

'Terrorism' in international law

Terrorism is a phenomenon to which an inordinate amount of international attention and resources have been dedicated, particularly in the post-9/11 era. The events of 11 September 2001 themselves were ubiquitously and uncontroversially characterised, and internationally condemned, as acts of 'international terrorism'. Their wake brought unprecedented unity of purpose on the international level as to the need to prevent, punish and otherwise combat international terrorism. Various subsequent attacks strengthened that resolve.¹ Legally binding measures directed against terrorism ensued, with broad-reaching political and legal effect, including Security Council resolutions that imposed a wide range of obligations on states to prevent and suppress terrorism and ensure that 'terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts'.² Around the globe, laws have been rewritten, policies changed, 'exceptional' measures imposed, and an enormous (and some say excessive³) international counter-terrorist effort brought to bear on the suppression and prevention of international terrorism.

One could be forgiven for assuming that international terrorism is a readily accessible legal concept. But is the universal condemnation of terrorism matched by a universal understanding of what we mean by the term? Are the obligations to suppress and punish terrorism matched by an internationally accepted definition of what precisely it is that is to be

¹ Notorious attacks attributed to international terrorism have occurred around the globe since 9/11, including in Madrid, London, Bali, Mumbai, Moscow, Libya, Iraq, Syria, the US and far beyond.

² SC Res. 1373 (2001), 28 September 2001, UN Doc. S/RES/1373 (2001). This resolution also established a Counter-Terrorism Committee (CTC) to monitor the implementation of the resolution. SC Res. 1377 (2001), 28 November 2001, UN Doc. S/RES/1377 (2001), sets out the tasks for the CTC. Other resolutions imposing wide-reaching obligations include SC Res. 2178, 24 September 2014, UN Doc. S/RES/2178 (2014).

³ M. Koskenniemi, 'What is International Law For?', in M. Evans (ed.), *International Law* (Oxford, 2010), 3rd edn.

penalised? In 2001, when questioned on the definition of terrorism, then UK Permanent Representative to the UN, Sir Jeremy Greenstock, suggested that 'What looks, smells, and kills like terrorism is terrorism'.⁴ If so, to paraphrase the famous dictum of a US judge that drives in the same direction, do we simply know terrorism when we see it,⁵ and is that a sufficient legal basis to give rise to obligations of states and criminal responsibility of individuals?

The search for an accepted definition of terrorism in international law has been described as 'resembl[ing] the Quest for the Holy Grail'.⁶ By the time of 9/11, scholars and practitioners had already put forward at least 109 possible definitions, and several more have been ventured since.⁷ In the wake of 9/11, there appeared to be renewed impetus to settle on an internationally agreed definition. Yet, as discussed below, diplomatic attempts to draft a global terrorism convention continued to fail, as consensus around a single definition of international terrorism proved elusive. Alongside the stagnant treaty process is an increasingly tumultuous debate as to whether customary law already provides for a definition of terrorism.⁸

While the status of terrorism *per se* in international law may remain subject to debate, what is clear is that legal developments relating to terrorism have not been paralysed by the impasse in achieving a global definition. Specific conventions addressing particular types of terrorism, developments by regional organisations for their regional purposes, and advances in other areas of international law have provided legal tools to address conduct that we commonly refer to as acts of terrorism.

This chapter will sketch out international and regional developments towards the adoption of a general definition of terrorism as part of a

⁴ Sir Jeremy Greenstock, the UK Permanent Representative to the UN, when questioned in October 2001 about the lack of a definition of terrorism, stated: 'There is common ground amongst all of us on what constitutes terrorism. What looks, smells, and kills like terrorism is terrorism.' UN Doc. A/56/PV.12, 1 October 2001, p. 18.

⁵ *Jocabilis v. Ohio* US 378: 184, 197, Justice Stewart 'I know terrorism when I see it', as cited in A. C. Arend and R. J. Beck, *International Law and the Use of Force: Beyond the UN Charter Paradigm* (New York, 1993), p. 140.

⁶ G. Levitt, 'Is "Terrorism" Worth Defining?', 13 (1986) *Ohio Northern University Law Review* 97.

⁷ The UN Special Rapporteur on Terrorism and Human Rights at the time of the 9/11 attacks noted that 109 definitions had been put forward since 1936. UN Doc. E/CN.4/Sub.2/2001/31, 27 June 2001, p. 8.

⁸ See section 2.2.3. This was suggested, e.g., by the Special Tribunal for Lebanon (STL), Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (hereinafter, STL, Interlocutory Decision), STL-11-01-I, 16 February 2011.

comprehensive convention, as well as the proliferation of specific terrorism conventions. Exploring the various definitions put forward in international practice, it will ask to what extent it can be said that there is an internationally accepted definition of terrorism under customary international law. If there is no such generic international definition, it will ask whether this leaves a gap in the international legal order as regards the phenomenon commonly referred to as terrorism. In this respect, this chapter assesses the extent to which the prohibition of terrorism and obligations in respect of it are addressed by other international legal norms. It concludes by enquiring as to the consequences of the use of the 'terrorism' label absent a definition provided in law. Related questions, such as the implications of the definitional gap for international cooperation to combat terrorism or for human rights protection, will be explored in more detail in Chapters 4 and 7, which focus on the legal framework governing states' responses to terrorism.

'Terrorist' is a label used loosely, selectively and invariably pejoratively. Since long before 9/11, but increasingly since then, 'terrorism' has been invoked to justify the application of 'exceptional' laws, legal regimes or practices, often with serious consequences. In this murky area, where the defining elements of terrorism are often confused with value judgements about those accused of it, the principal goal of this chapter is to unravel the terminology and identify the extent to which there are objectively applicable legal standards.

2.1 Developments towards a comprehensive definition of international terrorism

2.1.1 Pre-9/11: historical developments

As early as the 1930s, serious efforts were underway to achieve consensus on a general definition of terrorism. The Convention for the Prevention and Punishment of Terrorism (1937) defines terrorism as '[a]ll criminal acts directed against a State and intended or calculated to create [a] state of terror in the minds of particular persons or a group of persons or the general public'.⁹ The difficulties in achieving consensus around this definition were such that the 1937 Convention never came into force and the search for an international consensus was temporarily abandoned.

⁹ Article 2(1) Convention for the Prevention and Punishment of Terrorism (Geneva, 1937, never entered into force), League of Nations Doc. C.546M.383 1937.

In the early 1970s, the UN stepped into the fray and in 1972 an *ad hoc* committee of the General Assembly was mandated to consider a Draft Comprehensive Convention, and to produce a definition.¹⁰ The Committee ultimately produced a report that falls short of that objective, but rather serves to underline the problems associated with the definitional quandary. Specifically, fuelled by the recent experience of wars of national liberation fought against former colonial powers, the report reveals persistent division regarding the inclusion or exclusion of 'national liberation movements' (NLMs) within the definition.¹¹ Attempts to derive a generic definition thus again fell by the wayside (in preference for the framework of conventions identifying specific forms of terrorism, on which international consensus *could* be achieved, as discussed below).¹²

By the 1990s, shifting global politics – the end of the Cold War and of Apartheid, the achievement of independence from colonialism for several African countries and apparent progress towards peace in the Middle East – gave those in favour of a global convention fresh hope that consensus on a generic definition of terrorism might finally be achievable.¹³ In 1994, there was something of a breakthrough in the form of the 'Declaration on Measures to Eliminate International Terrorism' which, although non-binding, was endorsed by the UN General Assembly.¹⁴ It defined terrorism as 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'. Notably, it condemned terrorism as 'in any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature'.¹⁵ Thus,

¹⁰ During the 1960s, conventions were adopted addressing specific facets of terrorism, as discussed in section 2.1.3, but the killing of twenty-eight persons by a Japanese suicide squad at Lod airport, and of seventeen Israeli athletes at the Munich Olympic Games in the 1970s, have been described as the impetus for this renewed initiative. See J. Dugard, 'The Problem of the Definition of Terrorism in International Law' (hereinafter, 'Definition of Terrorism') conference paper, Sussex University, 21 March 2003, p. 4.

¹¹ A. Obote-Odora, 'Defining International Terrorism', 6.1 (1999) *E Law – Murdoch University Electronic Journal of Law*.

¹² See section 2.1.3.

¹³ Dugard, 'Definition of Terrorism', *supra* note 10, p. 6.

¹⁴ GA Res. 50/53, 11 December 1995, UN Doc. A/RES/50/53 (1995) and GA Res. 51/210, 17 December 1996, UN Doc. A/RES/51/210 (1996).

¹⁵ This definition was reiterated in subsequent General Assembly resolutions. See, e.g., GA Res. 51/210 (1997); GA Res. 52/165, 15 December 1997, UN Doc. A/RES/52/165 (1997); GA Res. 53/108, 8 December 1998, UN Doc. A/RES/53/108 (1998); GA Res. 54/110, 9 December 1999, UN Doc. A/RES/54/110 (1999); GA Res. 55/158, 12 December 2000, UN Doc. A/RES/55/158 (2000).

there was an attempt to divorce the condemnation of terrorism from the value judgements about the causes or reasons that may underpin it.

Building on this development, GA Res. 51/210 established an *ad hoc* Committee in 1996, *inter alia* to streamline efforts to arrive at a Draft Comprehensive Convention. The first draft of the Comprehensive Convention was presented by India in the Working Group in 1996.¹⁶ In the debate that followed in the *ad hoc* Committee the extent of controversy surrounding a generally accepted definition of terrorism was quickly apparent. Nonetheless, an indirect development came in the form of a partial definition agreed for the purposes of the International Convention for the Suppression of the Financing of Terrorism (1999).¹⁷ Despite this, controversy around the generic definition within the context of the global convention continued. The Committee's work was on-going when terrorism shot to the top of the international agenda on 11 September 2001, and its quest continues to the present day.

2.1.2 Post-9/11 developments: a global convention to meet a global concern?

Following 9/11, international statements demonstrated unparalleled unity in the condemnation of international terrorism. The Security Council, for its part, without defining terrorism, called on states to adopt wide-ranging measures on the domestic level, including the criminalisation of terrorist acts and their financing. It also urged states to ratify existing conventions and adopt pending conventions, in an apparent reference to the Draft Comprehensive Convention.¹⁸

¹⁶ UN Doc. A/C.6/51/6, 11 November 1996. In 2000, India presented an amended version: see UN Doc. A/C.6/55/1, 28 August 2000, also reproduced in 42 (2002) *Indian Journal of International Law* 219.

¹⁷ Article 2(1)(b) International Convention for the Suppression of the Financing of Terrorism (1999) includes a definition for the specific purposes of that Convention which provides: 'any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'. It does not define the conduct as such, however, but refers to conduct covered by conventions addressing particular forms of terrorism, see section 2.1.3.

¹⁸ In SC Res. 1373 (2001) at para. 3, *supra* note 2, the Security Council called upon all states to '(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001)'. See also SC Res. 1269 (1999), 15 October 1999, UN Doc. S/RES/1267 (1999). See the Security Council's approach to terrorism and growing clarity in SC Res. 1566.

wars of national liberation.³⁰ The proposed exclusion in Article 18 notes that 'the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention'.³¹ This encounters stringent resistance from delegations intent to ensure that those NLMs fighting against such state forces are likewise excluded. One counter-proposal therefore seeks to exclude both 'parties to a conflict', and to ensure that those fighting 'foreign domination' are considered within the purview of any such exclusion.³²

The Article 18 proposal excluding conduct already covered by IHL is supported by those, including the ICRC, concerned that conduct permissible under IHL should not be covered by 'terrorism', potentially jeopardising the applicable framework of IHL.³³ It is argued that conduct that violates IHL is adequately governed by the IHL framework, and that conduct that may be permissible under IHL should not be labelled 'international terrorism'. Doing so may preclude the application of amnesties at the end of the conflict (which IHL contemplates for offences not amounting to violations of IHL and which is said to provide an important incentive to compliance with IHL).³⁴ Unfortunately, existing international conventions take divergent and at times unclear approaches to application in armed conflict, causing potential confusion

³⁰ Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism, UN Doc. A/C.6/56/L.9, Annex I.B.

³¹ *Ibid.*

³² An alternative draft by the Organisation of the Islamic Conference excludes '[t]he activities of the parties during an armed conflict, including in situations of foreign occupation'. United Nations General Assembly, Report of the Ad Hoc Committee established by GA Res. 51/210 of 17 December 1996, Sixth session (28 January–1 February 2002), Annex IV, art. 18, ref. (Emphasis added.) See Dugard, 'Definition of Terrorism', *supra* note 10, p. 9. See also M. Hmoud, 'Negotiating the Draft Comprehensive Convention on International Terrorism', *supra* note 21. However, in order to provide further clarity, a new para. 5, framed as a 'without prejudice clause', was added during the 2007 session of the Ad Hoc Committee.

³³ See, e.g., ICRC, 31st International Conference of the Red Cross and Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 28 November 2011, pp. 48–53, ICRC Doc. 31IC/11/5.1.2, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf.

³⁴ See C. Martin, 'Terrorism', in L. van den Herik and N. Schrijver (eds.), *Counter-Terrorism Strategies in a Fragmented Legal Order: Meeting the Challenges* (Cambridge, 2013). Such amnesties are distinct from amnesties for serious violations of human rights, which are impermissible under international law, as discussed in Chapter 7.

as to the interplay of these regimes.³⁵ It remains to be seen, if a comprehensive convention comes to pass, what approach it will adopt on these issues and to what overall effect on the coherence of the broader international legal framework.

In conclusion, if any shift in negotiations could be discerned post-9/11, beyond a strengthened condemnation of acts such as those executed that day, it was in the expressions of support, in principle, for a global Convention. Commentators have long disagreed on the desirability of a comprehensive Convention as much as on its content,³⁶ yet reports of UN negotiations post-9/11 recorded that states 'reiterated the urgency of adopting a comprehensive convention on international terrorism'.³⁷ At least immediately following 9/11, then, the quest for a global terrorism Convention appeared to become accepted as a political reality. In this context, it is perhaps remarkable that the feasibility of achieving such a Convention, its precise content or scope, and of course the support that it might eventually muster, remain shrouded in uncertainty to the present day.

While some continue to seek to propel the process forward, with the passage of the years there may be a loss of momentum and confidence in the inevitability, or indeed the value, of a global Convention.³⁸ Some commentators have reverted to suggesting that 'a less ambitious approach' should be pursued which concentrates on further elaborating functional legal definitions of terrorism for specific purposes; this certainly reflects the reality that the greatest normative activity before and after 9/11 can be found in conventions related to specific forms of terrorist-related activity, addressed below.³⁹

On the other hand, the experience post-9/11 explored in this book testifies to the importance of a clear and precise definition of terrorism

³⁵ Martin, 'Terrorism', *supra* note 34, noting that four specific conventions appear to cover armed conflict. See also section 2.1.4.

³⁶ See, e.g., Dugard, 'Definition of Terrorism', *supra* note 10, pp. 12–14, and J. Murphy, 'International Law and the War on Terrorism: The Road Ahead', 32 (2002) *Israel Yearbook on Human Rights* 117.

³⁷ UN Doc. A/C.6/56/L.6, *supra* note 19, Annex IV at para. 4, 'Informal summary of the general discussion in the working group, prepared by the Chairman'.

³⁸ K. Prost, 'The Need for a Multilateral Cooperative Framework for Mutual Legal Assistance', in L. van den Herik and N. Schrijver, *Counter-Terrorism Strategies in a Fragmented Legal Order: Meeting the Challenges* (Cambridge, 2013), arguing that even from the point of view of facilitating international cooperation, a global convention is unnecessary.

³⁹ See Di Filippo, *supra* note 27, pp. 533–70.

and the abuse that results in practice from its absence.⁴⁰ The vastly divergent definitions of terrorism in national law and their application in the years following 9/11 may thus lend weight to the arguments in favour of pursuing a global definition. Whether this can ever be achieved, and the fate of the global Convention, remain to be seen.⁴¹

2.1.2.1 Other UN developments: providing a 'description' or 'framework' but not a 'definition' of terrorism

In 2004, two developments at the UN level contributed to the debate around definitions. Most significantly, following the notorious Beslan school siege in the Russian Federation, the Security Council for the first time passed a resolution, SC Res. 1566, that does provide a definition of sorts:

3. Recall[ing] that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and calls upon all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.⁴²

SC Res. 1566 is broad-reaching in its scope: the material element, or *actus reus* comprises any criminal acts, while the victim group is exemplified rather than defined as 'including' but not being limited to civilians. It could therefore be criticised for lack of clarity, but this may

⁴⁰ On the definitional issues see, e.g., Chapter 4 and 7 and Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism, E/CN.4/2006/98 at paras. 26–50, 72, and B. Saul, 'Defining "Terrorism" to Protect Human Rights', in D. Staines (ed.), *Interrogating the War on Terror: Interdisciplinary Perspective* (Newcastle, 2007), pp. 190–210.

⁴¹ Providing a definition many years after states have changed their laws to comport with SC Res. 1373 may be too late to avoid inconsistent legislation unless, by contrast to that in SC Res. 1566, it obliged states to bring their law and practice into line.

⁴² SC Res. 1566, S/RES/1566 (2004) at para. 3, available at: www.un.org/Docs/sc/unsc_resolutions04.html. For background and debate, see 'Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of the Most Serious Threats to Peace', available at: www.un.org/News/Press/docs/2004/sc8214.doc.htm.

overlook the purpose of SC Res. 1566, which does not purport to provide a binding definition but to provide a framework to assist states to provide for appropriate definitions in domestic law. In principle states should provide greater clarity and specificity themselves in domestic law, though in practice the tendency to do just the opposite lends support to the need for a clearer international framework.

The UN-sponsored High-Level Independent Panel, reporting at the end of 2004,⁴³ advanced a 'description of terrorism'.⁴⁴ It described terrorism as not covering state violence (which was adequately covered by other norms of international law) and stated that no justification existed for terrorism by non-state actors.⁴⁵ It thus sought to contribute to drawing a line under the on-going state versus liberation movement debate and move the Comprehensive Convention negotiations forward.⁴⁶ This description, like the Security Council framework, is clearly not binding but intended to provide guidance to states seeking to implement their obligations in good faith. As noted, it has done surprisingly little to dampen controversy at the negotiating table of the global Convention.

2.1.3 Specific international conventions

As attempts to arrive at a comprehensive terrorism convention foundered at various stages, the search for a generic definition was replaced by the elaboration of a framework of conventions that identify specific forms of terrorism. Currently, there are sixteen primary universal

⁴³ UN High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', UN Doc. No. A/59/565 (2 December 2004). This document was drafted by a panel of independent experts created by former Secretary-General Kofi Annan in order to provide a shared, comprehensive view about the way forward on critical issues regarding UN reform and collective security.

⁴⁴ '[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.' UN High-Level Panel on Threats, Challenges and Change, *supra* note 43 at para. 164.

⁴⁵ *Ibid.* at para. 160, identifying these two issues as the stumbling blocks for an agreed definition.

⁴⁶ Kofi Annan urged that the Comprehensive Convention integrate this description of terrorism. See Report of the Secretary-General 'In Larger Freedom: Towards Development, Security and Human Rights for All' at para. 91, delivered to the Security Council and the General Assembly, UN Doc. A/29/2005 (21 March 2005).

instruments pertaining to the subject of international terrorism.⁴⁷ A notable area of steady progress since 2001, when the Security Council called on states to 'work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism',⁴⁸ has been in the increased number of ratifications of these specific or sectoral conventions, as well as an increased emphasis placed on implementation.⁴⁹ These conventions do not generally attempt to define terrorism, with the notable exception of the International Convention for the Suppression of the Financing of Terrorism (1999)

⁴⁷ Report of the Secretary-General on Measures to Eliminate International Terrorism, UN Doc. A/64/161 (2009), available at: www.un.org/en/ga/sixth/64/Terrorism_Table_64th.pdf. The report refers to thirty instruments, including fourteen regional ones. The universal instruments are: Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, 1248 UNTS 451, in force 4 December 1969; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, 860 UNTS 105, in force 14 October 1971; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, 23 September 1971, 974 UNTS 177, in force 26 January 1973; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Montreal, 24 February 1988, (1988) 27 ILM 627, 1589 UNTS 474, in force 6 August 1989; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973, 1035 UNTS 167, in force 20 February 1977; International Convention against the Taking of Hostages, New York, 18 December 1979, 1316 UNTS 205, in force 3 June 1983; Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980, 1456 UNTS 24631, in force 8 February 1987; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988, 1678 UNTS 221, in force 1 March 1992; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 10 March 1988, 1678 UNTS 303, in force 1 March 1992; 2005 Protocol to the 1988 Protocol, *idem.*, Convention on the Making of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991, UN Doc. S/22393, in force 21 June 1998; International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, UN Doc. A/52/653, in force 23 May 2001; International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, UN Doc. A/Res/54/109, in force 10 April 2002 (hereinafter, 'Financing Convention'); International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UN Doc. A/Res/59/290, in force 7 July 2007; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, Beijing, 10 September 2010, DCAS Doc. No. 21 (not yet in force); and the Supplementary Protocol to the Convention for the Suppression of Unlawful Seizure of Aircraft, both signed in Beijing 2010, not yet in force as of early 2013.

⁴⁸ SC Res. 1373 (2001), *supra* note 2.

⁴⁹ Prost, 'The Need for a Multilateral Cooperative Framework', *supra* note 38.

(hereinafter, Financing Convention), which addresses only one aspect of terrorism but contains a generic definition of sorts by describing terrorism as:

any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.⁵⁰

More commonly, the specific conventions do not provide a general definition, but rather address specific types of conduct and set forth a framework of obligations on states parties, including measures to prevent criminal activity and cooperate in its prosecution. They often oblige states to either extradite or submit for prosecution persons suspected of the offences covered, subject to limited exceptions,⁵¹ and to cooperate in, for example, intelligence and evidence-gathering. Unlike certain other international treaties, they do not themselves purport to criminalise conduct, but to impose obligations on states to do so in domestic law.⁵²

This alternative 'piecemeal' approach to terrorism was consolidated during the 1970s, with conventions addressing offences on board aircraft or at airports,⁵³ crimes against internationally protected persons,⁵⁴

⁵⁰ In Article 2(1)(b) Financing Convention, *supra* note 47, the terrorist conduct in question is not specified other than by reference to specific terrorist conventions addressing particular forms of terrorism – see section 2.1.3. Article 2 also provides a definition of 'financing' which is also contentious: see, e.g., A. Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Control', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (Oxford, 2004), p. 415.

⁵¹ See exception in certain conventions, e.g., the 1997 Terrorist Bombing Convention, where there are substantial grounds for believing that extradition would lead to serious human rights violations or is motivated by discrimination. The traditional exception for 'political offences' has been removed in certain treaties, e.g., the Terrorist Bombings or Financing Conventions. See Chapter 4.

⁵² By contrast, see, e.g., Convention against Torture, Convention against Genocide or the Geneva Conventions and Protocols thereto; for a discussion of 'terrorism' as a crime under international law, see Chapter 4A.1.1.4 and, for terrorism in armed conflicts, section 2.1.

⁵³ The Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, *supra* note 47; Convention for the Suppression of Unlawful Seizure of Aircraft 1970, *supra* note 47; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and its Supplementary Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation 1988, *supra* note 47.

⁵⁴ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973, *supra* note 47.

hostage-taking⁵⁵ and acts aboard ships and at sea.⁵⁶ It continued to develop in the post-Cold War period, alongside the frustrated quest by the 1996 *ad hoc* Committee to find a global definition. During the 1990s, this resulted in two noteworthy conventions relating to 'terrorist bombings'⁵⁷ and the financing of terrorism.⁵⁸ The International Convention for the Suppression of Terrorist Bombings (1997) provides as comprehensive a terrorism convention as has been approved to date, covering the use of 'explosive or other lethal devices' in a public or state facility with intent to cause death or destruction, in particular where there is intent to cause terror in the public or particular individuals.⁵⁹ The Financing Convention (1999) prohibits provision of financial support for any of the acts covered by other *ad hoc* terrorist conventions. Notably, both of these conventions apply irrespective of the political, ideological, racial, or religious reasons that may underpin the acts.⁶⁰

A further convention addressing 'nuclear terrorism' was adopted and entered into force on 7 July 2007.⁶¹ A person who unlawfully and intentionally possesses radioactive material or makes or possesses any nuclear or radioactive explosive or dispersal device (or attempts to do so) with the intent to cause (1) death or serious bodily injury, or (2) substantial damage to property or the environment, commits an offence under the Convention.⁶² The Convention requires states parties to establish these offences as criminal acts under national law and to make them punishable by appropriate penalties that take into account their grave nature.⁶³

⁵⁵ International Convention against the Taking of Hostages 1979, *supra* note 47; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988, *supra* note 47.

⁵⁶ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, *supra* note 47.

⁵⁷ International Convention for the Suppression of Terrorist Bombings 1997, *supra* note 47.

⁵⁸ Financing Convention, *supra* note 47.

⁵⁹ Article 2 International Convention for the Suppression of Terrorist Bombings 1997, *supra* note 47.

⁶⁰ *Ibid.*, Article 6. Note the far-reaching provisions on cooperation, such as the exclusion of political offences, in these conventions.

⁶¹ International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005, UN Doc. A/RES/59/290, in force 7 July 2007 (hereinafter, 'Nuclear Terrorism Convention').

⁶² Article 2 Nuclear Terrorism Convention, *supra* note 61. ⁶³ *Ibid.*, Article 5.

2.1.4 Terrorism in armed conflict

International law also provides a definition of terrorism for the specific context of armed conflict. 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population', are prohibited in international armed conflict (IAC) and NIAC under treaty⁶⁴ and customary IHL.⁶⁵ Serious violations of this and other IHL prohibitions may also amount to a war crime for which individuals may be held to account, as affirmed, for example, by the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993)⁶⁶ or the Special Court for Sierra Leone (SCSL, 2002).⁶⁷ As such, terror inflicted on the civilian population in armed conflict is a special case, providing an exception to the rule that 'terrorism' as such is not defined in, and does not constitute a crime under, international treaty law.⁶⁸

As acts of terror in armed conflict are covered by IHL, by this specific provision or others addressing, for example, attacks against civilians, some of the 'Terrorism Conventions' purport not to apply in times of armed conflict. However, as noted above, the approach is irregular, and the issue remains controversial in the context of the Draft Comprehensive Convention. It currently excludes from the scope of application only the actions of 'armed forces' of the state during conflict, leaving non-state parties whose acts may respect IHL vulnerable to prosecution for

⁶⁴ Article 51 AP I and Article 13 AP II. See also Article 33(1) GC IV, which provides that 'terrorism is prohibited' without defining the phenomenon.

⁶⁵ J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: Rules (Geneva and Cambridge, 2005), pp. 8–10. See also the STL, Interlocutory Decision, *supra* note 8 and *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003; *Prosecutor v. Galić*, Case No. IT-98-29A, Appeal Decision, 30 November 2006.

⁶⁶ The ICTY adjudicated the first case concerning the offence of inflicting terror on the civilian population during armed conflict, which it found amounted to a crime under treaty law: *Galić*, Trial and Appeal Judgments, *supra* note 65. See also *Prosecutor v. Milošević*, Case No. IT-98-29/1, Trial Judgment, 12 December 2007, and Appeals Decision, 12 November 2009.

⁶⁷ E.g., the SCSL's first judgment including the crime of terrorism, *Prosecutor v. Brima, Alex Tamba et al.*, Case No. SCSL-04-16-T, Judgment (Trial Chamber), 20 June 2007; and *Prosecutor v. Charles Taylor*, Trial Judgment, Case No. SCSL-03-01-T, 18 May 2012. See K. Keith, 'Deconstructing Terrorism as a War Crime: The Charles Taylor Case', 11 (2013) JICJ 813. See also the STL, Interlocutory Decision, *supra* note 8.

⁶⁸ For the customary status of terrorism generally, see section 2.2. On the customary status of the terror crime under IHL, see Henckaerts and Doswald-Beck, *Customary International Humanitarian Law*, *supra* note 65.

terrorism.⁶⁹ By contrast, the Financing Convention includes within its scope terrorism in the context of armed conflict, and provides a specific definition for this purpose.⁷⁰ Unfortunately, it does not reflect precisely the definition of terrorism in IHL, causing further potential confusion as to the interplay of norms.⁷¹

2.1.5 Regional conventions

Regional organisations have, to varying degrees, assumed responsibility for addressing terrorism, giving rise to at least nine regional conventions.⁷² At the regional – as at the international – level, two broad

⁶⁹ E.g., Article 12 International Convention against the Taking of Hostages 1979 excludes hostage-taking in armed conflicts; Article 19 and Preamble International Convention for the Suppression of Terrorist Bombings 1997 excludes only 'activities of armed forces during an armed conflict', as does the current draft of the UN Draft Comprehensive Convention at Article 18. Some treaties also exclude from their scope of application military vehicles and aircraft (e.g., see Article 1(4) Convention on Offences and Certain Other Acts Committed on Board Aircraft 1963, Article 3(2) Convention for the Suppression of Unlawful Seizure of Aircraft 1970, Article 4(1) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971 and Article 2 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988). By contrast, while the OAU Convention on the Prevention and Combating of Terrorism 1999, provides at Article 22 that 'nothing in this Convention shall be interpreted as derogating from ... the principles of international humanitarian law', the specific exclusion at Article 3 appears to relate only to 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle'.

⁷⁰ Article 2(1) refers to '[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act'.

⁷¹ The definition differs slightly from the war crimes definition above, e.g., by omitting the critical 'primary purpose' to spread terror. See *Galić* judgment, *supra* note 66.

⁷² Arab Convention on the Suppression of Terrorism (hereinafter, 'Arab Convention'), Cairo, 22 April 1998, in force 7 May 1999; Convention of the Organization of the Islamic Conference on Combating International Terrorism, Ouagadougou, 1 July 1999, in force 7 November 2002; European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, ETS No. 90, in force 4 August 1978; OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Washington, DC, 2 February 1971, OAS Treaty Series No. 37, (1971) 10 ILM 255, in force 16 October 1973; OAU Convention on the Prevention and Combating of Terrorism, Algiers, 14 July 1999, in force 6 December 2002; SAARC Regional Convention on Suppression of Terrorism, Kathmandu, 4 November 1987, in force 22 August 1988; Convention on Combating

approaches emerge. On the one hand, the European Union and the League of Arab States have produced generic definitions of terrorism for their regional purposes. By contrast, others, such as the Council of Europe (CoE) or Organization of American States (OAS), do not define terrorism but refer to the existing conventions that address specific forms of terrorism.

2.1.5.1 Generic definition

Generic definitions of terrorism promulgated by regional organisations generally apply only to the Member States of those organisations. To the extent that they reveal common or different understandings of the nature of international terrorism, however, they are relevant to a discussion of the definition of terrorism in customary law, as discussed below.

The Arab Convention on the Suppression of Terrorism was adopted by the League of Arab States in 1998.⁷³ Article 1(2) of the Convention defines terrorism as:

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

This definition of terrorism has been criticised for its breadth, vagueness and consequent susceptibility to abuse.⁷⁴ In particular, the unqualified reference to 'violence' or the 'threat' of violence – irrespective of whether

Terrorism, Separatism and Extremism, Shanghai, 15 June 2001, in force 29 March 2003; Treaty on Cooperation among States Members of the Commonwealth of Independent States in Combating Terrorism, Minsk, 4 June 1999, in force dates vary; Inter-American Convention against Terrorism, Bridgetown, 3 June 2002, OAS Res. 1840 (XII-0/02), in force 10 July 2003; Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, in force 1 June 2007; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005, in force 1 May 2008.

⁷³ Arab Convention on the Suppression of Terrorism, *supra* note 72 (unofficial translation from Arabic by the UN translation service available at: www.ciaonet.org/cbr/cbr00/vidco/cbr_ctd/cbr_ctd_27.html).

⁷⁴ See Amnesty International's concerns with the scope of such 'threats' as potentially including legitimate political opponents: 'The Arab Convention for the Suppression of Terrorism: a serious threat to human rights', AI Index: IOR 51/001/2002, 9 January 2002.

it achieves any actual result, or of the gravity of the violence caused or threatened⁷⁵ – allows for a potentially very broad range of conduct to be brought under the rubric of this Convention.

Only eight days after 9/11, the Commission of the European Union presented a proposal to the European Council for a Framework Decision on Combating Terrorism, intended to arrive at a common European definition of terrorism.⁷⁶ The Framework Decision, adopted by the Council on 13 June 2002, states that:

terrorist offences include the following list of intentional acts which, given their nature or their context, may seriously damage a country or international organisation where committed with the aim of:

- (i) seriously intimidating a population, or
- (ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.⁷⁷

Article 1 then goes on to outline the offences to which terrorism relates, including attacks on persons, damage to property, seizure of means of transport, 'endangering' people or the environment, weapons offences and threatening to commit any of those acts,⁷⁸ while Articles 3 and 4 bring within its scope 'offences relating to a terrorist group' and 'offences linked to terrorist offences'.⁷⁹ This Council statement was adopted as a 'common position',⁸⁰ requiring Member States to take the legislative

⁷⁵ E.g., the Financing Convention, *supra* note 47, and the Draft Comprehensive Convention both refer to a requisite level of violence to be achieved, i.e., serious injury.

⁷⁶ See Commission Proposal for a Council Framework Decision on Combating Terrorism, 19 September 2001, COM (2001) 521 final.

⁷⁷ Article 1 Council Framework Decision on Combating Terrorism, 13 June 2002 (2002/475/JHA), OJ L164/3 of 22 June 2002 (hereinafter, 'European Council Framework Decision on Combating Terrorism'). Council Framework Decision 2008/919/JHA of 28 November 2008 (hereinafter, Framework Decision) obliging states to criminalise 'public provocation', 'recruitment' and 'training', 'aiding and abetting, inciting and attempting' terrorism. See further Chapter 4.

⁷⁸ Article 1 European Council Framework Decision on Combating Terrorism contains the definition of terrorism; see also 'preventative offences', *ibid*.

⁷⁹ *Ibid.*, Articles 2–4 requiring that these forms of association and liability be criminalised in domestic law.

⁸⁰ A Council Statement is a declaration of political intent, having no legal force. But under Article 15 Treaty on the European Union (TEU) Member States are under an obligation to ensure that their national policies conform to the 'common positions' adopted by the Council.

steps required to implement its terms in national law. It has been criticised for the use of 'unclear, vague and uncertain concepts'.⁸¹ In 2008 a further Framework Decision required states to ensure that 'provocation' to commit such terrorist offences is criminalised; 'aiding and abetting, inciting and attempting' such crimes are also criminalised.⁸²

2.1.5.2 Definitions by reference

The more common approach, adopted in the terrorism conventions of other regional organisations, is not to define terrorism as such but to identify terrorist activities by reference to existing UN treaties which have addressed specific forms of terrorism.⁸³ Regional organisations to have addressed terrorism in this way include the OAS,⁸⁴ the African Union,⁸⁵ the South Asian Association for Regional Cooperation (SAARC),⁸⁶ the CoE,⁸⁷ and more recently the Association of Southeast Asian Nations (ASEAN).⁸⁸ While these regional arrangements act as a framework for extradition or prosecution of acts which have already been deemed 'terrorist' at international law, they do not therefore make any attempt to elucidate a generic definition of terrorism.⁸⁹ One alteration to this approach is the Council of Europe Convention on the Prevention of Terrorism (2005), which is more specific and adds

⁸¹ See Chapter 4B.2.2. ⁸² 2008 Framework Decision, *supra* note 77.

⁸³ See European Convention on the Suppression of Terrorism, *supra* note 72. Note also that the Arab Convention, while offering a generic definition of terrorism, complements it by referring to 'terrorist offences' prohibited by pre-existing conventions (Article 3).

⁸⁴ OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance, Washington, DC, 2 February 1971, OAS Treaty Series No. 37, in force 16 October 1973.

⁸⁵ OAU Convention on the Prevention and Combating of Terrorism, Algiers, 14 July 1999, in force 6 December 2002, text available at: <http://treaties.un.org/doc/db/Terrorism/OAU-english.pdf>.

⁸⁶ SAARC Regional Convention on Suppression of Terrorism, Kathmandu, 4 November 1987, in force 22 August 1988, text available at: <http://treaties.un.org/doc/db/Terrorism/Conv18-english.pdf>.

⁸⁷ Council of Europe, Convention on the Prevention of Terrorism, Warsaw, 16 May 2005, in force 1 June 2007, text available at: <http://conventions.coe.int/Treaty/en/Reports/Html/196.htm>. Unlike the EU position, the Council of Europe both in the earlier 1977 European Convention on the Suppression of Terrorism and the 2005 Convention on the Prevention of Terrorism deal with terrorist offences by reference to crimes listed in other conventions.

⁸⁸ ASEAN Convention on Counter Terrorism 2007, Cebu, 13 January 2007, available at: www.aseansec.org/19250.htm.

⁸⁹ Despite not offering a definition, some of them nevertheless note the exclusion from the concept of terrorism of struggles against self-determination.

offences, or additional modes of liability, which must be reflected in Member States' domestic laws, namely (1) 'public provocation to commit a terrorist offence'; (2) 'recruitment for terrorism'; and (3) 'training for terrorism',⁹⁰ as well as ancillary offences.⁹¹ But this regional Convention, like most others, shies away from adopting, still less advancing, any generic definition of terrorism as such.

2.2 Do we know it when we see it? Defining terrorism and customary law

As has been seen, there is no global convention that can be said to establish a general definition of 'terrorism' that might be binding on states parties under international treaty law. The question then is whether there might nonetheless be sufficient international state practice and *opinio juris* to point to the general acceptance of an international legal definition of terrorism as a matter of customary international law.⁹² The issue had long been a matter of academic discussion, with perhaps a majority of commentators taking the view that no customary definition could be said to have crystallised.⁹³ The other view, however, was given voice by, among others, Professor Cassese, who had long sustained that terrorism was indeed a crime under customary law.⁹⁴ The issue came into sharp international focus when the STL, under the chairmanship of (by then) Judge Cassese, decided in February 2011 that terrorism was defined as a crime in customary law.⁹⁵

A brief comparative analysis of the various generic definitions of terrorism that have emerged in international instruments thus far may be instructive in ascertaining whether there is consensus on the essential elements of a definition. In assessing comparative practice, a few distinctions are worthy of emphasis. First, the questions whether there is

⁹⁰ Article 5 Council of Europe Convention 2005.

⁹¹ *Ibid.*, Article 9 requires parties to adopt such measures as may be necessary to establish as a criminal offence under its domestic law of 'participating as an accomplice', 'organising or directing' 'contributing to the commission of' or 'attempt' to commit an offence covered by the Convention.

⁹² See section 2.2.

⁹³ See, e.g., B. Saul, *Defining Terrorism in International Law* (Oxford, 2006), p. 270; Y. Dinstein, 'Terrorism as an International Crime', 19 (1989) *Israel Yearbook on Human Rights* 1971 55; A. Schmid, 'Terrorism: The Definitional Problem', 36 (2004) *Case Western Reserve Journal of International Law* 375.

⁹⁴ A. Cassese, *International Criminal Law* (Oxford, 2003), p. 103.

⁹⁵ See 'International Criminal Tribunals', section 2.2.3.

uniform condemnation in principle of terrorism, and whether states accept that they have obligations in respect of it, are of course distinct from the question whether there is a clear legal definition of terrorism in international law. Second, definitions are elaborated for different purposes, such that definitions of terrorism for immigration, administrative or other purpose will often be distinct from definitions of terrorism for criminal law purposes; just as the definitions may well be different, so are the requirements of international law in terms of the particularly rigorous requirements of certainty and clarity in criminal law. Third, whether there is broad agreement on certain 'core concepts' around the meaning of terrorism is different from the question whether there is a binding legal definition. There need not be absolute homogeneity of practice for customary law to emerge, and genuinely 'peripheral variations'⁹⁶ may not affect the emergence of the norm. However, the content or substance of the norm – the particular elements of the definition – must be sufficiently clear if a rule is to lay claim to govern as a binding legal norm.

Even a brief survey of, first, international instruments and practice and, second, national laws, casts doubt on the proposition that there is sufficient clarity around the definition of terrorism for the term to be defined (still less criminalised) in international law, with significant differences remaining on most if not all of the key elements of such a definition.

2.2.1 Identifying elements of a definition of terrorism from international instruments and practice

2.2.1.1 Conduct

The conduct (or, in criminal law terms, the *actus reus* or material element of the offence) varies between definitions. The more restrictive approach is found, for example, in the Draft Comprehensive Convention and the Financing Convention which covers essentially causing death, serious injury and in some cases damage to property.⁹⁷ By contrast, a broader-reaching and less precise approach is adopted in the Arab Convention which covers any 'violence or threats of violence'. The 1994 Declaration and 2004 Security Council definitions (SC Res. 1566)

⁹⁶ STL, Interlocutory Decision, *supra* note 8, p. 62 at para. 97.

⁹⁷ The Financing Convention, *supra* note 47, refers only to causing 'death or serious bodily injury'.

refer to undefined 'criminal acts' committed pursuant to a particular purpose, thus not really defining the material element of terrorism at all.⁹⁸ Likewise, the definition put forward by the STL in 2011, while going a little further, does not contain an exhaustive list of acts, but refers to 'the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act'.⁹⁹ Whereas some formulations cover 'inchoate' offences, where no result occurs, others depend on certain types of injury, damage or loss having actually occurred.¹⁰⁰

2.2.1.2 Purpose, motive and 'justification'

Terrorism tends to involve two or more subjective layers. The acts are rarely an end in themselves but rather a vehicle to achieving particular gains, which are usually ideological rather than private. Beyond the normal requirement of intent in respect of the conduct (e.g., the bombing, murder, other act, etc.), the person responsible will usually intend his or her acts to produce broader effects, namely spreading a state of terror and/or compelling a government or organisation to take certain steps towards an ultimate goal. In criminal law terms, the existence of this double subjective layer in many of the definitions appears to indicate that if there is a crime of terrorism, like certain other international offences, it is a *dolus specialis* crime, i.e., a crime that requires, in addition to the criminal intent corresponding to the underlying criminal act, the existence of an ultimate goal or design at which the conduct is aimed.¹⁰¹

⁹⁸ E.g., SC Res. 1566, *supra* note 42.

⁹⁹ STL, Interlocutory Decision, *supra* note 8, pp. 49–50 at para. 85. '[A] number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general *opinio juris* in the international community, accompanied by a practice consistent with such *opinio*, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.'

¹⁰⁰ E.g., in both the European Council Framework Decision on Combating Terrorism and the Arab Convention, 'threats' to commit specified acts suffice.

¹⁰¹ E.g., Persecution and genocide. For a discussion on the category of *dolus specialis* in the context of genocide, see Cassese, *International Criminal Law*, *supra* note 94, p. 103.

The need for such a broader design or purpose is often described as the essential element differentiating terrorism from other forms of violence. However, controversy and divergence of approaches surround the purposive element.

Definitions are not consistent in including a requirement of 'terrorisation' as such and numerous definitions contemplate a broader range of possible objectives. The EU definition, for example, includes 'seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation' as a possible purpose.¹⁰² The Arab Convention¹⁰³ and the OAU Convention¹⁰⁴ are broader still in the range of possible objectives. Those that do include terrorisation as an element, generally do not define it, with some envisaging a generalised terror, e.g., provoking 'terror in the general public',¹⁰⁵ and others including the much narrower terrorisation of 'particular individuals'.¹⁰⁶ Commonly, but not invariably, definitions also refer to another subjective layer by requiring that the terror, destabilisation, or other objective is in turn pursued with a view to compelling a response from another (but while this is usually from the government or state, in some definitions it may also be from an international organisation).¹⁰⁷

Some definitions on the international level also include an underlying political or ideological motivation as an additional layer to the definition of terrorism, but such inclusion has uneven support and remains a

¹⁰² Article 1 European Council Framework Decision on Combating Terrorism.

¹⁰³ Article 1(2) Arab Convention refers to 'seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize national resources'.

¹⁰⁴ A 'terrorist act' under Article 1(3) OAU Convention is one which is (i) intended to 'intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State'. (Emphasis added.)

¹⁰⁵ UN GA Res. 51/210, *supra* note 14. On the IHL prohibition of 'acts or threats of violence the primary purpose of which is to spread terror among the civilian population' in IACs or NIACs, see section 2.1.4.

¹⁰⁶ SC Res. 1566, *supra* note 42.

¹⁰⁷ '[T]he purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act.' Draft Comprehensive Convention, Article 2. While the Arab Convention refers only to compelling the state, in the European common definition, terrorist acts may be directed at a state or an international organisation. SC Res. 1566, *supra* note 42.

matter of very considerable controversy.¹⁰⁸ For some, the political or ideological motive is at the heart of the definition of terrorism, while for others, it is irrelevant, or indeed precluded by principles of human rights or criminal law.¹⁰⁹

A further issue, highlighted in relation to the 'authors' of terrorism, relates to whether considerations of a political, philosophical, or other nature might constitute a 'justification' for terrorism. There has been a tendency over time to move away from the language of 'justification', with this explicitly ruled out in certain definitions, such as SC Res. 1566, but not in others.¹¹⁰ Linked to this are different approaches to whether acts of terrorism can constitute 'political offences' and if so, whether this constitutes an exception to the duty to extradite or prosecute in related cases.¹¹¹

2.2.1.3 Who or what is protected

A further criterion on which definitions differ is the scope of potential 'victims' of terrorist acts. The 1937 definition, for example, is unusual in covering only acts directed against the state.¹¹² Other conventions, such

¹⁰⁸ E.g., SC Res. 1566, *supra* note 42, has no motive requirement. The STL judgment found no convergence of state practice on the existence of an ideological or political motive, but considered it an important element in understanding the nature of terrorism and one that may eventually 'emerge as an additional element of the international crime of terrorism'. STL, Interlocutory Decision, *supra* note 8, pp. 68–9 at para. 106.

¹⁰⁹ Under general principles of criminal law, personal motive is irrelevant, although this is not always clear in definitions of terrorism. Some consider the human rights to thought, conscience and religion, and limits on 'profiling', to preclude such a motive requirement in criminal law, while others consider it integral to notions of terrorism. See the debate between Kent Roach and Ben Saul, in K. Roach, 'The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive', and Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought', in A. Lynch, G. Williams and E. MacDonald (eds.), *Law and Liberty in the War on Terror* (Annandale, NY, 2007), p. 45. See also STL, Interlocutory Decision, *supra* note 8, pp. 63–9 at paras. 98–106.

¹¹⁰ SC Res. 1566, *supra* note 42, notes that acts referred to in the resolution 'are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature'. See also Article 5 Terrorist Bombings and Financing Conventions, *supra* note 47 which, like the 1994 Declaration, preclude any such justification. Earlier specific conventions and certain regional ones contain no such provision.

¹¹¹ The 'political offences' exception is increasingly being eliminated, especially in relation to terrorism post-9/11. See Chapter 4B.2.3 and section 2.1.4 regarding the human rights implications of this trend. Regarding specific terrorist conventions, see, e.g., Article 11 Terrorist Bombings Convention and the Financing Convention, *supra* note 47.

¹¹² Article 2(1) Convention for the Prevention and Punishment of Terrorism (Geneva, 1937, never entered into force), League of Nations Doc. C.546M.383 1937.

as the Financing Convention, by contrast, protect 'civilians' or other persons not taking a direct part in hostilities in armed conflict.¹¹³ More recent examples, such as the UN Draft Comprehensive Convention, include a broader range of targets, applying to injury or damage to 'any person' and to property whether 'public' or 'private'.¹¹⁴ Varying approaches to the target group that may be 'terrorised' – whether a 'people' or 'population' *en masse* as opposed to individuals – have been noted above.¹¹⁵

2.2.1.4 International element

Generally, conventions addressing 'international terrorism' explicitly restrict their application to terrorism with a cross-border element. With the exception of terrorism committed in the NIAC context (which, as noted, may be a war crime under international law), international conventions and declarations do not apply to domestic terrorism where the conduct, perpetrators and victims arise within one state. However, the regional terrorism instruments referred to express no such limitation.¹¹⁶

2.2.1.5 The authors: state actors and national liberation movements

In 2001, then Special Rapporteur on Terrorism and Human Rights, Ms Kalliopi K. Koufa, found the 'degree of consensus' around the definition of terrorism not to extend to the thorny issue of 'who can be a potential author of terrorism'.¹¹⁷ Despite the passage of time, the international community has not definitively answered the questions she highlighted as controversial, relating to whether, in turn, states and NLMs can be responsible for 'international terrorism'.

As regards the first question whether state conduct may constitute international terrorism, international instruments take different approaches.¹¹⁸ While the Draft Code of Crimes Against the Peace and

¹¹³ Article 2(1)(b) Financing Convention, *supra* note 47.

¹¹⁴ Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism; UN Doc. A/C.6/56/L.9, Annex I.B.

¹¹⁵ Section 2.1.2.

¹¹⁶ See, e.g., the European Council Framework Decision on Combating Terrorism and the Arab Convention.

¹¹⁷ Koufa, 'Progress Report', *supra* note 7. See also UN High-Level Panel on Threats, Challenges and Change, *supra* note 43, and Di Filippo, 'Terrorist Crimes', *supra* note 27.

¹¹⁸ See Dugard, 'Definition of Terrorism', *supra* note 10, p. 5. However, many implicitly exclude state terrorism, as discussed below.

Security of Mankind (1991) included international terrorism within the scope of crimes that can be committed by the state,¹¹⁹ terrorism was dropped from the list of offences covered by the 1996 version of the Draft Code.¹²⁰ Most subsequent provisions, while often not explicitly excluding the possibility of states falling within their purview, do exclude many guises of direct state terrorism by implication, either because the terror is inflicted against a state's own people (and is thus excluded by the broadly accepted 'international element' criterion referred to above), or because it takes place in armed conflict (and may then be explicitly excluded as already governed by IHL).¹²¹ While it remains sensitive – as seen, for example, from the fact that negotiations towards the nuclear terrorism convention were long stymied by differences of view on this critical point, which are also manifest in the Draft Comprehensive Convention discussed above – the majority of 'international terrorism' provisions do not address state terrorism as such.¹²²

In this respect, two points are worth clarifying. The first is that one justification for excluding 'state' terrorism from definitions of international terrorism is that the state is, or should be, accountable through other branches of law, such as human rights,¹²³ humanitarian law, or the law on the use of force, whereas the international responsibility of non-state actors is more limited.¹²⁴ On this basis the Secretary General's 2004 Report found the objections that 'state terrorism' should be included in a global definition of terrorism 'uncompelling', given that it is covered by other international norms. Secondly, the exclusion of 'state terrorism'

¹¹⁹ Draft Code of Crimes Against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its 43rd session, 29 April–19 July 1991, UN Doc. A/46/10, 1991.

¹²⁰ Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its 48th session, 6 May–26 July 1996, UN Doc. A/51/10, 1996, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf.

¹²¹ See section 2.2. See also the view of the UN High-Level Panel on Threats, Challenges and Change, *supra* note 43, that state terrorism is adequately covered by other international norms.

¹²² Controversial questions regarding state terrorism, and whether state action may itself constitute international terrorism – addressed here – should be distinguished from state responsibility for international terrorism by private actors, see Chapter 3.1.

¹²³ See Chapter 7 on responsibility and the extra-territorial application of human rights obligations.

¹²⁴ UN High-level Panel on Threats, Challenges and Change, *supra* note 43.

should be distinguished from (a) state responsibility for terrorism carried out by private actors, which are attributable to the state according to the general rules of state responsibility, and (b) state responsibility for violations of other obligations, which may include refraining from sponsoring or supporting terrorism, for example.¹²⁵

Stark differences of approach are seen also in relation to the yet more intractable question of the distinction between 'terrorism' and acts undertaken pursuant to 'the inalienable right to self determination and independence'.¹²⁶ The determination on the part of many states, particularly but not exclusively from the developing world, to exclude NLMs from any definition of terrorism has characterised almost all negotiations towards a definition in international practice.

As noted, the 1994 Declaration was thought to be a milestone in stating that the 'criminal acts' covered by it are 'in any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature', without reference to NLMs. SC Res. 1566 and numerous other instruments follow this approach. However, the Arab and African regional conventions expressly exempt from the terrorist definition peoples struggling for self-determination or national liberation in accordance with international law, 'including armed struggle against colonialism, occupation, aggression and domination by foreign forces'.¹²⁷ Under the Arab Convention, it has been noted that, while on the one hand relatively banal acts could be covered by the terrorism definition (due to the broad-reaching conduct covered by the definition), on the other, the most serious indiscriminate attacks against civilians could be excluded 'as long as [they were] perpetrated in the name of the right to self determination'.¹²⁸ A slightly different manifestation of the same phenomenon could be seen in an EU note accompanying the draft European Council Framework Decision circulated after 9/11, which noted that the definition of terrorism does not include

¹²⁵ See Chapter 3 for the discussion of responsibility and section 2.3.

¹²⁶ GA Res. 3034 (XXVII), 'Measures to Prevent International Terrorism', 18 December 1972, UN Doc. A/RES/3034 (XXVII).

¹²⁷ Article 3(1) OAU Convention; Preamble and Article 2(a) Arab Convention. See also Convention of the Organisation of the Islamic Conference on Combating International Terrorism, which couples this exclusion with a provision stating that 'political, philosophical ... or other motives shall not be a justifiable defence'.

¹²⁸ E. David, *Éléments de droit pénal international – Titre II, le contenu des infractions internationales* (Brussels, 1999), 8th edn, p. 539. See further Guzman, *Terrorism and Human Rights No. 1*, *supra* note 26.

'those who have acted in the interests of preserving or restoring democratic values'.¹²⁹

This issue continues to dog the negotiation of the UN Convention, as noted above, with dispute remaining as to whether there should be an exception for all types of conflict – international or non-international, and including wars of national liberation and situations of 'foreign occupation'.¹³⁰

A holistic and coherent approach to the legal framework would suggest that the definition of terrorism take into account other norms of international law. There is force therefore in the argument that it is less essential to include state terrorism, as states are bound by other international legal obligations. The argument is weakened in practice, however, where, as in the 'war on terror' context, states seek to deny the applicability of other relevant norms or branches of law¹³¹ and to evade responsibility and accountability under them.¹³² In turn, it has been suggested with some force that 'if international law takes self-determination seriously', definitions of terrorism must exclude legitimate liberation movements that forcibly resist its denial, and states should not be allowed to criminalise – as terrorists – those who engage in the legitimate exercise of their rights.¹³³ Whatever the merits or demerits of such inclusions or exclusions, in practice there is insufficient consensus to allow passage out of the quagmire on these most intransigent of issues.

In brief, this short survey reveals numerous commonalities but also substantial points of divergence in the approach to the definition of terrorism to date. It is undoubtedly possible to discern, in a general

¹²⁹ The note circulated with the draft decision continues: 'Nor can it be construed so as to incriminate on terrorist grounds persons exercising their legitimate right to manifest their opinions, even if in the course of the exercise of such right they commit offences.' See Statewatch, 'Critique of the Council's Agreed Decision on the definition of terrorism', *Statewatch Bulletin*, November–December 2001, available at: www.statewatch.org/news/2002/feb/06Aep.htm. But see SC Res. 1566, *supra* note 42.

¹³⁰ Article 18 Draft Comprehensive Convention; see the discussion of UN negotiations in section 2.1.2.

¹³¹ See, e.g., Chapter 7B.2 and 7B.3 denying the scope of application of human rights law extra-territorially or in armed conflict as an example of states seeking to avoid their obligations and accountability.

¹³² E.g., Chapter 7B14.

¹³³ B. Saul, 'Defending "Terrorism": Justifications and Excuses for Terrorism in International Criminal Law', 25 (2006) *Australian Yearbook of International Law* 177–226, available as Sydney Law School Research Paper No. 8/122, p. 13. Saul suggests that self-determination should be excluded 'by the full application of Protocol I', and human rights law should impede states from criminalising on this basis.

way, key features of terrorism, such as certain unlawful acts carried out for ideological ends. It is rather more difficult to identify, from the survey of international instruments, clear and precise elements of a definition that can be said to have garnered international support.

2.2.2 Other international practice: UN General Assembly and Security Council

Various resolutions of the UN General Assembly and Security Council have referred to the duties of states in respect of terrorism, from the duty to refrain from support¹³⁴ to the more proactive duty to suppress.¹³⁵ While many are non-binding,¹³⁶ these resolutions may reflect or contribute to the development of customary law regarding the obligations in question.¹³⁷ As discussed above, post-9/11, the Security Council went further and called on states to take broad-reaching measures against 'international terrorism', including criminalising such conduct.

For the most part, these UN initiatives do not provide a definition of terrorism and hence, one could argue, fail to give precise content or meaning to the obligations to which they refer and, in any event, to

¹³⁴ GA Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, 24 October 1970, UN Doc. A/RES/2625 (XXV), which has been cited as declaratory of customary law with regard to the non-use of force, provides that '[e]very state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife and terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts'. See also Preamble of SC Res. 748 (1992), 31 March 1992, UN Doc. S/RES/748 (1992).

¹³⁵ GA Res. 51/210, 'Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism', 17 December 1996, UN Doc. A/RES/51/210 (1999) refers in the Preamble to 'criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them'.

¹³⁶ Cf. Security Council resolutions passed under Chapter VII. Other resolutions, including those of the General Assembly, are not strictly binding under the Charter but may play a significant role in the formation of customary norms: see Chapter 1 and M. Wood, 'The Interpretation of Security Council Resolutions', 82 (1998) *Max Planck Yearbook of United Nations Law*, 74.

¹³⁷ On UN declarations and resolutions and the development of custom, see the arbitration award in *Texaco Overseas Petro. Co./California Asiatic Oil Co. v. Libyan Arab Republic*, 53 (1977) ILM 389 at para. 83, reprinted in 17 ILM 1. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, ICJ Rep. 1986, p. 14 at paras. 188 and 198.

contribute to our understanding of a definition of international terrorism. It has been argued that these resolutions, particularly those that refer to criminal law, presuppose sufficient understanding of the phenomenon referred to in international law.¹³⁸ But, then, the current state of negotiations on a global convention, and the Security Council's call to states, in the context of SC Res. 1373, to advance these negotiations belie such a view.

It remains doubtful to what extent other UN initiatives directed at providing content to the meaning of 'international terrorism' highlight the existence of sufficiently widespread agreement on the elements of a legal definition. On the contrary, in providing its 'description' of terrorism, the High-Level Panel of the General Assembly recognised in 2004 that there was a lack of agreement on a clear definition, which it considered to undermine the normative regulation and moral stance against terrorism.¹³⁹ Subsequent pleas by then-Secretary-General Kofi Annan for states to provide 'clarity' around the definition of terrorism reinforce the perceived gap. While the 2004 Security Council resolution was significant in providing a 'definition', it was clearly non-binding and aimed at providing a helpful framework for national definitions rather than purporting to itself embody a legal definition. Consistent with its nature as a reference point to assist states in providing the necessary specific definitions in domestic law, it provides a broad approach rather than a detailed specific definition and, as noted in the brief survey above, it both reflects and differs from approaches found elsewhere.

2.2.3 The practice of International Criminal Tribunals

The practice of International Criminal Tribunals (ICTs) is also relevant to the debate regarding whether there is in fact an international legal definition of terrorism, and specifically whether terrorism is a crime under international law (defined with sufficient clarity to provide a basis for criminal prosecution).

¹³⁸ See Cassese, *International Criminal Law*, *supra* note 94.

¹³⁹ 'The Panel calls for a definition of terrorism which would make it clear that any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and non-combatants, with the purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act. I believe this proposal has clear moral force, and I strongly urge world leaders to unite behind it.' Secretary-General's Kofi Annan's keynote address, *supra* note 20.

The Statutes of the International Criminal Tribunal for Rwanda (ICTR, 1994) and of the Special Court for Sierra Leone (SCSL, 2002) include terrorism as one of the crimes within their respective jurisdictions¹⁴⁰ and, as noted above, there have been convictions.¹⁴¹ These have been cited as creating a strong assumption that the drafters considered that there was in fact a crime of terrorism under international law at the time when the crimes within the jurisdiction of those tribunals were committed.¹⁴² However, it is clear from the context of these provisions that they cover the specific prohibition on terrorism in armed conflict. As discussed above, this is a special sub-category of terrorism which is defined in IHL – and amounts to an international crime that the ICTY has also prosecuted – rather than purporting to confer jurisdiction over a broader generic offence of terrorism in international law.¹⁴³

The STL, established in 2007, is the first international tribunal that focuses its jurisdiction on what is plainly a terrorist act,¹⁴⁴ although its competence as described in its statute is to apply 'the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism'.¹⁴⁵ In a significant interlocutory decision of February 2011, the Appeals Chamber decided that it should interpret Lebanese law in light of international law, and went on to conclude, controversially, that terrorism was already a crime under customary international law. The Tribunal found as follows:

¹⁴⁰ For the first judgment of the SCSL, including the crime of terrorism, see *Prosecutor v. Alex Tamba Brima*, *supra* note 67.

¹⁴¹ See, e.g., *Galić*, *supra* note 65, *Simma*, *supra* note 67, and *Taylor*, *supra* note 67.

¹⁴² Cassese, *International Criminal Law*, *supra* note 94, pp. 120–1, asserting that a definition of terrorism does exist and citing in support Article 4 Statute of the ICTR.

¹⁴³ The Statute of the SCSL (annex to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone), Freetown, 16 January 2002, available at: www.sc-sl.org/index.html) and the Statute of the ICTR, in both cases in Article 3 ('Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II') at (d) cover 'acts of terrorism'.

¹⁴⁴ On 13 December 2005, the Government of the Republic of Lebanon requested the UN to establish a tribunal to try those allegedly responsible for the 14 February 2005 attack in Beirut that killed the former Lebanese Prime Minister Rafic Hariri and twenty-two others. Pursuant to SC Res. 1664 (2006), the UN and the Lebanese Republic negotiated an agreement on the establishment of the STL. Further to SC Res. 1757 (2007) of 30 May 2007, the Statute of the Special Tribunal entered into force on 10 June 2007. See www.stl-tsl.org/.

¹⁴⁵ Article 2 STL Statute: 'Applicable criminal law' referring, *inter alia*, to 'the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism.'

On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism *in time of peace*, requiring the following elements: (i) the intent (*dolus*) of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act; and (iv) that the terrorist act be transnational. The very few States still insisting on an exception to the definition of terrorism can, at most, be considered persistent objectors. A comparison between the crime of terrorism as defined under the Lebanese Criminal Code and that envisaged in customary international law shows that the latter notion is *broader* with regard to the means of carrying out the terrorist act, which are not limited under international law, and *narrower* in that (i) it only deals with terrorist acts in time of peace, (ii) it requires both an underlying criminal act and an intent to commit that act and (iii) it involves a transnational element.¹⁴⁶

While the views of STL President Cassese were well known from his prior academic work, the judicial decision was surprising, given the on-going controversy as to the failure to reach international agreement on a definition of terrorism, and the differing elements emerging from national and international practice. Where the question is whether terrorism is defined as a *crime* under international law, the controversy can only be more pronounced, and the requisite degree of clarity and specificity stricter.¹⁴⁷ In the context of this particular case, prosecution, defence and interveners all agreed that there was no crime of terrorism under customary law, yet the STL *proprio motu* took a different view.¹⁴⁸

The decision has been promptly and stridently critiqued, with serious questions arising regarding the sources on which the STL based its assessment as to state practice and *opinio juris*.¹⁴⁹ Despite this, it is likely

¹⁴⁶ STL, Interlocutory Decision, *supra* note 8, p. 3, emphasis in original.

¹⁴⁷ It has been noted that the national practice cited in support of the conclusions does not distinguish between definitions of terrorism in criminal law and definitions for any other purposes in domestic law.

¹⁴⁸ STL, Interlocutory Decision, *supra* note 8 at para. 83 of the judgment describes as 'forceful' the position of both parties in this respect. Their pleadings and interventions are available at: www.stl-tsl.org/en/the-cases/stl-11-01/filings.

¹⁴⁹ B. Saul, 'Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism', 24 (2011) *Leiden Journal of International Law* 677, 677–700; K. Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law', 24 (2001) *Leiden Journal of International Law* 655.

that this decision will be interpreted as lending some weight to the argument in support of the crystallisation of a customary norm. While it remains unclear whether the decision of the STL will stand the test of time or be challenged before that Tribunal itself, it is clear that one decision of an international body is, in any event, far from conclusive on the question.

The International Criminal Court (ICC) experience, for its part, points in a different direction. The 160 states participating in the 1998 Rome conference on the establishment of the ICC noted that no definition of the crime of terrorism could be agreed upon for inclusion in the Statute, apparently indicative of the lack of any such definition under international law at the time of the Statute's adoption.¹⁵⁰ Attempts to include a crime of terrorism in the Court's jurisdiction have thus far gained relatively little traction.¹⁵¹

International criminal law practice is therefore divided. Beyond the Lebanon Tribunal decision, which stands apart in its endorsement of a crime of terrorism in peacetime, international criminal practice does not appear to support the existence of a definition of terrorism in CIL (other than perhaps in respect to the war crime of inflicting terror on the civilian population).¹⁵²

2.2.4 National definitions

In considering whether a customary definition has emerged, it is also relevant to look at state practice on the national level. Yet still less definitional convergence emerges in that sphere. The way national laws approach key elements of a definition of terrorism can be discerned from, among other sources, states' responses in the context of their

¹⁵⁰ See, e.g., Resolution E adopted by the Rome conference on the International Criminal Court as part of its Final Act, UN Doc. A/CONF.183/10: 'Regretting that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion within the jurisdiction of the Court.'

¹⁵¹ For the Dutch formal proposal to include terrorism within the Court's jurisdiction at the Kampala Review Conference, see Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18–26, 2009, UN Doc. ICC-ASP/8/20, Appendix III at 65–6.

¹⁵² See Statutes of the ICTR and of the SCSL, *supra* note 143; *Prosecutor v. Galić*, *supra* note 65; Statute of the International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90 (hereinafter, 'ICC Statute').

international reporting obligations, notably to the Security Council,¹⁵³ as well as from surveys of state practice on the national level.¹⁵⁴

Many states had specific counter-terrorism legislation in place long before the 'war on terror' which, unsurprisingly, present differing definitions of terrorism reflecting diverse historical and political national contexts.¹⁵⁵ Post-9/11, a plethora of new anti-terrorist measures were grafted onto the canvas of existing laws; while many states introduced entirely new terrorism legislation in the years following, others with long histories of counter-terrorism but renewed resolve in the different geopolitical landscape, introduced significant legislative changes.¹⁵⁶ Many of these laws were enacted according to expedited national procedures.¹⁵⁷ Not infrequently, such counter-terrorism legislation has been

¹⁵³ A broad range of national practice can be seen from state reports to the Security Council CTC on the criminalisation of terrorist acts under SC Res. 1373 at para. 2(e): www.un.org/Docs/sc/committees/1373/reports.html.

¹⁵⁴ See Saul, *Defining Terrorism*, *supra* note 93. The STL also selects examples of state practice, as do country reports of human rights monitoring bodies, see Chapter 7. See also V. M. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy* (Cambridge, 2005), particularly Chapters 14, 18, 22–24 and 26. The International Commission of Jurists, *Bulletin on Terrorism*, provides examples of legislative and other developments as they unfold.

¹⁵⁵ E.g., Article 270 of the Italian Criminal Code has no requirement for religious or political motivation or spreading fear or intimidation among the population, as the law was focused on organised crime and the activities of the mafia. Post-9/11, the law has been extended to cover acts with an international dimension. See K. Oellers-Frahm, 'Country Report on Italy', Conference on 'Terrorism as a Challenge for National and International Law', Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 24–25 January 2003, at: www.edoc.mpi.de/conference-on-terrorism/country.cfm. In Japan, Article 17(1) National Police Agency Organisation Act 1954 limits terrorism to a particular political view, covering '[v]iolent or subversive activities on the basis of ultra-left ideology and other assertions with the intention of achieving their purpose by spreading fear and apprehension'. N. Hirai-Braun, 'Country Report on Japan', Conference on 'Terrorism as a Challenge for National and International Law', at: www.edoc.mpi.de/conference-on-terrorism/country.cfm.

¹⁵⁶ E.g., Singapore and Malaysia made fewer amendments to their existing anti-terrorism regimes, whereas newly democratic Indonesia resisted the imposition of harsher new laws: see, e.g., Ramraj, Hor and Roach (eds.), *Global Anti-Terrorism Law and Policy*, *supra* note 154, Chapters 13 and 14.

¹⁵⁷ Less than two months after 9/11 the 342-page US Patriot Act 2001, which amends over fifteen statutes, passed into law. The UK government rushed through the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) within a month of submitting its draft to Parliament, thereby only allowing parliamentary debate and not the normal customary committee scrutiny. Both pieces of legislation afforded domestic law enforcement agencies and international intelligence agencies wide-ranging powers and restricted human rights protections.

the subject of criticism from human rights courts and bodies for its breadth and/or ambiguity, as discussed further in Chapter 7.

The enactment of new laws is in part a response to Security Council resolutions post-9/11,¹⁵⁸ in particular SC Res. 1373 passed under Chapter VII of the UN Charter (thereby imposing a legal obligation on Member States of the UN), which specifically required states to ensure that 'terrorist acts' are criminalised in domestic law.¹⁵⁹ This and other Security Council resolutions referring to obligations in respect of terrorism either make no attempt to define the phenomenon (SC Res. 1373, 2001) or provide a non-binding framework (SC Res. 1566, 2004).¹⁶⁰ Thus, despite the establishment of a Counter-Terrorism Committee (CTC) with a limited mandate to monitor implementation of SC Res. 1373,¹⁶¹ in practice the Security Council has left unfettered flexibility for the state to define terrorism as it sees fit.¹⁶² Many of the definitions in anti-terrorism legislation post-9/11 have given rise to serious concerns regarding compatibility with international human rights standards, which may itself undermine the claim that they represent an emerging international legal definition.¹⁶³ But it is the diversity of approach on key elements that makes such a claim most difficult to sustain.

It has been noted that some national terrorism laws have had considerable impact on definitions adopted in other states, as have international or regional initiatives, of course, leading to some similarity of approaches and language across different states.¹⁶⁴ Despite this,

¹⁵⁸ SC Res. 1368 (2001), 12 September 2001, UN Doc. S/RES/1368 (2001), called on Member States to work together to stop terrorism and punish those responsible.

¹⁵⁹ SC Res. 1373, *supra* note 2. SC Res. 2178 obliges states to also criminalise facilitating foreign travel in support of terrorism.

¹⁶⁰ SC Res. 1566, *supra* note 42.

¹⁶¹ The Committee originally made clear that it was not interested in monitoring the human rights implications: 'The Counter-Terrorism Committee is mandated to monitor the implementation of Resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate.' A briefing to the Security Council on 18 January 2002, available at: www.un.org/en/sc/ctc/rights.html. It now embraces a rights dimension to its work; see Chapter 7B.1.

¹⁶² SC Res. 1373 (2001), *supra* note 2, established the Committee and SC Res. 1377 (2001), *supra* note 2, clarified its tasks including to promote best practices, including the preparation of model laws as appropriate; and to disseminate the availability of existing technical, financial, legislative and other assistance programmes to assist the implementation of Resolution 1373.

¹⁶³ See Chapter 7B.5

¹⁶⁴ Definitions of terrorism in Australia, Hong Kong, New Zealand and South African laws are said to have been inspired by the definition in UK legislation; see Ramraj, Hor and Roach (eds.), *Global Anti-Terrorism Law and Policy*, *supra* note 154, p. 630.

definitions vary considerably – from adopting definitions by reference to existing specific conventions, to the establishment of newly drawn up offences that sometimes bear scant resemblance to international, regional, or other national definitions.¹⁶⁵ Even within regions and among states implementing the same regional standards, such as the twenty-seven European countries who are obliged to implement the European Council's Framework Decision on Combating Terrorism, divergent approaches are apparent.¹⁶⁶

In many states, terrorism is not defined in national legislation at all.¹⁶⁷ Where it is, the definitions cover a strikingly diverse range of conduct. While many involve some (often varied) forms of violence,¹⁶⁸ laws not infrequently cover a broader range of conduct including 'any intentional act',¹⁶⁹ or any 'explosion, arson or other action'¹⁷⁰ that meets the other elements of the definition (generally relating to the purpose behind the conduct). Some states have no purpose element, simply defining terrorism as violence calculated to cause death or injury, and where there is such an element, it takes broad-ranging forms. In some cases it covers terrorising, intimidating or inducing fear in the population,¹⁷¹ while in others terrorism is defined as intent to damage, weaken or oppose the state or public order, or to jeopardise essential values.¹⁷²

¹⁶⁵ See, e.g., 'creating a condition of widespread and extraordinary fear and panic' in Philippines Human Security Act 2007. Further examples of broad approaches are discussed in Chapter 7B.5.

¹⁶⁶ S. Schmahl, 'Specific Methods of Prosecuting Terrorists in National Law', in C. Walter, S. Vöneky, V. Röben and F. Schorkopf (eds.), *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin, 2004), p. 81.

¹⁶⁷ Saul notes that the dominant approach in states' criminal laws is to address terrorism through ordinary offences under criminal law; this was more striking prior to 9/11 but remains true despite an increase in national level definitions since 2001. Saul, *Defining Terrorism in International Law*, *supra* note 93, pp 264, 268.

¹⁶⁸ *Ibid.*

¹⁶⁹ For example, the Jordanian Anti-Terrorism Law No. 55 of 2006, Official Gazette No. 4790, at 4264, 1 November 2006, defines the material element of terrorism as 'every intentional act, committed by any means and causing death or physical harm to a person or damage to public or private properties, or to means of transport, infrastructure, international facilities or diplomatic missions'.

¹⁷⁰ For example, the Russian Federation: Article 3 of the Federal Law No. 35-FZ of 6 March 2006 on 'Countering Terrorism'. (Emphasis added.)

¹⁷¹ Saul refers to fifteen states including simple generic definitions of terrorism of this type, *Defining Terrorism in International Law*, *supra* note 93, p. 266.

¹⁷² *Ibid.*, p. 268.

Divergence between states is also noteworthy as regards the inclusion or omission of a political or religious motive requirement. The rejection of such a requirement by the Security Council's 2004 definition¹⁷³ is not necessarily reflected in practice on the national level.¹⁷⁴ The extent of the controversy on this element is apparent from the Canadian judiciary's rejection of such a requirement in Canadian legislation as violative of human rights.¹⁷⁵

In practice, uncertainty flows from particular elements and from the totality of definitions which combine a range of subjective and objective elements with unclear results. This cumulative confusion is exemplified in the Russian anti-terror law, which defines terrorism as 'the ideology of violence and the practice of influencing the decision making of state bodies, local municipal bodies or international organizations, involving intimidation of the population and/or other forms of illegal violent action'.¹⁷⁶

Unfolding practice on the national level should be closely observed as potentially constituting the most important development in this field, as a matter of practical significance and as a source of state practice that could, with time, contribute to the development of customary law. There is, however, little indication of uniformity of practice around a legal definition having emerged at this stage, or of this changing in the foreseeable future.

¹⁷³ See SC Res. 1566, *supra* note 42, but see STL, Interlocutory Decision, *supra* note 8.

¹⁷⁴ See, e.g., Roach, 'The Case for Defining Terrorism', *supra* note 109, p. 45, on Australian, Canadian and UK definitions reference to political or religious motivation. New Zealand and Hong Kong have also adopted the inclusion of religious or political motives, whereas the US, some Middle Eastern and some European countries use harm as a primary definer. See also Ramraj, Hor and Roach (eds.), *Global Anti-Terrorism Law and Policy*, *supra* note 154, particularly Chapters 14, 18, 22–24 and 26.

¹⁷⁵ A Canadian Court in *R. v. Kawaja* [OJ] 4245 [73] found that the Canadian requirement of religious or political motivation in the commission of the crime of terrorism violated fundamental freedoms. See Roach, 'The Case for Defining Terrorism', *supra* note 109, p. 45. For an interesting academic debate, see Roach, 'The Case for Defining Terrorism', *supra* note 109, and Saul, 'The Curious Element of Motive', *supra* note 109, p. 28.

¹⁷⁶ Russian Countering Terrorism Law 2006, *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 35-FZ, available at: www.garant.ru/law/12045408-000.htm, discussed in S. T. Bridge 'Russia's New Countering Terrorism Law: The Legal Implications of Pursuing Terrorists Beyond the Borders of the Russian Federation', 3 (2009) *Columbia Journal of East European Law* 1.

2.2.5 Meeting the legality threshold: preliminary conclusions on customary international law

The question whether terrorism is defined in international law is therefore controversial. While a thorough review of the practice of states in defining terrorism goes beyond the scope of this study, the differences of approach highlighted belie the notion of consensus around an accepted definition of terrorism, and what the content of any such definition might be. The brief survey of instruments would appear to suggest that, while the heart of the definitional dispute undoubtedly relates to the potential authors of terrorism, there is divergent practice in respect of most, if not all, elements of the definition.

Commentators differ as to whether there is sufficient clarity around a definition of terrorism under customary law.¹⁷⁷ The heart of the issue is whether there is a sufficiently solid core of a definition to hold that there is a clear prohibition in law and, in particular, that there is an international crime carrying individual responsibility.

In making this assessment, the requirements of legality must be kept centre stage.¹⁷⁸ The legitimacy of the law's restriction of rights and freedoms depends on it being sufficiently clear and accessible that individuals are able to conform their behaviour to the limits of the law. As human rights courts frequently remind us, genuine uncertainty as to the content and scope of law may render that law void for vagueness, and where the question is the existence of a definition under *criminal* law, particularly stringent requirements of legal certainty arise. It is questionable whether many of the definitions advanced above, applicable in particular regional or other contexts, themselves meet the requirements of *nullum crimen sine lege*, and more doubtful yet whether the common core that might be distilled from them would meet such a test.

¹⁷⁷ Cassese, *International Criminal Law*, *supra* note 94, p. 120, suggests that there is consensus on the 'general notion' of terrorism and that disputes relate only to the question of NLMs, which he describes as a dispute not as to an element of the definition but as to the 'exceptions' that apply thereto. See also J. Paust, 'Addendum: Prosecution of Mr. bin Laden *et al.* for Violations of International Law and Civil Lawsuits by Various Victims', *ASIL Insights* No. 77, 21 September 2001, at: www.asil.org. See R. Higgins, 'The General International Law of Terrorism', in R. Higgins and M. Flory (eds.), *International Law and Terrorism* (London, 1997); Saul, *Defining Terrorism Law*, *supra* note 93, p. 270; Y. Dinstein, 'Terrorism as an International Crime', 19 (1989) *Israel Yearbook on Human Rights* 1971 55; A. Schmid, 'Terrorism – The Definitional Problem', 36 (2004) *Case Western Reserve Journal of International Law* 375.

¹⁷⁸ See Chapter 7.

Counter-terrorism laws continue to emerge and a rule of customary law could, at least conceivably, emerge as international practice develops. National practice is being generated constantly, as states introduce new legislation and amend or reinforce existing laws and practices. As noted above, several states have followed one another's approach to the definitions of terrorism, leading to some key examples of parallel provisions in mostly similar but sometimes quite different legal systems.¹⁷⁹ The differences of approach are, however, at least as striking as the similarities.¹⁸⁰ The examples of the vastly divergent approaches to conduct, purpose and the motivation requirement on both the international and national levels, discussed above, illustrate this. Such divergence should be no surprise, given not only the inevitable peculiarities of the particular historical and geopolitical concerns of the individual state, but also the lack of homogeneity in the international and regional levels and the controversy that underpins the difficulties in arriving at an internationally accepted definition.¹⁸¹

To some extent, consensus may be consolidating around some of the elements of a definition in the context of the negotiations around a global Draft Convention. However, as the Draft Comprehensive Convention has not been completed or adopted, still less signed and ratified, it would be premature to rely on the current state of these negotiations alone as indicative of CIL at the present time. The adoption of new terrorism legislation which took a growth spurt post-9/11 may have slowed down, such that the 'soft-law guideposts' provided by SC Res.1566 in 2004 have had less obvious restraining influence than they might otherwise have had.¹⁸²

On-going attempts at model legislation, such as that adopted in 2011 by the African Union, may over time lead to a greater consistency of approach than has been evident in practice to date.¹⁸³ It remains to be seen whether attempts to guide and to exercise more effective oversight over definitions of terrorism and their application will gain pace.¹⁸⁴ It is

¹⁷⁹ Note similar approaches across the Commonwealth and beyond, inspired by the definition in UK legislation, see Ramraj, Hor and Roach (eds.), *Global Anti-Terror Law and Policy*, *supra* note 154, p. 630.

¹⁸⁰ See, e.g., the discussion of the European states' approaches in Schmahl, 'Specific Methods', *supra* note 166.

¹⁸¹ See section 2.1. ¹⁸² Saul, 'Legislating from a Radical Hague', *supra* note 149, p. 9.

¹⁸³ E.g., 'African Model Law on Counter Terrorism' at the 17th Ordinary Session of the Assembly of the Union, held in Malabo, in July 2011: see *Assembly/AU/Dec.369 (XVII)*.

¹⁸⁴ Human rights bodies have exercised considerable oversight in this respect – see Chapter 7B.5 – though the potentially potent role of the CTC appears to remain limited.

just conceivable that evolving national practice will move closer together and lead to future changes in CIL, to which the potential adoption and acceptance of a generic definition in a global convention would undoubtedly contribute, but this remains a very considerable way off.

For the time being, it may be tentatively concluded that international law cannot be said to prohibit or indeed penalise terrorism, according to an understood definition of the term under CIL. So far as there remain such uncertainties and ambiguities around the existence of a definition or its scope, it must be highly doubtful whether criminal prosecution on this basis would be consistent with the cardinal principles of legality and certainty in criminal matters.

2.3 Filling the gap? Terrorism and other international legal norms

If there is no generic definition of terrorism in international law, does this leave a gap in the international legal order? Two groups of issues are worth highlighting.

First, the absence of a definition of terrorism does not mean that serious acts of violence are not addressed by international and, of course, domestic law. As noted above, acts of 'terrorism' are covered by multiple specific conventions addressing particular types or aspects of terrorism, including hijacking, hostage-taking, violence against internationally protected persons, terrorist bombing and financing terrorism. Indeed it has been described as 'difficult to imagine a form of terrorism not covered by these Conventions'.¹⁸⁵

As treaty law, they are binding only on states parties to them, and the prosecution of associated offences depends on their incorporation into domestic law. Calls for the ratification and implementation of these conventions have, however, been made repeatedly by the Security Council and others post-9/11.¹⁸⁶ As a result, the enhanced ratification, and implementation, of these sectoral conventions has been a major area of positive development post-9/11.

¹⁸⁵ Dugard, 'Definition of Terrorism', *supra* note 10, p. 12. On this basis Dugard, like others, does not consider it essential or desirable to conclude a generic definition in a global convention.

¹⁸⁶ See, e.g., SC Res 1373, 1566 and others, *supra* note 2 and 42. See also Prost, 'The Need for a Multilateral Cooperative Framework', *supra* note 38.

Specific pockets of normative growth have arisen in recent years, bolstering this sectoral framework. For example, in relation to the challenging issue of terrorist financing,¹⁸⁷ there has been a proliferation of developments from Security Council resolutions,¹⁸⁸ to regional conventions and regulations,¹⁸⁹ as well as softer law standards and recommendations.¹⁹⁰ Coupled with enhanced ratification and implementation of existing provisions, these measures have facilitated the rapid tracing, freezing and ultimately confiscation of property or assets in suspected cases of money laundering and terrorist financing, and the exchange of information between national authorities.¹⁹¹

In addition, as discussed in more detail in Part II of the book, acts commonly referred to as 'terrorist' may amount to other violations of, or crimes under, international law, including customary law of general application. Notably they may amount to violations of various provisions of IHL, and in certain circumstances of the *jus ad bellum* or IHRL. They may give rise to individual responsibility as war crimes (if carried out in armed conflict) and crimes against humanity (whether or not there is an armed conflict), provided the necessary elements of those crimes are met.¹⁹²

The crimes mentioned above do not provide a comprehensive coverage of the range of possible terrorist acts. For example, attacks by non-state

¹⁸⁷ A. Gardella, 'The Fight against the Financing of Terrorism between Judicial and Regulatory Control', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism*, (Oxford, 2004), p. 415. Particular challenges are said to arise from poor international regulation of the financial system or its unsatisfactory implementation.

¹⁸⁸ See, e.g., SC Res 1373, *supra* note 2 and subsequent resolutions, which have referred to obligations in respect of terrorist financing, including calls to ratify the 1999 Convention. The Security Council has addressed terrorist financing and monitored implementation through its CTC.

¹⁸⁹ See, e.g., European Union Council Decision 2002/996/KHA, 28 November 2002; CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, in force 1 May 2008. On issues raised in the Southern African context, see A. Hübschle, 'Terrorist Financing in Southern Africa', ISS Paper 132, 2007.

¹⁹⁰ E.g., the Financial Action Task Force (FATF) is an inter-governmental body established in 1989 to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and related threats. FATF has issued numerous Special Recommendations in this field post-9/11: see www.fatf-gafi.org/topics/fatfrecommendations/. See other expert groups in Gardella, 'The Fight against the Financing of Terrorism', *supra* note 187.

¹⁹¹ *Ibid.* The 2008 CoE Convention also addresses the institutional dimension that often proves critical in practices; e.g., the need for financial intelligence units in each state party.

¹⁹² This requires a widespread or systematic attack, and that the civilian population, not state targets, be the object of the attack. See, e.g., ICC Statute definitions in Chapter 4A.1.1.

actors aimed at terrorising the civilian population in time of peace, which do not meet the widespread or systematic threshold requirement of crimes against humanity, carried out in a state that has not ratified the specific terrorism conventions, would probably not be proscribed under international law.¹⁹³ But the number of states to which this applies is narrowing as ratifications grow. Moreover, even in such circumstances, acts of international terrorism will be covered by ordinary domestic law. Whether or not domestic law criminalises terrorism as such, it will inevitably prohibit murder or attacks on the physical integrity of persons or on property.

The second point to note is that the lack of a definition of terrorism does not signify a lack of obligations to refrain from participating in or supporting terrorism and to take certain proactive counter-terrorist measures. Under the general rules governing relations between states, a state must, for example, 'not knowingly allow its territory to be used in a manner contrary to the rights of other states',¹⁹⁴ and refrain from the threat or use of force, direct or indirect, against another state.¹⁹⁵ As regards the treatment of persons subject to a state's 'jurisdiction' or 'control', the state is also obliged under IHRL not only to refrain from acts that jeopardise human security, but also to exercise due diligence to prevent and punish them.¹⁹⁶ States also have specific obligations in respect of the repression of 'terrorism' as such.¹⁹⁷ These include, for state parties to them, the obligations arising out of the specific terrorism conventions discussed above. They may also arise from, or be reflected in, UN resolutions, such as the far-reaching Security Council resolutions post-9/11.¹⁹⁸

¹⁹³ It has been suggested that what is needed is this definition of war crimes of terror, but applicable in time of peace, although this is, like other proposals, controversial. See website of the Terrorism Prevention Branch of the Office for Drug Control and Crime Prevention (http://undcp.org/terrorism_definitions.html) and concern expressed in Guzman, *Terrorism and Human Rights No. 1*, *supra* note 26, p. 191.

¹⁹⁴ *Corfu Channel (United Kingdom v. Albania) (Merits)*, ICJ Rep. 1949, p. 22.

¹⁹⁵ See state responsibility in international law and obligations to refrain from force, Chapter 3 and 5.

¹⁹⁶ On the extra-territoriality of human rights obligations see Chapter 7A.2.1. As noted above, terror within a state is not generally thought to be covered by the concept of 'international terrorism' for the purpose of the specific terrorism conventions, or the Draft Comprehensive Convention.

¹⁹⁷ As discussed below, the force of those obligations may be weakened or undermined by divergent interpretations of what is covered, and excluded, by the term.

¹⁹⁸ SC Res. 1368, *supra* note 158, states that 'those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable'. Unlike SC Res. 1373 (2001), *supra* note 2, this is not a Chapter VII

The importance of the existing, and proposed, terrorism conventions lies in the provision of a framework for the obligations regarding international cooperation¹⁹⁹ ensuring, for example, that states are obliged to 'extradite or prosecute' persons suspected of the offences covered by them.²⁰⁰ While the obligation to investigate and prosecute is not new or limited to these conventions, they seek to facilitate the effective discharge of the cooperation obligation and to remove obstacles to extradition.²⁰¹ Particular 'modalities' of cooperation aimed at discharging the general obligation to cooperate, such as intelligence and evidence-sharing, transfer of criminal proceedings, freezing and seizure of assets, execution and recognition of foreign judgments, or indeed extradition provisions, such as 'conditional extradition',²⁰² have been addressed selectively in particular treaties.²⁰³ It has been suggested that if there is a gap that the potential Draft Comprehensive Convention might fill, it may not relate so much to the definition, but to the lack of a comprehensive framework for international cooperation, covering all such modalities, including clarifying the hitherto irregular, and at times confusing, rules regarding extradition.²⁰⁴

The focus on and overuse of the terrorism terminology may, therefore, obscure the extent to which the sort of serious acts and threats we

resolution. SC Res. 1373 at paras. 1 and 2 obliges states to adopt wide-ranging measures including criminalisation, freezing of assets and denial of safe haven, as discussed in Chapter 3.1.2. See also, e.g., SC Res. 1624 (2005), UN Doc. S/RES/1624 (2005), which includes an array of preventive measures including asset freezing and confiscation.

¹⁹⁹ Cooperation is discussed in more detail in Chapter 4A.2 and the human rights issues raised are highlighted in Chapter 7A.4.3. Strengthening obligations of cooperation has been the main import of the sectoral conventions; see M. Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism beyond Violent Acts* (Leiden, 2010), p. 83 and Prost, 'The Need for a Multilateral Cooperative Framework', *supra* note 38.

²⁰⁰ On the obligation to extradite or prosecute (*aut dedere aut judicare*) war crimes, crimes against humanity, or genocide, for example, see also Chapter 4. See 'International Terrorism: Challenges and Responses', *Report from the International Bar Association's Task Force on International Terrorism*, 2003 and Chapter 7A.4 on positive human rights obligations.

²⁰¹ The usual requirements of extradition law (such as in some cases the 'double criminality' requirement), do not operate as a bar to extradition, while other developments seeking to further remove obstacles to extradition, or to streamline the extradition process, have been initiated, or advanced with renewed impetus, post-9/11, sometimes with troubling human rights implications. See Chapter 4B.2.2.

²⁰² Article 8(2) International Convention for the Suppression of Terrorist Bombings 1998, *supra* note 47.

²⁰³ See IBA Task Force, 'International Terrorism'.

²⁰⁴ *Ibid.* Prost, 'The Need for a Multilateral Cooperative Framework', *supra* note 38.

commonly associate with 'terrorism' are already regulated by other areas of international law. As is often the case, the problem lies more with the poor enforcement of existing norms, including but going beyond specific terrorism norms, than with the lack of a generic definition. In this respect it is noted that the Security Council's call to states to ratify existing terrorism conventions appears to have borne some fruit although the crucial challenge in that respect remains implementation.²⁰⁵ While a generic definition in a global convention, if it could be achieved and could garner near-universal support, may serve the interests of legal certainty and improve the efficiency of inter-state cooperation, what is clear is that its absence does not mean a legal void or necessitate legal paralysis.

2.4 Conclusion

Given the outstanding differences of view on its key elements, it is difficult to sustain that international terrorism is, *per se*, defined and clearly regulated in international law. The absence of a generic definition of terrorism leaves no gaping hole in the international legal order. Rather it would appear to be the case that what we commonly refer to as 'terrorism', although perhaps not defined as such, would most likely be prohibited by other international legal norms. In one view, then, the lack of a definition of terrorism is just not that significant. As one commentator noted: 'Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which the methods used are either unlawful, or the targets protected or both.'²⁰⁶

On the other hand, there can be little doubt of the political currency of the language of terrorism, particularly in the post-9/11 world.²⁰⁷ The stakes were raised considerably by SC Res. 1373 which, in what has been described as a new 'legislative' role for the Security Council,²⁰⁸ imposes

²⁰⁵ Many of the existing specific conventions are already widely ratified, though not necessarily implemented. See Chapter 4B. On the challenges, see generally Schrijver and van den Herik, *Counter-Terrorism Strategies*, *supra* note 34.

²⁰⁶ Higgins, 'The General International Law of Terrorism', *supra* note 177.

²⁰⁷ See, e.g., the State of the Union Speech by the United States' President, September 20, 2001: 'Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile Regime', available at: www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

²⁰⁸ P. Szasz, 'Note and Comment: The Security Council starts Legislating', 96 (2002) AJIL 901.

binding obligations on states to take extensive counter-terrorist measures. These include criminalising 'terrorism' and support for it, imposing serious penalties, freezing assets and excluding 'terrorists' from asylum and refugee protection. Broad-reaching obligations in respect of terrorism have been established without providing a clear definition of the conduct towards which such measures should be directed and, by contrast to earlier binding decisions taken by the Council, without limitation as to the situation or broad time frame in which it should apply.²⁰⁹

Imposing far-reaching obligations on the basis of an ambiguous concept – described by a senior French law enforcement official as having 'opened the universal hunting season on terrorism without defining it'²¹⁰ – may reap unfortunate consequences. First, it may generate uncertainty as to the precise nature of states' obligations towards the Council, and undermine those obligations. As has been noted: 'without reaching an acceptable international definition of the term "terrorism" one can sign any declaration or agreement against terrorism without having to fulfil one's obligations as per the agreement. For every country participatory to the agreement will define the phenomenon of terrorism differently from every other country.'²¹¹ Second, as discussed in other chapters, it raises fundamental concerns in respect of criminal law enforcement and the protection of a host of human rights.²¹² The lack of a binding definition, and 'too little too late' in terms of effective supervision of the human rights implications of national definitions and their implementation,²¹³ has meant that a substantial amount of effort purportedly dedicated to combating 'terrorism' has been misapplied for purposes that do not contribute to but rather subvert the international rule of law.

Despite the centrality of 'terrorism' in international law and practice, controversy surrounds most aspects of the concept in international law.

²⁰⁹ While the 9/11 attacks to which the resolution was responding would fall within any definition of terrorism, and of other crimes under international law, SC Res. 1373 is not in any way limited to that situation. See section 7B.1.2.

²¹⁰ Statement of Mr Jean-François Gayraud, Chief Commissioner of the French National Police, and of the French judge David Sénat, reported in Guzman, *Terrorism and Human Rights No. 2*, *supra* note 26, p. 26.

²¹¹ B. Ganor, 'Security Council Resolution 1269: What it Leaves Out', 25 October 1999, available at: www.ict.org.il/articles/articleDet.cfm?articleid=93. The reflection in relation to SC Res. 1269 is equally applicable to subsequent resolutions including SC Res. 1373, *supra* note 2.

²¹² Chapter 4 and 7B.5.

²¹³ See Chapter 7B.1 on security and human rights and on the role of the CTC; see also www.un.org/terrorism/pdfs/fact_sheet_3.pdf.

Absent a clear and accessible meaning to be attributed to the term, and consensus around the same, its susceptibility to abuse renders it an unhelpful basis for a legal, rather than political, analysis. Subsequent chapters will therefore address acts of terrorism and responses thereto based on other norms of international law.