

# Redefining terrorism under the Mubarak regime: towards a new definition of terrorism in Egypt

*Islam Ibrahim Chiha*<sup>\*</sup>

## ***Abstract***

In the fight against terrorism, many states have overreacted to its threat and have adopted overbroad definitions of terrorism that forfeited fundamental rights in the name of protecting national security. Egypt, under President Mubarak's regime, was one of those states that have exceedingly abused its terrorism definition to restrain many Egyptians' fundamental rights and freedoms. The following article provides a comprehensive analysis of the Egyptian definitional approach by highlighting the various deficiencies in the Egyptian definition of terrorism. Moreover, the paper underscores the harmful implication that such ambiguous and vague a definition may pose for the legal system and emphasises how easily this definition lends itself to manipulation by unscrupulous political regimes. To provide more insight, the article compares the Egyptian definition of terrorism to a number of international law definitions and underscores the various dissimilarities between them in the light of international law norms and standards for defining terrorism. It is further claimed that there are core elements of an objective definition that can be distilled from the various international definitions in order to prevent any potential abuse of power or undue interference with fundamental rights and freedoms. The article concludes with legal recommendations derived from the analysis of international law approaches for the prospective Egyptian legislator to consider when amending the anti-terrorism law of Egypt.

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<sup>\*</sup> Washington University in Saint Louis School of Law; LLM (University of Connecticut School of Law); Masters of law (University of Alexandria School of Law); LLB (University of Alexandria School of Law (French Department)). Assistant Professor of Law: Public Law Department, University of Alexandria School of Law.

## INTRODUCTION

The proper definition of terrorism has long been the subject of controversy.<sup>1</sup> Since the early twentieth century,<sup>2</sup> the question has been debated among states and scholars, politicians, government agencies, and ordinary citizens.<sup>3</sup> As one scholar commented, ‘it has become a real cliché; every paper on terrorism begins by noticing that the definition of terrorism is highly controversial’.<sup>4</sup> However, this does not mean that the need for a definition should be ignored, or that a standard definition of terrorism is unattainable. As Professor Scharf has noted, ‘an effort to understand terrorism in no way indicates an attitude of acceptance’.<sup>5</sup> Similarly, Baxter notes that, ‘we must make the best of matters and see what can be made of this notion of terrorism’.<sup>6</sup>

In reaching a compromise on a definition of terrorism, it should be borne in mind that terrorism is a legal concept that entails significant legal consequences and should therefore have a legal definition.<sup>7</sup> Terrorism is a serious crime that kills innocent civilians and threatens the peace and security of states.<sup>8</sup> As a preliminary threshold for any effective counter-terrorism strategy, it is crucial to develop a comprehensive, clear, and precise definition that complies with the principles of legality and legal

<sup>1</sup> Schmid ‘Terrorism – the definitional problem’ (2004) 36 *Case W Res Int’l L* 375–402. (‘terrorism has become such a diverse phenomenon that either it disappears under a host of precise definitions or it is covered by too broad an umbrella’).

<sup>2</sup> *Id* at 395–400 (providing a comprehensive discussion of four reasons for this failure).

<sup>3</sup> Hoffman *Inside terrorism* (1998) 13. (‘Like the Internet ... most people have a vague idea or impression of what terrorism is, but lack a more precise, concrete and truly explanatory definition.’)

<sup>4</sup> Begorre-Bret ‘The definition of terrorism and the challenge of relativism’ (2006) 27 *Cardozo L Rev* 1987–1988.

<sup>5</sup> Scharf ‘Terrorism on trial’ (2005) 37 *Case W Res J Int’l L* 287 at 292.

<sup>6</sup> Baxter ‘A skeptical look at the concept of terrorism’ (1974) 7 *Akron L Rev* 380.

<sup>7</sup> Young ‘Defining terrorism: the evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation’ (2006) 29 *BC Int’l & Comp L Rev* 23 at 30; see also UN GAOR 56<sup>th</sup> Session 12<sup>th</sup> plenary meeting at 18, *UN Doc A/56/PV 12* (1 October 2001) (proving that Ambassador Jeremy Greenstock, KCMJ Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, emphasised the importance of having a concrete definition of terrorism in his statement in the General Assembly debate over terrorism saying that the definition certainly requires something more than ‘what looks, smells and kills like terrorism is terrorism’).

<sup>8</sup> GA Res 49/60, n 9 above at Annex ¶ 2; see also Norberg ‘Terrorism and international criminal justice: dim prospects for a future together’ (2010) 8 *Santa Clara J Int’l L* 11 at 46; Goldstone & Simpson ‘Evaluating the role of the international criminal court as a legal response to terrorism’ (2003) 16 *Harv Hum Rts J* 13 at 14 (‘the failure to reach a consensus on the definition of the treaty crimes prevented terrorism from falling under the Court’s Jurisdiction’).

certainty, and encompasses all the universally agreed upon elements making up genuine terrorist conduct.<sup>9</sup>

In the fight against terrorism, some states have, however, tended to craft over broad definitions of terrorism featuring ambiguous and vague terms that reach well beyond the true meaning of terrorism. By applying such an approach, those states have taken advantage of the ambiguity and vagueness in order to increase their counter-terrorism powers with respect to targets and tactics.<sup>10</sup> The Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, has warned that an over-broad definition ‘poses the risk that, where such laws and measures restrict the enjoyment of rights and freedoms, they will offend the principles of necessity and proportionality that govern the permissibility of any restriction on human rights’.<sup>11</sup> This is understandable as many of the exceptional measures taken in counter-terrorism laws – such as powers of arrest, preventive detention, rules of investigation, and seizure of assets – have far-reaching consequences for human rights. These extraordinary measures apply not only to terrorist perpetrators, but also to others on the basis of mere suspicion of any link to terrorism, whether by participation, incitement, support, or finance. Therefore, failure to link these measures to an objective and precise definition of terrorism can undoubtedly result in an encroachment on human rights.

<sup>9</sup> Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism *Sixth Report on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* Commission on Human Rights ¶ 72(c), UN Doc A/65/258 (6 August 2010) (by Martin Scheinin) (hereafter *Sixth Report of the Special Rapporteur*) (recommending ‘to continue to work towards the completion of the draft comprehensive convention on international terrorism, keeping in mind that only a legally precise definition of terrorism that respects the principle of legality and that is restricted to conduct that is truly terrorist in nature, will help stop the use of abusive national definitions’); see also GA Res 60/288, PmbL UN Doc A/RES/60/288 (6 September 2006); Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism *First Report on the Promotion and Protection of Human Rights* Commission on Human Rights ¶ 45, UN Doc E/CN.4/2006/98 (28 December 2005) (by Martin Scheinin) (hereafter *First Rep of the Special Rapporteur*).

<sup>10</sup> Orlova & Moore “‘Umbrellas’ or ‘building blocks’?: Defining international terrorism and transnational organized crime in international law” (2005) 27 *Hous J Int’l L* 267 at 306; see also ‘Report of the Policy Working Group on the United Nations & Terrorism’ 57<sup>th</sup> Session’ ¶ 14 *UN Doc A/57/273/Annex* (10 September 2002). (‘The rubric of counter-terrorism can be used to justify acts in support of political agendas, such as the consolidation of political power, elimination of political opponents, inhibition of legitimate dissent and/or suppression of resistance to military occupation.’)

<sup>11</sup> *Sixth Report of the Special Rapporteur* n 10 above at: 10 ¶ 26.

Under the oppressive rule of President Hosni Mubarak, Egypt held the unenviable status as a state that defined terrorism broadly and ambiguously. The Mubarak Regime designed such a broad definition to ensure that the Egyptian legal system contained permanent tools to restrict the fundamental rights and freedoms of its citizens, in particular the freedoms of speech and association. Relying on that definition and a strong secret police apparatus, Mubarak's regime was able to weaken political opposition and civil society groups for decades. Such groups were forced into silence for fear of being prosecuted as terrorists.

Before proceeding, it should be noted that the Egyptian definition of terrorism has been the main inspiration for the definition of terrorism incorporated in the Organisation for the Islamic Conference Convention on Combating International Terrorism, and in the Arab Convention for the Suppression of Terrorism.<sup>12</sup> This definition is found in article 86 of the Egyptian Penal Code.<sup>13</sup> The definition was incorporated by Act 97 of 1992, known in Egypt as the Anti-Terrorism Reform Act.<sup>14</sup> Article 86 of the Penal Code reads:

Any use of force or violence or threat or intimidation to which the perpetrators resort in order to carry out an individual or collective criminal plan – or project –<sup>15</sup> aimed at disturbing the peace – or the public order –<sup>16</sup>

<sup>12</sup> League of Arab States, Arab Convention on the Suppression of Terrorism art 1(2) 22 April 1998, reprinted in *United Nations international instruments related to the prevention and suppression of international terrorism* UN Sales No E 08 V 2 (2008) (hereafter Arab Convention on the Suppression of Terrorism). See also Organization of the Islamic Conference, Convention on Combating International Terrorism, art 1(2) 1 July 1999, reprinted in *United Nations, international instruments related to the prevention and suppression of international terrorism* UN Sales No E 08 V 2 (2008) (hereafter Islamic Conference Convention on Combating International Terrorism); Amnesty International 'The Arab Convention for the Suppression of Terrorism: A Serious Threat to Human Rights' (2002) available at: [http://www.amnesty.org/en/library/asset/IOR51/001/2002/en/c2325833-d8a7-11ddad8cf3d4445c118e/ior510012002\\_en.pdf](http://www.amnesty.org/en/library/asset/IOR51/001/2002/en/c2325833-d8a7-11ddad8cf3d4445c118e/ior510012002_en.pdf) (hereafter 'Amnesty International 'A Serious Threat to Human Rights').

<sup>13</sup> Law No 58 of 1937 (Egyptian Penal Code, as amended by Law No 95 of 2003 and Law No 147 of 2006), *Al-Jarida Al-Rasmiyya* 5 August 1937, art 86 (hereafter Egyptian Penal Code).

<sup>14</sup> Law No 97 of 1992 (which amended some provisions of the Penal Code, the Criminal Procedure Code, the law establishing State Security Courts, the law on Secrecy of Bank Accounts, and the law on Weapons and Ammunition) *Al-Jarida Al-Rasmiyya* 18 July 1992, art 2 (Egypt).

<sup>15</sup> The Arabic version of provision 86 of the Egyptian Penal Code, n 14 above, uses the term 'individual or collective project', not 'plan', as often found in English translations. The Minister of Justice, in his presentation of the Act to the National Assembly, tried to

or jeopardizing the safety and the security of society which is of such nature as to create harm or fear in persons or imperil their lives, freedom or security; or [of such nature as] to damage the environment; damage or take possession over communications, transport, property, buildings or public or private reality; prevent or impede either the public authorities or religious institutions or educational institutions the performance of their work; or thwart the application of the Constitution or existing laws or regulations.<sup>17</sup>

This definition has been extensively criticised for its extremely vague and broad terms.<sup>18</sup> The definition appears to suggest that every action carried out contrary to the interests of the state qualifies as terrorism. In this respect, the Human Rights Committee has strongly criticised it noting that it ‘is so broad that it encompasses a wide range of acts of differing gravity’.<sup>19</sup> Likewise, the Special Rapporteur for the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, noted a similar concern in his report on Egypt’s counter-terrorism policy. He stated that ‘the definition in article 86, including the substantial and intentional elements as well as its purposes, is notably much broader than the three-step cumulative characterisation presented [in his proposed definition]’.<sup>20</sup>

This article considers the Egyptian definition of terrorism adopted by the regime of President Hosni Mubarak in light of the international law norms and standards accepted for the definition of terrorism. Section one addresses the various attempts to develop an international definition of terrorism,

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make clear that the concept of ‘project’ was intended to preclude random and accidental acts because terrorist offences presuppose a certain degree of preparation. Thus ‘project’ means any measures taken based on an existing plan. Many scholars have criticised the concept as ambiguous, confusing, and most likely to be used in other areas of law such as commercial or civil law.

<sup>16</sup> The Arabic version of provision 86 of the Egyptian Penal Code, n 14 above, uses the term ‘disturbance of public order’ rather than ‘of the peace’, as found in many English translations.

<sup>17</sup> See 1992 Anti-Terrorism Reform Act, n 15 above at art 2; see also Egyptian Penal Code n 14 above; Ramraj *Global anti-terrorism law and policy* (2005) 592.

<sup>18</sup> Belal *Principles of Egyptian criminal laws* (2ed 2006) 191; see also Shams-el-Din *Al seyasa al tashre’ya le mokafhat EleErhab we mada etafaqha ma’a osoul al shareya al gena’ya* (*Legislative policy for combating terrorism*) (2006) 28 (describing the Egyptian Minister of Interior’s argument for the three years extension of the Law of Emergency in 2002);

<sup>19</sup> Human Rights Commission *Comments on Egypt* ¶ 11 UN Doc CCPR/C/79/Add 23 (9 August 1993) (hereafter *Comments on Egypt*).

<sup>20</sup> Human Rights Commission *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Mission to Egypt* ¶ 9 UN Doc A/HRC/13/37/Add 2 (14 October 2009 (hereafter *Mission to Egypt*)).

including a number of United Nations General Assembly and Security Council Resolutions, international and regional conventions, and a recent decision delivered by the Special Tribunal of Lebanon. Section two identifies core elements of an objective definition that can be distilled from the various definitions of terrorism in international law, and that reaching a compromise formula for a definition of terrorism is quite possible. Section three evaluates the Egyptian definition of terrorism and highlights the various differences between the Egyptian and international approaches. It then concludes with proposed recommendations for the Egyptian legislature to consider when revising the current definition of terrorism in order to avoid implications for Egypt's international responsibilities.

## DEFINITIONS OF TERRORISM IN INTERNATIONAL LAW

International attempts to define terrorism date from the early twentieth century and predate the establishment of the United Nations after World War II.<sup>21</sup> To date, there is no consensus on a comprehensive and universally accepted definition in any international instrument. The United Nations (UN), with all its organs has not been able to agree on a definition of terrorism or any of its constituent elements.<sup>22</sup> Moreover, of the thirteen international conventions and regional treaties related to terrorism, none has adopted a definition of terrorism. Rather, they tend to focus on particular aspects or types of terrorism, such as hijacking or the financing of terrorism.

### United Nations General Assembly definitions of terrorism

The UN General Assembly (GA) has frequently condemned all acts of terrorism as criminal and posing a serious threat to international peace and security.<sup>23</sup> The first UN action regarding terrorism was in the early 1970s.<sup>24</sup>

<sup>21</sup> Convention for the Prevention and Punishment of Terrorism (1938) 19 *League of Nations OJ* 23; see also Schmid, n 2 above at 385.

<sup>22</sup> UN Secretary-General *Follow-up to the Outcome of the Millennium Summit* ¶ UN Doc A/59/565 159, (2 December (2004) hereafter UN Secretary-General, *Follow-up*) ('the lack of agreement on a clear and well-known definition undermines the normative and moral stance against terrorism and has stained the United Nations image').

<sup>23</sup> GA Res 49/60 n 9 above at ¶ 1; GA Res 51/210 ¶ 1, UN Doc A/RES/51/210 (17 December 1996); GA Res 60/288, n 10 above at Pmb1.

<sup>24</sup> Saul *Defining terrorism in international law* (2006) 193–95 ('use of terrorist (concept) in the 1970 Declaration refer to acts or activities, rather than to terrorist groups or bands. The term is used adjectivally to qualify the nature of acts violating the non-use of force or non-intervention, not as a noun to describe a separate legal category of persons. It relates to, and elaborates on, the *jus ad bellum* (resort to force), rather than the *jus in bello* (means of force), and is only helpful in that it strengthens prohibitions on indirect force and intervention').

In 1970, the GA issued the Declaration on Friendly Relations.<sup>25</sup> However, this Declaration focused on terrorism committed by states, and paid little attention to terrorist acts committed by individuals.<sup>26</sup> No definition of terrorism was included in the Declaration which amounted to a list of obligations incumbent upon states to refrain from involvement in terrorism.<sup>27</sup>

Following the terrorist attack that killed eleven athletes at the Munich Olympic Games in September 1972, concern over terrorism – and more specifically terrorism committed by individuals and organized groups – increased within the GA.<sup>28</sup> In the same year, the GA adopted resolution 3034.<sup>29</sup> However, this resolution was limited in various aspects of the problem. It did not include a definition of terrorism, neither did it include any general language condemning it.<sup>30</sup> Instead, the resolution reiterated the GA's deep concern about the rise of terrorism and violence, and expressed its sympathy to victims of terrorism. It also called upon states to join international conventions dealing with various aspects of terrorism.<sup>31</sup> The resolution established a thirty-five member *ad hoc* committee to work on measures to suppress terrorism.<sup>32</sup> The committee attempted in its 1973, 1977, and 1979 reports to articulate a comprehensive definition of terrorism, but was unable to reach consensus.<sup>33</sup> It noted in its last report that terrorism is

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<sup>25</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the UN, GA Res 2625 UN Doc A/2625 (24 October 1970).

<sup>26</sup> *Id* at Annex ¶ 1 ('every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to ... involve a threat or use of force. Another provision of the declaration urged states to 'refrain from organizing or encouraging the organisation of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state').

<sup>27</sup> *Ibid.*

<sup>28</sup> Combs *Terrorism in the twenty-first century* (2ed 2000) 168.

<sup>29</sup> GA Res 3034, UN Doc A/RES/3034 (18 December 1972).

<sup>30</sup> *Ibid.* This resolution was adopted by seventy-six votes to thirty-five, with seventeen abstentions. Countries such as the US opposed the resolution because of its weak language. Others opposed it because of disagreement on the definition of terrorism and the failure of the resolution to distinguish acts of terrorism from the acts of liberation movements.

<sup>31</sup> *Id* at ¶ 1.

<sup>32</sup> *Id* at ¶ 9.

<sup>33</sup> Young n 8 above at 38 (establishing an *ad hoc* committee on terrorism to define terrorism, but the committee did not make any progress because of disagreement among member states).

‘a loaded term [that is] liable to diverse interpretations’ and is therefore ‘extremely difficult to define’.<sup>34</sup>

Beginning in 1979, the GA shifted its concern from state sponsored terrorism to terrorism conducted by individuals and organisations.<sup>35</sup> Virtually all subsequent resolutions on terrorism open by condemning ‘as criminal all acts, methods and practices of terrorism, wherever and by whomever committed’.<sup>36</sup> In subsequent resolutions, such as, resolutions 44/29, 46/51, 50/53, 51/210, 52/165, 54/110 and 55/158, the GA expressed great concern over the increasing rise in terrorism, both international and domestic, seeing it as ‘criminal and unjustifiable’<sup>37</sup> under any circumstances.

The first resolution to define terrorism and identify some of its core elements was the 1994 Declaration on Measures to Eliminate Terrorism.<sup>38</sup> Although not initially intended as a definition, the Declaration to a great extent ‘serve[d] that function, at least as a working premise for the assembly’.<sup>39</sup> Article 3 defines terrorism as:

[c]riminal 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, and religious or any other nature that may be invoked to justify them.<sup>40</sup>

In 1996 the GA issued a resolution on Measures to Eliminate Terrorism that created an *ad hoc* committee to sketch out a comprehensive convention addressing the problem of terrorism.<sup>41</sup> The committee conceded in the

<sup>34</sup> See *Report of the Ad Hoc Committee on International Terrorism*, ¶¶ 36, 88, UN Doc A/34/37, UN GAOR 34<sup>th</sup> Session supp 37 (17 April 1979). The Soviet Union Delegation commented on the definitional dilemma by saying that ‘it is unacceptable to give a broad interpretation to the term international terrorism and to extend it over national liberation movements or acts committed in resisting an aggressor in occupied territories’. See Ramraj n 18 above at 44; see also Saul n 25 above at 206.

<sup>35</sup> Saul n 25 above at 203; see also GA Res 34/145 ¶ 3, UN Doc A/RES/34/145 (17 December 1979) (‘unequivocally condemned all acts of international terrorism which endanger or take human lives or jeopardize fundamental freedoms’).

<sup>36</sup> GA Res 40/61 ¶ 1, UN Doc A/RES/40/61 (9 December 1985); GA Res 42/59 ¶ 1, UN Doc A/RES/42/59 (30 November 1987).

<sup>37</sup> Saul n 25 above at 203; see also GA Res 34/145 ¶ 3, UN Doc A/RES/34/14555/158 (30 January 2001).

<sup>38</sup> GA Res 49/60 n 9 above at Annex ¶ 3.

<sup>39</sup> Saul n 25 above at 209.

<sup>40</sup> GA Res 49/60 n 9 above at Annex ¶ 3.

<sup>41</sup> GA Res 51/210, n 24 above at 9.



preamble to the resulting convention, that no international treaty had yet offered a precise and comprehensive definition of terrorism. Article 2 of the draft comprehensive treaty on terrorism defined it as:

[U]nlawfully and intentionally causing a) death or serious bodily injury to any person; or b) serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment or c) damage to property, places, facilities, or systems ... resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.<sup>42</sup>

The most recent GA attempt to articulate a definition of terrorism came in a 2006 resolution intended to encourage members of the international community to adopt a comprehensive convention that would clearly define terrorism.<sup>43</sup> However, the resolution simply restated the position of its predecessors by calling on states to ‘consistently, unequivocally and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security’.<sup>44</sup>

### **United Nations Security Council definition of terrorism**

The UN Security Council (SC) has always regarded terrorism as criminal conduct involving the ‘most serious threat to peace and security’.<sup>45</sup> Before 2001, the SC had addressed the problem on occasion and in response to specific incidents, but had never attempted either to define it or to promulgate measures to combat or punish it.<sup>46</sup> However, since 2001 the SC

<sup>42</sup> UN GOAR 57<sup>th</sup> Session supp 36, Annex II, UN Doc A/57/37 (28 January–1 February 2002).

<sup>43</sup> GA Res 60/288, n 10 above at Annex ¶ 1.

<sup>44</sup> *Ibid.*

<sup>45</sup> SC Res 1373, at Pmbl, UN Doc S/RES/7158 (28 September 2001); see also SC Res 1566, at Pmbl, UN Doc S/RES/1566 (8 October 2004).

<sup>46</sup> Saul n 25 above at 214–33; see also SC Res 731 ¶ 3, UN Doc S/RES/731 (21 January 1992); SC Res 748 ¶ 2, UN Doc S/RES/748 (31 March 1992). Both Resolutions condemned the terrorist bombing of a civilian aircraft over Lockerbie, Scotland and required member states ‘to contribute to the elimination of international terrorism and to cease all forms of terrorist actions and all assistance to terrorist groups’. See also SC Res 1044 ¶¶ 1–4(a)-(b), UN Doc S/RES/1044 (31 January 1996). The Resolution ‘condemn[ed] the terrorist assassination attempt of the President of the Arab Republic of Egypt in Addis Ababa, Ethiopia, on June 25, 1995’. *Ibid.* It further called upon Sudan ‘to extradite to Ethiopia for prosecution the three suspects sheltering in Sudan’ and to ‘desist from engaging in activities of assisting, supporting and facilitating terrorist

has adopted a significant number of resolutions dealing with terrorism, including resolutions 1368, 1373, and 1566.<sup>47</sup> In particular, the latter two have been seen as ‘extraordinary’.<sup>48</sup> Unlike earlier resolutions, which were confined to particular terrorist incidents requiring a state to undertake a certain action or abstain from a certain action, these resolutions, adopted under the Chapter VII powers, appeared ‘to establish new binding rules of International law ... and create a mechanism for monitoring compliance with them’.<sup>49</sup> As Professor Sadat observed, these resolutions ‘suggest a sea change in *opinio juris* on the issue of terrorism as a universal jurisdiction crime, enacted against the backdrop of a custom that had already been evolving in that direction’.<sup>50</sup>

Following the 9/11 attacks, the SC passed what has been considered the most assertive and comprehensive measure to confront terrorism—resolution 1373.<sup>51</sup> However, despite using the terms ‘terrorism’ or ‘terrorist’ over forty times, and highlighting the incontestable nature of terrorism as a threat to international peace and security, the resolution did not set up a definition of terrorism or identify what core elements should be incorporated in such a definition. Instead, it generally condemned all forms of terrorist acts and placed a number of obligations on members of the international community. These obligations include taking necessary measures to prevent and suppress the financing of terrorism, including freezing the funds of terrorist groups, and the criminalisation of all means of assistance and support for terrorism.<sup>52</sup>

The resolution also urged states to take all necessary measures to prevent acts of terrorism, to punish perpetrators and anyone providing support for them, to cooperate and exchange information with other states in any criminal investigation or proceedings related to terrorism, and to become parties to all international conventions and protocols relevant to terrorism.<sup>53</sup> Finally, it established a Counter Terrorism Committee (CTC) to monitor every member state through reports on the measures implemented by each

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activities and from giving sanctuaries to terrorist element’.

<sup>47</sup> SC Res 1368, UN Doc S/RES/1368 (September 12, 2001); SC Res 1373, n 46 above; see also SC Res 1566, n 46 above.

<sup>48</sup> Sadat ‘Terrorism and the rule of law’ (2004) 3 *Wash U Global Stud L Rev* 135, 150.

<sup>49</sup> Szasz ‘The security council starts legislating’ (2001) 96 *Am J Int’l L* 901 902.

<sup>50</sup> Sadat n 49 above at 150.

<sup>51</sup> SC Res 1373 n 46 above.

<sup>52</sup> *Id* at ¶ 1(a)–(c).

<sup>53</sup> *Id* at ¶ 3(a)–(d).

state.<sup>54</sup> It is worth noting that formulating a comprehensive definition of terrorism was not among the CTC's assigned tasks. This was noted by the Chairman of the CTC, who said that

I ... should also set out what the CTC is not ... it is not going to define terrorism in a legal sense, although we will have a fair idea of what is blatant terrorism; where necessary CTC members will decide by consensus whether an act is terrorism.<sup>55</sup>

In 2004, the SC adopted resolution 1566, which basically reiterated the position of its predecessor.<sup>56</sup> In addition to general language condemning all forms of terrorism and asserting the Council's existing views, the resolution emphasised the need for cooperation among states in the fight against terrorism, and again requested all members of the UN to become parties to international conventions related to terrorism.<sup>57</sup> What is novel about this resolution is that, although not designed to serve as such, it includes what could be construed as a definition of terrorism.<sup>58</sup> Article 3 recalls:

[T]hat criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking 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 intentional organization to do or abstain from doing any act, which constitutes 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

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<sup>54</sup> *Id* at ¶¶ 6–7.

<sup>55</sup> Jeremy Greenstock 'Combating international terrorism: the contribution of the United Nations (Presentation at the United Nations Symposium 2002) available at: [http://www.un.org/en/sc/ctc/docs/rights/2002\\_06\\_03\\_ctcchair\\_symposium.pdf](http://www.un.org/en/sc/ctc/docs/rights/2002_06_03_ctcchair_symposium.pdf).

<sup>56</sup> SC Res 1566 n 46 above.

<sup>57</sup> *Id* at 2, 4.

<sup>58</sup> Ronaldo Mota Sardenberg, Ambassador of Basil, in the debate over the adoption of Resolution 1566, pointed out that par 3 was not an attempt to define terrorism but to convey a political message. Press release, Security Council, 'Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of Most Serious Threats to Peace', UN Doc SC/8214 (10 August 2004), available at: <http://www.un.org/News/Press/docs/2004/sc8214.doc.htm> (last accessed 1 April 2013); see also Commission on Human Rights *Second Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism* ¶ 43, UN Doc A/61/267 (16 August 2006) (recommending that the definition of terrorism in Resolution 1566 be considered as 'a yardstick for an international definition').

such acts and, if not prevented, to ensure that such acts are punishable by penalties consistent with their grave nature.<sup>59</sup>

In 2010, Martin Scheinin, the UN Special Rapporteur on the Promotion and the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, asserted that domestic legislation defining terrorism should seek guidance from, and be in compliance with, the definition of terrorism in resolution 1566.<sup>60</sup> He stressed that ‘a definition of terrorism that goes beyond the [definition in SC res 1566] would be problematic from a human rights perspective’.<sup>61</sup>

### DEFINITIONS OF TERRORISM IN INTERNATIONAL ANTI-TERRORISM CONVENTIONS

Since 1963, some sixteen international conventions have been adopted with the aim of preventing and suppressing various acts of terrorism.<sup>62</sup> These conventions condemn and prohibit terrorism as attacks directed against civilians with the intent to coerce or to intimidate a population or a government, regardless of the motivations of the perpetrators, by stating that such acts ‘are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’.<sup>63</sup> Most subsequent international legal instruments, including the UN GA and SC resolutions, as well as regional anti-terrorism conventions, have referred to these conventions as including a comprehensive list of terrorism

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<sup>59</sup> SC Res 1566, n 46 above at ¶ 3; see also UN Secretary-General, *Follow-up* n 23 above at 164(d). The Final Report of the High-level Panel on Threats, Challenges and Changes appointed by Secretary General Kofi Anan referenced the Security Council definition of terrorism in Resolution 1566 and affirmed that terrorism is ‘any action . . . that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing act’.

<sup>60</sup> *Sixth Report of the Special Rapporteur* n 10 above at ¶ 27 (‘in the absence of a universally agreed upon, comprehensive and concise definition of terrorism, counter-terrorism laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be superseded in the fight against international terrorism, as identified by Security Council Resolution 1566’).

<sup>61</sup> *Ibid* at ¶¶ 28–29 (proposing a definition of terrorism that endorsed all the standards identified in the Security Council Resolution).

<sup>62</sup> For a list of international conventions related to terrorism, see ‘United Nations Conventions Deposited with the Secretary-General of the United Nations’ available at: [http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_en.xml&menu=MTDSG](http://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_en.xml&menu=MTDSG) (last accessed 23 March 2012).

<sup>63</sup> International Convention for the Suppression of the Financing of Terrorism art 6, UN Doc A/54/49 (9 December 1999) (hereafter Terrorism Financing Convention).

offences and have further called upon states to become members of these conventions.<sup>64</sup>

Rarely, however, have any of these conventions provided a precise and objective definition of terrorism. This is understandable as none of them was drafted for that purpose. Rather, these conventions are ‘operational in nature’ and are confined to particular aspects or acts of terrorism such as the financing of terrorism or the taking of hostages.<sup>65</sup>

Yet the International Convention for the Suppression of the Financing of Terrorism does include what could be deemed a generic definition. Although not intended for that purpose, the Convention incorporates all of the core elements identified by the SC and GA resolutions. Article 2 bans all funding of all offences recognised by international treaties for the suppression of terrorism listed in the annex, as well as all

[a]cts intended to cause death or serious bodily injury to [any person] not taking an active part ... in a situation of armed conflict ... to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.<sup>66</sup>

The ratification of this convention by more than 170 countries, and the fact that these countries have not registered any reservations as to this definition of terrorism, reveals that the international community has accepted these as core elements in the definition of terrorism.<sup>67</sup> The Supreme Court of Canada

<sup>64</sup> Many international instruments have called upon states to join all relevant international conventions and protocols related to terrorism, particularly the Terrorism Financing Convention, n 64 above. See also GA Res 49/60 n 9 above at Pmb1; GA Res 60/288, n 10 above at Annex ¶ 2(a). The Security Council also has referred to all international conventions of relevance to terrorism in a number of resolutions. See, eg SC Res 1373 n 46 above at Pmb1 ¶ 3(d); SC Res 1456 ¶ 2(a), UN Doc S/RES/1456 (20 January 2003); SC Res 1535, Pmb1 UN Doc S/RES/1535 (March 26, 2004); SC Res 1566 n 46 above at ¶ 4. Additionally, a number of regional anti-terrorism conventions have sought guidance from or referenced international conventions for the prevention and suppression of terrorism. See, eg European Convention on the Suppression of Terrorism art 1(1), 27 January 1977, 1137 UNTS 93; South Asian Association for Regional Cooperation, Regional Convention on the Suppression of Terrorism art 1(a)–(d) 4 November 1987 in United Nations, International Instruments Related to the Prevention and Suppression of International Terrorism, UN Sales No E 08 V 2 (2008).

<sup>65</sup> *First Report of the Special Rapporteur* n 10 above at ¶ 28.

<sup>66</sup> Terrorism Financing Convention n 64 above at art 6.

<sup>67</sup> Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Special Tribunal for Lebanon, Case No STL-11-01/I ¶ 108 (16 February 2011), available at: [http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216\\_STL-11-01\\_R176bis\\_F0010\\_AC\\_Interlocutory\\_Decision\\_Filed\\_EN.pdf](http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_Decision_Filed_EN.pdf) (last accessed 4 April

reached a similar conclusion with regard to the definition of terrorism in the Financing Convention, holding that ‘this definition catches the essence of what the world understands by terrorism’.<sup>68</sup>

Similarly, other conventions, even with different *actus reus* elements suited to their purposes, have the same *mens rea* elements of intending to intimidate a civilian population, compelling a government to do or abstain from doing anything, or causing major economic loss.<sup>69</sup> For example, article 2(1) of the Terrorism Bombing Convention reads:

any person commits an offence within the meaning of this convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a state or government facility, a public transportation system or an infrastructure facility: a) with the intent to cause death or serious bodily injury; or b) with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.<sup>70</sup>

Another example is found in the Convention on the Physical Protection of Nuclear Material, which includes the following offences in its article 7:

i) a threat to use nuclear material to cause death or serious injury to any person or substantial property damage, ii) to commit an offence described in sub paragraph (b) in order to compel a natural or legal person, international organisation or state to do or to refrain from doing any act.<sup>71</sup>

Furthermore, the International Convention for the Suppression of Acts of Nuclear Terrorism provides:

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2012 (hereafter Interlocutory Decision).

<sup>68</sup> Roach ‘The role and capacities of courts and legislatures in reviewing Canada’s anti-terrorism law’ (2008) 24 *Windsor Rev Legal & Soc Issues* 5.

<sup>69</sup> Some of these sectoral treaties have explicitly referenced the General Assembly Declarations on Measures to Eliminate International Terrorism annexed to the GA Res 49/60 n 9 above, and have included the same elements of the definition of terrorism provided in the Declaration. See *eg*, International Convention for the Suppression of Terrorist Bombings art 2(1) 15 December 1997, S Treaty Doc 106–6, 37 ILM 249 (hereafter Terrorist Bombing Convention).

<sup>70</sup> Terrorist Bombing Convention art 2(1).

<sup>71</sup> International Atomic Energy Agency, Convention on the Physical Protection of Nuclear Material art 7(1)(2) 26 October 1979, 1987 UNTS 125.

1– Any Person commits an offence within the meaning of this convention if that person unlawfully and intentionally:

... b–uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:

- i) with the intent to cause death or serious bodily injury;
- ii) with the intent to cause substantial damage to property or to the environment; or
- iii) with the intent to compel a natural or a legal person, an international organisation or a state to do or refrain from doing an act.<sup>72</sup>

### **DEFINITIONS OF TERRORISM IN REGIONAL ANTI-TERRORISM CONVENTIONS**

Regional terrorism-related treaties have varied in their treatment of the issue. While some have abstained from incorporating a generic definition of terrorism, others have defined terrorism and established some core elements.<sup>73</sup> However, the latter group has not followed any single protocol. Whereas some define terrorism in vague and ambiguous terms, others are careful to echo international standards reflected in United Nations resolutions and international treaties.

A number of regional conventions such as the 2005 Council of Europe Convention on the Prevention of Terrorism,<sup>74</sup> the 2004 Additional Protocol to the South Asian Association for Regional Cooperation Regional Convention on the Suppression of Terrorism,<sup>75</sup> the Shanghai Cooperation Organization Convention on Combating Terrorism,<sup>76</sup> and the OAU Convention on the Prevention and Combating of Terrorism,<sup>77</sup> have attempted to define terrorism in a way that follows UN SC resolution 1566. Although

<sup>72</sup> International Convention for the Suppression of Acts of Nuclear Terrorism art 2(1)(b) 15 April 2005, 2445 UNTS 89.

<sup>73</sup> See eg European Convention on the Suppression of Terrorism n 65 above. The European Convention on the Suppression of Terrorism and the 2002 Inter-American Convention against Terrorism are examples of regional conventions lacking a definition of terrorism.

<sup>74</sup> Council of Europe Convention on the Prevention of Terrorism Pmb1 16 May 2005, ETS 196 (defining terrorism).

<sup>75</sup> Additional Protocol to the South Asian Association Regional Convention on the Suppression of Terrorism art 4(1)(b) 6 January 2004 reproduced in *United Nations, International Instruments Related to the Prevention and Suppression of International Terrorism* UN Sales E 08V2 (2008).

<sup>76</sup> Shanghai Cooperation Organization, Convention on Combating Terrorism, Separatism, and Extremism art 1(1)(a)–(b), June 15, 2001 reproduced in *United Nations, International Instruments Related to the Prevention and Suppression of International Terrorism* UN Sales No E 08V2 (2008).

<sup>77</sup> Organization of African Unity, Convention on the Prevention and Combating of Terrorism art 1(3)(a) 14 July 1999, 2219 UNT S 179.

sometimes embracing broad or imprecise concepts, they generally follow the same core elements that make up the international trend in defining terrorism.<sup>78</sup>

The first common feature is that all of these definitions contain no reference to motivation. Moreover, the *actus reus* must be a criminal act or a violation of criminal law. Additionally, all require both criminal and specific intent. In other words, terrorist perpetrators must not only have intended death, serious bodily injury, or the destruction and damage of property, but also have intended to instil or create a state of fear, or to compel a government or an organisation to do or abstain from doing something.

Other regional conventions have disregarded these fundamental elements of terrorism and have instead opted for a more imprecise approach. The 1998 Arab Convention on the Suppression of Terrorism<sup>79</sup> and the 1999 Convention of the Organization of the Islamic Conference on Combating International Terrorism, contain vague and ambiguous definitions of terrorism.<sup>80</sup> These conventions have very similar definitions that share ambiguous wording, likely because the majority of the members of the Organization of Islamic Conference are Arab countries and are themselves members of the League of Arab States. They seem to have been influenced by the definition of terrorism incorporated in the Egyptian Penal Code.<sup>81</sup>

What is notable in the definitional approaches adopted by these conventions, is that they ignore the core elements used in the clear definitions of the international instruments discussed above. For instance, they do not require the prohibited conduct to be criminal or unlawful, and they treat the use of violence as terrorism without defining violence or what degree of violence may amount to terrorism.<sup>82</sup> Under both definitions the mere threat of violence could be considered terrorism.

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<sup>78</sup> Incorporating broad and imprecise phrases into the definition of terrorism is problematic. Phrases such as 'destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation', as in the European model, or violating 'the public security', as in the Shanghai Convention, contravenes the principle of legality and may result in restricting a number of fundamental rights. Similarly, the OAU definition of terrorism considers as terrorism, acts that may 'disrupt any public service, the delivery of any essential service to the public or to create a public emergency' and 'create general insurrection in a state'. The application of these phrases could treat as terrorists those who protest tyrannical regimes in countries such as Egypt, Tunisia and Libya.

<sup>79</sup> Arab Convention on the Suppression of Terrorism n 13 above.

<sup>80</sup> Islamic Conference Convention on Combating International Terrorism n 13 above.

<sup>81</sup> Amnesty International n 13 above.

<sup>82</sup> *Ibid.*



Regarding intent, according to both definitions, violence does not have to be accompanied by a criminal intent to cause death or serious bodily injury. Moreover, the specific intent required by the majority of definitions presented above, consisting of the intent to compel a government or an international organisation to do or abstain from doing something, is absent from both conventions. Therefore, these conventions consider terrorism in overbroad terms and regard it as simply any act that results in harming people and imperiling their lives, honour, or rights. Both conventions consider acts of destruction and occupation or seizure of public or private property as terrorism. The Islamic Conference Convention's definition goes further by including all acts threatening the 'stability, territorial integrity, political unity or sovereignty of independent states'.<sup>83</sup> These are broad and ambiguous terms that are not defined anywhere in the convention. They, however, have the potential of being applied arbitrarily and to promote an abuse of power.<sup>84</sup> Amnesty International has warned that definitions such as these 'can be subject to wide interpretation and abuse, and in fact [do] not satisfy the requirements of legality'.<sup>85</sup>

#### **The definition of terrorism in the Special Tribunal for Lebanon**

On 16 February 2011, the Special Tribunal for Lebanon (STL), established by SC resolution 1757, to prosecute those involved in the terrorist assassination of Prime Minister Rafiq el Hariri, attempted to articulate a definition of terrorism.<sup>86</sup> The decision in the STL appeal 'marks the first time that an international tribunal distinctly established a universal definition of terrorism under international law'.<sup>87</sup>

Although required by the express terms of article 2 of the resolution to apply 'the provisions of the Lebanese Criminal Code relating to the prosecution and punishments of acts of terrorism',<sup>88</sup> the Tribunal did not confine itself to the definition of terrorism in the Criminal Code of Lebanon or relevant Lebanese case law.<sup>89</sup> Instead it emphasised that, in interpreting the Lebanese

<sup>83</sup> Islamic Conference Convention on Combating International Terrorism n 13 above.

<sup>84</sup> Soll 'Terrorism: the known element no one can define' (2004) 11 *Willamette J Int'l L & Disp Resol* 123 147.

<sup>85</sup> Amnesty International n 13 above.

<sup>86</sup> SC Res 9029, UN Doc S/RES/9029 (20 May 2007).

<sup>87</sup> Doherty 'Tipping the scale: is the special tribunal for Lebanon international enough to override state official immunity' (2011) 43 *Case W Res J Int'l L* 831 868.

<sup>88</sup> SC Res 9029 n 87 above at Attachment art 2.

<sup>89</sup> Interlocutory Decision n 68 above at 47 49 51.

definition of terrorism, it would take into account Lebanon's international obligations under 'international conventional and customary law that is binding upon Lebanon'.<sup>90</sup>

The STL attempted to articulate an international definition of terrorism through the examination of definitions of terrorism in a wide variety of sources of international law, including SC and GA resolutions, international and regional conventions on terrorism, the domestic legislation of various states, and case law. The STL opined that

although it is held by many scholars and legal experts that no widely accepted definition of terrorism has evolved in the world society ... closer scrutiny demonstrated that in fact such a definition has gradually emerged.<sup>91</sup>

It explained that:

a number of international 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 ... has indeed emerged.<sup>92</sup>

Based on the above, the court concluded that the customary international law rule:

requires the following three key elements I) the perpetration of a criminal act ... or threatening such act; ii) the intent to spread fear ... or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; iii) when the act involves a transnational element.<sup>93</sup>

It is obvious that the STL definition of terrorism shares the common elements of terrorist crimes identified in the international legal instruments discussed above. First, with regard to the objective element, it requires that the prohibited conduct be criminal. Secondly, the subjective element is made

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<sup>90</sup> *Id* at 20 45; see also Flash 'The Special Tribunal of Lebanon Defines Terrorism' (10 October 2011) *Hum Rts Brief* available at: <http://hrbrief.org/2011/10/the-special-tribunal-for-lebanon-defines-terrorism/> (last accessed 1 April 2013).

<sup>91</sup> Interlocutory Decision n 68 above at 83.

<sup>92</sup> *Id* at 85.

<sup>93</sup> *Ibid*.

up of two principal elements: a criminal intent and a specific intent. While the former refers to the ‘intent of the underlying crime,’<sup>94</sup> the second refers to the intent to ‘spread terror or coerce an authority’.<sup>95</sup> The third element, requiring that the act be transnational, does not appear in the definitions examined above. This provision serves only to distinguish domestic and international terrorism, and ‘does not detract from the essential communality of the concept of terrorism’.<sup>96</sup>

### **The core elements of an objective definition of terrorism**

This section will extract the core elements from the myriad of definitions of terrorism presented above. These are the common, core elements that should be incorporated into a definition of terrorism to distinguish it from analogous criminal acts.

Despite the difficulty in reaching international consensus on a definition of terrorism due to its political nature and reservations expressed by some members of the international community,<sup>97</sup> it has been somewhat more successful at the domestic level as individual states do not face the same problems.<sup>98</sup> This part will delimit the scope of what should be construed as terrorism and its core elements.

The above definitions suggest common elements that must be present for an act to qualify as terrorism.<sup>99</sup> These core elements, found in various

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<sup>94</sup> *Id* at ¶ 111.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Id* at ¶ 90.

<sup>97</sup> Begorre-Bret n 5 above at 1994. Many states have opposed international attempts to formulate a definition of terrorism for various reasons. For example, Arab countries have long resisted a definition of terrorism because it overlaps with the rights of people to fight for freedom and independence and thus could impede liberation movements. Other countries, such as Russia and China, have opposed terrorism definitions because they perceive terrorism only as acts of violence carried out against the state, not against individuals.

<sup>98</sup> *Ibid.* See also Young n 8 above at 24; Zeidan ‘Desperately seeking definition: the international community’s quest for identifying the specter of terrorism’ (2004) 36 *Cornell Int’l LJ* 491.

<sup>99</sup> Young n 8 above at 32. Many scholars argue that terrorism has a core meaning with minimum identifiable elements. See *eg* Gross ‘Legal aspects of tackling terrorism: the balance between the right of a democracy to defend itself and the protection of human rights’ (2001) 6 *Ucla J Int’l L & Foreign Aff* 89 at 97 (‘the majority of the definitions have a common basis ... terrorism is the use of violence and the imposition of fear to achieve a particular purpose’); See also Schachter ‘The extraterritorial use of force against terrorist bases’ (1989) 11 *Hous J Int’l L* 309, 309. (‘The absence of a comprehensive definition does not mean that international terrorism is not identifiable.

international instruments, including UN GA and SC resolutions and anti-terrorism conventions and protocols, may suggest a customary international law rule, or at least provide a minimum legal basis for an objective and precise definition. Therefore, states drafting counter-terrorism laws should seek guidance from these sources to ensure that their laws are in line with international human rights norms and standards.<sup>100</sup> In several reports submitted to the GA and the Human Rights Council, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, has recommended that domestic definitions of terrorism should at least comply with SC resolution 1566 which should serve as a 'yardstick' for any definition of terrorism.<sup>101</sup> In a recent report, he further elaborated a model definition that takes into account all cumulative elements in the resolution, as well as those in other legal instruments.<sup>102</sup>

Firstly, as discussed in this article and acknowledged by various legal instruments, terrorism refers to terrorist acts conducted by non-state actors. This includes terrorism by a single individual, a group of persons, or an organisation. Whether state acts resulting in death or serious bodily injury could qualify as terrorism, is controversial and is still the subject of disagreement in the international community.<sup>103</sup> In fact, invoking state responsibility for acts of terrorism serves no purpose. As one scholar has noted, it is:

unnecessary for two reasons. First, the state action is already restricted by, inter alia, the UN Charter, the Geneva Conventions, the Genocide Convention, customary and conventional rules against torture, human rights obligations, international humanitarian law ... Second, acts done by individuals sufficiently connected to a state engage state responsibility for breaches of international law. State involvement can be usefully categorized

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It has a core meaning that all definitions recognizes'.)

<sup>100</sup> Young n 8 above at 26 (suggesting that all 'states should treat the international law definitional jurisprudence as setting a minimum level, not a maximum').

<sup>101</sup> *First Report of the Special Rapporteur* n 10 above at 39 ('counter-terrorism must be limited to the countering of offences within the scope of, and as defined in, the international conventions and protocols relating to terrorism, or the countering of associated conduct called for within resolutions of the Security Council, when combined the intention and purpose elements identified in security council resolution 1566 (2001). That an act is criminal does not, by itself, make it a terrorist act.')

<sup>102</sup> *Sixth Report of the Special Rapporteur* n 10 above at 28.

<sup>103</sup> Zeidan n 99 above at 492–96.

as state supporting terrorism ... state operating terrorism ... state performing terrorism.<sup>104</sup>

Secondly, with respect to the *actus reus* in the definition of terrorism, while some of the international instruments require the *actus reus* to be criminal under domestic law,<sup>105</sup> others require the prohibited conduct to be unlawful.<sup>106</sup> These two terms serve the same purpose and refer to applicable domestic law.<sup>107</sup> A core definition should avoid broad and ambiguous terms such as ‘the use of violence or force’, or ‘the threat thereof’ which are included in the Arab and Islamic anti-terrorism conventions.<sup>108</sup> As previously discussed, these kinds of terms can lead to abuse of power and erosion of fundamental freedoms as they hold the potential of being applied to situations where the use of force might be justified – such as ‘the use of force to defend oneself’.<sup>109</sup>

Thirdly, the *mens rea* in terrorism offences is specific. The above set of definitions examined in the international law section, indicates that *mens rea* in the context of terrorism consists of two major components. These have been referred to as ‘two-pronged requirements’.<sup>110</sup> The first requirement is the criminal intent that requires the act to either be done with the intent to cause death or serious bodily injury, or be aimed at the destruction and damage of public or private property or its installations. Thus, unintentional acts and acts not intended to cause these results should not be considered terrorism, even if they are subject to civil or criminal responsibility. The UN Special Rapporteur has argued that domestic anti-terrorism legislation should be confined to acts that ‘have sufficient relation to the intentional element of causing deadly or otherwise serious bodily harm’.<sup>111</sup> A number

<sup>104</sup> Young n 8 above at 62.

<sup>105</sup> SC Res 1566 n 46 above at 3; GA Res 49/60 n 0 above at Annex 3; Terrorist Bombing Convention n 70 above at art 2(1).

<sup>106</sup> International Civil Aviation Organization, Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation art 2 24 February 1988, 27 ILM 627.

<sup>107</sup> Young n 8 above at 56.

<sup>108</sup> Arab Convention on the Suppression of Terrorism, n 13 above; Islamic Conference Convention on Combating International Terrorism n 13 above.

<sup>109</sup> Amnesty International n 13 above.

<sup>110</sup> Orlova & Moore n 11 above at 275.

<sup>111</sup> *Mission to Egypt* n 21 above ¶ 10; see also Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Addendum, Mission to Turkey*, Commission on Human Rights ¶ 76, UN Doc A/HRC/4/26/Add 2 (16 November 2006)

of definitions in the GA resolutions, anti-terrorism conventions, and regional conventions consider terrorism to be acts which are intended to cause substantial damage to public or private property.<sup>112</sup>

The second requirement consists of the intent to coerce or intimidate a group of civilians or to affect the conduct of a government or an international organisation. This specific intent as a preliminary requirement is what distinguishes terrorism from other criminal offences.<sup>113</sup> It is the goal of intimidation that characterises terrorism.<sup>114</sup> Ordinary criminal actions should be considered terrorism only if they are aimed at creating an atmosphere of fear and terror among the population and that will threaten peace and security. Included here are criminal actions accompanied by the intent to influence or to coerce a group of people, a government, or an organisation to take a specific action, to follow particular policies, or to comply with other demands.<sup>115</sup> Only in such circumstances can a state justify exceptional policies – generally labelled counter-terrorism measures – to maintain peace and security.<sup>116</sup> The majority of the definitions examined require this specific intent for an act to be labelled terrorism.<sup>117</sup> It is important to note that in some of the international conventions, this specific intent has been referred

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(by Martin Scheinin) (hereafter *Mission to Turkey*) (terrorism ‘must be precisely defined, narrow in scope and only be related to crimes of level of severity which entails a threat to life or serious bodily harm to persons’).

<sup>112</sup> See eg, Terrorist Bombing Convention n 70 above at art 2(1); UN GOAR, 57<sup>th</sup> Session supp no 36, n 43 above.

<sup>113</sup> Paust ‘Terrorism’s proscription and core elements of an objective definition’ (2010) 8 *Santa Clara J Int’l L* 51 58 (noting that the state of terror or the intimidation provoked by terrorism should be regarded as a foundational requirement of the definition of terrorism. Terms such as ‘endanger’ or ‘threaten are far-reaching and could encompass a wide-range of activities that are not genuinely terrorism).

<sup>114</sup> Dycous & Banks & Raven-Hansen *Counterterrorism law* (2007) 8.

<sup>115</sup> Blakesley ‘Terrorism, law, and our constitutional order’ (1989) 60 *U Colo L Rev* 471 at 480 (explaining that the special intent required in terrorism crimes is a foundational factor to distinguish between terrorism offences and ordinary crimes because ‘if a person kidnaps or murders the child of a head of state simply to reap a profit or because he has a personal dislike for the father, the killing is domestic kidnapping or murder. But if he kills the child in order to coerce her father to take some direct political, military, or religious action, such as withholding aid to some country or group, or forbearing other legitimate conduct, such as publishing an offensive book, the kidnapping or murder also would constitute criminal terrorism.’)

<sup>116</sup> Kielsgard ‘A human rights approach to counter-terrorism’ (2006) 36 *Cal W Int’l LJ* 249 at 260.

<sup>117</sup> Some of the definitions of terrorism, such as the one encompassed in the Terrorism Financing Convention, n 64 above, have regarded the requirement of the ‘intimidation or coercion of a group of people or the compulsion and pressure on [a] government or an international organization to do or abstain from doing something’ not as an intention but rather as the purpose or the aim of the terrorist act. *Id* at art 2(1)(b).

to as the ‘aim or the purpose’ of a terrorist act.<sup>118</sup> Whether termed a specific intent, or a purpose, this element is the decisive factor distinguishing terrorism from other criminal activities.

Fourthly, the motive behind an act of terrorism should be irrelevant, regardless of whether it is political, religious, ideological, philosophical, sociological, or ethnic.<sup>119</sup> *Black's Law Dictionary* distinguishes between motive and intent by stating that intent is

the state of mind accompanying an act ... while motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial.<sup>120</sup>

Accordingly, the definitions of terrorism in GA resolution 1566 in the STL decision, and in the majority of international and regional anti-terrorism conventions, make no reference to motive.<sup>121</sup> Some advocate the incorporation of motive on the ground that it helps delimit the scope of what constitutes terrorism and distinguishes it from other crimes, but there has been a stronger inclination towards its exclusion.<sup>122</sup>

This inclination toward excluding motivation is strong for many reasons. First, no motive can justify the commission of this sort of violence.<sup>123</sup> As one

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<sup>118</sup> The Special Rapporteur himself has called this element sometimes both ‘intent’ and ‘purpose’ or ‘aim’. See *Mission to Egypt* n 21 above at ¶ 9.

<sup>119</sup> Sorel ‘Some questions about the definition of terrorism and the fight against its financing’ (2003) 14 *Eur J Int'l L* 365 at 371. (‘It does not seem useful to specify the type of political aim, or ... [it is] already qualified by their objective, which is to spread terror ... the removal of redundant provisions in existing texts could be of great help form more harmonious application of the concept in general’).

<sup>120</sup> *Black's law dictionary* 369 (7ed 1999).

<sup>121</sup> GA Res 49/60 n 9 above at Annex ¶ 3 (incorporating a number of motivations to affirm that none could justify terrorism).

<sup>122</sup> *Sixth Report of the Special Rapporteur* n 10 above at ¶ 27. Many scholars also have advocated similar positions on the exclusion of motivation from terrorism definitions. See eg, Ahmad ‘Terrorism: theirs & ours’ (presentation at the University of Colorado, Boulder 12 October 1998), available at: <http://www.sangam.org/ANALYSIS/Ahmad.htm> (last accessed 1 April 2013); See also Howard & Sawyer *Terrorism and counterterrorism: understanding the new security environment* (2003) 46–53.

<sup>123</sup> *Sixth Report of the Special Rapporteur* ¶ 27 (‘facts of terrorism are under no circumstances justifiable, and ... is not a conceptual requirement of a definition of terrorism’); see also Tiefenbrun ‘A semiotic approach to a legal definition of terrorism’ (2003) 9 *ILSA J Int'l & Comp L* 357 388. (‘There is no justification of terrorism. It is not defensible to argue that terrorism needs to be viewed from a political context and that the motivation of the actor and the sociological context in which the act occurs must be taken

scholar noted, to say ‘what would be a just cause ... would be tacit permission to any violently-oriented group to carry out their actions with a ready defense should they be apprehended’.<sup>124</sup> Secondly, motives for such offenses are often difficult, if not impossible, to prove.<sup>125</sup> Thirdly, disputes over motives have always been a crucial element in the inability of members of the international community to reach consensus on the definition of terrorism.<sup>126</sup> A further disadvantage of inclusion is that, with reference to specific motivations, the definition could not include other forms of terrorism that may arise in the future.

Finally, it should be noted that certain acts of international terrorism are proscribed by the United Nations anti-terrorism conventions without reference to either the criminal or political intent discussed above, or whether the acts are criminalised in domestic legislation. These acts should be incorporated into a comprehensive definition of terrorism as they represent a consensus on particular forms of terrorism. Examples include acts jeopardising the safety of aircraft or of persons or property in the aircraft,<sup>127</sup> hijacking or seizure of aircraft,<sup>128</sup> acts against the safety of civil aviation,<sup>129</sup> crimes against internationally protected persons including diplomatic agents,<sup>130</sup> the intentional taking of hostages,<sup>131</sup> unlawful possession or use of nuclear material,<sup>132</sup> acts of violence at airports serving international civil aviation,<sup>133</sup> unlawful acts against the safety of maritime

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into consideration. Such an approach would legitimize terrorist acts by claiming that the ends justify the means. The Machiavellian principle that the ends justify the means simply does not comport with the generally accepted principles of the rule of law.’)

<sup>124</sup> Soll n 85 above at 147.

<sup>125</sup> Young n 8 above at 59.

<sup>126</sup> Orlova & Moore, n 11 above at 279.

<sup>127</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft art. 1(b), 14 September 1963, 704 UNT S 220.

<sup>128</sup> Convention for the Suppression of Unlawful Seizure of Aircraft art 1 16 December 1970, 860 UNT S 150.

<sup>129</sup> Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation art 1 23 September 1971, 974 UNT S 128.

<sup>130</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents art 2(1) 14 December 1973, 1035 UNT S 167.

<sup>131</sup> International Convention Against the Taking of Hostages art 1 17 December 1979, 1316 UNT S 205.

<sup>132</sup> Convention on the Physical Protection of Nuclear Material, n 72 above at art 7.

<sup>133</sup> Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, n 107 above at art 2.



navigation,<sup>134</sup> and unlawful acts against the safety of the fixed platforms located on the continental shelf.<sup>135</sup>

To conclude, an objective definition of terrorism must take the following basic elements into account:

- the act must be performed by a non-state actor;
- the *actus reus* must be criminal under domestic law;
- the act must be intended to cause death or serious injury to civilians or to cause damage to private or public property;
- the act must be committed with the intention to generate a state of terror among the population, or to compel a government or an organisation to do or abstain from doing something;
- the motive should be irrelevant; and
- a comprehensive definition should incorporate all internationally proscribed terrorist conduct acknowledged by UN anti-terrorism conventions.

#### **DEFINITION OF TERRORISM IN THE EGYPTIAN LEGAL SYSTEM**

Having surveyed the international law definitions of terrorism, and illustrated the most common and core elements necessary for an objective and a generic definition of terrorism, this section evaluates the Egyptian definition of terrorism in the light of the dictates of international law. It underscores the detrimental effects that using such broad language has had on the human rights and fundamental freedoms of Egyptians – particularly their freedom of speech and association. It concludes by proposing recommendations for the Egyptian legislature to consider in revising the definition of terrorism used in Egyptian law.

#### **Evaluation of the Egyptian definition of terrorism**

As noted earlier in the introductory section to this paper, the Egyptian definition of terrorism is so broadly construed that it could easily be manipulated by the government to suppress fundamental rights and freedoms. Indeed, such a definition has been an important tool in the Egyptian counter-terrorism legal framework which the Mubarak regime

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<sup>134</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art 3, 10 March 1988, 1678 UNT S 221.

<sup>135</sup> Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf art 2, 10 March 1988, 1678 UNT S 303.

relied heavily upon in denying Egyptians their core fundamental rights and suppressing political opposition.

In essence, the Egyptian definition of terrorism, as it stands, suffers from several flaws and raises a number of human rights concerns regarding its constituent elements.

First, in most of the definitions examined above, the *actus reus* element requires offences classified as terrorism to be criminal or unlawful. In contrast, the Egyptian definition adopts a loose standard that considers any use of force or violence, or any threat or intimidation, to constitute terrorism. It does not require the prohibited conduct to be criminal or unlawful; rather, it only ‘requires[s] the act to be violent in nature’.<sup>136</sup> The law does not define any of these concepts, or provide examples of conduct that could be covered, or the degree of force, violence, or intimidation that may amount to terrorism. These broad and ambiguous terms not only violate international definitions, but also run foul of the long established constitutional principles of legality and legal certainty which require crimes to be defined precisely and clearly so as to provide individuals with fair notice of what constitutes prohibited conduct.<sup>137</sup> Consequently, under so broad a definition, countless activities that have nothing to do with terrorism – such as burglary, obstruction of roads by gangs, or even protests and demonstrations – could be classified as terrorism. Indeed, so broad and ambiguous a definition could apply to situations where the law has explicitly sanctioned the use of force, such as the ‘use of violence to escape oppression’ or the ‘use of force to defend oneself’.<sup>138</sup>

Secondly, as regards *mens rea*, the Egyptian definition classifies acts intended to ‘disturb the peace or the public order or jeopardize the safety and security of the society’ as terrorism.<sup>139</sup> Accordingly, the Egyptian approach

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<sup>136</sup> Interlocutory Decision, n 68 above at ¶ 70.

<sup>137</sup> Constitution of the Arab Republic of Egypt, 11 September 1971, as amended, May 22 1980, May 25 2005, March 26 2007, art. 66 (repealed 2011) (hereafter Egyptian Constitution).

<sup>138</sup> Blakesley, n 116 above, at 473.

<sup>139</sup> See generally Case no. 3/1993/ Supreme Constitutional Court (Egypt); Case no 28/1995/Supreme Constitutional Court (Egypt). The Supreme Constitutional Court of Egypt has warned that certain expressions employed in the definition are so wide that they do not sufficiently describe the specific intent required for criminalisation. Failure to narrowly describe the *mens rea* element in terrorism offenses may lead to critical consequences. Peaceful assemblies, protests, demonstrations, and other expressions of rights guaranteed under the Egyptian Constitution could be subject to criminalisation as

does not require criminal intent to cause killings, serious bodily injury, or damage and destruction to property – specific intent is adequate. Such an approach, as the Special Tribunal of Lebanon observed, ‘is grounded in the notion that terrorist conduct is so reprehensible that it must be punishable regardless of whether or not the intended consequences of the criminal conduct actually materialize’.<sup>140</sup> In other words, terrorism ‘is punishable not because and insofar as it creates actual damage, but because it puts in jeopardy the protected value’.<sup>141</sup>

Moreover, even the specific intent in the Egyptian definition – like the *actus reus* – offends the constitutional principles of legality and legal certainty.<sup>142</sup> The wording used to identify specific intent is not defined in any part of the Penal Code, and thus provides leeway for the government to interpret the law in a way that can better serve its interests. Furthermore, this specific intent requirement is in clear contrast with the *mens rea* requirements identified in the international law definition of terrorism. The *mens rea* in the majority of the definitions analysed above, is made up of two main components. The first is intent to cause death, or serious bodily injury, or the destruction of public or private property; while the second is a specific intent to intimidate or coerce a group of individuals, or to influence the policy of a government or organisation. Accordingly, a criminal act such as murder or battery committed without intent to create a state of fear, cannot be characterised as terrorism. Likewise, a demonstration or a legal protest demanding the resignation of a government, where the participants – in response to the excessive use of force by the police – might resort to some sort of violence that results in unintentional death or injury, would not qualify as terrorism because of non-compliance with the first element. However, under the Egyptian definition, both cases could fit into the definition of terrorism as they meet the requirement of disturbing the peace or public order, or jeopardising the safety and security of society.

Another controversial feature of the Egyptian approach is that it extends the sphere of criminalisation through the incorporation of extremely vague and ambiguous expressions that are nowhere defined in ‘concrete terms’.<sup>143</sup> Such

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terrorism if deemed to either disturb the peace or public order or to jeopardise the safety and security of the society.

<sup>140</sup> Interlocutory Decision, n 68 above at ¶ 56.

<sup>141</sup> *Ibid.*

<sup>142</sup> Egyptian Constitution n 138 above, at art 66 (repealed 2011).

<sup>143</sup> Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Sixth Report of the Special Rapporteur on the*

expressions violate the principle of legality and open the door to the potential abuse of power and infringement of fundamental human rights by being applied to crimes, or even lawful conduct, which do not genuinely fall under the definition of terrorism. This definition regards terrorism as any acts that ‘damage the environment,’ ‘damage or take possession over communications, transport, property, buildings of public or private reality,’ ‘prevent or impede either public authorities or religious institutions or educational institutions from the performance of their work,’ or ‘thwart the application of the Constitution or existing laws or regulations’. These broad expressions are nowhere defined in the Egyptian statute and could cover a wide variety of legitimate activity.<sup>144</sup> The Special Rapporteur noted, with serious concern, that the definition contains ‘a wide range of purposes [that could] run the risk of including acts that do not comprise a sufficient relation to violent terrorist crimes’.<sup>145</sup>

It should be noted that the Mubarak regime used this definition to suppress political opponents. In doing so, Mubarak relied on extraordinary constitutional and legislative powers, and transferred cases involving offences falling under this provision to Military and Emergency State Security Courts. The Mubarak regime had considerable influence over the rulings of these courts, and was able to secure the convictions of many Egyptians charged with terrorism and to sentence them to death.<sup>146</sup>

The existence of this provision in the criminal justice system remains highly problematic. It jeopardises a number of fundamental human rights, in particular freedom of expression and of association. Hypothetically, there

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*Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism Addendum: Mission to Tunisia*, Commission on Human Rights ¶ 8, UN Doc A/HRC/16/51/Add 2 (28 December 2010) (hereafter *Mission to Tunisia*) (criticising the Tunisian definition for including broad terms without explaining precisely to what they refer).

<sup>144</sup> *Comments on Egypt* n 20 above at ¶ 11; see also Human Rights Commission *Concluding Observations on Egypt* ¶ 16(a), UN Doc CCPR/CO/76/EGY (28 November 2002) (stating that the Committee ‘considers that the effect of the very broad and general definition of terrorism given in Act 97 of 1992 is to increase the number of offences attracting the death penalty in a way that runs counter to the sense of article 6, paragraph 2, of the Covenant’).

<sup>145</sup> *Mission to Egypt* n 21 above at 11.

<sup>146</sup> Amnesty International ‘Egypt: systematic abuses in the name of security’ 11–15, 23–33 (11 April 2007), available at: <http://www.amnesty.org/en/library/asset/MDE12/001/2007/en/29f8281d-d3c5-11dd-8743-d305bea2b2c7/mde12007en.html> (last accessed 1 April 2013). See also Reza ‘Endless emergency: the case of Egypt’ (2007) 10 *New Crim LR* 532.

are several ways in which the Egyptian definition of terrorism could be used to hold the demonstrators and protestors participating in the 25 January 2011 revolution against the Mubarak regime, liable for terrorism.

First, the protestors seized control of Tahrir Square and continued to protest for several successive days – clearly an act of possession of public property. Secondly, in the final days, the protestors stood in front of certain ministerial buildings, including the Ministries of the Interior, Justice, and Foreign Affairs, which could be classified as impeding public authorities from performing their work. Thirdly, ‘thwarting the application of the Constitution or other laws’ can also apply to the protestors’ actions, given that one of their primary demands was to abolish the Constitution and several laws they viewed as legitimising corruption and infringing on fundamental rights and freedoms.

Having established the various shortcomings in the Egyptian approach to a definition of terrorism, and its obvious conflict with international law norms and standards defining terrorism, I shall conclude by providing some legal recommendations. These recommendations, drawn from an examination of the definitions of terrorism in international law, are for the Egyptian legislature to consider when drafting a new anti-terrorism law, or revising the current anti-terrorism legal framework.

### **CONCLUDING OBSERVATIONS**

Egypt’s great revolution which took place throughout the country from 25 January 2011, and was directed against the tyrannical regime of President Hosni Mubarak, shows that Egyptians are willing to sacrifice themselves for democracy, justice, and human rights. Today, Egypt is living a new era in which every Egyptian is seeking to establish a genuine democratic state in which supremacy of the rule of law and respect of human rights and freedoms, will be the supreme values.

The legislature should, therefore, seize this opportunity to amend the definition of terrorism to ensure compliance with international standards. Certain of the sources examined above in the international section, are not binding on Egypt, such as international case law, GA resolutions, and the various reports of the Special Rapporteur. However, many other sources that have identified the core elements of an objective definition of terrorism, are considered binding on Egypt. These include the majority of international anti-terrorism conventions to which is Egypt is a party, and the binding UN

SC resolutions. The Egyptian legislature should take into account Egypt's obligations under international law and seek guidance from these sources when revising the country's definition of terrorism.<sup>147</sup> The definition must take into account all the basic elements of an objective and precise definition identified above.

In doing this, the legislature should first substitute the existing *actus reus* element in the Egyptian definition consisting of 'any use of force, or violence or threat' and limit it instead to criminal or unlawful acts. Terms used in the existing definition of terrorism may lead to the abuse of power and include a countless number of acts, some of which are otherwise legally justified.

The legislature should also revise the *mens rea* requirement in the Egyptian definition of terrorism. As emphasised above, article 86 of the Penal Code requires only specific intent – as opposed to criminal intent – for the commission of terrorism. The penal code considers terrorism to include all acts jeopardising the protected value of life, regardless of whether such acts have resulted in damage to, destruction, or loss of life.<sup>148</sup> Even the specific intent requirement is manifested in broad and ambiguous terms. In terms of the definition, all acts committed with the aim of 'disturbing the peace or the public order or jeopardizing the safety and the security of the society' are considered acts of terrorism. These terms, which are defined nowhere in the Penal Code, have 'provided the regime with extensive tools to punish opponents of the regime',<sup>149</sup> and could potentially apply to peaceful activities such as assemblies, demonstrations, or protests.

Therefore, the legislature should revise the intent requirement to bring it in line with the various definitions of terrorism in the international law instruments considered above – and especially those binding on Egypt. This

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<sup>147</sup> Egypt has been very active in adhering to international anti-terrorism conventions. UN Security Council, Letter of dated 28 May 2002 from the Chairman of the Security Council Committee Established Pursuant to Resolution 1373 (2001) Concerning Counter-terrorism addressed to the President of the Security Council, Annex ¶ 10, UN Doc S/2002/601 (29 May 29 2002) available at: <http://www.unhcr.org/refworld/country,,UNSC,,EGY,,46de603b0,0.html> (last accessed 1 April 2013).

<sup>148</sup> Interlocutory Decision n 68 above at ¶ 56.

<sup>149</sup> Moustafa 'Amending the Egyptian Constitution: 6 critical articles that test the military commitment to democracy' *Huff Post* 25 February 2011 5:29pm) available at: [http://www.huffingtonpost.com/tamir-moustafa/egypt-constitution\\_b\\_828479.html](http://www.huffingtonpost.com/tamir-moustafa/egypt-constitution_b_828479.html) (last accessed 1 April 2013).

would, of course, entail the legislature clearly providing that, for a crime to be considered terrorism, criminal intent must be stipulated in clear and precise terms and consist of the intent to cause death, serious bodily injury, or destruction of either a private or public property. The legislature should further require a specific intention to intimidate or coerce a group of individuals, or to influence the policy of a government or an organisation. Such an element, as reflected in the majority of the definitions examined above, is a crucial and decisive element by which to differentiate between terrorism and other violent crimes.

Thirdly, the legislature must ensure that any definition of terrorism respects the primacy of the Egyptian Constitution, in particular the principles of legality and legal certainty as required by article 66, as well as article 11(2) of the Universal Declaration of Human Rights (UDHR), and article 15 of the International Covenant on Civil and Political Rights (ICCPR).<sup>150</sup> As previously indicated, the Egyptian definition lacks the required clarity and precision demanded by the principles of legality and legal certainty, which require that a crime be defined in a concrete and precise way so that the law is sufficiently predictable, and provides ample notice of what constitutes a crime.<sup>151</sup> Rather, the existing definition of terrorism provides some examples of what could be considered terrorist conduct. It does so in very broad and ambiguous terms that could cover a wide variety of acts having nothing to do with actual terrorism. These include, damaging the environment, impeding the public authorities from the performance of their work, or thwarting the application of the Constitution and the laws. Such terms have no precise definition and stand in clear contrast to the principles of legality and legal certainty. Hence, the legislature must avoid the incorporation of similar broad terms, and ensure that terrorism is precisely and clearly defined by the law.<sup>152</sup> Such a requirement is an essential prerequisite for convicting an individual of a criminal offence in accordance with the principles of legality and general principles of criminal law.<sup>153</sup> In other words, a precise definition would allow persons to determine what exactly constitutes terrorism and who should be treated as a terrorist.

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<sup>150</sup> Egyptian Constitution n 138 above art 66 (repealed 2011); see also International Covenant on Civil and Political Rights art 15, 16 December 1966, 999 UNT S 171.

<sup>151</sup> *Mission to Tunisia* n 144 above at ¶ 9(a).

<sup>152</sup> International Bar Association 'International terrorism: legal challenges and responses' 58–59 (2004).

<sup>153</sup> Egyptian Constitution n 138 above at art 66 (repealed 2011).

Fourthly, although the existing definition does not include the motive among the constituent elements of terrorism offences, the legislature should refrain from using any wording that reflects a particular motive on the part of the perpetrators – whether political, religious, or ideological. As discussed, most of the international sources, including those binding on Egypt, have avoided including such an element in their definitions of terrorism.

Furthermore, the new definition of terrorism should be accompanied by a list of international acts of terrorism as determined by the international counter-terrorism conventions to which Egypt is a party. Such acts reflect an international consensus that certain conduct constitutes terrorism and is deemed as such, regardless of whether or not they incorporate the above components of an objective definition. This is particularly important given Egypt's obligations under these conventions.