

PROBLEMS AND PROGRESS IN DEFINING TERRORISM IN INTERNATIONAL LAW

Ridarson Galingging*

Abstract

There is an effort to adopt an internationally-accepted legal definition for 'terrorism' since such definition will enhance international cooperation in fighting terrorism, which at the moment is fragmented and ineffective. However, various obstacles e.g. political heterogeneity or ideological discrepancy arise when seeking a uniformed definition of terrorism, hence this study.

Abstrak

Dunia internasional berupaya untuk menetapkan definisi legal 'terorisme' yang diterima secara umum karena definisi ini dapat meningkatkan kerjasama internasional dalam melawan terorisme yang saat ini masih terkotak-kotak dan tidak efektif. Tulisan ini membahas pelbagai kesulitan yang muncul dalam upaya mencari definisi tersebut, seperti masalah keragaman politik dan kesenjangan ideologi antar negara.

Keywords: *definition, terrorism, human rights, international law.*

A. Introduction

It is difficult for the international community to prosecute and punish a criminal act if the act in question has not been universally defined. Without agreement on a general definition of terrorism, the famous phrase often heard during the period of de-colonization that "one man's terrorist is another man's freedom fighter" remains relevant. For Mrs. Thatcher, Mr. Cheney, and the apartheid regime in South Africa, Nelson

Mandela was a terrorist; for many others he was a freedom fighter. The same can be said about Yasser Arafat and Abdullah Ocalan.¹

The absence of a general definition of terrorism at the international level has also created legal uncertainty. Powerful states will impose their own definition of the term on others; lesser powers will attempt to identify and punish terrorism as they deem fit, possibly undermining human rights and humanitarian law.² In the Americas, "state

* PhD student, Department of Political Science, Northwestern University, Northwestern University Fellowship (e-mail: ridarson@yahoo.com).

¹ John Dugard, "The Problem of Definition of Terrorism in International Law", 2005, in Paul Eden and Therese O'Donnell (eds), *September 11, 2001: A Turning Point in International Law?*, Transnational Publishers, Ardsley, at p. 188.

² Surya P. Subedi, *The War on Terror and U.N. Attempts to Adopt a Comprehensive Convention on International Terrorism*, 2005, in Paul Eden and Therese O'Donnell (eds), *September 11, 2001: A Turning Point in International Law?*, Transnational Publishers, Ardsley, at p. 2007.

terrorism” has a notable history. “Many governments have engaged in kidnappings, forced disappearances and other egregious human rights violations against their own populations, often under the guise of fighting terrorism.”³ Human rights defenders were attacked. Only ten days after September 11, 2001, the U.N. High Commissioner for Human Rights declared herself “very apprehensive” about the risk of an erosion of civil liberties. On September 25, 2001, she warned that there were countries who were “gearing up to tackle terrorism by clamping down human rights defenders.”⁴

The effort to prosecute international terrorism cannot be strengthened until the international community formulates a generic definition. A definition can be useful for making punishable related or supporting conduct, such as fund-raising or money-laundering in relation to terrorism. It can also serve the purpose of making a terrorist context an aggravating feature of common crimes.⁵ A definition of terrorism is necessary for establishing jurisdiction for such crimes, and for staking out the field where we want to give extra powers to public security and law enforcement agencies.⁶ Furthermore, the prosecution of an individual for “terrorism”

as such (rather than for common crimes like murder), might go some way towards satisfying public indignation at terrorists acts and placating popular demands for justice.⁷

The non-existence of the definition does not mean that international terrorism cannot legally be prosecuted. Professor Oscar Schachter remarked that the absence of a comprehensive definition “does not mean that international terrorism is not identifiable.”⁸ The absence of a definition of terrorism does not mean that serious acts of violence, such as those carried out on September 11, are not criminalized under international (and of course domestic) criminal law. Acts of “terrorism” are covered by multiple specific conventions addressing particular types or aspects of terrorism, including hijacking, hostage taking, violence against internationally protected persons, terrorist bombing and financing of terrorism.⁹

International efforts to curb terrorist acts in contemporary international law first found expression in the League of Nations. In the framework of the League of Nations, two treaties were drafted and finalized in 1937, namely the Convention on the Prevention and Punishment of

³ Organization of American States: Inter-American Commission on Human Rights, 2002, *Report on Terrorism and Human Rights*, General Secretariat, Washington D.C., at p. 19.

⁴ Sibylle Kapferer, “Ends and Means in Politics: International Law as Framework for Political Decision-Making”, 2005, in Paul Eden and Therese O’Donnell (eds), *September 11, 2001: A Turning Point in International Law?*, Transnational Publishers, Ardsley, at p. 52.

⁵ Wybo P. Heere (ed), 2003, *Terrorism and the Military: International Legal Implications*, The Hague, T.M.C., Asser Press, at p. 118.

⁶ Wybo P. Heere (ed), *ibid*, at p. 118.

⁷ Ben Saul, 2006, *Defining Terrorism in International Law*, Oxford University Press, Oxford, at p. 4.

⁸ Oscar Schachter, 1989, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 Hous.J.INT’L L. 309, 309.

⁹ Helen Duffy, 2005, *The “War on Terror” and the Framework of International Law*, Cambridge University Press, Cambridge, at p. 41.

Terrorism (1937 Terrorism Convention)¹⁰ and the Convention for the Creation of an International Criminal Court, which was to have jurisdiction for terrorist offenses defined in the first-named Convention.¹¹ The 1937 Convention was intended, *inter alia*, to oblige parties thereto to establish as offenses in their national criminal legislation certain specific acts listed in Article 2, as well as to prosecute, or extradite, the alleged offenders if certain conditions were met.¹²

Article 1 (2) of this convention defines terrorism as: “criminal acts directed against a State and intended to or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.” Thus, at least the English text of the convention appeared to make it clear that what transformed the acts listed into terrorist acts was the existence of a special intent on the part of the offender to create a state of terror.¹³

The immediate problem with such a general definition is that it could criminalize the legitimate acts of persons struggling

against state oppression or to set up a free state, and hence be in conflict with the right to self determination.¹⁴ This definition protects states from being prosecuted as a perpetrator or sponsor of terrorism, for terrorism can only be committed by non-state actors or individual persons. However, this convention never entered into force for failure to receive the necessary signatures, accession or ratification and also as a result of the outbreak, only two years after its adoption, of the Second World War.¹⁵ The broad definition of terrorism contributed to the low number of signatures and ratifications. Britain, for example, did not ratify it because of anticipated difficulties with drawing up the required implementing legislation.¹⁶ Despite never entering into force, the League Convention remains important for the range and detail of legal issues it covered, many of which resurfaced in ongoing UN debates about definition in the 1970s and 2000s.¹⁷ Its definition served for many years as a benchmark, appearing early in the drafting of the 1954 ILC draft

¹⁰ Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations Doc. C.546M.383 (1937) reprinted in 7 *International Legislation* 862 (Manley O. Hudson ed., 1941)

¹¹ R.A. Friedlander, “terrorism”, in R. Bernhardt (ed.), 1999, *Encyclopedia of Public International Law*, Amsterdam, North-Holland, (2nd edn.), Vol.IV, at p. 845.

¹² See: Articles 8-10, Andrea Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism* in, Giuseppe Nesi (ed), 2006, *International Cooperation in Counter-terrorism*, Ashgate Publishing Limited, Aldershot, at p. 3.

¹³ Andrea Gioia, *The UN Conventions on the Prevention and Suppression of International Terrorism*, in Giuseppe Nesi, 2006, *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate Publishing Limited, Aldershot, p. 4.

¹⁴ Claire de Than and Edwin Shorts, 2003, *International Criminal Law and Human Rights*, London, Sweet & Maxwell, at p. 233.

¹⁵ Andrea Gioia, *supra* note 13, at p. 4.

¹⁶ Reuven Young, 2006, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, Boston College International & Comparative Law Review, at p. 6.

¹⁷ Christopher L. Blakesley, 2006, *Terror and Anti-Terrorism: A Normative and Practical Assessment*, Transnational Publishers, Ardsley, at p. 31.

Code of Offenses against the Peace and Security of Mankind, and shaping a much-cited 1994 General Assembly Declaration.¹⁸

The United Nations subsequently took up similar initiatives in defining terrorism through negotiations of multilateral treaties and the work of bodies at various levels of organizations, after the collapse of the League of Nations. However, as of this writing, the UN has still not come up with any consensus on a generic definition of terrorism. This failure has not weakened the international community's determination to fight terrorism through the use of international law. However, instead of using a generic approach, the international community looks at terrorism through piecemeal or sectoral angles as reflected in the forms of terrorism contained in the sectoral anti-terrorism conventions that have been adopted since 1963 until 2007. These sectoral conventions are:

1. Convention on Offenses and Certain Other Acts Committed on Board Aircraft (1963)¹⁹
2. Convention for the Suppression of Unlawful Seizure of Aircraft (1970)²⁰
3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)²¹
4. Convention on the Prevention and Punishment of Offenses against Internationally Protected Persons, Including Diplomatic Agents (1973)²²
5. International Convention against the Taking of Hostages (1979)²³
6. Convention on the Physical Protection of Nuclear Material (1980)²⁴
7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1988)²⁵
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)²⁶
9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988)²⁷
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)²⁸
11. International Convention for the Suppression of Terrorist Bombings (1997)²⁹

¹⁸ Christopher L. Blakesley, *ibid.*, at p. 31.

¹⁹ United Nations, Treaty Series, Vol. 704, p.218. Available at <http://untreaty.un.org>.

²⁰ This Convention was signed at the Hague on 16 December 1970 and entered into force on 14 December 1971. Available at www.onodc.org.

²¹ Available at <http://untreaty.un.org>.

²² *ibid.*

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ *ibid.*

12. International Convention for the Suppression of the Financing of Terrorism (1999)³⁰
13. International Convention for the Suppression of Acts of Nuclear Terrorism (2000)³¹

All the thirteen multilateral anti-terrorism conventions, with the exception of the 1999 Financing of Terrorism Convention, prohibit only single and specific instances of terrorism involving indiscriminate violence, which was most likely to be committed by terrorists, and which imposed upon States an obligation to either extradite or prosecute the offender.³² The logic of the “prosecute or extradite” doctrine is that it matters less who should try a terrorist than that the global terrorist should be tried by some state party (commonly referred to, therefore, as the “no safe haven” principle).³³

These conventions deal with both punishment and prevention across disparate subject areas. They proscribe conduct and broadly speaking, define the following crimes:³⁴ physical attacks on internationally

protected persons and their (or their government’s) property;³⁵ the seizure of hostages to compel third parties to act in a certain way;³⁶ the use of explosives or other lethal devices against public targets with the intention to cause death, serious injury, or major economic loss;³⁷ the unlawful possession of radioactive material with the intention to cause death or serious injury or the unlawful use of such material with the intention to cause death, serious bodily injury, substantial property or environmental damage, or to compel a person, organization, or state to do or not to do something;³⁸ jeopardizing the safety of a civil aviation aircraft or persons or property onboard,³⁹ gaining control of a civil aviation aircraft by use or threat of force or intimidation,⁴⁰ doing things that endanger the safety of civil aviation aircraft;⁴¹ acts of violence that cause serious injury or death or endanger safety at a civil aviation airport;⁴² the threat or use of nuclear material that cause or is likely to cause serious injury, death, or property damage;⁴³ and gaining control over a vessel

³⁰ *ibid.*

³¹ *ibid.*

³² A.R. Perera, Reviewing the UN Conventions on Terrorism: Towards a Comprehensive Terrorism Convention, in C. Fijnaut, J. Wouters & F. Naert (eds.), 2004, *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*, Martinus Nijhoff Publishers, Leiden, at p. 569.

³³ C.L. Lim, The Question of a Generic Definition of Terrorism under General International Law, in Victor V. Ramraj (eds.), 2005, *Global Anti-Terrorism Law and Policy*, Cambridge University Press, Cambridge, at p. 46.

³⁴ Reuven Young, *supra* note 16, at p. 10.

³⁵ Internationally Protected Persons Convention, art. 2(1) (a), (b).

³⁶ Hostages Convention, art. 1 (1).

³⁷ Bombings Convention, art. 2 (1).

³⁸ Nuclear Terrorism Convention, art. 2 (1) (a), (b)

³⁹ Tokyo Convention, art.1 (1) (b).

⁴⁰ Hague Convention, art. 1 (a).

⁴¹ Montreal Convention, art. 1 (1).

⁴² Montreal Airports Protocol, art.II (1).

⁴³ Nuclear Materials Convention, art.7 (1).

or fixed maritime platform by threat, force, or intimidation or endangering the safe navigation of the vessel or fixed maritime platform.⁴⁴

Despite not necessarily referring to terrorism expressly, these conventions and their prohibitions are intended to address terrorism.⁴⁵ These treaties aim at coordinating the prosecution and punishment of those terrorist offenses by the contracting States. The primary purpose of those treaties is to achieve the prompt and effective punishment of terrorism by national authorities. Each contracting State is duty bound to co-operate in and lend assistance to the repression of terrorism, that is, the apprehension and prosecution or extradition of alleged perpetrators of terrorist acts. No international body is entrusted with the task of prosecuting and punishing those criminal offenses.⁴⁶

These various subject-specific treaties remain the most reliable sources of international law today as to what terrorism looks like. Beyond these treaties there arises the question of what a general customary law definition would look like, and whether these treaty rules may have stimulated broad acceptance by states of parallel customary rules since these treaties have arguably resulted from the *opinio juris communis* of a significant number of states.⁴⁷ The existing conventions are well supported by states: in

2002, 175 states were parties to the Hague Convention of 1970 on the Suppression of Unlawful Seizure of Aircraft; 176 to the Montreal Convention of 1971 on the Suppression of Unlawful Acts against the Safety of Civil Aviation; 119 to the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; 108 to the 1979 Convention against the Taking of Hostages; 69 to the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; 64 to the 1997 International Convention for the Suppression of Terrorist Bombings; and 39 to the 1999 International Convention for the Suppression of the Financing of Terrorism.⁴⁸

Thus, in order to prosecute terrorism based on these conventions, terrorism must not be seen as a generic term, but be seen as a single and specific instances of terrorist acts. These conventions regard as criminal all terrorist acts whether they emanate from private individuals or State officials.⁴⁹ on the whole, therefore, the sectoral conventions confirm the assumption that some offenses can be considered *in themselves* as offenses of international concern, irrespective of any specific “terrorist” intent or purpose. Indeed, the principal merit of the sectoral approach is that it avoids the need to define terrorism or terrorist acts.⁵⁰ A definition would only be necessary if the punishment of the

⁴⁴ Maritime Convention, art. 3(1) (vessels); Fixed Platforms Convention, art. 2(1).

⁴⁵ Reuven Yound, *supra* note 16, at p. 10.

⁴⁶ Antonio Cassese, 2003, *International Criminal Law*, Oxford University Press, Oxford, at p. 130.

⁴⁷ C.L. Lim, The Question of a Generic Definition of Terrorism under General International Law, in Victor V. Ramraj (eds.), 2005, *Global Anti-Terrorism Law and Policy*, Cambridge University Press, Cambridge, at p. 60.

⁴⁸ John Dugard, *supra* note 1, at p. 205.

⁴⁹ Antonio Cassese, *supra* note 43, at 130

⁵⁰ Andrea Gioia, *supra* note 13, at 10

relevant offenses were made conditional on the existence of a specific terrorist intent; but this would be counter-productive, inasmuch as it would result in unduly restricting their suppression.⁵¹ on the other hand, the mere labelling of these offenses as “terrorist” offenses serves no operative legal purpose, and leaves the door open for new treaties to put the same label on other categories of offenses.⁵²

B. Obstacles to Defining Terrorism

The effort to find a universal legal definition of terrorism is still an unfinished agenda at the UN. Thus, there is no universally accepted legal definition of terrorism.⁵³ The difficulty in reaching a consensus on the definition of this term is more political than technical. International criminal justice is not a “technical instrumental-oriented enterprise,” but rather is densely implicated in international politics.⁵⁴ The problem is due to the political component of terrorism.⁵⁵ The major powers insist on limiting the crime to private actors, excluding from it State actors; small powers, meanwhile, insist on including State actors, while some of them would like to exclude “freedom fighters.”⁵⁶

For some, terrorism exists in the mind of the beholder, depending upon one’s political views and national origins. For others, terrorism consists of criminal acts, according to the laws of any civilized society.⁵⁷ The general acceptability of a definition of terrorism obviously depends on a certain political homogeneity or at least ideological proximity.⁵⁸ Thus, the failure to reach a precise and objective definition of terrorism has been caused by the fact that: (i) terrorism takes different forms; although it is usually equated with political subversion, it is employed at times by governments, and it is used as an instrument of syndicated crime; (ii) the criteria for defining “terrorism” is generally subjective since it is mainly based on political considerations; (iii) above all, terrorism is prompted by a wide range of motives depending on time and the prevailing ideology.⁵⁹ The problem of finding a proper definition is that “the spread of terror, the spread of fear can be applied downwards as well as upwards. on the one hand, certain groupings can use terror as an attempt to influence governmental decisions or even to demolish the structure of a state. on the other hand, the spread of fear by some government

⁵¹ Andrea Gioia, *supra* note 13, at 10

⁵² Andrea Gioia, *supra* note 13, at 10

⁵³ Roberta Arnold, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, Ardsley, 2004 at 3

⁵⁴ F Megret, “*The Politics of International Criminal Justice*” (2002) 13 EJIL 1261, 1280

⁵⁵ Roberta Arnold, *supra* note 53, at 4

⁵⁶ Georges Abi-Saab, *The Proper Role of International Law in Combating Terrorism*, in Andrea Bianchi (ed), *Enforcing International Law Norms against Terrorism*, Hart Publishing, Oregon, 2004 at xx

⁵⁷ R.A. Friedlander, “terrorism”, in R. Bernardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, North Holland, Vol.9, 1986 (1st edn.), at 373

⁵⁸ Gerhard Hafner, *The Definition of the Crime of Terrorism*, in Giuseppe Nesi (ed), 2006, *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate Publishing Limited, Aldershot, at p. 36.

⁵⁹ Omer Y. Elegab, 1997, *International Law Documents Relating to Terrorism*, London, Cavendish Publishing Limited, at p. xix.

is used downwards, against its own citizen, as a method of governance and as a means for remaining in power.⁶⁰

The divergent political perceptions and attitudes adopted by states towards a particular “terrorist” or “militant” group, as dictated by its own political priorities and compulsions, underlined the work of the UN in addressing international terrorism.⁶¹ The issue of terrorism was never very far away from the friendships, alliances and calculations of *realpolitik* that are a dominant feature of United Nations voting practice.⁶² When terrorism was taken up in the UN General Assembly (UNGA), it quickly became clear that no consensus on a general definition was possible. The delimitation between terrorists and freedom fighters pursuing self-determination proved especially insurmountable.⁶³ Another important question that has caused division among members of the international community, especially between developed and developing countries is whether the activities of official forces of a state can be categorized as terrorist offenses.

1. Freedom Fighters

The UNGA adopted its first resolution on the subject of international terrorism in 1972.⁶⁴ The title of the UNGA Resolution 3034 (XXVII) of 18 December 1972 reveals

quite transparently, the divergence of perception and approach in the UN treatment of the subject at that time:

Measures to prevent international terrorism which endanger or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lies in misery, frustration, grievance and despair and cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.⁶⁵

The title of this resolution is a clear evidence that showed us how divided the international community was when they discussed the issue of terrorism. The aftermath of the devastating impact of the Munich massacre, activities of the Red Brigades, the Baader-Meinhof and radical Palestine and other expatriate groups, lay behind the emphasis the West European countries placed on the need for effective measures to prevent and counter international terrorism.⁶⁶ The national liberation struggles, then raging in South Africa, and the struggle against foreign occupation in the Middle East, led the non-aligned countries to place emphasis on the need to address the underlying causes of terrorism in any U.N. initiative on the subject.⁶⁷ Operative paragraph four of this resolution condemns “the continuation of

⁶⁰ Wyboo P. Heere (ed), *supra* note 5, at p. 118.

⁶¹ A.R. Perera, *supra* note 32, at p. 567.

⁶² C.L. Lim, *supra* note 47, at p. 43.

⁶³ J. Wouters and F. Naert, Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism, in C. Fijnaut, J. Wouters & F. Naert (eds.), 2004, *Legal Instruments in the Fight against International Terrorism: A Transnational Dialogue*, Martinus Nijhoff Publishers, Leiden, at p. 413.

⁶⁴ Christian Walter, Defining Terrorism in National and International Law, in Christian Walter (eds.), 2004, *Terrorism as a Challenge for National and International Law: Security versus Liberty?*, Springer, Berlin, at p. 35.

⁶⁵ A.R. Perera, *supra* note 32 at 568

⁶⁶ *ibid.*

⁶⁷ *ibid.*

repressive and terrorist acts by colonial, racist and alien regimes in denying peoples of their legitimate right to self-determination and independence and other human rights and fundamental freedoms.” The qualification of acts by “colonial, racist and alien regimes” as “terrorists” underlines the strong presence of de-colonization issue in the debate on terrorism.⁶⁸

The UNGA position on the question of freedom fighters changed following the attacks and seizure on the *Achille Lauro* in 1985, an act related to the Israeli-Palestinian conflict. The Italian ship was captured by four members of the Palestine Liberation Front (PLF) while sailing from Genoa (Italy) to Ashdod (Israel), in retaliation for the Israeli attack on the PLO’s headquarter in Tunis the previous week. The PLF was associated with the PLO and its leader, Mohammad Abul Abbas, had a seat on the PLO’s executive committee.⁶⁹ The UNGA adopted a resolution stating that it “unequivocally condemns, as criminal, all acts, methods and practices of terrorism

wherever and by whomsoever committed, including those which jeopardize friendly relations among states and their security.”⁷⁰ Thus, acts committed in supporting national liberation movement is no exception, and be considered as terrorism in this resolution.

Then in 1995, through the General Assembly Resolution 53 on “Measures to Eliminate Terrorism” adopted on 11 December 1995, for instance, adopts implicitly and improves on the definition of terrorism under the now defunct 1937 Convention.⁷¹ It “reiterates” that “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”⁷² The UNGA’s efforts however, were not supported at the regional level. The 1998 Arab Convention for the Suppression of Terrorism⁷³ and the 1999 Convention of the Organization of the Islamic Conference

⁶⁸ Christian Walter, *supra* note 64, at p. 36.

⁶⁹ Roberta Arnold, *supra* note 53, at p. 156.

⁷⁰ G.A. Res.40/61/1985, U.N. Doc. A/RES/40/61 (1985)

⁷¹ Kriangsak Kittichaisree, 2000, *International Criminal Law*, Oxford University Press, Oxford, at p. 228.

⁷² UN Doc. A/RES/53.

⁷³ Article 2 of the Arab Convention for the Suppression of Terrorism states that: “(1) People’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination, in accordance with the principles of international law shall not be considered a terrorist crime. (2) None of the terrorist crimes mentioned in the previous article shall be considered political crimes. (3) In the Implementation of the provisions of this Convention the following crimes shall not be considered political crimes even when politically motivated: (a) aggression against kings and heads of state of Contracting States against their spouses, their ascendants or descendants. (b) Aggression against crown princes or vice-presidents or deputy heads of government or ministers in any of the Contracting States. (c) Aggression against persons enjoying international immunity including Ambassadors and diplomats in Contracting States or in countries of accreditation. (d) Murder or robbery by force against individuals or authorities or means of transport and communications. (e) Acts of sabotage and destruction of public properties and properties geared for public services, even if belonging to another Contracting State. (f) Crimes of manufacturing, smuggling or possessing arms and ammunition or explosives or other materials prepared for committing terrorist crimes. (4) All forms of international crimes, including illegal trafficking in narcotics and human beings, money laundering aimed at financing terrorist objectives shall be considered terrorist crimes. M. Cheriff Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* at p. 395 and 431.

on Combating International Terrorism⁷⁴ and the OAU Convention on the Prevention and Combating of Terrorism exclude from the ambit of terrorism, acts committed in the course of wars of self-determination, occupation, aggression and domination by foreign forces.⁷⁵ As a consequence of this exemption, at the regional level, the violence activities of organizations like Hamas, Islamic Jihad and Hezbollah will not be labelled as terrorist acts. Under the Arab Convention, it has been noted that, while on the one hand relatively banal acts could be covered by the terrorism definition (due to the broad-reaching conduct covering by the definition), on the other, the most serious indiscriminate attacks against civilians could be excluded “as long as [they were] perpetrated in the name of the right to self-determination.”⁷⁶

After the Second World War, “terrorism” became mired in the ideological cleavages and proxy violence of the Cold War. Whereas developed States focused on

non-State terrorism, developing and socialist States emphasized “State terrorism” by imperial powers, and regarded anti-colonial violence either as an exception to terrorism, or as justified by colonialism.⁷⁷ The change in the general political climate in the world community following the downfall of socialist regime, as well as the gradual demise of wars of national liberation, led to a change in attitude toward terrorism. For instance, General Assembly Resolution on terrorism adopted since 1991 have dropped the reference to the underlying causes of the terrorist phenomenon.⁷⁸ By the late twentieth century, new forms of fundamentalist religious terrorism emerged (such as Al-Qaeda), decoupled from particular territorial claims, specific demands like the release of prisoners, or restraint in tactics. At the same time, “traditional” assassinations continued to be used with devastating effect.⁷⁹

The question of labelling “freedom fighter” as terrorist has been resolved much earlier in 1977. The First Additional

⁷⁴ Article 2 of the Convention of the Organization of the Islamic Conference on Combating International Terrorism provides that: “(1) Any act committed in a situation of a struggle by any means, including the armed struggle against foreign occupation and aggression, for liberation and self-determination, according to the principles of international law is not to be considered a crime. Those acts taken in defense of the soil unity of any Arab state are also not to be considered crimes. (2) None of the terrorist crimes mentioned in the previous article is to be considered as a political crime. In applying the provisions of this Convention, the following crimes are not to be considered political crimes- even though they might be politically motivated: (a) aggression against monarchs, Presidents and Rulers of the Contracting States and their wives or relatives. (b) Aggression on Crown Princes, Vice Presidents, Prime Ministers or Ministers in any of the contracting states or in the states to which they are accredited. (c) Aggression on persons enjoying international protection, including ambassadors and diplomats in the contracting states or those accredited to them. (d) premeditated murder and forceful theft against individuals, authorities, or transport and communications means. (e) Sabotage and destruction of public and private property designated for the public service, even if belonging to another of the contracting states. (f) Crimes of manufacture, trafficking or possession of arms, ammunition, explosives, or any other material prepared for committing terrorist crimes.” M. Cheriff Bassiouni, *International Terrorism: Multilateral Conventions (1937-2001)* at p. 395 and 431.

⁷⁵ John Dugard, *supra* note 1, at p. 201-202.

⁷⁶ Helen Duffy, *supra* note 9, at p. 36-37.

⁷⁷ Ben Saul, *supra* note 7, at p. 2.

⁷⁸ Antonio Cassese, *supra* note 49, at p. 124.

⁷⁹ Ben Saul, *supra* note 7, at p. 2-3.

Protocol of 1977 provided an acceptable solution to the problem of avoiding labelling “freedom fighter” (that is, individuals and groups struggling for the realization of self-determination) as terrorists (Article 44.3 of the Protocol granted, on certain conditions, legal status as combatants, and prisoner of war status in case of capture, to fighters who are not members of the armed forces of a state and who normally do not carry their arms openly).⁸⁰ Organized groups and members thereof enjoyed legitimate combatant status under international law, as long as their struggle falls within Art 1(4) of the 1977 Protocol I. The level of violence permitted in an ensuing conflict with government forces is thereafter regulated by international humanitarian law -- and not the various anti-terrorist treaties -- and applies equally to both parties. Not only acts of terrorism, but all acts of violence to life or property are prohibited against non-combatants.⁸¹

2. State Terrorism

If we seek the origins of terrorist activity, asking to what the terrorist objects and why terrorist methods are resorted to, the answer in many individual cases is likely to be some manifestation of state policy and authority, legally enshrined in the sovereign power of the state in question.⁸² Governments are frequently both the ultimate target of

terrorist activity but also then major actors in the process of enforcing rules against terrorism. In a sense that is saying no more than that the terrorist quarrel is usually one between terrorist groups and governments, and begins as reaction against governmental policy and continues as a governmental or intergovernmental reaction against the first terrorist reaction.⁸³

Those who perceive matters from the perspective of the state, see state violence as lawful, however much terror it may induce in the minds of population. Those who perceive matters from the perspective of opponents of state authority see things very differently. For them, the state is the terrorist, which uses the military arsenal of the state to terrorize the people. Those who oppose the state by violent means are freedom fighters.⁸⁴ In the Middle East, Israel labels Palestinians as terrorists and Palestinians accused Israel of waging a war of terror. Moreover, while the West has no hesitation in categorizing Al Qaeda as a terrorist movement, many in the Muslim world see Osama Bin Laden and Al Qaeda as freedom fighters, engaged in the task of liberating the Islamic world from a corrupt and decadent West.⁸⁵

Are the Israel Defence Forces (IDF) engaged in lawful military action or in state terror? Are the Palestinian militants and suicide bombers terrorist or freedom fighters?

⁸⁰ Antonio Cassese, 2003, *International Law*, Oxford University Press, Oxford, at p. 449.

⁸¹ Ilias Bantekas & Susan Nash, 2003, *International Criminal Law*, Cavendish Publishing, London, at p. 41.

⁸² Christopher Harding, The Concept of Terrorism and Responses to Global Terrorism: Coming to Terms with the Empty Sky, in Paul Eden and Therese O'Donnell, 2005, *September 11, 2001: A Turning Point in International and Domestic Law?*, Transnational Publishers, Ardsley, at p. 175.

⁸³ Christopher Harding, *ibid*, at p. 168.

⁸⁴ John Dugard, *supra* note 1, at p. 188.

⁸⁵ John Dugard, *ibid*, at p. 189.

Is this a conflict regulated by international humanitarian law or by international criminal law? As long as the conflict in the Middle East continues, there can be no progress on a comprehensive convention on international terrorism.⁸⁶ Who then can be a potential author of terrorism? Recalling, but reversing the famous statement of the Nuremberg War Crimes Tribunal that war crimes are committed by men rather than abstract entities, it may be said that terrorism is perpetrated by abstract entities as well as by individual human beings.⁸⁷ The responsibility of individuals for established crimes under international law—such as genocide, crimes against humanity and war crimes—arises irrespective of whether the perpetrator was a state official or a non-state actor. This is true of all crimes within the jurisdiction of the International Criminal Court for example, and is made explicit in the definition of crimes against humanity, which must be committed pursuant to a “state or organizational plan or policy.”⁸⁸ In addition to abstract entities and individual human beings, in fact, acts of terrorism can also be committed by state. But state action that constitutes international terrorism should be distinguished from state support for international terrorism by private actors. Specific terrorism treaties generally cover only acts committed by non-state actors. However, these treaties do not themselves

impose responsibility directly on individuals, but on states, and the ability to hold the individual to account under them depends on incorporation into domestic law.⁸⁹

The involvement of state in terrorism can include the deployment of State agents or other persons controlled by that state; groups or persons independent from the State, but in receipt of financial aid or weapons, or only of logistic support; and persons or groups receiving no active support, but in respect of which a State acquiesces in their use of its territory.⁹⁰ When terrorist acts are perpetrated by State officials, alongside individual criminal liability there may arise State responsibility; the State on whose behalf the agent engages in terrorist action may incur international responsibility for breaching the international customary norms and any applicable treaty rules that make it unlawful to organize, instigate, assist, finance, or participate in terrorist act in territories of other States. In the former case States may be internationally responsible if they acquiesce in, tolerate, or encourage activities within their territory directed towards the commission of such acts abroad.⁹¹

What about terrorist acts committed by an organization? Legal action taken against the activity of a terrorist organization will be pursued against individual members of such a grouping, as individuals committing or planning criminal acts.⁹² In an ancillary

⁸⁶ John Dugard, *ibid.*, at p. 199.

⁸⁷ Christopher Harding, *supra*, note 82 at p. 181.

⁸⁸ Helen Duffy, *supra* note 9, at p. 62.

⁸⁹ Helen Duffy, *supra* note 9, at p. 62.

⁹⁰ Ilias Bantekas & Susan Nash, *supra* note 81, at p. 38.

⁹¹ Antonio Cassese, *supra* note 49, at p. 126.

⁹² Christopher Harding, *supra* note 82, at p. 177.

sense, political and/or legal action may be taken at the international level against states for indirectly contributing to terrorist activity, by supporting the latter in various ways, such as providing resources or effective territorial asylum (e.g., the justification for taking action against the territory of Afghanistan following the September 11 attacks).⁹³

It is highly unlikely whether cases involving direct or indirect State support of terrorism can be solved through the mechanisms envisaged in anti-terrorist treaties. In contesting the existence of the dispute in the *Lockerbie* case, the US and UK argued that the element of State sponsored terrorism in that case placed the situation outside the framework of the 1971 Montreal Convention.⁹⁴ Indeed, these conventions were premised on interstate cooperation under the assumption that terrorist acted against the interests of all States. The involvement of States in terrorist attacks on the territory of other States triggers, instead, the application of Art 2(4) of the 1945 Charter and humanitarian law.⁹⁵

Article 2(4) of the United Nations Charter prohibits the use of force in international relations. One significant change the Charter sought to effect is to outlaw the use of armed solutions to international disputes, and so successful was the message and the need to demonstrate fidelity to the Charter that the countries of the world that would otherwise have been

prompted to seek armed solutions could no longer do so without (1) a Security Council resolution under Chapter VII of the Charter, or (2) a justification based on unilateral or collective self-defence.⁹⁶

In cases where terrorists act with State support, or are harboured by States, the criminal law approach described above yields few results since, presumably, the State involved will neither be willing to extradite nor to (effectively) prosecute the perpetrators. The problem then arises how to deal with States breaching the prohibition to support, or participate in, terrorist acts committed in or against another State.⁹⁷ According to Professor Brownlie, state sponsored terrorism is governed mainly, if not exclusively, by the available categories of international legal thought such as the prohibition of the use of force in international relations, the doctrine of immutability in establishing state responsibility for the acts of individuals, the self-defence doctrine and so on.⁹⁸

International jurisprudence that deals with the question of the prohibition to encourage or tolerate terrorism contained in the *Corfu Channel* case. In the *Corfu Channel* case (1949), the International Court of Justice (ICJ) held that a State violating this rule contravenes the “general and well-recognized principle... not to allow knowingly its territory to be used for acts contrary to the rights of other States.”⁹⁹

⁹³ Christopher Harding, *ibid*, at p. 177.

⁹⁴ Ilias Bantekas & Susan Nash, *supra* note 81, at p. 39.

⁹⁵ Ilias Bantekas & Susan Nash, *supra* note 81, at p. 39.

⁹⁶ C.L. Lim, *supra* note 47, at p. 40.

⁹⁷ J. Wouters and F. Naert, *supra* note 63, at p. 417.

⁹⁸ C.L. Lim, *supra* note 47, at p. 38.

⁹⁹ *Corfu Channel* case, 9 Apr. 1949, *ICJ Rep.* 1949, 4 *et seq.*, p. 22.

Likewise, the UNGA's 1970 "Friendly Relations Declaration" holds that States must refrain from "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to... involve a threat or use of force."¹⁰⁰

In the *Tehran Hostages* case, the ICJ held that while the "direct" responsibility of Iran for the original takeover of the US Embassy in Tehran in 1979 was not proved, subsequent statements in the face of incidents involving hostage taking by students created liability on the part of the state. This approach has been followed by the International Criminal Tribunal of the former Yugoslavia (ICTY) in the *Tadic* Appeal Judgment and, the International Law Commission's Article 11 on State Responsibility.¹⁰¹ To paraphrase the ICJ in the 1980 *Hostages Case*, the acts of individuals are a catalyst for the State's international responsibility when the State authorities: (a) were "aware of the need for action on their part"; (b) had "the means of their disposal to perform their obligations"; and (c) "failed to use the means which were

at their disposal".¹⁰²

In 1986, in the *Military and Paramilitary Activities in and against Nicaragua* case, the ICJ had to define the way in which a State could be held responsible for sponsoring the terrorist activities of non-State armed group, namely the *contras*. The Court espoused a strict conception of control, that is, it had to be shown that the United States had "effective control" over the actions of the *contras*.¹⁰³ Although the Court found the US to have helped finance, organize, equip, and train the Nicaraguan *Contras*, this was not sufficient to render the *Contras*' activities attributable to the US. Such a level of support and assistance did not "warrant the conclusion that these forces [were] subject to the United States to such an extent that any acts they have committed are imputable to that State."¹⁰⁴ In this case, the Court found that it had not been proved that "the US had actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on its behalf".¹⁰⁵ The United States was found to liable for specific activities which were proved to be the result of direct action on the part of its military or foreign nationals in its pay.¹⁰⁶

¹⁰⁰ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation amongst States in accordance with the Charter of the United Nations, Annex to UN Doc. A/RES/265 (XXV) (24 Oct.1970), 1.1.9 and J. Wouters and F. Naert, Shockwaves through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism, in C. Fijnaut, J. Wouters & F. Naert (eds.), 2004, *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*, Martinus Nijhoff Publishers, Leiden, at p. 418.

¹⁰¹ Helen Duffy, *supra* note 9, at p. 51.

¹⁰² 1980 *Hostages Case*, para 68 and Pierre-Marie Dupuy, State Sponsors of Terrorism: Issues of International Responsibility, in Andrea Bianchi (ed), 2004, *Enforcing International Law Norms against Terrorism*, Hart Publishing, Portland, at p. 11.

¹⁰³ Pierre-Marie Dupuy, State Sponsors of Terrorism: Issues of International Responsibility, in Andrea Bianchi (ed), 2004, *Enforcing International Law Norms against Terrorism*, Hart Publishing, Portland, at p. 8.

¹⁰⁴ Helen Duffy, *supra* note 9, at p. 49.

¹⁰⁵ Pierre-Marie Dufuy, *supra* note 103, at p. 8.

¹⁰⁶ Helen Duffy, *supra* note 9, at p. 49-50.

Acts of terror are for the most part committed by non-State actors, either persons acting individually or, more frequently, non-State armed groups acting through a transnational network of agents. The difficulty, at least for keeping within the classical framework of public international law, lies with the fact that these groups do not at first glance appear to be subjects of international law, thereby not fulfilling the “subjective” element. If a wrongful act cannot be attributed to a subject of international law, there is no wrongful act of public international law and no responsibility for blatant acts of terrorism.¹⁰⁷ Thus, a state is responsible for an act of terrorism by private actors where it exercises effective control over the act, or subsequently endorses it as its own. States may also be responsible for other wrongful acts related to acts of terrorism, such as failing to take reasonable measures to prevent their territories being used by terrorists. As a matter of law, state responsibility has serious implications for the wrong doing state and, potentially, for the rights and obligations of other states.¹⁰⁸

There are basically two ways to ensure respect of certain rules of international law by non-State actors, particularly in those areas such as international human rights, humanitarian law and terrorism, where compliance with international law standards by these actors is most needed. The first technique consists of expanding the range of

subjects of international law, thus including non-State entities, the second one of broadening the criteria of attribution for the purpose of triggering State responsibility.¹⁰⁹

C. Development on General Definition of Terrorism

1. Financing of Terrorism Convention

The enactment of the 1999 International Convention for the Suppression of the Financing of Terrorism (hereafter: the 1999 Financing of Terrorism Convention) was also motivated by the awareness of the inadequacy of the existing legal framework to deal with new forms of terror. For example, the terror attack against Swiss tourist in Luxor in 1997, during which automatic weapons were used, did not fall within the scope of the 1997 Terrorist Bombing Convention-which refers only to explosive device-or any other existing treaty.¹¹⁰ Laws against the financing of terrorism are not aimed at terrorist or even those who may sympathize with their cause, but business people who are required, on pain of criminal conviction, to use their own resources to ensure that they are not assisting terrorists. Such systems are also encouraged by lists distributed by international, regional and domestic agencies of people who are designated as terrorists, lists that are often incorporated in the domestic law of many nations.¹¹¹

While this Convention addresses one aspect of terrorism, it contains a generic

¹⁰⁷ Pierre-Marie Dupuy, *supra* note 103, at p. 6-7.

¹⁰⁸ Helen Duffy, *supra* note 9, at p. 69.

¹⁰⁹ Pierre-Marie Dupuy, *supra* note 103, at p. 7.

¹¹⁰ Roberta Arnold, *supra* note 53, at p. 23-24.

¹¹¹ Kent Roach, *The Criminal Law and Terrorism*, in Victor V. Ramraj (eds.), 2005, *Global Anti-Terrorism Law and Policy*, Cambridge University Press, Cambridge, at p. 138.

definition of shorts by describing terrorism as “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. Alongside this formula in Article 2 (1) (b), the Convention provides that “terrorism”, so far as covered by the Convention, is that conduct covered by specific terrorist conventions addressing particular forms of terrorism.¹¹²

The 1999 definition is an indirect definition, which exclusively serves the purpose of defining a “secondary” (accessory) offense related to certain “primary” activities which are implicitly deemed to be acts of terrorism. The very existence of this definition makes the need to adopt a general definition of the “primary” offense even more evident. In fact, it seems paradoxical that the financing of terrorism as a whole is considered to be an offense, whereas terrorism itself is only criminalized if it consists of specific acts covered by the “sectoral” treaties.¹¹³ The reference in paragraph (1) (a) to pre-existing anti-terrorism treaties proves that the majority of states have at least agreed on some of the basic features of terrorism. Thus, a possible solution to tackle it comprehensively would

be to adopt a definition that synthesizes all the offenses contained in the anti-terrorism treaties listed in the annex to the convention. A *caveat*, however, is that since these treaties have not been universally ratified yet, the acceptance of such a definition would not be guaranteed.¹¹⁴

As far as international criminal law and procedure are concerned, apart from the definition of the offense of terrorist financing, an important feature of the 1999 Convention is that it obliges states to hold a legal person liable “when a person responsible for the management or control of that legal entity has, in that capacity, committed an offense described in Article 2.”¹¹⁵ The 1999 Convention is, therefore, the first treaty in force at the world level which contains a general definition of acts of terrorism. This definition confirms the assumption that, in order to distinguish terrorist acts from ordinary offenses, it is inevitable to include a specific “terrorist” intent or purpose as an element of the crime; this specific “terrorist” intent is described in identical terms in the draft comprehensive convention on the suppression of terrorism which is currently being elaborated within the UN Ad Hoc Committee.¹¹⁶

2. Draft Comprehensive Convention

The initiative for a comprehensive treaty definition of terrorism was a response to calls beginning in the 1990s for a departure

¹¹² Helen Duffy, *supra* note 9, at p. 20.

¹¹³ Andrea Gioia, *supra* note 13, at p. 13.

¹¹⁴ Roberta Arnold, *supra* note 53, at p. 25.

¹¹⁵ Andrea Gioia, *supra* note 13, at p. 12.

¹¹⁶ Andrea Gioia, *supra* note 13, at p. 13.

from a regime of variegated subject-specific treaties.¹¹⁷ The said sectoral and incremental – but not inconsistent – approach leaves lacunae since the conventions do not cover terrorist acts such as murder done by, e.g., shooting. The draft of a comprehensive convention currently under consideration by the Ad Hoc Committee and the Sixth Committee of the GA should remedy this. A general offense of terrorism to fill any lacunae left by sectoral conventions.¹¹⁸

The initiative had come originally from India, and negotiations are currently on going. United Nations General Assembly resolution 51/210 of 17 December 1996 had established an Ad Hoc Committee which, together with the United Nations' Sixth (Legal) Committee, is currently tasked with negotiations of the Draft Comprehensive Convention.¹¹⁹ The elaboration of a comprehensive convention on international terrorism is not designed to replace the existing “sectoral” treaties dealing with specific categories of acts of terrorism, but rather to complement them in order to fill existing gaps; the comprehensive convention is expected to oblige states to consider as offenses certain acts, defined in Article 2 and thus implicitly deemed to be terrorist acts, even if they are not covered by existing treaties.¹²⁰

The current informal definition of terrorism for the purposes of the Draft Comprehensive Convention (Article 2), prepared by the Coordinator for negotiating purposes, defines terrorism as unlawfully and intentionally causing (a) death or serious bodily injury to any person; (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. The definition further requires that “the purpose of the conduct, by its nature or context, is to intimidate a population or to compel a Government or an international organization to do or abstain from doing any act”.¹²¹ However, beyond the rhetoric, strikingly little progress appears to have been made in achieving consensus over a generic definition of terrorism for the Draft Comprehensive Convention, and old divisions continued to characterize the negotiations.¹²² The two main provisions of the draft comprehensive convention on which states were not prepared to compromise their position were whether the definition of terrorism should exclude (1) the activities carried out in people's struggle for self-determination, and (2) the acts of armed forces during an armed conflict.¹²³

The discussion on the definition issue has centred on a proposal made on behalf

¹¹⁷ C.L. Lim, *supra* note 47, p. 37.

¹¹⁸ Volker Roben, *The Role of International Conventions and General International Law in the Fight against International Terrorism*, in Christian Walter, 2004, *Terrorism as a Challenge for National and International Law: Security versus Liberty*, Springer, Berlin, at p. 816.

¹¹⁹ C.L. Lim, *supra* note 47, at p. 37.

¹²⁰ Andrea, *supra* note 13, at p. 14.

¹²¹ Helen Duffy, *supra* note 9, at p. 21; Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism; UN Doc. A/C.6/56/L.9, Annex I.B.

¹²² Helen Duffy, *supra* note 9, at p. 21.

¹²³ Surya P. Subedi, *supra* note 2, at p. 214.

of the Organisation of Islamic Conference (OIC), which seeks to clearly differentiate between terrorism and the legitimate struggle of people in the exercise of the right to self-determination and independence of all people under foreign occupation.¹²⁴ The West European group, opposed the proposal stating that while recognizing that people's struggle for the right to self-determination referred to in the proposal is legitimate and accepted under international law, the struggle could not be carried out by whatever means, but only within the confines of the rules of armed conflict, which rules prohibit act of terrorism.¹²⁵

The same is true of the activities of armed forces during an armed conflict. Whether or not the provision contained in Draft Article 18 (2) is included in the final text of the comprehensive convention on international terrorism, it cannot alter the *jus cogens* character of the laws of armed conflict. The armed forces of a state, even when they are acting against terrorist, are not allowed to harm civilians or civilian targets and undermine the principles of general international law concerning the prohibition on the use of force and non-interference. In the name of writing a new law on terrorism in the aftermath of the terrorist attacks of 9/11, states were not inclined to undo the basic principles of international law.¹²⁶

The absence of a comprehensive treaty definition of terrorism had its shortcomings,

not least of which was the missed opportunity here of stimulating more comprehensive legal doctrine under general or customary international law, existing alongside such a comprehensive treaty definition. The emergence of parallel customary rules, arising alongside treaty rules, has long been recognized in international law doctrine.¹²⁷ At least immediately following September 11, then, the quest for a global terrorism convention appeared to become accepted as a political reality, while the feasibility of achieving such a Convention, its precise content or scope, and of course the support that it might eventually muster, remain shrouded in uncertainty.¹²⁸

D. Conclusion

A common definition is necessary and indispensable to any serious attempt to combat terrorism. Without such a definition, a coordinated fight against international terrorism is likely to remain fragmented and ineffective. This was stated in the opinion of the League of Nations Council: namely that the definition is needed in order to enable international cooperation.¹²⁹

The problem that makes it very difficult for the international community to adopt a universally accepted legal definition of terrorism is the political component of terrorism.¹³⁰ Thus, the general acceptability of a definition of terrorism depends fundamentally on a certain political homoge-

¹²⁴ See Informal text prepared by the Coordinator, UN Doc.A/AC.252/2002/CRP.1.

¹²⁵ A.R. Perera, *supra* note 32, at p. 584.

¹²⁶ Surya P. Subedi, *supra* note 2, at p. 216.

¹²⁷ C.L. Lim, *supra* note 47, at p. 46.

¹²⁸ Helen Duffy, *supra* note 9, at p. 23.

¹²⁹ Gerhard Hafner, *supra* note 58, at p. 35.

¹³⁰ Roberto Arnold, *supra* note 53, at p. 4.

neity or at least ideological vicinity.¹³¹ These conditions are not likely to be met any time soon, which raises the question of how to go forward despite the limitations outlined in this paper. Waiting for conditions to arise that would make a comprehensive definition workable is unacceptable in that it would

hobble such progress that has been made under the sectoral approach. Moving forward and elaborating the sectoral, piecemeal approach to defining and prosecuting terrorism has the potential of accelerating the process of reaching a breakthrough on the divides preventing a comprehensive definition.¹³²

BIBLIOGRAPHY

- Bantekas, Ilias and Nash, Susan, 2003, *International Criminal Law*, Cavendish Publishing, London.
- Bianchi, Andrea, 2004, *Enforcing International Law Norms against Terrorism*, Hart Publishing, Oregon.
- Arnold, Roberta, 2004, *The ICC as a New Instrument for Repressing Terrorism*, Transnational Publishers, Ardsley.
- Cassese, Antonio, 2003, *International Criminal Law*, Oxford University Press, Oxford.
- _____, 2003, *International Law*, Oxford University Press, Oxford.
- Blakesley, Christopher L., 2006, *Terror and Anti-Terrorism: A Normative and Practical Assessment*, Transnational Publishers, Ardsley.
- Duffy, Helen, 2005, *The "War on Terror" and the Framework of International Law*, Cambridge University Press, Cambridge.
- Eden, Paul and O'Donnell, 2005, *September 11, 2001: A Turning Point in International Law?*, Transnational Publishers, Ardsley.
- Elegab, Omer Y., 1997, *International Law Documents Relating to Terrorism*, Cavendish Publishing Limited, London.
- Fijnaut, C. and Wouters, J., 2004, *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*, Martinus Nijhoff Publishers, Leiden.
- Nesi, Giuseppe, 2006, *International Cooperation in Counter-terrorism*, Ashgate Publishing Limited, Aldershot.
- Heere, Wyboo P., 2003, *Terrorism and the Military: International Legal Implications*, T.M.C., Asser Press, The Hague.
- Megret, F., 2002, "The Politics of International Criminal Justice", 13 EJIL 1261, 1280.
- Organization of American States: Inter-American Commission on Human Rights, 2002, *Report on Terrorism and Human Rights*, Washington D.C.
- Saul, Ben (2006), *Defining Terrorism in International Law*, Oxford University Press, Oxford.

¹³¹ Gerhard Hafner, supra note 58, at p. 36.

¹³² Gerhard Hafner, supra note 58, at p. 43.

- Schater, Oschar, 1989, “*The Extraterritorial Use of Force Against Terrorist Bases*”, 11 Hous.J.INT’L L 309.
- Than, Claire de and Shorts, Edwin, 2003, *International Criminal Law and Human Rights*, Sweet & Maxwell, London.
- Ramraj, Victor V., 2005, *Global Anti-Terrorism Law and Policy*, Cambridge University Press, Cambridge.
- Walter, Christian, 2004, *Terrorism as a Challenge for National and International Law: Security versus Liberty*, Springer, Berlin.
- Young, Reuven, 2006, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation*, Boston College International & Comparative Law Review.