

The Emergence of a Definition for the Crime of Terrorism under Conventional and Customary International Law

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Abstract

The recent terror attacks in Mozambique, which have crippled much of the Cabo Delgado region, once again, illustrate why the crime of terrorism is one of the most serious international crimes that continue to plague States. Historically, the definition of the crime of terrorism has been divisive and uncertain. This article aims to illustrate that the crime of terrorism has become less of an enigma and is, more than ever, susceptible to a common understanding and definition under conventional and customary international law.

Keywords: Terrorism; International Criminal Court; international crimes; international criminal law; public international law

Introduction*

In 2000, India formally circulated a draft convention titled the ‘Draft Comprehensive Convention on International Terrorism’ (Comprehensive Convention).¹ The Comprehensive Convention received support from more than 37 States, the Non-Aligned Movement, the Group of Eight, and the EU.² Since its introduction in 2000, Member States have been negotiating the text which is intended to complement the existing anti-terrorism treaties.³ The Comprehensive Convention does not specifically refer to a terrorist offence or act of terrorism, but defines an ‘offence within the meaning of the present Convention’ in Article 2 as

Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes:

- (i) Death or serious bodily injury to any person; or
- (ii) 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 to the environment; or
- (iii) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of the present article 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 organisation to do or to abstain from doing any act.⁴

The definition has to date remained unchanged, but the Comprehensive Convention has not yet been finalised. Two primary points of contention remain. The first involves the status of offences committed in furtherance of self-determination.⁵ Certain States believe that acts of terrorism are unjustified without exception.⁶ Other States believe that acts of terrorism should not be attributed to those engaged in armed struggles for

1 UNGA *Draft Comprehensive Convention on International Terrorism*, working document submitted by India 28 August 2000 A/C.6/55/1 art 2:1.

2 Ben Saul, *Defining Terrorism in International Law* (OUP 2006) 184.

3 UNGA ‘Measures to Eliminate International Terrorism’ (19 October 2000) A/C.6/55/L.2 45.

4 UNGA ‘Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly’ (12 August 2005) A/59/894 Appendix II, 9. See also, UN Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996’ (8–12 April 2013) A/68/37 Annex 1, Art 2(1).

5 UN press release, ‘Fight against International Terrorism Impeded by Stalemate on Comprehensive Convention, Sixth Committee Hears as Seventy-Third Session Begins’ (3 October 2018) GA/L/3566.

6 For example, UNGA Sixth Committee ‘Official Records of the Seventy-third Session’ 2 November 2018 statement by Nicaragua A/C.6/73/SR.2; UNGA Sixth Committee ‘Official Records of the Seventy-second Session’ 23 October 2017 statement by Lebanon A/C.6/72/SR.2; statement by Ukraine A/C.6/72/SR.3; statement by Bolivia A/C.6/72/SR.4; statement by the Dominican Republic A/C.6/72/SR.4; statement by observer for the State of Palestine A/C.6/72/SR.5.

self-determination.⁷ The second contention relates to whether the offences should apply to the armed forces of a State.⁸ This article will not focus on the points of contention of the Comprehensive Convention but will rather assess the definition of the crime of terrorism outside of the Comprehensive Convention. The assessment of the definition of the crime of terrorism under conventional and customary international law aims to show that the Comprehensive Convention if ever finalised, would probably not add much to the definition of the crime of terrorism in any event: that is not to say that the Comprehensive Convention would not add value, as it would reflect the understanding of States parties;⁹ moreover, implementation of the Convention would remit the use of repressive measures by States under the guise of counter-terrorism and also enhance international cooperation.¹⁰ However, from a normative perspective, this article will illustrate that the definition of the crime of terrorism has already emerged under conventional international law and is supported by customary international law.

Conventional International Law Prohibition of Terrorism

The crime of terrorism is prohibited under conventional international law, primarily through the adoption of sectoral and regional treaties. Historically, sectoral treaties, which refer to treaties on a particular theme, in the case at hand, each dealing with a specific manifestation of terrorism, have shied away from definitions, leaving their meaning to inference. Sectoral treaties aim to proscribe conduct that has formed part of a terrorist's repertoire at some point or another.¹¹ There are 19 universal counter-terrorism instruments.¹² However, other than featuring in the titles and preambles of the

7 For example, UNGA Sixth Committee, 'Official Records of the Seventy-third Session' 2 November 2018 statement by Islamic Republic of Iran A/C.6/73/SR.1; statement by Saudi Arabia A/C.6/73/SR.1; statement by Pakistan A/C.6/73/SR.1; statement by Lebanon A/C.6/73/SR.2; statement by Malaysia A/C.6/73/SR.4; statement by Namibia A/C.6/73/SR.4.

8 For example, UNGA Sixth Committee 'Official Records of the Seventy-second Session' 23 October 2017 statement by India A/C.6/72/SR.1; statement by Ukraine A/C.6/72/SR.2; statement by Israel A/C.6/69/SR.3; statement by India A/C.6/69/SR.3; statement by Islamic Republic of Iran A/C.6/69/SR.4.

9 Trevor Chimimba, 'United Nations Security Council Resolution 1373(2001) as a Tool for Criminal Law Enforcement' in Dire Tladi, Tiyanjana Maluwa and Max Du Plessis (eds), *The Pursuit of a Brave New World in International Law: Essays in Honour of John Dugard* (Brill Nijhoff 2017) 371.

10 *ibid.*

11 *ibid* (n 9) 371.

12 Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force on 4 December 1969) (Tokyo Convention); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971 entered into force 26 January 1973) (Montreal Convention); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973 entered into force 20 February 1977); International Convention against the Taking of Hostages (adopted 18 December 1979 entered into force 3 June 1983) (Hostages Convention); Convention on the Physical Protection of Nuclear Material (adopted 26 October 1979 entered into force 2 February 1987); Protocol for the Suppression of Unlawful Acts of Violence at

Terrorist Bombing Convention, the Financing of Terrorism Convention and the Nuclear Terrorism Convention, references to terrorism in the substantive provisions of these treaties are omitted.¹³

Though these treaties do not contain a definition of the crime of terrorism, they highlight reoccurring elements; these elements, in turn, provide insight into what constitutes the crime of terrorism. Based on an analysis of the sectoral treaties, the objective elements of the crime of terrorism entail, first, the prohibition of intentional acts which are already criminalised under domestic law.¹⁴ For example, the Tokyo Convention prohibits acts that affect in-flight safety.¹⁵ The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, requires State parties to criminalise murder, kidnapping or other attacks upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations or the means of transport of such person; a threat or attempt to commit such an attack; and an act constituting participation as an accomplice.¹⁶

Second, the commission of terrorist acts must have an international dimension which does not fall squarely within the confines of domestic terrorism. For example, the Financing of Terrorism Convention does ‘not apply where the offence is committed

Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 24 February 1988 entered into force 6 August 1989); Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (adopted 10 March 1988 entered into force 1 March 1992); Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, (adopted 10 March 1988 entered into force 1 March 1992); Convention on the Marking of Plastic Explosives for the Purpose of Detection (adopted 1 March 1991 entered into force 21 June 1998); International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997 entered into force 23 May 2001) (Terrorist Bombings Convention); International Civil Aviation Organization (ICAO), Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999 entered into force 4 November 2003); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999 entered into force 10 April 2002) (Terrorism Financing Convention); International Convention for the Suppression of Acts of Nuclear Terrorism (adopted 15 April 2005 entered into force 7 July 2007) (Nuclear Terrorism Convention); Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (Hague Convention)

13 For example, the preamble of the Terrorism Financing Convention (n 12).

14 Antonio Cassese and Paola Gaeta, *Cassese's International Criminal Law* (Publisher? 2008) 150. See also UNGA Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 art 3 which prohibits acts which result in the seizure or exercise of control over a ship by force, threat, or intimidation. In addition, acts of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship, or commit other acts against the safety of ships. See, art 2(1) of the Financing of Terrorism Convention (n 12); art 2(1) of the Nuclear Terrorism Convention (n 12); Terrorist Bombing Convention (n 12) art 2(1); Maritime Safety Convention (n 12) art 3.

15 Tokyo Convention (n 12) art 1.

16 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1977 (n 12) art 2.

within a single State'.¹⁷ The Hague Convention applies 'only if the place of take-off or the place of actual landing of the aircraft on board which the offence is committed is situated outside the territory of the State of registration of that aircraft'.¹⁸ The Maritime Safety Convention 'applies if the ship is navigating or is scheduled to navigate into, though, or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States'.¹⁹

Third, these treaties further oblige State parties to criminalise terrorist conduct domestically.²⁰ For example, the Terrorist Bombings Convention obliges state parties to criminalise the offences in the Convention domestically and to impose appropriate punishments.²¹ The Terrorist Financing Convention and the Nuclear Terrorism Convention contain similar provisions.²²

Lastly, the anti-terrorism treaties provide for universal jurisdiction as well as the obligation to prosecute or extradite. They do so, by and large, by implementing the 'Hague Formula' which has 'served as a model for most contemporary conventions containing the obligation to extradite or prosecute'.²³ For example, the Hostages Convention provides that if an offender is apprehended in a state, and that state does not extradite him, the state is obliged to prosecute.²⁴

17 The Financing of Terrorism Convention (n 12) art 3: 'This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.'

18 For example, Hague Convention (n 12) art 3(3).

19 The Maritime Safety Convention (n 12) art 4: '(1) This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States. (2) In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.'

20 For example, the Terrorism Financing Convention (n 12) art 4; the Nuclear Terrorism Convention (n 12) art 6.

21 Terrorist Bombings Convention (n 12) art 4: 'Each State Party shall adopt measures as may be necessary: (a) To establish as criminal offences under its domestic law and the offences set forth in Article 2 of this Convention; (b) To make those offences punishable by appropriate penalties which take into account the grave nature of those offences.'

22 Terrorism Financing Convention (n 12) art 4; Nuclear Terrorism Convention (n 12) art 6.

23 UNGA 'Final Report: Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*)' 5 June 2014 A/CN.4/L.844 6; Hague Convention (n 12) art 7: 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution ...'

24 The Hostages Convention (n 12) art 8: '(1) The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent

Moreover, sectoral treaties address the rationale for the commission of terrorist acts in their substantive provisions, which suggests that the reason for the commission of proscribed acts serves as an identifier for the crime of terrorism.²⁵ For instance, the Nuclear Terrorism Convention specifically points out that the commission of proscribed conduct under the treaty cannot be justified for reasons of a ‘political, philosophical, ideological, racial, ethnic, religious or other similar nature’.²⁶ Other treaties also address the issue of motive. For example, the Financing of Terrorism Convention requires that the proscribed conduct be carried out with the intention to ‘intimidate a population, or to compel a government or an international organisation ...’²⁷ Similarly, the Nuclear Terrorism Convention requires that the proscribed conduct be carried out with the intention of causing death, serious bodily injury, substantial damage to property or the environment, or with ‘the intent to compel a natural or legal person, an international organisation or a State to do or refrain from doing an act’.²⁸

authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.’

25 Cassese and Paola (n 14) 150.

26 The Nuclear Terrorism Convention (n 12) art 6: ‘Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’; The Terrorism Financing Convention (n 12) art 6: ‘Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature’; The Terrorist Bombings Convention (n 12) art 5: ‘Each State Party shall adopt measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of the Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature’.

27 Financing of Terrorism Convention (n 12) art 2(1): ‘Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act’.

28 Nuclear Terrorism Convention (n 12) art 2(1): ‘Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally: (a) Possesses radioactive material or makes or possesses a device: (i) With the intent to cause death or serious bodily injury; or (ii) With the intent to cause substantial damage to property or the environment; (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; or (ii) With

Clearly, identifying the crime of terrorism requires certain elements which distinguish it from ordinary domestic criminal conduct. Based on the above, the substantive content of what constitutes a terrorist act varies widely, which suggests that the rationale for committing the proscribed conduct weighs more heavily than the nature of the act and embodies an international dimension.²⁹

On the other hand, the regional treaties provide more substantive insight into what these treaties deem the crime of terrorism to be. For instance, in the Organisation of African Unity's Convention on the Prevention and Combating of Terrorism (OAU Convention), the definition of a terrorist act highlights salient elements which set a terrorist act apart from other crimes.³⁰ In addition to the commission of an act that causes death or serious injury, or damage to property, cultural sites, natural resources, and the like, the terrorist act must aim to 'intimidate, put in fear, force, coerce or induce'.³¹ This suggests that the motive for the commission of the acts supersedes the nature of the prohibited act when it comes to determining whether an otherwise 'ordinary' crime is a terrorist act.

The 2009 Shanghai Convention defined terrorism as an 'ideology of violence and the practice of influencing decision-making by the authorities or international organisations' using violence or criminal acts.³² A terrorist act was defined as an act intended to intimidate, endanger, cause substantial damage, or trigger environmental disasters to further 'political, religious, ideological and other aims ...'.³³ The Arab

the intent to cause substantial damage to property or the environment; or (iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.'

29 Hague Convention (n 12) art 3(3); The Financing of Terrorism Convention (n 12) art 3; the Montreal Convention (n 12) art 4(2); the Tokyo Convention (n 12) art 1(2); the Hostages Convention (n 12) Art 13; the Terrorist Bombing Convention (n 12) art 3.

30 The OAU Convention on the Prevention and Combating of Terrorism 1999 (*OAU Convention*) art 1(3) defines a 'terrorist act' as '(a) any act which is a violation of the criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to: (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or (ii) disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or (iii) create general insurrection in a State'.

31 As above.

32 Shanghai Cooperation Organization Convention Against Terrorism of the Shanghai Cooperation Organization 2009 art 2(2): 'Terrorism shall mean an ideology of violence and the practice of influencing decision-making by the authorities or international organisations either by committing or by threatening to commit acts of violence and/or other criminal acts intended to intimidate the population and cause harm to persons, to society or to the State.'

33 As above art 2(3) refers to a terrorist act as 'an act connected with intimidating a population and creating a danger to human life and health that is intended to cause significant property damage, an ecological disaster, or other serious consequences in order to achieve political, religious, ideological,

Convention for the Suppression of Terrorism (Arab Convention) defines terrorism as any act of violence aimed at the ‘advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them.’³⁴

In Europe, several conventions serve to combat terrorism. The Council of Europe Convention on the Prevention of Terrorism (Council of Europe Convention) takes a sectoral approach by cross-referencing various sectoral treaties on combating terrorism. Based on the proscribed offences, it infers the meaning of a terrorist offence.³⁵ Notably, an Additional Protocol to the Council of Europe Convention added several offences which significantly extended the ambit of terrorist offences to include preparatory acts such as receiving training for terrorism,³⁶ or travelling for the purposes of terrorism.³⁷ A 2017 European Parliament and the Council of the European Union Directive (EU Directive 541) implemented new European states’ rules to combat terrorism.³⁸ EU Directive 541 criminalises terrorism even further.³⁹ It provides a list of offences that

or other ends by influencing decision-making by the authorities or international organizations, or the threat of committing such acts.’

- 34 League of Arab States, Arab Convention on the Suppression of Terrorism 1998 art 1(2) which defines terrorism as ‘[a]ny act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.’
- 35 Council of Europe, ‘Convention on the Prevention of Terrorism’ 2005 art 1(1): ‘For the purposes of this Convention, ‘terrorist offence’ means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix.’
- 36 Council of Europe Committee of Ministers, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism 2015 art 3(1) ‘receiving training for terrorism means to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence. 2. Each Party shall adopt such measures as may be necessary to establish ‘receiving training for terrorism’, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.’
- 37 Council of Europe Committee of Ministers, Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (n 36) 2015 art 4(1) ‘travelling abroad for the purpose of terrorism’ means travelling to a State, which is not that of the traveler’s nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism. (2) Each Party shall adopt such measures as may be necessary to establish “travelling abroad for the purpose of terrorism”, as defined in paragraph 1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles. (3) Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in this article.’
- 38 European Union Directive (EU) 2017/541 of the European Parliament and the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, 2017.
- 39 Council of Europe Convention (n 36).

have featured in one or more sectoral treaties, including cyber-terrorism.⁴⁰ The extension of the criminalisation of terrorism, however, takes the form of proscribing conduct ranging from the supply of information, funding activities ‘in any way’, prohibiting the ‘glorification of terrorist acts’, solicitation for terrorism, providing as well as receiving training, travelling for the purpose of terrorism anywhere in the world, the facilitation or assistance of travel of others, aggravated theft and extortion for the purpose of terrorism, and drawing up false administrative documents for the purpose of furthering terrorism.

The above evaluation of sectoral and regional treaties leads to a few conclusions regarding the nature of the crime of terrorism under conventional international law: Concerning sectoral treaties, the proscribed acts are narrowly defined due to their focus on particular physical manifestations of the crime of terrorism. These manifestations of the crime of terrorism are linked to the particular context of the aforementioned conventions; for instance, the Hague Convention aims to proscribe unlawful actions aimed at an aircraft.⁴¹ So too, do most of the other sectoral treaties have a similar narrow focus requiring an inference that the proscribed acts in the conventions form part of the crime of terrorism.⁴²

The regional treaties, on the other hand, apply several different approaches. Some uphold a sectoral approach that requires an inference of the crime of terrorism whilst others define terrorism or terrorist act. The treaties that provide definitions indicate the following common elements; the commission, or intent to commit, some sort of harm in the broad sense aimed at either instilling fear, intimidating or endangering, to further a motive, be it political, religious, ideological or other aims. The regional treaties, particularly those in Europe, provide a broad, almost infinite array of proscribed actions which could constitute the crime of terrorism. In their own right, all of the acts would constitute ordinary crimes, again reemphasising that the crime of terrorism focuses on motive as a distinguishing element.

Based on the analysis of sectoral and regional treaties and the elements extracted therefrom, the crime of terrorism under conventional international law can be defined as: Any conduct, which causes harm to persons or property, with the motive of instilling fear or compelling a government or international organisation to do or refrain from doing something, committed to further a particular aim, which is often motivated by political, ideological, religious or philosophical reasons and which contains a transnational element.

40 EU Directive 541 (n 39) art 3.

41 The Hague Convention (n 12).

42 Aniel Caro de Beer, *Peremptory Norms of General International Law (Jus Cogens) and the Prohibition of Terrorism* (Brill 2019) 45.

Customary International Law Prohibition of Terrorism

It is an established rule of international law that both state practice and *opinio juris* are requirements for the formation of customary international law.⁴³ Put simply, for a custom to exist there must be evidence of the practice of states who, in turn, feel obliged to conform to the customary norm.⁴⁴ This article will now turn to whether the above definition of the crime of terrorism finds support under customary international law by considering domestic legislation, practice in relation to treaties, and the content of resolutions.

Evidence of State Practice

Regarding state practice in Africa, domestic legislation highlights a few common elements. For instance, Botswana's Counter-Terrorism Act defines an 'act of terrorism' as any act intended to 'advance a political, ideological or religious cause' which is intended to intimidate, threaten, or compel a government or international organisation to do or abstain from doing something.⁴⁵ Ghana's legislation echoes these elements when it describes terrorism as an act performed to further a political, ideological, religious, racial, or ethnic cause that results in serious harm.⁴⁶ In Mauritius the motive for the commission of an act of terrorism is more specific, evidenced by the phrasing 'intended to seriously intimidate a population'.⁴⁷ In Nigeria the motive is more limited in that terrorism is described as an act that is deliberately performed with malice or forethought, and which is intended unduly to compel a government or international organisation to do or refrain from doing something.⁴⁸ Tunisia focuses on the idea that terrorism is committed to 'spread terror among the population or to unduly compel...'.⁴⁹ Uganda, on the other hand, again refers to specific motives linked to the commission of a terrorist act: to influence government or intimidate the public for a political, religious, social, or economic aim, and indiscriminately to carry out a range of illicit acts.⁵⁰

43 International Law Commission, 'Draft Conclusions on Identification of Customary International Law, with Commentaries' 2018 122–123 para 3; KN Guernsey, 'The North Sea Continental Shelf Cases' (2000) 27 ONULR 141, 143.

44 *ibid.*

45 Botswana Counter-Terrorism Act 24 of 2014 s 2(1).

46 Ghana Electronic Surveillance and Searches under the Anti-Terrorism Act 762 of 2008 s 2(1)(a)–(e). See also, Samuel Boadi Adarkwah, 'Counter-Terrorism Framework and Individual Liberties in Ghana' (2020) 28 African Journal of International and Comparative Law 50, 57.

47 Mauritius Prevention of Terrorism Act 2002 s 3.

48 Nigeria Terrorism Prevention Act 2001 s 1(2)–(3). See also, EU Ejeh AI Bappah and Yusufu Dankofa, 'Nature of Terrorism and Anti-Terrorism Laws in Nigeria' (2019) 10 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 186, 190.

49 International Court of Justice, 'Position Paper: Tunisia's Law on Counter-Terrorism in light of International Law and Standards' (6 August 2015) <<https://www.icj.org/wp-content/uploads/2015/08/Tunisia-CT-position-paper-Advocacy-PP-2015-ENG-REV.pdf>> accessed 4 December 2020.

50 Uganda Anti-Terrorism Act 2002 s 7(2).

State practice in Australasia shows broad domestic powers to combat the crime of terrorism. Australia has been accused of being caught up in the ‘9/11 effect’ which saw the country implementing more domestic legislation than the parliamentary opposition could keep up with.⁵¹ On the whole, Australia defines terrorism as an action performed with two intentions.⁵² The first is the ‘intention of advancing a political, religious or ideological cause.’⁵³ The second is to coerce or influence through intimidation.⁵⁴ In China terrorism is defined as ‘appeals and actions that create social panic, endanger public safety, violate person and property, or coerce national organs or international organisations, through methods such violence, destruction, intimidation, so as to achieve their political, ideological, or other objectives.’⁵⁵ The common elements refer to the causing of harm, coercing, or influence by intimidation, which can manifest in many ways, aimed at advancing a political, religious, or ideological cause.⁵⁶ There is no specific mention of terrorism in Japan’s legislation but rather references to ‘intimidation’ of the general public or government.⁵⁷ This ties in closely with the idea that the crime of terrorism aims to intimidate or compel, as is also apparent in African legislation. Initially, Singaporean legislation did not link terrorism to intent or motive to compel or intimidate in furtherance of some cause.⁵⁸ This can be ascribed to outdated legislation on terrorism in Singapore dating back to 1960.⁵⁹ More recent legislation adopted in 2003, contains provisions on motive, which is to ‘influence or compel the government’ or ‘intimidate the public’.⁶⁰

Regarding state practice in Europe, domestic legislation indicates the influence of EU Framework decisions.⁶¹ The common elements include the commission of a harmful act that has a transnational element and is intended to intimidate a population, compel a

51 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (CUP 2011) 309–310.

52 Australia Criminal Code Act 1995 s 100(1)–(3).

53 As above s 100(1)(b): ‘[T]errorist act means an action or threat of action where: (a) the action falls within subsection (2) and does not fall within subsection (3); and (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and ...’

54 As above s 100(1)(c): ‘[T]he action is done or the threat is made with the intention of (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public.’

55 China Counter-Terrorism Law of the People’s Republic of China 2015. ‘The US-China Business Council’ (unofficial translation) <<https://www.uschina.org/china-hub/unofficial-translation-counter-terrorism-law-peoples-republic-china>> accessed 11 November 2020.

56 Australia Criminal Code (n 52) s 100; China Counter-Terrorism Law (n 55) art 3; India Prevention of Terrorism Act 15 of 2002.

57 Japan Act on Punishment of the Financing of Criminal Activities for the Purpose of Intimidation of the General Public and of Governments 67 of 2002 art 1.

58 EKB Tan, ‘Singapore’ in K Roach (ed), *Comparative Counter-Terrorism* (CUP 2015) 612.

59 Singapore Internal Security Act 18 of 1960.

60 *ibid.*

61 European Union: Council of the European Union, Council Framework Decision 2002/475 on Combating Terrorism 13 June 2002 2002/475/JHA; European Union: Council of the European Union Council Framework Decision 2008/913/JHA 28 November 2008.

government or international organisation, or to destabilise or destroy fundamental political, constitutional, economic, or social structures of the country or international organisation.⁶² Notably, European legislation more regularly omits references to political, religious, ideological, or philosophical motives found in state practice in most jurisdictions in other regions. Not in all cases though; in Belgium, terrorist offences must show terrorist intent, which is described as seriously intimidating a population, compelling a government or international organisation to act or refrain from acting, or destabilising or destroying ‘fundamental political, constitutional, economic, or social structures of the country or international organization’.⁶³ In Bosnia and Herzegovina, terrorist acts are identified as actions aimed at seriously intimidating or compelling persons or the government to act or refrain from acting.⁶⁴ Greece identifies terrorism as ordinary offences already criminalised under its domestic legislation, but with the added element of seriously harming the country or an international organisation with the purpose of seriously intimidating the population, illegally forcing a public authority to do, or refrain from doing something, or ‘with the purpose of seriously harming or destroying the fundamental constitutional, political and economic structures of a country or an international organisation’.⁶⁵ So too, Luxembourg’s Code identifies terrorism by the intent of seriously intimidating, unduly compelling public authorities to act or refrain from acting, or destabilising or destroying some structure or organisation.⁶⁶ The Netherlands focuses strongly on intent. Terrorist offences are referred to as acts committed with the intent of causing fear, or unlawfully compelling some structure or organisation to act or refrain from acting.⁶⁷ Russia identifies terrorism as the ideology of violence and the practice of influencing the adoption of a decision by

62 Belgium Criminal Code of the Kingdom of Belgium 1867 (as amended 2016) arts 137–140; Bosnia & Herzegovina Criminal Code (as amended 2018) art 201; Czech Republic Criminal Code of the Czech Republic 40 of 2009 art 311; France Criminal Code 2006 art 421; Greece Criminal Code 2014 art 187A; Luxembourg Criminal Code 2018 art 135(1); The Netherlands Crimes of Terrorism Act 24 of 2004 art 83; United Kingdom Terrorism Act 2000 s 1(1).

63 Anne Weyembergh and Celine Cocq, ‘Belgium’ in K Roach (ed), *Comparative Counter-Terrorism* (CUP 2015) 237.

64 Bosnia and Herzegovina, Criminal Code (n 62) art 201.

65 Council of Europe, ‘Profiles on Counter-Terrorist Capacity: Greece’ (2012) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168064101c>> accessed 29 November 2020.

66 Luxembourg Criminal Code (n 62) art 135(1); Council of Europe, ‘Profiles on Counter-Terrorist Capacity: Luxembourg’ (November 2005) 1 <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090001680641020> > accessed 28 November 2020.

67 The Netherlands Crimes of Terrorism (n 62) art 83 which describes a terrorist aim to mean ‘the aim to seriously intimidate the population or part of the population of a country, and/or to unlawfully force a government or international organization into acting, to refrain from acting or to tolerate, and/or to seriously destroy or disrupt the political, constitutional, economic or social structure of a country or international organization’. See also, Ronald Janse, ‘Fighting Terrorism in the Netherlands; A Historical Perspective’ (2005) 1 Utrecht Law Review 55, 55.

public authorities.⁶⁸ In the UK, ‘terrorism’ is the use or threat of an action designed to influence the government, international organisation, or intimidate the public to advance a political, religious, racial or ideological cause.⁶⁹

It emerges that the elements of the crime of terrorism found in African, Australasian, and European legislation, by and large, identify the common characteristics of the crime of terrorism as: violence against persons or property; aimed at intimidating, or compelling or endangering the general population or government, in the furtherance of an ideological, political, or religious motive, and which contains a transnational element.⁷⁰

Regarding state practice in the Middle East, the motives—political, religious, nationalistic, or ideological—for the commission of the crime of terrorism feature in Israeli legislation, along with the elements of harm, manifested in several ways, which seeks to intimidate, compel or coerce.⁷¹ Israeli legislation shows a gradual evolution of anti-terrorism policies with its most recent legislation, dating from 2016, comprehensively tackling terrorism whilst maintaining ‘Israel’s commitment to human rights’.⁷² Section 2 of the Counter-terrorism Law defines a ‘terrorist act’ as an offence which is carried out with a ‘political, religious, nationalistic or ideological motive’ with the ‘intention of provoking fear or panic among the public or with the intention of compelling a government’ or international organisation to do or abstain from doing anything and which must involve an element of serious harm.⁷³ The principal elements

68 Russia Federal Law NO 35-FZ of 6 March 2006 on Counteraction against Terrorism art 3(1) <<https://rm.coe.int/16806415f5%3E>> accessed 29 November 2020.

69 As above s 1(1): ‘In this Act “terrorism” means the use or threat of action where (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government [or an international governmental organisation] or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious [racial] or ideological cause.’ See also, Sir David Williams, ‘The United Kingdom’s Response to International Terrorism’ (2003) 13 Indiana International & Comparative Law Review 683, 689.

70 Botswana Counter-Terrorism Act (n 45) s 2(1); Ghana Electronic Surveillance and Searches under the Anti-Terrorism Act (n 46) s 2(1); Mauritius Prevention of Terrorism Act (n 47) s 3; Nigeria Terrorism Prevention Act (n 48) s 1; South Africa Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 s 1; Tanzania United Republic of Tanzania Prevention of Terrorism Act 2002 s 2.

71 Israel The Counter-terrorism Law 5776–2016 (unofficial translation) art 2.

72 *ibid* (n 71) art 1.

73 *ibid* (n 71) art 2 defines a ‘terrorist act’ as: ‘[A]n act that constitutes an offense, or a threat to carry out such an act, which meets all of the following: (1) It was carried out with a political, religious, nationalistic or ideological motive; (2) It was carried out with the intention of provoking fear or panic among the public or with the intention of compelling a government or other governmental authority, including a government or other governmental authority of a foreign country, or a public international organization, to do or to abstain from doing any act; (3) The act carried out or threatened to be carried out, involved one of the following, or posed an actual risk of one of the following a) Serious harm to a person’s body or freedom; b) Serious harm to public health or safety; c) Serious harm to property, when in the circumstances in which it was caused there was an actual possibility that it would cause

of the definition are therefore: (1) The conduct must be an offence. (2) The conduct must have some nefarious motive. (3) The aim of the conduct must be to intimidate or coerce. (4) The conduct must result in harm.⁷⁴ On the other hand, Saudi Arabian legislation is a tool for repression.⁷⁵ It acts contrary to other states' practice, is void of human rights considerations, and is primarily used to quell 'almost any non-governmental political action'.⁷⁶ The result is that the only common element to be extracted from it is that some harm must be done.⁷⁷

Regarding state practice in the Americas and Canada, the common elements also indicate the need to further some particular motive, objective, or cause.⁷⁸ Brazilian legislators initially believed that terrorism was impossible to define, but in 2016 they nonetheless achieved the 'impossible'.⁷⁹ Brazil's domestic legislation defines terrorism as prohibited acts committed for 'reasons of xenophobia, discrimination, or prejudice of race, colour, ethnicity and religion' to invoke terror or endanger the public peace or safety.⁸⁰ Canadian legislation identifies terrorism as an act or omission, committed with a 'political, religious or ideological purpose, objective or cause'.⁸¹ The terrorist act is

the serious harm mentioned in sub-paragraphs (a) or (b) and that was carried out with the intention of causing such harm; d) Serious harm to religious objects; here, 'religious objects' means a place of worship or burial and holy objects; e) Serious harm to infrastructure, systems or essential services, or their severe disruption, or serious harm to the State's economy or the environment'.

74 As above.

75 Maria Josua, German Institute for Global and Area Studies 'Anti-terror Legislation as a Tool of Repression in Arab States' (4 July 2019) <<https://www.giga-hamburg.de/en/publication/anti-terror-legislation-as-a-tool-of-repression-in-arab-states>> accessed 1 December 2020.

76 Library of Congress 'Algeria, Morocco, Saudi Arabia: Response to Terrorism' (2015) <<https://www.loc.gov/law/help/counterterrorism/response-to-terrorism.pdf>> accessed 23 October 2021.

77 Saudi Arabia's Law Concerning Offenses of Terrorism and its Financing art 1.

78 Canada Criminal Code 1985 art 83.01. For Brazil's anti-terrorism legislation see Ricardo Luis Da Cunha Rabelo, 'The Definition of Terrorism and the Current Brazilian Legislation' (2018) Escola de Comando E Estador-Maior Do Exército Escola Marechal Castello Branco 1, 21–22 <<https://bdex.eb.mil.br/jspui/bitstream/123456789/2890/1/MO%2000029%20-%20RABELO.pdf>> accessed 1 December 2020.

79 Rodrigo de Souza Costa, 'Brazil' in Kent Roach (ed), *Comparative Counter-Terrorism* (CUP 2011). 148.

80 Da Cunha Rabelo (n 78) 21–22.

81 Canada Criminal Code (n 78) art 83.01 defines 'terrorist activity' as '(b) an act or omission, in or outside Canada, (i) that is committed (A) in whole or in part for a political, religious or ideological purpose, objective or cause, and (B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and (ii) that intentionally (A) causes death or serious bodily harm to a person by the use of violence, (B) endangers a person's life, (C) causes a serious risk to the health or safety of the public or any segment of the public, (D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or (E) causes serious interference with or serious disruption of an essential service, facility or

further committed to intimidate or compel and causes some sort of harm, interference, or damage.⁸² In the case of Colombia's narco-terrorism legislation, the common elements of the crime of terrorism indicate a harmful act which aims to cause fear, intimidate, or compel.⁸³ Colombia characterises terrorism as 'producing and maintaining societal fear and distress by any means.'⁸⁴ The report on US legislation found that 'practically every agency of the United States Government (USG) with a counter-terrorism mission uses a different definition of terrorism.'⁸⁵ From these different definitions, the common elements identified are intent, either political or religious motive, perpetration of violence, and targeting of non-combatants by non-state actors.⁸⁶

The analysis above indicates that state practice proscribing the crime of terrorism has been general and consistent over an extended period and indicates support for the definitional elements for the crime of terrorism identified under conventional international law. This article will now turn to the evidence of state practice by other means.

As has been indicated above, customary international law emerges, first, by consistent and widespread state practice.⁸⁷ In addition to evidence of state practice in the form of

system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C), and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law.'

⁸² *ibid.*

⁸³ Colombia Penal Code Law 599 of 2000 arts 144 and 360.

⁸⁴ Luz Nagle, 'Colombia' in K Roach (ed), *Comparative Counter-Terrorism* (CUP 2011) 132–133.

⁸⁵ United States 'Report to the Speaker of the House of Representatives and the Minority Leader from the Subcommittee on Terrorism and Homeland Security House Permanent Select Committee on Intelligence' (17 July 2002) <https://fas.org/irp/congress/2002_rpt/hpsc_ths0702.html> accessed 17 November 2020. The United States' Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001 also defines 'domestic terrorism' as: '[a]cts dangerous to human life that is a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.'; United States, Code of Federal Regulations 28 CFR § 0.85 defines terrorism as 'the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.'

⁸⁶ Sudha Setty, 'The United States' in K Roach (ed), *Comparative Counter-Terrorism* (CUP 2015) 50.

⁸⁷ 'Draft conclusions on identification of customary international law, with commentaries' (n 43) 122–123 para 3; Christopher Greenwood, 'Sources of International Law: An Introduction' (2010) UN

domestic anti-terrorism legislation, the ILC draft conclusion 6 indicates that manifestations of state practice include ‘conduct in connection with treaties’.⁸⁸ Conduct in connection with treaties indicates that all UN member states have signed or ratified at least one of the nineteen sectoral treaties against terrorism.⁸⁹ Of the UN’s 193 member states, the Tokyo Convention has been ratified by 186 member states, the Montreal Convention by 188 member states, and the Hague Convention by 185 member states.⁹⁰ The Terrorism Bombings Convention has been ratified by 170 states, the Terrorist Financing Convention by 189 states, and the Nuclear Terrorism Convention by 117 states.⁹¹

In addition to domestic, sectoral, and regional legislation on the crime of terrorism, the UNSC has adopted a range of resolutions, some of which are binding on all member states in terms of Chapter VII of the UN Charter.⁹² Shortly after the attack on 11 September 2001, the UNSC adopted Resolutions 1368 and 1373.⁹³ Resolution 1373 has been described as the ‘cornerstone of the United Nations counterterrorism effort’.⁹⁴ Resolution 1373 draws on the practice of the United Nations’ (UN) counter-terrorism

Audiovisual Library of International Law <https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf> at 1> 09 December 2020; Emily Kadens and Ernest Young, ‘How Customary is Customary International Law’ (2013) 54 William & Mary Law Review 885, 907–913.

88 ‘Draft conclusions on the identification of customary international law, with commentaries’ (n 43) Conclusion 6: ‘1. Practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction. 2. Forms of State practice include but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct ‘on the ground’; legislative and administrative acts; and decisions of national courts. 3. There is no predetermined hierarchy among the various forms of practice.’

89 UNODC E4J University Module Series ‘Counter-Terrorism: Treaty-based Crimes of Terrorism – Universal Counter-Terrorism Instruments <<https://www.unodc.org/e4j/en/terrorism/module-4/key-issues/treaty-based-crimes-of-terrorism.html>> accessed 30 December 2020.

90 De Beer (n 42) 40.

91 UN Treaty Collection, International Convention for the Suppression of Terrorist Bombings <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-9&chapter=18&clang=_en> accessed 09 December 2022; UN Treaty Collection, International Convention for the Suppression of the Financing of Terrorism <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-11&chapter=18&lang=en> accessed 09 December 2020; UN Treaty Collection, International Convention for the Suppression of Acts of Nuclear Terrorism <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XVIII-15&chapter=18&Temp=mtdsg3&lang=en> accessed 09 December 2020.

92 UN Charter of the United Nations (24 October 1945) art 39: ‘The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.’

93 UNSC, Resolution 1368 (12 September 2001) S/RES/1368; UNSC, Resolution 1373 (28 September 2001) S/RES/1373.

94 Eric Rosand, ‘The Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism’ (2003) 97(2) American Journal of International Law 333, 337.

measures, including the wording of the counter-terrorism instruments, as will be seen below.⁹⁵ Resolution 1373 imposed twelve mandatory obligations and nine non-binding provisions on all member states.

Like sectoral treaties, Resolution 1373 obliges states to combat terrorism without providing or adopting a definition of terrorism.⁹⁶ Saul argues that the obligatory enforcement of Resolution 1373, void of a definition, contributed to a ‘decentralised and haphazard national implementation’.⁹⁷ Some states used the lack of definition to enact legislation containing overly-broad definitions of terrorism which raised human rights concerns.⁹⁸ In 2004, UNSC Resolution 1566 alluded to a potential definition of terrorism in paragraph 3 as:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to 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 such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.⁹⁹

A subsequent UNSC press release, however, refuted the notion that the UNSC had posited a definition of terrorism.¹⁰⁰ Rather, paragraph 3 of Resolution 1566 contained a clear political message emanating from a compromise by member states.¹⁰¹

The UNSC resolutions provide insight into what cumulative elements constitute the crime of terrorism. Resolution 1566 leads to the assessment that the elements for the crime of terrorism are: (1) The proscribed act is committed with the intent to cause harm to people.¹⁰² (2) The commission of the proscribed act must, in addition to causing harm, be accompanied by a further nefarious motive, be it intimidation of persons, compelling

95 Chimimba (n 9) 365.

96 Johanny Santana, ‘In the Aftermath of Resolution 1373: Tackling the Protective Veil of Counter-Terrorism’ (2015) 23 CICLR Law 663, 664–665.

97 Ben Saul, ‘Terrorism as a Legal Concept’ in Genevieve Lennon and Clive Walker (eds), *Routledge Handbook of Law and Terrorism* (2017) 32.

98 *ibid.*

99 UNSC *Resolution 1566* S/RES/1566 8 October 2004 para 3.

100 UNSC ‘Press Release SC/8214’ 8 October 2004 <<https://www.un.org/press/en/2004/sc8214.doc.htm>> accessed 21 October 2020.

101 Reuven Young, ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation’ (2006) 29 Boston College International and Comparative Law Review 23, 45.

102 S/RES/1566 (n 100) para 3: ‘[C]riminal acts ... committed with the intent to cause death or serious bodily injury, or taking of hostages ...’

a government or international organisation to do or refrain from doing something, or to ‘provoke a state of terror’.¹⁰³ (3) The commission of proscribed conduct must also be contained in an international convention, ie, one of the sectoral or regional treaties on terrorism.¹⁰⁴ (4) Political, philosophical, ideological, racial, ethnic, religious, or other considerations of a similar nature do not serve as grounds of justification.¹⁰⁵ Again, the elements identified by the UNSC indicate support for the definition of the crime of terrorism proposed in this article.

Evidence of *Opinio Juris*

The above analysis indicates ample state practice for proscribing the crime of terrorism. State practice on its own is, however, insufficient to prove the emergence of a customary international law norm. State practice needs to be performed along with the belief that the state is obliged to act in a certain manner or to proscribe certain conduct. This ‘sense of legal obligation’ is termed *opinio juris*.¹⁰⁶ This section will argue that the coalescence between the implementation of domestic legislation, state condemnation, and UNGA and UNSC resolutions together serve as evidence of *opinio juris*.

Since 1970, the UN General Assembly has approved many resolutions aimed at combating terrorism, which will be discussed below. UNGA resolutions on their own do not necessarily prove *opinio juris*.¹⁰⁷ However, resolutions serve as evidence of

103 ibid (n 102) para 3: ‘... with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act.’ These motives can further be identified as being of a “political, philosophical, ideological, racial, ethnic, religious or other similar nature.”

104 ibid (n 102) para 3: ‘... act, which constitutes offences within the scope of and as defined in the international conventions and protocols relating to terrorism.’

105 ibid (n 102) para 3: ‘... are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature...’

106 James Crawford and Ian Brownlie, *Brownlie’s Principles of Public International Law* (OUP 2019) 23; *The SS Lotus Case (France v Turkey)* (7 September 1927) (1927) PCIJ Ser A no 10. See also; Hiroshi Taki, ‘Opinio Juris and the Formation of Customary International Law: A Theoretical Analysis’ (2008) 51 GYIL 447, 450; John Tasioulas, ‘Opinio Juris and the Genesis of Custom: A Solution to the Paradox’ (2007) 26 AYBIL 199, 202–205; Christian Dahlman, ‘The Function of Opinio Juris in Customary International Law’ (2012) 81 Nordic Journal of International Law 327, 329–332; Madeline DiLascia, ‘China’s Stealthy Sovereignty: the Importance of Objective Opinio Juris’ (2018) 50 George Washington International Law Review 923, 929.

107 International Law Commission (n 43) 147 Conclusion 12: ‘1. A resolution adopted by an international organization or at an intergovernmental conference cannot, of itself, create a rule of customary international law. 2. A resolution adopted by an international organization or at an intergovernmental conference may provide evidence for determining the existence and content of a rule of customary international law or contribute to its development. 3. A provision in a resolution adopted by an international organization or at an intergovernmental conference may reflect a rule of customary international law if it is established that the provision corresponds to a general practice that is accepted as law (opinio juris).’

emerging *opinio juris* in instances when there is sufficient state support.¹⁰⁸ Resolutions express common interest or state will and are, therefore, an important indicator of states' views and beliefs.¹⁰⁹ The ILC Draft Conclusions on identification of customary international law indicate that resolutions of international organisations may be consulted in determining the existence of customary international law. However, 'critical importance' must be accorded to the context and content of these resolutions.¹¹⁰ UNGA resolutions should further be given special attention as these, with virtually universal participation, 'offer important evidence of collective opinion of its Members.'¹¹¹ In the *Nicaragua* case, the ICJ affirmed that *opinio juris* may be deduced from '*inter alia*, the attitude of Parties and the attitude of States towards certain General Assembly resolutions.'¹¹² In certain instances, it has even been argued that unanimous resolutions can be evidence of *opinio juris*.¹¹³ In the *Nicaragua* case, the ICJ further affirmed that 'consent to the text of such resolutions... may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution' instead of the mere 'reiteration or elucidation' of the rule.¹¹⁴ In the *Legality of the Threat of Nuclear Weapons* advisory opinion, the ICJ affirmed that: 'General Assembly resolutions ... provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'¹¹⁵ Given the above context regarding the validity of resolutions to determine *opinio juris*, this section will now turn to the evidence of *opinio juris* in resolutions.

In 1970, Resolution 2625 proclaimed basic international law principles and appealed to states to be guided by these principles in their conduct.¹¹⁶ Among these principles, it was agreed that every state had a 'duty to 'refrain from ... involvement in terrorist acts

108 Rosalyn Higgins, 'The Development of International Law by the Political Organs of the United Nations' (1963) 5; Yehuda Blum, 'State Response to Acts of Terrorism' (1976) 19 GYIL 223, 225–226; B Simma, 'The Charter of the United Nations: A Commentary' (2002) 237–241; P Sands and P Klein, 'Bowett's Law of International Institutions' (CUP 2001) 29; SM Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 ASIL 301, 301.

109 Saul (n 2) 192.

110 International Law Commission (n 43) 142.

111 *ibid* (n 107) 147.

112 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment of 27 June 1986, 89–90 para 188 <<https://www.icj-cij.org/public/files/case-related/70/070-19860627-JUD-01-00-EN.pdf>> accessed 11 December 2020.

113 Bin Cheng, 'United Nations Resolutions on Outer Space: 'Instant' International Customary Law?' (1965) 5 IJIL 23, 35–40; Julien Cantegrel, 'The Audacity of the Texaco/Calasian Award: René-Jean Dupuy and the Internationalization of Foreign Investment Law' (2011) 22 EJIL 441, 449; Myriam Feinberg, 'Terrorism Inside Out: Legislating for Humanity to Cooperate against Terrorism' (2017) 42 North Carolina Journal of International Law 505, 514.

114 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (n 112) para 188.

115 *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* of 8 July 1996, 32–33 para 70.

116 UNGA, Declaration on Principle of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations 24 October 1970 A/RES/2625 122.

in another state'.¹¹⁷ Resolution 2625 was adopted by consensus.¹¹⁸ In 1972, Resolution 3034 was aimed at taking measures against terrorism, both domestically and internationally.¹¹⁹ Resolution 3034 was adopted by a vote of 76 to 35, with 16 abstentions.¹²⁰ Of the 35 states who opposed resolution 3034, several did so on the basis that the resolution did not contain a sufficiently strong condemnation of the crime of terrorism.¹²¹ During the debates, several states expressed their belief that the crime of terrorism was 'a problem that demanded international action'.¹²² Most of the states who opposed Resolution 3034 did so because they 'were not disposed to lend their support to the weaker language contained in the adopted resolution'.¹²³

In 1976, Resolution 31/102 was adopted.¹²⁴ The resolution was essentially a reiteration of the principles in Resolution 3034.¹²⁵ Resolution 31/102 was adopted by a vote of 100 to 9, with 27 abstentions.¹²⁶ The United Kingdom explained its opposition to Resolution 31/102 as that 'it did not contain an adequate condemnation of terrorism'.¹²⁷ In 1979, Resolution 34/145 was adopted by a vote of 118 to 0, with 22 abstentions.¹²⁸ The text of Resolution 34/145 was far stronger in its condemnation of the crime of terrorism in comparison to previous resolutions, and unequivocally condemned 'all acts of international terrorism which endanger or take human lives or jeopardise fundamental

117 ibid (n 116) 123 Preamble: '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 organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force'.

118 RE Schreiber, 'Ascertaining *Opinio Juris* of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on the U.N. Process' (1998) 16 Boston University International Law Journal 309, 316.

119 UNGA, Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes 1972 A/RES/3034 119 Preamble: '4 The General Assembly... Condemns the continuation of repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms; 5. Invites States to become parties to the existing international conventions which relate to various aspects of the problem of international terrorism; 6. Invites States to take all appropriate measures at the national level with a view to the speedy and final elimination of the problem...'

120 (1972) 26 Yearbook of the United Nations 649–650.

121 Schreiber (n 118) 317.

122 (1972) 26 Yearbook of the United Nations (n 120) 641. The states were Australia, Austria, Bolivia, Brazil, Bulgaria, Canada, Israel, Iran, Italy, Japan, the Netherlands, New Zealand, Portugal, South Africa, Sweden, the USSR, the United Kingdom, the United States, and Uruguay.

123 Schreiber (n 118) 319.

124 A/RES/31/102 (n 119)

125 Schreiber (n 118) 319.

126 (1977) 30 Yearbook of the United Nations 833.

127 ibid.

128 A/RES/34/145 (n 119); (1979) 33 Yearbook of the United Nations 1149.

freedoms.¹²⁹ Resolution 40/61 of 1985, for the most part, echoed the sentiments of the 1979 resolution but amended the language to an unequivocal condemnation of all ‘acts, methods and practices of terrorism wherever and by whomever committed.’¹³⁰ On the recommendation of the Sixth Committee, Resolution 40/61 was adopted without a vote.¹³¹

In 1993, Resolution 48/122 condemned terrorism ‘in all its forms and manifestations … as activities aimed at the destruction of human rights.’¹³² Resolution 48/122 further called upon all states ‘to take all necessary and effective measures to prevent, combat and eliminate terrorism.’¹³³ In 1994, Resolution 49/60 stressed the ‘imperative need to further strengthen international cooperation between States in order to take and adopt practical and effective measures to prevent, combat and eliminate all forms of terrorism.’¹³⁴ It further stressed a firm determination ‘to eliminate international terrorism in all its forms and manifestations’ convinced that the suppression of international acts of terrorism ‘is an essential element for the maintenance of international peace and security’,¹³⁵ and stressed the need for states to fulfil their obligations – and in particular ‘to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts …’¹³⁶

In 1999, Resolution 54/110 amended the language used to condemn the crime of terrorism to a condemnation of acts and practices of terrorism, which were deemed

129 ibid 3: ‘The General Assembly…[u]nequivocally condemns all acts of international terrorism which endanger or take human lives or jeopardize fundamental freedoms; 4. Condemns the continuation of repressive and terrorist acts by colonial, racist, and alien régimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms; 5. Takes note of the study of the underlying causes of international terrorism contained in the report of the Ad Hoc Committee; 6. Urges all States, unilaterally and in cooperation with other States, as well as relevant United Nations organs, to contribute to the progressive elimination of the causes underlying international terrorism; 7. Calls upon all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State, or acquiescing in organized activities within their territory directed towards the commission of such acts …’

130 UNGA ‘Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes: resolution/adopted by the General Assembly’ 9 December 1985 A/RES/40/61 302 para 1.

131 (1985) 39 Yearbook of the United Nations 1167.

132 UNGA ‘Human Rights and Terrorism’ 20 December 1993 A/RES/48/122 at 1 para 1.

133 ibid (n 132) para 2. See also, UNGA ‘Human Rights and terrorism’ 23 December 1994 A/RES/49/185.

134 UNGA ‘Measures to eliminate international terrorism’ 9 December 1994 A/RES/49/60 at 3; UNGA ‘Measures to eliminate international terrorism’ 26 January 1996 A/RES/50/53.

135 A/RES/49/60 (n 136) 3.

136 A/RES/49/60 (n 136) 6. See also UNGA ‘Measures to eliminate international terrorism’ 16 January 1997 A/RES/51/210; UNGA ‘Measures to eliminate international terrorism’ 19 January 1998 A/RES/52/165; UNGA ‘Terrorism’ (26 January 1999) A/RES/53/108.

‘criminal and unjustifiable, wherever and by whomsoever committed.’¹³⁷ This condemnation of the crime of terrorism as a criminal act was accepted with a vote of 149 to 0 with only two abstentions, with many more resolutions condemning the crime of terrorism as criminal and unjustifiable.¹³⁸ Against the backdrop of UNSC Resolution 1373, Resolution 56/88 urged all states, to enact, as appropriate, domestic legislation necessary to implement the provisions of those conventions and protocols, to ensure that the jurisdiction of their courts enables them to bring to trial the perpetrators of terrorist acts, and to cooperate with and provide support and assistance to other States and relevant international and regional organisations to that end.¹³⁹

In 2006, the UN took its next step towards combating the crime of terrorism with the introduction of the United Nations Global Counter-Terrorism Strategy (CT Strategy).¹⁴⁰ The CT Strategy aimed to address conditions conducive to the spread of terrorism; ‘all UN Member States agreed for the first time to a common strategic and operational approach to fighting terrorism.’¹⁴¹

From the above, it is clear that the UN has actively attempted to combat the crime of terrorism for the better part of 50 years, supported by widespread state approval. This leads to the following arguments for the evidence of *opinio juris*. First, Resolution 2625 asserts that states have ‘a duty to refrain from organising, instigating, assisting, or participating in acts of civil strife or terrorist acts in another State.’¹⁴² The reference to ‘duty’ is indicative of recognition of a rule.¹⁴³ Resolution 2626 was widely accepted by states, which indicates states’ collective sense of legal obligation.

Second, from 1985 to the present, the crime of terrorism has been characterised as a criminal act.¹⁴⁴ The resolutions characterising the crime of terrorism as a criminal act

137 UNGA ‘Measures to eliminate international terrorism’ 2 February 2000 A/RES/54/110 at 2.

138 Regarding the condemnation of the crime of terrorism, see UNGA Resolutions A/RES/55/158; A/RES/56/88; A/RES/56/1; A/RES/57/27; A/RES/58/81; A/RES/58/136; A/RES/59/46; A/RES/60/43; A/RES/61/40; A/RES/63/129; A/RES/64/118; A/RES/65/34; A/RES/66/105; A/RES/67/99; A/RES/68/119; A/RES/69/127; A/RES/70/120; A/RES/71/151; A/RES/72/17; A/RES/72/123; A/RES/72/165; A/RES/73/211 and A/RES/74/194.

139 A/RES/56/88 (n 139) 3 para 7.

140 UNGA ‘The United Nations Global Counter-Terrorism Strategy’ 20 September 2006 A/RES/60/288; UNGA ‘The United Nations Global Counter-Terrorism Strategy’ 15 September 2008 A/RES/62/272; UNGA ‘The United Nations Global Counter-Terrorism Strategy’ 13 October 2010 A/RES/64/297; UNGA ‘The United Nations Global Counter-Terrorism Strategy Review’ 12 July 2012 A/RES/66/282; UNGA ‘The United Nations Global Counter-Terrorism Strategy Review’ 24 June 2014 A/RES/68/276; UNGA ‘The United Nations Global Counter-Terrorism Strategy Review’ 19 July 2016 A/RES/70/291; UNGA ‘The United Nations Global Counter-Terrorism Strategy Review’ 2 July 2018 A/RES/72/284.

141 UN Office of Counter-Terrorism, ‘UN Global Counter-Terrorism Strategy’ <<https://www.un.org/counterterrorism/un-global-counter-terrorism-strategy>> accessed 17 December 2020.

142 A/RES/2625 (n 116) 123.

143 International Law Commission (n 43) 148.

144 See generally, all resolutions (n 138) from 1985 (A/RES/40/61) to 2020 (A/RES/74/194).

have been widely accepted by states which is indicative of their collective sense of legal obligation. The reference to terrorism as a criminal act implies states' acceptance of a duty to prosecute the crime of terrorism.

Third, pursuant to finding the crime of terrorism a criminal act, the UNGA urged states to fulfill their obligations under international law to eliminate the crime of terrorism.¹⁴⁵ These obligations included preventing terrorist acts directed against other states and their citizens, ensuring the apprehension and prosecution or extradition of terrorists, an endeavour to conclude international and regional agreements aimed at combating terrorism, cooperation, and aligning domestic legislation with existing international conventions.¹⁴⁶ The wide acceptance of the resolutions against terrorism indicates states' collective sense of legal obligation, not to mention evidence of widespread state practice implementing domestic legislation aimed at combating terrorism aligned with these resolutions.

Fourth, the sequential adoption of resolutions aimed at combating the crime of terrorism for fifty years is evidence of *opinio juris*.¹⁴⁷ In 1970, the foundation was laid; Resolution 2625 asserted that states had a duty to prevent the crime of terrorism.¹⁴⁸ States accepted this duty. As time progressed, the duty to prevent terrorism turned into the characterisation of terrorism as a criminal act, with an ensuing duty on states to combat terrorism by apprehending, prosecuting, or extraditing terrorists. States accepted this duty too. Later, a common Counter-Terrorism Strategy was implemented to combat the crime of terrorism – a duty again accepted by all UN member states.¹⁴⁹ This sequential adoption of a series of resolutions shows 'the gradual evolution of the *opinio juris* required for the establishment of a new rule.'¹⁵⁰

Fifth, most states have complied with the obligation to develop domestic legislation to combat terrorism in terms of UNSC Resolution 1373, which serves as evidence of *opinio juris*.¹⁵¹ Concerning the implementation of domestic legislation as an indicator of *opinio juris*, in *Legality of the Threat of Nuclear Weapons*, the ICJ affirmed that the

145 For example, UNGA 'Measures to eliminate international terrorism' 9 December 1991 A/RES/46/51 284 para 4.

146 *ibid* 284 para 4.

147 Schreiber (n 118) 328.

148 A/RES/2625 (n 116) 122–123.

149 UN Global Counter-Terrorism Strategy (n 141).

150 International Law Commission (n 43) 148: '[I]t is necessary to look at [the resolution's] content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.'

151 UNSC Resolution 1368 12 September 2001 S/RES/1368; UNSC Resolution 1373 28 September 2001 S/RES/1373; International Law Commission (n 43) 149: 'This follows from the indication that, for the existence of a rule to be demonstrated, the *opinio juris* of States, as may be evidenced by a resolution, must be borne out by practice; other evidence is thus required, in particular to show whether the alleged rule is in fact observed in the practice of States.'

actual practice and *opinio juris* of states serve as the primary determinant for the emergence of customary international law.¹⁵²

Conclusion

The above analysis of the crime of terrorism under conventional and customary international law leads to a few conclusions: Under conventional international law, the various manifestations of the crime of terrorism are proscribed under both sectoral and regional treaties. The conventions on the crime of terrorism are so widely accepted that there is no doubt that the crime of terrorism is a crime under conventional international law. Under customary international law, most nations have adopted legislation prohibiting terrorism. Although states' approaches regarding the definition of the crime of terrorism differ in certain respects, there are common elements that identify the crime of terrorism under customary international law. Furthermore, the UNGA has a long track record of both its condemnation and combating of the crime of terrorism, supported by states.

With regard to the definition of terrorism in the Comprehensive Convention, it is evident that the Draft Comprehensive Convention on International Terrorism contains a definition for the crime of terrorism which aligns with the definition of terrorism identified in the analysis of conventional international law and which is reflective of customary international law. Article 2 of the Convention suggests that the elements for the crime of terrorism entail the commission of an act that causes harm or damage to persons or property, with the intent to intimidate or compel the population, government, or an international organisation to do or refrain from doing something. The definition of terrorism in the Comprehensive Convention thus aligns with the definition of terrorism in this article, which, substantiated by sectoral and regional treaties, and supported by customary international law is: Any conduct, which causes harm to persons or property, with the motive of instilling fear or compelling a government or international organisation to do or refrain from doing something, committed to further a particular aim, which is often motivated by political, ideological, religious or philosophical reasons and which contains a transnational element.

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152 Legality of the Threat or Use of Nuclear Weapons (n 115) 31 para 64.

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