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THE DEFINITION OF TERRORISM IN INTERNATIONAL LAW

Master Thesis

Supervisor:
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VILNIUS, 2013

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ABBREVIATIONS

ECtHR	European Court of Human Rights
EU	European Union
GA	United Nations General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
ILC	International Law Commission
OIC	Organization of Islamic Cooperation
SC	United Nations Security Council
STL	Special Tribunal for Lebanon
US	United States of America
UK	United Kingdom
UN	United Nations

INTRODUCTION

The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed.

Geoffrey Levitt[1]

When, during the Boston Marathon on April 15, 2013, two bombs exploded, killing three people and injuring 264 others, the SC expressed its deepest sympathy to the victims.[2] Yet terrorism has not been by any means a new topic to the SC, as references to it have been abundant in its recent resolutions.[3] In fact, its Resolution No. 2083 (2012) recognized terrorism as "one of the most serious threats to peace and security."[4] The GA has also expressed similar sentiments.[5] However, despite the immense threat posed by terrorism and its thorough condemnation,[6] it is mostly agreed that, as of 2013, there is no legally binding definition of terrorism.[7] This poses a set of legal problems that form the essence of this thesis.

The first problem is that of the need for a definition. At first sight, the answer to the question "do we need to define terrorism" seems to be an obvious "yes" because it is difficult to fight what one has not defined.[8] However, a number of scholars have argued against the need for a definition.[9] Rosalyn Higgins maintained that terrorism denotes a contemporary phenomenon rather than a discrete topic of international law, meriting to be defined.[10] John Dugard has stated that any form of

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[1] Levitt G., Is "Terrorism" Worth Defining?, 13 Ohio Northern University Law Review 97. (1986), p. 97 [hereinafter "Levitt"]

[2] SC Report of the 6948th meeting, UN Doc. S/PV.6948 (17 April 2013), p. 2

[3] SC Res. 2102, UN Doc. S/RES/2102 (2 May 2013), Preamble, recital 8; SC Res. 2100, UN Doc. S/RES/2100 (25 April 2013), Preamble, recital 4; SC Res. 2096, UN Doc. S/RES/2096 (19 March 2013), Preamble, recital 13; SC Res. 2093, UN Doc. S/RES/2093 (6 March 2013), Preamble, recital 7

[4] SC Res. 2083, UN Doc. S/RES/2083 (17 December 2012), Preamble, recital 2; See also SC Res. 1377, UN Doc. S/RES/1377 (12 November 2001), Preamble, recital 3

[5] GA Res. 42/159, UN Doc. A/RES/42/159 (9 December 1994), paras. 1, 2

[6] Cassese A., International Law, 2nd ed. (Oxford University Press, Oxford, 2005), p. 479 [hereinafter "Cassese's International Law"]

[7] Duchemann A., Defining Terrorism in International Law so as to Foster the Protection of Human Rights, 16 Revue Juridique de l'Océan Indien (2013), p. 175 [hereinafter "Duchemann"]; Lubell N., Extraterritorial Use of Force Against Non-State Actors (Oxford University Press, Oxford, 2011), p. 20 [hereinafter "Lubell"]

[8] Sorel J-M., Some Questions about the Definition of Terrorism and the Fight against its Financing, 14 European Journal of International Law (2003), p. 365

[9] Saul B., Defining Terrorism in International Law (Oxford University Press, Oxford, 2006), p. 8 [hereinafter "Saul's Defining Terrorism in International Law"]; Duchemann, n7, p. 27

[10] Higgins R., The General International Law of Terrorism, in Higgins R., Flory M. (eds), Terrorism and International Law (Routledge, London, 1997), pp. 13-14 [hereinafter "Higgins"]

international terrorism is already covered by sectoral anti-terrorism conventions.[11] This author respectfully disagrees with these opinions and dedicates Chapter One to analyze international criminal law, the anti-terrorism conventions and interaction of SC's anti-terrorism measures and human rights law in order to argue for the necessity of defining terrorism.

Second, if indeed defining terrorism is so important, a question begs to be raised: why does a definition not already exist? And indeed, many attempts have been made to define terrorism.[12] Chapter Two traces the evolution of these attempts from the 1937 League of Nations Convention to the negotiations over the Draft Comprehensive Convention in 2013. The Chapter analyzes the significance of these attempts, their proposed definitions and the biggest obstacles to reaching final agreement. It also analyzes the 2011 *Ayyash* judgment by the STL, where the Appeals Chamber concluded that a peacetime definition of terrorism had evolved in customary international law.[13] The author discusses the Tribunal's legal arguments and attempts to show that the *opinio juris* was far insufficient to conclude the existence of such a definition.

Third, having argued for the need for a definition and examined the past problems of reaching one, Chapter Three attempts to propose such a definition. To do this, the Chapter discusses its elements, discerned from past definitions and works of legal scholars, and analyzes them in light of legal doctrine and state practice. The Chapter also identifies the major points of disagreement over each element, evaluates the arguments surrounding each of these points, and attempts to propose ways how to resolve them. In consequence of this analysis, the author makes his own proposal for the definition of terrorism in international law.

Purpose of the thesis. The purpose of this thesis is to propose the definition of terrorism in international law.

Tasks. The thesis has set three tasks to achieve its purpose:

First, to analyze the existing treaty and customary international law relating to terrorism and its application in order to uncover the need for the definition of terrorism.

Second, to examine the major international efforts to reach consensus on the definition in order to identify their significance, achievements and insufficiencies.

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[11] Dugard C.J.R., The Problem of the Definition of Terrorism in International Law, in Eden, P. & O'Donnel, T. (eds.), September 11, 2001. A Turning Point in International and Domestic Law (Transnational Publishers, New York, 2005), p. 202 [hereinafter "Dugard"]

[12] Saul B., Attempts to Define 'Terrorism' in International Law, Sydney Law School Research Paper No. 08/115, SSRN (2008), p. 1 [hereinafter "Saul's Attempts to Define Terrorism in International Law"]

[13] Prosecutor v. Ayyash et al. (Interlocutory Decision on the Applicable Law), STL-11-01/I, Special Tribunal for Lebanon, Appeals Chamber (16 February 2011), para. 83 [hereinafter "Ayyash"]

Third, to resolve, while drawing on legal and historical analysis, the definitional obstacles in order to elucidate the contents of the definition of terrorism.

Hypothesis. The thesis raises the hypothesis that the definition of terrorism is necessary in order to increase the efficiency and legitimacy of the current international anti-terrorism regulation.

Object and subject. The object of the thesis is the treaty and customary international law relating to terrorism. The subject is the definition of terrorism in this law.

Methods. The thesis uses the following methods:

- analytical – it analyzes different legal sources, definitions of terrorism and definitional elements;
- comparative – it compares various definitions of terrorism in international legal documents;
- historical – it discusses historical attempts to reach a definition of terrorism and the events associated with them;
- logical – it uses induction, deduction and other logical operations to find common elements and links between various legal statements and definitions;
- philosophical – it makes and evaluates arguments and judgments, uses analogies;
- sociological – it analyzes the manifestation of the discussed legal rules in the actual state relations.

Literature used. This thesis refers to and draws on the analysis of major publicists who wrote on this topic. Among them are prominent scholars of international law, such as Rosalyn Higgins, Antonio Cassese, Ian Brownlie and John Dugard, experts of international criminal law, such as Mahmoud Cherif Bassiouni and Ilias Bantekas, experts of humanitarian and human rights law, such as Marco Sassòli and Helen Duffy. The thesis also pays close attention to authors extensively publishing on the definition of terrorism, most notably Ben Saul and Bibi van Ginkel.

Evaluation of the literature. This topic is moderately analyzed in the international legal literature, although that literature has become somewhat outdated and is disorganized. There is only one book entirely dedicated to the topic: "Defining Terrorism in International Law" by Ben Saul, but it is already seven years old. While some authors, notably, those mentioned above, have written articles and other publications on the topic, systemic analysis is often lacking and these publications often form only short detached parts of larger works. Moreover, this topic is new in Lithuania: no Lithuanian authors have published any articles or works analyzing and providing a definition in international law.

Legal sources used. The thesis relies heavily on international treaties, judicial decisions of international courts and tribunals, and resolutions of the UN bodies. Since most of the anti-terrorism treaties have never been adopted, this thesis analyzes the UN Draft Comprehensive Convention against International Terrorism, League of Nations Convention for the Prevention and Punishment of Terrorism, Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism. Furthermore, it analyzes sectoral anti-terrorism conventions, including the UN Convention for the Suppression of Unlawful Seizure of Aircraft, International Convention against the Taking of Hostages, etc. It also relies on the broadly ratified prominent international treaties, such as the UN Charter, the 1969 Vienna Convention on the Law of Treaties, the Rome Statute of the International Criminal Court and others. The thesis also refers to and discusses judicial decisions of international criminal tribunals, such as those in *Tadic*, *Galic, Vasiljevic* cases in the ICTY, and the *Ayyash* case in the STL. Finally, it relies on SC resolutions, including Resolutions No. 1373 (2001), 1566 (2004), 2083 (2012), GA Resolutions and many other primary and secondary sources of international law.

Importance of the thesis and its results. This thesis and its results have a wide-reaching theoretical and practical significance. Theoretically, the thesis will help delimit the elements and the scope of the definition of terrorism in international law, systematize recent legal practice over the definition, and enrich Lithuanian and international legal scholarship on the topic. Practically, the thesis will propose solutions for the current definitional problems and provide input that can potentially contribute to the ongoing legal and political debate over the definition.

Significance of the topic. The topic of the definition of terrorism is very significant internationally and, arguably, to a growing extent in Lithuania. Internationally, the topic is of great importance, because a definition would foreseeably lead into the adoption of the UN Comprehensive Convention against International Terrorism, the debate concerning which was stalled in April 11, 2013, mainly due to disagreements over the definition.[14] The lack of the definition was also likely the main cause why states rejected listing terrorism as an offense under the Rome Statute.[15] While Lithuania itself has "hardly any experience of terrorism,"[16] its current legal commitments to the UN and growing participation in the international community make the issue increasingly important to Lithuania too.

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[14] GA Press Release in the 9th Meeting, UN Doc. GA/L/3210 (12 April 2013), para. 1

[15] Duffy H., The "War on Terror" and the Framework of International Law (Cambridge University Press, Cambridge, 2005), p. 128 [hereinafter "Duffy"]

[16] Karlsson M., An Institution is Born: The Formation of a Lithuanian Counter-Terrorism Institution after 9/11, 44 Cooperation and Conflict 1 (2009), p. 38

1. NECESSITY OF DEFINING TERRORISM

Ben Saul remarks that "much of the international disagreement about defining terrorism stems from a more fundamental confusion about the underlying reasons for definition."[17] Indeed, arguing against the definition of terrorism, Rosalyn Higgins writes:

> *[I]s there an international law of terrorism; or merely international law about terrorism? Is our study about terrorism the study of a substantive topic, or rather the study of the application of international law to a contemporary problem? [...] My own view is that terrorism is not a discrete topic of international law with its own substantive legal norms. It is rather a pernicious contemporary phenomenon [...].*[18]

The question of whether there should be "international law of terrorism; or merely international law about terrorism" is essentially a question whether terrorism needs separate legal regulation (as it is argued below, such separate regulation would necessarily require defining terrorism); or if the existing regulation is sufficient (in which case, terrorism need not be defined, because existing legal categories, such as murder, can be used). As the ILC has set down in its Report on Fragmentation of International Law, if existing legal categories can effectively deal with a new phenomenon, we should not depart from them.[19] A good example of this is the crime of genocide. According to William A. Schabas, acts of genocide could now fit within the broader concept of crimes against humanity.[20] One could then argue that the separate crime of genocide and hence its definition were redundant because the crime can be confined to the aforementioned category. And indeed, the International Military Tribunal at Nuremberg convicted Nazis of crimes against humanity, not genocide, for the killings of European Jews.[21] However, genocide served an important legal function as a separate legal category: it created responsibility for genocidal acts in peacetime too, whereas, at that time, there were strong indications that crimes against humanity could only take place in times of war.[22] Therefore, one needs to determine what legal functions the

[17] Saul's Defining Terrorism in International Law, n9, p. 8
[18] Higgins, n10, pp. 13-14
[19] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the ILC, UN Doc.A/CN.4/L.682 (2006), paras. 15-16 [hereinafter "ILC Report on Fragmentation"]
[20] Schabas, W., Genocide in International Law: the Crime of Crimes (Cambridge University Press, Cambridge, 2000), p. 10 [hereinafter "Schabas"]
[21] Ibid.
[22] Ibid.

separate regulation of terrorism serves in order to determine whether the prerequisite of such regulation – a definition of terrorism, is necessary.

This author argues that terrorism should be defined because it would enable dealing with terrorist acts more effectively. First, a definition would allow making terrorism an international offense, which would increase the legitimacy and effectiveness of bringing important terrorists to justice. Second, a definition would let address terrorism through a comprehensive anti-terrorist convention, which would fix the gaps in the current fragmented international anti-terrorism law. Third, a definition of terrorism could help curtail state abuse disguised as response to terrorism and secure human rights. These three issues are discussed below in detail.

1.1. INTERNATIONALLY CRIMINALIZING TERRORISM

Had Osama Bin Laden been arrested instead of killed by the US Special Operations Forces on Pakistani territory on 2 May, 2011, the US would have had to face a number of problems over the provision of a fair trial, impartiality and independence of the judges, choice between a civilian versus a military court, or competition for jurisdiction and extradition.[23] These are some of the problems that, as this author argues below, could be solved by the international criminalization of terrorism, i.e. by trying terrorists in the ICC, another international criminal tribunal or perhaps both.

The idea of trying terrorists in an independent international institution is not new. In fact, the League of Nations attempted to create an international criminal court to try terrorist attacks as far back as in the 1930s.[24] However, these attempts failed and now terrorism *per se* is not a listed crime under the subject matter jurisdiction of any international court or *ad hoc* tribunal.[25]

This section first spells out why a definition of terrorism is necessary for international criminalization, then it explains what the benefits of such criminalization are, and then argues with the claims that terrorism does not need to be separately criminalized as terrorist acts could allegedly be qualified as war crimes or crimes against humanity.

[23] Van Ginkel B., Combating Terrorism: Proposals for Improving the International Legal Framework in Antonio Cassese (ed.), Realizing Utopia: The Future of International Law (Oxford University Press, Oxford, 2012), p. 476 [hereinafter "Van Ginkel"]
[24] Galingging R., Problems and Progress in Defining Terrorism, 21 Mimbam Hukum 3 (2009), p. 444 [hereinafter "Galingging"]
[25] Tiefenbrun S., A Semiotic Approach to a Legal Definition of Terrorism, 9 International Law Students Association Journal of International and Comparative Law (2002), p. 348 [hereinafter "Tiefenbrun"]

1.1.1. The need for a definition

International criminalization is impossible without an accepted definition of terrorism. The principal reason for that is the criminal law principle of *nullum crimen sine lege*, which is also fundamental to international criminal law,[26] and which posits that a criminal act cannot be suppressed through criminal jurisdiction if that act is not properly defined.[27]

In fact, this also seems to be the primary reason why terrorism is not included among the offenses under the jurisdiction of the ICC: as the Rome Statute was concluded, the States rejected the proposition of inclusion of the crime of terrorism but agreed to make a recommendation that when it came to reviewing the expansion of the ICC jurisdiction, this included review "with a view to arriving at an acceptable definition and [its] inclusion in the list of international crimes."[28] Thus, as Duffy also agrees,[29] the lack of an international definition is likely the main obstacle to the international criminalization of terrorism.

1.1.2. Necessity to criminalize terrorism as a separate crime

According individual criminal responsibility for terrorist acts would be useful in a number of ways:

First, international trial of terrorists could ensure a higher degree of due process than national trials and remove the shadow of partiality. As Cassese maintains, an international trial would dispel any doubts about a possible bias because the judges would be disassociated from the terrorist attack to a much higher extent – he gives an example of a New York jury trying terrorists for the September 11 attacks; the jury "would be too emotionally involved in the crime."[30] Indeed, among the other safeguards guaranteeing neutrality, the judges of e.g. the ICC are selected following the rule of a wide geographical representation,[31] which undermines the politicization of the case. Moreover, such an international trial would potentially be more transparent because it would not suffer from the national pressure to refrain from disclosing sensitive political evidence once that

[26] Prosecutor v. Vasiljevic (Trial Judgment), IT-98-32-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber (29 November 2002), para. 193
[27] Cryer R., An Introduction to International Criminal Law and Procedure (Cambridge University Press, Cambridge, 2007), p. 17 [hereinafter "Cryer"]
[28] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, (15 June - 17 July 1998), UN Doc. A/CONF.183/13 UN Official Records I (17 July 1998), p. 72
[29] Duffy, n15, p. 128
[30] Cassese A., Terrorism is Also Disrupting Some Crucial Legal Categories of International Law, 12 European Journal of International Law 5 (2001), p. 1000 [hereinafter "Cassese's Terrorism is Also Disrupting Some Crucial Legal Categories in International Law"]
[31] Rome Statute of the International Criminal Court, 2187 UN Treaty Series 90 (1998), art. 36(8)(a)(ii) [hereinafter "Rome Statute"]

evidence has been gathered.[32] Finally, all this would contribute to the public perception of the fairness of the trial, adding legitimacy to the verdict.

Second, international prosecution could ensure that terrorist acts do not go unpunished in less developed states. States, such as Egypt, Algeria, or the Philippines, often lack the financial capabilities to investigate, prosecute and punish terrorism.[33] Moreover, as van Ginkel remarks, terrorists may affect national prosecution "by threatening the government of unstable or weak states with adverse political consequences or even more violent repercussions."[34] In contrast, the independence of the ICC is guaranteed in this respect because it is financed by its States Parties (currently 122) together with the UN.[35]

Third, international prosecution could ensure greater cooperation in bringing captured terrorists to justice worldwide. The impartiality and authority associated with the Court could reduce the chances of terrorists receiving safe haven in states that might distrust the victimized state's judicial system or are unwilling to extradite for political reasons.[36] It could help avoid situations such as the one the German Federal Supreme Court found itself in when it quashed the conviction of a suspect for aiding and supporting the Hamburg branch of al-Qaeda because foreign states refused to provide potentially exonerating evidence.[37] It would also become harder for uncooperative states, such as Libya in the Lockerbie case discussed below, to refuse cooperation because they would be seen as breaching international law.

Moreover, international criminalization could achieve other important ends, such as giving greater resonance to the case,[38] initiating a more coordinated response to the issue, contributing to building the body of easily accessible and more consistent jurisprudence, et cetera. Some authors also suggest that including the crime of terrorism under the jurisdiction of the ICC in particular could provide a new impetus to renewing negotiation with the US over joining the Rome Statute – admittedly, this would most likely be a required step to make the international criminalization truly effective.[39]

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[32] Tiefenbrun, n25, p. 387
[33] Banchik M., The International Criminal Court & Terrorism, 3 Peace, Conflict and Development (2003), p. 9 [hereinafter "Banchik"]
[34] Van Ginkel, n23, p. 470
[35] Rome Statute, n31, arts. 40, 115
[36] Banchik, n33, p. 10
[37] Duffy, n15, p. 119
[38] Cassese's Terrorism is Also Disrupting Some Crucial Legal Categories in International Law, n30, p. 1000
[39] Pati R., Due Process and International Terrorism: An International Legal Analysis (Martinus Nijhoff, Boston, 2009), p. 474

1.1.3. Inadequacy of criminalizing terrorism as a war crime or a crime against humanity

Nonetheless, there are arguments that such specific criminalization is unnecessary because terrorism already falls under the Statute of the ICC as either a war crime[40] or a crime against humanity.[41] The author of this thesis holds that while this characterization could be maintained in some cases, it is far too limiting to be satisfactory.

This is evidently the case with war crimes, where in order to hold a terrorist act a war crime, the act would have to be perpetrated in the context of an armed conflict.[42] While the characterization of terrorist acts as war crimes is entirely appropriate to address the acts occurring in times of armed conflict, such characterization is unsuitable for a large number of terrorist acts, for example, most of the attacks in the developed states, because such attacks usually "take place in peacetime rather than as part of conventional warfare."[43] Admittedly, this is less evident with crimes against humanity, which no longer require a nexus to armed conflict.[44] They therefore merit additional discussion.

The principal reason why terrorism is not best fit to be qualified as a crime against humanity is because terrorist acts are frequently committed in an isolated and not well-coordinated manner. The definition of crimes against humanity includes certain atrocities that must be committed "as part of a widespread or systematic attack directed against any civilian population."[45] The Trial Chamber of the ICTR in *Akayesu* held that *widespread* may be defined as "massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims."[46] *Systematic* has been interpreted as requiring "a high degree of orchestration and methodological planning," possessing a continuous nature of the attack, an underlying plan or policy.[47]

It is not difficult to see how this can be of only limited use for prosecuting terrorist attacks. Any isolated terrorist attack would be excluded.[48] Any acts of terrorists working in smaller groups, without a clearly coordinated campaign, or concentrated attacks with severe consequences but not a

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[40] Tiefenbrun, n25, p. 384
[41] Dugard, n11, p. 202; Also see Arnold R., The Prosecution of Terrorism as a Crime Against Humanity, 64 Heidelberg Journal of International Law (2004), p. 999
[42] Rome Statute, n31, art. 8
[43] Scalabrino M., Fighting Against International Terrorism: The Latin American Response, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), p. 169 [hereinafter "Scalabrino"]
[44] Cryer, n27, p. 235
[45] Ibid, p. 230; Rome Statute, n31, art. 7
[46] Prosecutor v. Akayesu (Trial Judgment), ICTR-96-4-T, International Criminal Tribunal for Rwanda, Trial Chamber (2 September 1998), para. 579
[47] Duffy, n15, p. 81
[48] Prosecutor v. Tadic (Trial Judgment), IT-94-1-IT, International Criminal Tribunal for the former Yugoslavia, Trial Chamber (7 May 1997), para. 646

large number of victims would also be excluded. While it has been argued that acts of the magnitude of the September 11 attacks could be qualified as crimes against humanity,[49] it is difficult to see how the same would be true of smaller-scale terrorist attacks, for example, political assassinations.[50]

Moreover, there is another often-neglected problem in including terrorism as one of the crimes against humanity: the policy requirement. The Rome Statute requires that an attack against civilians be committed "pursuant to or in furtherance of a State or organizational policy" in order for it to qualify as a crime against humanity.[51] It is questionable whether the term "organizational" embraces private organizations, which do not have at least some characteristics of a state.[52] Even if it does, it is suggested that the "organization" needs to at least have a wide-reaching operational capacity or territorial control.[53] It is therefore uncertain whether a terrorist organization could meet this requirement.

Finally, even assuming that terrorist acts could be qualified as crimes against humanity, the uncertainty of whether any particular terrorist act will do so and the *ad hoc* nature of such qualification arguably require a separate category for terrorist crimes. This category, in turn, necessitates the definition of terrorism.

1.2. FIXING THE GAPS IN THE CURRENT INTERNATIONAL ANTI-TERRORISM LAW

On December 21, 1988, Pan Am flight 103A from London to New York exploded because of a bomb detonation and crashed in Lockerbie, Scotland, killing all 259 passengers and crew and 11 Lockerbie residents.[54] Three years later, the US indicted two Libyan citizens for the terrorist attack and requested their extradition from Libya.[55] Libya, however, refused the extradition.[56]

As Libya later asserted in the ICJ case over the issue, it established its jurisdiction and initiated investigation into the facts in compliance with Article 5 of the 1971 Montreal Convention

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[49] Dugard, n11, p. 202
[50] Saul B., Definition of 'Terrorism' in the UN Security Council: 1985–2004, 4 Chinese Journal of International Law (2005), pp. 145-146 [hereinafter "Saul's Definition of Terrorism in the SC"]
[51] Rome Statute, n31, art. 7(2)(a)
[52] Situation in the Republic of Kenya (Decision), ICC-01/09, International Criminal Court, Pre-Trial Chamber (31 March 2010), para. 51; Di Filippo M., Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of in the Category of International Crimes, 19 European Journal of International Law (2008), p. 566 [hereinafter "Di Filippo"]
[53] Prosecutor v Bemba Gombo (Pre-Trial Decision), ICC-01/05-01/08, International Criminal Court, Pre-Trial Chamber (15 June 2009), para. 81; Di Filippo, n52, p. 567
[54] Bantekas I., Nash S., International Criminal Law. 3rd ed. (Routledge-Cavendish, London, 2007), p. 27 [hereinafter "Bantekas and Nash"]
[55] Ibid.
[56] Ibid.

for the Suppression of Unlawful Acts against the Safety of Civil Aviation.[57] Moreover, there being no extradition treaty in force between Libya and the US, it was entitled by Article 8 of the same Convention not to extradite the accused since "this provision subjects extradition to the law of the requested State and Libyan law prohibits the extradition of Libyan nationals."[58] In fact, most of the judges of the Court agreed, and had it not been for a separate SC Resolution No. 731 (1992), obliging Libya to extradite, Libya would have been legally justified not to cooperate.[59]

This occurrence exemplifies the difficulties of the current legal framework to deal with terrorism. Section 1.2.3 will provide further analysis to expose some of the regulatory gaps in the existing conventions addressing terrorist acts. This will be followed by discussion why adopting a comprehensive convention (which has proven to be impossible without defining terrorism[60]) will fix some of the regulatory gaps. Before that, however, one has to review the regime of the existing conventions and the arguments for their suitability to regulate terrorism.

1.2.1. The existing legal framework to deal with terrorist offenses

As states have had trouble agreeing on the definition of terrorism, attempts to agree on a comprehensive terrorism convention were gradually replaced by the elaboration of international conventions that address specific forms of terrorism.[61] These conventions address hijackings of aircraft,[62] hostage taking,[63] protection of diplomatic agents,[64] terrorist bombings[65] and related issues.[66] All of these conventions use an inductive approach to the definition of terrorism: they never define the term itself and only prohibit very specific offenses in question, e.g. unlawfully forcefully exercising control over an aircraft.[67]

These conventions commonly include obligations for states to either extradite or prosecute individuals suspected of the offenses covered (*aut dedere aut judicare*), subject to certain

[57] Case Concerning Questions of Interpretation and Application of the Montreal Convention Arising Out of the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), Provisional Measures, ICJ Reports 3 (1992), para. 5
[58] Ibid.
[59] Bantekas and Nash, n54, p. 27
[60] Duffy, n15, p. 21
[61] Ibid, p. 23
[62] Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UN Treaty Series 105 (1970); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UN Treaty Series 177 (1971)
[63] International Convention against the Taking of Hostages, 1316 UN Treaty Series 205 (1979)
[64] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 UN Treaty Series 167 (1973)
[65] International Convention for the Suppression of Terrorist Bombings, 37 International Law Materials 249 (1998) [hereinafter "Terrorist Bombings Convention"]
[66] Levitt, n1, p. 101
[67] Ibid, p. 102

exceptions, or to cooperate in evidence gathering or providing intelligence.[68] However, unlike, for example, the 1949 Geneva Conventions or the Conventions against Torture and Genocide, the specific conventions do not themselves criminalize the conduct in question but only oblige states to do so in their domestic law.[69]

1.2.2. Arguments for the sufficiency of the existing framework

John Dugard provides weighty arguments for why these existing conventions are mostly sufficient to deal with terrorism:

> *Given the fact that existing conventions criminalizing different forms of international terrorism appear to cover all conceivable forms of terrorism, that it is no longer likely that terrorism will be treated as a political offense for purposes of extradition and that the armed forces are excluded from the scope of the Convention on the Suppression of Terrorist Bombings, there is no apparent need for a comprehensive convention on international terrorism that adds little, if anything, to existing conventions.*[70]

Moreover, Dugard also asserts that attempting to reach a definition has inherent risks: an unsatisfactory definition could likely alienate a body of states from the international efforts to fight terrorism, and, moreover, adopting a universal convention based on such a definition, if it is less widely adopted or ratified than the existing conventions, could undermine the effectiveness of the current framework.[71]

While acknowledging the due weight of the opinion expressed by Dugard, the author disagrees with the claim over the sufficiency of the existing regime and holds that it fails to address terrorism in an adequate and effective way. The next section explains the problems with the existing framework.

1.2.3. Problems with the existing framework

The fragmented regime of anti-terrorist conventions is unsatisfactory for a couple of reasons:

First, the specific conventions are unduly limited in their scope of application, which makes the implementation of these conventions more difficult or allows individuals and states to escape such implementation.

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[68] Duffy, n15, pp. 23-24
[69] Ibid, p. 24
[70] Dugard, n11, p. 204
[71] Ibid, p. 205

Only acts committed by very specific means can fall under the scope of the Convention. As Michael Scharf notes, "attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not covered; while similar attacks against an airplane or an ocean liner would be."[72] Because of the limits on the means of assault used, the 1997 Terrorist Bombing Convention or any other existing treaty failed to encompass the 1997 attack on tourists in Luxor, where six gunmen bearing automatic rifles killed 62 individuals.[73] Due to such limitations on the means, the conventions also neglect more contemporary forms of terrorism, such as cyberterrorism.[74]

Moreover, the conventions unduly limit their scope for various technical reasons. An aircraft seizure, before the aircraft's engine has been turned on, would not be counted as a terrorist offense under the 1963 Tokyo Convention.[75] While the 1970 Hague Convention fixes this gap, any assistance provided to the seizer by persons outside the aircraft would not qualify under that Convention either.[76]

Second, the conventions frequently fail to include sufficiently clear obligations for extradition. As a result, after the US had refused to extradite three members of the Irish Republican Army to the UK,[77] the UK and the US resorted to an *ad hoc* solution of concluding the 1985 Supplementary Treaty, which controversially narrowed the political offender exception essentially to nonviolent political action, making political dissenters engaging in any violent action extraditable.[78]

Third, the fears expressed over a new comprehensive convention undermining the older conventions are in large part unfounded. Simply concluding a new convention would not preclude the application of older conventions among states, which are not parties to the newer convention,[79] and, moreover, it would still be possible to apply the older conventions where their regulation is

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[72] Scharf M.P., Defining Terrorism as the Peacetime Equivalent of War Crimes: a Case of Too Much Convergence, 7 International Law Students Association Journal of International and Comparative Law 391 (2000-2001), p. 393 [hereinafter "Scharf"]
[73] Galingging, n24, p. 456
[74] Scharf, n72, p. 393
[75] Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 UN Treaty Series 220 (1964), art. 1(3)
[76] Bantekas and Nash, n54, p. 24
[77] Defabo V., Terrorist or Revolutionary: The Development of the Political Offender Exception and Its Effects on Defining Terrorism in International Law, 2 American University National Security Law Brief 2 (2012), pp. 84-85 [hereinafter "Defabo"]
[78] Ibid, p. 87
[79] Vienna Convention on the Law of Treaties, 1155 UN Treaty Series 331 (1980), art. 30(4)(b)

considered more precise.[80] This was also the endorsed view taken by a number of states in the Sixth Committee of the GA, when drafting the Comprehensive Convention on Terrorism, where these states suggested that the old conventions should apply as a *lex specialis*.[81]

1.2.4. Addressing the problems by defining terrorism

Many of the gaps and inconsistencies in the existing framework could be remedied by a comprehensive convention on terrorism, which is only achievable if terrorism is defined. As Cherif Bassiouni regrets, "there is no comprehensive convention on terrorism that even modestly integrates, much less incorporates into a single text, these thirteen conventions so as to eliminate their weaknesses."[82] Such a convention could clarify the aforementioned irregular rules on extradition, as well as enable more effective inter-state cooperation, including intelligence, evidence sharing, penal matters and preventive action.[83] Moreover, regulation in a comprehensive convention with a definition is likely to encourage the solidification of the law into custom, which would become binding on all states and not just those that have signed and ratified the existing conventions.[84]

However, as it is discussed in detail in Chapter Two, agreeing on the definition has been the main obstacle to adopting such a comprehensive convention against terrorism.[85] In consequence, a definition has to be reached before these questions can be resolved.

1.3. SECURING HUMAN RIGHTS IN FIGHTING TERRORISM

The SC responded to the terrorist attacks of September 11, 2001, by recognizing "the inherent right of individual or collective self-defense in accordance with the Charter" against *terrorist attacks*[86] and by passing Resolution No. 1373 (2001), where it created a number of obligations for UN Members to fight *terrorist acts*.[87] However, despite doing so, the SC failed to define the term *terrorism*.[88] Prior to this, the lack of a definition was legally inconsequential because no

[80] ILC Report on Fragmentation, n19, para. 56
[81] Subedi S.P., The War on Terror and U.N. Attempts to Adopt a Comprehensive Convention on International Terrorism, in Eden, P. & O'Donnel, T. (eds.), September 11, 2001. A Turning Point in International and Domestic Law (Transnational Publishers, New York, 2005), p. 219 [hereinafter "Subedi"]; Duchemann, n6, p. 27
[82] Bassiouni C. M., Legal Control of International Terrorism: A Policy-Oriented Assessment, 43 Harvard International Law Journal 83 (2002), p. 92 [hereinafter "Bassiouni"]
[83] Ibid, p. 102; Duffy, n15, p. 44
[84] Duffy, n15, p. 41
[85] Ibid, p. 21
[86] SC Res. 1368, UN Doc. S/RES/1368 (12 September 2001), Preamble, recital 3
[87] SC Res. 1373, UN Doc. S/RES/1373 (28 September 2001), paras. 1-2
[88] Saul's Definition of Terrorism in the SC, n50, p. 157

international rights or duties hinged on the term.[89] However, the newly created obligations, combined with the lack of a definition, have allowed states to overly broaden their own definitions of terrorism, violating human rights, discriminating certain groups or attacking political dissent and then hiding under the pretense of the sanctioned "fight" against terrorism.[90] This section will discuss the obligations against terrorism imposed by the SC, the human rights issues arising out of them and then explain why defining terrorism could address these issues.

1.3.1. SC anti-terrorism measures

On 28 September, 2001, just over two weeks after the September 11 attacks, the SC issued Resolution No. 1373. The Resolution obliged all UN Members to prevent, suppress and freeze the financing of terrorism,[91] to refrain from supporting or letting their territories be used for terrorist acts, as well as to prevent such acts and to deny safe haven to all who are associated with them.[92] It also obliged states to establish terrorist acts as serious criminal offenses, prevent the movement of terrorists over state borders and to assist other states in criminal investigations or proceedings.[93] It established a Counter-Terrorism Committee, which was to observe how states fulfill these obligations,[94] but which also decided not to define terrorism.[95]

Moreover, the SC strengthened all of this by calling any act of international terrorism "a threat to international peace and security."[96] As observed by Judge Kooijmans in the *Wall* Advisory Opinion of the ICJ, this was a "completely new element" in the history of SC resolutions because the Council made so "without any further qualification [… and] without ascribing these acts of terrorism to a particular State."[97] Thus, the SC for the first time designated a generalized phenomenon (rather than a specific act) as a threat to international peace and security and created concrete obligations to fight it.[98]

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[89] Saul B., Defining 'Terrorism' to Protect Human Rights, Sydney Law School Research Paper No. 08/125, SSRN (2008), p. 6 [hereinafter "Saul's Defining Terrorism to Protect Human Rights"]
[90] Van Ginkel, n23, p. 467
[91] SC Res. 1373, UN Doc. S/RES/1373 (28 September 2001), para. 1
[92] Ibid, para. 2
[93] Ibid.
[94] Ibid, para. 6
[95] Saul's Defining Terrorism in International Law, n9, p. 49
[96] SC Res. 1373, UN Doc. S/RES/1373 (28 September 2001), Preamble, recital 3; Also see SC Res. 1368, UN Doc. S/RES/1368 (12 September 2001), Preamble, para. 1
[97] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 131 (2004), Separate Opinion of Judge Kooijmans, para. 35
[98] Saul's Definition of Terrorism in the SC, n50, p. 158

Despite referring 18 times to *terrorist acts* in its operative part, the Resolution failed to adopt a definition of terrorism. As the preparatory works show, this was deliberate because consensus on the Resolution depended on avoiding a definition.[99]

1.3.2. Human rights violations resulting from the measures

By instituting measures against *terrorist acts* without at least providing a definition for the term, the SC has not only created uncertainty over the precise nature of states' obligations, undermining the effects of regulation,[100] but also opened the doors for wide interpretations of the term, raising concerns over human rights violations.[101] These concerns materialized in a number of cases:

First, certain governments have reportedly attempted to gain international support for dealing with internal problems under the heading of fighting terrorism.[102] China characterized Uighur separatists as terrorists, Russia did so for Chechen rebels and India applied this title to militants in Kashmir.[103] Similar unilateral characterizations were also made in Indonesia in respect to Aceh and West Papua insurgencies, to Maoist insurgencies in Nepal, or hostile forces in Israel and Morocco.[104] There were further concerns in a number of other countries.[105] These characterizations are dangerous not only because they risk potentially unilaterally undermining the UN Charter rights to self-determination,[106] but also because they attempt to use the already existing SC's regime to get other states to follow such unilateral characterizations.

Second, states have been using the justification of the "fight against terrorism" to neutralize political opponents or to limit political space for civil society organizations. This happened, for example, in Bahrain, where human rights defenders were tried under charges of terrorism.[107] In Maldives, an opposition politician was sentenced as a terrorist to ten years' imprisonment for peaceful protesting.[108] The lack of a definition has therefore provided these states a direct justification for oppressing dissent.

Third, the various sanctions instituted by Resolution No. 1373 (2001) have put fundamental human rights in jeopardy. It has been recognized by judicial bodies that similar SC's financial and

[99] Saul's Defining Terrorism to Protect Human Rights, n89, p. 6
[100] Duffy, n15, p. 45
[101] Saul's Definition of Terrorism in the SC, n50, p. 160
[102] Van Ginkel, n23, p. 465
[103] Saul's Defining Terrorism to Protect Human Rights, n89, p. 7
[104] Ibid.
[105] Van Ginkel, n23, p. 467
[106] Charter of the United Nations, 1 UN Treaty Series XVI (1945), art. 1(2) [hereinafter "UN Charter"]
[107] Van Ginkel, n23, p. 467
[108] Saul's Defining Terrorism to Protect Human Rights, n89, p. 7

physical sanctions (although under a different sanctions regime) infringe on fundamental human rights to property[109] or to private life.[110] The ECtHR also noted in the September 2012 *Nada v. Switzerland* case that although SC's resolutions' aim of fighting terrorism is a legitimate aim in terms of justifying interference with certain human rights, the reasons for implementing such resolutions must still be "relevant and sufficient" in every individual situation in order to avoid violating human rights.[111] It is difficult to conceive how the determination whether to apply anti-terrorist sanctions against any particular individual can be correctly and legitimately made without using at least a benchmark definition of terrorism.

1.3.3. The need for a definition

Defining terrorism could delegitimize states' attempts to interpret terrorism overly broadly by imposing a uniform standard of interpretation of the term. The SC once came close to providing a definition in its Resolution No. 1566 (2004), although that definition was limited because it referred only to acts which already constituted "offenses within the scope of and as defined in the international conventions and protocols relating to terrorism."[112] Despite such limits, legal scholars have nonetheless noted that consensus on even such a definition would still be a step in the right direction.[113] However, that definition was not declared as binding and the Resolution did not require states to adapt their policies to it, as apparently states have not done either.[114]

Without a definition, states are free to enact their counter-terrorism obligations arbitrarily. As Duffy observes, there is no way to stop states from interpreting such obligations to advance their own policies.[115] Powerful states will be able to impose their definitions on others and corrupt governments will be given the means to apply arbitrary criteria for justifying and punishing their opponents.[116] This all calls for agreement on the definition of terrorism in international law.

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[109] Joined Cases C-402P and C-415/05P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, European Court Reports I-nyr (2008), para. 371
[110] Nada v Switzerland (Grand Chamber), Application No. 10593/08, ECtHR (2012), para. 165
[111] Ibid, paras. 174, 185, 196
[112] SC Res. 1566, UN Doc. S/RES/1566 (8 October 2004), para. 3
[113] Saul B., Civilizing the Exception: Universally Defining Terrorism, Sydney Law School Research Paper No. 12/68, SSRN (2012), p. 7 [hereinafter "Saul's Civilizing the Exception: Universally Defining Terrorism"]
[114] Saul's Definition of Terrorism in the SC, n50, p. 165
[115] Duffy, n15, p. 45
[116] Galingging, n24, p. 442

1.4. CONCLUSIONS

An analysis of the current international law shows that, contrary to the views expressed by Higgins and Dugard, the definition of terrorism is necessary to achieve the following tasks:

First, enabling the international criminalization and prosecution of terrorist acts. This could guarantee a higher degree of fair process, remove the shadow of partiality, associated with national prosecution, and ensure that terrorism is punished in a larger number of states and with greater cooperation. Such international criminalization requires defining terrorism because of the principle *nullum crimen sine lege*, which is a fundamental principle of international criminal law. Furthermore, alternative solutions to qualify terrorism as a crime against humanity or a war crime are inadequate because terrorist acts are frequently isolated, not sufficiently coordinated or often take place outside the context of an armed conflict.

Second, fixing the gaps in the current international anti-terrorism law. The existing sectoral anti-terrorism conventions are unduly limited in their scope of application and regulation. Further, their fragmented nature and internal contradictions make effective inter-state cooperation difficult to achieve. This could be fixed by adopting a comprehensive anti-terrorism convention, which would integrate the sectoral conventions and eliminate their weaknesses. Such a convention, by its very nature, requires a definition of terrorism.

Third, securing human rights in the fight against terrorism. The SC in its Resolution No. 1373 (2001) created international obligations in regards to terrorism, while failing to define this term. This enabled a number of states to violate human rights and crush political dissent under the disguise of the "fight against terrorism," as well as put fundamental human rights in jeopardy. The definition of terrorism could help remedy these problems by adding clarity and legitimacy to the Council's action against terrorism.

2. HISTORICAL ATTEMPTS TO DEFINE TERRORISM

On April 12, 2013, gathering for the sixteenth time already, the UN Ad Hoc Committee established by the GA Resolution No. 51/210 (1996) was forced to conclude that it had once again failed to reach consensus on the Comprehensive Convention on International Terrorism.[117] Just like in the previous years, the principal disagreement among states was over the definition of terrorism.[118] Yet this was only the most recent episode of the decades-long history of unsuccessful attempts at reaching a definition.[119]

Having concluded in Chapter One that such definition is significant for international law, and before delving into analysis of its elements, it is necessary to overview the principal attempts to find a binding definition of terrorism in international law and to identify their achievements and shortcomings. This Chapter is thus going to trace the evolution of the major efforts to reach or identify a binding universal definition of terrorism by political and judicial bodies.

First, the Chapter discusses the first international attempt to reach a universal definition of terrorism in the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, which was ultimately unsuccessful.

Second, the discussion turns to the 1972 US-proposed Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, which was also unsuccessful, but the debates concerning which exemplified some of the biggest obstacles the international community would face in future attempts to reach a definition.

Third, the Chapter considers the 1999 Convention for the Suppression of Financing of Terrorism, which was the first universal instrument to contain a partial definition of terrorism.

Fourth, the UN Comprehensive Convention on International Terrorism is discussed. The author attempts to explain the regulations in the Convention, as well as to systematize the major points of disagreement over the definition among the parties.

Fifth, the Chapter reviews and evaluates the 2011 *Ayyash et al.* Judgment by the STL, where the Appeals Chamber stated that a definition of terrorism in customary international law has gradually emerged. Since most academic work on the definition of terrorism is premised on the

[117] GA Press Release in the 9th Meeting, UN Doc. GA/L/3210 (12 April 2013), para. 1
[118] GA Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, A/65/37 (Fourteenth session (12 to 16 April 2010)), UN Doc. A/65/37 (16 April 2010), para. 11
[119] Saul's Defining Terrorism in International Law, n9, pp. 168-190

assumption of the lack of international consensus on such a definition,[120] the author carefully evaluates the arguments provided by the Appeals Chamber, eventually reaching the conclusion that the Chamber erred in its reasoning. The author also assesses the impact this decision may have on international law.

The thesis will not discuss some less impactful attempts to find a definition, such as the 1954 ILC Draft Code of Offenses, which was never formally adopted by the GA or in a treaty form.[121] The definition referred therein is of little significance because, as argued by Higgins, terrorism was referred in that Code just by way of convenience[122] and it eventually disappeared from the text altogether.[123] The same is true for the subsequent 1996 ILC Draft Code of Crimes: while adding nothing new to the discussion, the Code eventually failed to provide a definition of terrorism, simply including "acts of terrorism" among war crimes.[124] Further, the Draft Rome Statute definition is also excluded from the discussion because it was mostly an amalgamation of previous definitions[125] and mentions of terrorism were in any event omitted from the final text due to disagreement among states.[126]

Neither will this thesis discuss instruments that do not aim to provide a general definition of terrorism. Such are the specific conventions that prohibit the various forms of terrorism, e.g. the International Convention for the Suppression of Terrorist Bombings or the International Convention against the Taking of Hostages. Such instruments only apply in their particular fields and do not provide a general definition of terrorism.[127] National and regional definitions are not addressed either because they provide widely differing definitions,[128] which are limited to the particular states or regions.[129] In any event, analysis of national or regional terrorism legislation is abundant in works by other authors.[130]

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[120] Defabo, n77, p. 69
[121] Saul's Attempts to Define Terrorism in International Law, n12, p. 9
[122] Higgins, n10, p. 27
[123] Saul's Attempts to Define Terrorism in International Law, n12, p. 12
[124] ILC Draft Code of Crimes against the Peace and Security of Mankind, Yearbook of the ILC, vol. II (Part Two) (1996), art. 20(f)(4)
[125] Saul's Attempts to Define Terrorism in International Law, n12, p. 16
[126] Duffy, n15, p. 39
[127] Ibid, p. 23
[128] Kirsch S., Oehmichen A., Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon, 1 Durham Law Review Online (2011), p. 15 [hereinafter "Kirsch"]
[129] Ibid, p. 5
[130] Reinisch A., The Action of the European Union to Combat International Terrorism, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), pp. 119-162; Saul's Defining Terrorism in International Law, n9, pp. 262-269; Scalabrino, n43, pp. 163-210; Tiefenbrun, n25, pp. 363-375

Finally, the discussion over the attempts of national, regional bodies and international organizations to define terrorism, insofar as such attempts are significant for the formation of the definition of terrorism in customary international law, is in any case subsumed by the discussion of the STL's *Ayyash* decision in Section 2.5 of this Chapter.

2.1. 1937 LEAGUE OF NATIONS CONVENTION

2.1.1. Historical background

The first attempt to define terrorism in international law is recorded in the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism.[131] This Convention was triggered by the assassination of King Alexander I of Yugoslavia while on a state visit to France in 1934 and Italy's subsequently refusal to extradite his assassins on the "political offense" exception.[132] The Convention thus encouraged states to remove the aforementioned exception to extradition (although the states did not agree on the obligation to do so[133]) and required them to criminalize terrorism.[134]

2.1.2. Definition of terrorism

Under Article 1(2) of the Convention, terrorism was defined as "… criminal acts directed against State and intended or calculated to create a state of terror in the minds of particular persons, or groups of persons or the general public."[135] The possible criminal acts were further enumerated in Articles 2 and 3 and included "any willful act causing death or grievous bodily harm or loss of liberty" to certain categories of public officials, "willful destruction of, or damage to, public property", and "any willful act calculated to endanger the lives of members of the public."[136]

Therefore, the Convention referred only to the means used ("criminal acts"), the intent ("create a state of terror") and the targets ("directed against State"). Its lack of reference to the actor indicates that it did not exclude states from being guilty of terrorism. However, only states could be affected by terrorism, thus any attack against, for example, trade-union activists would not qualify. It is also noteworthy that the definition was silent on the purpose of the action, i.e. a "political"

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[131] Dugard, n11, p. 189
[132] Saul B., The Legal Response of the League of Nations to Terrorism, 4 Journal of International Criminal Justice 78 (2006), p. 2
[133] Saul's Attempts to Define Terrorism in International Law, n12, p. 8
[134] Saul B., The Legal Response of the League of Nations to Terrorism, 4 Journal of International Criminal Justice 78 (2006), p. 3 [hereinafter "Saul's Legal Response of the League of Nations to Terrorism"]
[135] Convention for the Prevention and Punishment of Terrorism, 19 League of Nations Official Journal 23 (1938), art. 1(2) [hereinafter "League of Nations Convention"]
[136] Ibid, arts. 2, 3

purpose was not required. The lack of such references made certain authors criticize the definition as too vague and too confusing.[137]

There were a couple of points of contention when drafting the Convention. First, states expressed concerns over defining terrorism by using the word "terror" as this made the definition circular and hence tautological.[138] Yet they could not find any satisfactory replacement.[139] Second, it was not clear whether "a state of terror" could only be created in the general public, as the Netherlands or Poland argued, or whether it could also be created in particular individuals whom it was designed to affect, as it was argued by the UK.[140] The adopted text "in the minds of particular persons" codified the latter position, however, it gave rise to the unsettling situation where it was enough for a couple of people to perceive "terror" to give rise to terrorism.

2.1.3. Significance

In any event, the Convention only attracted 24 signatories (of which most were European and India was the only colonial state), never entered into force and was forgotten for a long time as a result of the befall of the Second World War.[141] Yet it was important because for many years it served as a benchmark in UN debates, it was reflected in Article 5 of the Draft Rome Statute and in a working definition adopted by the SC Resolution No. 1566 (2004).[142] Thus, the definition was an important starting point in the international attempts to define terrorism.

2.2. 1972 US DRAFT CONVENTION

2.2.1. Historical background

Interest in defining terrorism resurfaced in response to the killings of 11 Israeli athletes in the 1972 Munich Olympic Games and of 26 civilians at the Lod airport in Israel.[143] The US proposed the Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, brought forward in the Sixth Committee of the GA.[144] The Convention required states to criminalize the offenses in the Convention by "severe penalties", created an *aut dedere aut judicare* obligation

[137] Hennebel L., Lewkowicz G., Le problème de la définition du terrorisme, in Hennebel, L., Vandermeersch, D. (ed.), Juger le terrorisme dans l'Etat de droit (Bruylant, Bruxelles, 2009), p. 22 [hereinafter "Hennebel"]
[138] Saul's Legal Response of the League of Nations to Terrorism, n134, p. 10
[139] Ibid, p. 11
[140] Ibid.
[141] Dugard, n11, p. 189
[142] Saul's Legal Response of the League of Nations to Terrorism, n134, p. 19
[143] Dugard, n11, p. 191
[144] Levitt, n1, p. 98

for states in respect to terrorist suspects and required sharing information with other states in case the suspects flee to their territory.[145]

2.2.2. Definition of terrorism

While reference to terrorism is deducible from its title, the Draft Convention did not use the term itself. Its Article 1 referred to an "offense of international significance" and defined it as "unlawfully killing, causing serious bodily harm, or kidnapping" when such acts are "intended to damage the interests of or obtain concessions from a State or an international organization" and when they have a certain international dimension.[146] Moreover, it excluded acts committed by or against armed forces in the course of military hostilities.[147]

In contrast to the League of Nations Convention, this Draft Convention referred not only to the means (the listed criminal actions) but also the purpose of the act ("to damage the interests of or obtain concessions from a State or an international organization"). Furthermore, it was silent on its targets (thus not limiting them only to states anymore) and the intent ("creating terror" was no longer required). It also tacitly allowed states to be guilty of terrorism, especially by not excluding acts of armed forces committed in peacetime from the definition.[148] Thus, while being structurally similar to the League of Nations Convention, it was substantially different.[149]

2.2.3. The debate in the Sixth Committee

Perhaps more significant than the Draft Convention itself is the response to it by states in the Sixth Committee. The principal debates concerning the Convention and the definition in general illustrate what has perhaps become the biggest obstacle in agreeing on the definition of terrorism in international law.[150] Representing the common outlook of the developing countries,[151] the representative of Indonesia Mr. Joewono stated:

> *A distinction should be drawn between terrorism perpetrated for personal gain and other acts of violence committed for political purposes. Although recourse to violence must ultimately be eliminated from relations between peoples, it must be borne in mind that*

[145] US Draft Convention for Prevention and Punishment of Terrorism Acts, 4-6 International Legal Materials 11 (1972), arts. 2,3,5 [hereinafter "US Draft Convention"]
[146] Ibid, art. 1
[147] Ibid, art. 1(a)(c)
[148] Saul's Attempts to Define Terrorism in International Law, n12, p. 13
[149] Levitt, n1, p. 99
[150] Dugard, n11, p. 188
[151] Ibid., p. 192

certain kinds of violence were bred by oppression, injustice, and the denial of basic human rights, and the fact that whole nations were deprived of their homeland and their property. It would be unjust to expect such peoples to adhere to the same code of ethics as those who possessed more sophisticated means of advancing their interests. Such acts could not be classified as terrorism; on the contrary, they were to a certain extent to be regarded as anti-terrorist acts aimed at combatting a much more repulsive kind of terrorism, namely colonialism and other forms of domination. These forces of violence were legitimate, being founded on the right of self-determination proclaimed in the Charter and often reaffirmed by the United Nations.[152]

In other words, fuelled by the recent wars of national liberation in South Africa and Palestine, developing countries demanded an exception from terrorism for acts committed by national liberation movements.[153] In their eyes, the state was the terrorist, and those, who were deprived of army units and proper weapons and thus compelled to resort to unconventional methods to achieve their goal, were freedom fighters.[154] However, developed countries refused to agree and, in the end, no compromise could be reached. [155]

2.2.4. Significance

The ideological differences in the Sixth Committee proved insurmountable and the Convention was never even opened for adoption. However, the Convention is significant in two ways. First, it sheds light on states' position at the time of the Cold War and indicates that criminalizing terrorism was an urging issue at that time already. Second, the debate over the Convention helps explain the origins of the disagreement on a universal definition of terrorism. In fact, this disagreement resulted in states turning away from the search of such a universal definition and combatting terrorism through sectoral conventions instead.[156] Two decades would have to pass before they would return to the previous search.

[152] Dugard, n11, p. 192
[153] Duffy, n15, p.19
[154] Dugard, n11, p. 188
[155] Saul's Attempts to Define Terrorism in International Law, n12, p. 14
[156] Duffy, n15, p. 23

2.3. 1999 UN TERRORISM FINANCING CONVENTION

2.3.1. Historical background

The end of the Cold War, the termination of the apartheid in South Africa and the signing of the Oslo Accords depolarized state relations, which led into a new wave of cooperation in fighting international terrorism.[157] Firstly, the GA passed a non-binding declaration on "Measures to Eliminate International Terrorism" and resolutions endorsing it, where the GA referred to terrorist acts in the wording of the 1937 Convention and condemned them as unjustifiable "wherever and by whomsoever committed."[158] Secondly, the GA endorsed the sectoral 1997 International Convention for the Suppression of Terrorist Bombings, which had the same wide condemnation without exceptions for national liberation movements.[159] Thirdly, the 1999 Convention for the Suppression of Financing of Terrorism, requiring states to outlaw and make severely punishable the providing or collecting funds for terrorist purposes and to freeze and seize such funds,[160] was drafted.[161]

2.3.2. Definition of terrorism

Even though Article 2 of the Convention primarily refers to the existing anti-terrorism conventions to determine whether an act falls within the Convention's scope, it also alternatively provides a generic definition of terrorism: "any act intended to cause death or serious bodily injury to a civilian, or to any person not taking an active part in 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 an act."[162] The Convention also requires an international element and continues the trend of excluding any justifications for acts of political or ideological nature.[163] Importantly, the definition is limited to the purposes of determining terrorism financing.[164]

The definition is innovative in that it requires a specific terrorist purpose ("to intimidate a population or to compel a government or an international organization to do or abstain from doing an act") - this intent will be reproduced in identical terms in the Draft Comprehensive Convention

[157] Dugard, n11, p. 194, 198
[158] GA Res. 42/159, UN Doc. A/RES/42/159 (9 December 1994), paras. 1, 2
[159] Terrorist Bombings Convention, n65, arts. 5, 8(1)
[160] Duffy, n15, p. 20
[161] International Convention for the Suppression of the Financing of Terrorism, 39 International Law Materials 270 (1999), arts. 2(1), 4 [hereinafter "Terrorism Financing Convention"]
[162] Ibid, arts. 2(1)(a), 2(1)(b)
[163] Ibid, arts. 3, 6
[164] Kirsch, n128, p. 3

on the Suppression of Terrorism[165] - and it uncommonly describes the targets of terrorism with reference to an armed conflict (civilians or persons "not taking an active part in hostilities"). Moreover, while there are no limitations on the means of acting ("any act"), the required intent ("to cause death or serious bodily injury") is rather narrow as it excludes all damage to property.[166]

2.3.3. Significance

All in all, the 1999 Convention has entered history as the first treaty in force that contains a definition of acts of terrorism.[167] Its international significance is demonstrated by the fact that the Supreme Court of Canada used the definition to explain an undefined reference to terrorism in Canadian law.[168] Moreover, the SC Resolution No. 1566 (2004), itself being a non-binding attempt to define terrorism,[169] also draws the intent and partly the purpose element from this Convention.[170] Yet, this aside, the 1999 Convention itself sadly addressed only one aspect of terrorism – its financing – and it eventually fell short of facilitating consensus among states for a future comprehensive definition.

2.4. 2000 UN DRAFT COMPREHENSIVE CONVENTION

2.4.1. Historical background

In 2000, India circulated the revisited Draft Comprehensive Convention against International Terrorism, which was originally submitted to the UN Sixth Committee in 1996.[171] The participating states, still agitated by the September 11 attacks, made substantial drafting progress in 2001 and 2002 and had reached agreement on most of the 27 Articles by 2003, when the negotiations stalled.[172] The situation has remained so until the present, as the last unfruitful attempts to reach an agreement took place from 8 to 12 April 2013 in the UN.[173]

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[165] Gioia A., The UN Conventions on the Prevention and Suppression of International Terrorism, in Nessi G., International Cooperation in Counter-Terrorism the United Nations and Regional Organizations in the Fight against Terrorism. (Ashgate, England, 2006), p. 13
[166] Ibid, p. 13
[167] Galingging, n24, p. 457
[168] Suresh v. Canada (Minister of Citizenship and Immigration), 1 Supreme Court of Canada Records 3 (2002), para. 6
[169] Saul's Definition of Terrorism in the SC, n50, p. 165
[170] SC Res. 1566, UN Doc. S/RES/1566 (8 October 2004), para. 3
[171] GA Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, A/55/37 (Fourth session (14-18 February 2000)), UN Doc. A/55/37 (18 February 2000), para. 26
[172] Saul's Attempts to Define Terrorism in International Law, n12, p. 21
[173] GA Press Release in the 9th Meeting, UN Doc. GA/L/3210 (12 April 2013), para. 1

2.4.2. Definition of terrorism

The proposed Article 2 of the Draft Convention defines terrorism as unlawfully and intentionally causing either "(a) death or serious bodily injury to any person; or (b) serious damage to public and private property, including a State or government facility; or (c) other such damage where it is likely to result in major economic loss" when the purpose of such conduct is to "intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[174] The Draft also requires an international element and declares that its regulation gives way to the specific anti-terrorist treaties, although this is still a point of contention.[175]

The Convention does not require the acts to have political motives.[176] While it recognizes the compulsion of "a Government or an international organization" as a possible purpose (a formulation, which excludes other actors, such as civil society organizations or trade unions), this is only an alternative to intimidation of a population. Moreover, the definition covers a wide range of targets, as it includes not only people but also property, and "serious damage" is sufficient to constitute a terrorist offense (as opposed to, for instance, the higher "extensive destruction" standard used in the EU).[177]

2.4.3. The main obstacles to reaching a definition

Although various aspects of the definition were criticized by scholars over the years on the basis of the breadth and vagueness of terms,[178] the definition was initially not perceived as controversial among states.[179] However, two insurmountable obstacles relating to the definition quickly arose. The negotiators attempted to depart from these by treating them as challenges not to the definition itself but as exclusions from the scope of the definition, found in Article 18, but this treatment has not changed the substantial character of the problems.[180] The two main issues were whether the Convention should exclude: first, the activities carried out in people's struggle for self-determination, and second, the acts of states' armed forces.[181]

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[174] Draft Comprehensive Convention against International Terrorism: Consolidated text prepared by the coordinator for discussion, UN Doc. A/59/284 (2005), art. 2 [hereinafter "UN Draft Comprehensive Convention"]
[175] Ibid, arts. 3,4; Subedi, n81, p. 219
[176] Saul's Attempts to Define Terrorism in International Law, n12, p. 21
[177] Ibid.
[178] Duffy, n15, p. 21
[179] Saul's Attempts to Define Terrorism in International Law, n12, p. 22
[180] Duffy, n15, p. 22
[181] Galingging, n24, p. 458

The first issue is a manifestation of the debate over terrorists and freedom fighters, which resurrected partly as a result of the Second Palestinian Intifada.[182] The debate started when Malaysia proposed exempting from the definition "armed struggle against foreign occupation, aggression, colonialism and hegemony, aimed at liberation and self-determination in accordance with the principles of international law."[183] This proposal was copied from the text of the 1999 Convention to Combat Terrorism by the OIC.[184] While most developed states disagreed, the OIC states constantly emphasized "the need for a clear legal definition of terrorism, which distinguished terrorism from the legitimate struggle of peoples fighting in the exercise of their right to self-determination."[185]

The second issue is the question whether the Convention should apply to states. Firstly, the proposal of the developed states was to exclude the activities of state's armed forces "during an armed conflict, as those terms are understood by international humanitarian law, in so far as they are governed by that law" from the Convention.[186] Secondly, it was also proposed to exclude even the peacetime activities of state's military forces if these activities are "governed by other rules of international law."[187]

The debate over these issues has become intertwined. The developing states were willing to make the first concession and to place the state's armed forces during an armed conflict outside the ambit of the Convention if the Western states agreed to do so for self-liberation movements.[188] To achieve this purpose, they offered the following text of the Convention: "the activities of the *parties* during an armed conflict, *including in situations of foreign occupation*, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention" (emphasis added.)[189] The reference to *parties* (the coordinator had originally proposed *armed forces* instead) seeks to exempt organizations such as the Palestinian Liberation Organization, Hamas, or Hezbollah.[190] Moreover, the reference to *situations of foreign occupation*

[182] Dugard, n11, p. 198
[183] Subedi, n81, p. 213
[184] Convention of the Organisation of the Islamic Conference on Combating International Terrorism, 1 July 1999, Annex to OIC Resolution No: 59/26-P (1999), art. 2
[185] GA Summary record of the 23rd meeting, UN Doc. A/C.6/67/SR.23 (4 December 2012), para. 38; Van Ginkel, n23, pp. 465-466; Saul's Attempts to Define Terrorism in International Law, n12, p. 22
[186] Dugard, n11, p. 199
[187] Duchemann, n7, p. 28
[188] Dugard, n11, p. 199
[189] Ibid.
[190] Saul's Attempts to Define Terrorism in International Law, n12, p. 23

seeks to exclude situations where there are no hostilities, such as the violence against India in Kashmir or against Israel in the Occupied Palestinian territories.[191]

Regarding the second part of the proposal concerning the peacetime activities of state's military forces, the developing states agreed to exclude these activities only "inasmuch as they are *in conformity* with other rules of international law" (the original proposal text stated *governed).*[192] Thus, these states considered that the Comprehensive Convention should cover state conduct notwithstanding the existing international law, including international human rights law.

2.4.4. Significance

The Draft Comprehensive Convention, if it materialized, would have the potential to become a leading instrument in the international fight against terrorism. The Convention is meant to "fill legal lacunae and supplement the existing sectoral conventions."[193] The draft text included obligations to prevent and criminalize terrorism, and to extradite or deny refugee status for individuals suspected of it.[194] Moreover, it required states to cooperate in investigating and combatting terrorism, and included rules for establishing jurisdiction over terrorist offenses.[195] The Draft included human rights and fair treatment guarantees and protections against frivolous extradition requests.[196] It comprehensively addressed the issue of terrorism.

Furthermore, the Convention's definition of terrorism would result in a much-needed breakthrough in the international attempts to define the phenomenon and help concentrate states' communal effort in fighting terrorism. This could also possibly give rise to further significant initiatives. However, with the debate currently on hold, the future of the Convention remains uncertain.

2.5. 2011 STL AYYASH ET AL. DECISION

In an interlocutory decision rendered on 16 February, 2011, the Appeals Chamber of the STL held that a widely accepted definition of terrorism had emerged in customary international law.[197]

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[191] Ibid, p. 24
[192] Saul's Attempts to Define Terrorism in International Law, n12, p. 24
[193] GA Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, A/66/37 (Fifteenth session (11 to 15 April 2011)), UN Doc. A/65/37, para. 9
[194] UN Draft Comprehensive Convention, n174, arts. 5, 8, 9(1), 12, 15, 18
[195] Ibid, arts. 7, 9(2), 14
[196] Ibid, arts. 13, 16
[197] Ayyash, n13, para. 83

Although commentators have criticized the decision,[198] it is the first international decision of its kind; moreover, it brings attention to customary international law relating to the definition of terrorism, overviewing regional and national legal opinion in this respect. For these reasons, the decision merits additional consideration.

2.5.1. Background

The STL is a tribunal established by an agreement between the UN and Lebanon to prosecute persons responsible for the 14 February, 2005, attack resulting in the death of former Lebanese Prime Minister Rafiq Hariri and other persons.[199] The Tribunal operates by applying exclusively Lebanese criminal law.[200]

In 2007, in the case of Ayyash and three other Lebanese citizens, who are indicted *inter alia* for charges of "committing a terrorist attack by means of an explosive device,"[201] the Trial Chamber, following the Rules of Procedure and Evidence of the Tribunal, referred a number of questions to the Appeals Chamber.[202] It asked whether, despite the Tribunal's jurisdiction being limited to Lebanese law, it should nonetheless take into account the relevant applicable international law in order to define terrorism; and if so, what the constituent elements of terrorism are.[203]

The Appeals Chamber issued an interlocutory decision in response. It answered that while the Tribunal must apply only Lebanese law, in interpreting this law it may take into account the international law that is binding on Lebanon in order to align the Lebanese law as much as possible to international legal standards.[204] The Chamber stated that not only there was now a widely accepted definition of terrorism in customary law, but also a customary rule had emerged, regarding terrorism as an international crime in time of peace.[205] It also indicated that "a broader norm that would outlaw terrorist acts during times of armed conflict may also be emerging."[206]

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[198] Mylonaki E., Defining Terrorism: the Contribution of the Special Tribunal for Lebanon, 1 JURA (2012), p. 79 [hereinafter "Mylonaki"]; Saul's Legislating from a Radical Hague, n198, p. 2 [hereinafter "Saul's Legislating from a Radical Hague"]; Kirsch, n128, p. 1
[199] SC Res. 1757, UN Doc. S/RES/1757 (30 May 2007), art. 1.1
[200] Ibid., art. 2
[201] Ayyash et al. (Indictment), STL-11-01, Special Tribunal for Lebanon, Filling number: F0007 (10 June 2011), paras. 1.b, 4
[202] Kirsch, n128, p. 2
[203] Ibid, p. 3
[204] Ayyash, n13, paras. 33, 40, 41
[205] Ibid, paras. 83, 85
[206] Ibid, para. 107

2.5.2. Definition of terrorism

According to the Appeals Chamber, the newly emerged peacetime customary rule prohibiting terrorism required the following 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.*[207]

The definition requires exactly the same intent as the UN Draft Comprehensive Convention. Interestingly, the definition has a broader notion of a transnational element: while the Chamber stated that such element will "typically be a connection of perpetrators, victims, or means used across two or more countries", which is in line with Article 4 of the Comprehensive Convention, it also added that "it may also be a significant impact that a terrorist act in one country has on another," so expanding the notion.[208] Finally, it unconventionally includes an open-ended broad description of criminal acts, being satisfied with only the threat of such acts.

Notably, the emergence of such a crime with this definition was a position that Judge Antonio Cassese, the President of the Tribunal, had been advocating in his academic works for some time.[209]

2.5.3. Reasoning of the Tribunal

The Appeals Chamber set out to show that despite the disagreements among states in defining terrorism, "closer scrutiny demonstrates that in fact such a definition has gradually emerged."[210] It undertook to demonstrate the existence of both the required *opinio juris* and state practice.[211]

Without explicitly addressing the latter element, the Chamber referred to a pattern of GA resolutions since 1994 that condemn terrorism, the SC Resolution No. 1566 (2004), which allegedly defines terrorism,[212] the EU definition of terrorism arising out of the Council Framework Decision

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[207] Ibid, para. 85
[208] Ibid, para. 90
[209] Cassese's International Law, n6, p. 50
[210] Ayyash, n13, para. 83
[211] North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment, ICJ Reports 4 (1969), paras 76-77
[212] Ayyash, n13, para. 88

of 13 June, 2002,[213] and to a number of national legislative acts,[214] which reportedly "consistently define terrorism in similar if not identical terms to those used in the international instruments just surveyed."[215]

The Chamber also referred to the Canadian Supreme Court in *Suresh v. Canada*, the Italian Supreme Court of Cassation in *Bouyahia Maher Ben Abdelaziz et al.* and a number of other national court decisions, allegedly affirming that terrorism was an offense in customary international law.[216] It noted that "judicial decisions stating instead that no generally accepted definition of terrorism exists are far and few between, and their number diminishes each year."[217]

In order to deal with the assertion that disagreement over the "freedom fighter" exception hindered reaching a definition of terrorism, the Chamber relied on the absence of such an exception in the 1999 UN Terrorism Financing Convention.[218] It asserted that the fact that a very high number of states, including many OIC Members, had ratified the Convention and refrained from making any reservation indicated that such an exception was not applicable in customary international law.[219] In consequence, it held that the few states still insisting on such an exception "could, at most, be considered persistent objectors."[220]

2.5.4. Criticism

The Appeal Chamber's evidence for the customary definition of terrorism can be criticized on both procedural and substantive grounds.

On procedural grounds, it has been argued that the Chamber's definition holds little significance because, primarily being constituted to apply national law, the Tribunal stepped out of its competence to interpret international law.[221]

This author cannot fully agree with this opinion for two reasons. First, even though the grounds on which the Tribunal established its jurisdiction can be contested, it appears that it did provide a successful *prima facie* case why it needed to rely on international law to interpret national law harmoniously with it. As put by Oppenheim, "[a] rule of national law which ostensibly seems to

[213] Ibid, para. 93
[214] Ibid, paras. 94-95
[215] Ibid, para. 91
[216] Ibid, paras. 86, 100
[217] Ibid, para. 100
[218] Ibid, para. 108
[219] Ibid.
[220] Ibid, para. 110
[221] Kirsch, n128, p. 6

conflict with international law must, therefore, if possible always be interpreted so as to avoid such conflict."[222] Second, such purely procedural criticisms fail to address the essence of the Tribunal's arguments, thus potentially dangerously overlooking points that may have significance on determining the contents of customary international law.

On substantive grounds, however, there are far more convincing responses to the Chamber's arguments for the existence of a customary definition of terrorism:

First, the international legal sources cited by the Chamber cannot sustain the case for a universal definition. The key GA Resolution No. 42/159 cited by the Chamber emphasizes the need only to develop rules against terrorism.[223] The SC Resolution No. 1566 (2004) only defines as terrorist those acts that are already criminalized under the specific conventions.[224] Moreover, the Resolution is not binding and provides a different definition of terrorism than that cited by the Chamber.[225] Finally, despite the Chamber's reference to the EU law, definitions differ even among the EU Member States: for example, the British definition requires a political, religious or ideological cause, whereas German and French definitions do not.[226]

Second, the Chamber's reference to national legislation is problematic. Most definitions of terrorism in national legislation are made strictly for the purposes of that legislation, thus, it is questionable whether the Tribunal could rely on purely national definitions to evidence a rule of international law.[227] Moreover, there are fundamental conceptual differences between the national definitions cited: e.g. some definitions criminalize sectarian strife, others require "subverting the constitutional order" and yet others subsume comparatively trivial offenses.[228]

Third, the national cases cited have been criticized not only for their scarcity but also for the misrepresentation of these decisions.[229] Indeed, for example, the Canadian Supreme Court in *Suresh* only interprets "terrorism" for the limited purpose of applying a domestic immigration law statute, while recognizing a general absence of a definition.[230] Similarly, although the Italian Court of Cassation in *Bouyahia Maher Ben Abdelaziz et al*. does provide a definition, that definition includes

[222] Jennings R., Watts A. (eds), Oppenhelms' International Law, 9th ed., Vol. I, (Oxford: Oxford University Press, 2008), pp. 81-82
[223] GA Res. 42/159, UN Doc. A/RES/42/159 (9 December 1994), para. 12
[224] SC Res. 1566, UN Doc. S/RES/1566 (8 October 2004), para. 3
[225] Saul's Legislating from a Radical Hague, n198, pp. 9, 10
[226] Kirsch, n128, p. 15
[227] Ibid, p. 5
[228] Saul's Legislating from a Radical Hague, n198, p. 7
[229] Kirsch, n128, pp. 9, 16
[230] Saul's Legislating from a Radical Hague, n198, p. 11

a "purpose" element and hence significantly departs from the definition suggested by the STL.[231] The remaining cited national cases are also problematic.[232]

Lastly, the Tribunal's reliance on the wide adoption of the Terrorism Financing Convention to discredit the freedom fighter exception is unwarranted. The Convention only refers to financing offenses and does not purport to provide a general definition of terrorism.[233] This wide interpretation ignores the fact that states were compelled to adopt the sectoral approach to fight terrorism precisely because they could not agree on a definition.[234] Finally, the recent deadlock on the UN Comprehensive Convention also demonstrates the lack of consensus.[235]

In conclusion, this author believes that the decision cannot withstand these substantial criticisms against the arguments and it is highly doubtful whether the alleged customary definition of terrorism has indeed emerged.

2.5.5. Significance

In February 2012, the England and Wales Court of Appeal, relying on the Appeal Chamber decision in *Ayyash et al*., recognized terrorism as a crime under international law in peacetime.[236] While the STL decision itself is based on contestable grounds, as discussed above, and it is unclear whether other courts and institutions will follow it, the decision has arguably contributed to international law in three significant ways:

First, the Tribunal has brought attention to custom as a way of defining terrorism. This is important because previous attempts have been overwhelmingly focused on treaty definitions. This is a welcome development because a customary definition of terrorism could be more flexible and more susceptible to change and inclusion of new forms of the phenomenon.[237]

Second, the Tribunal has brought attention to an important distinction between terrorism in times of peace and in times of armed conflict. It did so by stating that a definition existed only in times of peace, and *opinio juris* regarding one in times of war had not crystalized. As this author argues in Chapter Three, this distinction might be helpful in reaching a universal definition of terrorism.

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[231] Ibid, p. 12
[232] Saul's Legislating from a Radical Hague, n198, pp. 10-17; Kirsch, n128, p. 16
[233] Kirsch, n128, p. 11
[234] Saul's Legislating from a Radical Hague, n198, p. 18
[235] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 3
[236] Regina v Mohammed Gul, Court of Appeal (Criminal Division), England and Wales Court of Appeal Criminal Division Records 280 (2012), paras. 33-34
[237] Mylonaki, n198, p. 80

Third, the Tribunal provides valuable analysis and reflection of the international efforts to define terrorism. This may help states find similarities in their legal regulations, on which they can later successfully base their consent. Furthermore, it encourages the international community to review its practice and reevaluate it in light of the current developments.

Fourth, even assuming, as some authors do,[238] that this definition was entirely a judicial construct, it demonstrates the international community's frustration in the lack of a definition and brings its attention to the need to agree. In so doing, the decision has the potential to fuel the discussion on terrorism as a legal concept.[239]

Despite all this, it has to be acknowledged that the fact that the decision was based on questionable grounds is potentially damaging. Not only may this undermine the confidence in international judicial institutions,[240] it may also infringe human rights of the accused, the principle of *nulla poena sine lege*, and possibly mislead legal professionals and the wider society of the current status of the definition of terrorism. In the opinion of this author, *de lege lata*, there is currently no definition of terrorism in customary international law, and this has to be acknowledged in order to have a more constructive debate on the definition.

2.6. CONCLUSIONS

The repeated attempts by the international community to reach an agreement on the definition of terrorism indicate the importance of such a definition. Moreover, they also indicate that significant progress has been achieved, as the attempts were able to build on one another. These attempts could be traced in the following order:

First, the 1937 League of Nations Convention, which was the first large-scale international attempt to define terrorism. Although the Convention never entered into force, it provided a preliminary definition of terrorism. While the definition referred only to the means ("criminal acts"), intent ("create a state of terror") and targets ("directed against State") of terrorism and attracted considerable critique, it served as a useful benchmark in future debates and definitions.

Second, the 1972 US Draft Convention against terrorism. Its definition included an element of purpose ("to damage the interests of or obtain concessions from a State or an international organization"), which, in a modified form, is found in many contemporary definitions of terrorism. The Convention never left its draft form because of the first significant historical manifestation of

[238] Kirsch, n128, p. 2
[239] Ibid., p. 19
[240] Ibid., p. 23

the debate whether national liberation movements could be regarded as terrorists. The disagreement over the definition has also led states into adopting sectoral conventions to combat terrorism instead of trying to adopt a comprehensive convention.

Third, the 1999 Terrorism Financing Convention. Although its definition is limited to the offense of the financing of terrorism, the Convention has nontheless entered history as the first treaty in force that contained a definition of terrorism. It defines targets of terrorism with reference to armed conflict and it also requires a specific terrorist purpose ("to intimidate a population or to compel a government or an international organization to do or abstain from doing an act"), which has been carried into the Draft Comprehensive Convention. Despite its limited scope, the Convention has been used by many as evidence of the crystalizing agreement on the definition of terrorism.

Fourth, the UN Draft Comprehensive Convention. Meant to fill the legal gaps in the existing sectoral conventions, if adopted, it would become one of the most important anti-terrorism conventions. Its current proposed definition covers attacks not only against people but also property and includes the purpose element from the 1999 Convention Terrorism Financing. Unfortunately, the work on the Convention has been obstructed by disagreement whether states and national liberation movements can be the actors of terrorism.

Fifth, the 2011 *Ayyash* decision by the STL. The Tribunal stated that the definition of terrorism in peacetime had emerged in customary international law. The definition required the perpetration of a criminal act with intent to spread terror and an international element. Although the reasoning of the Tribunal is highly contestable, the decision has arguably demonstrated the international community's frustration at the inability of states to agree. Moreover, it has brought attention to customary law, as opposed to treaty law, as a way of defining terrorism, drawn a significant distinction between terrorism in peacetime and terrorism in wartime and provided valuable reflections on the past attempts to reach a definition.

3. CONTENTS OF THE DEFINITION OF TERRORISM

Not all may compare the search for the definition to the quest for the Holy Grail,[241] but few can disagree that defining terrorism indeed possesses some intrinsic difficulty. The crime has many multifaceted expressions and is over-loaded with different connotations.[242] Defining it is made even more difficult by the need to make the definition precise enough, so as not to unnecessarily constrain individual liberties, yet broad enough to subsume the entire phenomenon.[243] Lastly, the need for the definition to be practical and enforceable further complicates the process.[244]

However, finding a definition is possible.[245] The already-achieved definition of the crime of genocide serves as an indication that even complex phenomena may be defined for the purposes of international law.[246] In addition, the already discussed attempts to reach a definition at various political organs and scholarly works further confirm that the task is possible.

This past practice also shows that nearly all attempts to define terrorism split up the phenomenon into several elements and combine them, either cumulatively or alternatively, to reach a definition.[247] Most international law publicists who have written on the issue, e.g. Duffy, Higgins and Saul, follow this approach.[248] This author also chose to follow this reductive approach to a definition.

It is useful to note that different publicists have chosen somewhat different structure for their analysis of terrorism. For example, some analyze only three elements, while others identify five or more.[249] This author suggests that this is a question of structure rather than substance. This is so because practically all elements of terrorism are interrelated in their nature. For example, when talking about the "freedom fighter" exception to terrorism, some authors analyze the "actors," others state that this discussion falls within the element of "motive" and yet others create an entirely new

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[241] Levitt, n1, p. 97
[242] Kolb R., The Exercise of Criminal Jurisdiction over International Terrorists, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), p. 228 [hereinafter "Kolb"]
[243] Hennebel, n137, p. 59
[244] Kfir I., The United Nations and the Challenge of Combatting International Terrorism, in Centre of Excellence Defence Against Terrorism (ed.), Legal Aspects of Combating Terrorism: Volume 47 NATO Science for Peace and Security Series: Human and Societal Dynamics (IOS Press, 2008), p. 25
[245] Saul's Defining Terrorism in International Law, n9, p. 57
[246] Convention on the Prevention and Punishment of the Crime of Genocide, 277 UN Treaty Series 78 (1948), art. 2
[247] Kolb, n242, p. 234
[248] Duffy, n15, pp. 32-37; Higgins, n10, pp. 15-17; Saul's Defining Terrorism in International Law, n9, pp. 59-65
[249] Garnett R., Clarke P., Cyberterrorism: A New Challenge for International Law, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), pp. 465-466 [hereinafter "Garnett and Clarke"]; Tiefenbrun, n25, p. 360

category of "exceptions to the general definition."[250] All of these approaches are equally valid. What is important is to cover the substantive parts of the definition, regardless of what structure one chooses.

With this in mind, based on an analysis of previous definitions, work by famous scholars and logical analysis, this author has identified six elements to the definition of terrorism: actor, conduct, intent, target, motive, and scope. The author will analyze each of these elements and attempt to present them in light of the historical debate, identify their problems, evaluate and suggest solutions.

3.1. ACTORS

The Special Rapporteur on Terrorism and Human Rights, Ms. Kalliopi K. Koufa, has stated that "among the main stumbling blocks in the effort to define terrorism has been the question of who can be identified and labeled as 'terrorist'."[251] That question could be rephrased: "who cannot be identified and labeled as 'terrorist'?" The debate among states indicates that there are two suggested exclusions from the possible scope of actors: states and national liberation movements.[252] This section attempts to identify and analyze the problems related with each of them.

3.1.1. States

Rosalyn Higgins provides the following example:

> *If a State uses rockets to coerce another State, that may be lawful or unlawful, depending on all the circumstances. But we do not usually describe it as 'terrorism'. If rockets are launched by an individual, we are apt to speak of 'terrorism'. Is terrorism something that is perpetrated only by private persons or can States engage in 'terrorism'? If a government kills those demonstrating against it, is this unlawful killing, or is it 'terrorism'?*[253]

This passage aptly demonstrates the first issue in defining terrorism: can states be considered as perpetrators of it, or is it something that is exclusively done by individuals? This problem has also found its way into the legal debate. For example, Duffy notes that state negotiations over a further convention addressing nuclear terrorism "have been stymied by differences of view as to the potential authors of terrorism, and specifically whether state terrorism should fall within the

[250] Duffy, n15, p. 25; Fassbender B., The UN Security Council and International Terrorism, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), p. 91; Di Filippo, n52, p. 533
[251] Special Rapporteur Ms. Kalliopi K. Koufa, Progress Report to the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2001/31 (27 June 2001), para. 33
[252] Duffy, n15, p. 35
[253] Higgins, n10, p. 16

Convention's scope."[254] Moreover, as discussed above, the same issue has also been plaguing the negotiations of the Comprehensive Convention.

On the one hand, there are two arguments for excluding states from the potential actors of terrorism:

First, there is already an existing body of law to address terrorist acts perpetrated by states. Quoting Brownlie, "there is no category of the 'law of terrorism' and the problems must be characterized in accordance with the applicable sectors of public international law: jurisdiction, international criminal justice, State responsibility, and so forth."[255] Duffy also points out that the existing human rights, humanitarian law or the law on the use of force are partially capable of addressing issues of state terrorism.[256]

Second, state terrorism can partly be addressed through individual criminal responsibility. The Nuremberg Tribunal stated in one of its judgments that: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[257] It can be argued that the mere absence of state responsibility for terrorism does not mean that the actual commanders and perpetrators of such attacks will go unpunished.

However, there are also significant counter-considerations:

First, it has been questioned whether the current international law can effectively address state terrorism. States can often shield behind rules of attribution of conduct or the difficult enforceability of the current legal obligations. Such inefficiency of international law is evidenced by the fact that especially weaker states often view the provision of funding and operational assistance to and the use of terrorist organizations to confront more powerful states as a form of combatting stronger adversaries while avoiding punishment.[258]

Second, similar arguments apply to the efficiency of international criminal law to deal with the actual commanders of terrorism. Following the reasoning of the ICJ in the *Genocide* case, the mere existence of individual responsibility does not exclude the possibility that states as entities may

[254] Duffy, n15, p. 25
[255] Brownlie, I., Principles of Public International Law, 7th ed. (Oxford University Press, Oxford, 2008), p. 713
[256] Duffy, n15, p. 36
[257] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, Nuremberg, Germany (1947), p. 223
[258] Hickman D.J., Terrorism as Violation of the "Law of Nations:" Finally Overcoming the Definitional Problem, 29 Wisconsin International Law Journal 447 (2012), p. 456

also bear responsibility for the same offense.[259] Indeed, individual responsibility may not be enough to address the consequences of state terrorism.

Given this apparent equality of arguments, this author suggests that this problem should be addressed by choosing the more equitable solution[260] - including states in the definition. The exclusion of state conduct from terrorism is legally asymmetric, given that non-state actors, often combatting against state, are not given this privilege. As Bassiouni puts it:

> *The exclusion of state actors' unlawful terror-violence acts from inclusion in the overall scheme of terrorism control highlights the double standard that non-state actors lament and use as a justification for their own transgressions. This disparity of treatment between state and non-state actors is plainly evident, and constitutes one of the reasons for the attraction of adherents to non-state terrorist groups.*[261]

Indeed, for the reasons outlined above and in order to eliminate such double standard, the definition should include both state and non-state actors. Thus, for example, extrajudicial assassinations of political opponents by state officials should be properly qualified as terrorism.[262] It is clear that only individuals could be responsible for terrorist offenses under international criminal law, however, states should be able to be held responsible under all the other relevant international anti-terrorism law.

3.1.2. National liberation movements

The uncertainty whether national liberation movements should be exempted from being defined as terrorists is perhaps the greatest of all obstacles to reaching the definition of terrorism. The problem has been summarized by famous dicta "one person's freedom fighter is another's terrorist"[263] and "what is terrorism to some is heroism to others."[264] In fact, this debate resembles the last-century debate between the developing and developed countries over whether wars of national liberation should be governed by rules of international or national armed conflict.[265] Unlike that debate, however, the present one does not show signs of any agreement.

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[259] Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosnia & Herzegovina. v. Yugoslavia), Preliminary Objections, ICJ Reports 1 (1996), para. 32
[260] Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Judgment, ICJ Reports 18 (1982), para. 71
[261] Bassiouni, n82, p. 102
[262] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 15
[263] Dugard, n11, p. 188
[264] Bassiouni, n82, p. 101
[265] Cassese A., Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press, Cambridge, 1995), p. 201 [hereinafter "Cassese's Self-Determination of Peoples"]

This problem also has a clear political dimension. For instance, the Palestine Liberation Organization is a terrorist group for Israel and a group of freedom fighters for many Arabs.[266] India has also described Kashmiri resistance groups as terrorists, while many Pakistanis regard them as freedom fighters.[267] The Afghani Mujahedeen were freedom fighters for the West and terrorists for the Soviet Union.[268] Nelson Mandela was a terrorist for Ms. Thatcher and Mr. Cheney, yet he was a freedom fighter for many South Africans.[269] Finally, Syrian rebels are terrorists for the Syrian President Bashar al-Assad, while they are freedom fighters for others.

Legal support for the rights of national liberation movements exists in the provisions of international treaties, such as the ICCPR, the ICESCR or even the UN Charter.[270] It is argued that national liberation movements, deprived by the states of army units and weapons, are forced to resort to unconventional methods of violence – sabotage or indiscriminate bombings.[271] This has been the case, for example, in the Arab Spring. Some argue that there is a direct causal connection "between state-sponsored acts of terror-violence and terror-violence committed by non-state actors."[272] In accordance with this, an argument can be made that national liberation movements should be excluded from the definition of terrorism even if they engage in terrorist-type violence; otherwise the realization of their right to self-determination will be obstructed.

However, it is not clear that the right to self-determination would carry any specific allowance to resort to violence. To the contrary, references to *peace* in the UN Charter seem to support exclusively peaceful realization of this right.[273] Moreover, an interpretation excluding national liberation movements goes against the common understanding that terrorism should be defined "by the nature of the act, not by the identity of the perpetrators or the nature of their cause."[274]

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[266] Galingging, n24, p. 1
[267] Ibid.
[268] Ibid.
[269] Dugard, n11, p. 188
[270] International Covenant on Civil and Political Rights, 999 UN Treaty Series 171 (1976), art. 1(1); International Covenant on Economic, Social and Cultural Rights, 993 UN Treaty Series 3 (1976), art. 1(1); UN Charter, n106, art. 1(2)
[271] Dugard, n11, p. 188
[272] Bassiouni, n82, p. 102
[273] UN Charter, n106, art. 1(2)
[274] Jenkins B., The Study of Terrorism: Definitional Problems, RAND Paper (1980), pp. 2–3

In consequence of these political and legal considerations, negotiations over the definition of terrorism have been at a deadlock.[275] Nonetheless, legal authors have proposed a number of solutions, which could help advance with the definition:

First, Cassese advocated a somewhat innovative solution to the "freedom fighter" dilemma: viewing the question as inessential to the definition. He wrote:

> *The refusal of developed countries to accept this exception led to a stalemate, which has erroneously been termed as a "lack of definition" of terrorism. What indeed was lacking was agreement on the exception. The general notion of the crime of terrorism was not in question. […] Logically, to say that because there is no consensus on the exception a general notion has not evolved would be a misconception. It is as if one were to say that, since in international criminal law it is doubtful whether murder may exceptionally be justified by duress, as a result one could not define murder.*[276]

Arguably, under this approach, one could also attempt to resolve the problem in terms of the UN Draft Comprehensive Convention by suggesting states to make reservations for its application to national liberation movements. However, in this author's opinion, this suggestion only conceals the problem rather than solves it. Michael Glennon puts it clearly:

> *[This argument] turns upon semantics, not substance. Semantically, rules can be stated in two substantively equivalent ways – in general terms subject to explicit exceptions, or in more specific terms that obviate the need for exceptions. That one form is chosen over another does not affect the rule's substance. Substantively, no consensus exists within the international community whether States or freedom fighters can in the right circumstances be viewed as terrorists.*[277]

Second, the problem could partially be addressed through legal defenses and the appeal to circumstances precluding wrongfulness. Saul has suggested that self-determination movements may in some exceptional circumstances be able to preclude their responsibility for certain acts that would fall under the definition of terrorism through certain legal defenses.[278] Among such defenses are the IHL protections for self-determination movements; international criminal law defenses of duress,

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[275] Saul's Attempts to Define Terrorism in International Law, n12, p. 20

[276] Cassese A., Terrorism as an International Crime, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), pp. 214-215

[277] Glennon M.J., Terrorism and International Law: The case for Pragmatism, in Glennon Michael J., Sur S., Terrorism and international law (Martinus Nijhoff, Boston, 2008), p. 86 [hereinafter "Glennon"]

[278] Saul B., Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law, Sydney Law School Research Paper No. 08/122, SSRN (2008), p. 3 [hereinafter "Saul's Defending Terrorism: Justifications and Excuses for Terrorism"]

necessity or self-defense; or, quite controversially, circumstances precluding wrongfulness, drawn by analogy from the law of state responsibility.[279] This author believes that such justifications could be useful in some situations, e.g. for justifying attacks against dictators who refuse to cede power. Yet, given the limited and uncertain applicability of such defenses, it is unlikely that advocates of the "freedom fighter" exception would hold them sufficient.

Third, the test of proportionality of the actor's cause to the harm committed has been suggested to address the problem. As DeFabo states: "the complications of […] not adequately allowing for acts of rebellion against racist regimes […] can be prevented by incorporating the proportionality test in the definition of terrorism."[280] This test is drawn by analogy from the "political offense" exception in extradition: Switzerland, for example, applies a proportionality test between the political goals sought by the individuals and the gravity of the illegal acts committed by them to determine whether it should apply the "political offense" exception and refuse their extradition.[281] Similarly, it is argued that the definition of terrorism could evaluate the national liberation movement's political goals and the harm to decide whether their acts can be regarded as terrorist.[282] It is suggested that the application of such a test could be further clarified through international agreements.[283]

Although this test might be useful in some circumstances, as DeFabo himself recognizes, "it relies on a much more subjective approach than an objective one."[284] In consequence, it complicates the determination of terrorism in each particular instance and also does not provide certainty for either side in the debate. For these reasons, it is unlikely that states would be willing to replace their insistence on the "freedom fighter" exception with a proportionality test.

Fourth, a response to the "freedom fighter" debate, advocated by this author, is to draw a distinction between terrorism committed in peacetime and in time of armed conflict, and to apply the general definition of terrorism only to the former, allowing IHL to regulate the latter. STL has arguably paved the way for this by making such a distinction in the *Ayyash* decision.[285] Admittedly, this does not directly solve the problem of "freedom fighters", but it shifts the part of the problem

[279] Ibid., p. 3
[280] Defabo, n77, p. 104
[281] Ibid, p. 98
[282] Ibid.
[283] Ibid, pp. 98-99
[284] Ibid, p. 103
[285] Ayyash, n13, paras. 85, 107

relating to "freedom fighters" in armed conflict to be addressed exclusively by IHL. This has two important positive consequences:

In the first place, drawing this distinction would significantly facilitate political consensus on the peacetime definition of terrorism. After all, the politically sensitive issue of the fight for self-determination is applicable mainly to situations of or related to armed conflict.[286] Thus states are more likely to agree that violent acts committed outside the theatre of armed struggle amount to terrorist acts.

In the second place, drawing this distinction would enable the legal framework more appropriate for this, i.e. IHL, to deal with the more difficult part of the problem concerning the qualification of "freedom fighters" in armed conflict. This is beneficial because states have already agreed on partial solutions relating to the status of "freedom fighters" in IHL: according to the Additional Protocol I to the 1949 Geneva Conventions, conflicts with such movements can be raised to the level of international armed conflict and self-determination fighters are guaranteed the combatant privilege as long as they visibly and openly carry their arms during military engagements and deployments.[287] Accordingly, those that target military objectives in accordance with IHL would not be liable to prosecution as "terrorists."[288] Those that target civilians would be in breach of IHL and could be punished for violations of IHL, for example, of the prohibition of "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population."[289] Civilian casualties could in rare circumstances be justified under the principles of necessity and proportionality.[290] Moreover, states and international criminal tribunals could further develop the existing body of IHL and clarify when exactly freedom fighters could be regarded as having committed terrorist acts in terms of IHL.

Notably, there are certain practical problems with this solution. Despite the theoretical advantages, the practical application of the IHL self-determination framework is often difficult. As Cassese observed, the Protocol I privileges for self-determination movements are rarely, if ever, applied by states in practice.[291] Moreover, states not parties to Protocol I may treat national liberation movements as non-international armed struggles, thus, Israel has commonly referred to

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[286] Van Ginkel, n23, p. 473
[287] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UN Treaty Series 3 (1977), arts. 1(4), 44(3) [hereinafter "Additional Protocol I"]
[288] Saul's Defining Terrorism to Protect Human Rights, n89, p. 10
[289] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UN UN Treaty Series 3 (1977), art. 51(2) [hereinafter "Additional Protocol II"]
[290] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 226 (1996), para. 33
[291] Cassese's Self-Determination of Peoples, n265, p. 203

killings of its soldiers in the Occupied Palestinian Territories as "terrorism."[292] Some states entirely refuse to apply the framework of armed conflict for internal struggles for purely political reasons.[293]

However, this author suggests that the practical problem of states' non-application of IHL for national liberation movements should be resolved by improving such application, rather than by attempting to define terrorism to encompass violent acts committed in armed conflict. The former solution is superior because it is grounded in enforcing instruments that have already been agreed on, moreover, it promises regulation more appropriate for the context of armed conflict. Thus, in fact, focus on the more consistent application of IHL, and particularly Additional Protocol I, could bring the international community closer to solving the "freedom fighter" dilemma and agreeing on the definition of terrorism.

3.2. CONDUCT

Among the elements of the definition of terrorism, the prohibited conduct is one of the least controversial. Such conduct is almost universally regarded to encompass some form of violence.[294] Moreover, it is also generally agreed that the type of violence is not necessarily homicidal.[295] In consequence, terrorism may involve not only indiscriminate bombings, shootings or assassinations, but also hostage taking, aircraft hijacking, acts of sabotage, et cetera.[296] In addition, this author has four further observations in regards to the conduct:

First, some publicists suggest that the violence in question must be indiscriminate.[297] However, this author does not share this view. While a lot of terrorist attacks might well be of such character, the killings of carefully selected individuals have also been widely regarded as terrorist violence because of the public-oriented nature of the harm brought by these acts. For example, the SC qualified the assassination attempt of the former Egyptian President Mubarak in 1996 as a terrorist act.[298] It did so again when the Lebanese Prime Minister Rafiq Hariri was assassinated in 2005.[299]

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[292] Saul's Defending Terrorism: Justifications and Excuses for Terrorism, n278, p. 11
[293] Abresch W., A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya, 16 European Journal of International Law 4 (2005), p. 756
[294] Duchemann, n7, p. 4; Begorre-Bret C., The Definition of Terrorism and the Challenge of Relativism, 27 Cardozo Law Review 1987 (2006), p. 1995 [hereinafter "Begorre-Bret"]
[295] Begorre-Bret, n294, p. 1995
[296] Higgins, n10, p. 15
[297] Kolb, n242, p. 234-235
[298] SC Res. 1054, UN Doc. S/RES/1054 (26 April 1996), Preamble, para. 3
[299] SC Res. 1757, UN Doc. S/RES/1757 (30 May 2007), Preamble, para. 2

Second, certain proposed international definitions of terrorism hold the threat of violence, as opposed to actual violence, enough to constitute terrorism.[300] In the opinion of this author, this leads to potentially unjust outcomes. As pointed out by Saul, threats to commit terrorist acts would be better served by being recognized as ancillary offenses with less severe penalties, rather than being terrorist acts in themselves.[301] Arguably, this distinction should for the same reasons apply to attempts to commit terrorist acts.

Third, the exact types of violence encompassed by the element of conduct could be somewhat clarified by providing an exhaustive list of the prohibited violent acts, for example, by listing the offenses covered in the sectoral anti-terrorism conventions (e.g. hijackings of aircraft, hostage taking, protection of diplomatic agents, terrorist bombings, etc.) and specifying additional acts not covered by these conventions (e.g. murder, physical assault or perhaps even attacks using information technology).[302] This would be helpful in increasing the legal certainty and compliance with human rights and criminal law standards.

Fourth, while contemporary definitions mostly refer to direct forms of violence, they should be open to the fact that such direct link between the physical behavior and the resulting violence is likely to become stretched in the future. For example, because of the reliance of computer systems to maintain state infrastructure, the increased use of cyberterrorism seems almost inevitable.[303] Definitions should therefore not limit the violence to physical violence, so as to leave the doors open for such new developments.

In conclusion, the prohibited conduct should involve violence, not simply threats or attempts to commit such violence. That violence should not be limited to only indiscriminatory violence, so that attacks against political leaders would also be encompassed. It should also not be limited to physical violence in order to accommodate future developments, such as cyberterrorism. Finally, if the definition enumerated the prohibited acts, this would increase its legitimacy and legal certainty.

3.3. INTENT

In order to help distinguish terrorist acts from other grave offenses, the definition of terrorism should encompass, as put by Bantekas, "the *mens rea* of a terrorist offense, that is, the creation of a

[300] Saul's Defining Terrorism in International Law, n9, p. 60; Ayyash, n13, para. 85
[301] Saul's Defining Terrorism in International Law, n9, p. 60
[302] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 12
[303] Garnett and Clarke, n249, p. 467

state of terror."[304] Such a required intent is found in a number of international legal instruments defining terrorism.[305] However, determining the precise meaning of the element of intent may pose some initial hurdles:

First, certain authors have claimed that any definition where intent contains the element of "terror" is tautological.[306] This author cannot fully agree with this. As Kolb rightly points out:

> *[The reference] would be tautological only if it had no other meaning than terrorism itself, i.e. if it was indissolubly linked to terrorism. But this is not true. The element of 'terror' can be replaced by any other word connoting the same idea, as for example fear, anguish, dread, intimidation, etc, adding to it eventually a qualification such as "extreme", "considerable", etc.*[307]

Second, it is not clear what is meant by "terror" and to whom it should be created. The term has on several occasions been interpreted as being "extreme fear."[308] However, the term "fear" itself is troublesome, since "fear" is not a legal term but rather a subjective psychological phenomenon.[309] The questions how such fear is to be accurately measured and what kinds of acts tend to produce such fear remain open.[310] Moreover, as it is exemplified by the discussions at the League of Nations Convention, it is somewhat unclear whether "terror" and "fear" refer to an individual or a communal feeling.[311] A solution at either side of the spectrum seems either nearly impossible to prove or too broad. Therefore, this author suggests that the definition should adopt a middle ground and require "terror" to be spread either among social groups or the entire population.

Third, determining "intent" is problematic because it requires insight into the mental state of the actor. To address this problem, it has been suggested that the intent to spread terror may be inferred from the material features of the conduct: i.e. indiscriminatory nature of the attacks, deliberate targeting of unexpecting individuals in the normal course of their everyday lives, an increased degree of brutality of the acts, et cetera.[312] Since offenses in international criminal law

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[304] Bantekas and Nash, n54, p. 17
[305] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 13
[306] Saul's Attempts to Define Terrorism in International Law, n12, p. 7
[307] Kolb, n242, p. 242
[308] Prosecutor v. Galic (Trial Judgment), IT-98-29-T, International Criminal Tribunal for the former Yugoslavia, Trial Chamber (5 December 2003), para. 137 [hereinafter "Galic Trial Judgment"]; Also see Saul's Attempts to Define Terrorism in International Law, n12, p. 7
[309] Tiefenbrun, n25, p. 362
[310] Saul's Defining Terrorism in International Law, n9, p. 304-305
[311] Saul's Legal Response of the League of Nations to Terrorism, n134, p. 11
[312] Di Filippo, n52, p. 562

often require a specific intent for the crime,[313] establishing such intent for terrorism should not pose an insuperable challenge.

In conclusion, the definition of terrorism should require the intent to "spread terror among social groups or the population." The "intent" should be specified clearly and unambiguously so that the definition is possible to be applied, and the practice of international criminal law could be drawn from to resolve how such intent is to be precisely determined.

3.4. TARGETS

The "targets" element of the definition sets "who or what is protected."[314] In this respect, recent practice indicates that international law has moved beyond the restricted approach of the 1937 Convention, where the only possible targets of terrorism were those that involved state interests, and now includes a broad range of targets.[315] However, there are still some questions about the exact definition and the scope of the "targets" element.

3.4.1. Civilians

The 1999 Terrorism Financing Convention states that the violence must be directed to "a civilian, or to any person not taking an active part in hostilities in a situation of armed conflict."[316] Some scholars also use the term "innocent civilians" to denote the required targets of terrorist attacks.[317] Part of the rationale for this is to exclude an intentional attack on combatants during an armed conflict from the definition of international terrorism, even if such attack has the intent of creating terror.[318]

However, the reference to civilians is arguably unnecessary and is better replaced by "persons" or a related generic term. First, leaving the reference would create difficulty in determining the targets because the related notion of "taking an active part in hostilities" is one of the most difficult to define and highly-debated topics in IHL.[319] While it has been interpreted by the ICRC in its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law", the interpretation has been widely contested and many authors

[313] Cryer, n27, p. 346
[314] Duffy, n15, p. 34
[315] League of Nations Convention, n135, art. 1(2); Contrast with: UN Draft Comprehensive Convention, n174, art. 2
[316] Terrorism Financing Convention, n161, arts. 2(1)(a), 2(1)(b)
[317] Tiefenbrun, n25, p. 381
[318] Ibid.
[319] Christensen E., The Dilemma of Direct Participation in Hostilities, 19 Journal of Transnational Law & Policy 281 (2010), p. 308

chose to withdraw their names from the final document.[320] Second, as this author argues, IHL is an entirely different regime, which should be left to regulate acts of terror separately. The element of targets is therefore better left without such limiting and context-specific references. It appears that the recent definition attempts have successfully adopted this approach.[321]

3.4.2. Property

Malcolm Shaw has raised the question: "should attacks against property, as well as upon persons, be covered?"[322] The answer to this question seems to be in the affirmative, as the recent instruments combatting terrorism include "public and private property" in their definitions.[323] Moreover, including property helps more comprehensively subsume the phenomenon: as it has been pointed out, "several terrorist groups, such as those in Sri Lanka or those comprised of environmental activists, choose to target only property and material goods."[324]

However, the destruction of property should only be able to give rise to terrorism if it is of sufficiently large scale or if the property destroyed is of very high economic or nonmaterial value. This would prevent qualifying certain forms of environmental activism or political protest that cause relatively minor harm as terrorism. An example of this is "when anti-Iraq war protesters painted "no war" on the shell of the Sydney Opera House in 2003; or when urban rioters caused property damage, as at G8 anti-globalization protests, or in the Paris suburbs in late 2005."[325]

In summary, in order to maintain the clarity of the regulation, the "targets" element should encompass "persons" without any references to IHL. Moreover, in order to better subsume the phenomenon of terrorism, property should also be a possible target of terrorist attacks. However, that property should be of high value or its destruction should be of relatively large scale, so as not to encompass minor forms of environmental or political protest.

3.5. MOTIVE

Motive or purpose is another important element of terrorism.[326] As Levitt writes:

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[320] Schmitt M.N., The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis, 1 Harvard National Security Journal (2010), pp. 5-6
[321] UN Draft Comprehensive Convention, n174, art. 2
[322] Shaw M.N., International Law, 6th ed. (Cambridge University Press, Cambridge, 2008), p. 1159
[323] Saul's Attempts to Define Terrorism in International Law, n12, p. 21
[324] Begorre-Bret, n294, p. 1998
[325] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 14
[326] Duffy, n15, p. 15

Not all hijackings, sabotages, attacks on diplomats, or even hostage-takings are "terrorist"; such acts may be done for personal or pecuniary reasons or simply out of insanity.[327]

Indeed, reference to a political or religious motive helps distinguish terrorism from transnational organized crime, which, while it may still generate terror, is motivated by financial or material benefits.[328] The core premise of such distinction is that violence committed for public-oriented reasons, e.g. politics, religion or ideology, is morally, and in its levels of dangerousness, different from violence perpetrated for private ends, e.g. profit, hatred, revenge, et cetera.[329] However, as practice shows, such special motive of terrorist acts often gets ignored.

3.5.1. Neglect of terrorist motives in proposed definitions

International legal anti-terrorism instruments have largely neglected to give sufficient attention to motives. For example, the 1972 US Draft Convention required the motive "to damage the interests of or obtain concessions from a State or an international organization", and the Draft Comprehensive Convention requires an alternative motive "to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act."[330] Yet such intimidation of a population or compulsion of a government may well be motivated by private non-political ends, such as financial profit. In consequence, these definitions do not necessarily require a political motive.

Furthermore, the sectoral anti-terrorism conventions have also avoided any reference to motive.[331] For example, both the Conventions for the Suppression of Terrorist Bombings and Terrorism Financing apply "irrespective of the political, ideological, racial or religious reasons that may underpin the acts."[332] In consequence, even though it is not yet clear if and whether the perpetrators of Boston Bombings on April 15, 2013, had any underlying political motives, the act qualifies as an act of international terrorism under Article 2 of the International Convention for the Suppression of Terrorist Bombings (the requirement for an international element under Article 3 is also satisfied because one of the victims was of Chinese nationality).[333]

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[327] Levitt, n1, p. 115
[328] Saul's Attempts to Define Terrorism in International Law, n12, p. 26
[329] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 10
[330] League of Nations Convention, n135, art. 1(2); Contrast with: US Draft Convention, n145, art. 1; UN Draft Comprehensive Convention, n174, art. 2
[331] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 9
[332] Duffy, n15, p. 24
[333] Terrorism Financing Convention, n161, arts. 2(1), 3

3.5.2. The need to include a terrorist motive in the definition

This author believes that the definition of terrorism should be strengthened by the requirement of a specific terrorist motive. Such a motive lets the definition reflect the distinct nature of the harm that terrorism inflicts more accurately.[334] International definitions that lack this element are too broad and risk undermining their moral and political value as being directed against terrorism,[335] as well as forcing governments to allocate the precious resources for fighting terrorism to acts that are less dangerous.

Yet, in practice, the motives behind particular acts are often hidden and difficult to determine. As Saul notes, terrorists often do not "make explicit demands or openly reveal the ultimate target of their actions."[336] Moreover, political motives may also be imitated – for instance, several criminal groups in Corsica and Colombia have reportedly pretended to have political goals in an attempt to legitimize their crimes.[337]

Acknowledging the difficulty in requiring a narrowly defined motive, this author proposes that definitions of terrorism should at least have a motive defined in broad terms – the terrorist acts must be "with political, religious, ethnic, or other ideological motives". This would duly reserve the notion of terrorism to public-oriented violence.

3.6. SCOPE OF THE DEFINITION

In order to ensure effective application, it is important to state the precise circumstances in which the definition does and does not apply. This section discusses two such relevant circumstances: the situational circumstances when the definition applies (i.e. peacetime or armed conflict) and the territorial circumstances which allow regarding a particular terrorist act as international.

3.6.1. Situational scope: peacetime or armed conflict

Most anti-terrorism conventions, with the notable exception of the Terrorism Financing Convention, do not apply in times of armed conflict.[338] However, as discussed above, there is a political debate whether the UN Draft Comprehensive Convention should exclude only states' armed forces or both parties to the conflict from the ambit of its application.[339]

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[334] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 13
[335] Levitt, n1, p. 115
[336] Ibid., p. 111
[337] Begorre-Bret, n294, p. 1995
[338] Duffy, n15, p. 25; Terrorism Financing Convention, n161, art. 2(1)
[339] Dugard, n11, p. 199

In the opinion of this author, the definition of terrorism should be limited to peacetime. As it was argued above, letting IHL alone govern the activities of the national liberation movement could help resolve the conflict between developing and developed states and reach the international definition of terrorism. Apart from that, there are other good reasons not to apply the definition of terrorism to armed conflicts:

First, IHL already provides a workable prohibition of terrorism for the specific context of armed conflict.[340] It has a system in place to prohibit acts of terrorism and to provide for the prosecution and punishment of the actors.[341] Both Additional Protocols I and II to the Geneva Conventions prohibit "[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population."[342] This treaty crime of terror has been applied by the ICTY Trial Chamber in the *Galić* case.[343]

Second, not excluding violence committed by the belligerent sides risks to interfere with the scrupulously formulated parameters of permissible violence in IHL and possibly lead to unjust outcomes. As Saul noted, IHL is crafted for dealing with self-determination conflicts and internal rebellions rising to an armed conflict.[344] Departing from this could jeopardize this delicate balance reached by IHL.

Third, branding non-state parties as terrorist groups reduces their incentives to comply with IHL in general. These groups are incentivized to prolong their fighting by any means because capture would inevitably result in criminal penalties. This is exemplified by the end of the conflict in Sri Lanka, where the international recognition of the Tamil Tiger groups as terrorists resulted in them using human shields and executing fleeing civilians.[345] In contrast, labeling the groups not as terrorists but as belligerents provides an incentive for them to comply with IHL in order to increase their legitimacy and secure belligerent treatment in case of capture.[346]

Admittedly, excluding the acts committed by parties to an armed conflict from the definition of terrorism does pose some problems. Not least of them is the need to rely on the determination when a terrorist act falls within an armed conflict and when it does not. While IHL has established

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[340] Duffy, n15, p. 25
[341] Condorelli L., Naqvi Y., The War Against Terrorism and Jus in Bello: Are the Geneva Conventions Out of Date?, in Bianchi A. (ed.), Naqvi Y., Enforcing international law norms against terrorism (Hart, Oxford, 2004), p. 37
[342] Additional Protocol I, n287, art. 51(2); Additional Protocol II, n289, art. 13(2)
[343] Galic Trial Judgment, n308, para. 138
[344] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 15
[345] Ibid.
[346] Ibid.

specific rules for this,[347] such a determination is still difficult, particularly in light of the US practice of having declared a global "war of terror."[348] Moreover, some terrorist groups could attempt to argue that their attacks were, while not in direct combat, still sufficiently linked by their purpose or manner to an armed conflict to attempt to exclude such attacks from the scope of the general definition of terrorism.[349] Yet there is reason to believe that these problems are not irresolvable, as IHL, through the jurisprudence of the ICTY and now the ICC, has been gradually clarifying the standards for qualification of terrorist attacks as acts in armed conflict.[350]

In summary, the definition of terrorism should be limited to peacetime, leaving IHL to address the situations of terrorism in armed conflict. This is so because international law already prohibits acts of terror in armed conflict. Moreover, failing to exclude violence committed by belligerent sides risks interfering with the parameters of permissible violence carefully set in IHL. Finally, branding non-state parties as terrorists incentivizes them to prolong the conflict and not to comply with IHL because of inevitable future punishment.

3.6.2. Territorial scope: national or international

Most definitions of terrorism include an international element.[351] This is explained by the fact that international law is supposed to deal only with terrorist acts that affect international relations and leave local terrorism to the control of the territorial state.[352] This element is included, for example, in the Draft Comprehensive Convention, which provides that it does not apply "where the offense is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis [...] to exercise jurisdiction [under this Convention ...]"[353]

However, a peculiar development in international law is that the scope of attacks considered "international" seems to be expanding. For example, the SC labeled the taking of hostages in Moscow in October 2002 an act of international terrorism, even though the act and its immediate

[347] Prosecutor v. Tadic (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia, Appeals Chamber (2 October 1995), para. 70
[348] Lubell, n6, p. 113
[349] Prosecutor v. Kunarac (Trial Judgment) IT-96-23&IT-96-23/1-A, International Criminal Tribunal for the former Yugoslavia, Trial Chamber (12 June 2002), para. 58
[350] Bianchi A., Terrorism and Armed Conflict: Insights from a Law & Literature Perspective, 24 Leiden Journal of International Law 1 (2011), pp. 5, 9-11
[351] Duffy, n15, p. 34
[352] Kolb, n242, p. 242
[353] UN Draft Comprehensive Convention, n174, art. 4

consequences seem to have been confined to the territory of the Russian Federation.[354] The SC also similarly recognized attacks in Bogota or Istanbul as threats to international peace and security despite their national scope.[355]

This points to the widening application of the "effects doctrine", which asserts that effects felt by another state form sufficient evidence for the international element.[356] To some extent, this is a welcome development. As argued by Saul, the international element "need not preclude a definition from covering domestic terrorism, where such conduct is thought to injure international values of sufficient gravity and attract international concern."[357]

However, the international community needs to establish clearer criteria of what forms "effects" in order not to infringe state sovereignty. As no interpretation of the term currently exists, it could be argued that almost any terrorist act is one of international concern since, especially in light of the intensified international protection of human rights, it attacks values held fundamental by the international community.[358] Not clearly defined, the application of "effects" can potentially infringe the fundamental principle of state sovereignty, i.e. the states' exclusive right to exercise the functions of a state in their territory.[359]

In order to address this problem, this author suggests that the "effects" could be interpreted by drawing guidance from the legal concept of *erga omnes*. The ICJ in *Barcelona Traction* referred to *erga omnes* obligations as such that "[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection."[360] The mention of "importance of the rights involved" could be imported to the definition of terrorism, stating that an act of terrorism has international effects if that act denies rights of such importance, that by their nature, these rights create corresponding *erga omnes* obligations on states.

Even though it has to be acknowledged that the concept of *erga omnes* is itself far from clearly defined,[361] linking the "effects doctrine" to it could let the two concepts evolve simultaneously complimenting each other. Having adopted this suggestion, terrorist acts directed against e.g.

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[354] SC Res. 1440, UN Doc. S/RES/1440 (24 October 2002), para. 1
[355] SC Res. 1465, UN Doc. S/RES/1456 (13 February 2003), para. 1; SC Res. 1516, UN Doc. S/RES/1516 (20 November 2003), para . 1
[356] Kolb, n242, p. 244
[357] Saul's Civilizing the Exception: Universally Defining Terrorism, n113, p. 13
[358] Ibid.
[359] Islands of Palmas case (Netherlands v. USA), Reports of International Arbitral Awards 2 (1928), pp. 829, 838
[360] Barcelona Traction, Light & Power Company, Limited (Belgium v. Spain), Judgment, ICJ Reports 3 (1970), para. 33 [hereinafter "Barcelona Traction"]
[361] Kadelbach S., Jus Cogens, Obligations Erga Omnes and other Rules - The Idenfification of Fundamental Norms in Tomuschat C., Thouvenin J.-M. (eds.), The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes (Martinus Nijhoff, Boston, 2006), p. 35

peoples' rights to freedom from slavery or racial discrimination[362] would be deemed international regardless of where and by or against whom such acts are committed.

3.7. CONCLUSIONS AND PROPOSED DEFINITION

The definition of terrorism can be analyzed through the following elements: actors, conduct, intent, targets, motive and scope. Analysis of these elements results in the following conclusions:

First, the biggest difficulty in defining terrorism lies with the actors of terrorism. Legal and political debates indicate that there are two suggested exclusions from the scope of possible actors of terrorism: states and national liberation movements. Despite the political difficulties, states should be included in the definition of terrorism because not doing so would create a double standard in relation to national liberation movements and result in unpunished grave acts. In regards to national liberation movements, the best available resolution of the debate is to draw a distinction between terrorism in peacetime and in armed conflict and to apply the definition only to the former. Doing so would facilitate consensus on the peacetime definition of terrorism because the politically sensitive issues of national liberation mostly figure in situations of armed conflict. Terrorist acts perpetrated in armed conflict would then be left to be regulated exclusively by IHL, which is the most suitable legal framework for such regulation, as it recognizes the combatant privilege for members of national liberation movements and provides prohibition on acts of terror specifically tailored for armed conflict.

Second, the element of conduct is not very problematic to the definition because it is generally agreed that such conduct must involve violence. That violence should not be limited to only indiscriminatory or physical violence, so that attacks against political leaders or possible acts of cyberterrorism would also be encompassed. Conduct falling short of actual violence, e.g. threats thereof or attempts to commit it, should not fall within the offense itself. The definition should also provide an exhaustive list of the prohibited acts in order to increase its legitimacy and legal certainty.

Third, in order to distinguish terrorist acts from other grave offenses, the definition should require the intent to "spread terror among social groups or the population." Such "intent" should be specified clearly and unambiguously, and the doctrine of international criminal law could be drawn from to resolve how such intent is to be precisely determined.

[362] Barcelona Traction, n360, para. 34

Fourth, the element of "targets" should avoid references to IHL and refer to targeted individuals in generic terms such as "persons" in order to make the regulation clear. Moreover, "targets" should include property, as this would subsume the phenomenon of terrorism more accurately. However, only property of high value or a large-scale destruction of it should qualify in order to delimit terrorism from more legitimate forms of political protest.

Fifth, the definition should require at least a broadly-defined political, religious, or similar ideological motive in order to reserve the notion of terrorism to public-oriented violence, as such violence is generally perceived morally different and more dangerous than violence perpetrated for private ends.

Sixth, the definition should only apply in peacetime, because IHL, which primarily governs conduct in time of armed conflict, already provides a workable prohibition of terrorism and is legally and consequentially better suited to continue governing parties' conduct in armed conflict.

Seventh, the definition needs to include an international element. Although it should generally require some physical conduct or relation of the perpetrator extending beyond state borders, it may also include effects of the attack extending beyond such borders. However, in the latter case, clear criteria for what amounts to such "effects" need to be established in order to avoid infringing state sovereignty. To address this problem, the definition could link "international effects" to the concept of *erga omnes* by stating that an act of terrorism has international effects if that act denies rights of such importance, that, by their nature, these rights create corresponding *erga omnes* obligations on states.

On the basis of the foregoing, this author proposes that the definition of terrorism in international law should be as follows:

> *Any violent act, such as murder, physical assault, or any other act prohibited by the international anti-terrorism conventions in force, which aims to cause harm to any person, group of persons or property of high economic or nonmaterial value, is intended to spread terror among a social group or the population, and is committed with an underlying political, religious or other ideological motive. Excluded from this definition are acts committed in armed conflict and governed by international humanitarian law, as well as acts which take place in and involve nationals of one single state, provided that these acts are not directed against rights of such importance, that, by their nature, these rights create corresponding erga omnes obligations on states.*

CONCLUSIONS

1. Contrary to the statements of John Dugard and Rosalyn Higgins, it is necessary to define terrorism in international law in order to mend the existing international anti-terrorism regulation, which currently functions ineffectively and creates grounds for human rights violations. Defining terrorism would allow to recognize terrorism as a separate offense in international criminal law while upholding the principle of *nulla poena sine lege*, to fix the existing system of anti-terrorism conventions and to legitimize the implementation of the anti-terrorism obligations imposed by SC Resolution No. 1373 (2001).
2. The STL erred in stating in its *Ayyash* interlocutory decision of 16 February, 2011, that there was a customary international law definition of terrorism in peacetime. The international legal sources, national legislation of states and national legal cases cited by the Tribunal are too scarce and contradictory to evidence the existence of *opinio juris* for such a definition.
3. Historical analysis demonstrates that the disagreements among states whether national liberation movements and state armed forces can be actors of terrorism are the principal obstacles to reaching the definition of terrorism in international law. In broad terms, the developing states have held the first and not the second view, while the opposite is true for the developed states. These obstacles have most recently prevented the adoption of the UN Comprehensive Convention against International Terrorism.
4. Despite the opposition from developed states, state armed forces should be recognized as possible actors of terrorism because not doing so would lead to unaccountability for grave offenses and the creation of a double standard in relation to national liberation movements.
5. The most appropriate solution to the disagreement whether national liberation movements may be potential actors of terrorism lies in limiting the scope of the definition of terrorism in international law to peacetime. This would dismantle the disagreement and facilitate consensus on the peacetime definition of terrorism because the politically sensitive issue of national liberation movements is applicable mainly to situations of armed conflict.
6. IHL should be the exclusive regime regulating terrorist acts in times of armed conflict because it possesses the most suitable legal framework for this purpose. IHL already prohibits acts of terror in armed conflicts and includes scrupulously crafted provisions protecting national liberation movements from being arbitrarily branded as "terrorists" through the guarantees in Additional Protocol I, which grants them combatant privileges. The only thing that has to be improved is the practical application of these IHL provisions.

7. The motive formulated as "to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act," as it is found in many proposed international definitions of terrorism, most notably, that of the UN Draft Comprehensive Convention against International Terrorism, does not allow to adequately address the phenomenon of terrorism because this formulation wrongly allows such intimidation or compulsion to be motivated by private non-political ends, such as financial profit. In consequence, this formulation should be amended to specify that these acts must be committed "with political, religious, or other ideological motives."
8. In order to resolve the current confusion when terrorist acts, which are confined to the territory of a single state, may nonetheless be called international, the definition should state that an act of terrorism becomes internationalized if that act denies rights of such importance, that, by their nature, these rights create corresponding *erga omnes* obligations on states.
9. In order to accurately encompass the phenomenon of terrorism and to minimize state disagreements, the definition of terrorism in international law should be as follows: *Any violent act, such as murder, physical assault, or any other act prohibited by the international anti-terrorism conventions in force, which aims to cause harm to any person, group of persons or property of high economic or nonmaterial value, is intended to spread terror among a social group or the population, and is committed with an underlying political, religious or other ideological motive. Excluded from this definition are acts committed in armed conflict and governed by international humanitarian law, as well as acts which take place in and involve nationals of one single state, provided that these acts are not directed against rights of such importance, that, by their nature, these rights create corresponding erga omnes obligations on states.*

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Miscellaneous

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SUMMARY

Vaštakas L. The Definition of Terrorism in International Law/ International Law Master Thesis. Prof. dr. J. Žilinskas. – Vilnius: Mykolas Romeris University, Faculty of Law, Institute of International and European Union Law, 2013.

In light of the widely acknowledged absence of the definition of terrorism in international law and once again unsuccessful attempts to agree on it in April 2013 at the United Nations, this thesis aims to propose such a definition.

Chapter One firstly attempts to answer why international law needs to define terrorism. It analyzes international criminalization of terrorism, sectoral anti-terrorism conventions and the obligations to fight terrorism imposed on states by the Security Council. Disagreeing with the views expressed by Rosalyn Higgins and John Dugard, the author advances arguments how such a definition could help solve problems of efficiency and legitimacy in all these fields.

Chapter Two then asks why, if a definition is needed, it does not already exist. The Chapter surveys the major historical attempts to define terrorism, aiming to identify the greatest obstacles and advances to agreeing on a definition. Notably, it finds that the main obstructions were disagreements whether states and national liberation movements can be actors of terrorism. Aside from treaty definitions, the author also analyzes and criticizes the arguments in the 2011 *Ayyash* judgment by the Special Tribunal for Lebanon over the alleged emergence of a peacetime definition of terrorism in customary international law.

Chapter Three then draws on the first two Chapters and analyzes the elements of the definition of terrorism: actors, conduct, intent, targets, motive and scope. It aims to explain the contents of each element, review and suggest solutions for the major points of disagreement. In particular, the author advocates the view that one needs to draw a distinction between terrorism in peacetime and terrorism in armed conflict and to apply the definition of terrorism only to the former in order to address the controversy over national liberation movements. The author also makes arguments for the need to include states as possible actors of terrorism; for the necessity, often neglected in current definitions, to require specific terrorist motives; and for the test whether terrorist acts attempt to infringe rights corresponding to *erga omnes* obligations in order to determine when such acts become international.

The thesis concludes with a proposed definition of terrorism in international law.

SANTRAUKA

Vaštakas L. Terorizmo apibrėžimas tarptautinėje teisėje / Tarptautinės teisės magistro baigiamasis darbas. Vadovas prof. dr. J. Žilinskas. – Vilnius: Mykolo Romerio universitetas, Teisės fakultetas, Tarptautinės ir Europos Sąjungos teisės institutas, 2013.

Atsižvelgdamas į plačiai pripažįstamą faktą, kad tarptautinėje teisėje nėra terorizmo apibrėžimo, ir į dar kartą nepavykusius Jungtinių Tautų Organizacijos 2013 m. balandžio mėnesio bandymus dėl jo susitarti, šis darbas siekia pasiūlyti tokį apibrėžimą.

Pirmasis skyrius iš pradžių bando paaiškinti, kodėl tarptautinėje teisėje reikalingas terorizmo apibrėžimas. Skyriuje nagrinėjami tokie klausimai kaip tarptautinis terorizmo kriminalizavimas, sektorinės kovos su terorizmu konvencijos ir Saugumo Tarybos valstybėms nustatyti įsipareigojimai kovoti su terorizmu. Prieštaraudamas Rosalyn Higgins ir John Dugard išreikštoms nuomonėms, autorius pateikia argumentus, kaip toks apibrėžimas galėtų išspręsti efektyvaus reguliavimo problemas visose minėtose srityse.

Antrasis skyrius tuomet klausia, kodėl, jeigu apibrėžimas reikalingas, jis vis dar neegzistuoja. Skyrius apžvelgia pagrindinius istorinius mėginimus apibrėžti terorizmą, siekdamas nustatyti pagrindines kliūtis ir svarbiausius pasiekimus tariantis dėl apibrėžimo. Autorius atskleidžia, kad pagrindinės kliūtys kilo dėl nesutarimų, ar valstybės ir nacionalinio išsivadavimo judėjimai gali būti terorizmo vykdytojai. Be sutartyse pateikiamų apibrėžimų, autorius nagrinėja ir kritikuoja Specialiojo Tribunolo Libanui 2011 m. Ayyash byloje pateiktus argumentus, kad taikos metu taikomas terorizmo apibrėžimas neva jau susiformavo tarptautinėje paprotinėje teisėje.

Trečiajame skyriuje, remiantis pirmųjų dviejų skyrių išvadomis, nagrinėjami terorizmo apibrėžimo elementai: vykdytojai, veika, ketinimas, objektai, motyvai ir apibrėžimo apimtis. Skyriuje siekiama paaiškinti kiekvieno elemento turinį, apžvelgti ir pasiūlyti sprendimus pagrindiniams dėl jų kylantiems nesutarimams. Darbo autorius pritaria požiūriui, kad siekiant išspręsti dėl nacionalinio išsidavimo judėjimų kylančius nesutarimus, teroristinė veika turėtų būti atskirta į veiką, atliekamą taikos metu, ir veiką, atliekamą ginkluoto konflikto metu, o tarptautinės teisės terorizmo apibrėžimas taikytinas tik pirmajai iš jų. Autorius taip pat įrodinėja, kad valstybės turėtų būti įtrauktos į galimų terorizmo vykdytojų sąrašą, kad būtina į terorizmo apibrėžimą įtraukti tam tikrus teroristinius motyvus, ir kad siekiant nustatyti, kada teroristiniai aktai tampa tarptautiniais, reikėtų vertinti, ar šie aktai kėsinasi į teises, kylančias iš *erga omnes* įsipareigojimų.

Magistro darbo pabaigoje pasiūlomas terorizmo apibrėžimas tarptautinėje teisėje.