist organisations are used by states as a secret weapon of war. The breakup of the Soviet Union transformed geopolitical situation across the world. Many countries that had previously been following the foreign policy of either the Soviet Union or the United States have begun playing a more serious and independent role in global politics. Having no sufficient military and economic resources to confront USA and EU directly, certain states use terrorism as an efficient mechanism to influence an enemy, without being held liable under international law.

Passive support. This form of cooperation occurs when states do not render direct support and even can have no contacts with international terrorist organisations. However, they do nothing to counter international terrorist organisations using their state territories for setting training camps and placing funds with financial institutions. By rendering passive support states expect that criminal investments will have a positive effect on their domestic economy and ensure social

¹² *ibid* S. 60.

stability in their countries. Therefore, they take neither law-enforcement nor military measures against terrorist organisations.

Failed states. The issue of failed states is closely connected with the above forms of cooperation between states and international terrorist organisations. In this case we have a situation whereby a government fails to control a part of its state territory and is unable to efficiently exercise its powers. Failed states do not have enough capacities for combating international terrorism.

2. Weaknesses of the modern system for combating terrorism at the international level.

In addition to objective political issues there is a range of international law issues having adverse effect on the efficient development of international system for combating terrorism.

The first such issue is lack of an efficient internationally applied mechanism for holding international terrorist organisations responsible under international criminal law. There is no state that acting exclusively within its national jurisdiction could have enough capacity to ensure sufficient and efficient measures against international terrorist organisations that act in a number of jurisdictions. Judgments against international terrorist organisations and their members issued in one state often have no effect and may not be enforced in other states. Many jurisdictions have adopted special legal norms for listing terrorist organisations in judicial or administrative order¹³. However the lists of terrorist organisations differ from jurisdiction to jurisdiction¹⁴. International terrorist organisations can use these differences and look for safe havens for their activities.

Measures taken by states are focused primarily on preventing certain terrorist attacks or investigating crimes already committed. Preventive measures require permanent considerable expenditures that affect national budgets and imply significant restrictions on rights of law-abiding citizens.

In many cases states have no legal grounds for applying efficient preventive measures against persons who are known to be associated with international terrorist organisations. A telling example is a recent terrorist act in France committed by an Al-Qaida member, Mohammed Merah. As the French interior minister Claude Gueant reported to BBC journalists, the Central

¹³ For example: An Act to enhance the Commonwealth's ability to combat terrorism and treason, and for related purposes 2002 (Australia); Федеральный закон от 6 марта 2006 г. № 35-ФЗ «О противодействии терроризму» (Russia); Terrorism Act 2000, Terrorism Act 2006 (UK); Decree by Federal Law № 1 of 2004 on Combating Terrorism Offences (UAE); the Immigration and Nationality Act of 1952 (USA).

¹⁴ <http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary> ; http://www.mha.gov.in/uniquepage.asp?Id_Pk=292; http://nak.fsb.ru/nac/ter_org.htm Country Reports on Terrorism 2011, p. 220-221 // <http://www.state.gov/j/ct/rls/crt/2011/195553.htm> <http://www.cisatc.org>

Directorate of Interior Intelligence (DCRI) had been tracking the killer for years¹⁵. This basically means that years of significant police efforts and considerable budgetary funds did not help prevent Merah from killing innocent people, including children. Unfortunately, this example is not exclusion.

The application of general preventive measures such as strengthening control in airports, at sea and rail transport, increasing security measures within specific targets do not help defeat international terrorist organisations. These measures only allow states and citizens to co-exist with international terrorist organisations in intervals between acts of terrorism constituting a permanent threat to state and public security.

This substantiates the idea of extending international jurisdiction over crimes committed by international terrorist organisations and development of measures aimed at termination of their activities.

The second issue is that certain states and international terrorist organisations cooperate in a way that makes it very hard or even impossible to establish the fact of such cooperation. States may adduce various arguments to avoid entering into international treaties or refrain from taking practical steps towards cooperation under such treaties. They maintain relations with international terrorist organisations through a network of third parties. In case of active or especially passive support states do not control acts of international terrorist organisations. There is no legal base for responsibility of states for conduct of group of persons as acts of states under international law. States also do not usually acknowledge or adopt the conduct of international terrorist organisations as their own. There is also no legal base for responsibility of state for coercion of international terrorist organisations, because such organisations are not subjects of responsibility under international law.

To elaborate its response to non-cooperating states, the international community will at least acquire understanding of the position such states. In our opinion, in order to accomplish this objective a new international legal mechanism must be developed. Undoubtedly, political negotiations play an important role in developing international relations and resolving international conflicts. However, negotiating has no direct legal effect. Thus, to hold states supporting international terrorist organisations responsible, a legal mechanism for clarifying their position has to be designed.

¹⁵<http://top.rbc.ru/society/21/03/2012/642796.shtml>

The basic idea is to develop efficient international laws and regulations on combating not only particular terrorist attacks or individual terrorists but also international terrorist organisations as such. With such regulations in place, the international community would be able to take preventive measures and strike down the fundamentals of international terrorist organisations. International terrorist organisations and supporting states are the real enemies that must be uncovered.

3. International terrorist organisation as a potential subject of responsibility under international criminal law.

3.1. The experience of Nurnberg and Tokyo tribunals.

The idea of recognizing certain organisations as criminal under international law is not new. This originated together with the creation of the Nurnberg tribunal, which contributed to the development of international criminal justice.

The provisions of the London Charter of International Military Tribunal, issued on 8 August 1945¹⁶, which stipulated the procedures for trial and punishment of the major war criminals of the European Axis countries (The Nurnberg Trials), are of great importance in determining whether an international terrorist organisation can be subject to liability under international criminal law.

Pursuant to Article 9 of the Charter, at the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organisation. Article 10 provides for that in cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership in such a group before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned. The Tribunal declared criminal Gestapo, SD, SS and political leadership of the NSDAP.

3.2. Responsibility of international terrorist organisations under international law.

The problematic of potential responsibility of international terrorist organisations under international law is poorly examined. A worth-mentioning study on the possibility of assigning

¹⁶ <http://www.unhcr.org/refworld/topic,4565c22538,4565c25f443,3ae6b39614,0.html>

limited international legal status to international terrorist organisations has been conducted by Lars Mammen¹⁷. The objectives of his study are to find theoretic and legal rationales for assigning limited international legal status to international terrorist organisations; to analyse whether and to what extent sanctions, namely sanctions under resolutions adopted by the UN Security Council acting under Chapter VII of the UN Charter, may be imposed on a terrorist organisation having separate legal personality; to study the effect of recognising a terrorist organisation as having limited international legal personality on applicability of international humanitarian law in armed conflicts with involvement of members of terrorist organisations¹⁸.

The main argument of Mammen in favour of recognizing international terrorist organisation as a subject of international law with limited personality is to extend to terrorist organisations obligations under international security law and international humanitarian law.

Although we agree with number of ideas and arguments presented by Mammen, we cannot agree with main idea of limited international legal personality of international terrorist organisations acting against norms of international law¹⁹.

In our opinion, international terrorist organisations should be recognised as subjects of crime “international terrorism” and responsibility under international law. What follows are arguments in favour of this position:

International terrorist organisations act systematically on territories of several states;

These organisations are organisationally and financially independent from states;

States often do not have effective control of their criminal activities;

International terrorist organisations collaborate with several states, which cooperation is based on common political and economic interests;

The acts of international terrorist organisations become a global threat to international peace and security, such acts are comparable with acts of states;

One of the main goals of international terrorist organisations is seize political power in different states and regions of the world, as a result in the framework of international community will exist states - subjects of international law under control of terrorist organisations, acting in their interests.

¹⁷Mammen, Lars Völkerrechtliche Stellung von internationalen Terrororganisationen. Nomos Verl. Baden-Baden 2008. 342 S.

¹⁸ Mammen, Lars Völkerrechtliche Stellung von internationalen Terrororganisationen. Nomos Verl. Baden-Baden 2008. S. 26

¹⁹ Иванов Э. А. Международная террористическая организация как потенциальный субъект ответственности по международному уголовному праву // Право. Журнал Высшей школы экономики. 2012. № 4.

A number of resolutions of the UN Security Council are aimed not against states but directly at combating the international terrorist organisation Al-Qaida and the Taliban, namely resolutions 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1988 (2011) and 1989 (2011).

Resolution 1526 (2004) dated 30 January 2004 it stresses that the Al-Qaida organisation and members of the Taliban, and any individuals, groups, undertakings and entities associated with them, represent threat to international peace and security.

An important resolution in our view is UN Security Council resolution 1822 (2008) dated 30 June 2008, which provides for application of sanctions against Al-Qaida, Osama bin Laden and the Taliban, and other individuals associated therewith. The Council emphasized that sanctions are an important tool under the Charter of the United Nations in the maintenance and restoration of international peace and security, and stressed in this regard the need for robust implementation of the measures in paragraph 1 of the resolution as a significant tool in combating terrorist activities. Acting under Chapter VII of the UN Charter the Security Council decided that all States shall take the measures as previously imposed by paragraph 4(b) of resolution 1267 (1999), paragraph 8(c) of resolution 1333 (2000), and paragraphs 1 and 2 of resolution 1390 (2002), with respect to Al-Qaida, Osama bin Laden and the Taliban, and other individuals, groups, undertakings, and entities associated with them, as referred to in the list created pursuant to resolutions 1267 (1999) and 1333 (2000) (the “Consolidated List”). In accordance with UN Security Council resolutions 1988 (2011) and 1989 (2011) consolidated list was divided into Al-Qaida Sanctions List and Taliban Sanctions List.

We propose the following mechanism for holding international terrorist organisations responsible under international law.

An international authority (international court) issues its decision that an organisation is an “international terrorist organisation”. Such decision would have the following effect:

Internationally:

- Issuing a ban on the organisation’s activity;
- Banning the granting political asylum to organisation’s members;
- Banning the recognition of terrorist organisation as a belligerent and organisation’s members as combatants under international humanitarian law.

Domestically:

- Imposing liability on any individuals involved for membership in the international terrorist organisation;
- Liquidating legal entities incorporated or controlled by members of the international terrorist organisation;
- Freezing and further confiscating assets owned by members of the international terrorist organisation, and legal entities incorporated or controlled by them.

Any such decision should be res judicata for national courts. An individual's association with the international terrorist organisation would be the only fact to prove. The criminal nature of such organisation would be considered proved.

The issue of possible association of an individual with an international terrorist organisation found reflection in 1617 UN Security Council resolution (2005) dated 29 July 2005. Acting under Chapter VII of the UN Charter, the Security Council decided that acts or activities indicating that an individual, group, undertaking, or entity is "associated with" Al-Qaida, Osama bin Laden or the Taliban include:

- Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;
- Supplying, selling or transferring arms and related materiel to Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;
- Recruiting for Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof; or
- Otherwise supporting acts or activities of Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof.

3.3. A mechanism for recognising an organisation as an "international terrorist organisation".

In order to bring an international terrorist organisation to liability, it is necessary to set an international authority (international court) competent to decide whether an organisation is an "international terrorist organisation", determine procedure for issuing decisions and legal effect thereof.

We consider it theoretically possible that decisions to impose liabilities on international terrorist organisations are within the competence of the UN Security Council, International Criminal Court or any designated international tribunal.

UN Security Council. The UN Security Council is the main body of the United Nations and has primary responsibility for the maintenance of international peace and security. A question that arises when analysing resolutions adopted by the UN Security Council considers which matters fall within the Council's competence. The UN Security Council is only competent to determine violation of the peace, threat to the peace, acts of aggression or acts taken by states in violation of international law.

The UN Security Council is a political body and is not competent to assess whether states act in compliance with international law. In actual practice, the Council does not have enough time to conduct any legal analyses or assessments of state actions. For example, let us consider a situation where two or more parties to a conflict act in violation of international law. Even in this complex situation, the Security Council would be seeking a prompt and efficient political decision for the maintenance or restoration of international peace, without conducting any time-consuming analysis to reveal possible violations.

On the basis of the foregoing, we may conclude that the legal assessment of acts committed by international terrorist organisations cannot be performed directly by the UN Security Council.

International Criminal Court. The International Criminal Court acts pursuant to the Rome Statute adopted on 17 July 1998 and effective from 1 July 2002

In accordance with Article 5 of the 1998 Statute of the International Criminal Court, the Court has jurisdiction over crimes of genocide, crimes against humanity, war crimes, and crimes of aggression.

Considering the issue on the status of the International Criminal Court, at the 46th session of the International Law Commission, held in 1994, Alain Pellet, a member from France, noted that a treaty to which only some states would be parties would not change the scope of competence for the Security Council provided for by the UN Charter and expressed regrets that only some states would have an opportunity to adjudge punishment for crimes concerning the international community. According to Pellet, an International Criminal Court, established as a subsidiary body of the General Assembly or even a common subsidiary body of the General Assembly and the UN Security Council, would be an appropriate solution. The Court could then invoke the

powers of the United Nations and act as a judicial authority for the international community, rather than for a small group of states²⁰.

In our view, the idea of extending jurisdiction of the International Criminal Court over criminal activities of international terrorist organisations has three serious drawbacks. First of all, implementation of this idea will involve a cumbersome procedure for making fundamental amendments to the Rome Statute. Secondly, the International Criminal Court's jurisdiction is limited to the states parties to the Rome Statute. Pursuant to Article 4 of the Statute, the Court may exercise its functions and powers on the territory of any State Party and, by special agreement, on the territory of any other state. Thirdly, the International Criminal Court has power to exercise its jurisdiction over crimes committed by individuals only. Therefore the idea of extending jurisdiction of the International Criminal Court over criminal activities of international terrorist organisations is considered impracticable.

We believe that the third solution, which lies with the establishment of an international tribunal on crimes of international terrorist organisations, deserves particular attention and should be analysed.

4. Establishment of an International Tribunal on Crimes of International Terrorist Organisations (ITCITO) as a possible solution.

4.1. The international legal basis for establishing International Tribunal on Crimes of International Terrorist Organisations (ITCITO)

The establishment of international criminal tribunals and internationalized tribunals and chambers has become common practice since the Nurnberg and Tokyo trials that has developed over the past decades. International criminal tribunals for the former Yugoslavia and Rwanda have been established, as has a number of internationalized tribunals.

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) was established by Resolution 827 of the United Nations Security Council dated 25 May 1993. The International criminal tribunal for Rwanda (ICTR) was established on 8 November 1994 by the United Nations Security Council by Resolution 955 (1994) in order to judge people responsible for the Rwandan Genocide and other serious violations of international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January 1994 and 31 December 1994.

²⁰ Yearbook of the International Law Commission 1994. T.1. p.17. A|CN4|SER.A.|1994.

The above resolutions to establish tribunals were adopted by the UN Security Council in accordance with Chapter VII of the Charter and are binding upon the states.

The UN Charter does not regulate the establishment of international judicial bodies by the Security Council. However, as set out in Article 29 of the UN Charter, the Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions.

A growing practice of internationalized criminal courts represents one of the development trends in modern international criminal justice. There are proposals on a framework convention on establishing hybrid international criminal courts²¹.

The possibility of establishing an International Tribunal on Crimes of International Terrorist Organisations as a subsidiary organ of the UN Security Council depends on whether the criminal activities of international terrorist organisations constitute a threat to international peace and security and whether combating such activities is within the functions of the UN Security Council.

The UN General Assembly adopted numerous counter-terrorism resolutions. As stated in the Global Counter-Terrorism Strategy of the United Nations adopted by General Assembly Resolution A/Res/60/288 dated 8 September 2006, terrorism constitutes one of the most serious threats to international peace and security. Pursuant to General Assembly Resolution A/Res/66/105 dated 9 December 2011, there is a need to strengthen the role of the United Nations and respective specialised institutions in combating international terrorism.

Moreover, the UN General Assembly places special emphasis on the application of the principle of universal jurisdiction. In its Resolution A/Res/66/103, dated 13 January 2012, the General Assembly decides that the Sixth Committee, at the 67th session of the General Assembly, will establish a working group with a view to continue a thorough consideration of the scope and application of universal jurisdiction.

Over the period from September 2001 to May 2012, the UN Security Council adopted 27 resolutions condemning international terrorism and contemplating counter-terrorism measures.

In its Resolution 1368 (2001) dated 12 September 2001, the UN Security Council condemns the terrorist attacks which took place in the USA and regards such acts, like any act of international terrorism, as a threat to international peace and security. In clause 5 of the resolution the UN

²¹See Ambach P. Eine Rahmenkonvention für die Errichtung hybrider internationaler Strafgerichte. Hamburg: Verlag Dr. Kovac, 2009.

Security Council expresses its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.

As repeatedly stated by the UN Security Council in its resolutions, including those adopted in accordance with Chapter VII of the UN Charter, international terrorism constitutes a threat to international peace and security. Acts of international terrorism are considered as a threat to international peace and security in the following resolutions: 1373 (2001), 1377 (2001), 1438 (2002), 1440 (2002), 1450 (2002), 1455 (2003), 1611 (2005), 1624 (2005).

It is important to note that in resolutions 1456 (2003) dated 20 January 2003, 1566 (2004) dated 8 October 2004, 1617 (2005) dated 29 July 2005, 1787 (2007) dated 10 December 2007, 1805 (2008) dated 20 March 2008, 1904 (2009) dated 17 December 2009, 1963 (2010) dated 20 December 2010, 1989 (2011) dated 17 June 2011, the Security Council states that not only acts of international terrorism but terrorism in all its forms and manifestations constitute a threat to international peace and security.

In resolution 1377 (2001) dated 12 November 2001 the UN Security Council stressed that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of as well as any other form of support for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations.

As noted by the UN Security Council in a number of resolutions, combating terrorism is within its responsibilities in accordance with the UN Charter. Thus, in resolution 1465 (2003) dated 13 February 2003, adopted in connection with the bomb attack in Colombia, the UN Security Council expressed its reinforced determination to combat all forms of terrorism in accordance with its responsibilities under the Charter of the United Nations. Similar statements may be found in resolutions 1516 (2003), 1530 (2004), 1535 (2004), 1618 (2005).

Having analysed the UN Security Council resolutions aimed at combating international terrorism, we may conclude that the UN Security Council consistently considers acts of international terrorism committed in various parts of the world as a threat to international peace and security, that a number of resolutions are aimed directly at combating international terrorist organisations and individuals and organisations associated therewith, and that the Security Council consistently states that its responsibilities include combating international terrorism.

We see the possibility of establishing an International Tribunal on Crimes of International Terrorist Organisations as pursuant to a resolution adopted by the UN Security Council. This solution will ensure an appropriate response to threats to international peace and security and the development of the existing practice of establishing international criminal tribunals.

4.2. Major problems of existing international tribunals and the ICC.

The International Criminal Court and existing international criminal tribunals receive criticism from both states and experts. The main weaknesses and problems in their activity are a lack of cooperation with states in collecting evidence; problems with enforcing decisions, in particular those issued against high-ranking public officials; a lack of proprietary detention facilities and prisons; lengthy proceedings; and the considerable expenses to maintain tribunals.

A new tribunal should be established with the above weaknesses taken into account.

4.3. Jurisdiction of the International Tribunal on Crimes of International Terrorist Organisations.

When setting up the International Tribunal on Crimes of International Terrorist Organisations, it is necessary to ensure that its activity is efficient, that its jurisdiction and competence are delineated, that its cooperation with existing international organisations and authorities is in place, and that no objections of principle are raised by states.

We believe that ITCITO's jurisdiction shall be limited to matters on recognizing organisations as "international terrorist organisations" and holding such organisations responsible in accordance with the rules of international law.

The Tribunal shall have no jurisdiction over individuals to avoid duplicating the functions of the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida, associated individuals, entities, and national courts, and, in the possible future, the International Criminal Court. As this solution does not require proprietary detention facilities and prisons, the Tribunal's expenses would be significantly lower than that of the tribunals for Yugoslavia and Rwanda.

Moreover, the ITCITO shall not be empowered to issue binding decisions relating to the crimes of states. Otherwise, its establishment might be challenged by states. Even if not challenged, in practice it would be extremely difficult to have such decisions enforced in relation to states.

4.4. Organisation of the International Tribunal on Crimes of International Terrorist Organisations.

The International Tribunal shall consist of the following organs:

- Five Prosecutors of Tribunal;
- Trial chamber;
- Appeal chamber;
- President of the Tribunal;
- Secretariat.

The Trial chamber shall be composed of 20 permanent independent judges, no 2 of whom may be nationals of the same state. The President of the Tribunal shall appoint 5 judges for each process. Judges from an applied state should not participate in the judicial process.

The Appeals chamber shall be composed of 7 independent judges, no 2 of whom may be nationals of the same State. Judges of the Judicial chamber should not simultaneously be judges of the Appeals chamber.

The President of the International Tribunal shall be a member of the Appeals chamber and shall preside over its proceedings.

The Secretariat shall be responsible for the administration and servicing of the International Tribunal.

4.5. Proceedings at the International Tribunal on Crimes of International Terrorist Organisations.

Presented below is a step-by-step description of the ITCITO model.

Step 1. Application. A state files an application. The application of any state seeking recognition of an organisation as an “international terrorist organisation” shall form the legal grounds for initiating proceedings at the ITCITO. An application shall be filed together with the national court’s order against members of the international terrorist organisation, a decision about listing terrorist organisation under national law (in case there is a listing), and other available materials on such organisation. The Prosecutor of the Tribunal should examine the application and prepare an opinion. The Tribunal may commence the proceedings if examination of the materials reveals that the organisation’s members were convicted of committing crimes of

terrorism. The President of the Tribunal shall decide on the beginning of the process and appoint five judges of the Trial chamber.

Step 2. Process by the Trial chamber.

The Trial chamber shall examine the materials submitted by the applicant state. Prosecutor of the Tribunal represents position of state that initiated the process. Representatives of state are entitled to participate on the process. The Tribunal shall have the rights and powers to:

- Request additional materials from the applicant state;
- Summon officials of the applicant state to appear before the tribunal for clarifications;
- Request materials from states;
- Obtain materials submitted by interested states on their own initiative;
- Hear representatives of states that wish to address the Tribunal session and present their positions.

To recognise an organisation as an “international terrorist organisation”, the Tribunal shall establish the following principle facts:

1. The crime of which the organisation was convicted by the national court may be qualified as a “crime of terrorism” in accordance with universal international treaties in the field of counter-terrorism²².
2. The crime was committed by members of the terrorist organisation.
3. The terrorist organisation carries out its activity in two or more states.

If all three facts are established, the Tribunal may decide to recognise the organisation as an “international terrorist organisation”.

Furthermore, the Tribunal shall determine, or attempt to determine, those states where the international terrorist organisation engages in its activities and the facts of collaboration of states with international terrorist organisations.

The decision of the Trial chamber should be officially published and come into force 60 days after publication.

²² http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml

The applicant state and organisation that is recognized as an “international terrorist organisation” have the right to appeal before the decision come into force.

Step 3. Process by the Appeal chamber.

The Appeal chamber should examine new information presented in appeal and possible errors on questions of law in the decision of the Trial chamber. The decisions of the Appeal chamber come into force immediately.

Step 4. Proposal for cooperation to states where international terrorist organisations are located.

As mentioned above, it is very important to clarify the position of states where international terrorist organisations are located.

Once the decision is issued, the ITCITO notifies the states where international terrorist organisations operate to that effect, and proposes terms of cooperation. Further actions will depend on the position of these states.

4.6. Legal validity and effect of decisions.

Decisions issued by the Tribunal shall have a binding effect on states.

4.7. Enforcement of decisions. Cooperation with the UN Security Council.

What follows are scenarios that may take place after the ITCITO issues its decision and proposal to cooperate.

Scenario 1. A state takes efficient measures against the international terrorist organisation located in its territory and informs the Tribunal to that effect.

Scenario 2. A state is ready to cooperate but is unable to take efficient measures against the terrorist organisation or fails to control a part of its territory. In this case, international organisations and other states may render technical and other assistance to this state.

The International Tribunal on Crimes of International Terrorist Organisations may also be empowered to establish, based on treaties with interested states, internationalised tribunals to prosecute members of international terrorist organisations within the territories of respective states. Thus, the International Tribunal could be charged with the responsibility to select and train judges for internationalised tribunals. Such trainings will provide an opportunity for judges to improve knowledge in the field of international criminal law and laws of a supported country.

Scenario 3. If a state rejects the proposal to cooperate, but there is no evidence that this state actively supports the international terrorist organisation, the Tribunal informs the UN Security Council of the existing situation.

When considering the position of the state that is refusing to cooperate in combating international terrorist organisations operating in its territory, it is important to follow the provisions of Security Council Resolution 1373 (2001), dated 28 September 2001. The UN Security Council, acting under Chapter VII of the UN Charter, decided that states should prevent those who finance, plan, facilitate, or commit terrorist acts from using their respective territories for those purposes against other states or their citizens.

Scenario 4. Sanctions and preventive self-defence. If a state rejects the proposal to cooperate and there is evidence that this state actively supports the international terrorist organisation, the Tribunal informs the UN Security Council and the state that initiated the proceedings at the Tribunal about the existing situation.

If the state is found to exercise actual control over the activities of the international terrorist organisation, it may be held responsible under international law.

Even if the state does not exercise effective control, but does provide active support to international terrorist organisation, the UN Security Council may qualify the situation as constituting a threat to international peace and security and take necessary measures acting under Chapter VII of the UN Charter. The states that initiated the proceedings may rely upon the right of self-defense and take appropriate measures.

The International Tribunal on Crimes of International Terrorist Organisations shall therefore act in close cooperation with the UN Security Council and create necessary conditions and a legal framework for the prosecution of international terrorist organisations and members thereof. By conducting an international legal assessment of crimes committed by international terrorist organisations, the Tribunal may help the UN Security Council elaborate an appropriate political response to such crimes, adopt resolutions based on Chapter VII of the Charter, and impose sanctions on states that support terrorists.

4.8. Setting up the International Tribunal on Crimes of International Terrorist Organisations.

Judges shall be appointed by the General Assembly as advised by the UN Security Council and act in their own capacity.

Potential judges shall meet requirements applicable in their countries for high-ranking judicial positions and have expertise in criminal law and international law.

5. Possible impact of recognizing international terrorist organisations as subjects of responsibility under international criminal law on the responsibility of states.

The possible model of responsibility of states supporting international terrorist organisations could include the following elements:

- Recognizing international terrorism as a crime under international customary law and the obligation of states to not collaborate with international terrorist organisations and to take effective measures against such organisations as obligations *erga omnes*;
- Recognizing international terrorist organisations as subject to crimes of “international terrorism” and responsibility under international law;
- Responsibility of states for coercion of international terrorist organisations.

In our view, the Tribunal’s proposal of cooperation, which contains detailed information about the crimes of an international terrorist organisation, will help to clarify the position of a state in the fight against international terrorism.

Refusal to cooperate can be interpreted as confirmation that a state knows of internationally wrongful acts. In this case, such a state should be responsible for aiding and abetting an international terrorist organisation.

Conclusion.

Based on the results of our analysis, we conclude that it is reasonable to establish an International Tribunal on Crimes of International Terrorist Organisations as a subsidiary body of the UN Security Council. The Tribunal may be established by a resolution of the UN Security Council, similarly to the existing international criminal tribunals for the former Yugoslavia and Rwanda.

The Tribunal shall be competent to issue decisions that recognize organisations as being “international terrorist organisations”, whose decisions are *res judicata* for national courts, and which cooperates with states and the UN Security Council.

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