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Terrorism in International and Regional Treaty Law

A. INTRODUCTION

Historically the existence of a discrete prohibition, crime, or concept of terrorism in international law was much doubted. The orthodox view was succinctly expressed by Baxter in 1974, who stated that ‘We have to regret that a legal concept of “terrorism” was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose.’ This view was shared by Higgins in 1997, who believed that terrorism ‘is not a discrete topic of international law with its own substantive legal norms’, but ‘a pernicious contemporary phenomenon which . . . presents complicated legal problems’. In her view: ‘“Terrorism” is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.’

In contrast, Cassese asserts that terrorism is a customary crime with distinct elements, deriving from a combination of mutually reinforcing sources: the definition in the 1999 Terrorist Financing Convention; the definition in a much-reiterated 1994 General Assembly Declaration; a 1937 League of Nations definition; numerous converging national law definitions; the

2 Baxter, n 1.
3 Higgins, n 1.
4 ibid, 28; see also I Brownlie, Principles of Public International Law (6th edn, OUP, Oxford, 2003) 713.
IHL prohibitions discussed in Chapter 1; and the statements and practice of States and international organizations since 11 September 2001.\textsuperscript{5} In his view, the essence of terrorism is the commission of serious, politically motivated, criminal violence, aimed at spreading terror, regardless of the status of the perpetrator.\textsuperscript{6} Such conduct must also have a nexus with armed conflict, or be of the magnitude of crimes against humanity, or involve State authorities and exhibit a transnational dimension, such as by jeopardizing the security of other States.\textsuperscript{7}

Chapter 1 argued for the differentiation of terrorism from other kinds of illicit violence and Chapter 2 explored the range of exclusions, justifications, and defences for terrorism. In the absence of any explicit definition of terrorism in international law, the next three chapters evaluate the residual disagreement about the normative status of ‘terrorism’ as a distinct legal concept. As Higgins observes: ‘Whether one regards terrorism . . . as new international law, or as the application of a constantly developing international law to new problems—is at heart a jurisprudential question.’\textsuperscript{8} This jurisprudential question is considered through a classical investigation of the sources of international law, considering treaties in this chapter, customary law in Chapter 4, and the special concept of terrorism in the treaty and customary law of armed conflict in Chapter 5. In particular, this chapter examines how international and regional treaty law have responded to terrorism, and evaluates their contribution to customary law on terrorism. It also considers key attempts in treaty law to define terrorism.

B. TRANSNATIONAL CRIMINAL LAW TREATIES\textsuperscript{9}

Twelve international treaties and five protocols were concluded between 1963 and 2005 to address specific types of violent conduct understood by many States as terrorist in nature.\textsuperscript{10} Most of these conventions were adopted in reaction to particularly egregious terrorist incidents, beginning with violence against civil aircraft in the 1960s. For instance, a series of attacks on civil aviation in 1970–71 led to the adoption of the 1970 Hague Convention and

\begin{itemize}
\item \textsuperscript{6} Cassese (2003), ibid, 129.
\item \textsuperscript{7} ibid, 125–126, 129.
\item \textsuperscript{8} Higgins, n 1, 13.
\item \textsuperscript{9} The term ‘transnational’ treaties is explained in Ch 1, n 2 above.
\end{itemize}
the 1971 Montreal Convention; the 1988 Montreal Protocol was a response to terrorist attacks on international airports in Rome and Vienna in 1985; and the 1988 Rome Convention was a response to the terrorist seizure of the Italian cruise ship, *Achille Lauro*, in 1985. The 1997 Terrorist Bombings Convention was initiated by the US in response to bombings against US interests in Saudi Arabia in 1996, gas attacks in Tokyo, and bombings in Sri Lanka, Israel, and Manchester in the UK.

Many of these treaties were adopted to fill normative gaps in the regulation of certain activities, such as air and maritime transport, which were spread across multiple jurisdictions and in relation to which the ordinary principle of territorial jurisdiction was insufficient. Some treaties were necessary because norms regulating the subject matter were considered inadequate. Thus, the 1988 Rome Convention was necessary because the crime of piracy was inapplicable to situations like the *Achille Lauro* incident, where the elements of piracy—the two-ship rule and a private motive—were not present.

Few of the so-called anti-terrorism treaties designate prohibited conduct as specifically ‘terrorist’ offences. Instead, most treaties require States to prohibit and punish in domestic law certain physical acts—such as hostage-taking or hijacking—without requiring, as an element of the offence, proof of a political motive or cause behind the act, or an intention to coerce, intimidate, or terrorize certain targets. The substantive provisions of these treaties never refer to the terms terrorism or terrorist.

A few treaties refer to these terms in their titles or preambles. The 1979 Hostages Convention describes ‘all acts of taking of hostages as manifestations of international terrorism’. The 1988 Rome Convention refers to terrorism five times in its preamble. The 1991 Plastic Explosives Convention mentions terrorism three times, signalling concerns about the terrorist use of unmarked explosives. The preambles of the 1997 Terrorist Bombing Convention, the 1999 Terrorist Financing Convention, and the 2005 Nuclear

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15 Witten, n 13, 775.
17 ibid.
Terrorism Convention recall General Assembly Resolution 49/60,\textsuperscript{18} which condemned ‘all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed’. The 1999 Terrorist Financing Convention further notes that ‘the number and seriousness of acts of international terrorism’ depend on their financing, while the preamble to the 2005 Nuclear Terrorism Convention warns that ‘acts of nuclear terrorism may result in the gravest consequences and may pose a threat to international peace and security’.

There is an abundant literature on these treaties and it is not necessary to retrace those debates here.\textsuperscript{19} In brief, some treaties prohibit specified, violent criminal acts against especially vulnerable or politically or economically significant targets (such as international aircraft, airports, ships, fixed platforms, and internationally protected persons).\textsuperscript{20} Sometimes this approach is coupled with prohibitions on loathsome methods or means (such as hijacking and hostage-taking).\textsuperscript{21} A further approach is the prohibition of the use of particular weapons (such as plastic explosives, nuclear material, and bombs).\textsuperscript{22} A recent convention also prohibits the financing of terrorist activities.\textsuperscript{23} Most of the treaties also contain a number of ancillary offences additional to the principal crimes.\textsuperscript{24} Other instruments are also relevant to combating the physical acts comprising terrorism,\textsuperscript{25} which may additionally qualify as other

\textsuperscript{18} UNGA Resolution 49/60 (1994) and annexed Declaration on Measures to Eliminate International Terrorism.


\textsuperscript{22} See, eg, 1980 Vienna Convention; 1991 Montreal Convention; 1997 Terrorist Bombings Convention; 2005 Nuclear Terrorism Convention.


\textsuperscript{24} Such as attempt, threats, complicity, abetting, organizing or directing, or intentionally contributing to the commission of an offence by a group of persons acting with a common purpose: see, eg, 1970 Hague Convention, Art 1; 1971 Montreal Convention, Art 1.

\textsuperscript{25} 1972 Biological Weapons Convention; 1982 UNCLOS, Arts 100–107 (piracy, including aircraft); 1944 Chicago Convention, Art 4; 1993 Chemical Weapons Convention; 1992 Biological Weapons Convention; UPU Resolution CA 1/2001 on Combating Terrorism; ICAO Resolutions A17–1 to A17–24 (1970); ICAO (Council) Resolution (1970), ICAO Doc 8923–C/998; Joint
international crimes.\textsuperscript{26} Two of the conventions are primarily regulatory and do not establish criminal offences.\textsuperscript{27}

These approaches have been variously classified as object-oriented or segmented, sectoral or enumerative, functional or inductive, and incremental or piecemeal.\textsuperscript{28} They reflect a ‘pragmatic, empirical, problem-oriented, step-by-step’, or ad hoc and ‘roundabout’ response to terrorist-type activities.\textsuperscript{29} The international community has approached terrorism in this way precisely to avoid confronting the contentious question of a general definition.\textsuperscript{30} This helps to explain the broad multilateral support for many of the treaties, since it evades the political and ‘prodigious’ technical difficulties\textsuperscript{31} of a generic, analytic, deductive, or comprehensive definition.\textsuperscript{32}

As terrorist violence spread from attacks mainly on western States to attacks on Arab, Communist, and Non-Aligned States,\textsuperscript{33} broad multilateral support emerged for many of the sectoral treaties. Table 3.1 below shows the level of State participation in each of the major anti-terrorism treaties (out of 192 UN member States). After 11 September 2001, Security Council resolutions urging States to ratify the anti-terrorism treaties\textsuperscript{34} produced a marked

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\textsuperscript{26} Particularly war crimes, crimes against humanity, genocide, or torture.

\textsuperscript{27} 1963 Tokyo Convention; 1991 Plastic Explosives Convention.


\textsuperscript{29} McWhinney, n 19, 107, 149 and Cassese (2003), n 5, 123, respectively.


\textsuperscript{31} Higgins, n 1, 14; also Lambert, n 16, 51; A Rubin, ‘Current Legal Approaches to International Terrorism’ (1985) 7 Terrorism 147, 158; R Mushkat, ‘ “Technical” Impediments on the Way to a Universal Definition of International Terrorism’ (1980) 20 Indian JIL 448.


\textsuperscript{33} J Murphy, ‘United Nations Proposals on the Control and Repression of Terrorism’ in Bassiouni (ed), ibid, 493, 504; Higgins, n 1, 18.

increase in multilateral participation in many treaties. Whereas only two States had ratified all twelve sectoral treaties before 11 September 2001, over 40 States had done so by December 2003.  

Table 3.1. Status of International Sectoral Treaties

<table>
<thead>
<tr>
<th>Convention</th>
<th>States Party</th>
<th>% of all States</th>
</tr>
</thead>
<tbody>
<tr>
<td>1963 Tokyo Convention</td>
<td>180</td>
<td>94</td>
</tr>
<tr>
<td>1970 Hague Convention</td>
<td>181</td>
<td>94</td>
</tr>
<tr>
<td>1971 Montreal Convention</td>
<td>183</td>
<td>95</td>
</tr>
<tr>
<td>1973 Protected Persons Convention</td>
<td>159</td>
<td>83</td>
</tr>
<tr>
<td>1979 Hostages Convention</td>
<td>153</td>
<td>80</td>
</tr>
<tr>
<td>1980 Vienna Convention</td>
<td>116</td>
<td>60</td>
</tr>
<tr>
<td>2005 Amendment</td>
<td>2 ratifications</td>
<td>(at 9 Jan 2006)</td>
</tr>
<tr>
<td>1988 Montreal Protocol</td>
<td>155</td>
<td>81</td>
</tr>
<tr>
<td>1988 Rome Convention</td>
<td>126</td>
<td>65 (representing 82% of world merchant shipping tonnage)</td>
</tr>
<tr>
<td>1988 Rome Protocol</td>
<td>115</td>
<td>60 (representing 77% of world merchant shipping tonnage)</td>
</tr>
<tr>
<td>1991 Montreal Convention</td>
<td>123</td>
<td>64</td>
</tr>
<tr>
<td>1994 UN Personnel Convention</td>
<td>79</td>
<td>41</td>
</tr>
<tr>
<td>2005 Protocol to 1994 Convention</td>
<td>4 signatories</td>
<td></td>
</tr>
<tr>
<td>1997 Terrorist Bombings Convention</td>
<td>145</td>
<td>76</td>
</tr>
<tr>
<td>1999 Terrorist Financing Convention</td>
<td>150</td>
<td>78</td>
</tr>
</tbody>
</table>

With the adoption of the 1997 Terrorist Bombings Convention and the 2005 Nuclear Terrorism Convention (after almost eight years of negotiation), most of the physical conduct widely considered as terrorist in nature

36 Status of treaties recorded by the relevant depositories (UN, ICAO, IAEA, and IMO) at 8 Feb 2006.
37 Witten, n 13. The vast majority of terrorist acts in the US from 1980 to 1999 were bombings: US Dept Justice (FBI), Terrorism in the US 1999 (Counterterrorism Division, Washington, DC, 2000), 41.
38 The 2005 Nuclear Terrorism Convention (adopted by UNGA Resolution 59/290 of 15 Apr 2005) fills lacunae left by 1980 Vienna Convention, by covering a wider range of ‘targets, forms and acts of nuclear terrorism’: Corell, n 34, 12. The 1980 Convention is limited to offences
is now prohibited. The result is the de facto criminalization of most acts commonly regarded as terrorism, although it is significant that only about one-quarter of States have ratified all sectoral treaties and there consequently remain jurisdictional gaps in the coverage of the existing treaties.

One of the few remaining normative gaps in the network of treaties is the failure to criminalize internationally the terrorist killings of civilians by any method. Presently, the treaties only criminalize violence by terrorists in specific contexts or by particular methods: at airports or on board aircraft (but only where it is likely to endanger air safety); against protected persons (but only when in foreign States); by nuclear material; on board ships or fixed platforms; or by explosives or other lethal devices. While the 1988 Rome Convention criminalizes murder on board ships, the Hague, Montreal, and Hostages Conventions do not criminalize killings at all.

Thus violence against civilians outside aerial or maritime contexts, who are not protected persons (or who are protected persons but present in their own States), and not victims of bombings or nuclear acts, is not criminalized as terrorism. Examples include the terrorist killing or assassination of civilians (such as business people, engineers, journalists, doctors, or teachers) by guns or knives, including killing hostages not on board aircraft or ships. Although the 1999 Terrorist Financing Convention refers to death or serious bodily injury by terrorist acts, it does so only for the purpose of criminalizing terrorist financing rather than terrorist offences per se. Similarly, the 1997 Terrorist Bombings Convention covers only death or serious injury caused by bombings, not other terrorist means such as sabotage of public transport or public utilities such as water or electricity relating to nuclear material while in international transport or in domestic use, storage and transport: Art 7. The 2005 Convention was drafted by the Ad Hoc Committee at the request of the General Assembly, based on a Russian draft of 1997: see UNGAOR (53rd–59th Sess), Ad Hoc Committee Reports (1997–2004), Supps 37 (A/53/37–A/59/37); UNGA (53rd Sess) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 22 Oct 1998, UN Doc A/C.6/53/L.4. A 2005 Amendment to the 1980 Vienna Convention required State Parties to protect nuclear facilities and material in peaceful domestic use, storage, and transport, and to cooperate on prevention and enforcement: IAEA Board of Governors: General Conference, Final Act of Amendment Conference of 4–8 July 2005, 6 Sept 2005, IAEA Doc GOV/INF/2005/10-GC(49)/INF/6.

40 1973 Protected Persons Convention, Art 1.
41 Respectively: 1971 Montreal Convention, Art 1 and 1988 Montreal Protocol, Art 1; 1973 Protected Persons Convention, Art 2; 1980 Vienna Convention, Art 7; 1988 Rome Convention, Art 3 and 1988 Rome Protocol, Art 2; 1997 ‘Terrorist Bombings Convention, Art 2 (the definition of ‘explosive or other lethal device’ in Art 1(3) does not extend to guns or knives and similar hand weapons).
42 Halberstam, n 12, 332 (Art 1 of the 1979 Hostages Convention prohibits only threats to kill hostages).
43 Scharf, n 39.
supplies. Further, mailing anthrax (or other biological agents) to government employees is not presently prohibited, nor are attacks on electronic systems (‘cyberterrorism’). Many of the existing treaties reach considerably beyond common conceptions of terrorism, since they prohibit certain acts without reference to their political motives or objectives. Thus criminal acts perpetrated for non-terrorist purposes, motives, aims, or objectives are also criminalized. For example, hostage-taking or hijacking for personal or private reasons (such as financial greed or child abduction to obtain custody) is also criminalized. This inherent overreach dilutes the special nature of terrorism, which is not inherent in a physical act of violence itself. The depoliticization of offences was deliberate, to minimize the availability of the political offence exception to extradition.

At the same time, a few of these treaties do reflect a more comprehensive or generic approach to the definition of terrorist acts. As early as 1972, the US proposed in the United Nations a treaty to criminalize unlawful killing, causing serious bodily harm, or kidnapping where ‘intended to damage the interests of or obtain a concession from a State or an international organization’. That initiative did not gain much support at the time, but its emphasis on the coercive aims behind violent acts is reflected in some subsequent treaties. For example, the 1979 Hostages Convention prohibits hostage-taking to compel a third party ‘to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage’. Similarly, the 1994 UN Personnel Convention requires States to criminalize intentional threats to commit violent attacks on UN and associated personnel and their property ‘with the objective of compelling a physical or juridical person to do or to refrain from doing any act’. In relation to maritime offences, the 1988 Rome Convention and 1988 Rome Protocol prohibit threats against the safety of ships or maritime installations ‘aimed at compelling a physical or juridical person to do or refrain from doing any act’. The Convention and Protocol are supplemented by two

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44 The Convention prohibits the use of an ‘explosive or other lethal device’, defined to include chemical and biological agents or toxins (Art 1(3)), while radioactive material is separately prohibited (Art 2); Witten, n 13, 776–777; Scharf, n 39; see also B Broomhall, ‘State Actors in an International Definition of Terrorism from a Human Rights Perspective’ (2004) 36 Case Western Reserve JIL 421, 426.
45 W Mallison and S Mallison, ‘The Concept of Public Purpose Terror in International Law’ in Bassiouni (ed), n 32, 67, 70.
46 Lambert, n 16, 50. 47 Joyner, n 12, 347.
49 See Ch 4 below. 50 1979 Hostages Convention, Art 1(1).
51 1994 UN Personnel Convention, Art 9(1)(c).
52 1988 Rome Convention, Art 3(1)(b), (c), and (e); 1988 Rome Protocol, Art 2(2)(c).
Protocols of 2005, which add new offences involving the use of biological, chemical, or nuclear weapons against ships or maritime platforms for the purposes of intimidating a population or compelling a government or international organization to do or refrain from doing any act.\textsuperscript{54}

Further in relation to weapons of mass destruction (WMDs), the 1980 Vienna Convention (as amended in 2005) prohibits threats to steal nuclear material, or interfere with a nuclear facility, to compel a natural or legal person, international organization, or State to do or refrain from doing any act.\textsuperscript{55} The 2005 Nuclear Terrorism Convention creates objective offences for possessing or using radioactive material or devices in certain circumstances,\textsuperscript{56} but also establishes the offence of using such material or devices\textsuperscript{57} with the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.\textsuperscript{58} States must legislate to punish these acts, ‘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’. While deriving from a 1994 General Assembly definition, itself similar to the 1937 League definition, the notion of a ‘state of terror’ is not an element of the offences, nor are the offences defined as ‘nuclear terrorism’ as such.

The 1999 Terrorist Financing Convention adds the notion of intimidation to the idea of compulsion found in these treaties, and comes closest to furnishing an essential definition of terrorism.\textsuperscript{59} The Convention prohibits the financing of:

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.\textsuperscript{60}

The idea of compulsion was included even though a number of States preferred referring only to intimidation,\textsuperscript{61} or eliminating any purposive element.\textsuperscript{62}

\textsuperscript{54} 2005 Protocol to the 1988 Rome Convention, Art 3bis; 2005 Protocol to the 1988 Rome Protocol, Art 2bis. Both 2005 Protocols were adopted under the auspices of the IMO on 14 Oct 2005.\textsuperscript{55} 1980 Rome Convention, Art 7(1)(g)(ii), as amended by the 2005 Amendment.\textsuperscript{56} With the intent to cause death or serious bodily injury, or to cause substantial damage to property or the environment: Art 2(1).\textsuperscript{57} Or using or damaging a nuclear facility in a manner which releases or risks the release of radioactive material.\textsuperscript{58} Art 1(b)(iii). Ancillary offences are established in Arts 2(2)(a)-(b), 3, and 4(a)-(c). The distinction between the 1980 and 2005 treaties is explained above in n 38.\textsuperscript{59} \textit{Suresh v Canada (Minister of Citizenship and Immigration)} [2002] 1 SCR; 2002 SCC 1, paras 96–98.\textsuperscript{60} 1999 Terrorist Financing Convention, Art 2(1)(b) (emphasis added).\textsuperscript{61} UNGA (54th Sess) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 26 Oct 1999, UN Doc A/C.6/54/L.2, 23 (Austria), 40 (Brazil), 51 (Kuwait); Ad Hoc Committee Report (1999), n 38, 12, 15 (France), 33 (Guatemala), 38 (Germany), 29, 31 (Austria).\textsuperscript{62} Working Group Report (1999), ibid, 61–62 (Chair).
Drafting proposals to refer expressly to acts intended to provoke terror, designed to terrorize, or of a terrorist nature, were also not accepted, with intimidation the preferred term.

Similarly, the 1997 Terrorist Bombings Convention did not embody drafting proposals to limit its scope to bombings ‘for a terrorist purpose’, nor to extend its scope to bombings likely to ‘create a state of terror’ or have ‘psychological effects’. In addition, the 1997 Terrorist Bombings Convention differs from the 1999 Terrorist Financing Convention by also rejecting proposals to define terrorist bombings as those designed to ‘seriously intimidate’ or to ‘intimidate, coerce or retaliate’ or compel. Instead, the Convention is limited to physical acts of bombing, regardless of any ulterior aim or purpose. At best, Article 5 requires States to ensure that criminal bombings are not considered justifiable ‘in particular’ where such acts ‘are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons’. This reference to the 1994 General Assembly definition is located in a qualifying provision which does not form part of the definition of offences, nor is there further definition of ‘a state of terror’.

The common element in the Hostages, Rome, UN Personnel, and Terrorist Financing treaties is, therefore, the requirement that the prohibited physical acts be committed to intimidate or compel another to do or refrain from doing any act. The motive of the acts—in the sense of motive as the end, purpose, or object of an act—is coercion of specified targets. In contrast, proof of a motive in another juridical sense—as an emotion prompting an act (such as political or private motives)—is not required. For example, while hostage-taking is often motivated by a specific ideological or political belief, the definition does not require evidence of such reasons, and thus covers such acts committed for private reasons (such as financial gain). This approach avoids the difficulty of having to identify and prove the motives underlying violence in order to secure a conviction.

63 ibid, 24 (Costa Rica and Mexico) and 39–40 (Syria); Ad Hoc Committee Report (1999), n 38, 58 (Rapporteur).
65 Ad Hoc Committee Report (1997), ibid., 5–6. 13 (revised Bureau text); see also Working Group Report (1997), ibid, 37 (revised text by Friends of Chair).
67 ibid, 20 (China) and 42 (Russia) respectively.
68 ibid, 23 (France for seven industrialized countries and Russia).
69 1997 Terrorist Bombings Convention, Art 2(1). The definition excludes accidental bombings and lawful uses of explosives, such as demolitions of buildings, controlled explosions, and hostage rescues: Ad Hoc Committee Report (1997), n 38, 51–52 (Rapporteur).
70 Hyam v DPP [1975] AC 55, 73.
71 ibid.
Many of the anti-terrorism treaties are built on the principle of ‘prosecute or extradite’ (aut dedere aut judicare), a treaty-based principle emerging as a customary norm in relation to some terrorist offences.\(^{72}\) The treaties do not give rise to individual criminal responsibility for terrorist-type activities in international law \textit{stricto sensu} (before international criminal tribunals), but rely on domestic prosecutions, facilitated by transnational judicial cooperation.\(^{73}\) Only the two most recent treaties expressly exclude the political offence exception to extradition,\(^{74}\) while preserving a non-discrimination clause (and remaining subject to the customary prohibition of refoulement to torture). The political offence exception was historically a source of much international anxiety about terrorism,\(^ {75}\) yet only the most recent treaties have secured agreement on its removal in the face of long-standing concerns about delivering up political opponents to oppressive regimes. The treaties contain


\(^{74}\) 1997 Terrorist Bombings Convention, Art 11; 1999 Terrorist Financing Convention, Art 14.

‘widely differing approaches to jurisdiction’,\textsuperscript{76} including resort to the territoriality, nationality, passive personality, and protective principles, and sometimes to a type of ‘subsidiary’ or ‘quasi’ universal jurisdiction.\textsuperscript{77} The treaties do not, however, establish priority of jurisdiction,\textsuperscript{78} nor do they specify whether prosecution or extradition takes priority.\textsuperscript{79}

In the absence of empirical research, it is hard to assess the effectiveness of these treaties in combating terrorism. Sectoral treaties are generally silent on remedies for breach of treaty obligations by States,\textsuperscript{80} although occasionally States have resorted to counter-measures, sometimes through political agreements, in response to breaches.\textsuperscript{81} While many States have implemented their obligations in national law, global statistics on prosecutions and extraditions under these treaties are not available,\textsuperscript{82} and only spectacular cases of enforcement failure command international attention. The formal framework of cooperation in criminal matters has also been frequently circumvented by discretionary measures of deportation or summary expulsion.\textsuperscript{83} Such measures by-pass the legal protections for suspects under extradition law, although some national courts have insisted that deportation cannot be used as a substitute for extradition law.\textsuperscript{84} Since late 2001, ‘irregular rendition’ has been used by the US precisely to evade the ‘traditional systems of criminal or


\textsuperscript{77} Guillaume, n 1, 6–7; Freestone, n 72, 58; Higgins, n 1, 24; N Schrijver, ‘Responding to International Terrorism: Moving the Frontiers of International Law for “Enduring Freedom”?’ (2001) 48 Netherlands ILR 271, 275; Freestone, n 1, 202.

\textsuperscript{78} Peers, n 76, 233; Halberstam, n 12, 366.


\textsuperscript{81} eg under the Summit Seven’s Bonn Declaration against Afghanistan in the 1980s: Levitt, n 11, 108–118.


\textsuperscript{84} See \textit{Mohamed v South Africa} (2001) 3 SA 893 (the South African Constitutional Court held that deporting a suspect in the 1998 bombing of the US embassy in Tanzania was unlawful and extradition law applied); \textit{R v Horseferry Road Magistrates Court, ex p Bennett} [1994] 1 AC 42 (Lord Griffiths) (obtaining informal custody through rendition is a ‘serious abuse of process’ where extradition law applies); \textit{R v Hartley} [1978] 2 NZLR 199; \textit{S v Ebrahim}, 1991 (2) SA 553 (Sth African Ct App).
military justice’ which the US believes do not apply to terrorists. It mirrors the converse unlawful practice of abducting suspects from foreign territory or the high seas.

Nevertheless, as Guillaume writes, ‘over the past forty years, international criminal law has made significant progress in the combat against international terrorism . . . Most of the normative work has been accomplished’. Effectiveness depends ‘on the will of States’ and ‘it cannot be denied that certain difficulties may arise, either because certain States are unable to maintain their authority on their own territory, or because of wrongful conduct by the States themselves.’

The sectoral treaties have also influenced the development of customary law. It is well accepted that treaty provisions are a ‘recognized method’ of custom formation, although this is ‘not lightly . . . attained’ and treaties have no capacity to bind third States. Customary law is evidenced ‘primarily in the actual practice and opinio juris of States’, although treaties may have ‘an important role’ in recording, defining, or developing customary rules. In developing custom, a treaty provision must ‘be of fundamentally norm-creating character as could be regarded as forming the basis of a general rule of law’. State practice must also be ‘extensive and virtually uniform’ and ‘show a general recognition that a rule of law or legal obligation is involved’. Nonetheless, ‘a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected’. The degree of ratification is thus clearly relevant.


87 Guillaume, n 1, 13.

88 ibid.

89 North Sea Continental Shelf cases (1969) ICJ Reports 3, 41.

90 Continental Shelf case (Libya v Malta) (1985) ICJ Reports 13, 29–30, para 27.

91 North Sea, n 89, 42–43, para 72.

92 ibid, 43, para 74.

93 ibid, 42, para 73 and 43, para 74.
In creating new rules to confront the challenges of modern terrorism, the sectoral treaties filled gaps in the existing customary law and thus played a significant role in developing new and parallel rules of customary law. Three treaties have been ratified by more than 90 per cent of States: the 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention. A further three treaties have been ratified by more than 80 per cent of States: the 1973 Protected Persons Convention, the 1979 Hostages Convention, and the 1988 Montreal Protocol. Parties to these treaties include numerous States specially affected by terrorism. State practice in general is consistent with the norms in these treaties, which States also regard as legally obligatory. It is thus probable that the core provisions of these treaties are now reflected in parallel customary rules.

The customary status of the remaining treaties is more doubtful, with five treaties having ratification levels below 65 per cent. While the 1997 Terrorism Bombings Convention and the 1999 Terrorist Financing Convention have both been ratified by more than 75 per cent of States, it is probably too soon to judge whether State practice as a whole is consistent with the rules in those treaties. On the other hand, conformity with the 1999 Terrorist Financing Convention has been greatly accelerated by the incorporation of its substantive provisions into Security Council Resolution 1373 (2001). This resolution binds all States and thus renders the substantive norms of the Convention applicable even to non-party States, with implementation supervised by the UN Counter-Terrorism Committee. Restrictions on terrorist financing are also reflected in the practice of regional organizations. In combination, these factors suggest that the key provisions of the 1999 Terrorist Financing Convention already reflect customary law due to the focused attention paid to such measures after 11 September 2001, and despite the relatively short period of time since the adoption of the Convention in 1999.

C. TREATIES OF REGIONAL ORGANIZATIONS

Unlike the international treaties, a number of treaties concluded by member States of regional or other organizations define specifically ‘terrorist’ offences. These treaties have a limited sphere of operation, governing

96 Including those of the SAARC, Arab League, OIC, OAU (now AU) and EU; see below; see also K Graham, ‘The Security Council and Counter-terrorism: Global and Regional Approaches to an Elusive Public Good’ (2005) 17 Terrorism and Political Violence 37, 49–52.
relations between members of geographically regional organizations (who have become parties to the treaty), or between members of organizations defined by religious or cultural affiliation (such as the Organization of the Islamic Conference (OIC) and the Arab League). Whereas regional treaties on terrorism were once rare, now nine such treaties have been adopted.

Aust observes that the concept of ‘regional’ treaties has no legal significance and the same might be said of treaties adopted by organizations typified by religious or cultural affiliation. However, such treaties may furnish evidence of local or regional custom over time (or of custom observed by States grouped according to other principles), which in turn may contribute to the evolution of international customary law. Lauterpacht writes that ‘the regional experience is a stage in the evolution towards the more complete integration of international society’. Regionalism in security matters has been seen as increasingly important in recent years, with the Security Council specifically urging regional organizations to enhance the effectiveness of their counter-terrorism efforts.

Other than the 1977 European Convention, little scholarly attention has been paid to most of these treaties, many of which have been adopted since 1998. Cumulatively, these organizations have international normative significance because many of them are long-established and involve a large number of States. In addition, other intergovernmental organizations—such as the Commonwealth, the North Atlantic Treaty Organization, the Organization for Security Cooperation in Europe, and the Association of South East Asian Nations—have adopted specific measures, short of treaties, in response to terrorism.

The definitions of terrorism in regional treaties contribute to the normative.

97 Not all organizations are ‘regional arrangements’ under the UN Charter, Art 52(1); see P Sands and P Klein, *Bowett’s Law of International Institutions* (5th edn, Sweet and Maxwell, London, 2001) 152–154.
98 Cassese, n 19, 592.
100 The ILC lists treaties as a form of State practice: (1950-II) ILCYB 368–372. Constant and uniform usage, in the practice of a group of States, may establish regional custom: *Asylum case* (*Columbia v Peru*) (1950) ICJ Reports 266, 276–277; see also *Right of Passage case* (*Portugal v India*) (1960) ICJ Reports 6, 39–43.
103 UNSC Resolution 1631 (2005), para 6.
104 See Table 3.2 below, although there is overlap in the memberships of the Arab League and the OIC, and the Council of Europe and the EU.
105 These are not considered here. See, eg, S Tay and Tan Hsien Li, ‘Southeast Asian Cooperation on Anti-Terrorism: The Dynamics and Limits of Regional Responses’ in V Ramraj, M Hor and K Roach (eds), *Global Anti-Terrorism Law and Policy* (CUP, Cambridge, 2005) 399.
debates about definition in international law, supplying concrete examples of definitions which might be accepted, modified, or contested on the international plane and which influence State practice. Their customary significance partly depends on the extent to which they shape State behaviour, including that of non-State Parties to the treaties. Since many of the treaties are relatively recent, it is premature to gauge their effects on State practice, or to anticipate their likely effects over time.

At present, the sheer diversity of regional definitions is sufficient to militate against the view that there is any embryonic customary definition of terrorism. While some of the more recent treaties include generic definitions of terrorism, other recent treaties have deliberately refrained from generic definition, following the approach of the older regional treaties. Among those treaties which include generic definitions, it is further difficult to discern any underlying shared conception of terrorism. As the ICJ stated in the Asylum case, these treaties reflect ‘so much uncertainty and contradiction, so much fluctuation and discrepancy . . . that it is not possible to discern in all this any constant and uniform usage, accepted as law’.\(^{106}\) While the ICJ stated in the Fisheries case that ‘too much importance need not be attached to a few uncertainties or contradictions’,\(^{107}\) the differences between the definitions of terrorism in regional treaties are not merely penumbral, but reflect fundamental disagreements about the permissibility and classification of political violence. Each of these treaties is considered below, according to their adopting organizations. The different elements of generic definitions are then compared and contrasted.

As Table 3.2 (page 145) shows, some of the regional treaties have been ratified by a large proportion of member States of the adopting regional organization, with universal or near-universal ratification of the Council of Europe, SAARC, and EU instruments. However, less than half of the Organization of American States (OAS) member States have ratified the OAS Convention after more than thirty years. About three-quarters of Arab League members have ratified that organization’s terrorism convention, although all States are signatories and it was only adopted in 1998.

The remaining treaties are too recent (since 1999) to effectively gauge their real levels of participation. Least successful so far is the OIC Convention, with slightly more than 20 per cent of OIC members currently parties, and only a handful more signatories. About 70 per cent of the Organization of African Unity (OAU) members are parties to the OAU Convention, and most remaining members have signed it; half of the Commonwealth of Independent States (CIS) members are parties to the CIS Treaty; and all members of the Shanghai Cooperation Organization (SCO) are parties to its treaty. While

\(^{106}\) Asylum case, n 100, 277.
\(^{107}\) Anglo-Norwegian Fisheries case (UK v Norway) (1951) ICJ Reports 116, 131.
about 40 per cent of OAS members are parties to the Inter-American Convention, nearly all are signatories and the treaty was only adopted in 2002.


One of the least controversial regional instruments is the 1971 Organization of American States (OAS) Convention,\(^ {109}\) which was a response to the growth of terrorism—mainly kidnapping, ransom, and extortion—in Central and South America in the early 1970s, usually to raise funds for urban guerilla movements or to secure the release of prisoners.\(^ {110}\) Although there was initially support for generically defining terrorism in a treaty,\(^ {111}\) the Convention

\(^{108}\) Status of treaties according to depositories as at 16 Nov 2005.

\(^{109}\) 1971 OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance.

\(^{110}\) McWhinney, n 19, 144.

as adopted is limited in scope to protected persons. It is really a regional
precursor to the 1973 Protected Persons Convention, though it uses broader
language. Article 1 requires States to ‘prevent and punish acts of terrorism,
especially kidnapping, murder, and other assaults against the life or physical
integrity of those persons to whom the State has the duty according to inter-
national law to give special protection, as well as extortion in connection with
those crimes’. The offences are ‘considered common crimes of international
significance, regardless of motive’.112

The term ‘acts of terrorism’ in Article 1 is open-ended and lacks de-
finition, although ambiguity might be cured in national implementation.
Article 1 lists certain prohibited acts as examples of ‘acts of terrorism’ rather
than as definitive components of it (the duty is to ‘prevent and punish acts
of terrorism, especially . . .’) (emphasis added). In contrast, the 1973 Pro-
tected Persons Convention makes no mention of the term ‘terrorism’,
instead exhaustively spelling out the physical elements of offences. The OAS
Convention therefore permits States to establish a wider crime of ‘terrorism’
in national law, although the crime is limited to acts against protected
persons.

By 1995, there was again some support in the OAS for defining terrorism
generically in a comprehensive regional convention. An internal draft con-
vention prepared by the OAS Secretariat of Legal Affairs in 1995 defined
terrorism, inter alia, as violence ‘intended to generate widespread fear,
imimidation, or alarm’ in the population.113 The events of 11 September 2001
generated renewed impetus for new legal instruments, and an OAS Decla-
ration condemned terrorism generically as ‘the targeting of innocent persons
to promote ideological objectives’.114

However, the US and Canada soon succeeded in arguing for a ‘pragmatic
and operational’ or ‘complementary’ approach to a new instrument.115 The
US explained that attempts at generic definition would result in deadlock and
detract from the agreement already reached through sectoral treaties.116 States
were conscious of the impasse affecting the Draft UN Comprehensive Con-
vention since 2000, although a counter-argument was that the national liber-
ation debate did not affect the western hemisphere to the same extent.117 It

112 1971 OAS Convention, Art 2.
113 Doc OEA/Sec.Gral. DDI/Doc.12/01 (26 Sept 2001); see M Scalabrino, ‘Fighting
against International Terrorism: The Latin American Response’ in Bianchi (ed), n 76,
183–185.
114 OAS, Declaration of Solidarity from the House of the Americas, 18 Oct 2001, OAS Doc
115 E Lagos and T Rudy, ‘Preventing, Punishing, and Eliminating Terrorism in the Western
116 ibid, 1629.
117 ibid, 1630–31. Domestic insurgency has been more common in Latin America: Scalabrino,
n 113, 172.
was, however, easier to avoid the ideological debate altogether, by focusing on terrorist acts rather than the definition of terrorism.\textsuperscript{118}

As a result, the 2002 Inter-American Convention against Terrorism, as adopted, does not require States to criminalize any generic terrorist offences,\textsuperscript{119} nor does it define terrorism even for the limited purposes of cooperation or extradition. While it aims ‘to prevent, punish, and eliminate terrorism’ (Article 1), it serves chiefly to encourage States to become parties to, and implement, the existing sectoral treaties, including by criminalizing their offences.\textsuperscript{120} A similar approach had been recommended by the American Bar Association as early as 1983.\textsuperscript{121} There are also provisions against terrorist financing,\textsuperscript{122} reflecting Security Council measures, and provisions for cooperation on border control, law enforcement, mutual legal assistance, and transfer of custody.\textsuperscript{123} Article 11 excludes the political offence exception for offences in the sectoral anti-terrorism treaties, although Article 14 preserves a non-discrimination clause. States must also exclude suspected terrorists from refugee status,\textsuperscript{124} even though sectoral offences may not always be of sufficient gravity to warrant exclusion.


A more ambitious regional response to terrorism is the Council of Europe’s 1977 Convention on the Suppression of Terrorism, which aimed to facilitate the extradition of persons suspected of terrorist offences.\textsuperscript{125} The European Convention was a response to violence, after the 1968 student protests, by groups such as the Baader-Meinhof Gang in West Germany and the Red Brigade in Italy.\textsuperscript{126}

Article 1 requires States to exclude listed offences from the political offence exception to extradition. The offences included those in three international anti-terrorism treaties;\textsuperscript{127} and an ‘offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use
endangers persons’. Article 2(1) allows States also not to regard as a political offence ‘a serious offence involving an act of violence . . . against the life, physical integrity or liberty of a person’, while Article 2(2) applies the same option to ‘a serious offence involving an act against property . . . if the act created a collective danger for persons’.

The 1977 European Convention expanded offences beyond those in the then existing international anti-terrorism treaties to include a variety of acts commonly committed by terrorists. However, it does not use or define the term terrorism, despite referring to ‘acts of terrorism’ in its preamble. There is no reference to any generic elements of terrorism in the substantive offences, such as an intention to instil terror or intimidate a group, or political motives or objectives. Nor does the Convention require domestic criminalization of the enumerated offences. It simply establishes a list of prohibited acts, often committed by terrorists (but not exclusively), to facilitate extradition, but subject to reservations and a non-discrimination clause. Prosecution is conditioned on a refusal to extradite and is thus subsidiary.

Following the adoption in 2002 of an EU Framework Decision on Combating Terrorism and an associated Decision establishing a common European arrest warrant, the 1977 European Convention is likely to diminish in importance. It is not, however, obsolete, because as an instrument of the Council of Europe, it encompasses a much larger number of States than the EU. Even after EU enlargement in 2004, the Convention will still govern extradition between European member States outside the EU, and between EU and non-EU States in Europe. Indeed, the 1977 Convention was revitalized by a 2003 amending Protocol, which updated the list of sectoral treaties in Article 1, strengthened implementation measures, placed procedural constraints on reservations, and precluded extradition to torture or to face the death penalty.

The 2003 Protocol was adopted after a review in the Council of Europe of how to strengthen the effectiveness of existing international terrorism conventions after 11 September 2001. The question of drafting a comprehensive regional convention against terrorism was also raised, but the relevant expert bodies concluded that the issue was not within their mandate.

128 1977 European Convention, Art 1(d).
129 Murphy, n 32, 21.
133 Multidisciplinary Group on International Action against Terrorism (GMT), superseded by the Committee of Experts on Terrorism (CODEXTER) from Oct 2003; see Explanatory Report on Council of Europe Convention on the Prevention of Terrorism, adopted by the Committee of Ministers, 925th mtg of the Council of Europe, paras 5–12.
Instead, it was decided that incremental steps should be taken to fill gaps in the legal framework, rather than taking a comprehensive approach to definition in a new treaty. One such step was the adoption of a convention on the proceeds of crime and terrorist financing in 2005.\textsuperscript{134}

In addition, the 2005 Council of Europe Convention on the Prevention of Terrorism was adopted in Warsaw in May 2005.\textsuperscript{135} It requires State Parties to adopt three new criminal offences with effective, proportionate, and dissuasive penalties: ‘public provocation to commit a terrorist offence’, recruitment for terrorism, and training for terrorism.\textsuperscript{136} The Convention also contains provisions on prevention; compensation for victims; and international cooperation.\textsuperscript{137} It imposes a duty to investigate the offences and to extradite (preferred) or prosecute.\textsuperscript{138} The offences are made extraditable and are excluded from the political offence exception, subject to the protection of a non-discrimination clause and a requirement to respect human rights in implementation.\textsuperscript{139} The Convention establishes mandatory territoriality and nationality jurisdiction, and optional bases for extending jurisdiction.\textsuperscript{140}

For the purposes of the Convention, terrorism is defined in Article 1 as any offence in ten listed sectoral treaties (although States not party to particular treaties can declare their non-applicability). While there is thus no attempt to generically or comprehensively define terrorism, the preamble recalls that:

\ldots acts of terrorism have the purpose by their nature and context to seriously intimidate a population or unduly compel a government or an international organization to perform or abstain from performing any act or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization.\ldots

Implicitly invoking the EU’s definition of terrorism is not, however, intended to require its purposive motives as an element of the Convention’s offences.\textsuperscript{141} A Council of Europe Parliamentary Assembly recommendation to use the EU definition in a Common Position of 27 Dec 2001 was not accepted by the expert drafting committee.\textsuperscript{142} The Council of Europe now has divergent definitions of terrorist-type activity between its 1977 and 2005 Conventions and the position is complicated further by the preambular reference to the EU’s different definition.

\textsuperscript{134} 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (adopted at Warsaw, 24 June 2005).
\textsuperscript{135} Opened for signature 16 May 2005, ETS No 196, Art 5(2) (not yet in force).
\textsuperscript{136} Arts 5–7 respectively. It is not necessary that a terrorist offence is committed: Art 8. Art 9 establishes ancillary offences of complicity, organizing or directing, and conspiracy. Legal entities are also liable under Art 10. The nature of the penalties is described in Art 11.
\textsuperscript{137} Arts 3, 13, 17 respectively.\textsuperscript{138} Arts 15 and 18 respectively.
\textsuperscript{139} Arts 19–21 (extradition), 12 (human rights).
\textsuperscript{140} Art 14.
\textsuperscript{141} Explanatory Report, n 133, para 46.
The most controversial aspect of the 2005 Convention is its criminalization of ‘public provocation’ of terrorism. ‘Public provocation’ is defined as ‘the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed’ (Article 5(1)). The provision stemmed from a working group and expert report which considered both ‘apologie du terrorisme’ and ‘incitement to terrorism’. Apologie du terrorisme was understood as the public expression of praise, support, or justification of terrorism. It is thus broader than ordinary incitement to commit a crime (including terrorism), which is already an offence in many European countries.

The drafters intended that the new offence of ‘public provocation’ should extend beyond direct incitement to cover indirect incitement and apologie. The purported rationale for criminalizing such statements is that they create ‘an environment and psychological climate conducive to criminal activity’, though they may fall short of any specific connection to the commission of an actual offence.

Examples of conduct that might be covered include ‘presenting a terrorist offence as necessary and justified’, and ‘the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding of terrorist organisations or other similar behaviour’. Such conduct must be accompanied by the specific intent to incite a terrorist offence. It must also cause a credible danger that an offence might be committed, and this may depend on ‘the nature of the author and of the addressee of the message, as well as the context’. These qualifications (specific intent and causing danger) substantially narrow the offence, such that merely justifying or praising terrorism, without more, is not criminalized.

Moreover, the drafters insisted that the crime must be viewed in the light of the quality and integrity of European judicial systems, the availability of effective remedies, and the guarantee of a fair trial. In particular, agreement on criminalizing public provocation was only reached because of mutual confidence in the system of institutional and legal protection of human rights in Europe. The drafters were conscious that criminalizing incitement or

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144 ibid, 5.
146 Explanatory Report, n 133, paras 98, 95 respectively.
147 ibid, paras 99–100.
148 CODEXTER, n 143, 31.
apologie might interfere in freedom of expression, but argued that it could nonetheless constitute a legitimate restriction. It seems that the drafters intended media transmissions of the statements to be excluded.

Even so, a great deal of discretion is given to the courts in evaluating the context and circumstances of a message, and since the intention behind messages will often be obscure, there is a danger that courts may too readily impute intentions without specific evidence. This danger is acute where a person is accused of making inflammatory, offensive, or shocking statements at odds with the prevailing values of the majority, where judges may face considerable pressure to conform to social morality in the face of public fear of terrorist violence. Further, the Convention does not expressly exempt statements made reasonably and in good faith for an academic, artistic, scientific, research, religious, journalistic, or other public interest purpose (as is common in defences to anti-vilification offences banning racial incitement).

Human rights concerns about the scope of such offences were raised regarding the British Prime Minister’s proposed new offence of ‘condoning or glorifying terrorism’ in the UK or abroad, announced in August 2005, partly to implement the 2005 Council of Europe Convention. Following considerable criticism, including by an independent expert appointed to review the proposals, the proposal was replaced in the Terrorism Act 2006 (UK) with a narrower offence of ‘encouragement of terrorism’. Even so, the UK provision may have a wider reach because it is linked to the generic UK definition of terrorism, rather than to the narrower definition based on sectoral treaties in the 2005 Council of Europe Convention.

In a related development, in September 2005 the UK sponsored UN Security Council Resolution 1624 which called on States to: ‘Prohibit by law incitement to commit a terrorist act or acts, prevent incitement, and deny safe haven or entry to inciters.’ The preamble also repudiates ‘attempts at the justification or glorification (apologe) of terrorist acts that may incite

150 CODEXTER, n 143, 31.
151 See, eg, Racial Discrimination Act 1975 (Australia), s 18D; Anti-Discrimination Act 1977 (NSW, Australia), s 20C(2); Racial and Religious Tolerance Act 2001 (Victoria, Australia), s 11.
152 Prime Minister Blair, Statement on Anti-Terror Measures, 5 August 2005, para 2.
153 Previously, UK law only prohibited incitement to terrorism within the UK or abroad, but not the broader offence of condoning or glorifying terrorism: see Terrorism Act 2000 (UK) ch 11, ss 59–61; C Walker, Blackstone’s Guide to the Anti-Terrorism Legislation (OUP, Oxford, 2002) 175–177.
155 Terrorism Act 2006 (UK), s 1. It is an offence to publish a statement (including a statement which glorifies terrorism) where members of the public are likely to understand it as a direct or indirect encouragement or inducement to commit, prepare, or instigate terrorist acts, and the person intends for members of the public to be encouraged.
156 UNSC Resolution 1624 (2005), para 3.
further terrorist acts’. The resolution does not go as far as the Council of Europe, since it calls for the criminalization of incitement, but merely repudiates the justification or glorification (apologie) of terrorism. Nonetheless, it ambiguously refrains from defining ‘incitement’, so it is unclear whether this term extends to indirect incitement, private incitement, or even vague apologie for terrorism. This lack of definition is of concern given that the Security Council has also failed to define terrorism itself, allowing governments to unilaterally and subjectively define the scope of criminal liability. In the absence of a binding universal human rights system as in Europe, encouraging all States to criminalize incitement may encourage some States to excessively restrict free expression without any remedial restraints.


The 1987 SAARC Convention stemmed from a Sri Lankan proposal in 1985. Under the Convention, specified offences according to national law are ‘regarded as terrorist’ and not as political offences for the purposes of extradition. Offences include those in three international anti-terrorism treaties; offences in treaties to which SAARC members are parties; and, in Article 1(e): ‘Murder, manslaughter, assault causing bodily harm, kidnapping, hostage-taking and offences relating to firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or serious damage to property.’ The Convention imposes no duty on States to criminalize the listed offences; its provisions on extradition only operate if member States have enacted the necessary offences. The designation of specified treaty crimes in Article 1 as ‘terroristic’ is not in itself problematic, given that the treaties themselves define the offences. By regarding terrorism as constituted by common crimes, the drafters sought to avoid conferring any special political status on offenders.

The SAARC Convention presents indiscriminate violence as a defining characteristic of ‘terrorist’ crimes, appearing to exclude discriminate attacks on designated (rather than random) targets. The acts listed as ‘terroristic’ also encompass forms of violence not commonly considered terrorist. Acts designed ‘to perpetrate indiscriminate violence involving death or serious damage to property’.

159 1987 SAARC Regional Convention on Suppression of Terrorism, Art 1.
161 Perera, n 158, 22.
bodily injury to persons or serious damage to property’ could conceivably cover ‘ordinary’ criminal acts such as serial killing or mass murder, neither of which are typically committed for political motives or objectives (although such acts may intend to cause great fear). Similarly, the use of the listed methods to seriously damage property could include wayward expressions of democratic political protest which lack a terrorist character.

Soon after 11 September 2001, SAARC took steps to draft a new instrument to implement Security Council Resolution 1373 (2001) and the 1999 Terrorist Financing Convention.\textsuperscript{162} As a result, the 2004 SAARC Additional Protocol to the 1987 Convention was adopted in Islamabad in early 2004.\textsuperscript{163} It requires States to create a new offence of directly or indirectly providing or collecting funds with the intention or knowledge that they will be used for terrorism.\textsuperscript{164} For the purposes of the Protocol, terrorism is defined as offences in ten listed sectoral treaties or ‘any’ SAARC treaty (necessarily including those not relating to terrorism), but also more generally as: ‘Any other act intended to cause death or serious bodily injury to a civilian, 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’.\textsuperscript{165} As with the 2005 Council of Europe Protocol, the consequence is that SAARC has created divergent definitions of terrorism for different purposes in its 1987 and 2004 instruments. The definition derives from that in the 1999 Terrorist Financing Convention and thus establishes consistency with the international treaty regime governing terrorist financing. An attempt to distinguish national liberation movements from terrorism during the drafting was not pursued following the ‘growing rapprochement’ between India and Pakistan by the end of 2002.\textsuperscript{166} Other provisions in the Protocol deal with regulatory measures to prevent, suppress, and eradicate financing; the seizure and confiscation of funds or assets; and predicate offences to money laundering.\textsuperscript{167}

\textsuperscript{162} SAARC Standing Committee, 28th Sess, Kathmandu, 19–20 Aug 2002; SAARC Council of Ministers, 23rd Sess, Kathmandu, 21–22 Aug 2002; drafting sessions were held in Sri Lanka and Bangladesh.

\textsuperscript{163} Adopted at the 12th SAARC Summit, Islamabad, 4–6 Jan 2004.

\textsuperscript{164} Art 4(1). The Convention also provides for the ancillary or inchoate offences of attempt, complicity, organizing or directing, and conspiracy: Art 4(4)–(5). Legal entities are also liable: Art 6.

\textsuperscript{165} Art 4(1). Art 5 encourages States to become parties to the existing sectoral treaties.

\textsuperscript{166} Perera, n 158, 24.

\textsuperscript{167} Arts 7–9. The remaining provisions relate to cooperation, mutual legal assistance, extradition (including the exclusion of the political offence exception, subject to non-discrimination), denial of refugee status to financiers, and technical cooperation: Arts 10–17, 20.
4. League of Arab States: 1998 Convention

One of the broadest definitions of terrorism appears in the 1998 Arab Convention on the Suppression of Terrorism,\(^{168}\) which defines ‘terrorism’ in Article 1(2) as:

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

Article 1(3) defines ‘terrorist offences’ as: ‘Any offence or attempted offence committed in furtherance of a terrorist objective in any of the Contracting States, or against their nationals, property or interests, that is punishable by their domestic law.’ The article additionally lists offences in six international treaties which are regarded as ‘terrorist offences’,\(^{169}\) as well as the provisions on piracy on the high seas in the 1982 UN Convention on the Law of the Sea.

The concept of terrorism in this Convention includes not only creating grave fear through acts or threats of violence, but any act or threat of violence, in pursuit of a criminal agenda, which endangers human life, liberty, or security, or which damages public or private property. It is difficult to see how the latter conduct can genuinely be described as terrorist, since it encompasses most ordinary violent crime.

The definition of terrorism in Article 1(2) is evidently very broad. Amnesty International argues that this definition ‘can be subject to wide interpretation and abuse, and in fact does not satisfy the requirements of legality.’\(^{170}\) The definition is based closely on Article 86 of the Egyptian Penal Code, adopted in 1992, which the UN Human Rights Committee describes as encompassing diverse acts of varying gravity.\(^{171}\) The term ‘violence’ is not defined and it is unclear whether it refers only to unlawful acts of violence rather than to all violent acts. ‘Threats’ of violence may count as terrorism, but it is not clear how credible a threat must be. The meanings of ‘to sow panic among people’ and ‘causing fear by harming them’ are subjective and potentially arbitrary. It is not obvious what level of danger...

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is envisaged by the expression ‘placing . . . lives, liberty or security in danger’.

Moreover, the expression ‘seeking to cause damage to the environment or to public or private installations or property’ does not require the commission of actual damage, and may also criminalize acts permitted by IHL in non-international armed conflict. It is uncertain how ‘seeking to cause damage’ relates to concepts in international criminal law such as attempt. Merely ‘occupying or seizing’ public or private installations or property will not necessarily be for terroristic reasons, particularly in the context of democratic political protest or civil disobedience actions. ‘Seeking to jeopardise national resources’ is unhelpfully broad, since neither ‘jeopardise’ nor ‘national resources’ is defined.

Article 2(b) excludes the offences in Article 1 from being regarded as political offences for the purposes of extradition. Article 2(c)–(h) lists additional offences not as political offences, ‘even if committed for political motives’. These include attacks on protected persons;

Premeditated murder or theft accompanied by the use of force directed against individuals, the authorities or means of transport and communications; Acts of sabotage and destruction of public property . . . even if owned by another Contracting State; [and] the manufacture, illicit trade in or possession of weapons, munitions or explosives, or other items that may be used to commit terrorist offences.

While the definition makes terrorism extraditable ‘whatever its motives or purposes’, a contradictory disclaimer appears in Article 2(a), which states that: ‘All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with . . . international law, shall not be regarded as an offence.’ The self-serving exclusion in Article 2(a) is the statement that the ‘provision shall not apply to any act prejudicing the territorial integrity of any Arab State’. Thus terrorist acts in pursuit of self-determination against non-Arab States are justifiable and lawful—but they are prohibited against Arab States.

On the other hand, the Convention does not expressly prevent the return of terrorist suspects to a State where they would be at risk of torture in contrast to the 2003 Council of Europe Protocol. Civil society groups have criticized the Convention for attempting to ‘contract around’ the international prohibition on return to torture by implicitly permitting it in the region. Plainly, regional treaty frameworks are circumscribed by peremptory norms of

international law, including non-refoulement to torture. Nonetheless, the absence of an express protection to this effect in the Convention is of concern given the substantial evidence of the return of suspects to torture in the region in the US-led ‘war’ on terror. The Arab Convention has been frequently used to deliver suspects in the region.

5. Organization of the Islamic Conference: 1999 Convention

Resembling the 1998 Arab Convention is the 1999 Organization of the Islamic Conference (OIC) Convention. The treaties are similar largely due to the substantial overlap in the memberships of the Arab League and the OIC, although the OIC also includes non-Arab Muslim States, including prominent victims of terrorism such as Pakistan, Indonesia, and Turkey. Article 1(2) of the OIC Convention defines ‘terrorism’ as:

...any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorizing people or threatening to harm them or imperiling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.

Article 1(3) defines a ‘terrorist crime’ as ‘any crime executed, started or participated in to realise a terrorist objective in any State party, or against its nationals, assets or interests or foreign facilities and nationals residing in its territory punishable by its internal law’. Article 1(4) additionally lists offences in twelve international treaties as terrorist crimes. Like the Arab League Convention, the OIC Convention also deems much ordinary criminal activity as terrorist, including any act of violence, pursuing a criminal plan, which threatens to harm people or imperil their lives, honour, freedoms, security, or rights. This encompasses conduct from mugging to burglary.


175 A Maged, ‘International Legal Cooperation: An Essential Tool in the War Against Terrorism’ in Heere (ed), n 73, 157, 177.


hegemony, aimed at liberation and self-determination in accordance with . . . international law.’ As in the 1998 Arab Convention, this exclusion exists despite the declaration in Article 1(2) that the ‘motives or intentions’ behind an act are irrelevant to its terrorist character.

Article 2(b) establishes that none of the offences ‘shall be considered political crimes’ in extradition law. Further offences to be treated as non-political are listed in Article 2(c) and are very similar to those found in Article 2(c)–(h) of the Arab League Convention. In addition, Article 2(d) states that: ‘All forms of international crimes, including illegal trafficking in narcotics and human beings [and] money laundering aimed at financing terrorist objectives shall be considered terrorist crimes.’

The definition of terrorism is broader than the already wide definition in the 1998 Arab Convention. The ‘aim’ of violence or its threat must be ‘terrorizing people or threatening to harm them or imperiling their lives, honour, freedom, security or rights’, introducing numerous vague and subjective elements. The term ‘violence’ is not defined or limited by reference to criminal or unlawful acts, nor to the severity of the violence. It is not clear what amounts to exposing the environment or any facility or property to a ‘hazard’. As in the 1998 Arab Convention, there are difficulties with the concept of ‘occupying or seizing’ property in the light of legitimate democratic protest, and ‘endangering a national resource’ is of potentially broad scope.

The greatest ambiguity lies in the abstract and political concept of ‘threatening the stability, territorial integrity, political unity or sovereignty of independent states’. Since many of the elements of the definition in Article 1(2) are not cumulative, a mere threat of a criminal act against State ‘stability’, ‘integrity’, ‘unity’, or ‘sovereignty’ could be treated as a ‘terrorist crime’. There is a serious danger of the abusive use of terrorist prosecutions against political opponents, ordinary criminals, and persons threatening public order or national security.


A narrower definition of terrorism is found in the 1999 OAU Convention, which requires States to criminalize enumerated offences.178 Article 1(3)(a) defines a ‘Terrorist act’ as any domestic criminal act ‘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’. Such an act must be conjunctively ‘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.

The OAU Convention is drafted more restrictively than the Arab League and OIC Conventions. It establishes a concept of terrorism which hinges on the intimidation or coercion of protected targets, or the disruption of public services, through violent criminal acts. Criminal acts must produce a fairly high minimum threshold of danger to the public before being considered as terrorist offences. It is similar in some respects to definitions of terrorist offences in the 2002 EU Framework Decision and the UN Draft Comprehensive Convention.

Nonetheless, it still defines terrorism very broadly. The protected targets are very wide and ill-defined. ‘Inducing’ a government to adopt or abandon a particular standpoint is a basic aim of democratic politics, sometimes occasioned by overzealous acts of protest which amount to criminal violence but fall short of the idea of terrorism and which ought not be treated as such. Regarding acts which create a ‘public emergency’ or a ‘general insurrection’ as terrorism conflates national security or emergency laws with terrorism laws, eroding any distinction between these categories.

Like the Arab League and OIC Conventions, the OAU Convention states in Article 3(1) that ‘the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts’. Again this exclusion exists despite Article 3(2) stating that: ‘Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.’ The national liberation provision operates, therefore, as an exclusion from the definition of terrorist acts, rather than as an immunity or defence to terrorism, although the practical consequence—impunity—is the same.

The definition and exclusion provisions in the 1999 Convention also supply the operative definition for a 2004 African Union Protocol to the Convention.179 The 2004 Protocol creates no new offences, but aims to enhance the implementation of the Convention and to coordinate and harmonize African efforts to prevent and combat terrorism.180 States undertake to implement a range of measures on terrorist training and financing, mercenarism, weapons

of mass destruction (WMDs), compensation for victims of terrorism, preventing the entry of terrorists, and the exchange of information and cooperation.\(^{181}\) It forbids the torture or degrading or inhumane treatment of terrorist suspects, but asks States to ‘take all necessary measures to protect the fundamental human rights of their populations against all acts of terrorism’.\(^{182}\) It tasks the African Union’s Peace and Security Council with harmonizing and coordinating African counter-terrorism, and States undertake to submit regular reports to the Council.\(^{183}\)


With the disintegration of the Soviet Union in the late 1980s, complex conflicts, some involving terrorist methods, developed in parts of Russia and the newly independent republics. With this physical fragmentation came new obstacles to law enforcement, as new national boundaries frustrated the once hegemonic Soviet police State. In 1999, the CIS Treaty was adopted to deal with judicial cooperation, exchange of information, and cross-border anti-terrorism operations.\(^{184}\) States must cooperate in preventing, uncovering, halting, and investigating terrorism (Article 2), but the treaty does not require States to criminalize terrorist offences.

For the purposes of cooperation and extradition, ‘terrorism’ is defined in Article 1 as the commission of a specified criminal act ‘for the purpose of undermining public safety, influencing decision-making by the authorities or terrorizing the population’.\(^{185}\) The specified acts include violence or threats of violence against natural or juridical persons, and certain acts against protected persons.

Specified acts against property in Article 1 include destroying or damaging, or threatening to destroy or damage, property and other material objects to endanger lives; or causing substantial harm to property or ‘other consequences dangerous to society’. The final type of specified act includes ‘Other acts classified as terrorist’ under national law or in ‘universally recognized’ international anti-terrorism treaties.

The definition of terrorism in the CIS Treaty is a composite of quite different offences—undermining public safety; influencing official decision-making; or terrorizing the population. It contains novel elements such as prohibiting violence for private motives such as ‘revenge’, in addition to

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\(^{181}\) Art 3(1). The Convention also supplies a basis for extradition (Art 8) and contains a dispute settlement provision: Art 7.

\(^{182}\) Art 3(1)(k) and (a) respectively.

\(^{183}\) Arts 4–5 and 3(1)(h)–(i) respectively. Regional mechanisms play a complementary role: Art 6.

\(^{184}\) 1999 CIS Treaty on Cooperation in Combating Terrorism.

\(^{185}\) ‘Technological terrorism’ is separately and lengthily defined in the CIS Treaty, Art 1.
political motives. It covers a wide range of activity, without limiting terrorist offences to very serious conduct (such as seriously undermining public safety or intimidating, rather than merely influencing, decision-makers). There is also vagueness in the notion of causing ‘other consequences dangerous to society’. The CIS Treaty permits States a wide latitude in unilaterally defining terrorist offences, since it declares that it also covers ‘Other acts classified as terrorist under the national legislation of the Parties’.

The CIS Treaty requires States not to regard acts of terrorism ‘as other than criminal’ for extradition purposes (Article 4). Nonetheless, a State may decline extradition if it believes that fulfilling the request ‘may impair its sovereignty, security, social order or other vital interests or is in contravention of its legislation or international obligations’, or the act does not satisfy the double criminality rule (Article 9). In practice therefore, the political offence exception survives under another name, to the extent that it exists to protect the sovereignty, security, social order, or vital interests of the requested State.

8. Shanghai Cooperation Organization: 2001 Convention

Five CIS member States are also members of the Shanghai Cooperation Organization (SCO), an intergovernmental organization established in 2001 by six States in Central Asia: Kazakhstan, China, Kyrgyzstan, the Russian Federation, Tajikistan, and Uzbekistan. The SCO aims to strengthen relations between member States and to promote political, security, and economic cooperation, and its political significance lies in the powerful combination of Russia and China in a single organization.

The SCO Convention on Combating Terrorism, Separatism and Extremism was adopted on the same day that the SCO was founded, indicating the importance of security matters to the Organization. The preamble states that ‘terrorism, separatism and extremism constitute a threat to international peace and security [and] the promotion of friendly relations among States’ and that such acts should be prosecuted ‘regardless [of] their motives, [and] cannot be justified under any circumstances’. The Convention immediately signals a blurring of terrorism with other phenomena, even though separatist movements, for example, need not use terrorist methods.

The Parties to the Convention undertake to cooperate and assist in preventing, identifying, and suppressing terrorism, separatism, and extremism and to consider such acts as extraditable offences, although extradition and

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187 As well as cooperation on science, culture, education, energy, transport, tourism, and environmental protection; and to create a ‘democratic, just, reasonable new international political and economic order’: see <www.sectsco.org>.
legal assistance remain in accordance with international treaties and national law.\textsuperscript{188} Most importantly, the parties must take all necessary measures, including legislation, to ensure that terrorism, separatism, and extremism are ‘in no circumstances . . . subject to acquittal based upon exclusively political, philosophical, ideological, racial, ethnic, religious or any other similar considerations and that they should entail punishment proportionate to their gravity’.\textsuperscript{189} The Convention thus implicitly requires the criminalization of terrorism, separatism, and extremism.

The Convention defines ‘terrorism’ in Article 1(1)(1) as: (a) offences in annexed treaties or (b) certain other violent criminal acts against persons or property ‘when the purpose of such act, by its nature or context, is to intimidate a population, violate public security or to compel public authorities or an international organization to do or to abstain from doing any act’. Acts against persons must be ‘intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict’, while acts against property must be intended to ‘cause major damage to any material facility’.\textsuperscript{190} The Convention thus excludes attacks on combatants in armed conflicts from being treated as terrorist and this exclusion appears to extend to both international and non-international conflicts. This may be significant to the extent that the violence in Chechnya is characterized (by the parties) as an armed conflict.

The generic part of the Convention shares elements in common with the 1999 Terrorist Financing Convention and the 2002 EU Framework Decision (including intimidating a population or compelling a government or international organization, and the qualifying phrase ‘by its nature or context’). However, the Convention goes significantly further by adding the vague alternative element of violating ‘public security’, which is nowhere defined. The definition of terrorism accordingly extends to cover violence against people or property which is not designed to terrorize, intimidate, or coerce, but simply to interfere with public order or security.

The scope of the Convention is further widened by the definition of ‘separatism’ in Article 1(1)(2) as criminal violence ‘intended to violate [the] territorial integrity of a State including by annexation of any part of its territory or to disintegrate a State’. In addition, Article 1(1)(3) defines ‘extremism’ as criminal violence ‘aimed at seizing or keeping power’, changing the ‘constitutional regime of a State’, encroaching on public security, or organizing or participating in ‘illegal armed formations’ for such purposes.

\textsuperscript{188} Art 2(1)–(3). The remainder of the Convention provides for detailed measures of cooperation and assistance, the exchange of information, requests for assistance, and technical assistance. It also foreshadows the establishment of a Regional Counter-Terrorist Structure, based in Bishkek, to combat terrorism: Arts 5–11.

\textsuperscript{189} Art 3.

\textsuperscript{190} Organizing, planning, aiding, or abetting such acts is also covered by the definition.
These definitions seek to suppress both secession and more limited domestic rebellions, and there is no exclusion for violence against combatants in internal armed conflicts. This effectively negates the benefit of the exclusion in the terrorism definition, since what is not classified as terrorism can be treated as separatism or extremism. These definitions might, for example, cover violent unrest by Uighurs in China’s Xinjiang province or other radical groups in the region, some of which is motivated by resistance to government repression or marginalization. Concerns have already been raised about the impact on freedom of expression and the media of Kyrgyzstan’s law banning extremism.


A more targeted regional approach to criminalizing terrorism was adopted by the EU Council in its hastily drafted 2002 Framework Decision on Combating Terrorism, which defines ‘terrorist offences’ to enable a common European arrest warrant and the mutual recognition of legal decisions and verdicts among EU States. It required the approximation of the (hitherto

191 On unrest in the region, see M Singh (ed), International Terrorism and Religious Extremism: Challenges to Central and South Asia (Anamika Publishers, New Delhi, 2003).
193 Law on Counteraction of Extremist Activities (adopted by the Kyrgyzstan Parliament on 30 June 2005, approved by the President on 17 Aug 2005); see Moscow Media Law and Policy Institute, quoted in ICJ Bulletin on Counter-Terrorism and Human Rights, No 8, Geneva, Nov 2005.
194 While not formally a treaty in public international law, the EU Framework Decision is considered here because it serves the similar purpose of imposing binding legal obligations on member States. Framework Decisions are binding under the EU third pillar of Police and Judicial Cooperation in Criminal Matters: EU Treaty, Arts 29–32. Such decisions are made cooperatively by member States (and thus more closely resemble treaties) rather than within European Community law-making processes.
disparate) domestic terrorism offences of EU States by 31 December 2002. The definition of terrorism in the Framework Decision also identifies individuals and entities subject to asset freezing under EU legislation implementing Security Council measures. The Framework Decision is not limited to international terrorism, extending to domestic and EU terrorism, and imposes wide extraterritorial jurisdiction on EU States.

The definition of terrorism in the Framework Decision is modelled on an identical definition in an EU Council Common Position of December 2001, which served the limited purpose of implementing Security Council Resolution 1373 (2001) to freeze the funds and assets of listed terrorist suspects and associates. The Framework Decision definition distinguishes terrorism from ordinary crime by focusing on the aims or motives of offenders. In tortuous language, Article 1(1) defines ‘terrorist offences’ as:

... offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of:
— seriously intimidating a population, or
— unduly compelling a Government or international organization to perform or abstain from performing any act, or
— seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization . . .

Motive is ordinarily irrelevant to criminal responsibility in most legal systems. The EU understands motive as the specific purpose behind committing prohibited acts—intimidation, compulsion, or destabilization—rather than as a particular ideological, political, or religious cause motivating the offence. This approach to motive contrasts with a 1996 resolution of the EU Parliament, which referred to terrorism politically as acts or threats of violence ‘intended to create a state of terror’ with ‘motives lying in separatism, extremist ideology, religious fanaticism or subjective irrational factors’.

The wording of the definition is ‘complex and uncertain’. It draws

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198 2002 EU Framework Decision, Art 11(1). Framework Decisions adopted under the EU ‘third pillar’ are not directly applicable and, like EC directives, require national implementation.
200 Peers, n 76, 233.
204 Guillaume, n 1, 4.
heavily on Article 2(1)(b) of the 1999 Terrorist Financing Convention, although it is ‘far wider’. It modifies the comparable provision of that Convention by requiring that the aim (rather than ‘purpose’) of offences must be to seriously intimidate a population or unduly compel a government or international organization to perform or abstain from doing any act. This modification raises the threshold of terrorist aims and ensures that less serious intimidation or compulsion will not fall within the Framework Decision’s offences. There is, however, no protection from compulsion for non-governmental organizations (NGOs), other non-international groups, or natural or juridical persons other than States or international organizations, just as such proposals were excluded from the 1999 Terrorist Financing Convention.

Further, the Framework Decision requires that offences ‘may seriously damage a country or an international organization’ in addition to having a terrorist aim, a requirement which is not present in the 1999 Terrorist Financing Convention. However, actual damage is seemingly unnecessary (‘may’ damage); a likelihood or even a possibility of damage is sufficient. The Framework Decision adds a third possible aim of terrorist offences—seriously destabilizing the fundamental structures of a country or an international organization—which is not found in the 1999 Terrorist Financing Convention. The idea of ‘fundamental structures’ is particularly imprecise. A further addition is the qualifying phrase ‘given their nature or context’, which provides flexibility in appreciating what conduct constitutes terrorism. While some argue that this qualifying phrase narrows the definition, to the contrary, it may widen the scope of offences by eliminating the need to prove an intention to intimidate, compel, or destabilize.

The prohibited acts in Article 1(1), linked to the generic part of definition, fall into five basic groups: offences against the person; offences against property; weapons offences; offences by other prohibited means; and threats to commit such offences. They are drawn from identical provisions in the EU Common Position of 2001. In short, the Decision prohibits three types of acts against the person in Article 1(1): ‘(a) attacks upon a person’s life which

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205 Peers, n 76, 232: ‘particularly as regards: the personal scope of prohibited death and injury; the scope of prohibited damage to property and the means by which such damage is caused; individual acts related to biological and chemical weapons; release of dangerous substances or causing fires and floods; interfering with resources; and threatening to commit the great majority of these acts’.

206 Working Group Report (1999), n 61, 40 (Brazil), 44 (India); Ad Hoc Committee Report (1999), n 38, 33 (Guatemala).

207 Peers, n 76, 231.

208 ibid, 232.

209 The expression ‘by its nature or context’ in the 1999 Terrorist Financing Convention was intended to remove the need to prove a subjective mental state: Working Group Report (1999), n 49, 62 (Chair).

may cause death; (b) attacks upon the physical integrity of a person; [and] (c) kidnapping or hostage taking’. Concerning property, Article 1(1)(d) establishes the terrorist offence of ‘causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss.’

Article 1(1)(e) creates the further property offence of the ‘seizure of aircraft, ships or other means of public or goods transport’, reflecting offences in existing anti-terrorism treaties.\(^{211}\) The idea of ‘causing extensive destruction’ was adapted from the 1997 Terrorist Bombings Convention and the targets protected are similar,\(^{212}\) although the Framework Decision extends protection to fixed platforms (embodying the 1988 Rome Protocol) and private property, increasing the risk of violent demonstrations in democratic societies being regarded as terrorism.\(^{213}\)

Indeed, the Framework Decision was initially intended to cover situations of ‘urban violence’,\(^{214}\) and Italy hoped the definition of terrorism would cover anti-globalization protests such as those against the G8 in Genoa.\(^{215}\) Such coverage would blur terrorism offences with other offences against public order and political violence, and ultimately the preamble to the Framework Decision stated that the Decision cannot be interpreted to restrict fundamental rights such as the right to strike and demonstrate, and freedoms of assembly, association, or expression.\(^{216}\)

It is not at all clear, however, that violence such as the widespread suburban riots in Paris and other French cities of November 2005\(^{217}\) would be excluded from the definition. Such violence involved extensive property damage and may have aimed to intimidate the population, coerce the French government, or destabilize fundamental political, constitutional, economic, or social structures in France, while also seriously damaging France. The difficulty here is that conduct which satisfies the legal definition of terrorism is not widely perceived as terrorism either in France or abroad; rather, it is an experience of urban (and racialized) violence by disaffected or disenfranchised segments of the population, also well-known in French history.

\(^{212}\) 2002 EU Framework Decision, Art 2.
\(^{213}\) Peers, n 76, 237.
\(^{216}\) 2002 EU Framework Decision, recital 10.
Regarding serious attacks on property as terrorism expands the scope of terrorism beyond direct attacks on people. Whereas the 1997 Terrorist Bombings Convention rejected proposals to regard attacks on private property as terrorism, the Framework Decision includes private property. The concern in 1997 was that reference to private property would criminalize acts governed by national law. The idea of ‘extensive destruction’ to property in the Framework Decision is similar to the grave breach of ‘extensive destruction’ in the 1949 Fourth Geneva Convention.

Article 1(1)(f) creates a bundle of weapons and explosives offences, while Article 1(1)(g) prohibits the ‘release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life’. A further offence in Article 1(1)(h) prohibits ‘interfering with or disrupting the supply of water, power, or any other fundamental natural resource the effect of which is to endanger human life’. Threatening to commit any of the forgoing acts is an offence in Article 1(1)(i). The remaining offences include ‘offences linked to terrorist activities’ (aggravated theft, extortion, or drawing up false documents with a view to committing a terrorist offence) and ‘inciting or aiding or abetting’ or ‘attempting’ to commit an offence.

A recital to the Framework Decision excludes the actions of armed forces during armed conflict from being regarded as terrorist offences, since such actions are governed by IHL. The recital also excludes actions by State armed forces ‘in the exercise of their official duties’ and ‘inasmuch as they are governed by other rules of international law’. This provision reflects the 1999 Terrorist Bombings Convention, although it takes the form of a recital, rather than an operative provision, and its legal effect is thus uncertain. An attempt to exclude persons analogous to freedom fighters in Europe in the Second World War is even more uncertain.

(a) Terrorist group offences

The Framework Decision also establishes terrorist group offences, an innovation not found in other regional treaties. A ‘terrorist group’ is defined in Article 2(1) to mean ‘a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist...
offences’; a ‘structured group’ is also defined. The definition is identical to that in the EU’s earlier Common Position of 2001. The general definition of terrorist groups cures the danger of statutory lists of proscribed groups inadvertently or tardily omitting certain groups, such as in the UK, where members of the Real IRA, responsible for the Omagh bombing, were acquitted of membership offences because only the IRA was proscribed. It also ensures that the failure to proscribe a group does not imply its legitimacy or lawfulness.

Article 2(2) requires States to punish intentionally (a) ‘directing a terrorist group’ and (b) ‘participating in the activities of a terrorist group’. Participation is defined to include the supply of information or material resources, or by funding the group’s activities in any way, ‘with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group’. Clearly, mere membership is not sufficient to attract liability, and these offences do not amount to collective punishment or guilt by association, since liability is for the crimes of direction or participation, not for the crimes of the group. Most such conduct would already be covered by ancillary and inchoate offences such as complicity or conspiracy, so that the offences are largely symbolic. They are based on Article 5 of the UN Convention against Transnational Organized Crime, and are narrower than group offences in UK legislation and those prosecuted at Nuremberg, but wider

227 A ‘structured group’ is then defined as ‘a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure’; see similarly 2000 UN Convention against Transnational Organized Crime, Art 2(c).
228 EU Council Common Position 2001/931/CFSP, n 199, Art 1(3).
231 In national law, mere membership of a criminal group is not usually sufficient to amount to criminal complicity: see, eg, Yugoslav Terrorism case (1978) 74 ILR 509 (Germany).
232 The Terrorism Act 2000 (UK) establishes various offences relating to a proscribed organization: belonging or professing to belong to it (s 11(1)), inviting support for it (s 12(1)), arranging, managing, or assisting in arranging or managing, a meeting of it (s 12(2)), addressing a meeting to encourage support for or further the activities of it (s 12(3)), and appearing in public displaying allegiance with or support for it (s 13(1)); directing an organization is also an offence, which does not require proscription (s 56); see Walker, n 153, 60–64. The UK law has a low threshold for ‘supporting’ terrorist organizations; one man was convicted of membership for wearing a ring inscribed with the initials of the Ulster Volunteer Force: James Rankin v Prosecutor Fiscal, Ayr, Scottish High Ct of Justiciary (Appeal Ct), Appeal No XJ343/03, 1 June 2004.
233 1945 Nuremberg Charter, Art 9 gave the International Military Tribunal at Nuremberg (IMT) power to declare organizations criminal in the trial of any individual member, while Art 10 allowed national authorities to prosecute individuals for membership of such organizations, whose criminality could not then be challenged (incorporated in Control Council Law No 10, Art II(1)(d)). The IMT declared criminal the Nazi Leadership Corps, Gestapo, SD, and SS. However, to avoid mass punishment, the IMT interpreted these provisions as requiring personal guilt, voluntary association, and criminal knowledge; and likened them to a criminal conspiracy (requiring an organized group with a common criminal purpose); Nuremberg Judgment 1946 (1947) 41 AJIL 172, 250–251; see also Altstoetter (Justice case) (1947) US Military Tribunal at Nuremberg, Trial of War Criminals before the Nuremberg Military Tribunals, vol III, 1030; see
than US anti-mafia legislation. Membership offences are preferable to indefinite detention of terrorist suspects where there is insufficient evidence to prosecute for an ordinary offence.

However, the first offence of directing a terrorist group problematically criminalizes all directions, ‘even if lawful and, indeed, even if desirable’, such as a direction to surrender, observe a cease-fire or to disarm. Further, that offence does not require that the person have knowledge of the criminal activities of the group. The second offence, participation, does not require a person to have specific knowledge of particular group crimes, nor does it demand that the person know of the group’s terrorist crimes, as opposed to its ordinary ones. This may result in unfairness where, for instance, a person donates money for charitable purposes to a group which performs mixed charitable and terrorist functions, such as some Palestinian groups. There is also no requirement that participation in a terrorist group must be voluntary, raising the prospect that persons coerced into participating may be held liable.

D. ATTEMPTS AT DEFINITION IN TREATY LAW 1930–2006

On a number of occasions since the 1920s, the international community has attempted to arrive at a generic definition of terrorism for the purposes of prohibition and/or criminalization, suggesting that it attaches considerable importance to definition. As Brownlie notes: ‘Even an unratiﬁed treaty may be regarded as evidence of generally accepted rules, at least in the short run.’ While these sources do not carry great weight as evidence of custom, they illustrate the recurring normative and political disputes surrounding deﬁnition and elucidate the basic features of terrorism.

K Kittichaisaree, International Criminal Law (OUP, Oxford, 2001) 248–249; Cassese (2003), n 5, 138. In numerous cases, the US Military Tribunal at Nuremberg found defendants guilty of membership of criminal organizations (mainly the SS): Medical case (USA v Karl Brandt et al) (1947); Pohl case (USA v Oswald Pohl et al) (1947); Milch case (USA v Erhard Milch) (1947); Justice case (USA v Josef Alstoeetter et al) (1947); Flick case (USA v Friedrich Flick et al) (1947); IG Farben (USA v Carl Krauch et al) (1948); RuSHA case (USA v Ulrich Greifelt et al) (1947–48); Einsatzgruppen case (USA v Otto Ohlendorf et al) (1948); Ministries case (USA v Ernst von Weizsaecker et al) (1949). However, constructive knowledge of the activities of a criminal organization could be imputed to an individual by virtue of that person’s position in the organization: Justice case, above, 1170, 1176; Flick case, above, 1122.


235 Walker, n 153, 170.


237 Subject to the criminal law defence of duress: see Ch 2 above.

238 Brownlie, n 14, 12.
Attempts to exclude terrorist ‘outrages’—such as the assassination of State officials—from the political offence exception to extradition had been steadily made in some national laws from the late nineteenth century, beginning with the Belgian *attentat* clause. Yet the idea of systematically defining terrorism as an international criminal offence only gathered momentum in the 1920s and 1930s. In 1926, Roumanie asked the League of Nations to consider drafting a ‘convention to render terrorism universally punishable’ but the request was not acted on.239

Terrorism was more systematically considered in a series of International Conferences for the Unification of Criminal Law between 1930 and 1935.240 The term ‘terrorism’ first appeared at the Third Conference in Brussels in 1930:

The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas will be punished.241

The political or social motives behind specified violent acts, and the risk of producing a common danger, were the defining features of terrorism.242 At the Fourth Conference in Paris in 1931, two rapporteurs proposed different definitions, although each shared the core element of imposing a political or social doctrine through criminal violence.243 Ultimately a resolution was adopted which avoided reference to political or social objectives, and instead emphasized the effects of specified violent acts:

Whoever, for the purpose of terrorizing the population, uses against persons or property bombs, mines, incendiary or explosive devices or products, fire arms or other deadly or deleterious devices, or who provokes or attempts to provoke, spreads or attempts to spread an epidemic, a contagious disease or other disaster, or who interrupts or attempts to interrupt a public service or public utility will be punished . . . 244

The Fourth Conference also recommended the adoption of a convention ‘to assure the universal repression of terrorist attempts’.245

240 Terrorism was discussed at the 3rd (Brussels 1930), 4th (Paris 1931), 5th (Madrid 1933) and 6th (Copenhagen 1935) International Conferences for the Unification of Criminal Law: G Bouthoul, ‘Definitions of Terrorism’ in Carlton and Schaerf (eds), n 1, 72; B Zlataric, ‘History of International Terrorism and its Legal Control’ in Bassiouni (ed), n 32, 474, 478–482; T Franck and B Lockwood, ‘Preliminary Thoughts towards an International Convention on Terrorism’ (1974) 68 AJIL 69, 75–76.
241 Final Commission Proposal, quoted in Zlataric, n 240, 479.
242 Zlataric, ibid, 479.
243 Definitions quoted in Zlataric, ibid, 479–480.
244 ibid, 480.
245 ibid.
At the Fifth Conference in Madrid in 1934, terrorism and crimes creating a common danger were considered separately and the discussion focused on terrorism. Whereas Rapporteur Roux concentrated on the definition from the Fourth Conference, Rapporteur Lemkin avoided the notion of terrorism and instead developed the idea of *crimina juris gentium* (including provoking international catastrophe, destroying art works, and participating in massacres or collective atrocities against the civilian population). While notions of political and social terrorism were discussed, ultimately only social rather than political terrorism formed part of the concept adopted by the Conference: ‘He, who with the hope of undermining social order, employs any means whatsoever to terrorize the population, will be punished.’ The Fifth Conference accordingly reduced the notion of terrorism to the crime of anarchy, avoiding earlier references to political motives or aims.

In 1935, the Sixth Conference at Copenhagen adopted model national legislation for the repression of terrorism. Article 1 proposed the offence of ‘intentional acts directed against the life, physical integrity, health or freedom’ of specified protected persons, where the perpetrator has created ‘a common [or public] danger, or state of terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance in international relations’. Article 2 listed acts which create a common danger or provoke a state of terror.

The Copenhagen Draft was similar to early draft provisions developed by the League of Nations’ expert Committee for the International Repression of Terrorism (CIRT) in 1935, suggesting that the Copenhagen Conference approved the approach taken by the CIRT. Importantly, the preamble of the Copenhagen Draft stated that

> ... it is necessary that certain acts should be punished as special offences, apart from any general criminal character which they may have under the laws of the State, whenever such acts create a public danger or a state of terror, of a nature to cause a change in or impediment to the operation of the public authorities or to disturb international relations, more particularly by endangering peace ...

This approach to treating terrorism as a discrete crime was markedly at odds with a ‘preliminary draft convention’ prepared by the International Criminal Police Commission in Vienna, which elaborated on a 1934 French

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proposal to the League, and was submitted to the CIRT at its first session. The prohibited acts in the Vienna Draft differed from the French Proposal only in elaboration: protected persons and property were specified in more detail; the list of prohibited weapons was expanded; and methods of incitement were listed. Significantly, the Vienna Draft stated that ‘acts of terrorism’ are enumerated offences punishable ‘as ordinary crimes’. In contrast, the Copenhagen Draft stated that ‘it is necessary that certain acts should be punished as special offences, apart from any general criminal character’.

2. 1937 League of Nations Convention

The most significant early modern attempt to define terrorism as an international crime was undertaken by the League of Nations between 1934 and 1937. In October 1934, King Alexander I of Yugoslavia was assassinated by Croatian separatists while on a State visit to France; the French Foreign Minister, Louis Barthou, and two bystanders were also killed. The suspects fled to Italy, and France requested their extradition under a treaty of 1870, which excluded political crimes from extradition. The Court of Appeal of Turin refused to surrender the accused on the grounds that the offences were politically motivated and thus non-extraditable. The Court found that ‘the assassination of a sovereign is a political crime if it is prompted by political motives . . . and offends against a political interest of a foreign state’, as are ‘crimes committed or attempted in the course of the said regicide’.

The League of Nations faced immediate political pressure to respond.

254 Copenhagen Draft, n 249, 1.
The memory of the assassination of Chancellor Dolfuss of Austria three months earlier in July 1934 was still fresh,\textsuperscript{259} as was an attempt on the life of Romanian Minister Duca.\textsuperscript{260} The League had faced a similar international crisis in 1923, when General Tellini of Italy was assassinated while delimiting the frontier between Albania and Greece, resulting in Italy’s bombardment and occupation of Corfu.\textsuperscript{261} Seasoned diplomats had not forgotten the assassination of Archduke Franz Ferdinand in Sarajevo in 1914 and its catastrophic consequences for global peace.\textsuperscript{262}

Following two months of intensive diplomacy, in a resolution of December 1934, the League Council noted that ‘the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee sufficiently international co-operation’.\textsuperscript{263} It established an expert committee, CIRT, to draft a preliminary international convention ‘to assure the repression of conspiracies or crimes committed with a political and terrorist purpose’. The terms ‘terrorist activity’ and ‘political and terrorist purpose’ were not defined. The CIRT comprised eleven States and met in three sessions between April 1935 and April 1937.\textsuperscript{264}

The Committee was further guided by a League Assembly resolution of October 1936, which stated that the proposed convention must be founded ‘upon the principle that it is the duty of every State to abstain from any intervention in the political life of a foreign State’. The resolution confined the scope of the convention further by stating that it should have ‘as its principal objects’: (1) To prohibit any form of preparation or execution of terrorist outrages upon the life or liberty of persons taking part in the work of foreign public authorities and services; (2) to prevent and detect such outrages; and (3) to punish terrorist outrages which have an international character.\textsuperscript{265}

The convention was drafted in a number of phases between 1935 and 1937.\textsuperscript{266} An international diplomatic conference met in November 1937 to draft and adopt a convention based on the final draft submitted by CIRT. The Final Act of the diplomatic conference adopted two international

\textsuperscript{259} Walters, n 256, 604.
\textsuperscript{260} Zlataric, n 240, 481.
\textsuperscript{261} ibid, 246, 600.
\textsuperscript{262} ibid, 246, 600.
\textsuperscript{263} LoN, Committee for the International Repression of Terrorism (CIRT), Geneva, 10 Apr 1935, LoN Doc CRT 1.
\textsuperscript{264} 1st Sess, Apr–May 1935; 2nd Sess, Jan 1936; 3rd Sess, Apr 1937. Members included Belgium, UK, Chile, France, Hungary, Italy, Poland, Roumania, USSR, Spain, and Switzerland.
conventions—the first defining international terrorist offences, and the second creating an international criminal court to punish the offences in the first treaty.267

The first treaty, the 1937 Convention for the Prevention and Punishment of Terrorism, required States to criminalize terrorist offences and encouraged States to exclude the offences from the political offence exception to extradition.268 It attracted twenty-four signatories: twelve were European States, seven were Caribbean, Central or South American States, and five others included major States from other regions.269 The Convention was only ratified by one (colonial) State—India, which had separate League membership to Britain270—and never entered into force. The Second World War diverted attention from the Convention and with the demise of the League of Nations, interest in the Convention never revived.

Despite never entering into force, the 1937 League Convention indicates the early views of States on terrorism. Article 1(1) reafﬁrms as a ‘principle of international law’ that it is ‘the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent acts in which such activities take shape’. States were, however, careful to implicitly exclude armed forces from the scope of the Convention, including acts committed in civil wars.271

Article 1(2) cumulatively deﬁnes ‘acts of terrorism’ as ‘criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public’ (emphasis added). Article 2 then enumerates the criminal acts which States must criminalize, where they are committed on that State’s territory, directed against another contracting State, and ‘if they constitute acts of terrorism

268 1937 League Convention, in International Conference Proceedings, n 266, Annex I, 5; and 1937 Convention for the Creation of an International Criminal Court, in International Conference Proceedings, above, 19. The latter treaty attracted fewer signatories and never came into force. A State party was entitled, instead of prosecuting, or extraditing a suspect to another State party, to send the suspect for trial before the international criminal court.
269 European States: Albania, Belgium, Bulgaria, Czechoslovakia, France, Greece, Monaco, the Netherlands, Norway, Romania, Spain, Yugoslavia. American States: Argentina, Cuba, Dominican Republic, Ecuador, Haiti, Peru, Venezuela. Other regions: USSR, Turkey, (British) India and Egypt, along with a small State, Estonia. Monaco signed later: Starke, n 255, 214.
270 Starke, ibid, 215.
within the meaning of Article 1. The acts include crimes against persons and property, weapons offences, and ancillary offences.272

Consequently, terrorism is defined by the intended aim (a state of terror), the ultimate target (a State), and the prohibited means used, but not by reference to political motives or coercive objectives.273 Proposals to define terrorism as a means to a political end were not accepted.274 ‘Acts of terrorism’ was defined circularly or tautologically by reference to ‘a state of terror’,275 despite objections that the term was ambiguous and open to abuse.276 The meaning of a ‘state of terror’ is not explained in the treaty or in the drafting record.

On a literal construction, it suggests acute or extreme fear, with the words ‘a state of’ indicating a more durable or continuing fear than the word ‘terror’ on its own. At the time, some States thought a ‘state of terror’ did not mean a subjective fear in the mind of one person, but a more objective state involving many individuals.277 However, the text of the provision refers to ‘a state of terror in the minds of particular individuals’ (emphasis added), which envisages that a subjective state of terror in the minds of a small number of persons could amount to terrorism.278

It is also unclear from the record whether acts ‘directed against a State’ narrowly referred to attempts to overthrow the State,279 or encompassed acts against broader State interests, including State ‘honour’, security, or public order.280 Further, only acts directed against a State, and not against private persons or groups, were regarded as terrorism. A French proposal to criminalize attacks on ‘private persons by reason of their political attitude’ (such as political activists, academics, suffragettes, or trade unionists) was not

272 Including wilfully: ‘causing death or grievous bodily harm or loss of liberty’ to protected persons and public officials (Art 2(1)); destroying or damaging public property of another State (Art 2(2)); endangering the lives of the public (Art 2(3)); attempting to commit offences (Art 2(4)); manufacturing, obtaining, possessing, or supplying arms, ammunition, explosives or harmful substances with a view to committing an offence in any country (Art 2(5)); and conspiracy, incitement, direct public incitement, wilful participation, and knowing assistance (Art 3).
273 International Conference Proceedings, n 265, 72 (Yugoslavia), 63 (Spain).
275 International Conference Proceedings, n 265, 81 (Yugoslavia), 80 (Spain), 78 (France).
276 1st Committee Records, n 266, 32 (Belgium); Observations by Governments (1937), n 271, 2 (Czechoslovakia); 2nd Sess Report, n 266, Appendix III, 16 (Roumania).
277 Observations by Governments (1937), n 271, 3 (Czechoslovakia); 1st Committee Records, n 266, 45 (Roumania); International Conference Proceedings, n 265, 77 (Netherlands), 75 (Poland).
278 International Conference Proceedings, n 265, 75–76 (UK, USSR, Poland).
279 As proposed in the 2nd Sess Draft, Art 2, in 2nd Sess Report, n 266; and by the UK: CIRT, ‘Suggestion by the British expert for an article to be inserted in the draft convention’, Geneva, 1 May 1935, LoN Archives Doc 3A/17592/15085/VII.
280 International Conference Proceedings, n 265, 72 (Yugoslavia) and 2nd Sess Report, n 266, Appendix III, 15 (Roumania).
accepted. (Likewise, a Latvian proposal to regard attacks on private property as terrorism was not accepted.)

As a result, the killings of Karl Liebknecht and Rosa Luxemburg in Weimar Germany in 1919 would not be considered terrorism, despite the German Social Democratic Party, exiled in Prague, bringing assassinations of its members in the 1920s and 1930s to the attention of the CIRT in 1937. With chilling prescience, Leon Trotsky, exiled in Mexico, also warned the League of Soviet terrorism against its enemies—just a few years before he was assassinated by Soviet agents.

The utility of the Convention was always doubtful because its extradition provisions did not exclude terrorism from the political offence exception. In a climate of mounting authoritarianism, many States were reluctant to confine their sovereign discretion in extradition matters, including the scope of political offences, and were at pains to protect asylum from degradation. The drafting of the Convention was primarily a means of averting the escalation of the international crisis precipitated by King Alexander’s assassination, rather than a progressive process of legal reform. A contemporary writer viewed its provisions as not of ‘major importance’, and suggested that practical cooperation was more important than ‘stiffening the law’. Despite definition, the term ‘terrorism’ remained open to abuse, with Hitler justifying the Nazi occupation of Bohemia and Moravia in March 1939 as designed to disarm ‘terrorist bands threatening the lives of [German] minorities’.

Nonetheless, the Convention is normatively significant in the debate about defining terrorism, since its drafting elucidated major substantive issues which remained relevant in the post-war period. Its definition served for many years as a benchmark definition of terrorism, surfacing early in the drafting of the 1954 ILC Draft Code of Offences, and most influentially, shaping a much cited 1994 General Assembly Declaration. In 1996, the League definition was approved by an English judge to limit the scope of the exclusion clauses in the 1951 Refugee Convention. It is significant that

283 Letter from the Sozialdemokratischen Partei Deutschlands (Prague) to CIRT (Geneva), 30 Oct 1937, LoN Archives Doc 3A/15105/15085/XIII.
284 1937 League Convention, Art 8.
285 1st Committee Records, n 266, 40 (UK); International Conference Proceedings, n 265, 53 (UK), 54 (Norway); 62 (Belgium); Observations by Governments (Series I), n 271, 3 (Belgium).
286 1st Committee Records, n 266, 48 (Finland), 37 (Norway); 39 (Netherlands), 41 (Sweden, France), 33, 43 (Belgium); Observations by Governments (Series I), n 271, 11 (Netherlands).
287 Walters, n 256, 605.
288 Starke, n 255, 215.
291 UNGA Resolution 49/60 (1994), annexed Declaration on Measures to Eliminate International Terrorism, para 3.
292 T v Home Secretary [1996] AC 742 (Lord Mustill).
the main dispute surrounding the drafting was the scope of the extradition provisions, rather than difficulties with the definition of terrorism itself. It is certainly possible that a treaty may reflect custom even if it has not entered into force, and the process of drafting treaties focuses world opinion and influences State behaviour and legal conviction. Nonetheless, the practice of States (including specially affected States) on the definition of terrorism since 1937 has been far from consistent with the Convention’s approach to definition.

3. 1954 ILC Draft Code of Offences

The next major attempt to codify terrorism was made by the International Law Commission (ILC) when drafting its 1954 Draft Code of Offences against the Peace and Security of Mankind (Part I). Terrorism was explicitly linked to the concept of aggression. Article 2(6) defines an offence ‘against the peace and security of mankind’ of the ‘undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State’. Under Article 1, offences in the Code ‘are crimes under international law, for which the responsible individuals shall be punished’. The offence only covers conduct by those acting for the State, and not the activities of non-State actors, despite an early 1950 draft provision covering acts of private persons. Further, it only covers State toleration of terrorist activities where those activities are sufficiently ‘organized’ to affect peace (such as acts of political parties directed against another State), thus excluding acts of single persons without any organized connection. Further, arguments to include private terrorism with international effects were not accepted, the requirement being that acts be directed against another State.

As the UK noted at the time, the terms ‘terrorist activities’ and ‘terrorist

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293 Continental Shelf case (Libya v Malta) (1985) ICJ Reports 13, 33, para 34.
296 (1950–II) ILCYB 59.
298 (1950–I) ILCYB 126 (Rapporteur Spiropoulos), 166 (Cordova); (1950–II) ILCYB 58, 253 (Rapporteur Spiropoulos), the latter conduct being left to national law. A proposal to delete ‘organized’ was not accepted: (1950–I) ILCYB 127 (Français).
299 (1950–I) ILCYB 129, 166 (ILC Chairperson).
300 ibid, 129 (Amado).
acts’ are not defined, and one ILC member stated that the first expression was as vague as another expression that had been rejected—‘fifth column’. In contrast, the Special Rapporteur argued that terrorism had a ‘fairly precise meaning in international law’, deriving from the 1937 League Convention, which, while not in force, expressed the legal views of 40 States. The Rapporteur decided, however, to make the provision more general in character than the 1937 definition. At the same time, the drafting record also refers to concepts of terrorism developed elsewhere: ‘systematic terrorism’ developed in 1919; the war crime of ‘indiscriminate mass arrests for the purpose of terrorizing the population’ from 1944; and terrorism in national law.

Yet some ILC members found references to terrorism too vague unless linked to the ‘excellent’ 1937 definition. As a result, a 1951 draft provision incorporated the League definition, but this disappeared after objections that the 1937 expression ‘a state of terror’ was ‘too literary’ and antiquated, and would embarrass a judge, with the modern term ‘terrorist activities’ preferred. Others also questioned the meaning of the 1937 definition, or found the draft definition too confused. As such, it was omitted from the 1954 provision, but contextualizes the meaning of terrorism.

Higgins argues that the inclusion of terrorism in the 1954 ILC Draft Code in relation to State aggression serves only as a ‘term of convenience’ or political expediency. In her view, this is because international law on the use of force and the law of State responsibility already address terrorist acts, or support for such acts, by States of the kind envisaged by Draft Article 2(6). Consequently, the description of such acts as terrorist is considered legally redundant, particularly in the absence of any definition of ‘terrorist activities’ in Article 2(6).

Higgins’ analysis is accurate to the extent that there is no normative void in international law in relation to responsibility for the acts of States envisaged by Article 2(6). The law of State responsibility and law on the use of force undoubtedly already apply to unlawful acts committed in these circumstances. Draft Article 2(6) merely particularizes forms of aggression and the scope of State responsibility.

303 ibid, 131. 304 (1950–I) ILCYB 218 (Alfaro).
305 ibid, 126. 306 (1950–II) ILCYB 253, 264–266.
307 See, respectively, Ch 5; UN War Crimes Commission, Legal Committee Report, 9 May 1944; Australian War Crimes Act 1945, s 3(ii): ‘murder or massacres—systematic terrorism’, and Chinese Law, 24 Oct 1946, art III(1): war crime of ‘Planned slaughter, murder or other terrorist action’.
308 (1950–I) ILCYB 127 (Hudson, François).
310 (1950–I) ILCYB 63 (Alfaro and Kerno respectively).
311 ibid. 312 ibid, 127–128 (Amado and Yepes respectively).
313 Higgins, n 1, 26–27. 314 See Ch 4 below.
On the other hand, the purpose of Article 2(6) was to establish *individual criminal responsibility* for the State commission, encouragement, or toleration of ‘terrorist activities’. Individual criminal responsibility is a different type of international legal liability than that provided for by the law of State responsibility or the law on the use of force. Reference to terrorism may thus serve a useful legal function for the purpose criminal liability, quite apart from whether it remains a term of convenience for the other purpose of State responsibility. The article on terrorism was adopted by the ILC by 10 votes to 0, with 3 abstentions, suggesting that ILC members believed reference to terrorism served some useful purpose. Further, the view that the provision was similar to a draft provision on civil strife did not result in the amalgamation of the provisions as suggested,315 indicating that the ILC felt justified in preserving a distinct provision on terrorism.

Due to insurmountable disagreement about the definition of aggression, in 1954 the General Assembly postponed further consideration of the 1954 ILC Draft Code until a Special Committee on defining aggression had reported.316 Subsequent attempts to define aggression have eschewed any reference to terrorism and severed the early linkage between these concepts. A (non-exhaustive) General Assembly resolution defining ‘aggression’ in 1974 makes no reference to terrorism,317 nor does the definition in the 1996 ILC Draft Code or in the 1998 Draft Rome Statute.318


The ILC resumed consideration of the Draft Code in 1982.319 Following nine reports by a Special Rapporteur between 1983 and 1991, the ILC adopted a first reading of a Draft Code in 1991.320 Article 24 of the 1991 ILC Draft Code, based on Article 2(6) of the 1954 Draft Code,321 proposed an offence where a State agent or representative commits or orders the ‘undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public’.322 Compared with the 1954 draft, this provision partially incorporated the 1937 League definition; added the notions of ‘organizing’,

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315 (1950–1) ILCYB 127 (El Khoury).
316 UNGA Resolution 897 (IX) (1954).
‘assisting’, and ‘financing’; and expressly covered acts against property. Some ILC members objected that the definition was tautological and that it would be better to refer to ‘a state of fear’ rather than a ‘state of terror’.323 The difficulty of proving subjective fear was also raised.324

The proposed offence did not apply to private individuals and required a State connection.325 Some ILC members thought, however, that groups of individuals could threaten peace and security,326 and regretted that acts by liberation movements, and international corporations, were not covered.327 Some governments also believed that terrorism should cover private as well as State conduct.328 Other governments felt that the provision was too imprecise to impose criminal liability,329 or that terrorism was too sensitive to be entrusted to an international tribunal.330

In 1995, a renumbered draft Article 24 retained similar wording to the 1991 draft, but added that acts must be committed ‘in order to compel’ the victim State ‘to grant advantages or to act in a specific way’.331 While this narrowed the scope of the offence, it had the disadvantage of excluding nihilist or other violence designed to terrorize but not also to compel.332 Some thought it better to avoid altogether any reference to the subjective motives or objectives of the act.333

As alternatives to a ‘state of terror’, reference was made to ‘a state of fear’ or a ‘state of dread’. New offences of ‘ordering’ or ‘facilitating’ terrorist acts emerged, while the offence of ‘assisting’ from 1991 disappeared. While some ILC members continued to insist that the meaning of terror was generally understood,334 others maintained that the term was imprecise and the provision should be deleted.335 Suggestions to refer to the sectoral anti-terrorism treaties, or to designate terrorism as a crime against humanity, were not accepted, nor was the view that the determination of terrorism should be left to the Security Council.336

The final ILC Draft Code (Part II) was adopted in 1996.337 While earlier

326 ibid, 338 (Njenga), 339 (Benama).
327 ibid, 338 (Pellet, Tomuschat, Njenga) and 338 (Pellet) respectively. cf 1999 Terrorist Financing Convention, Art 5, establishing corporate liability where a person ‘responsible for the management or control’ of a financial entity ‘in that capacity’ commits a financing offence.
328 ILC (45th Sess), Comments and Observations from Governments (1993), UN Doc A/CN.4/448; Sunga, n 325, 202 (Belarus, Denmark, Finland, Iceland, Norway, Paraguay, Sweden, and the UK).
329 Sunga, ibid, 202 (referring to Australia and the Netherlands). 330 ibid.
333 ibid, 15 (Vargas Carreño). 334 ibid, 45 (Chairperson Rao).
334 ibid, 41 (Rosenstock) and 6–7 (Pellet), 8 (Rosenstock), 15 (Mkulka) respectively.
336 ibid, 21 (Jacovides), 26 (Kramer); 40 (Razafindralambo); 8 (Rosenstock) respectively.
drafts between 1990 and 1995 had included distinct articles on ‘international terrorism’, a discrete terrorist offence was subsumed by, and recast within, final Article 20 on ‘war crimes’ (discussed in Chapter 5). The war crime of ‘acts of terrorism’ in Article 20 embodied the simple prohibition in Article 4(2)(d) of Protocol II. There was no longer any broader offence of creating a state of terror outside armed conflict.

5. 1998 Draft Rome Statute

While the 1996 ILC Draft Code was not adopted as a treaty, the General Assembly drew it to the attention of the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom). Ultimately, Article 5 of the 1998 Draft Rome Statute, presented to the 1998 Rome Diplomatic Conference, included ‘crimes of terrorism’ comprising three distinct offences. The first offence was:

Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them . . . (emphasis added)

This first offence resembles that in the 1991 ILC Draft Code and was not limited to armed conflict (as in the 1996 ILC Draft Code). It also shares elements of the 1937 League definition and a 1994 General Assembly working definition. The second offence comprised any offence in six sectoral treaties. The third offence involved ‘the use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups or persons or populations or serious damage to property’.

Thirty-four States spoke in favour of including terrorism, particularly

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344 Official Records, n 342, vol II: Albania, 82; Algeria, 73, 148, 177, 283; Armenia, 78; Barbados, 248, 354; Benin, 286; Bolivia, 347; Burundi, 118; Cameroon, 181; Comoros, 287; Congo, 117; Costa Rica, 175; Cuba, 181; Dominica, 248, 354; Egypt, 281; Ethiopia, 288; India, 87, 177–178, 323; Jamaica, 328; Kuwait, 289; Kyrgyzstan, 77; Libya, 102; Macedonia, 86; New
those that had been its victims. Those in favour of including terrorism argued that it shocked the conscience of humanity; had grave consequences for human suffering and property damage; occurred increasingly frequently and on a larger scale; and threatened peace and security. 345 The option of referring terrorism to the ICC was also intended to avoid jurisdictional disputes between States, and supply the Security Council with a means of referring terrorist threats for resolution. 346

Among States that supported the inclusion of terrorism, there was variation in the approach to definition and criminalization. Some States thought that terrorism should be included as a crime against humanity. 347 Russia thought the offence should be limited only to the most serious terrorist crimes; Turkey believed systematic and prolonged terrorism against a civilian population should be covered; and Albania argued that institutionalized State terrorism should be included. 348 Though in favour of including terrorism, Egypt sought to exclude national liberation movements, while a number of Islamic States impliedly urged the same result by invoking the 1999 Arab League Convention as a model approach to definition. 349

One alternative definition of terrorism presented at the Diplomatic Conference defined ‘an act of terrorism’ as serious crimes within the sectoral treaties, but also as:

An act of terrorism, in all its forms and manifestations involving the use of indiscriminate violence, committed against innocent persons or property intended or calculated to provoke a state of terror, fear and insecurity in the minds of the general public or populations resulting in death or serious bodily injury, or injury to mental or physical health and serious damage to property irrespective of any considerations and purposes of a political, ideological, philosophical, racial, ethnic, religious or of such other nature that may be invoked to justify it, is a crime... 350

Zealand, 178; Nigeria, 111; Pakistan, 173; Russia, 115, 177, 289; Saudi Arabia, 179, 293; Sri Lanka, 123, 176, 288, 339; Tajikistan, 92; Thailand, 332; Trinidad and Tobago, 248, 354; Tunisia, 174, 292; Turkey, 106, 124, 179, 276, 330; United Arab Emirates, 177; Yemen, 178. See also Kittichaisaree, n 233, 227; C Silverman, ‘An Appeal to the United Nations: Terrorism must come within the Jurisdiction of an International Criminal Court’ (1998) 4 New England and Comparative Law Annual: <www.nesl.edu/intljournal/VOL4/CS.HTM>.

346 ibid.
348 Official Records, n 342, vol II, 115, 177, 289 (Russia); 106, 124, 179, 276, 330 (Turkey); 82 (Albania).
349 ibid, 281 (Egypt); 177 (United Arab Emirates); 178 (Yemen); 179, 293 (Saudi Arabia); 289 (Kuwait).
350 Official Records, n 342, vol III, 222 (Coordinator draft), 242 (draft of India, Sri Lanka, and Turkey); 248, 354 (draft of Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago, and Turkey).
This partly circular definition differs in substance from draft Article 5 mainly in its requirement of ‘indiscriminate violence’ and its omission of any reference to the ‘undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State’. Removing the nexus to another State means that non-international terrorism could be covered. On the other hand, removing reference to the various methods of preparing, supporting, or committing terrorism narrows the scope of the offence, although much of this conduct would be covered by applying the Rome Statute’s provisions on the modes of criminal participation.\(^{351}\)

Ultimately, terrorism was not included in the 1998 Rome Statute as adopted. A conference resolution ‘regretted’ that ‘despite widespread international condemnation of terrorism, no generally acceptable definition . . . could be agreed upon.’\(^{352}\) Terrorism was not included for a variety of reasons: its legal novelty and lack of prior definition; disagreement about national liberation violence; and a fear that it would politicize the ICC.\(^{353}\) More pragmatically, some States felt that terrorism was better suited to national prosecution, due to investigative complexities and the need for immunities.\(^{354}\) The US felt that investigation, rather than prosecution, was the main problem in combating terrorism.\(^{355}\) Others believed that terrorism was not always serious enough to be internationally prosecuted.\(^{356}\) Of the 23 States which spoke against including terrorism,\(^{357}\) many of them agreed that terrorism was a serious crime but preferred to defer its inclusion until it was defined more clearly in future. These included developed States as well as those who supported an exception for self-determination movements. Sri Lanka and Turkey abstained from voting on the Rome Statute partly because terrorism was excluded.\(^{358}\) The omission of terrorism from the Rome Statute is normatively

\(^{351}\) 1998 Rome Statute, Art 25(3) (including committing, ordering, soliciting, inducing an offence, as well as complicity and the inchoate offences of conspiracy and attempt).

\(^{352}\) Resolution E, annexed to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on an ICC, 17 July 1998, UN Doc A/Conf.183/10.

\(^{353}\) ICC PrepCom, n 346, para 67; Kittichaisaree, n 233, 227–228; Cassese (2003), n 5, 125; see also N Boister, ‘The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics’ (1998) 3 JACL 27.


\(^{356}\) Cassese (2003), n 5, 125; Cassese (2001), n 5, 994.

\(^{357}\) Official Records, n 342, vol II, Bahrain, 284; Bangladesh, 181; Belgium, 174; Brazil, 277; France, 177; Ghana, 278; Greece, 175, 281; Guatemala, 291; Iraq, 174; Japan, 290; Morocco, 173; the Netherlands, 181, 269; Norway, 172; Oman, 180; Republic of Korea, 175, 277; Senegal, 176; Spain, 181, 329; Sweden, 176; Syria (speaking also for the Arab League), 172, 271; UK, 272; Ukraine, 176; US, 123, 176, 280; Uruguay, 283.

\(^{358}\) Kittichaisaree, n 233, 227.
significant, since the Statute represents the most recent and ‘authoritative expression of the legal views of a great number of States’ on international criminal law. The conference affirmed, however, that the Statute provides for future expansion of jurisdiction, which might provide an opportunity for the future inclusion of terrorism. Agreement on the definition of crimes was intended ‘to reflect existing customary international law, and not to create new law’, but nor was such agreement intended to preclude the emergence of new crimes.

In addition, the Rome Conference responded to terrorism in a different sense. In Article 7(2)(a) of the Rome Statute, crimes against humanity require ‘multiple commission of acts . . . pursuant to or in furtherance of a State or organizational policy to commit such attack’. The reference to organizations was ‘intended to include such groups as terrorist organizations’, although express reference to terrorism as a crime against humanity was not adopted. Thus terrorist groups which commit acts constituting crimes against humanity are liable. This includes acts in armed conflict or peacetime, as long as the conduct is ‘part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. Such attacks need not be both widespread and systematic; either is sufficient. Prosecution of such acts is, of course, subject to the jurisdictional and other limitations of the ICC.


364 Arsanjani, n 354, 31.

365 See M Morris, ‘Prosecuting Terrorism: The Quandaries of Criminal Jurisdiction and International Relations’ in Heere (ed), n 73, 133 (particularly acts committed by non-State party nationals in their own States, or by non-party nationals in other non-party States); M Morris, ‘Arresting Terrorism: Criminal Jurisdiction and International Relations’ in Bianchi (ed), n 76, 63; M Morris, ‘Terrorism and the Politics of Prosecution’ (2005) 5 Chinese JIL 405; C Van den Wyngaert, ‘Jurisdiction over Crimes of Terrorism’ in Heere (ed), above, 147.
6. 2000—Draft Comprehensive Convention

Not long after definition was deferred in the context of the ICC, attempts to comprehensively define terrorism resurfaced in the Ad Hoc Committee established by the UN General Assembly in 1996.\(^{366}\) Between 1997 and 2005, the Ad Hoc Committee successfully drafted the 1997 Terrorist Bombings Convention, the 1999 Terrorist Financing Convention, and the 2005 Nuclear Terrorism Convention. In 2000, India informally circulated in the Committee a revised draft comprehensive treaty originally submitted to the Sixth Committee in 1996.\(^{367}\) Earlier in 1994, Algeria had argued for a comprehensive convention to consolidate sectoral treaty offences,\(^{368}\) but the Indian draft went further by proposing a generic approach to definition. While Sudan endorsed the Indian proposal in 1997, only after the terrorist attacks on US embassies in Africa in 1998 did more than 37 States support the Indian approach.\(^{369}\) By 2000, India’s proposal had been supported by the Non-Aligned Movement, the Group of Eight and the EU.\(^{370}\)

Substantial drafting progress on the comprehensive convention was made in the Ad Hoc Committee in 2001–02, spurred on by the ‘shock of recognition’ of September 11,\(^ {371}\) and by 2002 agreement was reached on most of the 27 articles.\(^{372}\) By 2003, however, some States had reached their ‘bottom-line’ on disputed matters.\(^{373}\) The Coordinator believed that resolving outstanding issues—the preamble, definitions in Article 1 and definition of offences in Article 2\(^{374}\)—would depend on resolving Article 18 (application to armed forces and armed conflict).\(^{375}\) The drafting mandate was renewed again in


\(^{368}\) Report of the UN Secretary-General, UN Doc A/49/257 (25 July 1994); see van Ginkel, n 111, 216.

\(^{369}\) Van Ginkel, n 121, 217–218 (Algeria, Angola, Bahrain, Bangladesh, Brazil, Canada, China, Coast Rica, Croatia, Cuba, Dominican Republic, DR Congo, El Salvador, Ethiopia, Ghana, Guatemala, Honduras, Indonesia, Iran, Japan, Kuwait, Lebanon, Liechtenstein, Macedonia, Malawi, Malaysia, Mongolia, Nicaragua, Panama, Qatar, Slovakia, South Africa, Syria, Tanzania, Turkey, Uganda, Vietnam).

\(^{370}\) Van Ginkel, ibid, 219.\(^{371}\) Abi-Saab, n 359, 311–312.


\(^{373}\) Ad Hoc Committee Report (2003), n 38, 8.\(^ {374}\) ibid, 6.

Negotiations were given further impetus by the recommendations to define terrorism by the UN High-Level Panel on Threats, Challenges and Change (2004), the UN Secretary-General’s report *In larger freedom* (2005), the Madrid Summit (2005), and the UN World Summit (2005).

The preamble to the Draft Comprehensive Convention condemns ‘all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed’. Draft Article 2(1) proposes an offence if a person ‘unlawfully and intentionally’ causes: ‘Death or serious bodily injury to any person’; ‘Serious damage to public or private property’; or ‘Damage to property, places, facilities, or systems . . . resulting or likely to result in major economic loss’. The purpose of any such conduct, ‘by its nature or context’, must be ‘to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act’. Put another way, the prohibited acts must be motivated by purposes of intimidation or compulsion, but there is no requirement that acts be motivated by political aims or objectives. The treaty proposes to exclude the offences from the political offence exception to extradition.

Unlike the 1997 Terrorist Bombings Convention, the Draft Convention proposes to protect private property as well as public property. It captures a wider range of acts against property than the EU Framework Decision, by referring to ‘serious damage’ rather than ‘extensive destruction’. Like the Bombings Convention, the Draft Convention protects only States or international organizations from compulsion, and not NGOs, political parties, corporations, or other social groups.

While there was a basic consensus on the definition of offences, disagreement arose when Malaysia, on behalf of the OIC, sought to exclude

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377 UN High-Level Panel, n 102; UN Secretary-General, n 102; Club of Madrid, ‘The Madrid Agenda’, International Summit on Democracy, Terrorism and Security, 11 Mar 2005 (supporting the definition proposed by the UN High-Level Panel). The World Summit was unable to reach agreement on a definition of terrorism and merely stressed the need to reach agreement on the Draft Comprehensive Convention during the 60th Session of UNGA, and acknowledged the possibility of convening a high-level UN conference: 2005 World Summit Outcome, n 102, paras 83–84.
378 Ad Hoc Committee Report (2002), n 38, Annex I (Discussion paper by the Bureau).
380 Ancillary offences are in Draft Comprehensive Convention, Art 2(2), (3) and (4)(a)–(c). 
381 Draft Comprehensive Convention, Art 14.
‘people’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination.’ The aim was to balance the exclusion of the activities of State armed forces by also excluding national liberation forces. The proposal was taken from Article 2 of the 1999 OIC Convention and is significant in voting terms because the OIC comprises 56 States, and was also supported by Arab States and the Non-Aligned Movement. Other States objected to the proposal, believing that ‘a terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination’. Further, the obvious point had been made that self-determination was already governed by existing law, including obligations to comply with IHL in Protocol I.

No such exclusionary provision was included in the 1997 Terrorist Bombings Convention or the 2005 Nuclear Terrorism Convention, both of which were drafted by the same Ad Hoc Committee. When Pakistan lodged a reservation purporting to exclude the application of the 1997 Convention from self-determination struggles, numerous States formally objected. The UK and the US stated that the reservation amounted to a unilateral limitation on the scope of the Convention, contrary to its object and purpose (suppressing terrorist bombings, irrespective of location or perpetrator). It was further objected that the reservation was contrary to Article 5 of the Convention, which requires criminalization regardless of any justifications.

A remaining critical dispute is the application of the Convention to armed forces and armed conflicts. The 1997 Terrorist Bombings Convention, the 2005 Nuclear Terrorism Convention, and the 2005 Amendment to the 1980 Vienna Convention all exclude the ‘activities of armed forces during an armed conflict’ from those Conventions, as well as the activities of State military forces exercising their official duties ‘inasmuch as they are governed by other rules of international law’. This approach is also followed in the EU Framework Decision. Part of the 1999 Financing Convention protects ‘civilians’ or ‘any other person not taking an active part in the hostilities in a situation of armed conflict’. The sectoral treaties addressing maritime and

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383 Subedi, n 366, 163. 384 ibid. 385 ibid, 165.
386 Austria, Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, the Netherlands, New Zealand, Norway, Spain, Sweden, the UK, and the US.
387 1969 Vienna Convention on the Law of Treaties, Art 19(c), does not permit reservations which are incompatible with the object and purpose of a treaty.
388 2005 Nuclear Terrorism Convention, Art 4; 1997 Terrorist Bombings Convention, Art 19(2); 1980 Vienna Convention, Art 2(4)(b); also stating that ‘armed forces’ and ‘armed conflict’ are understood according to, and governed by, IHL. Thus non-State armed forces may also be covered: Witten, n 13, 780. Some State bombings outside armed conflict, and not by armed forces in their official duties, might still be unlawful, such as France’s bombing of the Rainbow Warrior in New Zealand in 1986: R Marauhn, ‘Terrorism: Addendum’ in R Bernhardt (ed), Encyclopaedia of PIL: vol 4 (North Holland, Amsterdam, 2000) 849, 853.
aerial violence do not apply to ships or aircraft used for military, customs, or police purposes.390

Proposed Article 18 of the Draft Comprehensive Convention is based on the 1997 Terrorist Bombings Convention, but is subject to three basic disagreements that also delayed the adoption of the 2005 Nuclear Terrorism Convention between 1997 and 2005.391 One disputed element is whether the Draft Convention should exclude the activities of the ‘parties’—rather than the ‘armed forces’—during an armed conflict, since reference only to ‘armed forces’ might exclude other participants in armed conflict under IHL, particularly as ‘parties’ are mentioned in the Hague Regulations and the Geneva Conventions.392 Reference to the ‘parties’ is specifically aimed at exempting organizations such as the PLO, Hamas, Islamic Jihad, and Hezbollah.393 This could preclude civilians taking part in hostilities from being regarded as ‘terrorists’.394

The International Committee of the Red Cross (ICRC) suggested that the term ‘armed forces’ should be defined to cover both government forces and those of organized armed groups,395 which would seem an appropriate approach. The 1997 Terrorist Bombings Convention refers to armed forces ‘as understood’ under IHL, but definition in the Draft Convention itself would provide further clarity, particularly concerning its application to non-State forces in non-international armed conflicts under Protocol II.396 Clearly, reference to the ‘parties’ would be too broad,397 since it would exclude all

391 Ad Hoc Committee Report (2003), n 38, 11–12; Ad Hoc Committee Report (1998), n 38, Annex III, 50. Some States wanted the Nuclear Terrorism Convention to apply to the activities of State armed forces and/or State-sponsored nuclear terrorism, particularly given that States are the primary possessors of nuclear material and that the legality of the use of nuclear weapons is contested and might benefit from codification. Lesser disagreements surrounded: whether radioactive dumping should be covered (Ad Hoc Committee Report (2003), above, 11–12); whether reference to the ‘environment’ should be retained (Ad Hoc Committee Report (1998), above, Annex III, 46, 47); the relationship to other instruments, particularly the nuclear non-proliferation regime (above, 45); and whether the offence of using or damaging a nuclear facility might criminalize peaceful protests (above, 47, 49).
392 OIC proposal, in Ad Hoc Committee Report (2002), n 38, 17 and Ad Hoc Committee Report (2004), n 38, 11, para 6 respectively.
396 Walter, n 393, 17–18.
397 Ad Hoc Committee Report (2003), n 38, 9.
State activity in armed conflict—not just military activities—as well as numerous non-State armed groups.398

A second disagreement concerns the issue of whether situations of ‘foreign occupation’ should also be excluded from the Convention, in addition to ‘armed conflict’.399 This is part of the same OIC proposal to exclude the activities of the ‘parties’ and is intended to cover situations where there are no hostilities and IHL may not strictly apply. Politically, it is aimed at excluding non-State violence against Israel in the Palestinian Occupied Territories and against India in Kashmir.400

It has been argued that this OIC proposal would ‘eviscerate’ the convention, by reintroducing a national liberation exception.401 Other States wanted even more explicit exemptions for self-determination movements.402 Since many terrorist acts take place in armed conflict or under foreign occupation, this proposal would neuter much of the treaty’s purpose. Such acts would remain punishable under national law, or under IHL to the extent that it applies, but would not be punishable as terrorism. In calling for ‘moral clarity’ in the drafting of the Convention, the UN Secretary-General has also implicitly criticized this approach.403 Others have called for liberation fighters to be exempted only to the extent that they do not terrorize civilians.404

A third cause of disagreement is whether State military forces exercising their official duties405 are excluded from the Convention if they are merely ‘governed’ by international law or required to be ‘in conformity’ with it. The OIC proposes that military forces would be liable for terrorism if they were not ‘in conformity’ with international law, including the law on genocide, torture, IHL, or State responsibility. These States felt that the convention should cover State and State-sponsored terrorism, notwithstanding the application of existing international law to State conduct.406 The OIC proposal

401 Halberstam, n 12, 582.
402 Working Group Report (1997), n 64, 19 (Syria), 31 (Egypt); Ad Hoc Committee Report (1997), n 38, 38 (Pakistan).
404 Ad Hoc Committee Report (2004), n 38, 7, para 16; 11, para 8.
405 In the 1997 Terrorist Bombings Convention, ‘military forces of a State’ is defined in Art 1(4) as ‘the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility’. Proposals to refer explicitly to official duties such as law enforcement, evacuation operations, peace operations, UN operations, or humanitarian relief were not adopted: Working Group Report (1997), n 64, 58 (Australia, Germany), 59 (Republic of Korea, Costa Rica, NZ).
406 Including IHL, human rights law, international criminal law, the law on the non-use of force and non-intervention, and the law of State responsibility.
lacks balance since the activities of non-State forces are not similarly classified as terrorism if they are not in conformity with international law.

In response, the ICRC warned of the danger of criminalizing acts that are not already unlawful in IHL.\(^{407}\) The ICRC stated that as a result, ‘third states would be under an obligation to prosecute or extradite persons who have not in fact committed an unlawful act under IHL’.\(^{408}\) The preferred position of the ICRC was to exclude acts covered by IHL (committed in the course of an armed conflict) from the scope of the convention.\(^{409}\) As discussed in Chapter 5, acts of terror committed in armed conflict are already prohibited and criminalized in IHL.

The ICRC position aims to maximize clarity and simplicity in the Draft Convention’s relationship to IHL. On one hand, criminalizing political violence against civilians as terrorism would seldom conflict with the objectives of IHL, just as prohibitions on genocide, crimes against humanity, and torture apply concurrently with IHL and complement it. An alternative approach would be to exclude the application of the Convention only where it directly conflicts with IHL.\(^{410}\) Yet since the Draft Convention also criminalizes violence against ‘any’ person and against property, its application to situations covered by IHL would interfere with the carefully constructed parameters of violence set by IHL, unravelling compliance with it.

The case for applying terrorist offences to the activities of State armed forces is strongest in situations where IHL does not apply, and the conduct in question does not rise to the level of crimes against humanity. Such application would confer legitimacy on the Convention for the many States, and others, who object to ‘State terrorism’. Under the present draft, only acts of State armed forces outside their official duties, and not covered by IHL, may be regarded as terrorism.\(^{411}\) Deliberate or ‘official’ State action designed to terrorize remains excluded.

Finally, the relationship between the Draft Comprehensive Convention and sectoral anti-terrorism treaties is undecided. Some States preferred no provision at all,\(^{412}\) in which case the sectoral treaties would only apply to the extent that they are compatible with the Draft Convention, as a treaty later in time.\(^{413}\) In contrast, Article 2 bis presently states that where the Convention and a sectoral treaty would apply to the same act, between parties to both, the sectoral treaty prevails,\(^{414}\) thus being regarded as lex specialis. While this provision was widely supported, some States objected that since it was

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\(^{407}\) ICRC, n 395.
\(^{408}\) ibid.
\(^{409}\) ibid.
\(^{410}\) Walter, n 393, 18–19.
\(^{414}\) Ad Hoc Committee Report (2002), n 38, 7; an approach adopted by the 1972 US Draft Convention.
designed to ‘fill gaps’ in the existing law, the Draft Convention established ‘a separate and autonomous regime’ applicable ‘in parallel with’ the sectoral treaties.415 This view correctly recognizes that terrorism is a special offence with additional and distinct elements to sectoral offences—that the Draft Convention itself is *lex specialis*. The provision may depend on resolving other disagreements.416

E. CONCLUSION

Despite the many international attempts to define terrorism generically, there is still no such crime as terrorism in international treaty law. Although some regional treaties have adopted general definitions, the variation in these definitions militates against the emergence of any shared international conception of terrorism. Some regional definitions are so broad as to be indistinguishable from other forms of political violence, or public order or national security offences. The divergent definitions also reflect the political preoccupations of particular regional groupings, especially concerning the validity of exclusions from any definition of terrorism. The next chapter examines whether customary law recognizes a generic definition of terrorism.

415 Ad Hoc Committee Report (2003), n 38, 9; Ad Hoc Committee Report (2004), n 38, 12, para 14.
416 Particularly Draft Comprehensive Convention, Art 18.