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## CRIMINAL PROHIBITIONS ON MEMBERSHIP IN TERRORIST ORGANIZATIONS

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*The article analyzes prohibitions on membership in terrorist organizations and examines their justifiability. It begins by providing a definition of a terrorist organization. It then describes the far-reaching modern prohibitions on membership in terrorist organizations in various jurisdictions. The article goes on to provide a doctrinal analysis of membership offenses. Based on similarities with conspiracy doctrine, membership offenses are analyzed as expansions of attempt law or, in some cases, of complicity doctrines. The justifiability of this expansion is examined. The article introduces a distinction between exclusively terrorist organizations, passive membership of which can be legitimately prohibited under certain conditions, and ancillary and dual-purpose organizations, passive membership of which cannot be legitimately prohibited. Next, the justifiability of prohibiting more active forms of membership in each of these types of organizations is discussed. Last, guidelines for the legislation of appropriate prohibitions are proposed.*

**Keywords:** *Terrorist organizations, membership, guilt by association, overcriminalization, conspiracy*

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Criminalization of membership in terrorist organizations has become fairly widespread in recent years. Legislatures have energetically enacted, prosecutors have enthusiastically indicted, and courts have resolutely adjudicated to interpret these prohibitions and determine their exact scope. Criminalization of active participation in dangerous activities conducted by terrorist organizations seems straightforward. Criminalization of lesser forms of involvement raises difficult questions of justification.

The main thrust of this article propounds that legal systems have been unable to design satisfactory prohibitions that would allow for maintaining a legal equilibrium in this complicated area of criminal law. Legislatures, courts and criminal justice authorities have all been pulling in different directions in an attempt to winnow out those cases appropriate to criminalization, but without much success. Drawing upon doctrinal analysis and its normative evaluation, this article seeks to delineate the appropriate scope for the criminalization of membership in such organizations.

Part I introduces initial definitions, distinctions, and background knowledge necessary for evaluating prohibitions on membership in terrorist organizations. It provides a narrow working definition of terrorist organizations as exclusively terrorist organizations, rather than as organizations with additional civil objectives. It then explores the differences between terrorist organizations and radical antigovernment organizations, as well as between terrorist organizations and organized crime groups. Next, the interests protected by prohibitions on membership in terrorist organizations are examined. It shall be demonstrated that liability is imposed because of the remote risk of grave harm to highly important legal interests. Last, a comparative overview of recent prohibitions on membership in terrorist organizations is introduced. The overview lays out the judicial distinction between passive and active membership, a distinction that will be more accurately defined and developed further in later parts of the article.

Part II presents a doctrinal analysis of membership offenses. First, the relationship between membership offenses and conspiracy doctrine is examined, concluding that they closely resemble each other. Based on this resemblance, this part continues to consider membership offenses as exceptional expansions of the scope of attempt law (in some cases) or of complicity doctrine (in other cases).

Part III examines the justifiability of this expansion of criminal law. It analyzes the attribution of the remote risk (which was identified in Part I) to members of terrorist organizations. This part concludes that the risk of terrorist attacks can be fairly attributed to “passive-nominal” members only when the organization is a highly dangerous one that conforms with the narrow definition of terrorist organizations introduced in Part I (“exclusively terrorist organisations”). Where participation is active, the risk can be attributed more easily and in a wider range of cases. Next, Part III introduces more detailed conclusions regarding the appropriate scope and structure of membership offenses. It does so by formulating certain additional distinctions among different types of passive membership and different types of active membership. Last, this part reflects on the appropriate mens rea of the proposed offenses.

The Conclusion draws attention to some possible abstractions of the analysis.

The method of this paper is to draw normative conclusions based on comparative research and theoretical analysis. This method has been adopted in the belief that it is capable of illuminating important aspects that are elusive when observing a single jurisdiction. Nevertheless, the danger of reaching reductive conclusions, which is inherent to such a method, should be kept in mind when reading this paper.

Prohibitions on membership in terrorist organizations are applied extensively and cover different types of conduct. Accordingly, the article seeks to observe those associations with terrorist organizations that should be presumably dangerous. In other words, the observation of the relevant conduct does not confine itself merely to the act of joining terrorist organizations and the status of membership. Rather, the article looks at the various conduct that has been used as a basis for conviction in membership offenses (even where such conduct can constitute another related offense such as training in weapons or possession of explosives). These forms of conduct are referred to as “different forms of membership.” In addition, the observation of positive criminal prohibitions does not confine itself merely to prohibitions on joining or remaining a member, but rather also includes prohibitions on other more glaring associations between an individual and a terrorist organization. As we shall see, these prohibitions have been described as very close to membership offenses.

## I. ANALYTICAL AND COMPARATIVE BACKGROUND

The aim of this part is to define and describe the subject matter of the article. Section A provides a definition of terrorist organizations and differentiates terrorist organizations from nonviolent antigovernment associations and from violent criminal organizations. Section B defines the interests protected by membership offenses and clarifies the connection of prohibitions on membership to future terrorist attacks. Section C describes the legal realities of membership offenses in various jurisdictions, raising and describing some of their more problematic aspects.

### A. Initial Definitions and Distinctions: Terrorist and Other Organizations Subject to Government Censure

This section provides a working definition of terrorist organizations, and then examines the similarities and the differences between terrorist organizations and other types of organizations subject to government censure. The main claim propounded here is that terrorist organizations, as appropriately defined, cannot be treated merely as radical antigovernment organizations (such as the Communist Party in the United States), nor can they be treated merely as criminal organizations (such as the Mafia).

Terrorism is usually defined in criminal codes as acts or threats of grave violence against a person, or acts or threats of serious damage to property (including essential services), that are intended to intimidate the public or to compel a person, a government, or an organization to do or to refrain from doing any act, and that are committed for a political, religious, or ideological purpose, objective, or cause.<sup>1</sup> It is arguable (although not decisively) that

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1. See, for example, the Canadian Criminal Code § 83.01(1); English Terrorism Act 2000 § 1 (as amended by the Terrorism Act 2006, ch. 11, § 34). There are also other, mostly wider definitions, such as the one found in section 1 of the Israeli Prevention of Terrorism Ordinance 1948, which refers to acts or threats of violence calculated to cause death or injury to a person, and does not require any additional purposes, objectives, or causes.

Many other efforts to define terrorism have been made in various international forums and in legal literature. See, for example, George P. Fletcher, *The Indefinable Concept of Terrorism*, 4 J. Int'l Crim. Just. 894 (2006); Thomas Weigend, *The Universal Terrorist*, 4 J. Int'l Crim. Just. 912 (2006); Christian Walter, *Defining Terrorism in National and*

where the imposition of criminal liability at very early stages (such as joining an organization) is concerned, there is no place for including acts of damaging property in the definition of terrorism. As we shall see, creating a fairly remote risk to interests of lesser importance such as property would hardly seem sufficiently wrongful and blameworthy to justify criminalization. If true, this principle can serve as one liability-limiting principle.

Terrorist organizations are usually defined as organizations that commit terrorist acts or have as their objective the commission of terrorist acts,<sup>2</sup> as well as “ancillary organizations” of various types, such as organizations acting at the direction of, or in association with, such organizations,<sup>3</sup> organizations that encourage terrorism or are otherwise concerned with terrorism,<sup>4</sup> or organizations that are indirectly engaged in assisting in or fostering terrorist acts.<sup>5</sup> Such definitions also cover organizations that are not engaged in the eventual commission of terrorist attacks (hereinafter: ancillary organizations) and organizations that, in addition to their terrorist activity, also have additional legitimate objectives (hereinafter: dual-purpose organizations).

These definitions call for criticism due to over-breadth. As for ancillary organizations, depending on their specific activity, their link to eventual terrorist attacks can be tenuous; and thus membership therein is, as we shall see in Part II, nothing more than a remote and indirect form of mere potential complicity. In some cases it does not even rise to that level.

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International Law, in *Terrorism as a Challenge for National and International Law: Security Versus Liberty?* 23 (Christian Walter et al. eds., 2004); Mordechai Kremnitzer, *Terrorism and Democracy and the Case of Israel*, 25 *Hamishpat* (2008) (in Hebrew). See also Orna Ben-Naftali & Yuval Shani, *International Law Between War and Peace* 287–91, esp. 290 (2007) (in Hebrew).

There is no single formal definition of terrorism under international law. But see Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 *J. Int'l Crim. Just.* 933, 935 (2006) (claiming that even though there is no formal definition of terrorism in international conventions, customary international law provides the factual and mental elements of the crime of terrorism in time of peace. Disagreements concern mainly the applicability of this definition in times of armed conflict, and particularly whether it applies to acts of “freedom fighters” in wars of national liberation).

2. See, e.g., in England, *Terrorism Act 2000* § 5; in Canada, *Criminal Code* § 83.01(1).

3. *Canadian Criminal Code* § 83.05(b).

4. *English Terrorism Act 2000* § 3(5) (ch. 1).

5. *Australian Criminal Code Act 1995* (Cth) § 102.1(1).

Accordingly, there is no place for defining them as terrorist organizations for our purposes.

As for dual-purpose organizations, whereas in certain contexts it may be appropriate to declare them terrorist organizations (because of the unified self-conception of such organizations, the potential difficulty in accurately identifying distinct organizational units, and the need to delegitimize such organizations), this is not the case in the context of the early imposition of criminal liability. As will be further demonstrated in Part III, in this context a broad definition can lead to the restriction of legitimate and even desired civil activities such as nonviolent political expression or caring for the welfare of deprived populations.

It is therefore suggested that only an organization the entire concerted action of which is directed toward committing terrorist attacks should be defined as a terrorist organization for our purposes. Terrorist organizations may be constructively differentiated according to several familiar parameters.<sup>6</sup> One parameter is the capability and determination of the organization to conduct terrorist attacks (with past attacks as the strongest indication). Clearly, where the organization is not capable of, or not determined to conduct terrorist attacks, it is impossible to attribute such capability or determination to any of its members merely on the basis of their association with the organization or even on the basis of their participation in any of its activities. Another parameter is the level of terrorist attacks the organization seeks to direct, with a possible differentiation between large-scale terrorist schemes like those of Al-Qaida and other, smaller-scale schemes. Considering the disastrous effects of large-scale terrorism, it is easier to justify early criminalization. In addition to terrorist organizations, the law can address dual-purpose and ancillary organizations. As we shall see below, criminalization of links to such organizations would be justifiable only in later stages of activity.

The definition of terrorist organizations suggests certain proximity between them and other types of organizations subject to government censure. First, most terrorist organizations can be categorized as one type of radical antigovernment organization: they are usually politically motivated with the intention to compel the government to do or refrain from doing any act. Clearly, this characteristic is less straightforward

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6. Kremnitzer, *supra* note 1.

(or rather absent) where the terrorists' aim is, for example, to force private cosmetics companies to avoid using animals for experimental purposes, while at the same time to encourage the amendment of legislation. Yet, since many terrorist organizations are indeed antigovernment, it is essential to clarify their unique characteristics as a subcategory of such organizations.

The main distinction between terrorist organizations (as defined above) and other radical antigovernment organizations seems clear enough, at least at first blush: unlike other organizations, terrorist organizations intend to achieve their aims through violent attacks on life and limb (and possibly also property) of members of the public. Yet, as the comparative overview in Section C will demonstrate, the line between terrorist and other organizations can be unjustifiably blurred by interested governments where, for example, an organization refers to the violent overthrow of the government at some unknown point in the future. Clearly, the broader the definition of a terrorist organization, the fuzzier the differentiating line.

The risk of governments blurring the distinction between violent and nonviolent organizations requires that even under a narrow definition of a terrorist organization, terrorist organizations be treated with due caution. Nevertheless, their violent methods of action do call for distinct treatment. Although there is no justification for prohibiting any links with nonviolent antigovernment organizations, certain such prohibitions can be legitimately invoked with respect to terrorist antigovernment organizations.

More complicated is the question of whether terrorist organizations should not be treated as merely criminal organizations. Terrorist organizations—or rather those branches of terrorist organizations that are engaged in terrorist attacks—are indeed one type of criminal organization. They are the groups that plan and execute criminal offenses.

Many jurisdictions have membership in criminal organizations as a general offense, in addition to specific prohibitions addressing terrorist organizations. For example: In Germany, § 129 of the Strafgesetzbuch, entitled "Forming Criminal Organisations," addresses organizations whose aims or activities are directed at the commission of offenses.<sup>7</sup> It imposes five years'

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7. Strafgesetzbuch (StGB) Subsection 2(2) excludes cases in which the commission of offenses is of merely minor significance for the objectives or activities of the organization.

imprisonment for forming such organizations, participating in them as members, recruiting for them, or supporting them,<sup>8</sup> with a minimum sentence of six months' imprisonment for ringleaders, or where the case is otherwise particularly serious.<sup>9</sup> Article 416 of the Italian *Código Penale*, as amended in 1982,<sup>10</sup> is oriented toward Mafia-type associations and imposes a sentence of three to six years' imprisonment on anyone belonging to such an association, with four to nine years' imprisonment for promoters, managers, or directors of such an association; prison sentences are lengthened in instances where someone in the association uses or threatens to use weapons.<sup>11</sup> In Canada, § 467.11 of the Criminal Code prohibits participation in or contribution to any activity of a criminal organization. The offense is punishable by five years' imprisonment.<sup>12,13</sup> The question

8. StGB Subsection 1.

9. StGB Subsection 4.

10. The Italian Code of 1931 was entitled "Association for Purposes of Delinquency." According to this article, the leaders and promoters of an association of three or more persons aimed at committing more than one crime were subjected to three to seven years' imprisonment. Those who merely participated in such an organization were subjected to one to five years' imprisonment. Punishment was increased if the number of persons associating was more than ten. See Wienczyslaw J. Wagner, *Conspiracy in Civil Law Countries*, 42 *J. Crim. L. Criminology & Pol. Sci.* 171, 178–79 (1951); Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy* (Part II), 61(6) *Colum. L. Rev.* 957, 962 (1961).

11. Article 416 states that "(1) whoever is part of a Mafia-type conspiracy consisting of three or more people is punishable with three to six years' imprisonment . . . (2) whoever promotes or manages or directs such an association is punishable with four to nine years' imprisonment. (3) . . . ." See also Michael Levi & Alaster Smith, *A Comparative Analysis of Organised Crime Conspiracy Legislation and Practice and Their Relevance to England and Wales 9–10* (Home Office Online Report 17/2002).

12. The wording is as follows: "Every person who, for the purpose of enhancing the ability of a criminal organization to facilitate or commit an indictable offence . . . knowingly, by act or omission, participates in or contributes to any activity of the criminal organization is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years."

13. In the United States, prohibitions on association with criminals were highly common until the mid twentieth century. Offenses of vagrancy or disorderly conduct referred mainly to association with "known thieves" or with prostitutes. The prohibition on association with prostitutes is probably best explained on moralistic grounds. Some state courts upheld the constitutionality of such offenses based on the theory that they were necessary both to prevent persons from becoming public charges and to destroy breeding places of crime. *Morgan v. Commonwealth*, 168 Va. 731, 191 S.E. 791, 111 A.L.R. 62 (1937). In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), the Supreme Court found such a prohibition

arises whether these prohibitions are sufficient for punishing membership in terrorist organizations:

The differences, similarities, and ties between organized crime and terrorism are too complicated to explore here, but it is worth briefly highlighting a few key points. I shall start by suggesting that some differences between organized crime and terrorist organizations require a more radical treatment of terrorist organizations:

First, unlike “simple” crime committed by organized groups, terrorist acts are committed “with the purpose to provoke a state of terror in the general public . . . intimidate a population or compel a government or an international organization to do or refrain from doing any act.”<sup>14</sup> Thus the terrorist’s aims and objectives manifest a particularly strong antisocial position that pierces the heart of the sociolegal order as such.<sup>15</sup>

Second, criminal organizations do not devote most of their energies to offenses against the most important legal interests (life and bodily integrity), but rather to pecuniary gain, as manifested in the delivery of illicit goods and services, corruption, pornography, human trafficking, drug trafficking, gambling, loan-sharking, racketeering, and money-laundering.<sup>16</sup> In most cases,

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in violation of the Due Process Clause of the American Constitution because of its alleged vagueness and uncertainty. (The New Jersey Public Enemy Act § 4, ch. 155, 1934 N.J. Laws, provided as follows: “Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or any other State, is declared to be a gangster. . . .”) Similar decisions by State courts preceded this decision: *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223 (1934); *People v. Licavoli*, 264 Mich. 643, 250 N.W. 520 (1934). For the history of criminalization of association with criminals in the United States, see: David Fellman, *Association with Bad People*, 22(4) J. Pol. 620 (1960), and the references provided therein; Note, *Guilt by Association: Three Words in Search of a Meaning*, 17 U. Chi. L. Rev. 148, 154–55 (1949). Today, criminal law focuses on association with more sophisticated organized crime groups. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961–1968 (1970) [RICO] does not prohibit membership as such. The Continuing Criminal Enterprise Statute, 21 U.S.C. § 848 (1988) prohibits engaging in a continuing criminal enterprise.

14. United Nations Security Council Resolution 1566 (2004).

15. On the other hand, some acts that can be covered by the definition of terrorism, such as justified acts of freedom fighters, have moral or at least understandable motives. See Kremnitzer, *supra* note 1.

16. See Michael D. Lyman & Gray W. Potter, *Organized Crime* 173–208 (4th ed. 2006); Alexis Aronowitz, *Trafficking in Human Beings: An International Perspective*, in *Global Organized Crime: Trends and Developments* 85 (Dina Siegel et al. eds., 2003);

offenses involving bodily harm that are committed by criminal organizations do not have the general public as their target. Furthermore, some (although definitely not all) acts or threats of terrorism are committed on a significantly larger scale than any organized criminal activity. The 9/11 terrorist attack and threats of using biological, chemical, or atomic weapons come to mind.

Third, the immediate environment in which the terrorists live and function is often supportive of their agenda, and most terrorists conceive of themselves as acting morally, are accordingly proud of their conduct, and are willing to bear the consequences of their actions. In this respect they psychologically resemble conscientious objectors rather than members of an organized crime syndicate.<sup>17</sup> Some terrorist groups such as the Red Army Faction (RAF) in Germany actually enjoyed public support, at least at some stages of their operation.<sup>18</sup> Accordingly, one can expect that terrorists would be harder to deter.

Yet other differences require a more cautious treatment of terrorist organizations, or rather of ancillary and dual-purpose organizations. Certain organizations that are 'terrorist' according to current definitions of the term also work to assist minorities or otherwise deprived groups. In contrast, organized crime groups have exclusively economic objectives, and their activities do not benefit the broader community in any way. Moreover, unlike crime groups, some terrorist organizations are also engaged in radical, but legitimate political expression.

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Howard Abadinsky, *Organized Crime* 267–363 (9th ed. 2007); Alfred R. Lindesmith, *Organized Crime*, 217 *Annals Am. Acad. Pol. & Soc. Sci.* 119, 123–27 (1941).

17. This is not in any way to say that the law should somehow take count of this self-image.

18. See, for example, Peter H. Merkl, *West-German Left Wing Terrorism*, in *Terrorism in Context*, 160, 208–9 (Martha Crenshaw ed., 1995): "Once the principals were in jail, their notoriety and especially the hunger strikes helped them to raise a veritable army of real sympathizers. Many very young people joined the new Committees against Isolation and Torture and extreme left wing groups willing to stage demonstrations and propaganda campaigns in big cities. . . ." But see David A. Meier, *Hooligans or Heroes?* (Book Review: Stefan Aust, *Baader-Meinhof: The Inside Story of the R.A.F.*, transl. Anthea Bell, 2009), *H-Net Reviews in the Humanities & Social Sciences* 1, 2 (Sept. 2009): "The group's turn to violence caused public opinion to turn sharply against it, as bombings and bank robberies in the early 1970s generated a clear public demand for the group's apprehension."

These latter differences are eliminated if terrorist organizations are defined in a way that excludes ancillary and dual-purpose organizations, as suggested above; whereas the other differences—those demanding more radical treatment of terrorist organizations—might become less significant were an organized criminal group to decide, for example, to attack and take over an airport in order to import a massive amount of drugs into the country, knowing that many civilians would be the victims of such an attack.<sup>19</sup> Random kidnapping and human trafficking by criminal organizations also challenge this distinction. Furthermore, terrorist organizations are themselves often engaged in typical organized-crime activities (such as drug offenses) to fund their terrorist activities and, thus, are in close contact with established organized crime groups.<sup>20</sup>

Nevertheless, the unique characteristics that make terrorist organizations more dangerous and their acts more reprehensible never disappear entirely, and accordingly the core concept of terrorist organizations is indeed distinguishable from the core concept of crime organizations.

## B. The Interests Protected by Membership Offenses

This section traces the legal interests that prohibitions on membership in terrorist organizations seek to protect. This investigation will allow us to provide an accurate doctrinal account of these prohibitions in Part II of the article, as well as to discuss their justifiability in Part III.

Various attempts have been made to provide a full account of protected legal interests.<sup>21</sup> However, for purposes of this paper, full development of

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19. Section 20(b) of the Israeli criminal code is one example of a legal rule that equates, in terms of legal consequences, the mens rea of specific intent to cause a result and the mens rea of knowing that this result is highly probable.

20. On the web of connections between terrorism and organized crime, see, e.g., Phil Williams, *Terrorist Financing and Organized Crime: Nexus, Appropriation or Transformation*, in *Countering the Financing of Terrorism* 126 (Thomas J. Biersteker & Sue E. Eckert eds., 2007); Tamara Makarenko, *The Ties that Bind: Uncovering the Relationship Between Organized Crime and Terrorism*, in *Global Organized Crime: Trends and Developments*, supra note 16, at 159; Federal Research Division, Library of Congress, *The Nexus Among Terrorists, Narcotics Traffickers, Weapons Proliferators and Organized Crime Networks in Western Europe* (2002), [http://www.loc.gov/rr/frd/pdf-files/WestEurope\\_NEXUS.pdf](http://www.loc.gov/rr/frd/pdf-files/WestEurope_NEXUS.pdf).

21. See Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 *Duq. L. Rev.* 345, 377-79, 413

the concept does not seem necessary. Rather, it is sufficient to address the core and uncontroversial legal interests that membership offenses protect, and to touch upon other possible objects of protection while noting potential difficulties.

Membership offenses are most reasonably viewed as inchoate offenses,<sup>22</sup> ancillary to offenses constituted by actual terrorist attacks. As such, the interests they protect are to be derived from these offenses. Common definitions of terrorism imply that these interests include, most straightforwardly, life, bodily integrity, possibly also property, an aspect of state sovereignty, that is, the state's capability to decide its actions without illegitimate pressures being applied (implied by the requirement of intention to compel a state to do or refrain from doing any act), and possibly also certain concrete aspects of general freedom of action (implied by the common requirement of intent to compel a person to do or refrain from doing any act).

Less straightforwardly appropriate to qualify as protected legal interests are the public's emotions<sup>23</sup> implied by the requirement of intent to intimidate the public. A mere offense to the public's emotions does not seem to justify membership offenses. To justify criminalization, the sense of an emotional offense must be justifiable (rather than idiosyncratic). Joel Feinberg further suggests that the offense should be profound and of a personal nature<sup>24</sup> (and even then should not be criminalized as a felony<sup>25</sup>). Although justifiable, the emotional offense at issue does not conform with Feinberg's additional characteristics. Moreover, it is debatable whether emotional well-being qualifies as a protected legal interest at all.<sup>26</sup>

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(1965–66); Joel Feinberg, *Harm to Others*, 33, 61–62 (New York, Oxford: Oxford University Press, 1984). For Feinberg's related notion of harm, see especially 31–33; and for his notion of offense, see Joel Feinberg, *Offense to Others*, 1–2, 14–22 (1985).

22. A different line of argument, according to which membership offenses are complete offenses, will be introduced on page 237.

23. See, for example, Manuel Cancio Meliá, *The Wrongfulness of Crimes of Unlawful Association*, 11 *New Crim. L. Rev.* 563, 571–72 (2008).

24. Feinberg refers mainly to offenses that are intense, profound, personal, and spiteful (his main example is the Nazis in Skokie case), and thus, according to his argument, lack any social value. See Feinberg, *Offense to Others*, supra note 21, especially ch. 11, sect. 9.

25. See *id.* at 4.

26. It has been claimed that the emotions of most human beings can easily take a certain amount of disappointment (Nicholas J. Mullany & Peter R. Handford, *Tort Liability*

Violating the public's ability to live an undisturbed day-to-day life and enjoy general freedom of action provides a stronger justification for criminalization. Yet the existence of an enforceable right for general liberty is not consensual;<sup>27</sup> as far as this right has been protected under criminal law, protection has focused on direct limitations on freedom of choice in the form of threats to do, or refrain from doing, an action in response to some act or omission by the victim (for example, the theoretically problematic, yet universally acknowledged, offense of extortion). More extensive protection might have significant limiting effects on other people's behavior and, in our case, on their fundamental liberties.

Another rationale for justifying criminalization is protecting democracy and the entire web of individual interests guaranteed by democracy (and in particular, the interest of general liberty).<sup>28</sup> This latter interest might well be threatened by a series of terrorist attacks culminating in the collapse of the democratic regime. Accordingly, the risk is remote from any specific attack, especially considering the fact that various additional means are probably required to achieve such a collapse (such as substantial military force or active, or at least passive, cooperation on the part of the democratic state's armed forces). Furthermore, many terrorist groups do not even seek such an outcome. Clearly, this course of development is even more remote from membership offenses. It is also doubtful whether such highly abstract concepts can fit within the framework of any desirable definition of protected legal interests.

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for Psychiatric Damage at 44–45 (1st ed. 1993); Feinberg, *Offense to Others*, supra note 21, at 3; Feinberg, *Harm to Others*, supra note 21, at 43); that the law should encourage responsibility for one's own emotional well-being rather than promote or validate undue sensitivity (Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 *Harv. L. Rev.* 1033, 1035 (1936)); and that there are various practical considerations against providing legal protection for emotions, such as the inability to prove and value psychological injury, and the difficulty in proving a causal link between one person's behavior and another's emotional harm, mainly where the harm is remote (Mullany & Handford, supra, at 43; W.V.H. Rogers, *Winfield and Jolowicz on Tort*, at 176–77 (16th ed. 2002); John G. Fleming, *The Law of Tort*, at 173 (9th ed. 1998); Simon Deakin et al., *Markensinis and Deakin's Tort Law*, at 230–31 (5th ed. 2003). Mullany and Handford have contradicted most of the practical considerations against recognition of psychological integrity (supra, at 43–44).

27. See Ronald Dworkin, *Taking Rights Seriously*, at ch. 12(1) (1978).

28. Shlomit Wallerstein, *Criminalising Remote Harm and the Case of Anti-Democratic Activity*, 28 *Cardozo L. Rev.* 1, 24–25, 26 (2007).

A different line of argument addresses membership offenses as complete offenses: the mere existence of a terrorist organization creates fear and distress to the general public. Here as well, the protected legal interest is the public's emotional well-being, and to the extent that such fear disrupts day-to-day conduct (for example, by deterring the public from using public transport or by causing people to avoid crowded places), the interest is also a general freedom of action and the right to live one's day-to-day life undisturbed.<sup>29</sup> But should these interests qualify as protected legal interests, it should be noted that it would be more appropriate to impute any effect on the public's emotions or freedom of action to the expected terrorist attacks and not to the mere existence of the terrorist organization.

Having recognized the special characteristics of terrorist organizations and the interests that they put at risk, we can progress to an examination of the prohibitions on membership in such an organization. The next section provides a short comparative overview. Following parts continue with a doctrinal analysis and a normative evaluation, making use of the conclusions reached up until this point.

### C. Membership Offenses: A Brief Cross-Jurisdictional Overview

Many liberal democracies prohibit membership in terrorist organizations or other links with such organizations. This section provides a short comparative introduction to the relevant modern prohibitions and implies the potential danger of political persecution.

In the United States, organizations that allegedly had terrorist overtones became the main target of government attack starting in the 1920s (together with an expansion of the legislation pertaining to vagary).<sup>30</sup> Yet criminal

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29. On the combination of these two interests, see *Virginia v. Black*, 538 U.S. 343, 359–60 (2003).

30. Well known are the Palmer Raids of 1919–1920 and the extreme governmental response against communist activists. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 *Harv. C.R.-C.L. L. Rev.* 1, 16 (2003). For limitations of political associations in the United States during the first half of the twentieth century, see John Lord O'Brian, *Loyalty Tests and Guilt by Association*, 61(4) *Harv. L. Rev.* 592, esp. 602–5 (1948); Cole, *supra*, at 15–28. See also *The Deportation and Exclusion Laws*, 41 Stat. 1008 (1920), 8 U.S.C. §§ 137 (d), (e), and (g) (1940). Following *Kessler v. Strecker*, 307 U.S. 22, 30 (1939), where the Supreme Court interpreted the Act as requiring present membership or affiliation, Congress amended the Act in 1940 to override this decision, and past membership was made a specific ground for deportation. However, the American

legislation was introduced only in 1940 by the well-known “Smith Act” (the Alien Registration Act of 1940<sup>31</sup>), which established specific conspiracy offenses as well as a broad offense of membership in, or affiliation with, organizations that advocated the violent overthrow of the government.<sup>32</sup> These offenses were applied against members of the Communist Party, even though its identification as a violent organization resembling terrorist organizations was dubious. The scope of this offense was somewhat narrowed in the highly controversial 1961 Supreme Court decision in *Scales v. United States*.<sup>33</sup> Upholding the conviction of the ex-communist Junius Scales, the U.S. Supreme Court regarded the membership clause constitutional, while accepting the government’s interpretation of it as requiring *active* membership and *intent* to overthrow the government by force.<sup>34</sup>

“Active membership” is defined as participation in any of a wide possible range of the organization’s activities (rather than only in a specific terrorist enterprise). It is contrasted with “passive-nominal” membership, which refers to mere registration that is not followed by participation in any of the organization’s activities. Later in the article it is submitted that this distinction is helpful and important, but insufficient and nonexhaustive, as demonstrated by the objectionable conviction in *Scales*. More precise definitions as well as further refinements are accordingly proposed, drawing upon the different forms of conduct that may constitute membership.

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Supreme Court consistently narrowed the scope of this legislation. See *Bridges v. Wixon*, 326 U.S. 135, 163 (1945).

31. Alien Registration Act 18 U.S.C. § 2385 (1940) [hereinafter the Smith Act].

32. “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 of persons, knowing the purposes thereof, shall be fined . . . 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.” *Id.* at 19 U.S.C. § 2385.

33. *Scales v. United States*, 367 U.S. 203 (1961).

34. It may be interesting to note that the U.S. Justice Department pursued this case following two Supreme Court decisions that significantly restricted its ability to use the Smith Act advocacy clause. See *Jencks v. United States*, 353 U.S. 657 (1957) (concerning the accessibility of evidence to defendants); *Yates v. United States*, 354 U.S. 298 (1957), 320 (requiring advocacy of action rather than advocacy of abstract doctrine).

More relevant to our discussion are the modern American prohibitions. In response to emerging Islamic terrorism, new prohibitions on the provision of material support for terrorist organizations were legislated during the 1990s. The first prohibition, enacted in 1994, makes it an offense to provide material support or resources, knowing or intending that they shall be used in preparation for, or in carrying out, a violation of various criminal prohibitions associated with terrorism.<sup>35</sup> The second prohibition, enacted in 1996, makes it an offense to knowingly provide material support or resources to a foreign terrorist organization.<sup>36</sup> “Material support” is defined expansively to include a range of possible interactions with the organization—amongst other things, the provision of any physical asset, transportation, lodging, communications equipment, personnel, expert advice, or assistance.<sup>37</sup> The American prosecution has been using the material support clauses most frequently as catch-all offenses, applying them to widely varying situations and stretching their interpretation to the limit.<sup>38</sup> The most problematic interpretation proposed by the prosecution to date has been of the prohibition on provision of personnel as applying to providing oneself to the organization by way of assisting its members.<sup>39</sup> This interpretation was eventually rejected when the District Court ruled that such a prohibition was unconstitutionally vague.<sup>40</sup> Yet a recent U.S. Supreme Court decision has rejected various constitutional challenges of the material support provision, including claims of vagueness and violation of freedom of speech and freedom of association.<sup>41</sup> This decision did not adopt claims made (perhaps somewhat too sweepingly) in legal literature, that “[t]he

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35. 18 U.S.C. § 2339A (2000 ed.).

36. 18 U.S.C. § 2339B (2000 ed.).

37. 18 U.S.C. § 2339A(b), defining material support or resources as “currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”

38. See Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 *J. Nat'l Security L. & Pol'y* 5, 6–7, 16–17 (2005).

39. *United States v. Sattar*, 272 F. Supp. 2d 348 (S.D.N.Y. 2003).

40. *Id.*

41. *Holder v. Humanitarian Law Project* (decided June 21, 2010). The court has rejected the claim that it is unconstitutional to prohibit conducts such as training Kurdistan Workers Party (PKK) members to use international law to resolve disputes peacefully, and teaching PKK members to petition the United Nations and other representative bodies for relief.

material support law is a classic instance of guilt by association. It imposes liability regardless of an individual's own intentions or purposes, based solely on the individual's connection to others who have committed illegal acts."<sup>42</sup>

In Canada, as in the United States, passive-nominal membership in terrorist organizations is not prohibited as such. Rather, § 83.18(1) of the Canadian Criminal Code,<sup>43</sup> entitled "Participation in Activity of Terrorist Group," makes it a crime for anyone to "knowingly participat[e] in or contribut[e] to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity." According to § 83.18(3), participation or contribution includes recruiting members, offering skills and services, entering or remaining in a country at the behest of a terrorist group, or making oneself available for the commission of a terrorist offense.

Nevertheless, it has been claimed here as well that the prohibition endangers freedom of association, mainly in light of § 83.18(4), which directs the court to consider, in reaching its decision, the defendant's use of words, symbols, or other objects representing the group, his association with persons who constitute the group, receiving benefits from a terrorist group, and engagement in activities at the instruction of persons who constitute the group.<sup>44</sup> Furthermore, "the reference to facilitating the carrying out of a terrorist activity . . . has been interpreted to include the broad definition of facilitation in section 83.19(2), which does not require the accused to know any particulars about the planned activity."<sup>45</sup> In addition, the definition of terrorism under § 83.01(a) includes inchoate forms of liability, which would be in addition to crimes that are inchoate in substance.<sup>46</sup>

Under recent United Kingdom law,<sup>47</sup> prohibitions usually apply to "membership" without a detailed definition of the term. Four prohibitions

42. Cole, *supra* note 30, at 10. It should be noted that in other jurisdictions supporting a terrorist organization is an independent offense, distinct from membership in a terrorist organization. See, e.g., English Terrorism Act, 2000, ch. 11 (Eng.) § 12; Israeli Prevention of Terrorism Ordinance No. 33, 5708-1948, § 4, Official Gazette No. 24 (1948).

43. R.S.C., ch. C-46 (1985).

44. *Id.*

45. Kent Roach, *Criminal Law* 402 (4th ed., 2009).

46. *Id.* at 405.

47. A historical example of prohibitions on association is the 1799 legislation entitled "An Act for the More Effectual Suppression of Societies established for Seditious and Treasonable Purposes; and for Better Preventing Treasonable and Seditious Practices," 1799, 39 Geo. 3, ch. 79 (Eng.). This Act provided for the suppression and prohibition of societies

have been legislated in the past century, two of which have already been abolished. These include § 24 of the Civil Authorities (Special Powers) Act Regulations (Northern Ireland) 1922 (repealed in 1973);<sup>48</sup> and more importantly, § 19(1) of the Northern Ireland (Emergency Provisions) Act 1973 (repealed in 1991). Interestingly, a 1978 decision by the Northern Ireland Court of Appeal in the matter of *Adams* confined the scope of the membership offense set by the last Act to cases in which the defendant actively associated himself with the proscribed organization, as opposed to cases of mere expression of support of the organization, its aims, or its methods of action.<sup>49</sup> The prohibitions currently in force include § 21(a) of The Emergency Provisions Act 1978,<sup>50</sup> and §§ 11–13 of the Terrorism Act 2000.<sup>51</sup> They prohibit belonging to proscribed organizations (as well as other links to such organizations). The compatibility of the 2000 Act

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aiming to overturn the laws, government, or other civil or ecclesiastical establishment. It further established strict regulations on printing presses and other means for publishing discussions of public matters.

48. This section laid down a prohibition on becoming or remaining a member of an unlawful association or doing any act with a view to promoting or calculated to promote the object of an unlawful association or seditious conspiracy. It proscribed the following associations: The Irish Republican Brotherhood, The Irish Republican Army, The Irish Volunteers, The Cumann na m'Ban, and The Fianna na h'Eireann. Section 1 of the Civil Authorities (Special Powers) Acts (Amending) (No. 1) Regulations (Northern Ireland) 1967 further deemed unlawful those organizations that were "at the date of this regulation or at any time thereafter describing themselves as 'republican clubs' or any like organisation howsoever described."

49. *R v. Adams*, [1978] 5 N.I.J.B.

50. Section 21(c) of this Act further sets the offense of soliciting or inviting any person to become a member of a proscribed organization.

51. Section 11(1) prohibits belonging or professing to belong to a proscribed organization. Section 11(2) allows a defense where (a) the organization was not proscribed when he became a member or began to profess to be a member, and (b) he has not taken part in the activities of the organization at any time while it was proscribed.

Section 12 lays down the offense of inviting support other than provision of money or property for a proscribed organization. It further lays down the offense of arranging, managing, or assisting in arranging or managing a meeting, knowing this meeting is to support a proscribed organization, or to further the activities of a proscribed organization, or to be addressed by a person who belongs or professes to belong to a proscribed organization. The offenses under §§ 11 and 12 carry a maximum sentence of ten years' imprisonment and a fine.

According to § 13, a person in a public place commits an offense if he wears an item of clothing, or wears, carries, or displays an article, in such a way or in such circumstances as to arouse reasonable suspicion that he is a member or supporter of a proscribed organization. The maximum sentence is six months' imprisonment and a fine.

with the Human Rights Act 1998 was challenged in *R (On the Application of the Kurdistan Workers' Party and Others) v. Secretary of State for the Home Department*.<sup>52</sup> The Administrative Court refused to rule on the issue, noting, with respect to the criminal prohibitions, that their interference with individual rights protected by the European Convention should be considered on the facts of each case as it arises.<sup>53</sup>

Certain other jurisdictions follow British legal tradition and simply prohibit membership in illegal or terrorist organizations as such, without legislatively defining the term "membership." For example, Israel has no less than four membership offenses with varying phrasings, burdens of proof, and sanctions. The offenses are set by §§ 58 and 85 of The (Emergency) Defence Regulations 1945, § 3 of the Prevention of Terrorism Ordinance No. 3 of 5708-1948, and § 147 of the Israeli Criminal Code of 1977. The Israeli Military Court of Appeal interpreted "membership" to include passive-nominal membership.<sup>54</sup> It further ruled that mere intention to join an illegal organization is sufficient for conviction.<sup>55</sup> Recently, the Israeli Supreme Court has interpreted the term "membership of a terrorist organization" in the context of the preventive arrest of "illegal combatants." The Court made some effort to narrow the scope of this term, noting that "it is insufficient to show any tenuous connection with a terrorist organization in order to be included within the cycle of hostilities in the broad meaning of this concept."<sup>56</sup>

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52. [2002] EWHC 644 (Admin.).

53. The Court stated as follows: "the question whether the regime of offences consequential upon a lawful proscription gives rise to an unjustified interference with an individual's Convention rights needs to be considered on the particular facts of an individual case as and when it arises. It should not be dealt with as an abstract or generalised issue. Whether there is such an infringement will depend on all the circumstances of the individual case. Alternatively, any challenge should at the very least await the outcome of the appeals to the Proscribed Organisations Appeal Commission. If the appeals succeed and the claimant organisations are de-proscribed, the issue concerning penalties will fall away. If they do not succeed, then consideration could be given to claims advanced at that time on the basis of the circumstances then prevailing. Further, it is better that there should be fresh claims at the right time, rather than adjourning the permission applications in respect of the relevant parts of the present claims." *Id.*, para. 91.

54. Appeal no. 7/68, *Baransi v. The Military Prosecutor*, Collection 2, 62, at 67 (1968).

55. Appeal no. 8/70, *Baransi v. The Military Prosecutor*, Collection 3, 7, at 30 (1970).

56. Criminal Appeal 6659/06 A. v. *The State of Israel* (11 June 2008), para. 21 of CJ Beinisch's judgement.

Australia (where associating with a member of a terrorist organization is also an offense under certain conditions),<sup>57</sup> Ireland,<sup>58</sup> and India<sup>59</sup> also follow the English tradition of leaving the interpretation of the term ‘membership’ for the courts.

Continental jurisdictions provide a further insight into the various types of prohibited links with terrorist organizations. In Germany, Strafgesetzbuch §§ 127–129a address armed and terrorist associations.<sup>60</sup> Section 127, entitled “Forming Armed Groups,” prohibits forming, commanding, and joining armed groups, as well as providing them with weapons or money or otherwise supporting them. Section 129a, entitled “Forming Terrorist Organisations,” distinguishes amongst different types of terrorist organizations and several circles of participants.<sup>61</sup> Participants include the inner circle of ringleaders,<sup>62</sup> a second

57. Section 102.3 of the Criminal Code Act 1995 (Austl.) prohibits membership (maximum sentence: ten years’ imprisonment). Section 102.8 sets the offense of associating with a member of a terrorist organization, where the association provides support for the organization, and the person intends that the support assist the organization to expand or to continue to exist (maximum sentence: three years’ imprisonment). Other offenses are set by sections 102.2, 102.4–102.7 (with maximum penalties ranging between fifteen and twenty-five years) include directing the activities of a terrorist organization, recruiting for a terrorist organization, providing training to or receiving training from a terrorist organization, receiving funds from or making funds available for a terrorist organization, and providing support or resources to a terrorist organization.

58. Offences against the State Act 1939 § 21 (Act No. 13/1939) (Ire.) (maximum sentence: two years’ imprisonment).

59. Prevention of Terrorism Act, No. 15 of 2002, § 20 (repealed 2004) (maximum sentence: ten years’ imprisonment). For the current prohibition, see The Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004, § 10 (maximum sentence: two years’ imprisonment and a fine).

60. For an account of the complicated legislative history of these sections, see Till Gut, German Federal Court of Justice (Bundesgerichtshof-BGH), 3rd Criminal Senate: Promoting a Terrorist Organisation: Support versus Recruitment of Members or Supporters, 71(6) J. Crim. L. 491 (2007).

61. Terrorist organizations are either organizations whose aims or activities are directed at the commission of very grave offenses (subsection 1(1)–(2)), or organizations whose aims or activities are directed at the commission of other less grave offenses that are intended for specified terrorist objectives (such as seriously intimidating the population) (subsection 2; the offenses are specified in subsections 1–5). According to subsection 3, when the organization’s aims or activities are directed merely at threatening the commission of offenses, the gravity of terrorist offenses is reduced.

62. Subsection 4 sets a sentence of three to ten years’ imprisonment for ringleaders or hintermen, unless the aims or activities of the group are directed merely at threatening the commission of offenses, in which case the sentence is one to ten years’ imprisonment.

circle of other member-participants or people who otherwise form the organization,<sup>63</sup> the third circle of supporters,<sup>64</sup> and last, the recruiters.<sup>65</sup> To count as a member, it is not enough that a person merely join an organization. After joining, activity toward the terrorist objective must further develop. Membership must be ongoing, and although there is no need for regular, constant action, a hiatus in activity does not alter one's status as a member.<sup>66</sup>

France has long-established prohibitions on membership in radical anti-government organizations.<sup>67</sup> The modern offense of criminal association in relation to a terrorist undertaking (*association de malfaiteurs en relation avec une entreprise terroriste*)<sup>68</sup> was legislated in 1996 as part of France's policy of aggressive prosecution of terrorist networks.<sup>69</sup> The offense is defined as "the participation in any group formed, or association established, with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles."<sup>70</sup> Apparently, "[t]he vast majority of terrorism suspects are detained and

63. Subsections 1 and 2 set a sentence of one to ten years' imprisonment for other formers or member-participants, unless the aims or activities of the group are directed merely at threatening the commission of offenses, in which case subsection 3 sets a sentence of six months' to five years' imprisonment.

64. Subsection 5 sets a sentence of six months' to ten years' imprisonment for supporters, unless the group was oriented only toward threatening, in which case the sentence is not more than five years or a fine.

65. Subsection 5 sets a sentence of six months' to five years' imprisonment for whoever recruits supporters or members for an organization whose aims or activities are directed toward committing the listed offenses.

66. Adolf Schönke & Horst Schröder, *Strafgesetzbuch: Kommentar* 1282 (26th ed. 2006). German law further includes a special and controversial jurisdiction clause applying these offenses to organizations abroad (StGB § 129b).

67. Article 265 of the French Penal Code, as legislated in 1810, was aimed at associations of criminals formed after the 1789 Revolution. After their disappearance at the beginning of the nineteenth century, and with the activities of anarchist at its prime focus, the wording of the prohibition was changed in 1893 include "any established association, . . . any agreement entered into with the purpose of preparing or perpetrating crimes against individuals or things." Wagner, *supra* note 10, at 174–75.

68. The offense was introduced by Law No. 96-647 of July 22, 1996, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 23, 1996.

69. Human Rights Watch, *Preempting Justice: Counterterrorism Laws and Procedures in France* (1 July 2008) [hereinafter *Preempting Justice*].

70. Article 421-2-1 of the Code pénal.

prosecuted on this charge.”<sup>71</sup> On some occasions massive preventative arrests were conducted, with the offense used as a legal platform.<sup>72</sup> Only very slight evidence of contact between people is required to obtain judicial detention warrants.<sup>73</sup> Related offenses include leading or organizing terrorist associations, and aggravated forms are established where the association’s purposes are especially dangerous.<sup>74</sup>

It may be concluded that membership offenses are common, that they often (though not always) cover mere registration as a member, and that they cause inconvenience and legal disquiet in many jurisdictions.

## II. MEMBERSHIP OFFENSES EXPAND THE SCOPE OF CRIMINAL LAW

This part provides a doctrinal analysis of prohibitions on membership in terrorist organizations. It explores the way in which these prohibitions expand the scope of well-established doctrines of criminal law. Based on the analysis proposed in this part, the justifiability of the expansion will be examined in Part III.

### A. Membership Offenses are “Relatives” of Conspiracy Doctrine

This section compares membership offenses and the conspiracy doctrine. This comparison opens the door for a subsequent analysis of membership offenses as expansions of attempt law and to some extent also of complicity law, much like conspiracy doctrine.

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71. Preempting Justice, *supra* note 69, part III (referring to Ministry of Justice statistics, as reported in Piotr Smolar, *Les prisons francaises comptent 358 detenus pour activisme*, *Le Monde* (Paris), September 9, 2005).

72. Preempting Justice, *supra* note 69, at 15.

73. *Id.* at 13–14.

74. These include willful attacks on life; willful attacks on the physical integrity of persons; abduction and unlawful detention; hijacking of planes, vessels, or any other means of transport; attacks with explosives or fire in places and at times where such attacks are likely to cause the death of one or more persons; or the introduction into the atmosphere, the ground, waters, foodstuffs, or ingredients of any substance liable to cause the death of one or more persons. The aggravated offense was introduced in 2006 by Law No. 2006-64 of January 23, 2006, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], January 24, 2006.

Criminal law usually prohibits the commission of offenses, attempts to commit offenses, and complicity (which includes motivating the perpetrator into action as well as aiding the commission of an offense). Apart from that, some preparatory acts that are not sufficient for establishing a criminal attempt are specifically and exceptionally prohibited.

Anglo-American jurisdictions further criminalize conspiracy to commit an offense. Clearly, the offense of conspiracy developed differently in each of the Anglo-American jurisdictions. However, certain commonalities may be traced, and for the sake of brevity, I shall concentrate on these commonalities while spotlighting England and the United States. The history of the conspiracy doctrine can be very briefly (and somewhat simplistically) described as follows: The early English common law offense of conspiracy prohibited a combination of two or more persons to do or accomplish either an unlawful act or a lawful act by unlawful means.<sup>75</sup> This definition was in use in other common law countries, as well as in countries that drew inspiration from the common law (such as the United States). Both in and outside England, the definition was criticized as exceptionally broad in terms both of the conspiratorial object and of the essence of the conspiratorial relationship.<sup>76</sup> In the United States it was further criticized as extremely vague.<sup>77</sup> Criticism brought about legal reform: Following developments in

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75. See Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 *Harv. L. Rev.* 276, 277 (1948) and the references therein; Mordechai Kremnitzer, *Criminal Conspiracy and Its Relation to Criminal Solicitation*, 14 *Mishpatim* 231, 233–34 (1985) (in Hebrew). For the development of the common law of conspiracy, see also Percy Henry Winfield, *The History of Conspiracy and Abuse of Legal Procedure* 112–30 (2001 [1921]).

76. The conspiratorial relationship included at least an agreement between intended perpetrators, an agreement between an intended perpetrator and an intended aider, and possibly also a combination of an intended perpetrator and a person who wants the offense to be committed but does not intend to take any part in its commission. Kremnitzer, *supra* note 75, at 235. For the controversy around the aims of conspiracy, see P. Gillies, *Law of Criminal Conspiracy in Australia and England*, 8 *Sydney L. Rev.* 107 (1977).

77. For example, American courts defined the nature of the conspiratorial relationship in various manners including “an agreement,” “an implied agreement” that might be established by fictional components, “a partnership in criminal purposes,” and “a combination,” the nature of each was not particularly clear. See Herbert Wechsler et al., *supra* note 10, at 977–78. See also Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 *Cal. L. Rev.* 1137 n.17 (1973). For a detailed account of American courts’ definitions, see Theodore W. Cousins, *Agreement as an Element in Conspiracy*, 23 *Va. L. Rev.* 898 (1939). At least at some stages it was unclear whether mere knowledge of the conspired act, as distinguished from

common law,<sup>78</sup> the modern English definition now refers to an agreement where one or more parties to the agreement would (attempt to) commit an offense, accompanied by intent or knowledge regarding the facts or circumstances necessary for the commission of the offense.<sup>79</sup> The American Model Penal Code definition confines “conspiracy” primarily to agreements to commit, attempt, solicit, or aid the commission of a crime, with the purpose of promoting or facilitating its commission.<sup>80</sup> Significantly, the purpose requirement was considered crucial, in accordance with the parallel requirement governing the law of complicity (as well as the law of attempt). It was “necessitated by the extremely preparatory behavior that may be involved in conspiracy,”<sup>81</sup> demonstrating that the perpetrator made the venture his own and had a stake in its outcome.<sup>82</sup> The purpose requirement was explicitly meant to exclude criminal liability based on mere passive-nominal membership in organizations with both legal and illegal purposes.<sup>83</sup>

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purpose, was sufficient for establishing criminal responsibility. See Cousens, *id.* at 970. This vagueness had led courts and commentators to assert that “the modern crime of conspiracy is so vague that it almost defies definition” (*Krulewitch v. United States*, 336 U.S. 440, 446 (1949), cited by Wechsler et al., *supra* note 10, at 967), and that “no intelligible definition of conspiracy has yet been established” (Wright, *The Law of Criminal Conspiracies and Agreements* (1887), cited by Wechsler et al., *supra* note 10, at 967).

78. For a detailed description of these developments, see Peter Gillies, *The Law of Criminal Conspiracy* (2nd ed. 1990).

79. Section 1(1) of the Criminal Law Act 1977 refers to “[an agreement] with any other person or persons that a course of conduct shall be pursued which . . . either (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible.” Subsection 2 adds a requirement that the conspirators intend or know that all of the facts or circumstances necessary for the commission of the offense shall or will exist when the prohibited conduct takes place.

80. The American Law Institute, *Model Penal Code: Complete Statutory Text (Official Draft and Explanatory Notes)*, § 5.03 (1985). The prohibition on agreement to provide aid was very broad, referring to provision of aid in the planning or commission of a crime as well as aid in the planning or commission of an attempt or solicitation to commit a crime.

81. Wechsler et al., *supra* note 10, at 971.

82. See Judge Learned Hand’s opinion with regard to the purpose requirement in conspiracy and abetting cases in *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir. 1940), *aff’d*, 311 U.S. 205 (1940).

83. Wechsler et al., *supra* note 10.

In continental Europe the concept of conspiracy has traditionally been more limited in scope (the elements are strictly defined) and in application (only conspiracy to commit grave offenses has been prohibited).<sup>84</sup> At the heart of the traditional continental concept of conspiracy was the existence of a criminal *organization*.<sup>85</sup> Yet, despite long-lasting suspicion,<sup>86</sup> some continental jurisdictions have adopted a general offense of conspiracy to commit a crime,<sup>87</sup> integrating the modern Anglo-American emphasis on agreement.<sup>88</sup> In some jurisdictions there seems to be no strict purpose requirement.<sup>89</sup>

As far as unified doctrines of conspiracy and membership offenses may be traced, many of their core characteristics are similar, and such similarity is most remarkable where the object of comparison is the traditional common law conspiracy. As with conspiracy, membership refers to a prohibited relationship between the perpetrator and others. The underlying assumption is that the prohibited relationship is directed toward an illegitimate future conduct, and this conduct should be prevented by way of early intervention. Similar to the traditional common law definition of the conspiratorial relationship, the essence of membership relations is hardly fixed and

84. Wagner, *supra* note 10.

85. The Italian prohibition on association—with its reference to multiple participant groups aiming at the commission of multiple offenses, and with its distinctions between different organizations and different participants—is often introduced as the classic example of continental conspiracy doctrine. Wechsler et al., *supra* note 10, at 962; Wagner, *supra* note 10, at 178.

86. Wagner, *supra* note 10, at 171 and 175–77.

87. In Germany, StGB §§ 30–31 establish a general conspiracy doctrine (notably, § 30(2) refers to “a person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony”). Felonies are defined in § 12 as acts punishable by a minimum sentence of one year’s imprisonment.

In France, the general conspiracy offense is set by the Code pénal, Book IV (Felonies and Misdemeanours against the Nation, the State and the Public Peace), Title V (Participation in a Criminal Association). According to article 450-1, “a criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years imprisonment.”

88. German law provides a good example. See StGB, *supra* note 87.

89. French law mentions merely that the conspiracy should be established with “a view for the preparation” of felonies. See Code pénal, *supra* note 87. The German prohibition does not expressly mention an intent requirement, but some form of intent is nevertheless required. See Schönke & Schröder, *supra* note 66, at 571.

accurate, and accordingly, may be constituted by various forms of conduct (thus, generating a possible overlap of the prohibitions).<sup>90</sup>

Yet, nonetheless, some differences are obvious. The aim of the following discussion is merely to highlight these differences, although under certain conditions their relevance to the normative discussion conducted in Part III is implied.

Many of the differences between membership offenses and conspiracy doctrine emphasize the broader applicability of the former over the latter. In terms of the mental element, most membership offenses require mere knowledge of the fact that the group's purpose is directed toward terrorist acts,<sup>91</sup> whereas many (although not all<sup>92</sup>) conspiracy doctrines are purpose-centered, and are thus intentionally narrower than membership offenses.<sup>93</sup> It is thus harder to rely on the actor's strong culpability to justify criminalization of membership. As for the factual element: The reference to an agreement in *modern* conspiracy doctrines is clearer and narrower than undefined references to "membership," thus ensuring a higher level of determination. Moreover, unlike most membership offenses,<sup>94</sup> some conspiracy doctrines require one or more of the conspirators to have performed some overt act in furtherance of the criminal agreement,<sup>95</sup> thus demonstrating dangerousness and determination. In addition, whereas conspiracy is constituted by a momentary act (agreement or consent),

90. The line can be roughly drawn at the consumption of knowledge regarding the commission of offenses: once a member is exposed even to the most general knowledge regarding criminal activity, he would in many cases also be considered a conspirator.

91. The American membership offense set by the Smith Act, as it was interpreted in *Scales*, *supra* note 33, is an exception. The current Canadian prohibition set in Canadian Criminal Code § 83.18(1) (which according to some claims resembles membership offenses) requires an aim to enhance the organization's ability to commit offenses. This requirement comes close to a requirement of an aim that offenses be committed.

92. See Note, *The Conspiracy Dilemma*, *supra* note 75, at 279, 281–82; *Blumenthal v. United States*, 332 U.S. 539, 557 (1947); *The English Criminal Law Act 1977*, ch. 45, § 1(2).

93. Model Penal Code, *supra* note 80.

94. The French membership offense, which requires the commission of an overt action, is an exception; see Part I, Section A.

95. Yet it has been noted that "this additional requirement adds little. Practically any act will do, including seemingly innocent conduct that carries the conspiracy no closer to accomplishing its object than the agreement itself. Moreover, an act by one alleged conspirator suffices for all." Johnson, *supra* note 77, at 1142. See also Note, *Conspiracy and the First Amendment*, 79 *Yale L.J.* 872, 878 (1970), and the references therein; George P. Fletcher, *Rethinking Criminal Law* at 224 (2000).

membership is, in some cases, a continuing situational offense whose commission continues until the actor does an act that “terminates” his or her membership.

In other respects, membership offenses are narrower than conspiracy doctrine, and are accordingly easier to justify. Unlike conspiracy, membership offenses have often had only the commission of *grave crimes* (in continental jurisdictions, usually more than one<sup>96</sup>) as their object.<sup>97</sup> Thus, as we shall see in Part III, the gravity of the expected harm may justify membership offenses even more than it may justify the conspiracy doctrine. In addition, for the purposes of conspiracy, it is usually unimportant with whom or with how many people the perpetrator conspires.<sup>98</sup> For purposes of membership offenses, the perpetrator must join an organization, that is, an already existing group of at least several people.<sup>99</sup> Chances of success are therefore higher. Furthermore, this organization must be characterized as a terrorist organization. Considering the motives and objectives of terrorist organizations, membership can demonstrate a relatively high level of determination.

To conclude, there seem to be close similarities between membership offenses and conspiracy offenses, with membership offenses being more inclusive mainly with respect to the mental element and the exact nature of the prohibited conduct (and with conspiracy offenses being more inclusive mainly with respect to the identity of the coconspirators). Legal literature on traditional continental law does not distinguish conspiracy offenses from

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96. Modern French antiterrorism offenses that require that the organization be directed at the commission of any terrorist act are an interesting development; see Part I, Section A.

97. Current German prohibitions provide an example; see above, Part I, Section A.

98. The old continental conception of conspiracy as a prohibition on organization is different, but this conception gradually disappears even from continental legislation.

99. Meliá, *supra* note 23, at 581, and the references therein. Article 2 of Framework Decision 2002/475/JHA (June 13, 2002) of the Council of the European Union on combating terrorism does contain some structural requirements. It defines a terrorist group as follows: “a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. ‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.” However, together with the changing structure of terrorist organizations—from hierarchical, well-structured organizations to horizontal cells connected loosely—this requirement is being relaxed.

membership offenses.<sup>100</sup> The ties between the modern Anglo-American concept of conspiracy and the concept of membership<sup>101</sup> have been observed by the U.S. Supreme Court and more explicitly in the relevant legal literature.<sup>102</sup> Considering those ties and similarities, it is not surprising that both conspiracy doctrine and membership offenses have been used for political persecution.<sup>103</sup>

The similarities and differences between the doctrines can be of assistance both in analyzing membership offenses and in evaluating their justifiability.

### **B. Are Membership Offenses Expansions of Attempt Law or of the Doctrine of Complicity?**

Section A compared membership offenses and conspiracy doctrine, emphasizing the similarities between the two. This section analyzes membership offenses as expansions of attempt law and possibly also of complicity doctrines, on the basis of their similarities with conspiracy doctrine. Having come to the conclusion that membership offenses expand the scope of these doctrines, an examination of the justifiability of this expansion will follow.

Conspiracy doctrine is in itself a hybrid, broadening the scope of criminal attempt on the one hand, and the scope of criminal complicity on the other.<sup>104</sup>

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100. Wagner, *supra* note 10, e.g., 178; Wechsler et al., *supra* note 10, at 962; Kremnitzer, *supra* note 75, at 233. The linkage between conspiracy and membership offenses is easily demonstrated when observing, for example, the French prohibition of 1893, which addressed both associations and agreements directed toward commission of crimes (French Penal Code, *supra* note 67), thus encompassing a wide net of relationships including the narrowest and clearest form of conspiratorial relationships—the agreement to commit a crime.

101. In the United States, for example, legislation of the Smith Act membership offenses as well as of its specific conspiracy offenses was nourished mainly by frustration regarding the practical limitations of federal conspiracy law. Mark A. Sheft, *The End of the Smith Act Era: A Legal and Historical Analysis of Scales v. United States*, 36 *Am. J. Legal Hist.* 164, 166 (1992).

102. See, e.g., Wechsler et al., *supra* note 10, at 969; Sheft, *supra* note 101, at 166–67, 187; Scales, *supra* note 33, at 229; Abrams, *supra* note 38, at 29–30.

103. For concrete examples see Johnson, *supra* note 77, at 1139, 1153; Note, *Conspiracy and the First Amendment*, *supra* note 95. See also dissenting opinion at Epton v. New York, 390 U.S. 29, 32 (1968).

104. For a more comprehensive argument demonstrating that conspiracy is an inchoate crime rather than a complete crime, see Kremnitzer, *supra* note 75, at 236–41.

One aspect of conspiracy, arguably its main aspect, is that of criminal preparation, that is, taking preparatory steps toward the commission of an offense, steps that are usually not punishable because of their remoteness from the commission of the offense and the resulting harm.<sup>105</sup> It is easy to see how the scenario of agreements among potential perpetrators who intend to commit an offense has been considered a form of preparation. Such agreements create objective grounds for future cooperation in committing an offense.<sup>106</sup> By punishing preparation, conspiracy broadens the scope of criminal attempt.<sup>107</sup>

It is more difficult to reach a definitive conclusion about the preparatory nature of membership. The nature of the conduct that may constitute the status of a member affects its possible characterization as preparation. As for passive-nominal membership: On the one hand, joining an already established group brings the perpetrator closer to the commission of an offense than does an agreement amongst unorganized persons. Where the group is already established, the criminal infrastructure already exists, and thus commission of the offense is easier and more inviting. On the other hand, especially where ancillary and dual-purpose organizations are at issue, the mere fact of membership in a group does not automatically imply an intention to commit a criminal offense, nor does the fact of membership automatically assign the member a specific role in the commission of a terrorist attack. Even where the organization is exclusively terrorist in nature, the absence of more or less fixed modes of action (for example, suicide bombing) can make it hard to regard passive-nominal membership as preparatory. The degree of destructiveness can also affect the identification of preparation: when an organization targets property, we might be less inclined to identify preparation for reasons that are further discussed in Part III. Leaving passive-nominal membership aside, more active conduct may very well have a clearer preparatory nature. Learning how to operate weapons is an obvious example. Where membership takes such a form, the nature of the organization is of lesser importance.

Yet it should be kept in mind that the mens rea of most membership offenses distances these offenses from the realm of criminal attempts, which in the Anglo-American world are characterized by an intention to commit the offense. Most membership offenses do not require even knowledge of a

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105. *Id.* at 239.

106. *Id.* at 238–39.

107. Johnson, *supra* note 77, at 1141–42.

specific planned offense, let alone the intention to participate in its commission. All that membership offenses require is that the perpetrator knows that the organization has the general aim of committing a grave offense.

A second aspect of conspiracy, and accordingly of membership offenses, is that of complicity: inducement or solicitation to the commission of an offense or aiding and abetting its commission. In the typical case of conspirators who intend to commit an offense jointly, the initiator solicits the other(s) to commit the offense.<sup>108</sup> More peripheral cases would usually establish mere spiritual aid.<sup>109</sup> Where the coconspirator does not reach a final decision to commit the offense, or when the offense whose commission is meant to be aided is neither committed nor attempted, conspiracy doctrine criminalizes merely attempted complicity.

Membership offenses can be similarly analyzed as expanding the scope of criminal complicity.<sup>110</sup> But here, the typical case would be close in essence to (attempted) aid, and only peripheral cases would be of (attempted) solicitation.

With respect to (attempted) solicitation, membership in large organizations can perhaps have a soliciting effect. Here, the relevant arena is not usually one of simple criminal solicitation, but rather of incitement to terrorist offenses (as a special and broad form of solicitation): the fact of a person's membership in a terrorist organization can perhaps encourage other unspecified members of the organization to decide to participate in terrorist attacks. This can be either in those rather rare cases where the member in question holds a special spiritual position in relation to other members, or in the more common case, where the mere fact of a large membership base encourages potential terrorists and drives them into action. Notably, the mere fact of membership does not itself project any independent inciting content (such as a call for violence), and the soliciting effect exists only in conjunction with other memberships.

More plausibly, membership should be analyzed with reference to (attempted) aid doctrines. Here there is a reason to distinguish passive-nominal membership from active membership. Passive-nominal membership can perhaps be said to aid physically in the commission of terrorist attacks, assuming that the members form the infrastructure of the whole

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108. Kremnitzer, *supra* note 75, at 245.

109. *Id.* at 246, esp. n.63.

110. See, e.g., Scales, *supra* note 33, at 227.

terrorist mechanism.<sup>111</sup> In other words, without a basis of (silent, supportive) members, the organization would simply not be able to operate. Yet, such an assumption seems too speculative; and even if it is valid, a single member's conduct is rather ineffectual in its antisocial nature and gains its ultimate force only in conjunction with other similar conduct. Otherwise, passive membership might spiritually aid potential perpetrators of terrorist offenses: knowing that there is a basis of members would probably reassure the perpetrators.

When membership is defined as active participation, the (attempted) aid may very well be physical. It is in this light that Norman Abrams has suggested analyzing current American material support offenses.<sup>112</sup> But even where membership is so defined, it is necessary to examine the membership's exact manifestation, especially where ancillary and dual-purpose organizations are concerned. Not every form of active participation in the organization's activities can be regarded as a form of (potential) criminal aid. While participation in terrorist activities does qualify as aid, participation in civil activities does not. It is hard to accept the position shared by various authors<sup>113</sup> and accepted by the Israeli Supreme Court<sup>114</sup> that participation in civil and terrorist branches are one and the same thing. Although funding of terrorism raises specific difficulties in this regard,<sup>115</sup> the objects of other concrete acts of aid can surely be identified as civil or terrorist. Civil activities that as a by-product increase popular support, which in turn merely provides spiritual aid for terrorists, cannot qualify as (potential) aid.

111. BSH'P 6552/05 *Abidat v. The State of Israel* [17.8.05] TakSC 2005(3) 2120.

112. Abrams, *supra* note 38, at 18.

113. See, e.g., Peter Margulies, *Uncertain Arrivals: Immigration, Terror, and Democracy After September 11*, [2002] *Utah L. Rev.* 481, 506–7 (2002); Matthew Levitt, *Stemming the Flow of Terrorist Financing: Practical and Conceptual Challenges*, 27 *Fletcher F. World Aff.* 59, 64–66 (2003).

114. *Abidat*, *supra* note 111, at 2120. The Court goes on to say: “The civil function nourishes the military objective, and the military objective provides the cause for and objective of the monetary-civil activity and the provision of funding needed for the organisation's activity, including helping people in need and conducting social activities for young members in order to encourage their participation and membership in the organisation.”

115. The main claim here is that there is no possibility of cutting off funding to terrorist activities without cutting off funding for civil activities (which would otherwise be directed to terrorist activities). See for example, Robert M. Chesney, *Review: Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 *Mich. L. Rev.* 1408, 1447 (2003). For criticism of these claims, see David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, 62–63 (2003).

As far as membership offenses criminalize such activities, they expand the scope of aid doctrine.

This expansion comes in addition to other, more general expansions of liability: first, membership offenses expand liability to cases in which the eventual offense has not been committed or attempted. Membership offenses further expand the scope of complicity doctrines by the minimal mens rea requirement that does not include a purpose to aid, or even knowledge that the fact of membership might aid the commission of an offense, nor does it require a purpose that the offense be committed or even knowledge of a particular planned offense.

Considering the abandonment of both central actus reus requirements and central mens rea requirements of complicity doctrines, as well as the fact that the contribution of members to the commission of offenses is usually slight (in the main, a vague and indirect form of spiritual aid), the question arises of whether there remains any real nexus between membership offenses and complicity doctrines.

Based on its similarities to conspiracy doctrine, this part of the article has demonstrated that prohibitions on membership in terrorist organizations criminalize a broad range of conduct, some of which is preparatory or pre-preparatory (thus expanding the scope of attempt law), whereas other conduct maintains some loose connection to soliciting conduct or aiding conduct (thus expanding the scope of complicity doctrine). The next part of the article examines whether expanding the scope of criminal law to cover this conduct is justifiable. The examination draws upon many of the justifications for conspiracy doctrine, as far as they are applicable to membership offenses, as well as upon criticism of conspiracy doctrine. It further proposes particular considerations for and against criminalization.

### **III. IS THE EXPANSION OF CRIMINAL LAW JUSTIFIABLE?**

To examine the justifiability of expanding criminal law as described in Part II, this section builds upon two main distinctions: The primary distinction is between exclusively terrorist organizations on the one hand, and ancillary and dual-purpose organizations on the other hand, as outlined in the definition of terrorism proposed in Part I. This distinction allows us to identify those organizations that most closely resemble conspiracies and examine the justifiability of criminalizing membership therein on similar lines as those of conspiracy.

The secondary distinction, also introduced in Part I, is between passive membership and active membership. As explained above, passive membership means mere affiliation to the organization. The crudest form of passive membership, also termed “passive-nominal membership,” refers to joining an organization, but neglecting to take any part in its activities. Active membership refers to taking part in different activities of the organization (there is no need for any preceding act to symbolize joining the organization). Obviously, the last distinction is hardly clear-cut. Rather, different forms of membership can be categorized as tending more toward passive participation or more toward active participation, and various considerations affect the categorization. Furthermore, additional distinctions are required to properly evaluate membership offenses and delineate their legitimate scope. Yet for purposes of simplicity, this part begins by discussing passive in contrast to active membership.

The two above-mentioned distinctions would help in examining how far criminal law can be justifiably expanded. They have been selected for the following reason: To identify the legitimate scope of criminalization, it is necessary to evaluate the different possible links between members and terrorist organizations according to two variants: the risk they cause (as acts of preparation and possibly as acts of attempted complicity) and their value as exercises of fundamental constitutional rights. For this purpose, the roles members take in the terrorist scheme can be arranged according to different combinations of three pairs of parameters: passivity / activity; civil orientation / orientation toward dangerous activity; lack of legitimate expressive purposes / existence of legitimate expressive purposes. These chosen distinctions manifest combinations of these three parameters (as will become clearer in course of the analysis); and they also manifest, to some extent, the doctrinal differentiation between acts of preparation and acts of attempted complicity, which adds yet another dimension to the evaluation.

Section A demonstrates that when it comes to exclusively terrorist organizations, and especially to exclusively terrorist organizations that are also highly destructive, there is sufficient justification for criminalizing both passive membership (subject to certain limitations) and active membership. Referring to von Hirsch’s notion of remote risk, and relying on various justifications for modern conspiracy doctrine, it is demonstrated that, in such a case, the risk of terrorist attacks can be fairly attributed not only to the active member, but also to the passive member, under certain conditions.

Section B discusses ancillary and dual-purpose organizations. Where such organizations are concerned, conspiracy doctrine and membership offenses diverge along separate paths, and there is no sufficient justification for attributing the risk to the passive member. Accordingly, it may be argued that there are strong reasons for criminalizing certain forms of active membership while avoiding criminalization of passive membership.

The essential fine-tuning of the distinction between passive and active membership, as well as the development of additional distinctions among different types of active participation, are the subject of Section C.

Section D discusses the *mens rea* of the proposed prohibitions.

### **A. Membership in Exclusively Terrorist Organizations**

The first issue is the justifiability of prohibitions on passive-nominal membership in exclusively terrorist organizations. Having come to the conclusion that such prohibitions are justifiable, the justification for prohibiting active membership in such organizations is almost self-evident. Yet, it is claimed in the last part of this section that criminalization should not apply to all forms of membership, passive and active, under a single general prohibition on membership. Rather, different forms of conduct should be addressed by separate and specific prohibitions.

As demonstrated in Part II, passive membership mainly extends the realm of attempt doctrine, although in certain cases, it also extends the realm of complicity. Accordingly, where a member joins subsequent to a terrorist attack, and there are no other potential attacks on the horizon, criminalization can hardly be justified. Clearly, preparation and solicitation offenses are out of the question; nor can such membership be conceived as aid after commission (which could consist of helping the terrorists to escape, for example). But where a member joins prior to an attack, an argument for criminalization can be made. Although it is possible to claim that membership does not reflect the same commitment as an agreement to commit a crime, membership is, at the very least, a declaration of willingness to move forward and commit, or take part in the commission of, a terrorist attack; and it exposes the member to pressures by other members and superiors directed at causing his involvement in the commission of such an attack, thus increasing the risk of an eventual harm. The question then becomes whether this forms sufficient ground for criminalization.

This question should be analyzed using what Andrew von Hirsch terms “remote harm” or “remote risk” doctrines.<sup>116</sup> Von Hirsch refers to the criminalization of conduct creating “risks that are remote in the sense that they involve certain kinds of contingencies,”<sup>117</sup> and enumerates situations of abstract endangerment, yet-expected intervening choices, and resulting accumulative harms as qualifying under this definition.<sup>118</sup> As with conspiracy, membership offenses generally meet the criteria of the yet-expected intervening choices category: conduct that is “thought to induce or lead to further acts (by the defendant or a third person) that create or risk harm.”<sup>119</sup> The main question raised by von Hirsch is, under what circumstances can the eventual harm be fairly imputed to the conduct at issue?<sup>120</sup>

In response, von Hirsch begins by comparing legal causality doctrines and remote harm doctrine, concluding that legal causation doctrines should not be imported, but rather examined to see how they can be suggestive for developing imputation principles.<sup>121</sup> The same can be said with respect to other general doctrines of criminal law that address contingencies, mainly aid doctrine (where the harm is caused by another person, and the actor is charged with responsibility for her contribution to its occurrence), as well as certain attempt or solicitation doctrines that resemble remote harm doctrine in terms of the probability of the expected harm, and differ from it only in its remoteness. Thus, these doctrines should be kept in mind when considering criminalization of membership.

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116. See Andrew von Hirsch, *Extending the Harm Principle: “Remote” Harms and Fair Imputation*, in *Harm and Culpability* 259 (A.P. Simester & A.T.H. Smith eds., 1996).

117. *Id.* at 263.

118. *Id.* at 263–65.

119. *Id.* at 264.

120. Von Hirsch discusses this question; see *supra* note 116, 265. It may be worthwhile to mention the two assumptions underlying the discussion of remote harm and fair imputation: first, that criminal law has a preventative purpose—see Andrew Ashworth, *Conceptions of Overcriminalization*, 5 *Ohio St. J. Crim. L.* 407, 413–18 (2008) (section III of the article, entitled “Risk and the Preventive Function of Criminal Law”); and second, that risk creation might be morally blameworthy, yet it is usually not morally equivalent to harm creation, thus is not worthy of the same punishment. This second assumption is hardly a consensual one; see, e.g., Stephen J. Morse, *The Moral Metaphysics of Causation and Results*, 88 *Cal. L. Rev.* 879 (2000), claiming that results and causation do not matter for desert.

121. Von Hirsch, *supra* note 116.

Von Hirsch objects to the idea that one general test may be used to determine the question of fair imputation in each and every instance, and urges the construction of “reasons why the ultimate harm is appropriately deemed the proper concern of the actor or actors.”<sup>122</sup> He then proposes applying first the distinction between general prohibitions directed to the public as a whole and specific prohibitions that are role-related.<sup>123</sup> The scope of general prohibitions (such as conspiracy and membership offenses) “should be kept narrow. Not only should the harm be imputable to the actor . . . but the conduct should be sufficiently obviously reprehensible for its wrongness to be apparent to ordinary persons. Included would be *mala in se* crimes of ordinary victimisation, plus infringement of certain basic and well-understood public duties” (von Hirsch refers here to duties like paying taxes).<sup>124</sup> Where membership is in an exclusively terrorist organization, its impropriety seems to be apparent to ordinary persons.<sup>125</sup> The wrongness of the conduct is affected by various factors. These include, first, the nature of the expected harm, its probability, and its extent.<sup>126</sup> The following discussion of these factors draws inspiration from the justifications for conspiracy doctrine, as these factors serve to justify modern conspiracy doctrine in ways that are in part applicable to membership offenses as well.

As for the nature of the harm, prosecuting a conspiracy offense may be justified partly on the basis of the expected harm to an important legal interest, harm that will be caused by the conspired offense. Terrorist organizations usually threaten grave harm to the most important protected legal interests (and in this respect membership offenses are even easier to justify

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122. *Id.* at 270.

123. *Id.* at 271–73.

124. *Id.* at 273.

125. The distinction between *mala in se* and *mala prohibita* is a complicated one, especially where conduct connected to *mala in se* prohibitions are concerned. For purposes of the current discussion, I have presumed that prohibitions on conduct preceding the violation of *mala in se* prohibitions can themselves be categorized as *mala in se* prohibitions. For a more detailed discussion, see Douglas Husak, *Overcriminalization: The Limits of the Criminal Law*, at 104–19 (2008); R.A. Duff, *Crime, Prohibition, and Punishment*, 19 *J. Applied Phil.* 97 (2002).

126. Many of these considerations are relevant for conspiracy doctrine as well, and have been mentioned in this context. See mainly, Neal Kumar Katyal, *Conspiracy Theory*, 112 *Yale L.J.* 1307, 1310–27, 1338–39, 1375–76 (2003); Kremnitzer, *supra* note 75, at 242; Meliá, *supra* note 23, at 569; Wechsler et al., *supra* note 10, at 958–61; Note, *The Conspiracy Dilemma*, *supra* note 75, at 876–77; Model Penal Code, *supra* note 80, § 5.03 (p.388).

than conspiracy doctrine). As implied in Part I, it may be appropriate to limit liability solely to membership in organizations that threaten life or limb rather than property. Property does not rise to other more fundamental interests, and where the threat is to property alone, the wrong nature of mere passive-nominal membership is less apparent.<sup>127</sup>

The extent of the harm threatened varies, but it is in any case greater than the extent of the harm threatened by many conspiracies: organizations like Al-Qaeda threaten mega-scale attacks causing most extensive harm, whereas other organizations threaten less dramatic attacks. Yet the threshold that can justify early criminalization is crossed even by “modest” terrorist organizations, especially noting the well-known dangers of group activity that are discussed below.

The strongest justification for conspiracy doctrine concerns the special danger posed by group activity, both in terms of the extent of the harm and in terms of its probability, and this justification is surely applicable to membership offenses as well. The presence of participants in a group activity increases both the potential harm and the chances of success: Groups encourage risk-taking, which increases the magnitude of the expected harm. Groups also allow division of labor and development of expertise, serve as “schools” for efficient planning and commission of terrorist activities, enable large-scale, complicated actions that are impossible for individual perpetrators, and enable the execution of such complicated actions as well as more simple ones relatively quickly, while also raising the risk of unplanned violence. Furthermore, groups allow for continuity, and thus also increase the chances of achieving the group’s ultimate goals (such as coercing governments to take action).<sup>128</sup>

The actor’s culpability also affects the question of “wrongness” as the term is used by von Hirsch. Much (though not entirely) like an agreement to commit a crime, making the choice to join an exclusively terrorist organization is significant and culpable: it usually reflects a (direct or indirect) intent to commit violent attacks. It should be mentioned, though, that unlike conspiracy doctrine, membership offenses do not require that the prosecution prove such intent. In addition, it has already been noted in the

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127. It can be noted that this liability-limiting principle does not necessarily apply to modern conspiracy doctrines. An agreement to commit a crime is a more advanced and accordingly more blameworthy act of preparation, and thus liability can be justified even where less important legal interests are at stake.

128. See Wallerstein, *supra* note 28, at 24, 34.

context of conspiracy that groups deepen the actor's antisocial attitudes in a way that affects both dangerousness and culpability: Research demonstrates that groups work to polarize the attitudes of members,<sup>129</sup> discourage doubts and dissent,<sup>130</sup> encourage submerging one's self-interest to that of the group, and in general, enhance members' determination and their commitment to maximizing success.<sup>131</sup> Acting in a group also reduces the sense of personal responsibility for the offense, thus making the prohibited conduct psychologically easier. Because of the special force leaders often have over followers, the more hierarchical the structure of a group, the stronger these psychological effects are. This is all the more so with terrorist organizations as opposed to criminal conspiracies. Many such organizations work on the highly receptive substrata of religious or ideological motivations, and possibly also against the background of a sense of deprivation and oppression; their methods of indoctrination can be particularly effective; often they promise martyrdom with its significant psychological, social, and material benefits for the member and her close family; and they usually enjoy strong support by the member's immediate environment.<sup>132</sup>

Considering these factors, membership of exclusively terrorist organizations seems sufficiently wrongful. Next, it should be examined whether the harm is indeed imputable to the actor. To decide this last issue, von Hirsch suggests that the purpose of the norm should be considered first.<sup>133</sup> Much like modern conspiracy doctrine, prohibitions on all forms of membership

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129. See Katyal, *supra* note 126. It may be noted that the justification that goes down to the actor's determination (and thus both to his dangerousness and to his guilt) is usually mentioned in the context of agreement-based conspiracy law, and in that context it focuses on the act of agreement as manifesting strength of mind. However, this argument takes different forms and emphasis in the present context.

130. Katyal, *supra* note 126, at 1321–22.

131. Psychological research demonstrates that in terrorist organizations, membership is “being associated with a fusion of the young adult's individual identity with the group's collective identity and goals.” See Jeff Victoroff, *The Mind of the Terrorist: A Review and Critique of Psychological Approaches*, 49 *J. Conflict Resol.* 3, 10 (2005), referring to a study by Jerrold M. Post, Ehud Sprinzak, & Laurita M. Denny, *The Terrorists in Their Own Words: Interviews with Thirty-Five Incarcerated Middle Eastern Terrorists*, 15 *Terrorism & Pol. Violence* 171 (2003).

132. Victoroff, *supra* note 129, at 10.

133. Von Hirsch asks here “how the conduct is linked to the eventual risks”; Von Hirsch, *supra* note 116, at 270.

in all sorts of terrorist organizations are primarily meant to prevent members from committing attacks. Thus, it seems easier to fairly impute the expected harm to members preparing for a terrorist attack rather than to members who are merely potential accomplices.<sup>134</sup> Passive members of exclusively terrorist organizations are rightly taken to be potential perpetrators of terrorist attacks (since, as explained above, their membership is a declaration at least of an initial willingness to go forward), and therefore criminalization seems justifiable in this respect.

It is suggested here that other considerations relevant for the question of attribution can include the existence of any special circumstances that make the reasonable and usual course of development less likely; and the reasonable capability to appreciate in advance whether and how the conduct (membership) might be integrated into the main offense (a terrorist attack). The chances that a member of an exclusively terrorist organization will not take a role that integrates into the main offense are low, as there are hardly any such roles in exclusively terrorist organizations (excluding roles such as secretaries or drivers, yet members intending to fill those positions are still at an increased risk of becoming operative terrorists, in comparison with nonmembers), and the integration of the conduct in the eventual terrorist attack usually complies with established routines of operation.

The above analysis has demonstrated that the (immoral) choice to join an exclusively terrorist organization is a dangerous and culpable conduct that seems sufficiently linked to the eventual harm to justify prosecution under criminal statutes. Some counter considerations can be proposed.<sup>135</sup> Passive-nominal membership is characteristic of an extremely early stage in the advancing the terrorist activity<sup>136</sup> (earlier than that of an agreement to commit a crime), thus reflecting a relatively low level of dangerousness and culpability that would increase only as the actor further acts and approaches commission.<sup>137</sup> Not all terrorist organizations aim at, or are

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134. This conclusion regarding fair imputation further strengthens and sharpens our earlier assumption regarding the difficulty of justifying membership offenses as forms of expanded complicity.

135. See mainly Kremnitzer, *supra* note 75, at 243–45; Katyal, *supra* note 126, at 1334.

136. Thus membership offenses have been referred to as “pre-inchoate crimes”; Meliá, *supra* note 23, at 564.

137. See Daniel Ohana, *Desert and Punishment for Acts Preparatory to the Commission of a Crime*, 20 *Canadian J. L. & Jurisprudence* 113, 117 (2007).

capable of, committing full-scale attacks. At the same time, individual perpetrators are able to cause serious harm almost immediately simply, for example, by distracting a bus from its route. The dangerousness of group actions is reduced by the fact that the weakest link of the terrorist chain may foil the terrorist plot simply by failing to do its part, as well as by the fact that group actions are at a higher risk of being revealed, for example, by leaks of information to the authorities. Fear of information leaks could be expected to cause organizations to monitor their members, whilst this in turn could be expected to sow distrust among the members, reduce motivation, and weaken commitment to the organization and its activities.<sup>138</sup> Working in groups is more expensive and requires additional effort. Many of the alleged psychological effects of groups have as their source the group's presumed hierarchical structure, yet according to certain intelligence agencies, at least some modern terrorist organizations have a different, more horizontal structure of loosely connected cells.<sup>139</sup>

Yet, many of the considerations supporting criminalization do not lose their strength entirely. Most importantly, reality demonstrates that the destructiveness of group activity is enormous despite the impediments: the most deadly terrorist attacks have been and are performed by groups rather than by individuals. Accordingly, it is submitted that the balance tips in favor of early criminalization. Joining the organization should be punishable, assuming that it was initiated or otherwise promoted by the actor (thus, having been registered by someone else would not suffice;<sup>140</sup> neither would a mere positive

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138. This argument can also be used in support of criminalization. Katyal, *supra* note 126, at 1334, uses this argument to explain the positive law enforcement effects of conspiracy law.

139. CRS Report for Congress, *Al Qaeda: Profile and Threat Assessment* (August 17, 2005): "According to this view, the threat from Al Qaeda has been replaced by a threat from a number of loosely affiliated cells and groups that subscribe to Al Qaeda's ideology but have little, if any, contact with remaining Al Qaeda leaders."

140. Criminalization of passive-nominal membership can in some cases create a "situational offense" (a prohibition that does not require any volitional conduct; rather it applies to anyone found in a certain situation). Whereas most of the modern prohibitions do not cover such cases, the Israeli offenses were interpreted to cover such membership until recently, as described in Part I. Under such an interpretation a person may be punished because, for example, someone else registered him or her as a member of a terrorist organization, regardless of whether the actor could have avoided this situation. Clearly, imposing punishment under such circumstances violates the principle of guilt. A.P. Simester, *On the So-Called Requirement For Voluntary Action*, 1 *Buff. Crim. L. R.* 403, 412 (1998). Meir Dan Cohen further adds, "The definition of such an offence has no educational effect, it does not outline any preferable conduct, and the

reply to a recruiter). Lack of later participation in the organization's activities should not affect this conclusion because of the possibility that the member is part of a "sleeper cell." However, this possibility should be evaluated in light of the overall circumstances. A person who merely registered as a member of an exclusively terrorist organization and then became a peace activist has demonstrated that her registration was merely technical and did not constitute substantive membership.

If passive-nominal membership in exclusively terrorist organizations is to be criminalized under certain conditions, a fortiori most of the more dangerous and more culpable forms of participation ("active membership") should be criminalized as well. A detailed discussion of active forms of membership is introduced later in the article. It can nevertheless be mentioned here that some of that conduct, such as possession of explosives, is dangerous in and of itself and is accordingly criminalized by other criminal prohibitions as well. Yet its criminalization under a prohibition of membership is justified on the basis of the risk of future terrorist attacks, rather than on the basis of any immediate danger. Other conduct, such as collecting or receiving intelligence, is not always criminalized under other non-terrorist-related prohibitions. Its criminalization, too, is justified on the basis of its predominantly preparatory nature and its integration into the activity of a dangerous organization.

Some active members such as secretaries or drivers take minor parts in the dangerous activities of the organization, parts that have the nature of (potential) aid rather than of preparation. It can be argued that this weak and remote form of (potential) aid cannot justify criminalization. Nevertheless, criminalization of such forms of membership can be justified on the same basis as passive membership: their weak and remote (potential) aid to the terrorist effort is at the same time an expression of initial willingness to take more dangerous preparatory roles, if asked to do so by their superiors. At the very least, it exposes the actor to pressure to take such roles, pressure

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punishment is not a deterrent factor but a means of arbitrary oppression"; see Meir Dan Cohen, *The "Actus Reus" and Offences of "Situation,"* 7 *Is. L. Rev.* 186, 191 (1972). At best, situational offenses are interpreted as imposing an obligation to change the situation. Under this interpretation, they create an obligation to act and thus put a particularly heavy burden on general freedom of action. See Mordechai Kremnitzer & Liat Levanon, *Abetment to Crime by Omission: Should There Be a Specific Legal Duty to Act?*, 4 *Alei Mishpat* 175 (2005) (in Hebrew); Mordechai Kremnitzer & Liat Levanon, *Aid in Committing an Offence and Interpretation of Criminal Statutes*, 17 *Bar Ilan Law Studies* 403, 405-6 (2002) (in Hebrew).

that would be very hard to resist for various reasons, including a mental “slippery slope.”

Before moving on, it should be noted that criminalization of all forms of membership in exclusively terrorist organizations can perhaps be justified also on the basis of an omission to report or otherwise prevent the materialization of a risk (the risk of terrorist attacks). Under this analysis, the mere fact of membership establishes a specific link between the member and the risk of terrorist attacks. Looked at from a crime prevention perspective, the offense of membership is a tool for extracting information from members of terrorist organizations, possibly in the course of plea bargaining.<sup>141</sup> This, however, seems like a shaky basis for criminalization. Members do not necessarily know of any concrete terrorist plots, and to the extent that they do, the question of criminalization should be resolved with reference to such knowledge rather than to the fact of membership.<sup>142</sup> Needless to say, criminal offenses should not be police intelligence tools.

### **B. Membership in Ancillary Organizations and Dual-Purpose Organizations**

Complications arise with regard to ancillary and dual-purpose organizations. As demonstrated in Part I, liberal democracies usually prohibit various types of links between individuals and ancillary or dual-purpose organizations.

Clearly, prohibition of some types of active preparatory membership in such organizations is justified on the same lines as discussed above. Some forms of active membership are fairly proximate to the traditional realm of criminality.<sup>143</sup> At times the relevant conduct is dangerous in and of itself, as well as requiring the investment of a significant amount of energy, and thus its implementation increases the actor’s determination to proceed with the commission of the offense.<sup>144</sup> In such cases, criminalization is justifiable subject to the above-mentioned guidelines and the presence of a sufficiently strong *mens rea* requirement, as explained in the Section D, below.

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141. Katyal, *supra* note 126, at 1328–32.

142. Possibly, a unique dangerousness consideration applies here, too.

143. Kremnitzer, *supra* note 75, at 242.

144. *Id.* at 244.

However, criminalization of more passive forms of membership as well as of active civil forms of membership in ancillary or dual-purpose organizations raises difficult questions of justification.<sup>145</sup> Ancillary and dual-purpose organizations have much less in common with conspiracies whose only object is the commission of crimes: ancillary and dual-purpose organizations do not necessarily aim to commit crimes, and some of their activities may even have positive value, such as engaging in legitimate political expression that deserves strong legal protection. Accordingly, criminalization of membership therein can hardly rely on grounds similar to those of conspiracy.

The main consideration in favor of criminalization is that ancillary or dual-purpose organizations can be more effective in increasing the member's commitment to terrorism: where an ancillary or dual-purpose organization provides financial support to the actor's family as part of its civil activities, pressures can be imposed by threats of sanctions or the withholding of necessary benefits.<sup>146</sup>

Yet many other considerations work the other way. Sweeping criminalization of passive and civil-active membership in ancillary or dual-purpose organizations ignores the fact that these organizations cannot be rightfully defined as terrorist organizations. As explained in Part I, only organizations working in concert with the prospect of committing terrorist attacks can be so defined. Accordingly, where terrorist wings of dual-purpose organizations can be identified, criminalization of membership can be justified as explained above; but where separate wings cannot be so identified, an examination of the actor's specific conduct—in terms of whether it is preparatory or not—is due.

The member who is active in civil branches demonstrates that her membership is not directed at terrorist attacks. Acting in a nonterrorist sphere, she would not be exposed to requests or demands to take part in terrorist activities. The passive member does not demonstrate lack of willingness to participate in terrorist attacks; nevertheless it is still difficult to attribute the risk of terrorist attacks fairly in most cases. As mentioned above, the purpose of the norm is to stop potential perpetrators

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145. The attempt by the Israeli Supreme Court to narrow the scope of local membership offenses (all applying to various dual-purpose organizations), which was described in Part I, is but one example that reflects these difficulties.

146. Ohana, *supra* note 137, at 137.

at an early stage. Both on evidentiary and substantive levels, it is not clear that the passive member of a dual-purpose organization, and all the more so the member of an ancillary organization, actually prepares for the commission of a terrorist attack rather than merely for performing a task in the civil activities of the organization. Even where the member may be viewed as providing aid to the commission of an attack, this aid is significantly more remote from causing the harm than that of a member in an exclusively terrorist organization. (The case of passively consuming terrorism-oriented information, dealt with in Section C below, is different and constitutes an exception).

Other considerations against criminalization should also be taken into account. As passive-nominal membership in ancillary or dual-purpose organizations can sometimes give rise to weak moral objections (for example, where a doctor joins an organization because this is the most effective way to provide medical care for a deprived population living in the area), potential defendants' innate moral brakes might not signal to them that their behavior might be prohibited. Meeting the moral boundaries shared by the vast majority of the population is an important component of true and fair advanced warning under criminal law.

Prohibitions on passive or civil-active membership in ancillary or dual-purpose organizations also pose the risk of unjustifiable violation of freedom of association, mainly of members who join the organization with the prospect of civil activities in mind. Such membership is, at most, an indirect expression of support of terrorism by way of association. This expression lacks any specific terrorist content (such as concrete advances to commit terrorist attacks), and in many cases the actor lacks intent to promote an attack. Thus, such expression is neither sufficiently dangerous nor sufficiently culpable to justify infringement of an expressive aspect of associational rights.<sup>147</sup>

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147. The rights of members whose membership is a clear act of preparation of terrorist attacks are not violated in the same manner. This is either because there is no right to associate for the purpose of committing deadly attacks or, if there is such a right, because the balance tips in favor of its infringement when concrete steps toward the commission of such attacks are taken. The constitutional doctrine of freedom of speech supports these conclusions. To take the most obvious example, communication of words constituting an agreement to commit a deadly attack is not protected under free speech clauses. For criticism of this legal position, see, e.g., Susanne Baer, *Violence: Dilemmas of*

As the U.K. *Adams* case and, to some extent, the U.S. *Scales* case (both introduced in Part I) rightly demonstrate, violation of freedom of association is not to be taken lightly. Because of its importance, we shall look at the right of association more closely. Freedom of association is a fundamental right, specifically protected under most liberal constitutions<sup>148</sup> and under international conventions.<sup>149</sup> The importance of the liberty to associate is deep-rooted and profound. It has been noted that the human mind is developed by the reciprocal influence of associating human beings with each other.<sup>150</sup> Interpersonal relations form a part of our identity.<sup>151</sup> They are the substrate upon which personality develops; association is a method of self-expression and of giving greater depth and scope to an individual's needs, aspirations, and liberties, as well as allowing the individual to realize her own capabilities.<sup>152</sup> Solidarity with informal groups is a potent measure for allaying anxieties, releasing aggressions, satisfying curiosity, and assuaging mischievous drives,<sup>153</sup> and fraternity may help to restore a sense of self-importance bruised by the anonymity of life amidst great crowds.<sup>154</sup>

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Democracy and Law, in *Freedom of Speech and Incitement against Democracy*, 63, 69–70 (David Kretzmer & Francine Kershman Hazan eds., 2000).

148. To take a few examples, freedom of association is protected in Article 9 of the German constitution, Article 23 of the Swiss constitution, Section 22 of the Spanish constitution, Section 2 of the Canadian Charter of Rights and Freedoms, and Article 12 of the Greek constitution.

149. Article 20 of the Universal Declaration of Human Rights, G.A. Res. 217(A), at 71, U.N. GAOR, 3d Sess., 1 plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948); Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 11(2), Nov. 4, 1950, CETS No. 005. Even in the United States, where freedom of association is not specifically protected by the constitution, the Supreme Court has elevated it to the level of a constitutional right derived from the First Amendment. See *NAACP v. Alabama ex rel. Patterson* 357 U.S. 449 (1958); *Scales*, supra note 33.

150. Alexis de Tocqueville, 2 *Democracy in America* 132 (Francis Bowen trans., 1864) (1840).

151. George Kateb, *The Value of Association*, in *Freedom of Association* 35, 48 (Amy Gutmann ed., 1998): "I am my relationships; and if I as a self have intrinsic value, so do all the relationships that are inextricably interwoven with my identity."

152. Amy Gutmann, *An Introductory Essay*, in *Freedom of Association*, id. 3, 4.

153. Daniel Ohana attributes those advantages to other preparatory acts such as surfing the Internet or casually inquiring after close friend (see Ohana, supra note 137, at 116), but it seems that association can fulfil the same functions.

154. See William O. Douglas, *The Right of Association*, 63 *Colum. L. Rev.* 1361, 1361–62 (1963) and the sources cited therein: Talcott Parsons, *Certain Primary Sources and Patterns of Aggression in the Social Structure of the Western World*, in *Conflicts of Power in Modern Culture: Seventh Symposium* 29, 45 (Lyman Bryson et al. eds., 1947);

Other justifications for freedom of association put the spotlight on the social and structural-democratic functions of associations.<sup>155</sup> Associations allow members to develop their capacity to participate actively in democratic life. The need for organized action is inherent in modern political, economic, and civil realities that leave major challenges in the hands of citizens. Interest groups are necessary for any kind of effective advocacy. Organized action is the only type of action that can effectively oppose immense government power (by itself, an association contributing to general welfare). It can prevent the state from exercising too substantial an influence over the individual and over minorities,<sup>156</sup> and it permits deprived groups “to contest and ameliorate the structure of social power in ways that are not directly political.”<sup>157</sup> Small community associations also work to improve citizens’ quality of life by allowing opportunities for mutual help, small-scale charity, and the like. Free association allows a rich, varied, and culturally pluralistic civil society.<sup>158</sup>

Freedom of association is closely tied with other fundamental freedoms such as the freedom of religion, freedom of thought, and freedom of conscience. Most relevant for our discussion is the corresponding right of freedom of speech and assembly.<sup>159</sup> The similarities between freedom of speech rationales and some (though not all) freedom of association rationales highlight this point.<sup>160</sup> So, too, does the historical fact that prohibitions on association, much like prohibitions on expression, have

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Schlesinger, *The Rise of the City, 1878–1898*, at 288–90 (1938). See also Thomas Emerson, *Freedom of Association and Freedom of Expression*, 74 *Yale L.J.* 1, 4 (1964).

155. Kateb, *supra* note 150, at 37.

156. De Tocqueville, *supra* note 149, at 218.

157. Stuart Woolman, *Freedom of Association*, in *Constitutional Law of South Africa*, ch. 22 at 2 (M. Chaskalson et al. eds., 1996).

158. *Id.*

159. As mentioned above, in the United States associational rights have been derived from the First Amendment.

160. For the rationales for freedom of speech, see, e.g., Eric Barendt, *Freedom of Speech 6–36* (2007). The American analysis of freedom of association emphasizes the close link between association and expression, and some even go as far as claiming that the right of association is a legally empty right. See Emerson, *supra* note 153, at 4 (1964). Possibly, this has to do with the structure of the American constitution that does not contain specific reference to freedom of association (its protection is derived from the First Amendment). It is arguable that this position ignores mainly (but not only) the distinct arguments from personality for protection of associations, as indicated above.

often been used as a tool for political oppression,<sup>161</sup> and the legal fact that some expressions can deem an association illegal<sup>162</sup> or alternatively serve as indications of its illegality.<sup>163</sup> Association may be necessary to truly realize one's freedom of speech.<sup>164</sup> Only associates who are empathetic toward one's ideas would be sufficiently attentive to make the experience of self-expression a fulfilling one. The amalgamation of intellectual resources allows for fuller development of members' positions. Association is also an important phase in the process of transforming private and personal ideas into concepts for discussion in the public sphere.<sup>165</sup>

Hand in hand with its unique importance, freedom of association is also uniquely vulnerable, as the above brief cross-jurisdictional overview demonstrates. Legislators, governments, and prosecution authorities all favor dealing with terrorism by way of broad limitations on association. Reasons are varied,<sup>166</sup> but one is particularly noteworthy: in belonging to several minorities simultaneously (defendants, political-ideological minorities,

161. See above; Cole, *supra* note 30.

162. See, e.g., Israeli Criminal Code 1977 § 145(t), where encouragement or incitement to perform one of a given list of prohibited acts deems the association illegal; Israeli (Emergency) Defence Regulation 1945 § 84(1)(a), which defines an illegal association as an association whose constitution or propaganda encourages, incites, or recommends one of a list of activities or attitudes; Offences Against the State Act 1939 § 18 (Act No. 13/1939) (Ir.), which defines "unlawful organization" as an organization that promotes, encourages, or advocates some specific illegal activities.

163. See, for example, the Canadian Criminal Code § 83.18(4), entitled "Participation in Activity of Terrorist Group": "In determining whether an accused participates in or contributes to any activity of a terrorist group, the court may consider, among other factors, whether the accused (a) uses a name, word, symbol or other representation that identifies, or is associated with, the terrorist group. . . ."

164. Emerson, *supra* note 153, at 22, states: "The purpose of a system of freedom of expression—to allow individuals to realize their potentialities through reason and agreement rather than force and violence—cannot be effectively achieved in modern society unless free rein is given to association designed to enhance the scope and influence of communication."

165. See also Woolman, *supra* note 156, ch. 22 at 1; S. Mohan, *Freedom of Association*, 3(4) *Central India L.Q.* 431, 432 (1990).

166. Kremnitzer, *supra* note 1. See also Meliá, *supra* note 23, at 564–65; *Preempting Justice*, *supra* note 69, at 15. Moreover, prosecution for mere membership is in itself used as a preventative means, a tool for (very) early warning and (very) early intervention designed to "nip the risk of terrorist activity in the bud"; Abrams, *supra* note 38, at 7. Abrams further refers to the "ubiquitous quality" of the American material support offenses, and mentions that they are being used as "catch-all" offenses; *id.*

and many times religious and/or ethnic minorities), members of radical organizations such as ancillary or dual-purpose organizations are typically subject to human rights violations by majorities.<sup>167</sup>

Prohibitions on passive membership in ancillary or dual-purpose organizations would presumably violate the freedom to associate within certain branches of structured organizations that seek to further concrete aims in the public sphere. The level of protection provided to these branches should be particularly strong: in addition to their key role with regard to the individual's personality, they have an added social value, their activity is expressive in nature, and historically, they have been the target of political persecution.<sup>168</sup> Thus, arguably, society should be willing to internalize some risks to protect these branches. It is submitted that where the chances of membership materializing as a terrorist attack are less than high, membership in such organizations should not be criminalized. In other words, if it is impossible to prohibit passive membership in only the terrorist branches, no prohibition should be imposed.

### C. Fine-Tuning the Distinctions

In concluding that criminalization of both passive and active membership can at times be justifiable, the technique of criminalization should be discussed. Significantly, there is no place to formulate one catch-all offense addressing both passive and active membership. The broad brush of catch-all membership offenses, which can include anything from mere nominal membership to active and even leadership participation, violates the principle of guilt and the derivative requirement of fair labelling by bundling together significantly different types of behavior and attributing the same stigma and potential sentencing guidelines to them all.<sup>169</sup>

Furthermore, the term "membership" is an extremely vague one: it is unclear what types of behavior constitute membership (an expression of consent to an offer to join an organization? attending an organization's public or private assembly?). It is also unclear where membership ends and other criminal conduct such as support or participation in the activities of

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167. Mordechai Kremnitzer & Liat Levanon, *Victims' Constitutional Rights under Substantive Criminal Law* (work in progress, on file with the author).

168. See also Woolman, *supra* note 156, ch. 22 at 8.

169. Meliá, *supra* note 23, addresses the problematically wide scope of membership offenses, e.g. on 565.

a terrorist organization begins. Such vagueness does not comply with a commitment to the principle of fair advanced warning.

Being broad and vague, sweeping membership offenses assign significant powers to the prosecution to decide whom to investigate, whom to threaten with prosecution, and whom to prosecute. Here as well, the principle of legality and the requirement of fair advanced warning are compromised; and in addition, there is the risk of the prosecution employing its powers in a prejudicial manner or at the whim of government politics.

Accordingly, distinct and well-defined offenses should be formulated. The aim of the remainder of this section is to identify concrete conduct that reflects sufficiently strong links to terrorist activity to justify its criminalization. Significantly, punishability is determined on the basis of links to terrorist activity, rather than to terrorist organizations. An actor who joins an organization should be punished (if at all) on the basis of proximity to terrorist attacks—proximity that is formed by the act of joining—and an actor who trains in weapons should be punished more severely on the same basis (as well as on the basis of the immediate danger she creates by using weapons). Thus, there is no place for punishing the latter twice—once on the basis of her membership and a second time on the basis of her training in weapons.

The punishability of any such conduct should be determined mainly according to the distinctions that were proposed above—its classification as active or passive, as well as the nature of the organization at issue. However, these distinctions are insufficiently delicate. This section introduces additional necessary distinctions when addressing conduct that cannot be sharply identified as either passive or active, or when the distinction between passive and active conduct is insufficient.

Different forms of conduct linking individuals to terrorist organizations may be ranked. On the lowest level is passive-nominal membership, referring to a mere external expression of willingness to join a group, such as a positive answer given to a recruiter, possibly motivated by factors other than strong identification with the group's purposes, such as fear of the group or weakness of mind, and even a self-initiated act of joining the group, which does not lead to any other associations with it. Such conduct is, at most, a potential act of preparation that is extremely preliminary and does not reflect particularly strong determination (or even serious consideration of the possibility of committing an offense). Although not potential acts of preparation, they might be acts of mere potential spiritual aid to terrorist attacks. At the same time, such conduct may have some

characteristics of political expression. Accordingly, as explained in Sections A and B, such conduct should generally not be criminalized,<sup>170</sup> with the exception (mentioned above) of self-initiated or otherwise self-promoted membership in exclusively terrorist organizations that have demonstrated the determination and capability to commit highly destructive attacks.

A somewhat higher ranking could be one of predominantly passive membership, referring to the consumption of information distributed by the group to its members, and possibly also to participating in group activities, yet predominantly as a recipient (for example, attending lectures, learning groups, or discussions). Such conduct, too, is usually so remote from commission that it is hard to categorize it as either preparation or attempted complicity. There may be a place to make distinctions according to the dangerousness of the conduct, to the fundamentality of the right in which the member is engaged, and to the legitimacy of its expressive aspects. Thus, consuming merely abstract-theoretical information such as general ideology or principles of religion should be distinguished from consuming dangerous concrete knowledge with possible practical implications, such as the locations of potential destinations of terrorist attacks. The first should never be punished (arguably not even where the organization is exclusively terrorist, because of its high independent value), but the second would appear to be appropriate for criminalization as an act of preparation both where the organization is exclusively terrorist and where it is a dual-purpose organization (or an ancillary organization, though such activity would probably be less common in such organizations).

The next level of predominantly active membership follows, with actual contribution to the conduct or arrangement of group activities (for example, training, recruiting, teaching, arranging meetings). As demonstrated in Part I, both the American and the Canadian prohibitions specifically address such conduct; yet, they are, at times, bundled together with more passive conduct. (In Canada, for example, the court may consider, in addition to active conduct, also conduct such as receiving benefits from a terrorist group). Predominantly active membership in exclusively terrorist organizations can be legitimately criminalized. When it comes to active membership in ancillary or dual-purpose organizations, it might be appropriate to differentiate amongst the above-mentioned parameters. Thus, providing lodging,

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170. Such membership by an authoritative figure with a special spiritual stand poses a more difficult question, but it seems that it may be best to leave it to general incitement law.

transportation, or some physical assets—all prohibited under the American material support offenses—is different from teaching passionate ideology (possibly more dangerous, but carrying a clear expressive nature), which is, in turn, different still from training in weapons (clearly the most active and dangerous, and lacking any expressive aspect). Each of these forms of conduct is worthy of a more detailed discussion in another forum. Where the activity is by nature a clearly preparatory one, such as training, criminalization is straightforwardly due. Other activities require more careful consideration.

The highest ranking of membership is where the member takes on a leadership role as a key person in the organization. Whereas it seems inappropriate to punish civil leaders, provided they are indeed merely civil leaders and not only in title, terrorist leaders should be punished severely.

#### **D. Mens Rea**

As demonstrated in Part I, current prohibitions on membership in terrorist organizations require only a weak mens rea, mainly knowledge of the terrorist nature of the organization. Part II suggested that this fact distances membership offenses from the well-established realm of criminality, as determined by doctrines of derivative liability. Part III further noted the relevance of blameworthiness to criminalization of remote harm. Accordingly, it is carefully submitted that prohibitions on membership should usually require intent to participate in the commission of a terrorist attack, even if the details of such an attack do not need to be carefully planned at the time of the act. Where the prohibition is justified by its preparatory nature, intent provides the act with this nature, at least as far as we follow Anglo-American doctrines of attempt and criminal preparation; and in any case, intent is necessary to provide sufficient guilt in light of the weakness of the factual element (remote acts of preparation or acts of potential spiritual aid).

Nevertheless, where the factual element is sufficiently strong—for example, in the case of weapons training, which is, in and of itself, dangerous and poses a considerable future risk—this requirement may be abandoned.

#### **CONCLUSIONS**

The law has not yet managed to find an appropriate equilibrium in its treatment of membership in terrorist organizations. Some laws prohibit membership, opening the door to convictions on the basis of various links

with terrorist organizations, from passive-nominal memberships to leadership roles. Being blatantly over-inclusive, legislative and judicial mechanisms have developed to narrow the scope of these prohibitions: Current English legislation provides a defense whereby the membership started before the organization was proscribed as terrorist and there was no active participation after the proscription; previously, the Northern Ireland Court of Appeal required that the member actively associate herself with the organization; the United States Supreme Court confined the scope of a membership offense to active membership accompanied by intent to commit attacks; whereas the Israeli Supreme Court clarified that not every tenuous connection with a terrorist organization can constitute membership. Similarly, the German interpretation of the prohibition on membership requires that, after joining, the activity toward the terrorist objective must continue to progress.

Other laws are less inclusive. They provide a list of active conduct that forms a link with the organization sufficient to justify criminalization. But where the law is of such a nature, the legal system usually creates mechanisms broadening the scope of the offense. The Canadian prohibition on participation in the activity of terrorist groups allows the court to consider the defendant's use of words, symbols, or other objects representing the group, as well as his association with persons who constitute the group. And the current American material support offenses have been widely used by the prosecution as catch-all offenses, and have been interpreted by some lower courts as including even "supplying" oneself as a member of the organization. In both cases legal literature has advanced the claim that, in effect, the offenses are actually almost identical to the over-inclusive membership clauses.

This article suggests that these legal developments demonstrate unease regarding the definitions of membership offenses. Legal systems, it is submitted, have been struggling without much success to sketch out prohibitions that would cover only cases justifying criminalization. The inability to find an appropriate legal equilibrium in the form of a well-balanced definition reflects the acknowledgment that sometimes even weak membership is dangerous and culpable, and should therefore be prohibited; yet, in many other cases its criminalization would be unjustified and may even encroach upon fundamental liberties. The article suggests tackling these difficulties by taking three main routes: first, by narrowing the definition of terrorist organizations passive membership of which is prohibited to include only exclusively terrorist organizations, second, by making various distinctions amongst active forms of participation in the activities of these and other

(ancillary and dual-purpose) organizations to include only the wrongful and culpable ones and to differentiate amongst varying levels of wrongful and culpable participation, and third, by setting stricter mens rea requirements in appropriate cases.

It may be appropriate to end with an abstraction. The analysis that has been introduced here demonstrates that delineating justifiable prohibitions on membership of terrorist organizations can be achieved in two ways. One possibility is drawing membership offenses closer to well-established criminal law doctrines such as attempt and complicity, primarily through requiring a strong mens rea such as specific intent that a terrorist attack be committed (in appropriate cases), and also by requiring that some substantial step be taken in preparation of the attack.

Another possibility, which may be combined with the former, is drawing membership offenses closer to well-established constitutional doctrines—for example, through requiring at least a realistic prospect that the membership would materialize as involvement in a terrorist attack, and where freedom of speech considerations apply in full force—by applying the stricter freedom of speech tests—for example, those requiring a reasonable possibility or even a high probability that the membership would thus materialize (it is possible to opt for a test that includes an element of immediacy).<sup>171</sup> Preferably, these constitutional standards would be applied by the legislature in drafting precisely worded prohibitions rather than by the courts. The evaluation of the dangerousness of terrorist groups, as set forth above, is an example for the application of these constitutional standards.

Observing prohibitions on membership in terrorist organizations thus exposes the rich web of interrelationships amongst general doctrines of criminal law, general principles of criminalization (which may or may not be constitutionally protected), and general doctrines of constitutional law. Criminal law doctrines manifest a constitutional balance between rights of victims, rights of defendants, and state power. Criminalization that goes beyond well-established doctrines of criminal law should therefore be scrutinized carefully as there is a significant risk of its violating constitutional balances and infringing upon (possibly constitutional) principles of freedom.

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171. For critical discussion of constitutional tests for protection of freedom of speech, see Morderchai Kremnitzer & Liat Levanon, Freedom of Speech in the Judgments of Chief Justice Aharon Barak, in *The Judicial Legacy of Aharon Barak 170–80* (Celia W. Fassberg et al. eds., 2009) (in Hebrew).