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

One could be forgiven for assuming that international terrorism is a readily accessible legal concept. But is the universal condemnation of terrorism matched by a universal understanding of what we mean by the term? Are the obligations to suppress and punish terrorism matched by an internationally accepted definition of what precisely it is that is to be penalised? In 2001, when questioned on the definition of terrorism, then UK Permanent Representative to the UN Sir Jeremy Greenstock suggested ‘What looks, smells, and kills like terrorism is terrorism.’ If so, to paraphrase the famous dictum of a US judge

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


4. Sir Jeremy Greenstock, the Permanent Representative of the UK to the UN when questioned in October 2001 about the lack of a definition of terrorism, stated: ‘There is common ground amongst all of us on what constitutes terrorism. What looks, smells and kills like terrorism is terrorism’. UN Doc. A/56/PV.12, 1 October 2001, p. 18.
that drives in the same direction, do we simply know terrorism when we see it,\(^5\) and is that a sufficient legal basis to give rise to obligations of states and criminal responsibility of individuals?

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

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

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

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

\(^8\) Special Tribunal for Lebanon (STL) Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Interlocutory Decision), STL-11-01-I, 16 February 2011. See further below.
later chapters which focus on the legal framework governing states responses to terrorism.

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

2.1 DEVELOPMENTS TOWARDS A COMPREHENSIVE DEFINITION OF INTERNATIONAL TERRORISM

2.1.1 Pre-9/11: historical developments

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

In the early seventies, the United Nations stepped into the fray and in 1972 an ad hoc committee of the General Assembly was mandated to consider a Draft Comprehensive Convention and produce a definition. The Committee ultimately produced a report that falls short of that objective, but rather serves to underline the problems associated with the definitional quandary. Specifically, fuelled by the recent experience of wars of national liberation fought against former colonial powers, the report reveals persistent division regarding the inclusion or exclusion of ‘national liberation movements’ within the definition. Thus attempts to derive a generic definition again fell by the wayside (in preference for the framework of conventions identifying specific forms of

10 During the 1960s, conventions were adopted addressing specific facets of terrorism, as discussed at 1.1.3 below but the killing of 28 persons by a Japanese suicide squad at Lod airport, and of 17 Israeli athletes at the Munich Olympic Games in the seventies have been described as the impetus for this renewed initiative. See J. Dugard, ‘The Problem of the Definition of Terrorism in International Law’, (hereinafter ‘Definition of Terrorism’) conference paper, Sussex University, 21 March 2003, p. 4.
terrorism, on which international consensus could be achieved, as discussed below).12

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

Building on this development, General Assembly Resolution 51/210 established an ad hoc committee in 1996, inter alia to streamline efforts to arrive at a Draft Comprehensive Convention. The first draft of the Comprehensive Convention was presented by India in the Working Group in 1996.16 In the debate that followed in the ad hoc Committee the extent of controversy surrounding a generally accepted definition of terrorism was quickly apparent. Nonetheless, an indirect development came in the definition in the 1999 Convention for the Suppression of Financing of Terrorism.17 Despite this, controversy around the generic definition within the context of the global convention continued. The Committee’s work was ongoing when terrorism

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12 See this Chapter, para. 1.3.
17 International Convention for the Suppression of the Financing of Terrorism, 1999, Art. 2(1)(b): “…any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”. It does not define the conduct as such but refers to conduct covered by conventions addressing particular forms of terrorism – see this chapter, para. 2.1.3 below.
shot to the top of the international agenda on 11 September 2001, and its quest continues to the present day.

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

Following 11 September 2001, international statements demonstrated unparalleled unity in the condemnation of international terrorism. The Security Council for its part, without defining terrorism, called on states to adopt wide-ranging measures on the domestic level including the criminalisation of terrorist acts and their financing. It also urged states to ratify existing conventions and adopt pending conventions, in an apparent reference to the Draft Comprehensive Convention.18

As the working group of the ad hoc committee hurried to re-commence its work in this new context, all delegations were unequivocal in their condemnation of terrorism in all forms and manifestations.19 The momentum towards the global convention may, at that point, have seemed irresistible. However, beyond the rhetoric, many additional years of negotiating time and efforts at various junctures to instil a sense of urgency in the process,20 strikingly little progress has been made.21 Old divisions have continued to characterise the negotiations, as explained below. Indeed while the ‘outstanding’ issues on which agreement could not be reached had not and have not changed considerably with years of negotiations, new controversies have emerged in

response to new proposed solutions (with even the title of the draft emerging as the subject of debate).22

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, government or public facility;23 or (c) other such damage where it is likely to result in major economic loss.24 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 organisation to do or abstain from doing any act’.25

While various aspects of this definition have been subject to criticism over the years on the basis of the breadth and vagueness of terms,26 the heart of the outstanding controversy might be classed in three inter-related groups. Two relate to the potential authors of terrorism under the Convention’s definition, namely whether states on the one hand and ‘national liberation movements’ on the other, should fall within the purview of the Convention.27 The third is whether conduct in armed conflict should be excluded, and if so, whether such exclusion applies to both ‘parties’ to the conflict.28

Some negotiators sought (unsuccessfully, it would seem) to depart from the age-old debate around the qualification or not of oppressive states versus liberation movements as terrorists by treating the question not as part of the definition of terrorism as such, but as a limitation on the scope of the Convention. Thus Article 18 of the Draft Comprehensive Convention excludes from the scope of the Article 2 definition acts carried out during armed conflict, on the basis that another body of international legal rules, namely international

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22 In 2008, debate emerged over removing the word ‘comprehensive’. Sixty-third session of the Sixth Committee, Agenda item 99, Measures to Eliminate International Terrorism, Oral Report of the Chairman of the Working Group, 24 October 2008, para. 27. Negotiations are ongoing at time of writing, despite some delegates suggesting a pause in negotiations: UN Press Office L3209 (8 April 2013) and L3210 (12 April 2013).

23 The text provides ‘including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment’. 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.

24 Ibid.

25 Ibid.

26 See e.g. F. A. Guzman, Terrorism and Human Rights No. 1 and Terrorism and Human Rights No. 2 (International Commission of Jurists, Geneva, 2002/3).


28 Proposals regarding draft Article 18 below.
humanitarian law, already governs armed conflict, including wars of national liberation.29

However, the current draft excludes only ‘armed forces’, thereby exempting only state forces and not others whose conduct would also be governed by IHL, such as non-state parties to non-international armed conflicts, or liberation movements in the context of wars of national liberation.30 The proposed exclusion notes that ‘the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention’.31 This encounters stringent resistance from delegations intent to ensure that those national liberation movements fighting against such state forces are likewise excluded. One counter-proposal therefore seeks to exclude both ‘parties to a conflict’, and to ensure that those fighting ‘foreign domination’ are considered within the purview of any such exclusion.32

The Article 18 proposal excluding conduct already covered by IHL is supported by those, including the ICRC, concerned that conduct permissible under IHL should not be covered by ‘terrorism’, potentially jeopardizing the applicable framework of IHL.33 It is argued that conduct that violates IHL is adequately governed by the framework of IHL, and that conduct that may be permissible under IHL should not be labeled ‘international terrorism’. Doing so may preclude the application of amnesties at the end of the conflict (which IHL contemplates for offences not amounting to violations of IHL and which

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29 Such wars are considered international conflicts under Article 1(4) of Additional Protocol I to the Geneva Conventions. Some other conventions, such as the The International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997, UN Doc. A/RES/52/164, in force 23 May 2001) took the same approach: see Preamble and Article 19. See by contrast the example of the Financing Convention at 2.1.4 below.


31 Ibid.


Chapter 2

is said to provide an important incentive to compliance with IHL). Unfortu-
nately, existing international conventions take divergent and at times unclear
approaches to application in armed conflict, causing potential confusion as
to the interplay of these regimes. It remains to be seen, if a comprehensive
convention comes to pass, what approach it will adopt on these issues and
to what overall effect on the coherence of the broader international legal
framework.

In conclusion, if any shift in negotiations could be discerned post-September
11, beyond a strengthened condemnation of acts such as those executed that
day, it was in the expressions of support, in principle, for a global convention.
Commentators have long disagreed on the desirability of a comprehensive
Convention as much as on its content, yet reports of UN negotiations post-
September 11 recorded that States ‘reiterated the urgency of adopting a com-
prehensive convention on international terrorism’. At least immediately
following September 11, then, the quest for a global terrorism convention
appeared to become accepted as a political reality. Yet the feasibility of achiev-
ing such a Convention, its precise content or scope, and of course the support
that it might eventually muster, remain shrouded in uncertainty to the present
day.

While some continue to seek to propel the process forward, with the
passage of the years, there may be a loss of momentum and confidence in the
inevitability, or indeed the value, of a global convention. Some commenta-
tors have reverted to suggesting that ‘a less ambitious approach’ should be
pursued which concentrates on further elaborating functional legal definitions
of terrorism for specific purposes; this certainly reflects the reality that the
greatest normative activity before and after 9/11 can be found in conventions
related to specific forms of terrorist-related activity, addressed below. On
the other hand, experience post 9/11 explored in this book testifies to the
importance of a clear and precise definition of terrorism and the abuse that

34 See Claudia Martin, in van den Herik and Schrijver (eds.), Counter-terrorism Strategies in
a Fragmented Legal Order, (Cambridge: Cambridge University Press, 2013). Such amnesties
are distinct from amnesties for serious violations of human rights, which are impermissible
under international law, as discussed at Chapter 7.
35 Ibid.
36 See for example, Dugard, ‘Definition of Terrorism’, supra note 10, pp. 12-14, and J. Murphy,
on Human Rights 117.
37 UN Doc A/C.6/56/L.6, supra note 19, Annex IV, para. 4, ‘Informal summary of the general
discussion in the working group, prepared by the Chairman’.
38 Kim Prost, in van den Herik and Schrijver, Count-terrorism Strategies, supra note 35, arguing
that even from the point of view of facilitating international cooperation, a global convention
is unnecessary.
39 See Di Filippo, supra note 27, p. 533-70.
results in practice from its absence.\(^{40}\) The vastly divergent definitions of terrorism in national law and their application in the years following 9/11 may thus lend weight to the arguments in favour of pursuing a global definition. Whether this can ever be achieved, and the fate of the global convention, remain to be seen.\(^ {41}\)

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

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

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

Security Resolution 1566 is broad reaching in its scope: the material element, or **actus reus** comprises any criminal acts, while the victim group is exemplified rather than defined as ‘including’ but not being limited to civilians. It could therefore be criticised for lack of clarity, but this may overlook the purpose of resolution 1566 which does not purport to provide a binding definition, but to provide a framework to assist states to provide for appropriate defini-

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\(^{41}\) Providing a definition many years after states have changed their laws to comport with Security Council Resolution 1373 may be too late to avoid inconsistent legislation, unless by contrast to that in Security Council Resolution 1566, it obliged states to bring their law and practice into line.

tions in domestic law. In principle states should provide greater clarity and specificity themselves in domestic law, though in practice it is the tendency to do just the opposite that lends support to the need for a clearer international framework.

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

2.1.3 Specific international conventions

As attempts to arrive at a comprehensive terrorism convention floundered at various stages, the search for a generic definition was replaced by the elaboration of a framework of conventions that identify specific forms of terrorism. Currently, there are 14 primary universal instruments pertaining to the subject of international terrorism. A notable area of steady progress
since 2001, when the Security Council called on states to ‘work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism’, has been in the increased number of ratifications of these specific or sectoral conventions, as well as an increased emphasis placed on implementation. These conventions do not generally attempt to define terrorism, with the notable exception of the 1999 Convention for the Suppression of Financing of Terrorism which addresses only one aspect of terrorism, but contains a generic definition of sorts by describing terrorism as:

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

More commonly, the specific conventions do not provide a general definition, but rather address specific types of conduct and set forth a framework of

49 K. Prost, supra 38, in v.d. Herik and Schrijver.
50 In the Financing Convention, Art. 2(1)(b) the terrorist conduct in question is not specified other than by reference to specific terrorist conventions addressing particular forms of terrorism. Art 2 provides a definition of ‘financing’ which is also contentious: see for e.g. A Gardella, The Fight against the Financing of Terrorism between judicial and Regulatory Control, in A Bianchi (ed), Enforcing International Law Norms against Terrorism, (Oxford, UK: Hart Publishing, 2004), p. 415.
obligations on states parties, including measures to prevent criminal activity and cooperate in its prosecution. They often oblige states to either extradite or submit for prosecution persons suspected of the offences covered, subject to limited exceptions, and to cooperate, for example, in intelligence and evidence gathering. Unlike certain other international treaties, they do not themselves purport to criminalise conduct, but to impose obligations on states to do so in domestic law.

This alternative 'piecemeal' approach to terrorism was consolidated during the 1970s, with conventions addressing offences onboard aircraft or at airports, crimes against internationally protected persons, hostage taking and acts aboard ships and at sea. It continued to develop in the post cold war period, alongside the frustrated quest by the 1996 ad hoc Committee to find a global definition. During the nineties, this resulted in two noteworthy conventions relating to 'terrorist bombings' and the financing of terrorism. The Terrorist Bombings convention provides as comprehensive a terrorism convention as has been approved to date, covering the use of 'explosive or other lethal devices' in a public or state facility with intent to cause death or destruction, in particular where there is intent to cause terror in the public or particular individuals. The Financing Convention prohibits provision of financial support for any of the acts covered by other ad hoc terrorist conven-

51 See exception in certain conventions e.g. the 1997 Terrorist Bombing Convention, where there are substantial grounds for believing that extradition would lead to serious human rights violations or is motivated by discrimination. The traditional exception for 'political offences' has been removed in certain treaties e.g. the Terrorist Bombings or Financing Conventions. See Chapter 4.
52 See for e.g. Convention against Torture, Convention against Genocide or the Geneva Conventions and Protocols thereto; for a discussion of 'terrorism' as a crime under international law, see below, Chapter 4A.1.1.4 and terrorism in armed conflicts, this chapter 1.1.
58 Financing Convention, supra note 48.
tions. Notably, both of these conventions apply irrespective of the political, ideological, racial or religious reasons that may underpin the acts.60

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

2.1.4 Terrorism in armed conflict

International law also provides a definition of terrorism for the specific context of armed conflict. ‘Acts or threats of violence the primary purpose of which is to spread terror among the civilian population’, are prohibited in international and non-international armed conflict under treaty64 and customary IHL.65 Serious violations of this and other IHL prohibitions may also amount to a war crime for which individuals may be held to account, as affirmed, for example, by the International Criminal Tribunal for the former Yugoslavia (ICTY)66 or the Special Court for Sierra Leone.67 As such, terror inflicted on

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


62 Article 2 Nuclear Terrorism Convention, ibid.

63 Ibid., Article 5.

64 Article 51 of Additional Protocol I and Article 13 of Additional Protocol II. See also Article 33(1) of the Fourth Geneva Convention, which provides that ‘terrorism is prohibited’ without defining the phenomenon.


66 The ICTY adjudicated the first case concerning the offence of inflicting terror on the civilian population during armed conflict, which it found amounted to a crime under treaty law: Galić, Trial and Appeal Judgments, supra note 68. See also Prosecutor v. Milosevic Case No. IT-98-29/1, Trial Judgment, 12 December 2007, and Appeals Decision, 12 November 2009.

67 E.g. the Special Court for Sierra Leone’s first judgment including the crime of terrorism, Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Saultigie Borbor Kanu, SCSL-04-16-T, 20 June 2007; and Prosecutor v. Charles Taylor, Trial Judgment, Case No. SCSL-03-01-T, 18 May 2012. See K. Keith, Deconstructing Terrorism as a War Crime: The Charles Taylor Case, J.I.C.J. 11 (2013), 813. See also the Special Tribunal for Lebanon Interlocutory Decision, supra note 8.
the civilian population in armed conflict is a special case, providing an exception to the rule that ‘terrorism’ as such is not defined in, and does not constitute a crime under, international treaty law.68

As acts of terror in armed conflict are covered by IHL, by this specific provision or others addressing for example attacks against civilians, some of the ‘Terrorism Conventions’ purport not to apply in times of armed conflict, although as noted above the approach is irregular, and the issue remains controversial in the context of the Draft Comprehensive Convention. It currently excludes from the scope of application only the actions of ‘armed forces’ of the state during conflict, leaving non-state parties whose acts may respect IHL vulnerable to prosecution for terrorism.69 By contrast, the Financing Convention includes within its scope terrorism in the context of armed conflict, and provides a specific definition for this purpose.70 Unfortunately, it does not reflect precisely the definition of terrorism in IHL, causing potential confusion as to the interplay of norms.71

2.1.5 Regional conventions

Regional organisations have, to varying degrees, assumed responsibility for addressing terrorism, giving rise to at least nine regional conventions.72 At

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68 For the customary status of terrorism generally, see this Chapter, para. 1.2. On the customary status of the terror crime under IHL, see Henckaerts and Doswald-Beck.

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

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

71 The definition differs slightly from the war crimes definition above, for example by omitting the critical ‘primary purpose’ to spread terror. See Galic judgment, supra note 68.

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

2.1.5.1 Generic definition

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

The Arab Convention on the Suppression of Terrorism was adopted by the League of Arab States in 1998. Article 1(2) of the Convention defines terrorism as:

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

This definition of terrorism has been criticised for its breadth, vagueness and consequent susceptibility to abuse. In particular, the unqualified reference


73 Arab Convention on the Suppression of Terrorism, supra note 75 (unofficial translation from Arabic by the UN translation service available at http://www.ciaonet.org/cbr/cbr00/video/cbr_ckt/cbr_cct_27.html).

to ‘violence’ or the ‘threat’ of violence – irrespective of whether it achieves any actual result, or of the gravity of the violence caused or threatened\(^ {75} \) – allows for a potentially very broad range of conduct to be brought under the rubric of this Convention.

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

terrorist offences include the following list of intentional acts which, given their nature or their context, may seriously damage a country or international organisation where committed with the aim of:
(i) seriously intimidating a population, or
(ii) unduly compelling a Government or international organisation to perform or abstain from performing any act, or
(iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.\(^ {77} \)

Article 1 then goes on to outline the offences to which terrorism relates, including attacks on persons, damage to property, seizure of means of transport, ‘endangering’ people or the environment, weapons offences and threatening to commit any of those acts,\(^ {78} \) while Articles 3 and 4 bring within its scope ‘offences relating to a terrorist group’ and ‘offences linked to terrorist offences’.\(^ {79} \) This Council statement was adopted as a ‘common position’,\(^ {80} \) requiring member states to take the legislative steps required to implement its terms in national law. It has been criticised for the use of ‘unclear, vague and uncertain concepts.’\(^ {81} \) In 2008 this was compounded by a further Frame-

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\(^ {75} \) E.g. the Financing Convention, supra note 48, and the Draft Comprehensive Convention both refer to a requisite level of violence to be achieved, i.e. serious injury.


\(^ {78} \) Article 1, European Council Framework Decision on Combating Terrorism contains the definition of terrorism; see also ‘preventative offences’, ibid.

\(^ {79} \) Ibid., Articles 2-4 requiring that these forms of association and liability be criminalised in domestic law.

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

\(^ {81} \) See Guzman, supra note 27 and Chapter 4.2.2.
work Decision required states to ensure that ‘provocation’ to commit such terrorist offences is also criminalised, as well as ‘aiding and abetting, inciting and attempting’ such crimes are also criminalised.82

2.1.5.2 Definitions by reference

The more common approach, adopted in the terrorism conventions of other regional organizations, is not to define terrorism as such but terrorist activities are identified by reference to existing UN treaties which have addressed specific forms of terrorism.83 Regional organisations to have addressed terrorism in this way include the Organisation of American States,84 the African Union,85 the South Asian Association for Regional Cooperation,86 The Council of Europe87 and, more recently, the Association of Southeast Asian Nations (ASEAN).88 While these regional arrangements act as a framework for extradition or prosecution of acts which have already been deemed ‘terrorist’ at international law, they do not therefore make any attempt to elucidate a generic definition of terrorism.89 One alteration to this approach is the 2006 Council of Europe Convention on the Prevention of Terrorism which is more specific and adds offences, or additional modes of liability, which must be reflected in member states’ domestic laws, namely (1) ‘public provocation to commit a terrorist offense’; (2) ‘recruitment for terrorism’; and (3) ‘training for terrorism’,90 as well as ancillary offences.91 But this regional Convention,

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82 2008 Framework Decision, supra note 77.
83 See European Convention on the Suppression of Terrorism, Strasbourg, 27 January 1977, ETS. No. 90, in force 4 August 1978. Note also that the Arab Convention, while offering a generic definition of terrorism, complements it by referring to ‘terrorist offences’ prohibited by pre-existing conventions (Article 3).
89 Despite not offering a definition, some of them nevertheless note the exclusion from the concept of terrorism of struggles against self-determination.
90 Article 5, Council of Europe Convention 2005.
like most others, shies away from adopting, still less advancing, any generic
definition of terrorism as such.

2.2 DO WE KNOW IT WHEN WE SEE IT? DEFINING TERRORISM AND CUSTOMARY
LAW

As has been seen, there is no global convention that can be said to establish
a general definition of ‘terrorism’ that might be binding on state parties under
international treaty law. The question then is whether there might nonetheless
be sufficient international state practice and *opinio juris* to point to the general
acceptance of an international legal definition of terrorism as a matter of
customary international law.92 The issue had long been a matter of academic
discussion, with perhaps a majority of commentators taking the view that no
customary definition could be said to have crystallized.93 The other view,
however, was given voice by, among others, Professor Cassese, who had long
sustained that terrorism was indeed a crime under customary law.94 The issue
came into sharp international focus when the Special Tribunal for Lebanon,
under the chairmanship of (by then) Judge Cassese, decided in February 2001
that terrorism was defined as a crime in customary law.95

A brief comparative analysis of the various generic definitions of terrorism
that have emerged in international instruments thus far, as described above,
may be instructive in determining whether there is consensus on the essential
elements of a definition of terrorism. In assessing comparative practice, a few
distinctions are worthy of emphasis. First, the questions whether there is
uniform condemnation of terrorism, and whether states have obligations in
respect of it, are of course distinct from the question whether there is a clear
legal definition of terrorism in international law. Second, definitions are
elaborated for different purposes, such that definitions of terrorism for immi-
grantion, administrative or other purpose will often be distinct from definitions
of terrorism for criminal law purposes; just as the definitions may well be
different, so are the requirements of international law in terms of the particular
rigorous requirements of certainty and clarity in criminal law. Third, whether

91 *Ibid.*, Article 9 requires parties to adopt such measures as may be necessary to establish
as a criminal offence under its domestic law of ‘participating as an accomplice’, ‘organising
or directing’ ‘contributing to the commission of’ or ‘attempt’ to commit an offence covered
by the Convention.
92 See Chapter 1.2
93 See for e.g. B. Saul, *Defining Terrorism in International Law* (Oxford: Oxford University Press,
2008), at 270; Y. Dinstein, ‘Terrorism as an International Crime’, 19 Israel Yearbook on Human
95 See ‘International Criminal Tribunals’ below, 2.2.3.
there is broad agreement on certain ‘core concepts’ around the meaning of terrorism is different from the question whether there is a binding legal definition. There need not be absolute homogeneity of practice for customary law to emerge, and genuinely ‘peripheral variations’ may not affect the emergence of the norm, but the content or substance of the norm – the particular elements of the definition – must be clear if a rule is to lay claim to govern as a binding legal norm.

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

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

2.2.1.1 Conduct

The conduct (or in criminal law terms, the actus reus or material element of the offence) varies between definitions. The more restrictive approach is found, for example, in the Draft Comprehensive Convention and the Financing Convention which covers essentially causing death, serious injury and in some cases damage to property. By contrast, a broader reaching and less precise approach is adopted in the Arab Convention which covers any ‘violence or threats of violence’. The 1994 Declaration and 2004 Security Council definitions refer to undefined ‘criminal acts’ committed pursuant to a particular purpose, thus not really defining the material element of terrorism at all. Likewise, the definition put forward by the Special Tribunal for Lebanon, while going a little further, does not contain an exhaustive list of acts, but refers to ‘the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act’. Whereas some formulations

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96 STL Interlocutory Decision, supra note 8, p. 62, para. 97.
97 The Financing Convention, supra note 48, refers only to causing ‘death or serious bodily injury’.
98 E.g. SC Res. 1566, para 3 above.
99 STL Interlocutory Decision, supra note 8, p. 49-50, para. 85. ‘[A] number of treaties, UN resolutions, and the legislative and judicial practice of States evince the formation of a general opinio juris in the international community, accompanied by a practice consistent with such opinio, to the effect that a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority
cover ‘inchoate’ offences, where no result occurs, others depend on certain
types of injury, damage or loss having actually occurred.100

2.2.1.2 Purpose, Motive and ‘Justification’?

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

The need for such a broader design or purpose is often described as the
essential element differentiating terrorism from other forms of violence or
illegality. However, deep controversy and divergence of approaches surround
the purposive element. Definitions are not consistent in including a require-
ment of ‘terrorisation’ as such and those that do generally do not define it,
with some envisaging a generalised terror e.g. provoking ‘terror in the general
public’,102 and others including the much narrower terrorization of ‘particular
individuals’.103 ‘Terror’ is not a necessary element in numerous definitions
that contemplate a broader range of possible objectives. The EU definition, for
example, includes ‘seriously destabilising or destroying the fundamental
political, constitutional, economic or social structures of a country or inter-
national organisation’ as a possible purpose.104 The Arab Convention105
to take some action, or to refrain from taking it; (iii) when the act involves a transnational
element.’

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

101 Persecution and genocide, for example. For a discussion on the category of dolus specialis
in the context of genocide, see Cassese, International Criminal Law, supra note 97, p. 103.

102 UN GA Res. 51/210, supra note 14. On the IHL prohibition of ‘acts or threats of violence
the primary purpose of which is to spread terror among the civilian population’ in inter-
national or non-international armed conflict, see this chapter, para. 1.4.1

103 SC Res. 1566, supra 2.1.2.1.

104 Article 1, European Council Framework Decision on Combating Terrorism.

105 Article 1(2) of the Arab Convention refers to ‘seeking to sow panic among people, causing
fear by harming them, or placing their lives, liberty or security in danger, or seeking to
cause damage to the environment or to public or private installations or property or to
occupying or seizing them, or seeking to jeopardize national resources’.
and the OAU Convention\textsuperscript{106} are broader still in the range of possible objectives. Commonly, but not invariably, definitions also refer to another subjective layer by requiring that the terror, destabilisation or other objective is in turn pursued with a view to compelling a response from another (but while this is usually from the government or state, in some definitions it may also be from an international organisation).\textsuperscript{107}

Some definitions on the international level also include an underlying political or ideological motivation as an additional layer to the definition of terrorism, but such inclusion has uneven support and remains a matter of very considerable controversy.\textsuperscript{108} For some, the political or ideological motive is at the heart of the definition of terrorism, while for others it is irrelevant, or indeed precluded by principles of human rights or criminal law.\textsuperscript{109}

A further issue, highlighted in relation to the ‘authors’ of terrorism, relates to whether considerations of a political, philosophical or other nature might constitute a ‘justification’ for terrorism. There has been a tendency over time to move away from the language of ‘justification’, with this explicitly ruled out in certain definitions, such as the Security Council Resolution 1566 of 2004, but not in others.\textsuperscript{110} Linked to this are different approaches to whether acts

\textsuperscript{106} A ‘terrorist act’ under the OAU Convention is one which is (i) intended to ‘intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State’, Article 1(3).

\textsuperscript{107} ‘[T]he purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or abstain from doing any act.’ Draft Comprehensive Convention, Article 2. While the Arab Convention refers only to compelling the state, in the European common definition, terrorist acts may be directed at a state or an international organisation.

\textsuperscript{108} E.g., SC Res. 1566 has no motive requirement. The STL judgment found no convergence of state practice on the existence of an ideological or political motive, but considered it an important element in understanding the nature of terrorism and one that may eventually ‘emerge as an additional element of the international crime of terrorism’. STL Interlocutory Decision, p. 68-69, para. 106.

\textsuperscript{109} Under general principles of criminal law, personal motive is irrelevant, although this is not always clear in definitions of terrorism. Some consider the human rights to thought, conscience and religion, and limits on ‘profiling,’ to preclude such a motive requirement in criminal law while others consider it integral to notions of terrorism. See debate between Kent Roach and Ben Saul: Roach, ‘The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive’, and Saul, ‘The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient or Criminalising Thought’, in Law and Liberty in the War and Terror, A. Lynch, G. Williams, and E. MacDonald (eds.), (Annandale: The Federation Press, 2007), p. 45. See also STL Interlocutory Decision, supra note 8, p. 63-69, para. 98-106.

\textsuperscript{110} SC Res. 1566, supra note 43, notes that acts referred to in the resolution ‘are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’. See also Article 5, Terrorist Bombings and Financing
of terrorism can constitute ‘political offences’ and whether the political nature of an offence can constitute an exception to the duty to prosecute for terrorism.\footnote{111}{The ‘political offences’ exception is increasingly being eliminated, especially in relation to terrorism post September 11. See below Chapter 4B.2.3 and this chapter, para. 2.1.4 regarding the human rights implications of this trend. Regarding specific terrorist conventions, see, for e.g., Article 11, Terrorist Bombings Convention and the Financing Convention, supra note 48.}

2.2.1.3 Who or what is protected

A further criterion on which definitions differ is the scope of potential ‘victims’ of terrorist acts. The 1937 definition, for example, is unusual in covering only acts directed against the state.\footnote{112}{Article 2(1), Convention for the Prevention and Punishment of Terrorism (Geneva, 1937, never entered into force), League of Nations Doc. C.546M.383 1937.} Other conventions, such as the 1999 Financing Convention, by contrast protect ‘civilians’ or other persons not taking a direct part in hostilities in armed conflict.\footnote{113}{Financing Convention, Art. 2(1)(b), supra note 48.} More recent examples, such as the UN Draft Comprehensive Convention, include a broader range of targets, applying to injury or damage to ‘any person’ and to property whether ‘public’ or ‘private’.\footnote{114}{Informal text of Article 2, Report of the Working Group on Measures to Eliminate International Terrorism; UN Doc. A/C.6/56/L.9, Annex I.B.} Varying approaches to the target group that may ‘terrorised’ – whether a ‘people’ or ‘population’ en masse as opposed to individuals – has been noted above.\footnote{115}{Chapter 2.2.1.2.}

2.2.1.4 International element

Generally, conventions addressing ‘international terrorism’ explicitly restrict their application to terrorism with a cross-border element. With the exception of terrorism committed in the context of non-international conflict (which as noted may be a war crime under international law), international conventions and declarations do not apply to domestic terrorism where the conduct, perpetrators and victims arise within one state. However, the regional terrorism instruments referred to express no such limitation.\footnote{116}{See, for e.g., the European Council Framework Decision on Combating Terrorism and Arab Convention.}
2.2.1.5 The authors: state actors and national liberation movements

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

As regards the first question whether state conduct may constitute international terrorism, international instruments take different approaches.118 While the 1991 Draft Code of Crimes Against the Peace and Security of Mankind included international terrorism within the scope of crimes that can be committed by the State,119 terrorism was dropped from the list of offences covered by the 1996 version of the Draft Code.120 Most subsequent provisions, while often not explicitly excluding the possibility of states falling within their purview, do exclude many guises of direct state terrorism by implication, either because the terror is inflicted against a state’s own people (and is thus excluded by the broadly accepted ‘international element’ criterion referred to above), or because it takes place in armed conflict (and is explicitly excluded as already governed by IHL).121 While it remains sensitive – as seen for example from the fact that negotiations towards the nuclear terrorism convention were long stymied by differences of view on this critical point, which are also manifest in the Draft Comprehensive Convention discussed above – the majority of ‘international terrorism’ provisions do not address state terrorism as such.122

In this respect, two points are worth clarifying. The first is that one justification for excluding ‘state’ terrorism from definitions of international terrorism is that the state is, or should be, accountable through other branches of law,
such as human rights,\footnote{Chapter 7 on responsibility and the extra-territorial application of human rights obligations.} humanitarian law or the law on the use of force, whereas the responsibility of non-state actors is more limited.\footnote{U.N. High-level Panel on Threats, Challenges and Change, supra note 44.} On this basis the Secretary General’s Report of 2004 found the objections that ‘state terrorism’ should be included in a global definition of terrorism ‘uncompelling’ given that it is covered by other international norms. Secondly, the exclusion of ‘state terrorism’ should be distinguished from (a) state responsibility for terrorism carried out by private actors, which are attributable to the state according to the general rules of state responsibility, and (b) state responsibility for violations of other obligations, which may include refraining from sponsoring or supporting terrorism for example.\footnote{See Chapter 3 for discussion of responsibility and 2.3 below.}

Stark differences of approach are seen also in relation to the yet more intractable question of the distinction between ‘terrorism’ and acts undertaken pursuant to ‘the inalienable right to self determination and independence’.\footnote{GA Res. 3034 (XXVII), ‘Measures to Prevent International Terrorism’, 18 December 1972, UN Doc. A/RES/3034 (XXVII).} The determination on the part of many states, particularly but not exclusively from the developing world, to exclude national liberation movements from any definition of terrorism has characterised almost all negotiations towards a definition in international practice.

As noted, the 1994 Declaration was thought to be a milestone in stating that the ‘criminal acts’ covered by it are ‘in any circumstances unjustifiable whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature’, without reference to national liberation movements (NLM)s. The Security Council Resolution 1566 and numerous other instruments follow this approach. However, the Arab and African regional conventions expressly exempt from the terrorist definition peoples struggling for self-determination or national liberation in accordance with international law, ‘including armed struggle against colonialism, occupation, aggression and domination by foreign forces’.\footnote{OAU Convention, Article 3(1); Arab Convention, Preamble and Article 2(a). See also Convention of the Organisation of the Islamic Conference on Combating International Terrorism which couples this exclusion with a provision stating that ‘political, philosophical or other motives shall not be a justifiable defence’.} 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’.\footnote{E. David, 
\textit{Eléments de droit pénal international – Titre II, le contenu des infractions internationales}, 8th ed. (Brussele, 1999), p. 539. See further Guzman, supra note 27.} A slightly different manifestation of the same phenomenon could be seen in a European Union note accompanying

\begin{footnotesize}
\begin{itemize}
\item Chapter 7 on responsibility and the extra-territorial application of human rights obligations.
\item U.N. High-level Panel on Threats, Challenges and Change, supra note 44.
\item See Chapter 3 for discussion of responsibility and 2.3 below.
\item GA Res. 3034 (XXVII), ‘Measures to Prevent International Terrorism’, 18 December 1972, UN Doc. A/RES/3034 (XXVII).
\item OAU Convention, Article 3(1); Arab Convention, Preamble and Article 2(a). See also Convention of the Organisation of the Islamic Conference on Combating International Terrorism which couples this exclusion with a provision stating that ‘political, philosophical or other motives shall not be a justifiable defence’.
\item E. David, \textit{Eléments de droit pénal international – Titre II, le contenu des infractions internationales}, 8th ed. (Brussele, 1999), p. 539. See further Guzman, supra note 27.
\end{itemize}
\end{footnotesize}
the draft European Framework decision circulated after 11 September 2001, which noted that the definition of terrorism does not include ‘those who have acted in the interests of preserving or restoring democratic values’.129

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

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

In brief, this short survey reveals numerous commonalities but also substantial points of divergence in the approach to the definition of terrorism to date. It is undoubtedly possible to discern, in a general way, key features of terrorism, such as certain unlawful acts carried out for ideological ends. It is rather more difficult to identify, from the survey of international instruments, clear and precise elements of a definition that can be said to have garnered international support.

129 The note circulated with the draft decision continues: ‘Nor can it be construed so as to incriminate on terrorist grounds persons exercising their legitimate right to manifest their opinions, even if in the course of the exercise of such right they commit offences.’ See Statewatch, ‘Critique of the Council’s Agreed Decision on the definition of terrorism’, Statewatch bulletin, November-December 2001, available at http://www.statewatch.org/news/2002/feb/06Aep.htm. But see SC Res. 1566, supra note 43.

130 Article 18 Draft Comprehensive Convention; see discussion of UN negotiations para. 2.1.2.

131 See e.g. Chapter 7B2 and 7B3 denying the scope of application of human rights law extra-territorially or in armed conflict as an example of states seeking to avoid their obligations and accountability.

132 E.g. Chapter 7B14.

2.2.2 Other international practice: United Nations General Assembly and Security Councils

Various resolutions of the UN General Assembly and Security Council have referred to the duties of states in respect of terrorism, from the duty to refrain from support\textsuperscript{134} to the more proactive duty to suppress.\textsuperscript{135} While many are non-binding,\textsuperscript{136} these resolutions may reflect or contribute to the development of customary law regarding the obligations in question.\textsuperscript{137} As discussed above, post September 11, the Security Council went further and called on states to take broad-reaching measures against ‘international terrorism’, including criminalising such conduct.

For the most part, these UN initiatives do not provide a definition of terrorism and hence, one could argue, fail to give precise content or meaning to the obligations to which they refer and, in any event, to contribute to our understanding of a definition of international terrorism in customary international law. It has been argued that these resolutions, particularly those that refer to criminal law, presuppose sufficient understanding of the phenomenon referred to in international law.\textsuperscript{138} But then, the current state of negotiations on a global convention, and the Security Council’s call to states, in the context of resolution 1373, to advance these negotiations belie such a view.

It remains doubtful to what extent the UN initiatives directed at providing content to the meaning of ‘international terrorism’ highlight the existence of sufficiently widespread agreement on the elements of a legal definition. In providing its ‘description’ of terrorism, the High-level Panel of the General

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

\textsuperscript{135} GA Res. 51/210, ‘Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism’, 17 December 1996, UN Doc. A/RES/51/210 (1999) refers in the preamble 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 circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them’.

\textsuperscript{136} Cf Security Council resolutions passed under Chapter VII. Other resolutions, including those of the GA, are not strictly binding under the Charter but may play a significant role in the formation of customary norms: see Chapter 1 and M. Wood, “The interpretation of Security Council resolutions”, Max Planck Yearbook of United Nations Law, Vol. 2, 1998, p. 74.

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

\textsuperscript{138} See Cassese, supra note 97.
Assembly indicated in 2004 that there was a lack of agreement on a clear
definition of terrorism, which it considered to undermine the normative
regulation and moral stance against terrorism. Subsequent pleas by then-
Secretary-General Kofi Annan for states to provide ‘clarity’ around the defini-
tion of terrorism reinforce the perceived gap. While the 2004 Security Council
resolution was significant in providing a ‘definition,’ it was clearly non-binding
and aimed at providing a helpful framework for national definitions rather
than itself embodying a legal definition. Consistent with its nature as a refer-
ce point to assist states in providing the necessary specific definitions in
domestic law, it provides a broad approach rather than a detailed specific
definition, and, as noted in the brief survey above, it both reflects and differs
from approaches found elsewhere.

2.2.3 The practice of International Criminal Tribunals

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

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

139 ‘The Panel calls for a definition of terrorism which would make it clear that any action
constitutes terrorism if it is intended to cause death or serious bodily harm to civilians and
non-combatants, with the purpose of intimidating a population or compelling a Government
or an international organization to do or abstain from any act. I believe this proposal has
clear moral force, and I strongly urge world leaders to unite behind it.’ Secretary-General’s
Kofi Annan’s keynote address, supra note 20.
140 For the first judgment of the Special Court for Sierra Leone including the crime of terrorism,
see Prosecutor v. Alex Tamba Brima, supra note 70.
141 See for e.g. Galic, supra note 68, Simma, supra note 70, and Taylor, supra note 70, referred
to above.
142 Cassese, supra note 97, pp. 120-21, asserting that a definition of terrorism does exist and
citing in support Article 4 of the Statute of the International Criminal Tribunal for Rwanda
(ICTR).
also prosecuted – rather than purporting to confer jurisdiction over a broader generic offence of terrorism in international law.\(^\text{143}\)

The Special Tribunal for Lebanon, established in 2007, is the first international tribunal that focuses its jurisdiction on what is plainly a terrorist act,\(^\text{144}\) although its competence as described in its statute is to apply ‘the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism…’.\(^\text{145}\) In a significant interlocutory decision of February 2011, the Appeals chamber decided that it should interpret Lebanese law in light of international law, and went on to conclude, controversially, that terrorism was already a crime under customary law. The Tribunal found as follows:

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

While the views of Tribunal President Cassese were well known from his prior academic work, the judicial decision was surprising, given ongoing controversy as to the failure to reach international agreement on a definition of terrorism, and differing elements emerging from national and international

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


\(^\text{145}\) STL Statute, ibid, Article 2 ‘Applicable criminal law’ referring inter alia to “the provisions of the Lebanese Criminal Code relating to the prosecution and punishment of acts of terrorism,…”

\(^\text{146}\) STL Interlocutory Decision, supra note 8, p. 3, emphasis in original.
practice. Where the question is whether terrorism is defined as a crime under international law, the controversy can only be more pronounced, and the requisite degree of clarity and specificity stricter. In the context of this particular case, prosecution, defence and interveners all agreed that there was no crime of terrorism under customary law, yet the tribunal proprio motu took a different view.

The decision has been promptly and stridently critiqued, with serious questions arising regarding the sources on which the tribunal based its assessment as to state practice and opinion juris. Despite this, it is likely that this decision will be interpreted as lending some weight to the argument in support of the crystallisation of a customary norm. While it remains unclear whether the decision of the Special Tribunal will stand the test of time or be challenged before that Tribunal itself, it is clear that one decision of an international body is, in any event, far from conclusive on the question.

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

International criminal law practice is therefore divided. Beyond the Lebanon tribunal decision, which stands apart in its endorsement of a crime of terrorism in peacetime, international criminal practice does not appear to support the existence of a definition of terrorism in customary international law (other

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

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


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

than perhaps in respect to the war crime of inflicting terror on the civilian population).\textsuperscript{152}

2.2.4 National definitions

In considering whether a customary definition has emerged, it is also relevant to look at state practice on the national level. However, here still less definitional convergence emerges. The way national laws approach key elements of a definition of terrorism can be discerned from international reporting obligations, notably to the Security Council as regards implementation of obligations\textsuperscript{153} as well as from surveys of state practice on the national level.\textsuperscript{154}

Many states had specific counter-terrorism legislation in place long before the ‘war on terror’, which, unsurprisingly, present differing definitions of terrorism reflecting diverse historical and political national contexts.\textsuperscript{155} Post-September 11, a plethora of new anti-terrorist measures were grafted onto the canvas of existing laws; while many states introduced entirely new terrorism legislation in the years following, others with long histories of counter-terrorism but renewed resolve in the different geopolitical landscape, introduced


\textsuperscript{153} A broad range of national practice can be seen from state reports to the Security Council Counter-Terrorism Committee on the criminalization of terrorist acts under SC Res. 1373, para 2(e): www.un.org/Docs/sc/committees/1373/reports.html.

\textsuperscript{154} See Ben Saul, ‘Defining Terrorism’, supra note 96 (or did you mean his article at note 417). The Special Tribunal for Lebanon also selects examples of state practice in support, and for examples of practice in country reports of human rights monitoring bodies see Chapter 7. See also Global Anti-Terrorism Law and Policy, Victor V. Ramraj, Michael Hor and Kent Roach (eds.), (Cambridge: Cambridge University Press, 2005), particularly Chapters 14, 18, 22-24 and 26. The International Commission of Jurists Bulletin on Terrorism provides examples of legislative and other developments as they unfold.

\textsuperscript{155} E.g. Article 270 of the Italian Criminal Code has no requirement for religious or political motivation or spreading fear or intimidation among the population, as the law was focused on organised crime and the activities of the mafia. Post-September 11, the law has been extended to cover acts with an international dimension. See K. Oellers-Frahm, ‘Country Report on Italy’, Conference on ‘Terrorism as a Challenge for National and International Law’, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 24-25 January 2003, at www.edoc.mpil.de/conference-on-terrorism/country.cfm. In Japan, Article 17(1) of the National Police Agency Organisation Act of 1954 limits terrorism to a particular political view, covering ‘[v]iolent or subversive activities on the basis of ultra-left ideology and other assertions with the intention of achieving their purpose by spreading fear and apprehension’. \textit{Ibid.}, N. Hirai-Braun, ‘Country Report on Japan’, Conference on Terrorism as a Challenge for National and International Law’, at www.edoc.mpil.de/conference-on-terrorism/country.cfm.
significant legislative changes.156 Many of these laws were enacted according to expedited national procedures.157 Not infrequently, such counter-terrorism legislation has been the subject of criticism from human rights courts and bodies for its breadth and/or ambiguity, as discussed further in Chapter 7.

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

156 E.g. Singapore and Malaysia made fewer amendments to their existing anti-terrorism regimes, whereas newly democratic Indonesia resisted the imposition of harsher new laws: see for example, Global Anti-Terrorism Law and Policy, supra note 160, Chapters 13 and 14.
157 Less than two months after 9/11 the 342-page US Patriot Act 2001, which amends over fifteen statutes, passed into law. The UK government rushed through the Anti-Terrorism, Crime and Security Act 2001 within a month of submitting its draft to Parliament, thereby only allowing parliamentary debate and not the normal customary committee scrutiny. Both pieces of legislation afforded domestic law enforcement agencies and international intelligence agencies wide-ranging powers and restricted human rights protections.
159 SC Res. 1373, supra note 2.
160 SC Res. 1566, supra note 43.
161 The Committee originally made clear that it was not interested in monitoring the human rights implications: “The Counter-Terrorism Committee is mandated to monitor the implementation of Resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee’s mandate.” A briefing to the Security Council on 18 January 2002, available at http://www.un.org/en/sc/ctc/rights.html. It now embraces a rights dimension to its work; see Chapter 7B1.
162 Resolution 1373 (2001) established the Committee and SC Res. 1377 (2001), supra note 2, clarified its tasks including to promote best practices, including the preparation of model laws as appropriate; and to disseminate the availability of existing technical, financial, legislative and other assistance programmes to assist the implementation of Resolution 1373.
163 See Chapter 7B.5.
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It has been noted that some national terrorism laws have had considerable impact on definitions adopted in other states, as have international or regional initiatives of course, leading to some similarity of approaches and language appearing across different states.\textsuperscript{164} Despite this, for the most part definitions vary considerably in their approaches – from adopting definitions by reference to existing specific conventions, to the establishment of newly drawn up offences, that sometimes bear scant resemblance to international, regional or other national definitions.\textsuperscript{165} Even within regions and among states implementing the same regional standards, such as the 27 European countries who are obliged to implement the EU’s Framework Decision on Combatting Terrorism, divergent approaches are apparent.\textsuperscript{166}

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

\textsuperscript{164} Definitions of terrorism in Australia, Hong Kong, New Zealand, South African laws are said to have been inspired by the definition in UK legislation; see Ramraj, Hor and Roach, Global Anti-Terror Law and Policy, supra note 160, p. 630.

\textsuperscript{165} See e.g., ‘creating a condition of widespread and extraordinary fear and panic’ in Phillipines Human Security Act 2007. Further examples of broad appraoches are discussed in Chapter 7B5.


\textsuperscript{167} Saul notes that the dominant approach in states’ criminal laws is to address terrorism through ordinary offences under criminal law; this was more striking prior to 9/11 but remains true despite an increase in national level definitions since 2001. Saul, supra note 91, pp 264, 268.

\textsuperscript{168} Ibid.

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

\textsuperscript{170} For example, the Russian Federation: Article 3 of the Federal Law no. 35-FZ of 6 March 2006 on ‘Countering Terrorism’.

\textsuperscript{171} Saul refers to 15 states including simple generic definitions of terrorism of this type, supra note 96, p. 266.

\textsuperscript{172} Ibid., p.268.
Divergence between states is also noteworthy as regards the inclusion or omission of a political or religious motive requirement. The rejection of such a requirement by the Security Council’s 2004 definition173 is not necessarily reflected in practice on the national level.174 The extent of the controversy on this element is apparent from the Canadian judiciary’s rejection of such a requirement in Canadian legislation as violative of human rights.175

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

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

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

The question whether terrorism is defined in international law is therefore controversial. While a thorough review of the practice of states in defining terrorism goes beyond the scope of this study, the differences of approach highlighted belie the notion of consensus around a definition of terrorism.

173 See SC Res. 1566, supra note 43, but see STL Interlocutory Decision, supra note 8.
174 See e.g., K. Roach, ‘The Case for Defining Terrorism With Restraint and Without Reference to Political or Religious Motive’, supra note 114, p. 45, on Australian, Canadian and UK definitions reference to political or religious motivation. New Zealand and Hong Kong have also adopted the inclusion of religious or political motives, whereas the US, some Middle Eastern and some European countries use harm as a primary definer. See also Global Anti-Terrorism Law and Policy, supra note 160, particularly Chapters 14, 18, 22-24 and 26.
While the heart of the definitional dispute undoubtedly relates to the potential authors of terrorism, there is divergent practice in respect of most, if not all, elements of the definition.

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

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

Counter-terrorism laws continue to emerge and a rule of customary law could, at least conceivably, evolve as international practice develops. National practice is being generated constantly, as states introduce new legislation or reinforce existing laws and practices. The definitions in domestic legislation reveal both some consistency and much divergence of approach. As noted above, several states have followed one another’s approach to the definitions of terrorism, leading to some key examples of parallel provisions in mostly similar but sometimes quite different legal systems. Differences of approach are, however, at least as striking as the similarities. The examples of the vastly divergent approaches to conduct, purpose and the motivation requirement on both the international and national levels, discussed above, illustrate


178 See Chapter 7.

179 Note similar approaches across the commonwealth and beyond, inspired by the definition in UK legislation, *Global Anti Terror Law and Policy*, *supra* note 160, p. 630.

180 See, for example, discussion of the European states’ approaches in Schmahl, *supra* note 172.
this. Such divergence should be no surprise, given not only the inevitable peculiarities of the particular historical and geo-political concerns of the individual state, but also the lack of homogeneity in the international and regional levels and the controversy that underpins the difficulties in arriving at an internationally accepted definition.\footnote{181}{See Chapter 2.1 above.}

Consensus may be consolidating around many of the elements of a definition in the context of the negotiations around a global draft Convention, with the notable exception of the National Liberation Movement issue. However, as the Draft Comprehensive Convention has not been completed or adopted, still less signed and ratified, it would appear premature to rely on the current state of these negotiations alone as indicative of customary international law at the present time. The adoption of new terrorism legislation which took a growth spurt post September 11 may have slowed down, such that the ‘soft-law guideposts’ provided by Resolution 1566 in 2004 have had less obvious restraining influence than it might otherwise have had.\footnote{182}{Saul, ‘Legislating from a Radical Hague’, supra note 155, p. 9.} The evolution of national legislation will however continue, including through on-going attempts at model legislation, such as that adopted in 2011 by the African Union, which may over time lead to a greater consistency of approach than has been evident in practice to date.\footnote{183}{E.g. ‘African Model Law on Counter Terrorism’ at the 17th Ordinary Session of the Assembly of the Union, held in Malabo, in July 2011: see Assembly/AU/Dec.369 (XVII).}

Attempts to guide and to exercise more effective oversight over states for the definitions adopted and their application may gain pace. It remains just conceivable that evolving national practice will move closer together and lead to future changes in customary international law, to which the potential adoption and acceptance of a generic definition in a global convention would undoubtedly contribute, but this remains some way off.

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

2.3 FILLING THE GAP? TERRORISM AND OTHER INTERNATIONAL LEGAL NORMS

If there is no generic definition of terrorism in international law, does this leave a gap in the international legal order? Two groups of issues are worth highlighting.
First, the absence of a definition of terrorism does not mean that serious acts of violence, such as those carried out on September 11, are not addressed by international (and of course domestic) law. As noted above, acts of ‘terrorism’ are covered by multiple specific conventions addressing particular types or aspects of terrorism, including hijacking, hostage taking, violence against internationally protected persons, terrorist bombing and financing terrorism. Indeed it has been described as ‘difficult to imagine a form of terrorism not covered by these Conventions’.184

As treaty law, they are binding only on states parties to them, and the prosecution of associated offences depends on their incorporation into domestic law. Calls for the ratification and implementation of these conventions have, however, been made repeatedly by the Security and others post 9/11.185 As a result, the enhanced ratification, and implementation, of these sectoral conventions has been a major area of positive development post 9/11.

Specific pockets of normative growth have arisen in recent years, bolstering this sectoral framework. For example in relation to the challenging issue of terrorist financing,186 there has been a proliferation of developments from Security Council resolutions,187 to regional conventions and regulations,188 as well as softer law standards and recommendations.189 Coupled with enhanced ratification and implementation of existing provisions, these measures have facilitated the rapid tracing, freezing and ultimately confiscation of

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

185 See e.g. SC Res 1373, 1566 and others. See also Prost, supra note 39.


187 See e.g. SC Res 1373 and subsequent resolutions, which have referred to obligations in respect of terrorist financing, including calls to ratify the 1999 convention. The Security Council has addressed terrorist financing and monitored implementation through its Counter-terrorism committee.


189 E.g. the Financial Action Task Force (FATF) is an inter-governmental body established in 1989 to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and related threats. FATF has issued numerous Special Recommendations in this field post 9/11; see http://www.fatf-gafi.org/topics/fatfrecommendations/. See other expert groups in Gardella, supra note 195.
property or assets in suspected cases of money laundering and terrorist financing, and the exchange of information.\(^{190}\)

In addition, as discussed in more detail in Chapter 4, acts commonly referred to as ‘terrorist’ may amount to other crimes under international criminal law, including customary law of general application. Notably they may amount to war crimes (if carried out in armed conflict) and crimes against humanity (whether or not there is an armed conflict), provided the necessary elements of those crimes are met, including that they be committed against the ‘civilian population’.\(^{191}\)

The crimes mentioned above do not provide comprehensive coverage of the range of possible terrorist acts: for example, attacks aimed at terrorising the civilian population in time of peace, which do not meet the widespread or systematic threshold requirement of crimes against humanity, and in a state that has not ratified the specific conventions, would probably not be proscribed under international law.\(^{192}\) But the number of states to which this applies is narrowing as ratifications grow. Moreover, even in such circumstances, acts of international terrorism will be covered by ordinary domestic law. Whether or not domestic law criminalises terrorism as such, it will inevitably prohibit murder or attacks on the physical integrity of persons or on property.

The second point to note is that the lack of a definition of terrorism does not signify a lack of obligations to refrain from participating in or supporting terrorism and to take certain proactive counter-terrorist measures. Under the general rules governing relations between states, a state must for example ‘not knowingly allow its territory to be used in a manner contrary to the rights of other states’,\(^{193}\) and to refrain from the threat or use of force, direct or indirect, against another state.\(^{194}\) As regards the treatment of persons subject to a state’s ‘jurisdiction’ or ‘control’, the state is also obliged under international human rights law not only to refrain from acts that jeopardise human security, but also to exercise due diligence to prevent and punish them.\(^{195}\) States also

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190 Ibid. The 2008 Council of Europe Convention also addresses the institutional dimension that often proves critical in practice; eg the need for financial intelligence units in each State Party.

191 These requires that the civilian population, not state targets, be the object of the terror or the prohibited acts amounting to crime against humanity. See, e.g., ICC Statute definitions.

192 It has been suggested that what is needed is this definition of war crimes of terror, but applicable in time of peace, although this is, like other proposals, controversial. See website of the Terrorism Prevention Branch of the Office for Drug Control and Crime Prevention (http://undcp.org/terrorism_definitions.html) and concern expressed in Guzman, Terrorism and Human Rights No. 1, supra note 27, p. 191.

193 Corfu Channel (United Kingdom v. Albania), Merits, ICJ Reports 1949, p. 22.

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

195 On extra-territoriality of human rights obligations see Chapter 7A.2.1. As noted above, terror within a state is not generally thought to be covered by the concept of ‘international terrorism’ for the purpose of the specific terrorism conventions, or the Draft Comprehensive Convention.
have specific obligations in respect of the repression of ‘terrorism’ as such.\textsuperscript{196} These include, for state parties to them, the obligations arising out of the specific terrorism conventions discussed above. But obligations may also arise from, or be reflected in, UN resolutions, such as the far reaching Security Council resolutions post September 11.\textsuperscript{197}

The importance of the existing, and proposed, terrorism conventions lies in the provision of a framework for the obligations regarding international cooperation,\textsuperscript{198} ensuring, for example, that states are obliged to ‘extradite or prosecute’ persons suspected of the offences covered by them.\textsuperscript{199} While the obligation to investigate and prosecute is not new or limited to these conventions, they seek to facilitate the effective discharge of the cooperation obligation and to remove obstacles to extradition.\textsuperscript{200} Particular ‘modalities’ of cooperation aimed at discharging the general obligation to cooperate, such as intelligence and evidence sharing, transfer of criminal proceedings, freezing and seizure of assets, execution and recognition of foreign judgments, or indeed extradition provisions, such as ‘conditional extradition’,\textsuperscript{201} have been addressed selectively in particular treaties.\textsuperscript{202} It has been suggested that if there is a gap that the potential Draft Comprehensive Convention might fill, it may not relate so much to the definition, but to the lack of a comprehensive framework for international cooperation, covering all such modalities, including

\textsuperscript{196} As discussed below, the force of those obligations may be weakened or undermined by divergent interpretations of what is covered, and excluded, by the term.
\textsuperscript{197} SC Res. 1368, supra note 164, states that ‘those responsible for aiding, supporting or harbouring the perpetrators, organisers and sponsors of these acts will be held accountable’. Unlike SC Res. 1373 (2001), supra note 2, this is not a Chapter VII resolution. SC Res. 1373 paras. 1 and 2 obliges states to adopt wide ranging measures including criminalisation, freezing of assets and denial of safe haven, as discussed at Chapter 3.1.2. See also e.g. SC Res. 1624 (2005) which includes an array of preventive measures including asset freezing and confiscation.
\textsuperscript{198} Cooperation is discussed in more detail in Chapter 4. 4A.2 and the human rights issues raised are highlighted in Chapter 7A.4.3.8. Strengthening obligations of cooperation has been the main import of the sectoral conventions; see M. Lehto, ‘Indirect Responsibility for Terrorist Acts’ p.383 and Prost, supra note 39, in Van de Herik and Schrijver, supra note 35.
\textsuperscript{199} On the obligation to extradite or prosecute (\textit{aut dedere aut judicare}) war crimes, crimes against humanity genocide e.g., see also Chapter 4. See ‘International Terrorism: Challenges and Responses’, Report from the International Bar Association’s Task Force on International Terrorism, 2003 and Chapter 7A.4 on positive human rights obligations.
\textsuperscript{200} The usual requirements of extradition law (such as in some cases the ‘double criminality’ requirement), do not operate as a bar to extradition while other developments seeking to further remove obstacles to extradition, or to streamline the extradition process, have been initiated, or advanced with renewed impetus, post September 11, some with troubling human rights implications. See Chapter 4B.2.2 and para. 7A.8.
\textsuperscript{201} Article 8(2), International Convention for the Suppression of Terrorist Bombings 1998, supra note 48.
\textsuperscript{202} See IBA Task Force, ‘International Terrorism’, Ch. 7.
clarifying the hitherto irregular, and at times confusing, rules regarding extradi
tion.\footnote{Ibid. Prost, supra note 39.}

The focus on and overuse of the terrorism terminology may, therefore, obscure the extent to which the sort of serious acts and threats we commonly associate with ‘terrorism’ are already regulated by other areas of international law. As is often the case, the problem lies more with the poor enforcement of existing norms, including but going beyond specific terrorism norms, than with the lack of a generic definition. In this respect it is noted that the Security Council’s call to states to ratify existing terrorism conventions appears to have borne some fruit although the crucial challenge in that respect remains implementation.\footnote{Many of the existing specific conventions are already widely ratified, though not necessarily implemented. See Chapter 4, section B. On the challenges, see generally Schrijver and van den Herik, supra note 35.}

While a generic definition in a global convention, if it could be achieved and could garner near universal support, may serve the interests of legal certainty and improve the efficiency of inter-state cooperation, what is clear is that its absence does not mean a legal void or necessitate legal paralysis.

2.4 CONCLUSION

Given the outstanding differences of view on its key elements, it is difficult to sustain that international terrorism is, \textit{per se}, defined and clearly regulated in international law. The absence of a generic definition of terrorism leaves no gaping hole in the international legal order. Rather it would appear to be the case that what we commonly refer to as terrorism, although perhaps not defined as such, would most likely be prohibited by other international legal norms. In one view then, the lack of a definition of terrorism is just not that significant. As one commentator noted: ‘Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of states or individuals, widely disapproved of and in which the methods used are either unlawful, or the targets protected or both.’\footnote{Higgins, ‘General International Law’, supra note 186.}

On the other hand, there can be little doubt of the political currency of the language of terrorism, particularly in the post September 11 world.\footnote{See, e.g. the State of the Union Speech by the United States’ President, 20 September 2001: ‘Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile Regime’, available at http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.}

The stakes were raised considerably by Security Council Resolution 1373, which, in what has been described as a new ‘legislative’ role for the Security
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Council,\(^{207}\) imposes binding obligations on states to take extensive counter-terrorist measures. These include criminalising ‘terrorism’ and support for it, imposing serious penalties, freezing assets and excluding ‘terrorists’ from asylum and refugee protection. Broad-reaching obligations in respect of terrorism have been established without providing a clear definition of the conduct towards which such measures should be directed, and, by contrast to earlier binding decisions taken by the Council, without limitation as to the situation or broad time frame in which it should apply.\(^ {208}\)

Imposing far-reaching obligations on the basis of an ambiguous concept – described by a senior French law enforcement official as having ‘opened the universal hunting season on terrorism without defining it’\(^ {209}\) – may reap unfortunate consequences. First, it may generate uncertainty as to the precise nature of states’ obligations towards the Council, and undermine those obligations. As has been noted: ‘without reaching an acceptable international definition of the term “terrorism” one can sign any declaration or agreement against terrorism without having to fulfil one’s obligations as per the agreement. For every country participatory to the agreement will define the phenomenon of terrorism differently from every other country.’\(^ {210}\) Second, as discussed in other chapters, it raises fundamental concerns in respect of criminal law enforcement and human rights.\(^ {211}\)

Despite the centrality of ‘terrorism’ in international law and practice, controversy surrounds most aspects of the concept of terrorism in international law. Absent a clear and accessible meaning to be attributed to the term, and consensus around the same, its susceptibility to abuse renders it an unhelpful basis for a legal, rather than political, analysis of events such as 9/11 or


\(^{208}\) While the September 11 attacks to which the resolution was responding would fall within any definition of terrorism, and of other crimes under international law, Resolution 1373 is not in any way limited to that situation.

\(^{209}\) Statement of Mr Jean-François Gayraud, Chief Commissioner of the French National Police, and of the French judge David Sénat, reported in Guzman, Terrorism and Human Rights No. 2, supra note 26, p. 26.


\(^{211}\) Chapters 4 and 7.

\(^{212}\) See Chapter 7B.1 ‘Security v Human Rights and on the role of the UN Counter-Terrorism Committee; see also http://www.un.org/terrorism/pdfs/fact_sheet_3.pdf.
responses thereto. Subsequent chapters will therefore address those events and responses based on other norms of international law.