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# ORGANIZED CRIMINALS AS TERRORISTS

ZAID FALAH, TAL MIMRAN & MOHAMMED S. WATTAD\*

## INTRODUCTION

Terrorists and organized criminal groups are increasingly working together as a source of financing, or to elicit fear within groups or areas they seek to influence or control.<sup>1</sup> They also exchange knowledge and support each other operationally.<sup>2</sup> Naturally, and unfortunately, this partnership bolsters their capabilities.<sup>3</sup> Terrorist and organized criminal groups also bear many similarities; for example, they operate clandestinely with similar tactics and a shared desire for intimidation through violence.<sup>4</sup> The growing nexus between the two groups challenges security and order and erodes confidence in the State.<sup>5</sup>

Against this backdrop, this Article journeys into the relationship between terrorism and the world of organized criminal activity, commonly referred to as the organized crime-terror nexus.<sup>6</sup> This Article investigates the conceptual premises on which both phenomena stand, and the practical relations between them, to explore whether organized criminals should be treated as terrorists.

There is a growing understanding at the international level that a close connection exists between international terrorism and transnational organized crime.<sup>7</sup> The trend towards a liberal globalized economy after the end of the Cold War provided new opportunities, such as communication technology, that strengthened the nexus between terrorism and organized

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\* **Dr. Zaid Falah**, Judge of the Magistrates' Court, Haifa District in Israel; Adjunct Lecturer at the School of Law, Zefat Academic College (Israel). **Dr. Tal Mimran** is a research director at Federmann Cyber Security Research Center (Hebrew University of Jerusalem) and adjunct lecturer at Zefat Academic College. **Prof. Mohammed S. Wattad**, Deputy Vice President for Academic Affairs, Dean of Law, and Full Professor Zefat Academic College; Senior Researcher, at the Institute for National Security Studies, Tel-Aviv University; Senior Researcher at the Institute for Israeli Thought; Research Fellow, the International Institute for Counter-Terrorism, Reichman University; and Research Fellow, the Minerva Center for the Rule of Law under Extreme Conditions, Haifa University. **The authors' names are provided in an Alphabetical order.** The authors are most grateful to the faculty members of the School of Law at Zefat Academic College, before whom an earlier version of this article was presented; particularly, they are most grateful to Dr. Asaf Harduf for his very organized detailed, and constructive notes, comments, and criticism, all the more so for opening doors of wisdom before the authors.

<sup>1</sup> U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., POLICY TOOLKIT ON THE HAGUE GOOD PRACTICES ON THE NEXUS BETWEEN TRANSNATIONAL ORGANIZED CRIME AND TERRORISM 2 (2019).

<sup>2</sup> İsmail Sari, *The Nexus Between Terrorism and Organized Crime; Growing Threat?* 6 UYUŞMAZLIK MAHKEMESİ DERGİSİ 463, 472 (2016).

<sup>3</sup> Erik Alda & Joseph L. Sala, *Links Between Terrorism, Organized Crime and Crime: The Case of the Sahel Region*, 3 INT'L J. SEC. & DEV. 1, 4 (2014).

<sup>4</sup> Louise I. Shelley, *The Nexus of Organized International Criminals and Terrorism*, 40 INT'L ANNALS CRIMINOLOGY 85, 85 (2002).

<sup>5</sup> Patricia Bibes, *Transnational Organized Crime and Terrorism: Colombia, a Case Study*, 17 J. CONTEMP. CRIM. JUST. 243, 251 (2001).

<sup>6</sup> Helena Carrapico, Daniela Irrera & Bill Tupman, *Transnational Organised Crime and Terrorism: Different Peas, Same Pod?*, 15 GLOB. CRIME 213, 214 (2014).

<sup>7</sup> S.C. Res. 1373, ¶ 4 (Sept. 28, 2001).

crime.<sup>8</sup> The September 11, 2001 terrorist attacks in the United States became a watershed moment that led to the understanding that the link between terrorism and organized crime is central domestically and internationally.<sup>9</sup> More recently, the COVID-19 health crisis allowed terrorists and organized criminal groups to exploit the disruption and economic hardships caused by the pandemic to spread fear, radicalize, and recruit new followers.<sup>10</sup>

Indeed, the international community has introduced a range of modalities and tools for international cooperation in the battle against terrorism and organized crime; for example, extradition, freezing and seizing of assets, and more.<sup>11</sup> Comparative inquiry reveals that many domestic legal systems distinguish between crimes committed by an individual perpetrator and others committed by joint perpetrators. One would assume that when more perpetrators are involved in the criminal commission, legal systems would view them as more dangerous. Such dangerousness is derived mainly from the fact that upon joining together, the potential to execute harm is greater.

However, many legal systems address the dangerousness of organized criminal groups not solely through their joint perpetration, but rather, first and foremost, through their affiliation. This Article argues that more emphasis should be placed on dangerousness for two reasons: first, because these groups act from within very organized, well-established, and equipped groups,<sup>12</sup> and second, because they are incentivized to empower their status in the society by imposing extreme fear on the public as such.<sup>13</sup> This is especially true because terrorism does not constitute a crime in itself; rather, it represents a high level of dangerousness associated with its conceptual meaning of imposing fear on the public.

This Article is constructed as follows. Part I frames the discussion by characterizing organized criminal groups and terrorism, as this is the underlying basis for our discussion. Part II highlights the nexus between terrorism and organized criminal groups from an international perspective. This requires explaining what leads to cooperation between terrorists and organized criminal groups and discussing the commonalities and differences between these groups. Among the common features between terrorists and organized criminal groups, this Article focuses on criminal activity as a basis for cooperation, reliance on modern technologies and networks, violence and intimidation, criminalization, and the shared hostility towards the State apparatus. Part III discusses international efforts to cope with the growing

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<sup>8</sup> Frank Bovenkerk & Bashir Abou Chakra, *Terrorism and Organized Crime*, U.N. OFFICE ON DRUGS AND CRIME CRIME, FORUM ON CRIME AND SOCIETY, TERRORISM & ORGANIZED CRIME, at 8, U.N. Sales No. E.05.IV.8 (2004).

<sup>9</sup> Carrapico, Irrera, & Tupman, *supra* note 6, at 215.

<sup>10</sup> Press Release, Security Council, Briefing Security Council on Linkages between Terrorism, Organized Crime, Executive Director Notes Greater Efforts Needed in Cross-Border Cooperation, U.N. Press Release SC/14273 (Aug. 6, 2020).

<sup>11</sup> U.N. Secretary-General, *Action Taken by Member States and United Nations Entities to Address the Issue of Linkages Between Terrorism and Organized Crime*, U.N. Doc. S/2020/754, ¶ 18 (July 29, 2020).

<sup>12</sup> See e.g., Tamara Makarenko, *The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism*, 6 GLOB. CRIME 129, 130, 135, 137 (2004) (discussing criminal groups in Colombia that controlled almost half of the Colombian territory at a certain point and enjoyed hundreds of millions of dollars in annual revenue).

<sup>13</sup> Alda & Sala, *supra* note 3.

nexus between terrorism and organized criminal groups, alongside domestic legislation that was an important result of this effort—out of a desire to promote harmonization in the criminalization of organized criminal groups. Finally, Part IV discusses whether there is a justification to treat terrorism and organized crime similarly by harmonizing the battle against the two phenomena.

## I. FRAMING THE DISCUSSION

### A. FEATURES OF ORGANIZED CRIMINAL GROUPS

Organized crime is based on a hierarchical structure, which strives for monetary gains and dominance. Contrary to a regular criminal group, the funds resulting from criminal activity reach the top of the pyramid, rather than being divided equally among its members. Traditionally, domestic criminal law jurisprudences concerning joined perpetration have not provided an adequate response to organized crime, especially regarding the criminal responsibility of the head of an organized criminal group.<sup>14</sup>

Classifying the leaders of criminal organizations within the framework of criminal law is essential to the legal responsibility assigned to them. In particular, criminal justice may require holding criminal organization leaders directly and primarily responsible for every act committed by their members. In doing so, the leaders would be subject to severe punishment, as the main perpetrators. Criminal organization leaders seek to reduce their responsibility to secondary and indirect execution only. In effect, their responsibility would be reduced and compared to that of the members of the same organization who directly committed the crimes.

The German criminal law, for example, examined three cases for imposing responsibility on the heads of criminal organizations:<sup>15</sup>

- (1) when the leader forces another person (the soldier) to commit a criminal act;
- (2) when the leader misleads the other person (the soldier), thus causing him to commit an offense by doing so; and
- (3) where the leader controls the criminal organization, and as far as that organization is concerned, the offense must be committed.

This test was introduced by the German Supreme Court, which determined that the responsibility of the person controlling a criminal organization for an offense committed based on his instructions is not affected by his responsibility (full or partial) of the direct doer.<sup>16</sup> In other words, an organization leader can be held responsible, as a perpetrator by means of another, for a member's criminal act as though the leader was directly responsible and had criminal intent.<sup>17</sup>

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<sup>14</sup> JAMES O. FINCKENAUER & ELIN J. WARING, *RUSSIAN MAFIA IN AMERICA: IMMIGRATION, CULTURE AND CRIME* 12–13 (1998).

<sup>15</sup> CLAUS ROXIN, *TÄTERSCHAFT UND TÄTHERRSCHAFT* (4th ed. 1984).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* This position formed the basis for the conviction of the commanders and those in charge in East Germany, who gave orders to shoot at the residents of East Germany who were trying to escape to West Berlin.

## B. CHARACTERIZING TERRORISM

“I will send my terror ahead of you and throw into confusion every nation you encounter. I will make all your enemies turn their backs and run. I will send the hornet ahead of you to drive the Hivites, Canaanites and Hittites out of your way.”<sup>18</sup>

Terrorism is not a new phenomenon; it has been present for centuries, but it has never had the same features. Terrorism has its roots in early recorded history as a group of people attempting to scare others with religious motives; for example,

- (1) The Zealots, who were Jewish men, attacked Roman and Greek authorities in front of large groups of spectators to send a message to the ruling body that they were not wanted there;<sup>19</sup>
- (2) The Sicari, who were also Jewish, but mostly murdered other Jews who had fallen from their religious faith;<sup>20</sup> and
- (3) The Assassins, a group of militant Muslims who murdered others who deviated from strict Muslim law.<sup>21</sup>

The word “terror” entered western European lexicons through French in the fourteenth century and was first used in English in 1528.<sup>22</sup> The French Revolution provided the first political connotations to the word “terrorism” with the Reign of Terror initiated by the revolutionary government.<sup>23</sup> The term “terror” owes its etymology to Middle English: from the Anglo-French “*terroure*” (to frighten); to the Latin “*terrere*” (to frighten); to the Greek “*trein*” (to be afraid); and the French “*tremaine*,” (to tremble). In addition, the word “terror” has deep roots in the Christian Bible, which describes a spectrum of degrees of extreme fear, translated from Hebrew into English as “terror,” for example, by Chetat<sup>24</sup> and Ematah Ubachad.<sup>25</sup> The Bible explains explicitly the kind of fear that terrorism broadcasts:

You will live in constant suspense, filled with dread both night and day, never sure of your life. In the morning you will say, ‘If only it were evening!’ and in the evening, ‘If only it were morning!’ — because of the terror that will fill your hearts and the sights that your eyes will see. . . .<sup>26</sup>

In the nineteenth century, a new notion of terrorism was developed by an Italian revolutionary, Carlo Pisacane, who argued that terrorism could deliver a message to an audience and draw attention to and support for a

<sup>18</sup> Exodus 23:27–28.

<sup>19</sup> H.H. BEN-SASSON, A HISTORY OF THE JEWISH PEOPLE 275 (1976).

<sup>20</sup> *Id.*; see also Daniel C. Peterson and William J. Hamblin, *Who were the Sicarii?*, MERIDIAN MAGAZINE (June 7, 2004) <https://latterdaysaintmag.com/article-1-4364/> [<https://perma.cc/3UZH-F7KW>]

<sup>21</sup> See e.g., BERNARD LEWIS, *The Isma'ilites and the Assassins*, in A HISTORY OF THE CRUSADES, VOLUME I: THE FIRST HUNDRED YEARS 99–133 (M. W. Baldwin ed., 1969), <https://images.library.wisc.edu/History/EFacs/HistCrus/0001/0001/reference/history.crusone.i0019.pdf> [<https://perma.cc/6VKB-7QF9>].

<sup>22</sup> Mohammed S. Wattad, *Is Terrorism a Crime or an Aggravating Factor in Sentencing?*, 4 OXFORD J. OF INT'L CRIM. JUST. 1017, 1023 (2006).

<sup>23</sup> *Id.*

<sup>24</sup> Genesis 35:4–6.

<sup>25</sup> Exodus 15:15–17; Leviticus 26:15–17; Deuteronomy 2:25.

<sup>26</sup> Deuteronomy, 28:66–68.

cause.<sup>27</sup> For example, the Ku Klux Klan was formed to try to dissuade Reconstruction after the Civil War.<sup>28</sup> Additionally, the Young Bosnians were responsible for the assassination of Archduke Ferdinand in 1914, which led directly to the outbreak of World War One.<sup>29</sup> Inquiring about the conceptual meaning of terror throughout history leaves no doubt about its core meaning as a conclusive phenomenon of imposing extreme fear and dread on a group or a class of people.

Scholars have examined the shared understanding of terrorist acts by highlighting six features, most of which are present in the standard cases: (1) the victims are civilians or innocent bystanders, (2) terrorists are private actors against States, (3) terrorists have political motives, (4) terrorists act as organized groups, (5) the act has a theatrical aspect, and (6) terrorists feel guiltless.<sup>30</sup> Thus, the more components scholars add to the basic meaning of “terror,” the closer they get to what reflects the present definition of terrorism.<sup>31</sup> Similarly, the United States Criminal Code pays much attention to various arguable purposes of international terrorism, defining “international terrorism” as:<sup>32</sup>

activities that —

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State.
- (B) appear to be intended —
  - i. to intimidate or coerce a civilian population;
  - ii. to influence the policy of a government by intimidation or coercion; or
  - iii. to affect the conduct of a government by assassination or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States.

This definition reflects the United Nations Security Council’s depiction of international terrorism as constituting “one of the most serious threats to international peace and security in the twenty-first century.”<sup>33</sup> Yet the political motives that stand behind the contemporary definitions of “terrorism” make these definitions appear controversial, as captured by the aphorism: “[O]ne person’s terrorist is another one’s liberation fighter.”<sup>34</sup>

<sup>27</sup> BRUCE HOFFMAN, *INSIDE TERRORISM* 17 (Columbia University Press: New York, 1988).

<sup>28</sup> *Wattad*, *supra* note 22.

<sup>29</sup> *Id.*

<sup>30</sup> George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 OXFORD J. OF INT’L CRIM. JUST. 910 (2006).

<sup>31</sup> *Id.* The Federal Bureau of Investigation defines “terrorism” as the unlawful use of force against a person or property to intimidate or coerce a government, the civilian population, or any segment thereof to further social objectives. U.S. DEP’T OF JUST., FED. BUREAU OF INVESTIGATION, *TERRORISM 2002–2005* iv (2005).

<sup>32</sup> 18 U.S.C. § 2331(1).

<sup>33</sup> S.C. Res. 1377, ¶ 4 (Nov. 12, 2001).

<sup>34</sup> See, e.g., Annette Hübschle, *From Theory to Practice: Exploring the Organised Crime-Terror Nexus in Sub-Saharan Africa*, 5 PERSPS. ON TERRORISM 81, 82 (2011).

Some scholars, and English dictionaries,<sup>35</sup> define “terrorism” as an “act” rather than a state of mind, and very few of them exclude a political component from their definitions.<sup>36</sup>

There is no crime of “terrorism” per se, domestically or internationally.<sup>37</sup> Therefore, a definition of terrorism must be developed that distinguishes condemned acts from those that the international community does not criminalize.<sup>38</sup> A domestic penal code that criminalizes terrorism must provide a precise definition of terrorism to avoid vagueness, as criminal law must be sufficiently knowable.<sup>39</sup> The requirement that the laws be sufficiently defined also satisfies of the notice and fair trial requirements implicit in the rule of law.

The motive behind terrorism is also important to understand. There are various ways of exercising terrorism to achieve different motives—religious, political, and so forth. Yet all forms of terrorism share one core component: imposing fear on a sizeable specific group of people as such and not on individuals. Some terrorist groups possess separatist characteristics, like the Irish Republican Army or the Kurdish Workers Party.<sup>40</sup> Other groups focus on religion, like Boko Haram or the Islamic State.<sup>41</sup> Still others seek a transnational foothold, like Al-Qaida.<sup>42</sup>

In his classic book *Just and Unjust Wars*, Michael Walzer describes the purpose of terrorism as destroying the morale of a nation and undercutting its solidarity.<sup>43</sup> However, in analyzing the effect of the September 11, 2001 attacks, Fletcher argues that when the terror comes from outside, it has the effect of *increasing* solidarity among the victims.<sup>44</sup> Without taking a side in this discussion, it is notable that both Walzer and Fletcher refer to the United States. This is what distinguishes terrorism from, other crimes, such as “ordinary murder;” it does not target specific people, but rather the whole nation, both physically and psychologically. “Nationhood” refers to ordinary people who may or may not have a state.<sup>45</sup> “The nation bears the . . . language, history, culture, and the bond between geography and the self,”<sup>46</sup>

<sup>35</sup> *Terrorism*, BLACK'S LAW DICTIONARY (8th ed. 2004); ALBERT SIDNEY HORNBY, OXFORD ADVANCED LEARNER'S DICTIONARY 1233 (Jonathan Crowther et al. eds., 5th ed. 1995).

<sup>36</sup> JOHN BOUVIER, BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA 3262 (8th ed. 1914) (“Terror: The state of mind which arises from an event or phenomenon that may serve as a prognostic of some catastrophe; a fright from apparent danger.”); 6 OXFORD AT THE CLARENDON PRESS, THE OXFORD ENGLISH DICTIONARY 216 (1933) (“Terror: The state of being terrified or greatly frightened. . .”).

<sup>37</sup> The Israeli Penal Act of 1977 defines “an act of violence or terror” as a crime that causes harm to a person’s body or that endangers him as for death or as for severe injury. § 144D2(b), Penal Law, 5737–1977, LSI 54 (on file with authors). Germany and France both make it a crime to be a member of a terrorist organization or even to make efforts to form one. See Strafgesetzbuch [STGB] [Penal Code], § 129a (punishing anyone who forms a terrorist organization, defined as having the purpose of perpetrating any one of several violent crimes defined elsewhere in the Code.).

<sup>38</sup> ALAN M. DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 8–9 (2003).

<sup>39</sup> *Kokkinakis v. Greece*, 17 Eur. Ct. H.R. 397, 423 (1994).

<sup>40</sup> Sari, *supra* note 2, at 466.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> M. WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 197 (3rd ed., New York: Basic Books, 2000).

<sup>44</sup> GEORGE P. FLETCHER, ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM 36 (2002).

<sup>45</sup> WILLIAM SHAKESPEARE, HENRY V act 4, sc. 3, l. 60–63.

<sup>46</sup> FLETCHER, *supra* note 44.

and it is what people feel part of rather than merely belonging. When terrorism occurs, it affects the nation, though not necessarily in the same way.

## II. THE NEXUS BETWEEN TERRORISM AND ORGANIZED CRIMINAL GROUPS: THE INTERNATIONAL PERSPECTIVE

### A. BACKGROUND

Discussion on the growing immersion between terror groups and organized crime began in the 1970s concerning groups in Colombia—most notably, the Colombian National Liberation Army (*Ejército de Liberación Nacional* (ELN)) and the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias Colombianas* (FARC)).<sup>47</sup> From the 1980s onwards,<sup>48</sup> the relationship between terrorism and organized crime, to which we refer as the organized crime-terror nexus, became more common, as was witnessed, for example, in Lebanon with the rise of Hezbollah.<sup>49</sup> During that period, a new term came into being—“narco-terrorism”—describing terrorist groups that used drug trafficking, kidnapping, and other criminal activities to finance their operations.<sup>50</sup>

The end of the Cold War brought about a growing symbiosis between terrorism and organized crime,<sup>51</sup> given the decline of State-sponsored terrorism and the opportunities presented by globalization.<sup>52</sup> As noted by scholars, the strength of this growing nexus surprised even the closest observers.<sup>53</sup> Globalization enabled transformation and convergence as it brought about faster communication, more accessible travel, increasing electronic surveillance, and unprecedented access to information.<sup>54</sup> In this era of accelerated global interaction, transnational organized crime and international terrorism also flourished.<sup>55</sup> Napoleoni termed this era as “the new economy of terror.”<sup>56</sup> By the end of the millennium, the crime-terror nexus was consolidated.<sup>57</sup>

A quantum leap in the international attention to the nexus between organized crime and terrorism, came after the September 11 attacks in the

<sup>47</sup> Bibes, *supra* note 5, at 244–45.

<sup>48</sup> Bovenkerk & Chakra, *supra* note 8, at 3.

<sup>49</sup> For a report on criminal activity by Hezbollah and Afwāj al-Muqāwama al-Lubnāniyya, see INTER-GOVERNMENTAL ACTION GROUP AGAINST MONEY LAUNDERING IN WEST AFRICA, *THREAT ASSESSMENT OF MONEY LAUNDERING AND TERRORIST FINANCING IN WEST AFRICA*, GIABA REPORT 93 (2010).

<sup>50</sup> Hübschle, *supra* note 34, at 84.

<sup>51</sup> Hübschle, *supra* note 34, at 85.

<sup>52</sup> Makarenko, *supra* note 12, at 130.

<sup>53</sup> Phil Williams & Roy Godson, *Anticipating Organized and Transnational Crime*, 37(4) CRIME, L. SOC. CHANGE 311, 311 (2002). Stohl believes, in comparison, that terrorist groups have engaged in clearly criminal activities for many years, notwithstanding the post-Cold War environment and the development of a networked organizations. See Michael Stohl, *Networks, Terrorists and Criminals: The Implications for Community Policing*, 50 CRIME L. SOC. CHANGE 59, 63 (2008).

<sup>54</sup> Thomas M. Sanderson, *Transnational Terror and Organized Crime*, 24 SAIS REV. INT’L AFFS. 49, 50 (2004).

<sup>55</sup> Bovenkerk & Chakra, *supra* note 8, at 6.

<sup>56</sup> Loretta Napoleoni, *The New Economy of Terror: How Terrorism is Financed*, 4 F. ON CRIME AND SOC’Y 31, 32 (2004).

<sup>57</sup> Makarenko, *supra* note 12, at 130.

United States.<sup>58</sup> This event led to significant international and domestic legal developments, including a coordination of counterterrorism efforts and common definitions. However, the modern globalized economy also provided opportunities, with communication technology presenting new capacities and large-scale global migration strengthening the organized crime-terror nexus.<sup>59</sup> In this new reality, drug cartels operating in the Latin American tri-border area of Brazil, Argentina, and Paraguay can traffic cocaine through West Africa and, at times, through the Middle East to European markets.<sup>60</sup> At the same negotiation table, one can find representatives of the Islamic State alongside South American drug cartels, discussing ways for the jihadist group to transport drugs to Europe and to other parts of the world.<sup>61</sup> During the recent COVID-19 pandemic, organized criminal groups and terrorists sought to capitalize on new vulnerabilities and challenges to border security that arose, given travel restrictions and lockdown measures.<sup>62</sup> In particular, they harnessed the disruptions and hardships caused by COVID-19 to spread fear and radicalize and recruit new followers.<sup>63</sup>

The link between terrorism and organized crime constitutes a major national and international security threat.<sup>64</sup> Unfortunately, there is little hope for improvement, with growing disparities between the developed and the developing world and the fact that billions of people still do not live under regimes that respect international law.<sup>65</sup> As such, there is a need to assess further possible ways to better cope with terrorism, organized crime, and the growing organized crime-terror nexus. The next step in the journey is to understand what brings these groups together—mainly, if there is an essential connection between them, which invites similar conceptualization, or if it is instead an opportunistic relationship that merits different treatment of each group.

#### B. WHAT LEADS TO COOPERATION BETWEEN TERRORISTS AND ORGANIZED CRIMINAL GROUPS

The coordination of terrorist groups and organized criminal organizations threatens law and erodes public confidence and trust.<sup>66</sup> Notable instances where terrorism and organized crime flourished include movements in Colombia (e.g., FARC, ELN), the Balkans (e.g., Kosovo Liberation Army (KLA)), Asia (e.g., Tamil Tigers), and the Middle East (e.g., Hezbollah, Taliban, and Al-Qaeda).<sup>67</sup> For example, at its height, the FARC controlled forty percent of Colombian territory, enjoyed annual revenues of

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<sup>58</sup> Shelley, *supra* note 4. As for the international response to the attacks, see S.C. Res. 2170 (Aug. 15, 2014); S.C. Res. 1373, ¶ 4 (Sept. 28, 2001); HELEN DUFFY, *THE "WAR ON TERROR" AND THE FRAMEWORK OF INTERNATIONAL LAW* 246 (2d ed. 2015).

<sup>59</sup> Bovenkerk & Chakra, *supra* note 8, at 6.

<sup>60</sup> Hübschle, *supra* note 34, at 89.

<sup>61</sup> ALEX P. SCHMID, *REVISITING THE RELATIONSHIP BETWEEN INTERNATIONAL TERRORISM AND TRANSNATIONAL ORGANISED CRIME 22 YEARS LATER* 21 (2018).

<sup>62</sup> U.N. Press Release SC/14273, *supra* note 10.

<sup>63</sup> *Id.*

<sup>64</sup> Carrapico, Irrera, & Tupman, *supra* note 6, at 214.

<sup>65</sup> SCHMID, *supra* note 61, at 10.

<sup>66</sup> Bibes, *supra* note 5.

<sup>67</sup> SCHMID, *supra* note 61, at 16–17.



hundreds of millions of dollars, and substantially disrupted Colombian society.<sup>68</sup>

As seen in Sierra Leone, Somalia, and Afghanistan, terrorist and organized criminal groups flourish in impoverished regions with demoralized populations.<sup>69</sup> This is also reflected in the Sahel region of northern Africa, where there is a growing nexus between radical Islamist groups and organized crime.<sup>70</sup> Here, a primary source of revenue is a forced tax for organized crime groups transporting drugs across territories the Islamic groups control.<sup>71</sup> This type of taxation practice is not limited to this area; naturally, groups like the Islamic State in Iraq and Syria (“Islamic State”)<sup>72</sup> seemed to perfectly exercise this taxation in areas it controlled.<sup>73</sup>

Recently, the Islamic State took over significant territories in the Syrian Civil War<sup>74</sup> and declared itself a caliphate in June 2014.<sup>75</sup> It transformed from a minor group of only dozens of activists, that funded its operations on criminal activity (e.g., kidnapping, pillage, and trafficking in persons)<sup>76</sup> into an alleged quasi-state, presenting capabilities and wealth like no other group before it, while also embracing a religious identity with a potential appeal to hundreds of millions worldwide.<sup>77</sup> This evolution was enabled through criminal activities that became an integral part of the *modus operandi* of the group.

Another critical arena in which terrorists and criminals coordinate ever more frequently is cyberspace. Various forms of cybercrime are also on the

<sup>68</sup> Makarenko, *supra* note 12, at 137.

<sup>69</sup> Hübschle, *supra* note 34, at 88.

<sup>70</sup> Alda & Sala, *supra* note 3, at 8.

<sup>71</sup> *Id.*

<sup>72</sup> This organization is also known as the Islamic State of Iraq and the Levant, ISIS (an acronym for “the Islamic State in Iraq and Greater Syria”), ISIL (an acronym for “the Islamic State in Iraq and the Levant”), Daesh (an abbreviation of the organization’s name in Arabic, *al-dawlah al-islamiyah fil Iraq wa al-sham*), and the Takfiri.

<sup>73</sup> MICHAEL WEISS & HASSAN HASSAN, ISIS: INSIDE THE ARMY OF TERROR 169 (2016); U.N. Secretary-General, *Report of the Secretary-General on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat*, ¶ 4, U.N. Doc. S/2016/92 (Jan. 29, 2016). For an elaboration on the economic capabilities of the Islamic State from a historical perspective see PATRICK B. JOHNSTON, JACOB N. SHAPIRO, HOWARD J. SHATZ, BENJAMIN BAHNEY, DANIELLE F. JUNG, PATRICK K. RYAN & JONATHAN WALLACE, FOUNDATIONS OF THE ISLAMIC STATE: MANAGEMENT, MONEY, AND TERROR IN IRAQ, 2005–2010, 255 (2016).

<sup>74</sup> During which millions of people were forced to leave their home and hundreds of thousands of people have died. For updated data, see UNHCR, Syria Regional Refugee Response, Operational Data Portal, <https://data.unhcr.org/en/situations/syria> [<https://perma.cc/3TYF-DGSD>].

<sup>75</sup> For a historical survey of the evolution of the Islamic State, see Johan D. van der Vyver, *The ISIS Crisis and the Development of International Humanitarian Law*, 30 EMORY INT’L L. REV. 531 (2016).

<sup>76</sup> For elaboration on the crimes committed by the group, see UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the so-called Islamic State in Iraq and the Levant and Associated Groups*, UN Doc. A/HRC/28/18 (Mar. 27, 2015); G.A. Res. 69/281, Saving the Cultural Heritage of Iraq (June 9, 2015); S.C. Res. 2199 (Feb. 12, 2015); Committee against Torture, *Concluding Observations on the Initial Report of Iraq*, U.N. Doc. CAT/C/IRQ/CO/1, ¶ 11 (Sept. 7, 2015).

<sup>77</sup> ALI A. ALLAWI, THE CRISIS OF ISLAMIC CIVILIZATION 163 (2009). In the view of the Islamic State, it constitutes the world’s center for Muslims, and it has called all Muslims in the world to join it as nationals of the only “true” Islamic State. For discussion, see Cole Bunzel, *From Paper State to Caliphate: The Ideology of the Islamic State*, BROOKINGS 41 (Mar. 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/The-ideology-of-the-Islamic-State-1.pdf> [<https://perma.cc/45XT-A2NQ>].

rise as an essential system to generate funds.<sup>78</sup> The COVID-19 pandemic exponentially accelerated the digitalization of various aspects of life, increasing the dependency on cyberinfrastructure and the potential for harmful cyber activities.<sup>79</sup> For example, hospitals around the globe were targeted by terrorists and organized criminals during the pandemic.<sup>80</sup>

So, why is this organized crime-terror nexus strengthening? There are various reasons, depending on whether one looks from the perspective of organized criminal groups or that of terrorists. Criminals will provide terrorists with whatever they require for the right price, while terrorists are prepared to engage in, or tolerate, criminal activities that serve their needs (e.g., forging travel documents which can serve both as a means of revenue and facilitates attacks).<sup>81</sup>

Generally speaking, poor governance and the absence of the rule of law provide ideal conditions for the nexus to flourish.<sup>82</sup> Weak border security and a lack of law enforcement have facilitated the emergence of hybrid groups that have simultaneously sought political goals alongside monetary gains, often benefiting from an interchangeable recruitment pool.<sup>83</sup> For example, the 1990s bombings of the Israeli Embassy and Jewish Cultural Center in Buenos Aires, Argentina, perpetrated by Hezbollah, were enabled by the lawless tri-border region of Argentina, Brazil, and Paraguay.<sup>84</sup> This allowed the group to plan and prepare for their operation, and even use explosives paid for and assembled in the tri-border region.<sup>85</sup>

Terrorist groups are also frequently involved in crimes to support their activities, particularly illegal drug trafficking, smuggling, falsification of documents, and more.<sup>86</sup> Trafficking and smuggling include too wide of a spectrum of potential operations: illegal goods and services, drugs, arms, human beings, exotic animal species, tropical timber, hazardous materials, and more.<sup>87</sup> For example, the Kurdish Workers Party (PKK) maintains its operations via legal means, like fundraising campaigns, alongside criminal activities.<sup>88</sup>

<sup>78</sup> U.N. Press Release SC/14273, *supra* note 10. Amongst the primary cyber risks, we can note phishing attacks, identity thefts, and attempts at critical infrastructure. *Id.*

<sup>79</sup> François Delerue, *Covid-19 and the Cyber Pandemic: A Plea for International Law and the Rule of Sovereignty in Cyberspace*, 13 INT'L CONF. ON CYBER CONFLICT 9, 12–13 (2021).

<sup>80</sup> Matt Burgess, *Hackers Are Targeting Hospitals Crippled by Coronavirus*, WIRED (Mar. 22, 2020), <https://www.wired.co.uk/article/coronavirus-hackers-cybercrime-phishing> [<https://perma.cc/6S8Q-ZCPE>].

<sup>81</sup> Alda & Sala, *supra* note 3, at 7–8.

<sup>82</sup> U.N. Secretariat, *International Cooperation Against Terrorism and Links Between Terrorism and Other Criminal Activities in the Context of the Work of the United Nations Office on Drugs and Crime* ¶¶ 54–55 (ELEVENTH UNITED NATIONS CONG. ON CRIME PREVENTION AND CRIM. JUST., U.N. Doc. A/Conf.203/5, 2005). As such, UNODC focuses on promoting the rule of law, stable and viable criminal justice systems and enhancing regional and international cooperation in criminal matters; S.C. Res. 2482, U.N. Doc., at Preamble (July 19, 2019).

<sup>83</sup> U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., *supra* note 1, at 6.

<sup>84</sup> Sanderson, *supra* note 54, at 53. Significant disparities in incomes and prices, alongside prohibitive import tariffs in the three bordering States, have created what Shelley and Picarelli refer to as a “smuggler’s paradise.” This area hosts Yakuza, Latin American groups, Chinese Triads such as the Fuk Ching and more. See Louise I. Shelley & John T. Picarelli, *Methods and Motives: Exploring the Links between Organized Crime and International Terrorism* 9(2) TRENDS IN ORGANIZED CRIME 52, 61 (2005).

<sup>85</sup> *Id.*

<sup>86</sup> Hübschle, *supra* note 34, at 86.

<sup>87</sup> Bovenkerk & Chakra, *supra* note 8, at 8; U.N. Secretariat, *supra* note 82, at ¶ 10.

<sup>88</sup> Sari, *supra* note 2, at 465.

The need for terrorist groups to fund their operations through criminal activities also derives from international pressure on charities and electronic banking services as part of the battle against money laundering and terror financing.<sup>89</sup> These measures, aimed at minimizing the abilities of terrorists to organize and operate, effectively strengthen the interdependency and nexus between criminals and terrorists. Terrorist groups, like the Islamic State in Iraq and Syria, fund their operations by engaging in criminal activity—ranging from extortion to trafficking in illegal goods or kidnapping for ransom.

Further, penal institutions have proved themselves prime locales for crime-terror interactions, as prison radicalization has been identified as a particular point of organizational learning.<sup>90</sup> This issue manifested during 2004 in Madrid and in more recent attacks perpetrated in Europe by groups that hold both the characteristics of terrorist groups and criminal organizations.<sup>91</sup> An illustrative example is the chain of attacks by the Islamic State on November 13, 2015, in Paris, France, taking the lives of 126 people.<sup>92</sup> The Islamic State's founder, Abu Musab al-Zarqawi, and the group's leader at the time, Abu Bakr al-Baghdadi, were both radicalized in prison before the group's rise.<sup>93</sup>

Another critical factor is corruption. Indeed, a significant problem—a tactic that both terrorist and criminal groups use—is that some use the government's machinery for personal enrichment.<sup>94</sup> An example is the discovery of 400 kilograms of cocaine to the Russian embassy in Buenos Aires.<sup>95</sup> Corruption further complicates the ability to cope with regulation challenges in a globalized world, operated through new means of communication and platforms for cooperation that criminals and terrorists exploit.<sup>96</sup>

In sum, terrorist and criminal groups exchange information and support each other operationally.<sup>97</sup> Frank Bovenkerk and Bashir Abou Chakra suggest that terrorist organizations enjoy the benefits of the drug trade with no loss in status, while drug traffickers who joined hands with terrorists become more formidable.<sup>98</sup> Even political or ideological disagreements do

<sup>89</sup> Sanderson, *supra* note 54, at 58. Rudner provides an illuminating presentation of the financial money laundering operations of Hezbollah. See Martin Rudner, *Hizbullah Terrorism Finance: Fund-Raising and Money Laundering*, 33(8) *STUD. IN CONFLICT & TERRORISM* 700, 702 (2010).

<sup>90</sup> Shelley, *supra* note 84, at 57–58.

<sup>91</sup> U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., *supra* note 1, at 3.

<sup>92</sup> The attacks took place, inter alia, in the vicinity of the football stadium "Stade De-France," while it hosted a national team game with many spectators, including the French president François Hollande, as well as on the streets of Paris and the "little Cambodia" restaurant. This deadly attack drew significant attention, since it was the most substantial attack on French soil since World War II. For elaboration, see Karen Yourish, Derek Watkins, Tom Giratikanon & Jasmine C. Lee, *How Many People Have Been Killed in ISIS Attacks Around the World*, N.Y. TIMES (July 16, 2016), <https://www.nytimes.com/interactive/2016/03/25/world/map-isis-attacks-around-the-world-DE.html> [<https://perma.cc/2THC-9H3B>].

<sup>93</sup> For discussion, see WILLIAM MCCANTS, *THE ISIS APOCALYPSE: THE HISTORY, STRATEGY, AND DOOMSDAY VISION OF THE ISLAMIC STATE* (2015).

<sup>94</sup> SCHMID, *supra* note 61, at 22.

<sup>95</sup> JACK A. JARMON, *THE NEW ERA IN U.S. NATIONAL SECURITY: CHALLENGES OF THE INFORMATION AGE* SECOND EDITION 260 (2019).

<sup>96</sup> Shelley, *supra* note 4, at 88–89.

<sup>97</sup> GLENN E. CURTIS & TARA KARACAN, *THE NEXUS AMONG TERRORISTS, NARCOTICS TRAFFICKERS, WEAPONS PROLIFERATORS, AND ORGANIZED CRIME NETWORKS IN WESTERN EUROPE* 25 (2002).

<sup>98</sup> Bovenkerk & Chakra, *supra* note 8, at 4.

not disrupt possible economic cooperation, as seen in the collaboration between odd pairs like ultranationalist Turks and Kurdish groups or the ability of Christian, Sunnite, Shi'ite Muslim, and Druze groups to work together on the drug trade in Lebanon.<sup>99</sup>

The next part of this inquiry looks deeper into the common differences between terrorists and organized criminal groups.

### C. COMMONALITIES AND DIFFERENCES BETWEEN TERRORIST AND ORGANIZED CRIMINAL GROUPS

There are several similarities between terrorist and organized crime groups. Both groups:<sup>100</sup>

- (1) Engage in criminal activity that serves as their operations' economic basis;
- (2) Rely on modern networks and communications platforms to manage operations, to circulate and use funds, or to launder them;
- (3) Share a mutual desire for intimidation and use violence to gain it, notwithstanding differing motivations;
- (4) Engage in criminal activity domestically and internationally; and
- (5) Oppose the States apparatus.

Of course, this analysis will examine some differences between these groups to paint as complete of a picture as possible.

#### 1. Criminal Activity as the Basis of Operations

Both groups have similar needs—including false documentation, weapons, and the like—and their respective resources and expertise complements and supplements one another.<sup>101</sup> In addition, they use similar tactics, such as kidnappings, assassination, extortion, and more.<sup>102</sup>

Another common feature, these groups deal with small, light arms that can be trafficked for money or used in operations. FARC is an illustrative example of a terrorist group that advanced its political goals, at least in the earlier days of its operation, through criminal activities (e.g., narcotics trade, kidnapping for ransom).<sup>103</sup>

#### 2. Reliance on Modern Technologies and Networks

Both groups use coding, steganography, and encryption in their operations. In addition, they learned to exploit the anonymity of the internet, which has become a central tool for communication, recruitment, and, when appropriate, operations.<sup>104</sup> A group that mastered the use of the internet is the Islamic State, as the rise of the group was facilitated by its ability to develop

<sup>99</sup> For earlier discussion, see RACHEL EHRENFELD, *NARCO-TERRORISM* (1990).

<sup>100</sup> SCHMID, *supra* note 61, at 14.

<sup>101</sup> U.N. Secretariat, *supra* note 82, at ¶ 6.

<sup>102</sup> Hübschle, *supra* note 34, at 84.

<sup>103</sup> Sanderson, *supra* note 54, at 53.

<sup>104</sup> Louise I. Shelley & John T. Picarelli, *Methods Not Motives: Implications of the Convergence of International Organized Crime and Terrorism*, 3(4) POLICE PRAC. & RSCH. 305, 310 (2002).

powerful technological capabilities and to use it in an unprecedented fashion to recruit, plot, and radicalize.<sup>105</sup>

### 3. Violence and Intimidation

Intimidation is a characteristic of both groups, although the reasoning behind it might differ sometimes.<sup>106</sup> Manifestations of the violence criminal groups inflict are evident today—as in Juarez, Mexico—and were also prevalent in the past, for instance, during the 1990s in Italy—particularly in Sicily.<sup>107</sup>

To intimidate, both groups target identifiable symbols to spread fear. Examples range from the World Trade Center attacks in the United States in 2001, the Lateran Church in Rome in 1993, the Uffizzi Museum in Florence in 1993, and the Supreme Court of Colombia in 1985.<sup>108</sup> In Brazil, groups like Comando Vermelho, Amigos dos Amigos, and Terceiro Comando also realized the potential effectiveness of using terror tactics to force political demands on the government or to enable their illicit operations.<sup>109</sup>

### 4. Criminalization

As will be elaborated below in the discussion on the international response to threats of terrorism and organized crime and concerning relevant domestic legislation, the activities of both groups are criminalized. As will also be shown, investigation, enforcement, and prosecution tools are very similar.

### 5. Opposition of the State Apparatus

Terrorist and organized criminal groups have a common enemy: the State apparatus and its law enforcement agencies.<sup>110</sup> As noted by John Picarelli,<sup>111</sup> turning to crime for funds is “instrumental in enabling a terrorist group to threaten the State apparatus at its very foundation—the monopoly on the use of force and control over territory.”<sup>112</sup>

The two increasingly cooperate, sometimes based on a joint desire to disrupt societies for different reasons, and at times also begin to share

<sup>105</sup> An illustration is Dabiq, a stylishly publication of the group. See Tal Mimran, *In A Broken Dream: Lessons from The Rise and Demise of the Self-Declared Caliphate of the Islamic State in Syria and Iraq*, 29 J. TRANSNAT'L L. & POL'Y 16 (2019–2020).

<sup>106</sup> Sari, *supra* note 2, at 470.

<sup>107</sup> Shelley & Picarelli, *supra* note 104, at 309.

<sup>108</sup> *Id.*

<sup>109</sup> Makarenko, *supra* note 12, at 134. The Albanian Mafia also became a hybrid group with political and criminal activities that became intertwined.

<sup>110</sup> John T. Picarelli, *Osama bin Corleone? Vito the Jackal? Framing Threat Convergence Through an Examination of Transnational Organized Crime and International Terrorism*, 24(2) TERRORISM & POL. VIOLENCE 180, 183 (2012).

<sup>111</sup> *Id.* at 191.

<sup>112</sup> Concerning the monopoly on the use of force, see Dieter Grimm, *The State Monopoly of Force*, in INT'L HANDBOOK VIOLENCE RSCH. 1043, 1045 (W. Heitmeyer & J. Hagan eds., 2005). As for sovereignty, this concept was first introduced in 1576 by Bodin, and later affirmed in the Treaties of Westphalia of 1648, which recognized the right of (Western) states to establish a domestic governmental system without outside interference. Sovereignty is a foundational principle in the international system in which states were, and still are, the predominant actors. See *Island of Palmas Case* (Netherlands v. USA), II R.I.A.A. 829, 837 (1928); Yaël Ronen, *Entities That Can Be States But Do Not Claim to Be*, in STATEHOOD AND SELF-DETERMINATION: RECONCILING TRADITION AND MODERNITY IN INTERNATIONAL LAW 23 (Duncan French ed., 2013).

operational characteristics.<sup>113</sup> In practice, the nexus of organized crime and terrorism leads to disruptions on both the intrastate and interstate level and threatens security and prosperity. As such, there have been significant developments in response to these threats that will be explored in further detail below.

## 6. Differences Between Terrorists and Organized Criminal Groups

There are disincentives to the collaboration between terrorist and organized criminal groups, most notably unwanted attention and surveillance or the fear of compromising the internal structures of the group through infiltration.<sup>114</sup> This is because close association makes both groups a higher priority for law enforcement agencies, strengthening the fear of opportunism on either side and possible betrayal.<sup>115</sup> In addition, there is some competition between the groups over the same demographic to maintain their ranks. Both recruit from similar segments of the population: those subject to social, cultural, or political marginalization.<sup>116</sup> These targeted populations possess greater preparedness to take risks and express suspicion or dismay toward the law.<sup>117</sup>

Indeed, some claim that the connection between crime and terrorism is not as frequent or meaningful and that they eventually end up, at least at times, on opposite sides of the barricades. Phil Williams, for example, argued that the alliances are based on opportunism rather than a fundamental change in attitudes or nature.<sup>118</sup> In addition, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism notes that there is a shortage of empirical evidence to affirmatively mandate the wholesale export of counterterrorism law and practice into ordinary law enforcement arenas currently regulating organized crime.<sup>119</sup>

Alex Schmid, one of the most prominent scholars dealing with this nexus, suggested two main differences between terrorist and criminal groups.<sup>120</sup> First, ideological motivation underlies terrorism, while monetary gain is the primary rationale for criminals. Second, terrorists desire to win or change public perception, while criminals desire a more hidden working environment that maximizes profits.

These differences are not so dramatic. First, as for ideological motivations, groups change dramatically over the years. A terrorist group can

<sup>113</sup> Sanderson, *supra* note 54, at 49. *See also* UN Secretariat, *supra* note 82, ¶ 23.

<sup>114</sup> Alda & Sala, *supra* note 3.

<sup>115</sup> U.N. Secretariat, *supra* note 82, ¶ 7.

<sup>116</sup> Bovenkerk & Chakra, *supra* note 8, at 9.

<sup>117</sup> *Id.*

<sup>118</sup> Phil Williams, *Cooperation Among Criminal Organizations*, in TRANSNATIONAL ORGANIZED CRIME AND INTERNATIONAL SECURITY: BUSINESS AS USUAL? 67 (Mats Berdal & Monica Serrano Eds., 2022).

<sup>119</sup> *Views of the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism to the Secretary-General's Pending Report Pursuant to UNSCR 2482 (2019) Addressing the Issue of Linkage Between Terrorism and Organized Criminal Groups (OCG)*, at 1. [hereinafter *Views of the United Nations Special Rapporteur*]. The main concern of the Special Rapporteur is that overstating the intensity of the nexus may lead to government responses that unnecessarily impinge on vital human rights. *See* Ben Saul, *The Legal Relationship Between Terrorism and Transnational Crime*, 17 INT'L CRIM. L. REV. 417, 451 (2017).

<sup>120</sup> SCHMID, *supra* note 61, at 13.

choose to divert its resources and attention to crime or vice versa. As is discussed in the next Part, Dawood Ibrahim's transnational organized crime syndicate, D-Company (D-Company) began to supplement its criminal operations with a radical ideology and later launched deadly terror campaigns, costing the hundreds of lives.<sup>121</sup>

Second, concerning public perception, terrorists often seek out media coverage and, as such, usually take responsibility for their actions. In contrast, organized criminals avoid attention and prefer to disassociate themselves from their criminal activities.<sup>122</sup> Still, terrorists and criminals learn from each other. Criminal groups also choose to deploy terror campaigns that promote their interests. This was seen in Colombia in the 1980s, Italy during the 1990s, and elsewhere in Europe in the early 2000s.<sup>123</sup>

In sum, should the differences between terrorists and criminals lead to alternate enforcement apparatuses? Or should the violent outcome that both groups bring about be the main factor in deciding how to treat the threat? This Article reflects the belief that the latter is correct. The distinctions between terrorist and criminal motivations and values often become blurred. In the coming parts, this Article will delve into the different legal responses to the threats emanating from terrorism and organized crime. This will assist the inquiry and, hopefully, illustrate that there are substantial reasons to treat organized criminals and terrorists similarly.

#### D. THE INTERNATIONAL EFFECT

As affirmed by the Security Council, there is a “close connection between international terrorism and transnational organized crime,” including illicit drugs, money laundering, illegal arms trafficking, and illegal hazardous materials movement.<sup>124</sup> As such, the international community has introduced a range of modalities and tools for international cooperation in the battle against terrorism and organized crime—such as extradition, mutual legal assistance, and seizing assets.<sup>125</sup> In addition, attempts are constantly made to facilitate cooperation and the exchange of information between agencies.<sup>126</sup>

There are a host of United Nations bodies involved in oversight, norm creation, and promotion of international cooperation in the battle against terrorism and organized criminal groups. These groups include, but are not limited to, the United Nations Office on Drugs and Crime (UNODC), the United Nations Commission on Crime Prevention and Criminal Justice, and the United Nations Commission on Narcotic Drugs.<sup>127</sup> Also of importance are regional organizations that support cooperation through information

<sup>121</sup> U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., *supra* note 1, at 5.

<sup>122</sup> Sanderson, *supra* note 54, at 55.

<sup>123</sup> U.N. Secretariat, *supra* note 82, ¶ 13.

<sup>124</sup> S.C. Res. 1373, ¶ 4 (Sept. 28, 2001). For discussion, see Hübschle, *supra* note 34, at 81. In response to the Security Council dealing with the nexus between terrorist groups and criminal groups, UNODC worked in 2020 with the United Nations Multidimensional Integrated Stabilization Mission in Mali to integrate a session on trafficking in persons and smuggling of migrants, including when perpetrated by terrorist groups. See U.N. Doc. S/2020/754, *supra* note 11, at ¶ 67.

<sup>125</sup> U.N. Secretariat, *supra* note 82, at ¶ 56; U.N. Doc. S/2020/754, *supra* note 11.

<sup>126</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶ 19.

<sup>127</sup> *Views of the United Nations Special Rapporteur*, *supra* note 119, at 2.

exchange, training, and the development of joint actions, including the International Criminal Police Organization (INTERPOL), the Police Community of the Americas, the Association of Southeast Asian Nations, the Anti-Terrorism Centre of the Commonwealth of Independent States, the Council of Europe, the Regional Anti-Terrorist Structure of the Shanghai Cooperation Organization, the Southern African Development Community, and the South American Intelligence Network against Organized Crime and Terrorism.<sup>128</sup>

Of most pertinence is UNODC, which offers support for strengthening the capacity of customs officials, immigration officers, and border guards as part of its Global Programme on Terrorism and Global Programme against Transnational Organized Crime.<sup>129</sup> UNODC also provides legislative and technical assistance to comply with the international legal frameworks on terrorism, corruption, and transnational organized crime.<sup>130</sup> States, for their part, strive to improve their prevention, detection, control, investigation, and prosecution capabilities.<sup>131</sup> In addition, States have acted to blacklist individuals and terrorist groups on the domestic, regional, and international levels.<sup>132</sup>

The United Nations Security Council also dealt extensively with the organized crime-terror nexus and the need to deal with its threats. For example, on July 19, 2019, the Security Council adopted Resolution 2482, which expressed concern that terrorists could benefit from organized crime.<sup>133</sup> The Security Council also focused on specific incidents of cooperation, like the flow of weapons to and between criminals and Jihadist groups in Iraq and Syria.<sup>134</sup> The Council also encouraged States to take all appropriate actions to maintain a safe and humane environment in prisons; to impede cooperation and transfer of skills and knowledge between terrorists and other criminals; and to promote rehabilitation and reintegration of convicted terrorists and criminals.<sup>135</sup>

Also, INTERPOL established the Fusion Task Force to address linkages between organized crime and terrorism.<sup>136</sup> Other relevant bodies are the United Nations Educational, Scientific and Cultural Organization and the Organization for Security and Cooperation in Europe, which cooperated with UNODC and INTERPOL to implement Security Council Resolution 2347 on the protection of cultural heritage, countering trafficking in cultural property, and address linkages that may benefit terrorist groups.<sup>137</sup> Importantly, the Islamic State used its control over territories in Iraq and Syria to pillage and sell antiquities, with a specialized unit established for

<sup>128</sup> U.N. Secretary-General, *supra* note 11, at ¶¶ 28, 52.

<sup>129</sup> Sanderson, *supra* note 54, at 57. Through this work, the organization hopes to counter trafficking in narcotics, human beings, vehicles, and weapons.

<sup>130</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶¶ 61–62. The United Nations Interregional Crime and Justice Research Institute developed the Hague Good Practices on the Nexus between Transnational Organized Crime and Terrorism, alongside a policy toolkit, to aid in the planning and executing strategies to counter linkages between terrorism and organized crime.

<sup>131</sup> *Id.* at ¶ 9.

<sup>132</sup> Carrapico, Irrera, & Tupman, *supra* note 6, at 213.

<sup>133</sup> U.N. Secretary-General, *supra* note 11, at ¶ 1.

<sup>134</sup> S.C. Res. 2482, U.N. Doc., at Preamble (July 19, 2019).

<sup>135</sup> *Id.* at ¶ 20.

<sup>136</sup> Sanderson, *supra* note 54, at 57.

<sup>137</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶ 94.



this purpose.<sup>138</sup> At times, the group destroyed cultural heritage as part of its terror campaign, while at other times, it was used for monetary gain.<sup>139</sup>

Another regional multinational organization is the Southeastern European Cooperative Initiative, which supports transborder crime-fighting efforts, composed initially of Eastern-European states, including Albania, Bosnia and Herzegovina, Bulgaria, Hungary, Moldova, Romania, and Croatia.<sup>140</sup> In addition, various non-United Nations organizations, such as the Financial Action Task Force and the Global Counterterrorism Forum, are involved in this battle.<sup>141</sup> In the desire to facilitate cooperation, relevant bodies have created various databases and information-sharing platforms, such as UNODC's knowledge management portal known as Sharing Electronic Resources and Laws on Crime (SHERLOC), INTERPOL databases, Global Terrorism Database, the RAND Database of Worldwide Terrorism Incidents, and the South Asia Terrorism Portal.<sup>142</sup>

Steps have been taken to promote cooperation, including ratifying relevant legal instruments concerning money laundering, terrorist financing and corruption, and strengthening financial intelligence units and border security.<sup>143</sup> Notable examples include the United Nations Convention Against Transnational Organized Crime, the United Nations Convention Against Corruption, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and regional treaties such as the Council of Europe Convention on Action Against Trafficking in Human Beings.<sup>144</sup>

It is important to recall that there are also possible costs to the critical efforts to deal with terrorists and organized criminal groups. For example, as discussed earlier, effective border security is of tremendous value in addressing linkages between terrorism and organized crime.<sup>145</sup> As such, the United Nations Security Council encouraged States to collect, analyze, and share Advance Passenger Information (API) and Passenger Name Record (PNR) data to help monitor passenger transit and make connections between individuals associated with organized crime and terrorists.<sup>146</sup> Similarly, INTERPOL supported the global coalition against the Islamic State by providing analytical support to uncover relationships, delivering foreign terrorist fighter biometric records collected in conflict zones, and issuing blue notices to warn countries of a suspected terrorist's cross-border movement.<sup>147</sup>

<sup>138</sup> A notable instance for destruction of cultural heritage, is the bulldozing of the Assyrian city of Nimrud. See G.A. Res. 69/281, *Saving the Cultural Heritage of Iraq* (June 9, 2015); S.C. Res. 2199 ¶¶ 15–17 (Feb. 12, 2015).

<sup>139</sup> For general discussion, see Adnan Almohamad, *The Destruction and Looting of Cultural Heritage Sites by ISIS in Syria: The Case of Manbij and its Countryside*, 28(2) INT'L J. CULTURAL PROP. 221 (2021).

<sup>140</sup> Sanderson, *supra* note 54, at 57.

<sup>141</sup> *Views of the United Nations Special Rapporteur*, *supra* note 119, at 2.

<sup>142</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶ 72; U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., *supra* note 1, at 16, 25.

<sup>143</sup> U.N. Press Release SC/14273, *supra* note 10.

<sup>144</sup> S.C. Res. 2482, U.N. Doc., at ¶ 3 (July 19, 2019); U.N. Doc. S/2020/754, *supra* note 11, at ¶ 7.

<sup>145</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶¶ 35–37.

<sup>146</sup> S.C. Res. 2482, U.N. Doc., at ¶ 15 (July 19, 2019).

<sup>147</sup> It also supported national financial intelligence units to exchange and cross-check data on terrorism financing and money laundering to address linkages between terrorism and organized crime.

Such initiatives raise concerns regarding human rights, particularly the right of every person to be protected against arbitrary or unlawful interference with their privacy.<sup>148</sup> The protection against unlawful interference, namely not authorized in law. This protects against arbitrary interference, a notion that the Human Rights Committee has construed as including elements of inappropriateness, injustice, lack of predictability, reasonableness, necessity, proportionality, and due process of law.<sup>149</sup> It is important to recall that security and human rights are not at odds with one another; they are entwined, co-dependent, and essential for safeguarding the rule of law.<sup>150</sup> Still, from the State's perspective, grounds for interference with the right to privacy, or other human rights, include national security, public safety, public health, or the protection of the rights and freedoms of others.<sup>151</sup> The threats emanating from the nexus fall into the ambit of these grounds, but an evaluation of the proportionality of the tool should also be taken.

Finally, relating to terminology, the September 11 attacks brought about a realization that international efforts must be united in the fight against terrorism, with a primary challenge being the matter of definitions. Still, defining "terrorism" is politically charged, which pervades its legal definition. Consequently, it undermines the ability to draft a comprehensive convention incorporating a single, all-encompassing, legally binding definition of terrorism.<sup>152</sup> While there is no consensus on a comprehensive definition, there are several international conventions and protocols that criminalize various manifestations of terrorism, such as hijacking, hostage-taking, or bombings, that fill much of the void.<sup>153</sup>

Contrary to the difficulties in defining terrorism, there is indeed a common international definition of organized crime that was adopted in

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See U.N. Secretary-General, *Action taken by Member States and United Nations entities to address the issue of linkages between terrorism and organized crime*, U.N. Doc. S/2020/754 ¶¶ 78–79 (July 29, 2020).

<sup>148</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966); United Nations Hum. Rys. Comm., CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Apr. 8, 1988), <https://www.refworld.org/docid/453883f922.html> [<https://perma.cc/Q64M-F7DM>]. This right has been understood as protective of core aspects of human dignity, and autonomy, and as an important condition for physical and mental well-being and the enjoyment of other human rights. See *Beizaras & Levickas v. Lithuania*, App. No. 41288/15 (Jan. 14, 2020).

<sup>149</sup> UN Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2081/2011, U.N. Doc. CCPR/C/117/D/2081/2011 (July 15, 2016) (citing United Nations Hum. Rys. Comm., General Comment No. 35 Article 9 (Liberty and Security of Person), ¶ 12, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014)). The ECHR also seeks to examine compatibility to the rule of law. See EUR. CT. HUM. RTS., GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2020).

<sup>150</sup> *Views of the United Nations Special Rapporteur*, *supra* note 119, at 3.

<sup>151</sup> EUR. CT. HUM. RTS., *supra* note 149.

<sup>152</sup> HUM. RTS. COUNCIL ADVISORY COMM., NEGATIVE EFFECTS OF TERRORISM ON THE ENJOYMENT OF HUMAN RIGHTS, U.N. Doc. A/HRC/AC/24/CRP.1 (Jan. 22, 2020). One was considered at the time as an essential step, which later proved insufficient, was the decision of the Sixth Committee of the United Nations General Assembly to embark on an effort to find common ground for defining this phenomenon. See Sari, *supra* note 2, at 467.

<sup>153</sup> See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civilian Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Terrorist Bombings, Dec. 15, 1977, U.N. Treaty Reg. No. 37517; Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, U.N. Treaty Reg. No. 38349.

article 2(a) of the United Nations Convention Against Transnational Organized Crime (Palermo Convention), which states that “organized criminal group”

shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.<sup>154</sup>

This definition focuses on organized hierarchy, violence, restricted membership, and illegality.<sup>155</sup> As we will show below, this correlates with domestic legislations.

While in the past criminal groups aspired to follow the traditional design of older corporations, for example, similar to the car of the steel industry, today modern groups adopted a modern network-based structure.<sup>156</sup> The network-based form of organization enables operational flexibility alongside effective decision-making and allows one to move and use financial resources swiftly and secretly.<sup>157</sup> Concerning violence, international organized crime groups use targeted violence to promote organizational goals, while terrorist groups resort to it to advance political goals.<sup>158</sup> Unlike organized crime groups that instrumentally use violence, when it comes to terrorist organizations, it forms part of their sense of identity and defining characteristics.<sup>159</sup>

After looking at the international dimension, we wish to complement our inquiry by examining domestic legislation States adopted in the face of terrorism and organized criminal groups. In addition, we will show that the customary avenues for attributing international criminal responsibility for aiding and abetting, and Joint Criminal Enterprises (JCE), which significantly resemble the approach States took at the domestic level.

#### E. DOMESTIC LEGISLATION DEALING WITH TERRORISM AND ORGANIZED CRIMINAL GROUPS

An essential catalyst for the criminalization of both terrorism and organized crime on the domestic level is the Palermo Convention, adopted by 190 States.<sup>160</sup> Moreover, the absence of a comprehensive international definition for “terrorism” increases the importance of deference to national legislation and practice.<sup>161</sup>

At times, it might be possible to prosecute organized crime offenses in parallel with terrorism offenses.<sup>162</sup> It is important to use precise and defined terminology in the effort against terrorism and organized criminal groups,

<sup>154</sup> G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Jan. 8, 2001).

<sup>155</sup> See generally James O. Finckenaue, *Problems of Definition: What is Organized Crime?*, TRENDS IN ORGANIZED CRIME, Spring 2005, at 63, 65.

<sup>156</sup> Shelley, *supra* note 4, at 87.

<sup>157</sup> Sanderson, *supra* note 54, at 54.

<sup>158</sup> Shelley & Picarelli, *supra* note 104, at 308.

<sup>159</sup> U.N. Secretariat, *supra* note 82, at ¶ 15.

<sup>160</sup> Hübschle, *supra* note 34, at 86.

<sup>161</sup> *Views of the United Nations Special Rapporteur*, *supra* note 119, at 2.

<sup>162</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶ 12.

since the absence of such precision can be abused and undermine human rights protections for individuals and groups.<sup>163</sup> In particular, States might utilize broad security-based criminal measures and extraordinary mechanisms that might jeopardize fundamental human rights.<sup>164</sup>

The ability to cooperate on the international level depends on the effectiveness of national legal systems—in particular, a uniform and comprehensive approach to jurisdiction manifested in the *aut dedere aut judicare* rule (extradite or prosecute).<sup>165</sup> This Section will focus on domestic legislation, which is aimed at promoting such a uniform and comprehensive approach. The next Section will show how the customary avenue for attributing international criminal responsibility resembles the domestic level.

Many States instituted legislation criminalizing organized crime. These laws are much more similar than they are different due to the extensive and significant influence of UNODC. We will present a short survey of States from different global regions—with common law, continental, and combined common law-continental systems. In particular, the states analyzed include Australia, Bulgaria, Bosnia and Herzegovina, Canada, Denmark, Germany, Israel, Latvia, the United Kingdom, and the United States.

### 1. Australia

In Australia, a common law system,<sup>166</sup> the Criminal Code differentiates between first- and second-degree liability in commissioning a crime.<sup>167</sup> Direct perpetrators are considered first-degree offenders, while aiders and abettors are second-degree offenders.

Under Article 11.5(2) of the Australian Criminal Code Act, for a person to be considered a conspirator, they must agree with at least one more person before the commission of the act, to work together in its completion.<sup>168</sup> There also needs to be at least one overt act based on the agreement as a crystalizing factor for the conspiracy.<sup>169</sup>

Sections 345 and 346 of the New South Wales Crimes Act dictate that the punishment must be as severe for first- and second-degree offenders.<sup>170</sup>

<sup>163</sup> *Views of the United Nations Special Rapporteur*, *supra* note 119, at 5.

<sup>164</sup> Including, but not only, torture, inhuman and degrading treatment, due process rights, lack of access to legal counsel and more. See David Jenkin, *The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Changes in the 'Five Eyes' Nations*, in Routledge Handbook of Law and Terrorism, 266 (2015) (Genevieve Lennon & Clive Walker eds., 2017).

<sup>165</sup> U.N. Secretariat, *supra* note 82, at ¶ 59.

<sup>166</sup> See generally SIMON BRONITT & BERNADETTE MCSHERRY, *PRINCIPLES OF CRIMINAL LAW* (2d ed. 2005).

<sup>167</sup> D. BROWN, D. FARRIER, S. EGGER, L. MCNAMARA, A. STEEL, M. GREWCOCK & D. SPEARS, *CRIMINAL LAWS: MATERIALS AND COMMENTARY ON CRIMINAL LAW AND PROCESS OF NEW SOUTH WALES* (5th ed. 2011).

<sup>168</sup> *Criminal Code Act 1995* (Cth), 11.5(2) (Austl.) (“For the person to be guilty: (a) the person must have entered into an agreement with one or more other persons; and (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.”).

<sup>169</sup> For discussion, see BROWN, FARRIER, EGGER, MCNAMARA, STEEL, GREWCOCK, & SPEARS, *supra* note 167.

<sup>170</sup> *New South Wales Crimes Act 1900* (NSW), § 345 (Austl.) (“Every principal in the second degree in any serious indictable offence shall be liable to the same punishment as the principal in the first degree.”). *Id.* at § 346, the Section states:

Every accessory before the fact to a serious indictable offence may be indicted, convicted, and sentenced, either before or after the trial of the principal offender, or together with the principal

Still, the principle of equality dictates that there should be less punishment for second-degree offenders.<sup>171</sup> Notwithstanding, at times, there can be a similar punishment, and, at times, a second-degree offender might receive a harsher penalty. When an organized criminal group leader directs others to commit offenses, they can also be considered an accomplice to the act. If convicted, their punishment might be more severe than the actual perpetrator.<sup>172</sup> This is true regardless of when the partnership (between the leader and the perpetrator) began or the temporal or geographical proximity of the leader and the offenses.<sup>173</sup>

The approach—according to which a leader of an organized crime group must be penalized more severely than the actual perpetrators they send—derives from a 2006 legislative amendment.<sup>174</sup> The Amendment was advanced against the backdrop of the Bilal Skaf incident.<sup>175</sup> Skaf was a leader of a criminal group that was responsible for several incidents of rape and sexual assault. While he was initially sentenced to fifty-five years, his sentence was reduced, after an appeal, to twenty-eight years (with a possibility of an early release after twenty-two years). Under the Amendment, the ultimate decision regarding who should be considered a mere member of an organized armed group and who should be considered the group's leader is left up to the court.

## 2. Bulgaria

The Bulgarian Penal Code deals more indirectly with accomplices; for example, who would be found to be an accomplice in the preparation of an offense.<sup>176</sup> Still, the jurisprudence of the domestic courts in Bulgaria enabled the development of the doctrinal interpretation and understating of this phenomenon.

This is similar to international criminal law, since a person who gives significant assistance or mental support for the commission of an offense while being aware that their action or omission facilitates that act will bear responsibility for the offense committed.<sup>177</sup> The penal law in Bulgaria

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offender, or indicted, convicted, and sentenced, as a principal in the offence, and shall be liable in either case to the same punishment as the principal offender, whether the principal offender has been tried or not, or is amenable to justice or not.

<sup>171</sup> *Id.*

<sup>172</sup> *Regina v Styman* [2005] NSWCCA 129 (Austl.).

<sup>173</sup> *McAuliffe v The Queen* [1995] HCA 37 (Austl.). The Australian courts applied and expanded the doctrine of a joint cause, and also do not require the actual presence or participation of the group leader in the crime.

<sup>174</sup> *Crimes (Sentencing Procedure) Act 1999 No 92* (NSW) (Austl.); *Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006* (NSW) sch 1 (Austl.).

<sup>175</sup> *Regina v Skaf* [2005] NSWCCA 297 (Austl.).

<sup>176</sup> Bulgaria Criminal Procedure Code, SG No. 86/28.10.2005, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF\(2019\)034-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2019)034-e) [<https://perma.cc/9WF8-JY8G>]

<sup>177</sup> *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment, ¶ 399 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 681–89 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

assumes that damage increases when more than one person joins forces in its perpetration.<sup>178</sup>

Regarding the penalty of accomplices, the Bulgarian Penal Code is more specific and indicative: all parties involved in the commission of the offense (principal perpetrator, alongside aiders and abettors) are expected to receive the same punishment.<sup>179</sup> At the same time, the Bulgarian Penal Code states that responsibility is personal. If there is a gap between the role played and the actual part each person was involved in, there might be a difference in their sentence.<sup>180</sup> This is only logical given the desire to avoid collective punishment, which goes against fundamental principles of criminal law and is illegal in most domestic and international systems.<sup>181</sup>

### 3. Bosnia and Herzegovina

After the dissolution of the former Yugoslavia, Bosnia and Herzegovina became an independent State in 1992.<sup>182</sup> The newly established State introduced a new Criminal Code in 2003.<sup>183</sup> The Code states that the joint criminal responsibility of all perpetrators is based on the principle of individual culpability, in the sense that every participant will be liable within the limits of her guilt, regardless of the existence or the extent of culpability of others involved in the offense.<sup>184</sup>

<sup>178</sup> Nikola Filchev, *General Characteristics of Complicity Under the Criminal Law of the Republic of Bulgaria*, in YEARBOOK OF THE ST. CLEMENT OF OHRID UNIVERSITY OF SOFIA – SCHOOL OF LAW, BOOK I (1982).

<sup>179</sup> Criminal Code, S.G. no. 86/28.10.2005, Art. 21 (Bulg.), the law states:

- (1) All accomplices shall be punished by the punishment provided for the perpetrated crime, with due consideration of the nature and degree of their participation.
- (2) Abettors and accessories shall be held liable only for what they have intentionally abetted or by what they have aided the perpetrator.
- (3) Where because of certain personal characteristics or attitude of the perpetrator the law treats the perpetrated act as a crime, liable for this crime shall be both the abettor and the accessory with respect of whom such circumstances are not in evidence.
- (4) The special circumstances, due to which the law excludes, reduces or increases the punishment for some of the accomplices, shall not be taken into account for the remaining accomplices with respect to whom such circumstances are not in evidence.

<sup>180</sup> *Id.* at Art. 35, the Article states:

- (1) Criminal liability is personal.
- (2) A punishment may be imposed only on a person who has committed a crime defined as such by law.
- (3) The punishment shall correspond to the crime.
- (4) A punishment for a crime shall be imposed only by the established courts of law.

<sup>181</sup> For discussion, see, e.g., Jonathan Grebinar, Comment, *Responding to Terrorism: How Must a Democracy Do It? A Comparison of Israeli and American Law*, 31 FORDHAM URB. L.J. 261, 275 (2003).

<sup>182</sup> See Maurizio Ragazzi, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia*, 31 INT'L L. MATERIALS 1488, 1495, 1522 (1992). See also Paul Williams & Jennifer Harris, *State Succession to Debts and Assets: The Modern Law and Policy*, 42 HARV. INT'L L.J. 355, 385 (2001).

<sup>183</sup> OFF. GAZETTE BOSN. & HERZ. [CRIMINAL CODE] nos. 3/03, 36/03, (Bosn. & Herz.).

<sup>184</sup> *Id.* at Art. 32(1) ("The accomplice shall be considered *guilty* within the limits set by his own intent or negligence, and the inciter and the accessory within the limits of their own intent.") *Id.* at Art. 29 ("If several person who, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense, shall each be punished as prescribed for the criminal offenses..."); *Id.* at Art. 30(1) ("Whoever intentionally incites another to perpetrate a criminal offence, shall be punished as if he himself perpetrated

As for the level of culpability, when dealing with more than one person, the most severe degree is joint perpetration of the offense. The next degree is instigation for the commission of an offense.<sup>185</sup> The lowest degree is aiding and abetting.<sup>186</sup> The Criminal Code also refers to a partner-in-crime who decides to prevent the ultimate commission of the offense.<sup>187</sup> The Code incentivizes prevention so by stating that the court will avoid punishing a co-perpetrator, an instigator, or an abettor that has voluntarily prevented the perpetration of the criminal offense.<sup>188</sup>

The Code also adopted the concept of conspiracy to commit an offense and recognized that the agreement may be in writing, orally, or through different forms.<sup>189</sup> When an organized criminal group leader sends their members to commit an offense, the leader may be responsible for instigating the offense. As such, the leader may be subject to severe punishments as well.<sup>190</sup> As such, the leader may bear liability for instigation to commit a crime, even if, for example, they do not know which of their members committed the particular offense.

#### 4. Canada

There are several legal instruments in Canada that form the primary legal sources of the criminal system in Canada—most notably, the Canadian Constitution and the Canadian Criminal Code.<sup>191</sup> Articles 21–23 of the Canadian Criminal Code deal with joint perpetrators of an offense.<sup>192</sup>

Article 21 of the Canadian Criminal Code distinguishes between three types of parties of the offense who: (1) commit it; (2) do or omit to do anything to aid any person to commit it; or (3) abet any person in committing it.<sup>193</sup> Article 22 deals with a situation in which one person counsels another

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such offence.”); *Id.* at Art. 31(1): “Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.”).

<sup>185</sup> Criminal Code, S.G. no. 26/2.04.1968, Art. 35 (Bulg.)

<sup>186</sup> FRANJO BAČIĆ, KAZNENO PRAVO – OPĆI DIO, [Penal Law, General Part, Informator] 330 (Informator 5th ed.1998).

<sup>187</sup> Criminal Code S.G. no. 36/03 Art. 34(2) (Bosn. & Herz.) (“The court shall refrain from imposing a punishment on an accomplice, inciter or accessory that has voluntarily prevented perpetration of the criminal offence.”).

<sup>188</sup> *Id.*

<sup>189</sup> *See id.* at Art. 247, the Code states:

Whoever agrees with another to perpetrate a criminal offence prescribed by law of Bosnia and Herzegovina, for which a punishment of imprisonment of three years or a more severe punishment may be imposed, unless a heavier punishment is foreseen for conspiracy of a particular criminal offence, shall be punished by a fine or imprisonment for a term not exceeding one year.

<sup>190</sup> *Id.* at Art. 250(3), this Article states:

Whoever organizes or directs at any level a *group for organised crime* which by joint action perpetrates or attempts to perpetrate criminal offence prescribed by the law of Bosnia and Herzegovina, shall be punished by imprisonment for a term not less than ten years or a long-term imprisonment.

<sup>191</sup> Kent Roach, *The New Terrorism Offences and the Criminal Law*, in *THE SECURITY OF FREEDOM: ESSAYS ON CANADA’S ANTI-TERRORISM BILL* 151, 152 (R. Daniels, P. Macklem & K. Roach eds., 2001).

<sup>192</sup> Criminal Code, R.S.C. 1985, c C-46, Art. 21–23 (Can.)

<sup>193</sup> Criminal Code, R.S.C. 1985, c C-46, Art. 21(1) (Can.) (“Every one is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it; or (c) abets any person in committing it.”); in the next subsection, the Code states:

to become part of an offense, in the sense that the counselor becomes a party to the offense regardless of whether it was conducted differently from the counsel.<sup>194</sup> Similar to the United Kingdom, the Canadian Criminal Code defines counseling an offense to include either solicitation, incitement, or procurement.<sup>195</sup> The Canadian Criminal Code does not differentiate between direct and indirect participation.<sup>196</sup> Article 23 of the Canadian Criminal Code deals with an accessory after the fact, namely a person who receives, comforts, or assists an offender to enable that person to escape.<sup>197</sup> Articles 21–23 of the Canadian Criminal Code apply to an accessory regardless of the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted.<sup>198</sup> This is similar to the situation under international law, as noted above, because there is neither a need to show a causal link between the actions of the abettor and the commission of the offense, nor a need to prove that the assistance was a preliminary condition for committing the offense.<sup>199</sup>

The Canadian Criminal Code expands the definition of “sides to an offense” beyond knowingly aiding or abetting.<sup>200</sup> The Code includes persons who share a common intention to commit an offense in collaboration—in particular, when they knew or should have known that the commission of the offense will be the probable result their joint cause.<sup>201</sup> As for the punishment, each participant in the criminal plot might receive the same sentence as the main perpetrator. The Canadian Criminal Code states that, nevertheless, the penalty will be concerning the extent of the offense and the offender’s culpability level.<sup>202</sup> The judicial jurisprudence highlighted some aggravating

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Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

*Id.* at Art. 21(2)

<sup>194</sup> *Id.* at Art. 22, the Article states:

(1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled. (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

<sup>195</sup> *Id.* at Art. 22(3) (“For the purposes of this Act, ‘counsel’ includes procure, solicit or incite.”).

<sup>196</sup> *Id.* at Art. 22.

<sup>197</sup> *Id.* at Art. 23.

<sup>198</sup> *Id.* at Art. 23.1 (“For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.”).

<sup>199</sup> *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgement, ¶ 48 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

<sup>200</sup> *See* Criminal Code, R.S.C. 1985, C-46, Art. 21(2) (Can.).

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at Art. 718.2 (Can.), stating that:

A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor, (ii) evidence that the offender, in committing the offence, abused the offender’s spouse or common-law partner, (ii.1) evidence



circumstances in the context of sentencing, such as pre-planned offenses or criminal associations.<sup>203</sup> In particular, when an offense is conducted in the context of terrorism, it is considered an aggravating factor, especially when dealing with a group leader.<sup>204</sup> Some claimed that this trend is expansive because the courts lowered the bar and conflated terrorist and criminal.<sup>205</sup>

The Canadian Supreme Court ruled that all participants in a criminal enterprise can be considered aiders or abettors, regardless of the extent of their participation (especially when dealing with violent acts).<sup>206</sup> The Supreme Court stated, specifically, that a leader can be convicted of a murder offense, even if the actual perpetrator were accused of a lower offense like manslaughter.<sup>207</sup>

## 5. Denmark

The Danish Criminal Code deals with organized criminal groups in considerable detail. For example, the leader of an organized criminal group who orders the commission of an offense will bear criminal responsibility as an aider or instigator, regardless of whether the actual perpetrator was prosecuted and convicted.<sup>208</sup>

The leader's punishment depends, among other things, on the offense committed and its gravity.<sup>209</sup> The extent of dependability between the perpetrator and the leader who gave the order is also a relevant issue that might aggravate the leader's punishment.<sup>210</sup> An additional aggravating factor is when the offense is committed by several perpetrators operating in concert as part of a criminal group.<sup>211</sup>

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that the offender, in committing the offence, abused a person under the age of eighteen years, (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, (iv) evidence that the offence was committed for the benefit, or at the direction of or in association with a criminal organization, or (v) evidence that the offence was a terrorism offence shall be deemed to be aggravating circumstances . . . .

<sup>203</sup> See *Regina v. Plourde*, [1985], 23 C.C.C. (3d) 463, 465, 468 (Can. Que. C.A.).

<sup>204</sup> *Regina v. LeSarge*, [1975], 26 C.C.C. (2d) 388 (Can. Ont. C.A.).

<sup>205</sup> CLAYTON BURY, SENTENCING, 93 (Toronto, 2004); See Roach, *supra* note 191.

<sup>206</sup> *Regina v. Wood*, [1989] 51 C.C.C. (3d) 201, 226 (Can. Ont. C.A.).

<sup>207</sup> See *Remillard v. The King*, [1921] 62 S.C.R. 21, 21 (Can.).

<sup>208</sup> THE CRIMINAL CODE, Order No. 909 of Sept. 27, 2005, as amended by Act Nos. 1389 and 1400 of Dec. 21, 2005, Art. 151 (Den.).

<sup>209</sup> *Id.* at Art. 23. Stating that:

(1) The penalty in respect of an offence shall apply to any person who has contributed to the execution of the wrongful act by instigation, advice or action. The punishment may be reduced for any person who has only intended to give assistance of minor importance, or to strengthen an intention already existing and if the offence has not been completed or an intended assistance has failed. (2) The punishment may similarly be reduced for a person who has contributed to the breach of a duty in a special relationship in which he himself had no part. (3) Unless otherwise provided, the penalty for participation in offence that are not punishable more severely than with imprisonment for 4 months may be remitted where the accomplice only intended to give assistance of minor importance or to strengthen an intention already existing, or where his complicity is due to negligence.

<sup>210</sup> This is regardless of the question of a duty to disobey an order, in the context of hierarchical organization such as the military. For discussion, see MALENE FRESE JENSEN, VAGN GREVE, GITTE HØYER & MARTIN SPENCER, *THE DANISH CRIMINAL CODE & THE DANISH CORRECTIONS ACT* (DJOF Publishing 2d ed. 2003).

<sup>211</sup> THE CRIMINAL CODE art 81 (Den.) ("In determining the penalty it shall, as a rule, be considered a circumstance in aggravation (1) . . . ; (2) that the offence is committed by several persons together; (3) that the offence is specifically planned or part of extensive crime. . . .").

The sentence can be aggravated when more than one person joins hands in the commission of an offense as part of a joint criminal enterprise—be that a criminal group (a random assembly of persons that cooperates temporarily with a low level of organization) or a criminal enterprise (a group of persons that operates with defined goals, with an accepted leader, and based on an internal hierarchy and distinctive features from people outside the group).<sup>212</sup>

## 6. Germany

In Germany, when a group of persons commits a joint offense, each group member is considered a perpetrator.<sup>213</sup> When a person aids or abets the commission of an offense, their punishment is generally identical to that of the actual perpetrator.<sup>214</sup> Still, in some cases, there can be some leniency toward the former.<sup>215</sup> The law recognizes the role of the “perpetrator behind the perpetrator” in initiating, ordering, or planning an offense. When dealing with an instigator, the German approach is that an instigator should be sentenced similarly to a perpetrator.

An aider or abettor can receive leniency since the main perpetrator has already made up their mind to commit an offense. This is unlike an instigator, who pushes a person in the direction of the offense’s commission (even if the perpetrator has not fully decided to go ahead with the criminal plan). Similar to Denmark and Canada, an indirect perpetrator—for example, a person ordering the commission of the offense—can be prosecuted regardless of the ability to prosecute and convict the direct perpetrator of the offense. In the view of Claus Roxin, the difference between an instigator and an aider is that the instigator “sparks the flame,” while the aider only assists in the effort to maintain it.<sup>216</sup>

The sentencing guidelines do not consider the person’s specific role in the criminal enterprise. For example, the sentence could be reduced depending upon the perpetrator’s motive for committing the offense, level of anti-social behavior, socioeconomic status of the perpetrator, former criminal prosecutions, and their attempt to rectify the act afterwards.<sup>217</sup>

<sup>212</sup> For discussion, see INGEBORG GADE, RIKKE FREIL LAULUND & KATRINE SCHJØNNING, *DET POLITIMÆSSIGE OG STRAFFERETLIGE SAMARBEJDE I DEN EUROPÆISKE UNION* [POLICE AND JUDICIAL CO-OPERATION IN THE EUROPEAN UNION] 249, 316–30 (2005).

<sup>213</sup> *Strafgesetzbuch* [STGB] [Penal Code], as last amended by art. 2 of the Act of Nov. 22, 2021, § 25 (Ger.) (“Commission of offense (1) Whoever commits an offence themselves or through another incurs a penalty as an offender. (2) If several persons commit an offence jointly, each person incurs a penalty as an offender (joint offenders).”).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at § 27 (“Aiding (1) Whoever intentionally assists another in the intentional commission of an unlawful act incurs a penalty as an aider. (2) The penalty for the aider is determined in accordance with the penalty threatened for the offender. It must be mitigated pursuant to section 49(1).”).

<sup>216</sup> CLAUD ROXIN, *STRAFRECHT, ALLGEMEINER TEIL, BAND II, BESONDERE ERSCHEINUNGSFORMEN DER STRAFTAT* [CRIMINAL LAW, GENERAL PART, VOLUME II, SPECIAL MANIFESTATIONS OF THE CRIME] 182 (2003).

<sup>217</sup> STGB § 46 (Ger.), the law states:

(1) The offender’s guilt provides the basis on which the penalty is fixed. The effects which the penalty can be expected to have on the offender’s future life in society are to be taken into account. (2) When fixing the penalty the court weighs the circumstances which speak in [favor] of and those which speak against the offender. The following, in particular, may be taken into consideration: the offender’s motives and objectives, in particular including racist, xenophobic, antisemitic or other motives evidencing contempt for humanity, the attitude reflected in the offence and the degree of force of will involved in its commission, the degree of the breach of

One guideline that most agree upon is that the greater role that the leader has in convincing a person to commit an offense, the greater the leader's culpability.<sup>218</sup> This resembles the notion of the JCE, where there is a group of persons with a joint plan or goal that involves committing an international crime, which can lead to a conviction of all parties to the crime as direct perpetrators.<sup>219</sup> When all participants in the JCE are acting by a common plan, they all possess the same criminal intent, even if their roles are different.<sup>220</sup>

Relevant considerations for determining the role of a leader in a criminal enterprise are a leader's control over the perpetrator and the action more generally. As such, the more organized and hierarchical the group is, the more criminally liable its leader will be found, and at times the leader can be considered a joint perpetrator altogether.<sup>221</sup>

Some have criticized the attempt to treat a leader as an indirect perpetrator and advocated for treating a leader as a direct perpetrator.<sup>222</sup> However, in practice, a leader does not need to know the victim, the time the offense was committed, or the place where the offense was committed. For example, in the trial of Erich Honecker for the shooting at the East-West German border, Honecker was found guilty of murder, even though he did not provide instructions to kill specific people or pre-determine the time or the location of the shooting).<sup>223</sup>

## 7. Israel

In Israel, there are five primary forms of perpetrators: direct individual perpetrators, direct joint perpetrators, perpetrators via another, instigators, and aiders and abettors.<sup>224</sup> Jurisprudence is divided based on the classification of a leader of an organized criminal group. For example, in some cases, leaders are liable for criminal offenses as joint perpetrators, while in others, leaders are viewed as instigators.<sup>225</sup> Preeminent scholars, such as Mordechai Kremnitzer and Miriam Gur-Arie, believe that a leader of

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the offender's duties, the *modus operandi* and the consequences caused by the offence to the extent that the offender is to blame for them, the offender's prior history, personal and financial circumstances, and the offender's conduct in the period following the offence, in particular efforts to make restitution for the harm caused as well as efforts at reconciliation with the victim  
 . . . .

<sup>218</sup> Ulrich Sieber, *Strafbare Mitwirkung von Führungspersonen in Straftätergruppen und Netzwerken in Deutschland* [Criminal Involvement of Leaders in Criminal Groups and Networks in Germany], MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT IN FREIBURG (2012).

<sup>219</sup> Prosecutor v. Simic, Case No. IT-95-9-T, Judgement, ¶ 138 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

<sup>220</sup> Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise, ¶¶ 5–6 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003).

<sup>221</sup> For discussion, see KAI AMBOS, *DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS* [THE GENERAL PART OF INTERNATIONAL CRIMINAL LAW] 605 (2002).

<sup>222</sup> HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL* [TEXTBOOK OF CRIMINAL LAW, GENERAL PART] 670 (5th ed. 1996).

<sup>223</sup> Goodman, Micah, *After the Wall: The Legal Ramifications of the East German Border Guard Trials in Unified Germany*, 29 CORNELL INT'L L.J. 727, 727–729, 734 (1996).

<sup>224</sup> Amendment 39 to the Israeli Penal Code, which entered into force in 1995, defined five forms of complicity in committing a crime, in sections 29 to 31 of the Penal Code.

<sup>225</sup> In the *Meshulam* case, the dissenting opinion by Justice Dorner viewed the leader as the instigator of the offence rather than a joint perpetrator.

an organized criminal group should be considered a perpetrator via another.<sup>226</sup>

Justice Cheshin, former Deputy President of the Supreme Court of Israel, opined that as a principle and as a moral matter, leaders of criminal organized groups should be classified as perpetrators through another individual.<sup>227</sup> Still, given the language of the law, there is no plausible interpretation that can bring such a conclusion.<sup>228</sup> As such, Cheshin classified a group leader as a joint perpetrator. However, some, like Gur-Arie, believe that perpetration via another is the more suitable option.<sup>229</sup> In contrast, others, like Aharon Anker, view joint perpetration as a better option (most pertinently, when the leader was part of the planning of the offense).<sup>230</sup>

Treating a leader not physically involved in the offense as a joint perpetrator created a problem. In response, the Israeli legislature adopted a law that defined an organized criminal group and created specific treatment for these offenses:

“Criminal organization” means an incorporated or unincorporated body of persons acting in an organized, systematic and continuous format for the commission of offenses which, under the laws of Israel, fall within the category of a felony or the offense enumerated within the First Schedule, except offenses falling within the category of a felony enumerated within the Second Schedule; for this purpose, it is irrelevant – (1) whether or not the members of the organization know the identity of the other members; (2) whether the composition of the members of the group is fixed or changing; (3) whether the aforesaid offenses in the opening passage are committed or intended to be committed in Israel or abroad, provided however that they constitute offenses both under the laws of Israel and under the laws of the place in which they were committed, or that under Israeli law, the Israeli penal laws apply to them, even if they are not offenses under the laws of that place; (4) whether the organization also commits lawful acts and whether it also acts for lawful purposes.<sup>231</sup>

As for the possible sentences that a leader can face,

(a) A person who heads a criminal organization or a person who does one of the following acts in a manner that could promote the criminal activity of a criminal organization shall be liable to imprisonment for ten years: (1) he directly or indirectly manages, organizes, directs or supervises activities in a criminal organization; (2) he directly or indirectly finances activities of a criminal organization or receives

<sup>226</sup> Mordechai Kremnitzer, *The Operation in Penal Law - Lines for His Character*, 1 CRIMINALS 65, 74 (1990) (on file with authors); Miriam Gor-Arie, *Parties to the Offense - Amendment 39 to the Penal Code in the Jurisprudence Test*, TRENDS IN CRIMES 83, 104 (Eli Lederman editor, 2001) (on file with authors).

<sup>227</sup> Case No. 2796/95 Peloni v. The State of Israel, P.D. No. (3) 239, 249 (1996) (Isr.) (on file with authors).

<sup>228</sup> Additional criminal hearing 1368/96, 1294 Uzi Meshulam v. the State of Israel, P.D. No. (5)1, 58 (1998) (Isr.) (on file with authors).

<sup>229</sup> Miriam Gor-Arie, *supra* note 226.

<sup>230</sup> Aharon Anker, *On the distinction between the perpetrator and the accomplice*, 17 LEGAL STUDIES 344 (2002) (on file with authors).

<sup>231</sup> Combating Criminal Organizations Law, 5763-2003 (Isr.).

financing to operate the organization or decides concerning the distribution of monies in a criminal organization. (b) A person providing a consulting service to a criminal organization with the object of promoting the criminal activities of the criminal organization shall be liable to imprisonment for ten years. (c) Where an offense, as stated in subsections (a) and (b), has been committed concerning a criminal organization whose activities also include an offense for which the penalty prescribed exceeds imprisonment for 20 years, the person committing such an offense shall be liable to imprisonment for 20 years.<sup>232</sup>

## 8. Latvia

The Criminal Code of Latvia broadly defines the term “perpetration” to include direct perpetration,<sup>233</sup> joint perpetration,<sup>234</sup> and criminal associations.<sup>235</sup> As for associations and the roles of organizers, instigators, or accessories, the law differentiates between direct and indirect associations. As such, an association can also include a person not physically involved in the offense’s perpetration.<sup>236</sup> The Code also defines “direction” (that is, ordering and organizing).<sup>237</sup>

As such, leaders of criminal organized groups usually fall under one of several categories. These include instigators, planners, or accessories to the act, even if they did not partake in it directly. However, as none of these alternatives are treated as direct participation.

## 9. The United States

The United States follows the common law, so criminal law differentiates between two degrees of culpability. A first-degree offense usually involves a primary and direct perpetrator, not in the context of an association. A second-degree offense generally deals with criminal associations. There are also options below second-degree, such as aiding and abetting before the act or aiding and abetting after the act.<sup>238</sup>

<sup>232</sup> *Id.*

<sup>233</sup> Criminal Law § 17 (1998) (Lat.) (“A person, who himself or herself has directly committed a criminal offence or, in the commission of such, has employed another person who, in accordance with the provisions of this Law, may not be held criminally liable, shall be considered the perpetrator of a criminal offence.”).

<sup>234</sup> *Id.* at § 18 (“The participation by two or more persons knowingly in joint commission of an international criminal offence is participation or joint participation.”).

<sup>235</sup> *Id.* at § 19 (“Criminal acts committed knowingly by which two or more persons (that is, a group) jointly, knowing such, have directly committed an intentional criminal offence shall be considered to be participation (joint commission). Each of such persons is a participant (joint perpetrator) in the criminal offence.”).

<sup>236</sup> *Id.* at § 20(1), the law states:

An act or failure to act committed knowingly, by which a person (joint participant) has jointly with another person (perpetrator), participated in the commission of an intentional criminal offence, but he himself or she herself has not been the direct perpetrator of it, shall be considered to be joint participation. Organizers, instigators and accessories are joint participants in a criminal offence.

<sup>237</sup> *Id.* at § 20(2) (“A person who has organized or directed the commission of a criminal offence shall be considered to be an organizer.”).

<sup>238</sup> *Standefer v. United States*, 447 U.S. 10, 15 (1980).

To be tried jointly, every person prosecuted needs to meet some of the *actus reus* (culpable act) requirements and have the requisite *mens rea* (culpable mental state).<sup>239</sup> However, the law treats joint perpetrators as first-degree offenders if they were also involved directly in the commission of the offense.<sup>240</sup> Joint perpetrators will have lower degrees of culpability if the commission of the offense was through another person.<sup>241</sup>

Federal and state laws refer to different forms of criminal associations,<sup>242</sup> with a spectrum of possible levels of culpability and punishments.<sup>243</sup> This also includes cases of aiders and abettors, not only direct perpetrators.<sup>244</sup> Direct perpetration in the United States includes individual perpetrators, joint perpetrators, and those who commit an offense via another person. In some cases, the same level of responsibility, and maybe even punishment, will be imposed on individuals with different roles in a criminal offense (direct perpetration and aiding, for example).<sup>245</sup>

In the past, the question of criminal association was complicated by the context of the Cold War, when questions of criminality, particularly ones of a communist nature, were entangled with political associations.<sup>246</sup> The

<sup>239</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 461 (3d ed. 2001).

<sup>240</sup> Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 344 (1985) (“So long as each person commits some of the *actus reus* of the crime and, acting jointly, they succeed in committing the crime, each is liable as a co-principal.”).

<sup>241</sup> *Id.*

<sup>242</sup> WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 333 (2d ed. 2003).

<sup>243</sup> N.Y. PENAL LAW § 20.00 (McKinney 2023), The law outlines the standards for holding a person criminally liable for the conduct of another:

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct.

MODEL PENAL CODE § 2.06 (AM. L. INST. 2022), the Code outlines:

(1) A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or both. (2) A person is legally accountable for the conduct of another person when: (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct; or (b) he is made accountable for the conduct of such other person by the Code or by the law defining the offense; or (c) he is an accomplice of such other person in the commission of the offense. (3) A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it, or (ii) aids or agrees or attempts to aid such other person in planning or committing it, or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or (b) his conduct is expressly declared by law to establish his complicity.

<sup>244</sup> 18 U.S.C. § 2385, stating:

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States . . . by force or violence, or by the assassination of any officer of any such government . . . shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

See also W. VA. CODE § 61-3-1 (2023) (“(a) Any person who willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling . . . shall be guilty of arson in the first degree . . .”).

<sup>245</sup> GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 655 (1978).

<sup>246</sup> 18 U.S.C. § 2385, the law states:

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly

September 11, 2001 terrorist attack and, more generally, the United States' War on Terror led to a new challenge of a similar nature—balancing between national security and human rights in the context of associations.<sup>247</sup> Scholars have suggested that most cases of criminal terrorism in the United States included material support to the terrorist act rather than basing the conviction simply on membership in a criminal group.<sup>248</sup>

In the United States, “conspiracy” constitutes both an offense and a basis for attributing joint criminal responsibility. Under *Pinkerton v. United States*, a party to a conspiracy can bear criminal liability for an act perpetrated by another individual when the perpetrator worked in connection with the conspirator, the offense was committed based on a common plan and understanding among the conspirators, and the party could foresee that their co-conspirators would commit an offense.<sup>249</sup> When these conditions are met, criminal liability is attributed even if the individual did not partake in the actual commission of an offense—namely, fulfilling the *actus reus*, even if the individual did not specifically know that an offense would be committed, but could have foreseen it.<sup>250</sup>

There are several relevant criteria regarding sentencing leaders of organized criminal groups: the extent of the authority of the leader in the decision-making process, the leader's role in the particular offense, the leader's gain from the offense, and the type of offense undertaken.<sup>251</sup> The question being examined in such cases is whether the evolution was a natural and probable outcome of the original order. This doctrine allows criminal liability to be attributed—to the individual ordering the act and on individuals who aided and abetted it—when the evolution of the offense is a natural and probable outcome.<sup>252</sup> The Supreme Court has also referred to the chain of instigation, where a leader gives orders to an individual, who then orders a third party to commit the offense.<sup>253</sup> Further, the Supreme Court has attributed criminal responsibility to the leader for either conspiracy, instigation, or aiding and abetting.<sup>254</sup>

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of persons, knowing the purposes thereof—Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. If two or more persons conspire to commit any offense named in this section, each shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. As used in this section, the terms “organize” and “organize,” with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons.

<sup>247</sup> See, e.g., *Humanitarian L. Project v. Gonzales*, 380 F. Supp. 2d 1134 (C.D. Cal. 2005).

<sup>248</sup> David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 9 (2003).

<sup>249</sup> *Pinkerton v. United States*, 328 U.S. 640, 647–48 (1946).

<sup>250</sup> See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 693 (7th ed. 2001).

<sup>251</sup> Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 607–08 (1992).

<sup>252</sup> *Roy v. United States*, 652 A.2d 1098, 1105 (D.C. Cir. 1995).

<sup>253</sup> *People v. Bloom*, 133 N.Y.S. 708, 710 (N.Y. App. Div. 1912).

<sup>254</sup> See LAFAYE, *supra* note 242, at 195.

### 10. The United Kingdom

When a group of individuals conducts the offense, they are referred to as joint principals.<sup>255</sup> To determine if an individual is a principal offender or secondary party, the court must determine whether the actions of the individual form part of the *actus reus* or simply constitute assistance to it.

There can also be perpetration through another, either when the person committing the offense lacks the requisite *mens rea* or enjoys protection (e.g., if they are a minor).<sup>256</sup> In addition, the law recognizes instigators and aiders and abettors, both before and after the offense.<sup>257</sup> The penalty for indirect offenders is identical to that of the direct perpetrator.<sup>258</sup>

The United Kingdom's criminal jurisprudence recognizes four forms of indirect perpetration: aid, abet, counsel, and procure. These terms are interpreted considering their natural meaning. "Aid" means "help," "abet" means "encourage," "counsel" means "instigate," and "procure" means "assist before the act."<sup>259</sup> In common law systems, there is no way to attribute direct responsibility to indirect perpetrators if the direct perpetrator cannot be convicted.<sup>260</sup>

To prosecute the leader of an organized criminal group, the leader must have played a direct role in the commission of the offense to prosecute based on laws covering criminal associations. Alternatively, there needs to be some awareness on their behalf that the offense would be committed. Prosecution requires proving that the leader was aware of the possibility that the offense would be committed and encouraged the actual perpetrator. The leader must have known specific details that constitute the criminal offense, or at a minimum, the possibility of the commission of the type of offense committed.<sup>261</sup> This relates to the international law situation discussed above. Prosecution of aiders and abettors includes cases in which the abettor is not aware of the concrete crime that they aided.<sup>262</sup>

The leader of an organized criminal group who orders the commission of an offense will be charged with instigation and assistance, and the leader may face the same penalty as the direct perpetrator. Prosecution requires that the leader was aware of the essential aspects composing the offense or some form of foreseeability that the conditions for the commission of the offense exist.<sup>263</sup> It is not enough that the leader is aware of some unplanned risks. Instead, the leader must be mindful of the potential that this type of offense

<sup>255</sup> ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* 416 (7th ed. 2013).

<sup>256</sup> *R v. Cogan and Leak*, [1976] QB 217 (Eng.).

<sup>257</sup> Magistrates' Court Act, 1980, c. 43, § 44 (Eng.) ("(1) A person who aids, abets counsels or procures the commission by another person of a summary offence shall be guilty of the like offence and may be tried (whether or not he is charged as a principal) either by a court having jurisdiction to try him. (2) Any offence consisting in aiding, abetting, counseling or procuring the commission of an offence triable either way (other than an offence listed in Schedule 1 to this Act) shall be triable either way.")

<sup>258</sup> *A-G Reference 1* [1975] QB 773 (Eng.).

<sup>259</sup> CATHERINE ELLIOTT & FRANCES QUINN, *CRIMINAL LAW* 233 (4th ed. 2002).

<sup>260</sup> GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 349–53 (2d ed. 1961); GLANVILLE WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 330 (2d ed. 1983); DAVID ORMEROD, SMITH & HOGAN *CRIMINAL LAW* 230 (13th ed. 2011).

<sup>261</sup> *Johnson v. Youden*, [1950] 1 KB 544, 546 (Eng.).

<sup>262</sup> *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 484 (Int'l Crim. Trib. For Rwanda Sept. 2, 1998).

<sup>263</sup> A.P. SIMESTER & G.R. SULLIVAN, *CRIMINAL LAW: THEORY AND DOCTRINE* 214–215 (2d ed. 2003).



would be committed. For example, even if the criminal plan was to commit a robbery without violence, it is plausible that such an act might escalate into a violent one.<sup>264</sup>

### III. INTERNATIONAL CUSTOMARY AVENUES FOR ATTRIBUTION OF RESPONSIBILITY

As a matter of customary international law,<sup>265</sup> acts considered international crimes are unlawful based on either direct or indirect attribution. Direct attribution occurs when a person commits,<sup>266</sup> plans,<sup>267</sup> instigates,<sup>268</sup> or orders<sup>269</sup> an action that constitutes an international crime. Liability also arises when a person aids or abets<sup>270</sup> a crime or participates in a JCE.<sup>271</sup> Indirect attribution applies in certain instances involving military commanders (command responsibility) or civilian leaders (superior responsibility).<sup>272</sup> At times, the avenues for prosecution may overlap.<sup>273</sup> This inquiry focuses on aiding, abetting, and JCE.

Concerning aiding and abetting,<sup>274</sup> a person who significantly assists or mentally supports the commission of a crime, with awareness that their action or omission facilitates that act, bears responsibility for the crime committed.<sup>275</sup> There is no need to show a causal link between the actions of the abettor and the commission of the crime, nor is there a need to prove that the assistance was a preliminary condition for committing the crime.<sup>276</sup>

The physical element of aiding and abetting can exist before, during, or after the commission of the crime.<sup>277</sup> For example, the physical element can consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed. This constitutes instigating or abetting the perpetrators of the crime.<sup>278</sup>

<sup>264</sup> R. v. Barnard, [1980] 70 Cr. App. R 28 (Eng.).

<sup>265</sup> Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, ¶ 321 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

<sup>266</sup> Prosecutor v. Stakic, Case No. IT-97-24-T, T. Ch. II, ¶ 439 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003).

<sup>267</sup> See, e.g., Tadić, Case No. IT-94-1-A, ¶ 692.

<sup>268</sup> See, e.g., Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

<sup>269</sup> See, e.g., Kordić, Case No. IT-95-14/2-T, ¶ 388.

<sup>270</sup> Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 484 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998).

<sup>271</sup> William A. Schabas, *Symposium: The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1032 (2003).

<sup>272</sup> United States v. Flick, 6 TRIALS OF WAR CRIM. 1187, 1191 (U.S. Mil. Trib. Nuremberg 1947).

<sup>273</sup> In such cases the tribunal may decide which is the most appropriate head of responsibility. See, e.g., Prosecutor v. Krnojelac, Case No. IT-97-25-T, Trial Judgment, ¶ 463 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

<sup>274</sup> ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 214 (2d ed. 2008).

<sup>275</sup> Kordić, Case No. IT-95-14/2-T, ¶ 399. This proposition is true even if the person who actually committed the crime was not aware of the abettor's assistance, and if the abettor is not aware of the concrete crime that he aided in committing.

<sup>276</sup> Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeal Judgement, ¶ 48 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

<sup>277</sup> CASSESE, *supra* note 274, at 214.

<sup>278</sup> Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgment, ¶ 62 (Int'l Crim. Trib. for the Former Yugoslavia June 25, 1999).

The mens rea is fulfilled when there is proof that the accused assisted in the commission of a crime while knowing the purpose behind that crime.<sup>279</sup> This is true even if the abettor was not aware of the specific crime that they furthered.<sup>280</sup> Additionally, prosecuting the aider or abettor, does not require prosecuting or even locating the person who directly committed the crime, even when a crime is considered heinous.<sup>281</sup> For example, the International Criminal Tribunal for the former Yugoslavia (ICTY) held the Chamber's inability to locate the principal participants in the genocidal enterprise did not negate the finding that Radislav Krstić was aware of their genocidal intent.<sup>282</sup> A person who contributed significantly to committing a crime can fall under aiding and abetting. For example, financial support for terrorist activities can meet this criterion.

The other relevant avenue for attribution of criminal responsibility is participation in a JCE, which was first recognized in the Statute of the Nuremberg Military Tribunal and the International Military Tribunal for the Far East.<sup>283</sup> The JCE doctrine was further developed in ICTY jurisprudence and other ad-hoc international criminal courts.<sup>284</sup> Evidence of the status of this doctrine under international law today is its inclusion in the International Criminal Court (ICC) Statute and scholarly writings.<sup>285</sup>

To convict a person for participating in a JCE, it must be proven that:

- (1) There is a group of persons with a joint plan or goal that involves committing an international crime;
- (2) The accused contributed significantly to the fulfillment of this plan; and
- (3) The accused continued taking part in it out of their own will. An accused found criminally liable in a JCE is regarded as having committed that crime as opposed to having aided and abetted the crime.<sup>286</sup>

There are three types of JCE:<sup>287</sup>

- (1) All participants in the JCE are acting by a common plan, even if their roles are different, and they all possess the same criminal intent (for example, killing a particular person);
- (2) All participants in the JCE are members of armed forces which are acting under the same plan when the accused had a role with

<sup>279</sup> Prosecutor v. Tadić, Case No. IT-94-I-A, Judgment, ¶ 228 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

<sup>280</sup> Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 246 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

<sup>281</sup> Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶¶ 489–90 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

<sup>282</sup> Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment ¶ 143 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

<sup>283</sup> See Robert Cryer, *International Criminal Law*, in INTERNATIONAL LAW 770–71 (Malcolm D. Evans 3d ed. 2010).

<sup>284</sup> Prosecutor v. Krnojelac, Case No. IT-97-25, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 15, 2002).

<sup>285</sup> Beth S. Lyons, *Tortured Law/Tortured "Justice" – Joint Criminal Enterprise in the Case of Aloys Simba*, 17 ILSA J. INT'L & COMP. L. 459, 459 (2011).

<sup>286</sup> Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, ¶ 138 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2003).

<sup>287</sup> Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Separate Opinion of Judge David Hunt on Challenge by Ojdanić to Jurisdiction Joint Criminal Enterprise, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003).

responsibility within the group and assisted actively in the crime, even if they did not commit it (for example, a commander in a concentration camp where crimes against humanity occurred);

- (3) All participants were party to a joint plan and even if the crime committed was not previously defined in the plan, it was still a reasonable result of pursuing the plan (for example, evacuating a civilian population from a specific geographical zone in the process of ethnic cleansing).<sup>288</sup>

While the conduct of all JCE forms is the same, the requisite mens rea is distinct to each form.<sup>289</sup> The first type of JCE requires the intent to perpetrate a particular crime. The second type requires personal knowledge of the system of ill-treatment as well as intent to further this common concerted system of ill-treatment. Finally, the third type of JCE requires intent to participate in criminal activity and contribute to the joint criminal enterprise. The third type also demands: (1) it was foreseeable that such a crime might be perpetrated by one or other members of the group, and (2) the accused willingly took such a risk.<sup>290</sup>

#### IV. HARMONIZATION IN THE BATTLE AGAINST TERRORISM AND ORGANIZED CRIMINAL GROUPS

It is increasingly difficult to categorize or differentiate between terrorist and organized crime groups.<sup>291</sup> The relationship between these groups usually begins with an alliance, either promoted out of a desire to seek expert knowledge (like treatment of explosives) or to receive operational support (such as access to smuggling routes).<sup>292</sup> From that point, as articulated by Erik Alda and Joseph L. Sala, several possible avenues can be taken—coexistence, cooperation, or convergence.<sup>293</sup> An additional option, transformation is when a group might become so keenly focused on one activity—terror or crime—that it drops the other altogether.<sup>294</sup> Groups mutate their structure and organization partly out of a desire to avoid the inherent problems present in all alliances: competition, priorities, disagreements, distrust, and defection.<sup>295</sup>

<sup>288</sup> It should be mentioned that some of the elements in these modes of attribution received slightly different interpretation, for example in relation to the threshold of the demanded of *mens rea*. See CASSESE, *supra* note 274, at 164–72.

<sup>289</sup> Prosecutor v. Tadic, Case No. IT-94-I-A, Judgment, ¶ 228 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

<sup>290</sup> Concerning the development of attribution of international criminal responsibility, see Katharina Margetts & Patrick Hayden, *Current Developments at the Ad Hoc International Criminal Tribunals*, 7 J. INT'L CRIM. JUST. 1153, 1154–55 (2009).

<sup>291</sup> Angela Veng Mei Leong, *Chasing Dirty Money: Domestic and International Measures Against Money Laundering*, 10 J. MONEY LAUNDERING CONTROL 140, 145, 149 (2007).

<sup>292</sup> Makarenko, *supra* note 12, at 131. For example, the Islamic Movement of Uzbekistan relied on the Afghan drug mafia and Central Asian criminal groups to facilitate transportation of heroin between Afghanistan and the Russian Federation and the Caucasus.

<sup>293</sup> Peng Wang, *The Crime-Terror Nexus: Transformation, Alliance, Convergence*, 6 ASIAN SOC. SCI. 11, 15, 17 (2010).

<sup>294</sup> Shelley & Picarelli, *supra* note 84, at 64.

<sup>295</sup> Makarenko, *supra* note 12, at 133.

The symbiotic relationship between organized crime groups and terrorist groups requires addressing both threats at the same time.<sup>296</sup> This is especially true in a world in which the lines between terrorist and organized crime groups are increasingly blurred.<sup>297</sup> As noted by Louise I. Shelley and John T. Picarelli, two leading voices in the research of this nexus, the interaction between terrorism and organized crime is growing more profound and more complex ways that blur the lines of separation between the two phenomena.<sup>298</sup> Michael Lyman, Gary Potter, and subsequent scholars suggest that political plans and desire for profit can be concurrent variables in acts of terrorism.<sup>299</sup> As a result, some individuals find themselves belonging to terrorist and organized crime groups at the same time.<sup>300</sup>

Against this backdrop, some consider that terrorism and organized crime might converge and become the same.<sup>301</sup> For example, Tamara Makarenko claimed that global market structures—which allow unrestricted access to technological advancements—alongside emigrant and refugee communities—which can serve as recruitment base—have blurred the lines between terrorist groups and organized crime groups.<sup>302</sup> Similarly, Helena Carrapico, Daniela Irrera, and Bill Tupman believe that the changing nature of terrorism contributed to confusing the two phenomena through tactical alliances and the appropriation of methods.<sup>303</sup> Others suggest that the spectrum of involvement between the two groups includes several manifestations: associations, alliances, cooperation, confluence, convergence, or symbiosis.<sup>304</sup> This process was termed the “commercialization of terrorist groups” or “politicization of criminal organizations.”<sup>305</sup>

An interesting example is Ibrahim’s D-Company. This group started as a smuggling operation in the late 1970s and developed into a transnational organized crime syndicate by the 1980s.<sup>306</sup> After a series of anti-Muslim events, D-Company began to supplement its criminal operations with a radical Islamic ideology until finally, in the 1990s, D-Company began to launch terror campaigns.<sup>307</sup> Most notably, D-Company launched a series of explosions that shook Bombay, India on March 12, 1993 and led to the loss of 257 lives.<sup>308</sup> Other examples of organized criminal-terrorist campaigns include those initiated by the Medellin drug trafficking organization in Colombia in the 1980s and the Italian Mafia in the early 1990s.<sup>309</sup> Another example, the hashish trafficking group was an organized criminal group that

<sup>296</sup> Bibes, *supra* note 5, at 246.

<sup>297</sup> Hübschle, *supra* note 34, at 89.

<sup>298</sup> Shelley, *supra* note 84, at 52.

<sup>299</sup> See MICHAEL D. LYMAN & GARY POTTER, ORGANIZED CRIME (1997); see also Bovenkerk & Chakra, *supra* note 8, at 4.

<sup>300</sup> Shelley & Picarelli, *supra* note 84, at 53.

<sup>301</sup> Picarelli, *supra* note 110, at 184.

<sup>302</sup> Tamara Makarenko, *Transnational Crime and its Evolving Links to Terrorism and Instability*, 13 JANE’S INTEL. REV. 22, 22–24 (2001).

<sup>303</sup> Carrapico, Irrera, & Tupman, *supra* note 6, at 215.

<sup>304</sup> Alex P. Schmid, *Links Between Terrorist and Organized Crime Networks: Emerging Patterns and Trends*, (2004) (unpublished paper presented at the Institute for Securities Studies).

<sup>305</sup> U.N. Secretariat, *supra* note 82, at ¶ 21.

<sup>306</sup> Makarenko, *supra* note 12, at 132.

<sup>307</sup> U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., *supra* note 1, at 5.

<sup>308</sup> *Id.*

<sup>309</sup> U.N. Secretariat, *supra* note 82, at ¶ 13.

became politicized and radicalized to later commit the March 11, 2004 Madrid bombings.<sup>310</sup>

Other than radicalization based on an organized crime group's ideology, the influence and shift can also go the other way around. Examples include Abu Sayyaf, the Islamic Movement of Uzbekistan, and the FARC.<sup>311</sup> When there is a degradation of the leaders committed to the political cause or significant criminal profits, terrorist groups might turn their attention and resources toward crime (even under a bogus political banner).<sup>312</sup> In such cases, terrorist groups maintain a public façade, but in effect, they have transformed into a different type of group.<sup>313</sup>

A lesson of the past two decades, early experience with a petty crime gets one accustomed to violence and more vulnerable, or even open to, radicalization to extreme political ideologies.<sup>314</sup> An illustrative example of such an evolution is Abu Musab al-Zarqawi.<sup>315</sup> After a life as a young delinquent occupied with petty crime and after being radicalized in Jordanian prisons, al-Zarqawi established Jama'at al-Tawhid w'al-Jihad in 2003, which later became Al Qaeda in Iraq and evolved into the Islamic State.<sup>316</sup> Tens of thousands of people from around the world later went through a similar radicalization process, leading them to join the caliphate self-declared by the Islamic State in 2014.<sup>317</sup> These and other examples show that unemployment can lead to drugs, crime, or political violence.<sup>318</sup> This evolution primarily occurs with second- and third-generation immigrants who are caught between cultures, in search of their identity, and more vulnerable to influence and manipulation.<sup>319</sup> The fact that a prison is a hub for both terrorists and criminals, in which inmates exchange know-how and build alliances, leads to an understanding that any regulation in the sphere must address the two phenomena together.

It should be recalled that a prominent feature of transnational organized crime is the ability to exploit differences in the political cultures and legal systems of States. Instability benefits terrorists, who wish to undermine the legitimacy of governments, and organized crime groups, which desire to maximize their profits.<sup>320</sup> As such, cooperation between terrorist and organized crime groups makes both more dangerous, because it increases the flexibility and resilience of their networks.<sup>321</sup> This nexus has a direct

<sup>310</sup> *Id.* at ¶ 20.

<sup>311</sup> Makarenko, *supra* note 12, at 137.

<sup>312</sup> Picarelli, *supra* note 110, at 189.

<sup>313</sup> Makarenko, *supra* note 12, at 136.

<sup>314</sup> SCHMID, *supra* note 61, at 19.

<sup>315</sup> For discussion, see Hassan Hassan, *The Sectarianism of the Islamic State: Ideological Roots and Political Context*, CARNEGIE MIDDLE E. CTR. (June 13, 2016), <https://carnegie-mec.org/2016/06/13/sectarianism-of-islamic-state-ideological-roots-and-political-context/j1sf> [https://perma.cc/UA4C-4XUR].

<sup>316</sup> *Id.*

<sup>317</sup> On August 15, 2014, the SC adopted SC Resolution 2170, calling on UN member states to take national measures to prevent fighters from travelling from their soil to join the Islamic State, placing economic sanctions against the group, imposing travel restrictions on six of its members and calling for prosecution of foreign fighters. *See* SC Res. 2170 (Aug. 15, 2014). These very same foreign fighters later returned home and posed a threat on their respective societies.

<sup>318</sup> SCHMID, *supra* note 61, at 21.

<sup>319</sup> *Id.*

<sup>320</sup> Makarenko, *supra* note 12, at 132.

<sup>321</sup> U.N. Secretariat, *supra* note 82, at ¶ 5.

negative impact on security and threatens the erosion of political, economic, and social stability and development.<sup>322</sup> Therefore, it is essential to develop integrated approaches to assess, identify, and respond to such linkages.<sup>323</sup>

### CONCLUSION

Various elements underlie the long-standing relationships between terrorist and organized criminal groups: poor governance, the need to finance operations, weak border control, corruption, and the ability to use the opportunities presented to them—including developments like globalization or international health crises. Even if these groups choose to work together, similar legal treatment is not justified, whether in conceptualization or the tools deployed to address them.

Nevertheless, there are good reasons to treat terrorists and criminals similarly, at least in intelligence and enforcement measures. The growing nexus between terrorism and organized crime brings about concerns at domestic and international levels. As this Article has shown, terrorist and organized criminal groups bear many similarities. They operate clandestinely, use similar tactics, share a mutual desire for intimidation, and use violence to achieve their goals. Moreover, they usually oppose the State apparatus. Terrorists and criminals also work together, which increases the threat that emanates from them. In addition, they are more alike than not, mainly when focusing on the outcomes of their actions, as evidenced by the blurring of the lines between them and their interchangeability.

The combined presence of terrorism and organized crime threatens all States, specifically their security, social stability, and economic development. It also exacerbates conflicts in affected regions. This nexus will grow deeper so long as structural challenges subsist, including economic hardship, class disparities, migration pressures, repression by authoritarian regimes, ungoverned spaces, and misuse of the internet.

Strengthening the nexus between terrorism and organized crime led to a situation in which similar tools were deployed against them. At the same time, counterterrorism legislation and measures have generally been more restrictive than the provisions that apply to other criminal acts.

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<sup>322</sup> U.N. INTERREGIONAL CRIME & JUST. RSCH. INST., *supra* note 1, at 2.

<sup>323</sup> U.N. Doc. S/2020/754, *supra* note 11, at ¶ 112.