Terrorism in Customary International Law

A. INTRODUCTION

In the absence of a generic treaty crime of terrorism, analysis of customary law confirms that there is no distinct international crime, or unified legal concept, of terrorism. There is little in the literature on whether universal jurisdiction over terrorism exists, and the predominance of ‘soft law’ sources on terrorism requires a broad inquiry.¹ A number of conflicting definitions of terrorism have emerged in the practice of the UN General Assembly and the Security Council, and in national case law and legislation. While there is a definite movement towards generic definition over time, the divergent approaches to definition, and persistent disagreement over the scope of exceptions, have inhibited the emergence of a customary crime. At best, there is international consensus on condemning terrorism, or support for a prohibition on terrorism, but which is insufficiently precise to support individual criminal liability.

B. UN GENERAL ASSEMBLY PRACTICE

General Assembly resolutions normally have no binding legal effect under the Charter,² nor is it admitted that they can give rise to ‘instant custom’.³ A Philippine proposal to vest the Assembly with legislative powers was decisively rejected at San Francisco.⁴ Resolutions or a series of resolutions may, however, be declaratory of customary norms,⁵ or evidence of emergent custom or opinio juris, depending on their content and conditions of adoption.⁶ When framed as general principles they may help progressively to

⁶ Legality of the Threat or Use of Nuclear Weapons (1996) 35 ILM 809, 826; Military and Paramilitary Activities (Nicaragua v US) (1986) ICJ Reports 14, para 188; Texaco v Libya (1978)
develop and consolidate customary norms. They may also promote the adoption of treaties which elaborate upon the principles they espouse. Resolutions may express ‘common interests’ and the ‘general will’, and are an important concentration of opinion in an international community of many States. Resolutions may be especially important where other sources of customary law are unclear.

The normative significance of resolutions depends on a variety of factors: their subject matter, objectives and context; the generality and normativity of their language (including whether it is declaratory, obligatory, or recommendatory); the voting pattern (including bloc voting and the votes of specially affected States) and explanations of votes; and the position of the Security Council. States do not necessarily vote out of a sense of legal obligation, and the Assembly is foremost a political body expressing political opinions. Even resolutions adopted by consensus need not signify universal acceptance of their provisions as law, since States may not object because they believe a resolution is non-binding, or because agreement was secured due to the inclusion of vague language open to divergent interpretations. Resolutions should not be considered in isolation but as merely ‘one manifestation’ of State practice. While they provide an accelerated and ‘very concentrated focal point for state practice’, what must be examined is the


7 Brownlie, ibid, 14.
8 Tadic (Interlocutory), n 5, para 112.
15 Wolfke, n 13, 63; Villiger, n 13, 9.
17 Higgins, n 6, 2.
collective practice . . . in all its complex manifestations’, particularly whether State behaviour outside the UN conforms to even a unanimous resolution.

Resolutions framed as declarations may have direct legal effect as authoritative interpretations of the Charter. A declaration is ‘a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated’. Declarations may be authoritative statements of the international community, expressing a ‘general consensus’, creating an expectation of adherence, and potentially becoming binding as embodying customary norms. The legal authority of declarations does not, however, stem from their designation as declarations but from their usual function of restating well-settled customary norms.

1. 1970 Declaration on Friendly Relations and 1965 Declaration

The first major General Assembly resolutions referring to terrorism were adopted in 1965 and 1970. In interpreting the Charter obligation to refrain from the use of force, the 1970 Declaration on Friendly Relations, adopted without objection, states that:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to . . . involve a threat or use of force.

There is no definition of ‘terrorist acts’ and the matter received little attention during the drafting. A related provision of the 1970 Declaration notes the duty of States ‘to refrain from organizing or encouraging the organization of

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20 Brownlie, n 6, 15; Schachter, n 9, 85; Shearer, n 12, 46–47.
21 UN Office of Legal Affairs, Memorandum (1962) 34 UNESCOR Supp 8, 15, UN Doc E/CN.4/1/610.
23 Jennings and Watts (eds), n 19, 45.
24 UNOLA, n 21; see also Arangio-Ruiz, n 19.
25 Wolfke, n 13, 85.
27 1970 Declaration, Principle of Prohibition on Threat or Use of Force, para 9 (emphasis added).
irregular forces or armed bands, including mercenaries, for incursion into the territory of another State’. 28 Both provisions were intended to confront indirect uses of force after 1945. 29 The reference to ‘irregular forces or armed bands’ was non-exhaustive and intended to apply to ‘all categories of irregular forces, irrespective of their composition’ 30 and even if ‘not expressly mentioned’. 31 As such, those terms arguably encompass terrorist groups.

In the Nicaragua case, the ICJ held that the above provisions referred to ‘less grave forms of the use of force’ below the level of an ‘armed attack’, 32 which may also violate the principle of non-intervention. 33 Accordingly, in elaborating on the Charter obligation of non-intervention, the 1970 Declaration states that ‘no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State’. 34 There has equally been little judicial explication of ‘terrorist’ activities. The principle of non-intervention was designed to protect political independence, at the insistence of Eastern European and Latin American States. 35 Although some western States were sceptical of its legal status, it was eventually supported. The US noted that indirect intervention had become the most prevalent kind since 1945. 36

The principle was drawn verbatim from the 1965 Declaration on the Inadmissibility of Intervention. 37 In 1966, a committee to draft the 1970 Declaration asserted that the 1965 Declaration ‘reflects a universal legal conviction which qualifies it to be regarded as an authentic and definite principle of international law’. 38 This was contested by western States, which thought that the 1965 Declaration was too imprecise and reflected political rather than legal consensus. 39 There was much disagreement about the scope of non-intervention, and accommodation was reached on the basis of the Organization of American States (OAS) Charter and a generalizing of western hemisphere norms. 40

28 ibid, para 8.
31 UNGAOR Supp 18 (1970), n 30, para 86 (drafting Special Committee).
32 Nicaragua, n 6, para 191.
33 ibid, para 205.
34 1970 Declaration, Principle of Non-Intervention, para 2 (emphasis added).
35 Rosenstock, n 29, 726, 728.
36 ibid, 727.
37 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, annexed to UNGA Resolution 2131(XX) (1965) (109 votes to 0, with 1 abstention).
38 UNGAOR 21st Sess (1966) Annexes, UN Doc A/6230, para 341 (Special Committee); see also UNGAOR Supp 18 (1970), n 30, Special Committee Report, paras 58–59.
39 (1965) UNYB 93 (Australia, Belgium, Canada, France, Italy, NZ, Spain, the UK); Rosenstock, n 29, 728.
40 Rosenstock, ibid, 729.
There is little guidance in the drafting record on the meaning of ‘terrorist’ activities in either Declaration. In 1965, States referring to terrorism were heavily influenced by Cold War politics.\(^41\) Charges were made that the Vietcong and North Vietnam were terrorists, and counter-charges that the Vietnamese were victims of terrorism.\(^42\) The US spoke of the infiltration of agents who terrorize innocent people and impose the will of a foreign government and ideology, while Albania objected that the US financed terrorism against socialist States.\(^43\) Some States referred to Latin America as a victim of terrorism, while others condemned it for exporting terrorism.\(^44\) Colombia and Kenya emphasized State terrorism, whereas Brazil objected to liberation terrorism.\(^45\) Terrorism and subversion were often referred to interchangeably as forms of intervention.

In the absence of definition, it is significant that both uses of ‘terrorist’ in the 1970 Declaration refer to ‘acts’ or ‘activities’, rather than to terrorist groups or bands. The term is used adjectivally to qualify the nature of acts violating the non-use of force or non-intervention, not as a noun to describe a separate legal category of persons. It relates to, and elaborates on, the *jus ad bellum* (resort to force) rather than the *jus in bello* (means of force), and is only helpful in that it strengthens prohibitions on indirect force and intervention. Proposals to include State support for ‘terrorist’ acts in the 1974 Definition of Aggression were not, however, accepted,\(^46\) although the Commission on Human Rights has since designated terrorism as aggression.\(^47\)

Ultimately the precise meaning of ‘terrorist’ in the 1970 Declaration may not be legally important, because it is the use of force or intervention by a State (rather than the particular terrorist methods) which violates

42 1st Committee, ibid, 1399th mtg, 7 Dec 1965, para 16 (Australia); 1406th mtg, 10 Dec 1965, para 5 (US) and 1398th mtg, 6 Dec 1965, para 45 (China) respectively.
43 Ibid, 1396th mtg, 3 Dec 1965, para 8 (US); 1405th mtg, 9 Dec 1965, paras 66, 68 (Albania).
44 Ibid, 1400th mtg, 7 Dec 1965, para 18 (Brazil); para 28 (Honduras) respectively.
45 Ibid, 1395th mtg, 3 Dec 1965, para 28 (Colombia); 1402th mtg, 8 Dec 1965, para 21 (Kenya); 1400th mtg, 7 Dec 1965, para 13 (Brazil).
46 Proposal by the US, the UK, Australia, Canada, Italy and Japan, quoted in B Ferencz, ‘A Proposed Definition of Aggression: By Compromise and Consensus’ (1973) 22 ICLQ 407, 420; UNGAOR (27th Sess) Supp 19 (1972), UN Doc A/8719, 15 (drafting committee).
47 UNComHR Resolutions 1995/43, para 1; 1996/47, para 2; 1997/42, para 2; UNSub-ComHR Resolutions 1996/20, para 1; 1997/39, para 1. The prohibition in the 1974 Definition on States sending ‘armed bands, groups, irregulars’ to use armed force against another State (UNGA Resolution 3314 (XXIX) (1974) Annex, Art 3(g)) arguably encompasses terrorist groups, since reference to the specified groups was not intended to be exhaustive (Nicaragua, n 6, 14, para 168 (Schwebel J); G Fitzmaurice, ‘The Definition of Aggression’ (1952) 1 ICLQ 137, 143–144), but merely indicative of the kinds of groups which may use force (J Stone, ‘Hopes and Loopholes in the 1974 Definition of Aggression’ (1977) 71 AJIL 224, 237, referring to PLO terrorists). The category of ‘armed bands’ is a useful *clausula generalis* covering different uses of force: I Brownlie, ‘International Law and the Activities of Armed Bands’ (1958) 7 ICLQ 712, 713.
international law. The 1970 Declaration is declaratory of custom, and an authoritative interpretation of the Charter. It is restated or particularized in numerous resolutions on terrorism, which reflect customary norms on State responsibility, the use of force, and non-intervention, rather than evidencing new obligations specifically governing terrorism. The application of general customary rules to terrorism may indicate that States did not consider there to be any specific rules of customary law governing terrorism.

In particular, States owe long-established customary duties to diligently prevent and suppress the use of their territory for acts harmful to other States, including violence by private actors. States are also responsible for injuring, or failing to diligently prevent or suppress private harm to, foreign nationals in their territory. Both duties implicitly include harm caused by terrorist acts. Thus in Reparation for Injuries, Israel was responsible for


49 Brownlie, n 6, 15; Shaw, n 12, 179; 1970 Declaration, para 3; ‘Legal Questions’ (1970) UNYB 787.


52 Nuclear Weapons (Advisory Opinion), n 6, para 72.


54 See, eg, British Property in the Spanish Zone of Morocco (1924) 2 RIAA 640; Tehran Hostages ibid; Janes Case (US v Mexico) (1925) 4 RIAA 82, 87; Youmans Case (US v Mexico) (1926) 4 RIAA 110; Solís (1928) 4 RIAA 358, 361; Texas Cattle Claims ibid; Home Missionary Society (US v Great Britain) (1920) 6 RIAA 42; Noyes Case (US v Panama) (1933) 6 RIAA 308; see also R Lillich and J Paxman, ‘State Responsibility for Injuries to Aliens Occupied by Terrorist Activities’ (1977) 26 AULR 217, 222–251, 262–270.

failing to prevent the assassination of a UN mediator in Palestine, Count Bernadotte, by Jewish extremists in Israel.56 A State is not, however, responsible for private acts that are not attributable to it, nor for harm caused by private acts where there is no failure of due diligence. It is the question of State control of private actors (or a breach of due diligence) that is decisive, not their status as armed bands, terrorists, or otherwise.57

Since 11 September 2001, the US has drawn no distinction between the acts of terrorists and the States that harbour, train, arm, fund, or supply them,58 holding all ‘equally guilty’.59 Likewise, Israel allegedly killed twelve Palestinian police, staffing checkpoints in the West Bank, for failing to prevent the transit of ‘terrorists’ who killed six Israeli soldiers in 2002,60 although it partly justified its action as a reprisal. It is too soon to judge the customary force of this view, but it exerts pressure to modify customary rules of State responsibility on attribution,61 by holding States directly responsible for private acts even if a State does not ‘effectively control’ (or exercise ‘overall control’ over) the private actor.62 Such a change may make the identification of ‘terrorist’ acts increasingly important, given the potential for triggering more frequent claims of self-defence against terrorism.


2. The Munich Olympics and the 1972 US Draft Convention

While ‘terrorism’ had incidental significance in the 1970 and 1965 Declarations, the first concerted effort to address terrorism as a discrete subject in the General Assembly came in response to the killing of Israeli athletes at the Munich Olympics in early September 1972, and earlier attacks at an Israeli airport and on a Soviet diplomat in New York.63 In late September, the US presented to the General Assembly a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism,64 although the proposed offences were designated as of ‘international significance’ rather than as ‘terrorist’ ones.65

Article 1 proposed three principal offences of unlawfully killing, causing serious bodily harm, or kidnapping, if such acts have an international dimension,66 and are ‘intended to damage the interests of or obtain a concession from a State or an international organization’.67 Sectoral anti-terrorism treaties were to take precedence in the event of a conflict with the US Draft Convention.68 The decision of whether to prosecute or to extradite was left to the discretion of the custodial State.

The US Draft Convention was limited to international rather than domestic acts of terrorism, excluding most acts by self-determination movements.69 It was also designed to focus on individual terrorist acts, rather than State support for terrorist activity.70 It excluded acts committed by, or against, ‘a member of the Armed Forces of a State in the course of military hostilities’,71 and applicable IHL treaties would take precedence in case of a conflict.72 The US Draft Convention further stated that it does not ‘make an offence of any act which is permissible under’ IHL, nor does it deprive any person of prisoner of war status if entitled to such status in IHL.73

As a result, a prohibited act committed against a military member in

65 Murphy, n 63, 493, 505.
66 Acts must be committed by a foreign national (Art 1(a)), and outside the target State, or inside the target State but against a foreign national (Art 1(b)). A State’s territory includes all territory under its jurisdiction or administration: Art 2(c).
68 ibid, Art 14.
70 Murphy, n 63, 496.
71 1972 US Draft Convention, Art 1(c).
72 ibid, Art 13.
73 ibid, Art 13(a)–(b).
peacetime may amount to terrorism. Secondly, a prohibited act committed by a military member in peacetime may amount to terrorism, so admitting the punishment of ‘State terrorism’ (subject to State immunities). Acts committed by non-state forces in the course of military hostilities are not privileged by exclusion from the Convention, so guerilla, national liberation, or self-determination forces may be punished as terrorists in some circumstances. Since the Convention was proposed in 1972, its exclusionary provisions in relation to IHL did not refer to the recognition extended to non-state forces in the 1977 Protocols.

Despite these limitations, the US Draft Convention envisaged broad liability, since the concept of intending to damage the ‘interests’ of a State is ambiguous and open-ended. There need only be an intention to damage; no actual damage is required. The idea of ‘damage’ is not limited by any minimum degree of severity. States have any number of ‘interests’ of varying importance and there was no attempt to circumscribe the types of interests deserving special protection. There is similarly no gradation of the concept of ‘concessions’ in terms of their political significance. There were, however, no property offences in the Convention, which focused on threats to life, and few States except Israel expressed support for protecting property.

There was little support for the US initiative in a General Assembly deadlocked by Cold War politics and the ideological divide between developed and developing States, particularly over self-determination. The US sought to convene a treaty conference, but was opposed by Arab and African States, and China, which believed that it was an attempt to criminalize self-determination movements. The timing of the US proposal ensured its defeat, given the ‘heated atmosphere engendered by the Munich killings and by the charges and countercharges passing between Israel and the Arab States’.

3. Resolution 3034 (XXVII) (1972)

In place of the American proposal, UN Secretary-General Waldheim proposed an agenda item in the General Assembly on: ‘Measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms’. There was opposition to addressing terrorism without considering its causes, and the item was amended to include a ‘study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and

74 T Franck and B Lockwood, ‘Preliminary Thoughts towards an International Convention on Terrorism’ (1974) 68 AJIL 69, 76.
75 ibid.
76 Murphy, n 69, 17; Murphy, n 63, 493, 499.
77 ibid, 502.
78 Quoted in Sofaer, n 63, 903.
despair and which cause some people to sacrifice human lives, including their own, to effect radical changes. An Italian compromise to both study the causes and request the ILC to prepare a draft treaty to criminalize terrorism was rejected. In response to the agenda item, in Resolution 3034 (XXVII) of December 1972, the Assembly expressed deep concern about ‘increasing acts of violence which endanger or take innocent human lives or jeopardize fundamental freedoms’, but refrained from condemning terrorism, despite a draft proposal to that effect. While the resolution was adopted by 76 votes to 35, with 17 abstentions, some States not supporting the resolution, such as the US, did so because its language and measures were not strong enough, not from a reluctance to condemn terrorism. Similar resolutions from 1976 to 1983 attracted more support, and many States voted against or abstained for similar reasons.

In contrast, some States did not support the resolutions because of disagreements on defining terrorism, the relevance of its causes, and distinguishing liberation movements. Particularly contentious was the affirmation in 1972 of:

... the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and... the legitimacy of their struggle, in particular the struggle of national liberation movements in accordance with the principles and purposes of the Charter and the relevant resolutions of the organs of the United Nations... 87

Ambiguous affirmations of this kind were common in resolutions until 1993, and were often thought to imply either that terrorism is justifiable in pursuit of self-determination, or that acts of self-determination cannot be considered

79 Murphy, n 63, 500.
80 UNGA Resolution 3034 (XXVII) (1972), para 1; see also UNGA Resolution 31/102 (1976), para 1.
85 Schreiber, n 51, 319–320; Halberstam, n 81, 574; see UNGA Resolutions 31/102 (1976) (by 100 votes to 9, with 27 abstentions); 32/147 (1977) (by 91 votes to 9, with 28 abstentions); 32/148 (1977) (by consensus); 36/109 (1981); 38/130 (1983).
86 Schreiber, n 51, 320–321; (1977) UNYB 969 (Afghanistan, Cuba, Iran, Libya and the USSR).
terroristic at all. So too did the emphasis in Resolution 3034 (XXVII) (1972) on condemning only State terrorism: ‘repressive and terrorist acts by colonial, racist and alien regimes in denying peoples their legitimate right to self-determination and independence and other human rights’. 

One writer described Resolution 3034 (XXVII) as ‘a victory for those who supported the right to use all available measures to advance the ends of self-determination and wars of national liberation’. That conclusion is difficult to sustain from the text of the resolution. Although the title of the resolution problematically assumes that there is a causal relationship between terrorism and underlying causes, nothing in the resolution asserts that terrorism is a lawful means of pursuing just causes, or even that those causes justify or excuse terrorism, rather than simply explain it.

After 1991, resolutions on terrorism refrained from reaffirming self-determination. Proposals for an international conference to distinguish national liberation from terrorism have never been accepted, despite some support for this approach. Attempts to include liberation exceptions in sectoral treaties, such as the 1973 Protected Persons Convention and the 1979 Hostages Convention, were unsuccessful. Since 1977, many States have accepted Protocol I—which decriminalized violence by qualifying liberation movements, that complied with IHL—as resolving the ‘freedom fighter’ problem.

The 1972 resolution established an Ad Hoc Committee of 35 States to make recommendations for eliminating terrorism. The Committee reported

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90 Sofaer, n 63, 905.
91 See Ch 2 above.
95 There were 163 parties to Protocol I at April 2005: Swiss Federal Department of Foreign Affairs.
96 Cassese, n 88, 123; see generally Ch 5, and E Chadwick, Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict (Martinus Nijhoff, The Hague, 1996).
97 UNGA Resolution 3034 (XXVII) (1972) paras 9, 10; mandate renewed in UNGA Resolutions 31/102 (1976) paras 7–11 and 32/147 (1977) paras 7–11.
in 1973, 1977, and 1979, examining the definition of terrorism, its causes, and preventive measures, although there was disagreement about whether definition was a precondition for studying the causes or taking preventive measures. The debate about causes is examined in Chapter 2. The measures recommended in 1979 provided a template for future resolutions: condemning terrorism; eliminating its causes; respecting the 1970 Declaration; implementing sectoral treaties and developing new ones; encouraging cooperation, information exchange, prosecution, and extradition; and involving the UN, specialized and regional agencies. A series of later resolutions has also addressed the human rights implications of terrorism and counter-terrorism, in particular requiring anti-terrorism measures to comply with international law, including human rights, humanitarian, and refugee law.

The balance of this chapter focuses on the Assembly’s initial condemnation of terrorism and its attempts to define it. There was little normative progress in the 1970s and early 1980s, due to ideological differences between non-aligned, communist and developed States. However, as moderate Arab States and developing and communist States increasingly became victims of...
terrorism, the ideological polarization and permissive international attitudes towards terrorism began to diminish.

(a) General condemnation of terrorism

Numerous resolutions since 1979 have condemned international terrorism without defining it. In the Ad Hoc Committee, some States believed condemnation would ‘exert considerable moral influence’, while others believed it dangerous to condemn terrorism without first determining its scope. The earliest is Resolution 34/145, which ‘unequivocally’ condemned ‘all acts of international terrorism which endanger or take human lives or jeopardize fundamental freedoms’, and condemned State terrorism in the same way as the 1972 resolution. The resolution was a breakthrough of sorts, prompted by détente after the Vietnam war and the emergence of non-western victims of terrorism, such as in the OPEC hostage-taking.

The term ‘unequivocally’ implies that no justifications for terrorism are permissible. However, since some States understood terrorism to exclude acts furthering just causes ab initio, a resolution ‘unequivocally’ condemning terrorism could still be supported. The resolution attracted significant support (118 votes to 0, with 22 abstentions, including the US and the UK). Unequivocal condemnation of terrorism became a common refrain in later resolutions, with important accretions.

First, Resolutions 40/61 and 42/159 condemned ‘as criminal, all acts, methods and practices of terrorism, wherever and by whomever committed’. Terrorism, rather than only ‘international’ terrorism, was condemned; it was designated ‘criminal’ for the first time; and there was greater specification (‘all acts, methods and practices’; ‘wherever and by whomever committed’). While this language impliedly excludes justifications for terrorism, this was not the understanding of States that perceived terrorism to exclude just causes. Second, from Resolution 44/29 onwards, terrorism was routinely condemned as both ‘criminal and unjustifiable’.

This cumulatively modified formula was adopted in the Assembly’s 1994
Declaration on Measures to Eliminate International Terrorism.\textsuperscript{111} Many later resolutions further strengthened this condemnation by referring to ‘all acts, methods and practices of terrorism \textit{in all its forms and manifestations}, wherever and by whomever committed’.\textsuperscript{112} This additional language suggests that novel forms of terrorism, such as those facilitated by new technologies or by organized crime, are also condemned. UN subsidiary bodies have condemned terrorism in similar terms.\textsuperscript{113}

The designation of terrorism as criminal in 1985 was a significant turning point. One writer argues that the description of terrorist acts as ‘criminal’ is evidence of implicit customary universal jurisdiction over terrorism.\textsuperscript{114} While resolutions have not expressly posited terrorism as an international crime, Cassese writes that most international crimes originated as prohibitions on certain conduct, which did not specify the criminal consequences of such conduct,\textsuperscript{115} or precisely define its elements. Reference to criminality generally, rather than to sectoral treaty offences, may indicate a belief by States in the existence of underlying customary norms.\textsuperscript{116}

However, it is not clear from the resolutions whether terrorism itself is considered ‘criminal’, or whether that designation refers to the ordinary crimes or sectoral offences which typically comprise terrorist acts. It is also unclear whether criminality refers to the international or domestic legal order, although Van den Wyngaert accepts that the term ‘criminal’ refers to the international level rather than domestic law.\textsuperscript{117} There is, however, room for some doubt, since the emphasis in resolutions has been on transnational judicial cooperation for national prosecutions, which may relate to domestic crimes rather than to any special international ones.

Further, the condemnation of terrorism as ‘criminal’ is hortatory,\textsuperscript{118} and does not carry with it an international obligation to criminalize terrorism.


\textsuperscript{113} UNComHR Resolutions 1995/43, para 1; 1996/47, para 2; 1997/42, para 2; 1998/27, para 3; 1999/27, para 1; 2000/30, para 1; 2001/37, para 1; 2002/35, para 1; 2003/37, para 1; 2003/68, preamble; UNSubComHR Resolutions 1996/20, para 1; 1997/39, para 1; also 1994/18, para 1; 2001/18, preamble; 2002/24, preamble.

\textsuperscript{114} Schreiber, n 51, 326.

\textsuperscript{115} Cassese, n 88, 17.

\textsuperscript{116} In \textit{Tadic (Interlocutory)}, n 5, para 116, resolutions referred to ‘international humanitarian law’ rather than the treaty law of the Geneva Conventions and were held to be ‘clearly articulating the view that there exists a corpus of general principles and norms on internal armed conflict embracing common Article 3 but having a much greater scope’.


\textsuperscript{118} Dinstein, n 55, 56–57.
domestically, or to prosecute or extradite offenders. Resolutions have not purported to impose duties of this kind (nor could they), nor to suggest that such duties exist in custom. At most, resolutions have encouraged States to apprehend and prosecute or extradite perpetrators, cooperate and/or exchange information, and conclude agreements on prosecution and extradition. States have also been urged to establish jurisdiction to prosecute terrorism, but only for offences in sectoral treaties. Another resolution has stressed accountability for ‘aiding, supporting or harbouring the perpetrators, organizers and sponsors’ of terrorism. Despite asking States to exclude terrorism from the political offence exception to extradition, the Assembly has recognized the sovereign primacy of national law in extradition.

(b) Specific condemnations of terrorism

From 2001, the Assembly began to condemn particular incidents as terrorism, an approach followed earlier by the Security Council. Resolution 56/1 condemned the ‘heinous acts of terrorism, which . . . caused enormous loss of human life, destruction and damage’ in the US on 11 September 2001. Resolution 57/27 condemned terrorist acts in Bali and Moscow. The common feature of these attacks was the indiscriminate killing of civilians for political reasons, outside the theatre of hostilities in any armed conflict. It is significant that the Moscow attack was characterized as terrorism, rather than as a treaty-offence of hostage-taking, or a crime against humanity, and that the Assembly involved itself in domestic terrorism.

A resolution of 2003 condemned the ‘atrocious and deliberate attack’ on the UN Office in Baghdad, which killed the UN High Commissioner for Human Rights, fifteen UN staff, and seven others. It called for

126 UNGA Resolution 57/27 (2003), preamble (by consensus).
cooperation to bring to justice the perpetrators, organizers, and sponsors of the attack, and to prevent and eradicate terrorism.\textsuperscript{128} It is significant that the attack was categorized as terrorism, rather than as treaty offences against protected persons or UN personnel,\textsuperscript{129} or as war crimes in IHL, and it is unclear which offences the Assembly had in mind in calling for cooperation.

(c) Definition in the Ad Hoc Committee on international terrorism

In its final report, the Ad Hoc Committee refrained from defining terrorism due to the persistent disagreement among States. Terrorism was described as a ‘loaded term’ and ‘liable to diverse interpretations’, as well as a ‘highly emotional’ and imprecise term ‘encompassing many forms of violence linked to war and political oppression’.\textsuperscript{130} Others thought that no definition could accommodate the divergent views, and that terrorism was ‘extremely difficult to define’.\textsuperscript{131} The methodology of definition was also controversial, such as whether it should be general, abstract, and comprehensive; enumerative, analytical, and pragmatic; or mixed (combining generic elements with listed acts).\textsuperscript{132} Yet others thought the ‘substance’ or ‘framework’ of terrorism could be identified for taking preventive measures,\textsuperscript{133} without requiring precise definition.

In proposing definitions, some States emphasized violence for political motives or objectives,\textsuperscript{134} or for coercive (but not necessarily political) ends.\textsuperscript{135} Venezuela proposed the twin aims of instilling terror and achieving a political objective, thus narrowing the definition. For some, acts motivated by ‘material gain or personal satisfaction’ were not terrorism,\textsuperscript{136} whereas other proposals explicitly included private motives.\textsuperscript{137} All proposals specified an international element, commonly by reference to territory or nationality.\textsuperscript{138} Some of the proposals specified the perpetrators and/or the victims of terrorism,\textsuperscript{139} or listed serious violent acts, in conjunction with generic elements.\textsuperscript{140}

\textsuperscript{129} 1973 Protected Persons Convention; 1994 Convention on UN and Associated Personnel.
\textsuperscript{130} Ad Hoc Committee Report (1979), n 98, 25, para 88 and Ad Hoc Committee Report (1973), n 98, 5, para 13 respectively.
\textsuperscript{131} Ad Hoc Committee Report (1979), n 98, 11, para 34 and 26, para 90 respectively.
\textsuperscript{132} Respectively: Ad Hoc Committee Report (1973), n 98, 6, para 14 and Ad Hoc Committee Report (1979), n 98, 11, para 33; Ad Hoc Committee Report (1973), n 98, 6, para 15; Ad Hoc Committee Report (1973), n 98, 11, para 36.
\textsuperscript{133} Ad Hoc Committee Report (1973), n 98, 12, para 36.
\textsuperscript{134} ibid, 7, para 19; 15, para 48; Annex, 22 (Haiti); 23 (Venezuela).
\textsuperscript{135} ibid, Annex, 21 (France); 22 (Greece); Ad Hoc Committee Report (1979), n 98, 13, para 43.
\textsuperscript{136} Ad Hoc Committee Report (1973), n 98, 7, para 19.
\textsuperscript{137} ibid, Annex, 21 (Non-Aligned States), 22 (Greece).
\textsuperscript{138} ibid, Annex, 21 (France) 11, 36 (Greece), 22 (Haiti), 23 (Venezuela).
\textsuperscript{139} ibid, Annex, 22 (Greece, Haiti), 23 (Venezuela).
\textsuperscript{140} ibid, Annex, 23 (Venezuela); 26 (Greece); 28–33 (US).
Some States simply enumerated objective violent acts considered terrorist, without generic elements.\(^{141}\)

Among the most divisive issues was the belief that ‘State terrorism’ was the most harmful, noxious, cruel, pernicious, or dangerous form of terrorism.\(^{142}\) Conversely, violent struggles were seen as ‘a negation of terrorism’ and an attempt to secure human rights and a just legal order.\(^{143}\) A very wide range of activity was considered State terrorism.\(^{144}\) This included violations of existing legal norms on aggression, use of force, self-determination, apartheid, discrimination, foreign occupation, colonial domination, non-intervention, non-interference, subversion and infiltration, mercenaries, acts of terror against civilians, terror bombing, torture, massacres, mass imprisonments, and reprisals.

It also included more ambiguous, extra-legal acts, such as oppression, serfdom, hegemony, use of defoliants, economic destruction, preventive action, banditry by fascists or intelligence services, and the nuclear ‘balance of terror’. Concrete examples of State terrorism suggested included Israeli occupation of Palestine, armed provocation by Israel against Arab States and Uganda, and acts of Zionists, national immigrant centres and fascist groups.\(^{145}\) Rhodesia and South Africa were also accused of ruling by terror.\(^{146}\)

While a number of proposed definitions included State terrorism,\(^{147}\) other States sought to limit terrorism to non-State violence. The principal objection was that State violence was already regulated by existing norms (including the UN Charter, the 1970 Declaration, self-determination, and human rights law) and institutions (such as the Security Council), and it was therefore ‘unnecessary and inappropriate to revert to those questions’.\(^{148}\) It was also

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\(^{141}\) ibid, Annex, 23 (Nigeria); 33–34 (Uruguay);

\(^{142}\) ibid, 8, para 24; 18, para 62; Ad Hoc Committee Report (1977), n 98, 14, para 11 (Algeria); Ad Hoc Committee Report (1979), n 98, 8, para 26.

\(^{143}\) Ad Hoc Committee Report (1979), n 98, 9, para 28.

\(^{144}\) ibid, 8, para 26; 9, para 28; 12, paras 39–40; Ad Hoc Committee Report (1973), n 98, Annex, 24 (Algeria).


\(^{146}\) Ad Hoc Committee Report (1977), n 98, 31, para 20 (Tunisia).

\(^{147}\) Ad Hoc Committee Report (1973), n 98, Annex, 21 (Non-Aligned States: Algeria, Congo, Democratic Yemen, Guinea, India, Mauritania, Nigeria, Syria, Tunisia, Tanzania, Yemen, Yugoslavia, Zaire, and Zambia); 22–23 (Iran); 23 (Venezuela); 24 (Algeria).

argued that the acts of armed forces in armed conflict were extensively covered by IHL and human rights law.\textsuperscript{149}

Apart from resolutions reiterating the 1970 Declaration and the 1974 Definition of Aggression, few resolutions have explicitly referred to State terrorism. A 1984 resolution was devoted entirely to the ‘Inadmissibility of the policy of State terrorism’,\textsuperscript{150} but the acts it describes are no more than a political relabelling of State responsibility for violations of existing legal norms mentioned in the resolution.\textsuperscript{151} It is not evidence of separate customary norms on State terrorism, nor does it define it. It must also be interpreted in the light of its large number of abstentions.\textsuperscript{152}

The other divisive issue was the attempt to exclude self-determination, liberation, or independence movements from the prohibition of terrorism.\textsuperscript{153} The USSR also sought to exclude demonstrations by workers opposed to exploitation.\textsuperscript{154} Exclusion provisions are found in a number of proposed definitions.\textsuperscript{155} Other States thought this amounted to double standards ‘based on ideological criterion [sic] and vestiges of the cold war’ and argued for no exceptions.\textsuperscript{156} The inability to agree on the exception partially accounts for the failure to reach agreement on definition.

(d) Subsequent Resolutions on definition

The deep division on definition prevented the Assembly from addressing the question for many years. In Resolution 42/159, the Assembly recognized that a ‘generally agreed definition’ would make the struggle against terrorism more effective.\textsuperscript{157} Yet no concrete definition was forthcoming until 1994. In the meantime, some resolutions indicated some of the characteristics of terrorism. A preliminary step was Resolution 48/122, which did not define terrorism but described some of its attributes, as:

\textsuperscript{149} Ad Hoc Committee Report (1973), n 98, 8, para 24; 12, para 37; see also Ad Hoc Committee Report (1977), n 98, 15, para 14 (Sweden); 23, para 16 (Italy); 34, para 29 (UK).
\textsuperscript{150} UNGA Resolutions 39/159 (1984).
\textsuperscript{151} ibid, preamble, including the non-use of force, territorial integrity and political independence, non-intervention, self-determination, and sovereignty over natural resources.
\textsuperscript{152} UNGA Resolution 39/159 (1984) was adopted by 117 votes to 0, with 30 abstentions.
\textsuperscript{153} Ad Hoc Committee Report (1973), n 98, 12, para 37; Ad Hoc Committee Report (1977), n 98, 27, para 37 (Haiti); 26–27, para 35 (Yugoslavia); 26, para 33 (Ukraine); 28, para 2 (Czechoslovakia); 30, para 13 (Venezuela); 30, para 15 (USSR); Ad Hoc Committee Report (1979), n 98, 24, para 82.
\textsuperscript{154} Ad Hoc Committee Report (1979), n 98, 5–6, para 16; Ad Hoc Committee Report (1977), n 98, 30, para 15 (USSR).
\textsuperscript{155} Ad Hoc Committee Report (1973), n 98, Annex, 22 (Greece), 23 and 27 (Nigeria), 21 (Iran).
\textsuperscript{156} Ad Hoc Committee Report (1979), n 98, 7, para 23 and 24, para 83.
...activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and having adverse consequences on the economic and social development of States...\(^\text{158}\)

The resolution also characterized terrorism as the killing, massacre, and maiming of innocent persons ‘in indiscriminate and random acts of violence and terror, which cannot be justified under any circumstances’.\(^\text{159}\) A more comprehensive definition was provided in the 1994 Declaration on Measures to Eliminate International Terrorism:

*Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them...*\(^\text{160}\)

Although the provision was not expressly presented as a definition,\(^\text{161}\) it implicitly serves that function, at least as a working premise for the Assembly. The 1994 Declaration has been affirmed in later resolutions,\(^\text{162}\) and partly reflects the definition in the 1937 League Convention.

Cassese argues that the 1994 Declaration is evidence of ‘broad agreement’ on the ‘general definition of terrorism’,\(^\text{163}\) influenced also by the 1999 Terrorist Financing Convention and IHL provisions on terror.\(^\text{164}\) This partly underpins a wider argument that terrorism is a customary crime with distinct elements: (1) violent (national) criminal acts; (2) a special intent (*mens rea*) to spread terror (or fear or intimidation) by violence or threats of violence against the State, the public or a group; and (3) a political, religious, ideological, or other (non-private) motive.\(^\text{165}\) For Cassese, there is general agreement on a definition, but the scope of exceptions remains contentious.\(^\text{166}\) Kolb agrees that there is nascent universal jurisdiction over terrorism.\(^\text{167}\) In


\(^{160}\) UNGA Resolution 49/60 (1994) annexed Declaration, para 3 (emphasis added).

\(^{161}\) Halberstam, n 81, 576.


\(^{164}\) Cassese, n 88, 121–122.

\(^{165}\) Cassese, n 62, 994; Cassese, n 163, 246, 259; Cassese, n 88, 120–131.

\(^{166}\) Cassese, n 88, 121.

\(^{167}\) Kolb, n 1, 87–88; cf R Kolb, ‘The Exercise of Criminal Jurisdiction over International Terrorists’ in Bianchi (ed), n 55, 227, 276–278.
theory, the assertion by States of excuses or justifications for violations of a customary rule need not challenge or undermine the existence of the rule itself.\textsuperscript{168}

The normative weight of the 1994 definition must be evaluated in the light of a number of factors. On one hand, as a Declaration it is of greater importance than ordinary resolutions. It was adopted without a vote, suggesting a degree of consensus among States, and has been reiterated in numerous later resolutions.\textsuperscript{169} The reference to ‘criminal acts’ invokes normative language, rather than mere exhortation or aspiration. On the other hand, there is little support for the view that the definition declares custom. The Declaration itself emphasizes the need to progressively develop and codify the law on terrorism,\textsuperscript{170} far from purporting to reflect existing rules. Adoption by consensus does not guarantee unanimity among States, just that there are no formal objections.\textsuperscript{171} States may also have supported it for non-legal reasons.

Indeed, in the Sixth Committee, a number of States proposed legal definitions, or gave concrete examples, of terrorism at variance with the 1994 Declaration.\textsuperscript{172} More importantly, many States argued that there was still a need to define terrorism and/or to adopt a comprehensive treaty,\textsuperscript{173} and to distinguish self-determination struggles.\textsuperscript{174} Subsequently, the many States of the Non-Aligned Movement and the OIC have insisted on legal definition and the differentiation of liberation struggles—even while approving the 1994 Declaration.\textsuperscript{175}

The statement in the 1994 Declaration that terrorist acts are ‘unjustifiable’ must be cautiously interpreted in this light. While other States dismissed the

\textsuperscript{170} 1994 Declaration, para 12.
\textsuperscript{172} UNGAOR (49th Sess) (6th Committee), 13th mtg, 19 Oct 1994, para 3 (Germany); 14th mtg, 20 Oct 1994, para 5 (Sudan); para 23 (Pakistan); paras 74, 78 (Turkey); 15th mtg, 21 Oct 1994, paras 44–45, 60 (Kuwait); para 59 (Iraq); para 25 (Libya); para 26 (US).
\textsuperscript{173} ibid, 14th mtg, 20 Oct 1994, para 5 (Sudan), 13 (India), 27 (Algeria), 71 (Nepal); 15th mtg, 21 Oct 1994, para 4 (Sri Lanka), 9 (Iran), 18–19 (Libya).
\textsuperscript{174} ibid, 14th mtg, 20 Oct 1994, para 6 (Sudan), 20 (Syria), 24 (Pakistan); 15th mtg, 21 Oct 1994, para 9 (Iran), 18–19 (Libya).
need for a definition and/or a convention, the 1994 definition must be viewed as a compromise formula, which identifies a minimal political agreement on the scope of terrorism, but falls short of a legal definition, left to another day. There is further a ‘lack of universal opinio juris’ on the scope of terrorism ratione personae, as to whether a crime is limited to private actors or also encompasses State conduct. State practice reveals that States remain ‘profoundly divided’ on definition, notwithstanding resolutions evidencing ‘a clear sign of deep concern regarding the problem’.

Cassese also relies too heavily on resolutions as evidence of custom. The resolutions must be interpreted cautiously, since parallel UN treaty negotiations since 2000 have been unable to reach agreement on a legal definition. Against that background, it is difficult to interpret resolutions as sufficient evidence of a customary crime, particularly since the 1994 definition is quite different to that in the Draft Comprehensive Convention.

Further, treaties negotiated after 1994—including the 1999 Terrorist Financing Convention and regional treaties—have adopted different definitions, suggesting that the definition of terrorist crimes remains contested. While Cassese states that the 1994 definition ‘is not far from, and indeed to a large extent dovetails with’ the definition in the 1999 Terrorist Financing Convention, that is a misdescription. The 1994 Declaration defines terrorism as criminal acts intended to provoke terror in certain persons for political purposes. In contrast, the 1999 definition refers to serious violent acts for the purpose of intimidating a population, or compelling a government or international organization. The first definition focuses on a mental state inflicted for a political purpose, whereas the second focuses on coercive or intimidatory objectives for whatever purpose—including non-political ones. The 1999 definition should also be read cautiously since it does not establish general terrorist offences, but triggers only financing offences. In any event, Cassese’s proposed definition lacks reference to the element of compelling a government or international organization, at least where such compulsion does not also intimidate or terrorize.

Cassese further relies on the terrorism provisions in IHL to support the contention that there is a customary crime of terrorism. Yet, as Chapter 5 explains, terrorism has a distinctive meaning in armed conflict and States have not abstracted and generalized that definition to create a general crime of terrorism outside the context of armed conflicts. More specifically, terrorism

176 UNGAOR (49th Sess) (6th Committee), 14th mtg, 20 Oct 1994, para 18 (Sweden for Nordic States), 38 (Romania), 41 (Israel), 56 (Venezuela); 15th mtg, 21 Oct 1994, para 40 (Hungary), 57 (Germany for EU).
177 G Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’ in Bianchi (ed), n 55, xiii, xx.
178 Nuclear Weapons (Advisory Opinion), n 6, paras 67 and 71 respectively.
179 Cassese, n 88, 124.
180 1999 Terrorist Financing Convention, Art 2(1)(b).
in armed conflict has not been interpreted to require a political, religious, ideological, or other motive, which Cassese claims is a core part of the customary definition of terrorism.

There have been few extradition requests or prosecutions pursuant to the 1994 definition, which has only marginally influenced national laws. At best, the definition reflects nascent political agreement on a shared concept of terrorism, but not legal agreement evidencing a customary crime. Voting support for such resolutions may have been conditioned on the understanding that they did not generate criminal liability. It would be surprising if the protracted disputes on definition in the treaty context could be circumvented by a relatively recent series of non-binding resolutions, unsupported by State behaviour in conformity with the 1994 definition.

(e) Particular manifestations of terrorism

Occasionally, the Assembly has addressed particular types of terrorism. Indeed, many of the sectoral treaties were adopted under its auspices. Other resolutions have called for the prevention of hostage-taking and addressed the detection of explosives and harmful substances. States have also been encouraged to prevent terrorists from using electronic systems; abusing social, cultural and charitable groups (including for financing terrorism); and being involved with organized crime.

In 2003–04, three resolutions were devoted to preventing terrorists from acquiring weapons of mass destruction (WMDs) and their means of delivery. The emphasis on prevention indicates States’ concerns at the consequences of even a single use of WMDs; the preambles call the problem a ‘threat to humanity’. This judgment is borne out by the literature on terrorism and WMDs, which, while sometimes alarmist and unsubstantiated by

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181 See ‘E. National Terrorism Legislation’ below.
evidence of particular threats, holds that the risk of WMDs warrants a firm precautionary approach.

4. Summary of Assembly practice

Attempts in the Assembly to define terrorism in the 1970s were unsuccessful, largely due to Cold War politics and differences over decolonization. Over time, gradual progress was made towards definition, as terrorism was condemned as criminal and unjustifiable; the early emphasis on State terrorism dissipated; and the implicit exemption of self-determination movements was eliminated from resolutions.

In 1994, political agreement was reached on a working definition of terrorism—instilling fear for political purposes—but falling short of a legal definition. There is not yet sufficient evidence of a customary crime based on this definition, given the absence of wider State practice (such as national prosecutions or laws), and the ongoing disagreement on definition in the treaty negotiation context. It is, however, plausible that a customary prohibition on terrorism, as minimally defined in 1994, has emerged, but not yet criminal liability for breaches of that prohibition.

Customary norms are, however, reflected in early Assembly declarations, often reiterated, which affirm States’ duties not to support terrorism against other States amounting to a use of force or an intervention. Yet State responsibility for terrorism is a subset of the long-established customary rule that States are responsible for unlawful harm caused to other States, although, in practice, the identification of ‘terrorist’ actors may be necessary for purposes of attribution and/or self-defence. While fulfilling these duties may require domestic criminalization or extradition of terrorists, divergences in national definitions preclude the existence of a customary crime.

C. UN SECURITY COUNCIL PRACTICE

The question of terrorism was largely consigned to the General Assembly prior to 2001, reflecting the structural dichotomy between the Assembly as the ‘soft UN’ and the Council as the ‘hard UN’. There has been


189 Schreiber, n 51, 327–328.
little scrutiny of the breadth of Council resolutions on terrorism before 11 September 2001. Until then, resolutions did not impose measures against terrorism generally, nor did they define it. However, various resolutions after 1985 designated specific incidents, and types of violence by and against various actors, as terrorism. The first part of this section deductively and incrementally identifies the substantive content of ‘terrorism’ in Council practice, notwithstanding the lack of consistency in the designation of acts as terrorism.

The second part examines radical shifts in the Council’s approach after September 2001. Since then, the Council has imposed binding, quasi-legislative measures against terrorism in general, unconnected to specific incidents, and unlimited in time. The Council has also regarded ‘any’ act of terrorism as a threat to peace and security, regardless of its severity, or international effects. Yet, the Council failed to define terrorism until late 2004, despite using it as an operative legal concept with serious consequences for individuals and entities. For three years, States could unilaterally define terrorism and assert universal jurisdiction over it, despite wide divergences in national definitions. The Council’s 2004 definition raises other problems, since it is non-binding (allowing States to preserve unilateral definitions) and potentially conflicts with multilateral treaty negotiations on defining terrorism.

1. Legal implications of Council resolutions

Council resolutions do not formally create international law, but are normative obligations on member States under the Charter. The Council is ‘a political organ having legal consequences’, determined by the terms of a resolution, surrounding discussions, the Charter provisions invoked, and all


197 ibid.
the circumstances. Resolutions may also assist in interpreting the Charter; evidence general principles of law, or reflect opinio juris, ‘provided that their subject-matter is not restricted to particular circumstances.’ Unanimous Council resolutions may be of ‘great relevance to the formation of opinio juris.’ Even non-binding resolutions may influence State behaviour or evidence general principles of law. The Council’s repeated reference to terrorism over time may, therefore, be of normative significance to the development of that concept in customary law. However, given the Council’s unrepresentativeness, evidence of more general acceptance (or acquiescence) is required. Resolutions alone will seldom reflect the necessary opinio juris and generality of State practice.

In applying legal rules to specific situations over time, resolutions may have precedential effects in equivalent situations, notwithstanding the absence of any doctrine of precedent in international law. The application of a norm to a specific case is inevitably a ‘law-creative act’. Precedents are especially important in relation to security because ‘the body of principles is still so fragmentary and abstract’: ‘Such precedents contribute the specificity which is essential to convert the “soft” law of the Charter into the “hard” law needed for effective implementation. Greater precision through case law may also contribute to more rational treatment of particular problems.’ In applying legal rules to specific situations over time, resolutions contribute to ‘the stream of authoritative decisions which are looked to as a source of law’. Caution is, however, warranted, given that the Council is foremost a political decision-maker rather than a judicial body applying legal principles and there is not always proper consideration of relevant legal issues. While there are risks in developing international law through ‘the ad hoc and piecemeal reactions of a political organ to particular crises’, this may not be so ‘different from the process by which law ingests the haphazard practice of States’. Coordinated consideration of a problem by the Council may

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201 de Brichambaut, n 196, 273.
202 Tadic (Interlocutory), n 5, para 133.
204 Hulsroj, n 200, 70.
206 Gowlland-Debbas, n 205, 300.
208 Schachter, n 203, 964.
209 ibid.
210 Higgins, n 207, 6.
211 ibid, 6–7.
212 Gowlland-Debbas, n 205, 301.
sometimes promote more legal coherence than the unsystematized, unilateral reactions of individual States.

The Council’s presidential statements, adopted by consensus, do not generally create binding obligations on States, although they may bind the Council, its members, and the UN Secretariat on organizational and procedural matters.213 In principle, a Council ‘decision’ binding States under Articles 25 and 27 and Chapter VII of the Charter could be taken in the form of a Presidential Statement, although this has not yet occurred.214 Nonetheless, the terms of statements should be closely examined and they may reinforce and implement binding resolutions.215

2. Council resolutions before 1985

Until the 1990s, the Council was reluctant to regard terrorist acts as threats to peace and security, although this was attributable more to Cold War politics than to an absence of terrorist threats. Some of the most flagrant terrorist acts, such as the attack on Israeli athletes at the Munich Olympics in 1972, or the Air France flight hijacked to Entebbe in 1976,216 failed to produce any action by the Council. In cases involving State violence against civilian aircraft,217 and non-State aircraft hijacking and hostage-taking,218 the Council treated such acts within the legal frameworks on the use of force and on international civil aviation (including the 1944 Chicago Convention), without reference to ‘terrorism’, allowing it to avoid the political and ideological disputes surrounding that term.

The Council’s response to the occupation of the US Embassy in Tehran by revolutionary students in November 1979 similarly avoided referring to ‘terrorism’. Instead, a series of resolutions dealt with the incident within the legal frameworks of diplomatic and consular immunities and State responsibility.219 The Council’s involvement was overtaken by a negotiated settlement in January 1981, resulting in the release of the hostages, and overshadowing

214 ibid, 450.
215 ibid, 454-458.
217 eg UNSC Resolutions 262 (1968) (Israel attacked Beirut airport); 616 (1988) (US destroyed an Iran Air flight; an ICJ action was discontinued after a settlement: Aerial Incident of 3 July 1988 (Iran v US) (Order of Discontinuance) 22 Feb 1996); 1067 (1996) (Cuba shot down two civil aircraft).
218 UNSC Resolutions 286 (1970) (appealing for the release of hostages held in hijackings and calling on States to prevent hijackings); 337 (1993) (condemning Israel for forcibly diverting and seizing an Iraqi Airways aircraft from Lebanese air space).
219 UNSC Resolutions 457 (1979) and 461 (1979).
Iran’s non-compliance with an adverse ICJ judgment of May 1980. Reparations proceedings before the ICJ were discontinued in May 1981 and later dealt with through a bilateral claims process.

3. Hostage-taking in the 1980s

The first Council resolution to use the term ‘terrorism’ was Resolution 579 of 1985, in response to a spate of terrorist acts in the preceding year. On the day of the resolution, Palestinian suicide bombers killed twenty people at US and Israeli check-in desks at Rome and Vienna airports. Resolution 579 condemned ‘all acts of hostage-taking and abduction’ as ‘manifestations of international terrorism’. Hostage-taking and abduction (and impliedly, terrorism) were considered ‘offences of grave concern to the international community’, endangering human rights and friendly relations.

In 1988, Resolution 618 condemned the abduction of a UN military observer in Lebanon and demanded his release. The Council President reported in 1989 that the UN observer ‘may have been murdered’ and called for international action against hostage-taking and abductions as ‘unlawful, criminal and cruel acts’. Resolution 638 was adopted unanimously soon after, condemning hostage-taking and abduction in general and demanding the release of all victims. States were urged to become parties to relevant treaties, and to prevent, prosecute, and punish ‘all acts of hostage-takings and abductions as manifestations of terrorism’.

The classification of all hostage-takings and abductions as terrorism discounts political motives, an intent to instil fear, or intimidatory or coercive aims, as the defining elements of terrorism. Instead, it is objectively defined by the prohibited methods of hostage-taking and abduction—even if done for private ends—and despite the political motives underlying the specific incidents the Council was responding to.

The preamble to Resolution 638 also stated that such acts were ‘serious violations’ of IHL, indicating that the Council regarded those acts as governed by an existing legal framework when committed in armed conflict.

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220 *Tehran Hostages*, n 53.
221 *Tehran Hostages case (Order of Discontinuance)*, 12 May 1981.
222 Including the hijackings of a Kuwaiti aircraft in December 1984; a Jordanian aircraft, a Middle East Airlines flight, and a TWA flight in June 1985; an Egyptair flight in November 1985; the seizure of the Achille Lauro in October 1985; and the seizure of 25 Finnish UN soldiers by the South Lebanon Army in June 1985.
223 UNSC Resolution 579 (1985) paras 1 and 5; see also UNSC Pres Stat (9 Oct 1985).
224 UNSC Resolution 579 (1985) preamble; see also 638 (1989) preamble.
225 UNSC Resolution 618 (1988) preamble and paras 1–2 respectively.
228 ibid, paras 4–5.
is the approach of the 1979 Hostages Convention, which excludes hostage-taking constituting a grave breach of the Geneva Conventions and Protocols. Thus hostage-taking in armed conflict, including by liberation movements, is treated as a war crime rather than as the general treaty crime of hostage-taking.

There are numerous IHL provisions prohibiting hostage-taking in armed conflict. Traditionally, hostage-taking aimed to intimidate a resisting enemy population, to ensure its obedience and secure control of occupied territory. It was thus a deliberately political use of violence. In contrast, a wider definition is given to the hostage-taking offences in the 1998 Rome Statute, which requires that the ‘perpetrator intended to compel a State, an international organization, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person or persons’. This definition is similar to that in the 1979 Hostages Convention, suggesting a harmonization of the meaning of hostage-taking in armed conflict and in peacetime. The modern view covers any hostage-taking to obtain a concession or advantage, including for private reasons, such as financial gain. It thus loses some of the specificity of its earlier linkage to explicitly political violence. The modern view is consistent with the Council’s approach to regarding all hostage-taking as forbidden. It is also supported by the customary prohibition on hostage-taking (whether military or civilian) and complemented by the human right to be free from arbitrary detention.

In later Resolution 1502 (2003), on the protection of UN, humanitarian and associated personnel in conflict zones, the Council strongly condemned:

...forms of violence, including, inter alia, murder, rape and sexual assault, intimidation, armed robbery, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed, as well as attacks on humanitarian convoys and acts of destruction and looting of their property...

229 1979 Hostages Convention, Art 12.
231 1949 Geneva Conventions, common Art 3(1)(b); 1949 Fourth Geneva Convention, Art 34; 1977 Protocol II, Art 4(2)(c); 1993 ICTY Statute, Art 2(h); ICTR Statute, Art 4(c); 1998 Rome Statute, Art 8(2)(a)(viii) (international conflicts) and Art 8(2)(c)(iii) (non-international conflicts).
233 1998 Rome Statute: Elements of Crimes (2002); common element 3, Art 8(2)(a)(viii) and (c)(iii).
235 ICRC Study, n 168, 336.
What is significant here is the omission of any reference to ‘terrorism’ against UN personnel in armed conflict. This may suggest that by 2003, the Council had retreated from categorizing the hostage-taking of UN personnel, such as the abduction of a UN observer in Lebanon in 1988, as terrorism, instead invoking more established legal categories under humanitarian, human rights and refugee law.\textsuperscript{237} On the other hand, a resolution in the same year condemned a ‘terrorist attack’ on UN headquarters in Baghdad,\textsuperscript{238} indicating that violence against UN staff may still be regarded as terrorist.


In 1989, the Council President condemned the assassination of Lebanese President Rene Muawad in Beirut as a ‘cowardly, criminal and terrorist act’ and ‘an attack upon the unity of Lebanon, the democratic processes and . . . national reconciliation’.\textsuperscript{239} It is significant that the Council regards assassination as terrorism. To the contrary, some argue that since assassination targets individuals, it is not capable of causing terror generally.\textsuperscript{240} Such a conclusion is suspect, because assassination is likely to terrify (at least) other politicians and their supporters, who share the victim’s political beliefs. While an isolated assassination does not necessarily put the public in fear, it may have that effect. If prohibiting terrorism aims to protect peaceful, deliberative politics,\textsuperscript{241} then assassination will often qualify as terrorism, and is popularly regarded as such.

Sixteen years later in 2005, the former Lebanese Prime Minister, Rafiq Hariri, was assassinated in Beirut, with many others killed or injured. A Council Presidential Statement unequivocally condemned the ‘terrorist bombing’ and called on the Lebanese government ‘to bring to justice the perpetrators, organizers and sponsors of this heinous terrorist act’.\textsuperscript{242} The Council was concerned that the murder would jeopardize the holding of parliamentary elections in ‘transparent, free and democratic conditions’ and destabilize Lebanon and its democracy. The assassination arguably had the converse effect, hastening a complete Syrian withdrawal from Lebanon.\textsuperscript{243}

A fact-finding mission to Lebanon involving the UN Secretary-General concluded soon after that ‘the Lebanese investigation process suffers from

\textsuperscript{237} UNSC Resolution 1502 (2003) para 3.
\textsuperscript{238} UNSC Resolution 1511 (2003) para 18.
\textsuperscript{239} UNSC Pres Stat (22 Nov 1989) S/20988.
\textsuperscript{241} See Ch 1 above.
\textsuperscript{243} See UNSC Pres Stat 2005/17 (4 May 2005) (including military and intelligence personnel).
serious flaws and has neither the capacity nor the commitment to reach a satisfactory and credible conclusion’.244 In response, Council Resolution 1595 of April 2005 established an independent international investigation Commission, based in Lebanon, ‘to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices’.245 The Commission was empowered to collect evidence, interview witnesses, move freely in Lebanon, and enjoy the necessary facilities and cooperation from the authorities.246 It could also determine its own procedures of investigation, ‘taking into account the Lebanese law and judicial procedures’.247 The creation of the Commission is significant because it inserts an international investigative body into a domestic justice system, although Lebanon remained responsible for any prosecutions and was required only to take into account the investigation’s findings.248

In Resolution 1636 of October 2005, the Council was concerned at the Commission’s conclusion that Syrian and Lebanese officials were involved in the assassination,249 commended Lebanon for arresting former security officials suspected of involvement, and extended the Commission’s mandate.250 It imposed travel bans on, and froze the funds, assets, and resources of, individuals designated by Lebanon or the Commission as involved in the assassination.251 Such steps were intended to assist in the investigation and not to prejudice judicial determination of responsibility.252

Further, Syria was required to cooperate fully and to detain any officials or individuals whom the Commission suspected of involvement and to make them available for interview by the Commission.253 The Council also insisted that Syria should not interfere in Lebanese affairs, and warned that any State involvement in the assassination would violate States’ obligations ‘to prevent and refrain from supporting terrorism’ and to respect Lebanon’s sovereignty and political independence.254 The Council warned of ‘further action’ in the event of Syrian non-compliance.255

Despite these strong measures, assassinations continued in Lebanon in

244 UNSC Resolution 1595 (2005) preamble.
249 UNSC Resolution 1636 (2005), para 2: ‘there is converging evidence pointing at the involvement of both Lebanese and Syrian officials in this terrorist act, and that it is difficult to envisage a scenario whereby such complex assassination could have been carried out without their knowledge’.
251 UNSC Resolution 1636 (2005) para 3(a), subject to the approval of a Security Council Committee.
252 ibid, para 3.
253 ibid, paras 11 and 5.
254 ibid, paras 12 and 4–5.
255 ibid, para 12.
2005, consolidating a long history of the practice in that country. Council Presidential Statements condemned the separate assassinations of Lebanese journalist Samir Qassir (‘a symbol of political independence and freedom’) and former Communist Party leader George Hawi in June 2005.256 A Statement in December 2005 condemned a ‘terrorist bombing’ in Beirut that killed ‘Lebanese member of Parliament, editor and journalist Gebrane Tueni, a patriot who was an outspoken symbol of freedom’ and of Lebanese sovereignty and independence.257 These statements confirm that the Council regards ‘political assassinations’ as ‘terrorist acts’ which ‘undermine security, stability, sovereignty, political independence and . . . civil accord’.258 They also call on Lebanon to bring to justice those responsible for the attacks and for other States to respect Lebanon’s sovereignty, territorial integrity, unity, and political independence.

Soon after, Council Resolution 1644 of December 2005 extended the Commission’s mandate to June 2006 and demanded that Syria cooperate ‘unconditionally’ and respond ‘unambiguously and immediately’ with the Commission’s investigation.259 On Lebanon’s request, the Council expanded the Commission’s mandate to investigate terrorist attacks in Lebanon since October 2004,260 when Minister Marwan Hamade was killed. In addition, the Council acknowledged Lebanon’s request that those responsible for killing Prime Minister Hariri be tried by ‘a tribunal of an international character’ and requested the Secretary-General to identify the assistance needed.

The latter measure did not specify for which crimes those responsible might be tried. International tribunals typically prosecute international crimes rather than domestic crimes such as murder. Yet, there is no international crime of ‘assassination’ as such, although a pattern of organized political killings may amount to the crime against humanity of murder, where it is part of a systematic attack on the civilian population, and particularly where a foreign State such as Syria is involved. There is, however, room for doubt, and isolated or sporadic assassinations may not meet the threshold of crimes against humanity. Alternatively, it is open to the Council to confer jurisdiction over crimes of ‘international terrorism’ on an international tribunal, although that would arguably amount to retrospective punishment in the absence of any existing treaty or customary crime of terrorism as such.

In his report to the Security Council on 21 March 2006, the Secretary-General recommended establishing a mixed or hybrid tribunal with both Lebanese and ‘significant’ international participation. He noted that Lebanon would prefer to apply Lebanese substantive criminal law, although

256 UNSC Pres Stat 2005/22 (7 Jun 2005) and 2005/26 (22 Jun 2005) respectively.
260 ibid, para 6–7.
specific charges would depend on the results of the investigation. Thus, the assassinations and bombings in Lebanon may ultimately be prosecuted simply as murder or other common crimes, although there are also terrorism offences in Lebanese law. The Secretary-General further observed that security concerns would make it difficult to establish an effective tribunal within Lebanon itself, such that any tribunal may need to be located elsewhere. In response to his report, Security Council Resolution 1664 (2006) asked the Secretary-General to negotiate with Lebanon with the aim of ‘establishing a tribunal of an international character based on the highest international standards of criminal justice’ and in light of the Secretary-General’s report.

5. Plastic explosives 1989

In Resolution 635 (1989), the Council raised ‘the implications of acts of terrorism for international security’ in the context of detecting plastic explosives. While not naming the incident, the resolution was prompted by an attack on a civilian aircraft over the Sahara, which killed 400 people. The resolution called on States ‘to prevent all acts of terrorism’ and urged the International Civil Aviation Organization (ICAO) to intensify its efforts to prevent terrorism against civil aviation, particularly the drafting of a treaty on plastic explosives, adopted two years later. The resolution implies that the unlawful use of plastic explosives may amount to terrorism, suggesting a definition based on prohibited means, rather than political motives, or intimidatory or coercive aims.


After the 1991 Gulf War, the ‘permanent ceasefire’ resolution required Iraq ‘to inform the Council that it will not commit or support any act of international terrorism or allow any organization directed towards the commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods and practices of terrorism’. This obligation was later asserted to constitute a ceasefire condition in the dispute about disarming Iraq from 1991 to 2003. The Council does not specify which Iraqi acts constitute terrorism, and the invasion of Kuwait was a classic case of interstate aggression. However, the resolution also invoked the 1979 Hostages

263 UNSC Resolution 635 (1989) paras 2 and 4 respectively.
Convention and condemned the taking of hostages, some of whom were used as human shields. It is still unclear why the Council designated such conduct as terrorism rather than as violations of IHL, or of obligations concerning hostage-taking or protected persons.

After 11 September 2001, the US and the UK sought to prove links between Iraq and the terrorist group Al-Qaeda, although little evidence of links emerged, even after the overthrow of Saddam Hussein in 2003. This was so despite the aberrant finding of a US judge in 2003, in a civil case for damages, that there was a ‘conclusive link’ between Iraq and Al-Qaeda concerning the September 11 attacks. There was, however, evidence of Iraq funding Palestinian suicide bombings.

Normatively, the resolution is significant because of its binding character under Chapter VII and because it admits not only State-sponsored terrorism, but also direct State terrorism (by requiring Iraq not to ‘commit’ it). It is doubtful whether this description adds anything to the legal framework of States’ obligations, since the law on the use of force, non-intervention, and State responsibility for transboundary harm by non-State actors already governs international violence by, or supported by, States. Most such violence is inherently political in purpose, so it is not possible to distinguish between State uses of force and State terrorism as separate categories on the basis of political motivation alone. There is no evidence that the resolution was intended to create individual criminal liability for State terrorism by Iraq, unless it obliquely refers to liability under IHL for acts of terror or spreading terror. No crime of terrorism was included in the 2003 Statute of the Iraqi Special Tribunal for Crimes against Humanity.

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268 Others argue that Iraq’s destruction of oil wells in retreat from Kuwait amounted to ‘eco-terrorism’ (but it is difficult to see how that would terrify a population): L Edgerton, ‘Eco-Terrorist Acts during the Persian Gulf War: Is International Law Sufficient to Hold Iraq Liable?’ (1992) 22 Geo JICL 151; J Seacor, ‘Environmental Terrorism: Lesson from the Oil Fires of Kuwait’ (1994) 10 AUJILP 481.


272 Higgins, n 193, 20–21.

273 Coalition Provisional Authority, Order No 49, Delegation of Authority regarding an Iraqi Special Tribunal, 10 Dec 2003, annexed Statute, Arts 11–14 (crimes within jurisdiction).
After the overthrow of the Iraqi government, the Council shifted its emphasis to non-State terrorism in Iraq. In Resolution 1511, on UN involvement in occupied Iraq, the Council condemned the ‘terrorist bombings’ of the Jordanian and Turkish embassies, UN headquarters in Baghdad, and a mosque in Najaf. It also condemned the murder of a Spanish diplomat and the assassination of an Iraqi leader, and emphasized that those responsible must be brought to justice. The preamble called these ‘attacks on the people of Iraq, the United Nations, and the international community’, and the assassination as an attack on Iraq’s future.

The resolution emphasized the need for effective Iraqi police and security forces to combat terrorism, and called on States to prevent the transit, arming, and financing of terrorists in Iraq. The resolution does not define terrorism, although the acts it condemns partly illustrate its conception of terrorism—including attacks on embassies and diplomats, UN premises, political leaders, and religious sites—despite most of these acts already being covered by IHL and sectoral treaties.

In Resolution 1546, the Council endorsed the formation of a sovereign interim Iraqi government from 30 June 2004. The resolution condemns ‘all acts of terrorism in Iraq’ and refers to States’ obligations to prevent ‘terrorist activities in and from Iraq or against its citizens’. The resolution reaffirmed the authorization of the multinational force established in Resolution 1511, and gave the force ‘the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq . . . including by preventing and deterring terrorism’. This is the first Council resolution to give explicit authority to States to use force against ‘terrorism’, albeit limited to a connection with Iraq, and contingent on the (not entirely consensual) ‘Iraqi request for the continued presence of the multinational force’. The resolution does not define terrorism, implicitly conferring a discretion on the multinational force to determine for itself the meaning of terrorism. In November 2005, the Council extended the mandate of the multinational force until the end of 2006, based on a request by Iraq which specifically noted the threat of ‘forces of terrorism that incorporate foreign elements’.

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274 UNSC Resolution 1511 (2003), para 18. The bombing of UN headquarters was also condemned as a ‘terrorist attack’ against the international community as a whole’ in Pres Stat S/PRST/2003/13 (20 Aug 2003).
276 ibid, paras 16, 19; see also UNSC Resolution 1546 (2004) para 17.
277 ibid, para 17.
278 ibid, para 10 (emphasis added).
281 Letter of 27 Oct 2005 from the Prime Minister of Iraq to the President of the Council, Annex I to UNSC Resolution 1637 (2005).
The Council itself affirmed that terrorism must not be allowed to disrupt Iraq’s political and economic transition. 282

Yet it is unclear which activities amount to ‘terrorism’ in Iraq. Following the US invasion, a variety of irregular forces continued to resist occupation. Not all of these forces can be characterized as terrorists, since some may qualify as combatants in an international armed conflict—either as irregular forces resisting occupation, 283 or as civilians levée en masse. This was implicitly recognized in an amnesty offer to Iraqi insurgents by the incoming Iraqi government, 284 an approach which the Council seems to have endorsed:

The Security Council calls on those who use violence in an attempt to subvert the political process to lay down their arms and participate in the political process. It encourages the Iraqi authorities to engage with all those who renounce violence and to create a political atmosphere conducive to national reconciliation and political competition through peaceful means. 285

Further, some acts labelled as terrorism by the US are difficult to accept as such. For instance, given the privatization of military functions, a plot to bomb a civilian passenger airliner, contracted to transport US troops to Iraq, 286 may be a legitimate military action.

It seems unlikely either that the references to terrorism are intended to carefully reflect the limited IHL prohibitions on terror, and the Statute of the Iraqi Special Tribunal does not recognize acts of terror, or spreading terror, as war crimes. Rather, such references derive from earlier unsubstantiated links between Iraq and terrorism, and paradoxically address the appearance of non-State terrorism in Iraq where, pre-invasion, there was none. 287

Further guidance on the Council’s conception of terrorism in Iraq emerges from the Council’s response to violence in Iraq in 2005. Presidential Statements condemned the separate assassinations of an Egyptian and two Algerian diplomats in July 2005, and the attempted assassinations of diplomats from Bahrain and Pakistan. 288 The statements called for those responsible to be brought to justice and emphasized that ‘there can be no justification for such terrorist acts’. Council Resolution 1618 of August 2005 further condemned the ‘shameless and horrific’ terrorist attacks that killed over one hundred people, including children, electoral employees, and persons

involved in drafting a new Iraqi Constitution. The resolution also condemned attacks on diplomats, including murder and kidnapping.


In 1992, Resolution 731 condemned the destruction of a civil aircriner over Lockerbie in Scotland. It deplored Libya’s failure to cooperate in establishing responsibility for these ‘terrorist acts’, and urged Libya to help eliminate ‘international terrorism’. The resolution implicitly required Libya to surrender two nationals for trial a significant interference in the sovereign operation of national extradition law in circumstances where Libya did not extradite nationals. While terrorism is not defined, it is clear that the Council considers violence against civil aviation (by explosives) to be terrorism, regardless of ulterior motives or aims.

Following non-compliance, Resolution 748 demanded Libyan compliance with requests from France, the UK and the US, and imposed aircraft, military, and diplomatic sanctions. It also required Libya itself to ‘cease all forms of terrorist action and all assistance to terrorist groups’ and ‘demonstrate its renunciation of terrorism’, and all States to deny freedom of movement to Libyans involved in terrorism. The resolution did not define terrorism, nor was there any list of terrorist groups.

Resolution 883 also demanded compliance and imposed further financial and aircraft sanctions. Suspension of sanctions was conditioned on Libya surrendering those charged for trial in a UK or US court, satisfaction of French judicial authorities, and compliance with earlier resolutions. The preamble noted the Council’s determination to bring to justice ‘those responsible for acts of international terrorism’.

In constantly referring to ‘terrorism’, these resolutions avoided invoking the 1971 Montreal Convention, which is evidently an important legal framework governing violence against civil aviation. The deliberate, repeated use of the term suggests that the Council attributed normative importance to it—perhaps because it more fittingly captured the shocking nature of the incident than the more technical law on air safety, or because it supplied a political trigger for Council involvement. Given the suspected responsibility of Libyan

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292 Reisman, n 207, 86.
294 UNSC Resolution 748 (1992) para 1 and paras 4–7 respectively. The UK and the US also demanded that Libya disclose all knowledge and evidence of the crime, and pay compensation: US, Statement Regarding the Bombing of Pan Am 103, 27 Nov 1991, UN Doc S/23308.
295 ibid, para 16.
297 ibid, para 16.
officials in the bombing, the Council implicitly accepted that States could perpetrate terrorism. 298

The Council’s demands conflicted with Libya’s attempt to rely on its obligation to prosecute the suspects (as an alternative to extradition, since Libya does not extradite nationals) under the 1971 Montreal Convention. In 1992, the ICJ declined a Libyan request for provisional measures to prevent Libya being forced to transfer the suspects. 299 Since all States are required, under Articles 25 and 103 of the Charter, to carry out Council decisions over other treaty obligations, the ICJ found that the treaty rights claimed by Libya were no longer ‘appropriate for protection’ and ‘would be likely to impair’ rights enjoyed by the UK and the US in Resolution 748. 300

In contrast, at the preliminary objections phase in 1998, the ICJ rejected the argument that Libya’s treaty rights could not be exercised because they were superseded by Resolutions 748 and 883. 301 Those resolutions were adopted after Libya’s application was filed in March 1992, and later resolutions could not affect ICJ jurisdiction once established. Resolution 731, adopted before the application, was non-binding and thus did not render the application inadmissible.

The incident was ultimately resolved in a settlement, formalized in Resolution 1192 (1998). Libya handed over two suspects for trial in a Scots law court sitting in the Netherlands. 302 In 2003, Libya accepted responsibility for the acts of Libyan officials, paid compensation, renounced terrorism, and committed to cooperation. 303 In Resolution 1506, the Council lifted sanctions

298 Marauhn, n 88, 851; Higgins, n 193, 23.
300 Lockerbie (Libya v UK) (Provisional Measures), n 299, paras 39–41.
and removed the item from its agenda.\textsuperscript{304} The ICJ cases were discontinued in 2003,\textsuperscript{305} removing the possibility of an ICJ merits review of the legal effects of Council resolutions.\textsuperscript{306} Doubt remains about the lawfulness of the Council’s adopting binding measures in support of an unlawful UK/US threat to use force if Libya did not comply with their demands.\textsuperscript{307} Questions also remain about whether Libya’s actions really constituted a threat to the peace.\textsuperscript{308}


Presidential Statements have highlighted the Council’s concern at terrorism as a threat to peace and security. In 1992 at the first Council meeting of Heads of State and Government, the Council President expressed ‘deep concern over acts of international terrorism’ and emphasized the need to deal with them effectively.\textsuperscript{309} This generalized statement of concern about terrorism was facilitated by the possibilities of cooperation opened up by the end of the Cold War. In 1994, the President condemned ‘terrorist attacks’ in Buenos Aires and London, demanded ‘an immediate end to’ such attacks, and stressed the need for cooperation and ‘to prevent, combat and eliminate all forms of terrorism, which affect the international community as a whole.’\textsuperscript{310} While terrorism was not defined, the attacks involved killings of civilians by organized groups (such as the IRA) for political purposes. Condemnation of terrorism in Presidential Statements rather than in resolutions may be a matter of convenience as much as a calibrated judgment about the seriousness of the threat and the appropriate form of response.


In Resolution 1044, the Council condemned ‘the terrorist assassination attempt’ on the President of Egypt in Ethiopia in 1995, which violated...
Ethiopia’s sovereignty and integrity and disturbed regional peace and security.\textsuperscript{311} The resolution called on Sudan to comply with Organization of African Unity (OAU) requests to extradite three suspects to Ethiopia and to: ‘Desist from . . . assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements.’\textsuperscript{312}

Facing non-cooperation, the Council adopted Resolution 1054 under Chapter VII, which demanded compliance with its earlier requests within two weeks, after which it would impose diplomatic sanctions and travel restrictions.\textsuperscript{313} In Resolution 1070, the Council repeated its demands and imposed sanctions on Sudanese aircraft.\textsuperscript{314} The Council’s management of the incident was interrupted by US air strikes on a pharmaceutical factory in Khartoum,\textsuperscript{315} wrongly thought to be producing chemical weapons for terrorist use. Sudan had expelled Bin Laden in 1996. After requests by the OAU, Egypt, and Ethiopia, sanctions were finally lifted by Resolution 1372 (2001).


Four resolutions on Kosovo have referred to terrorism, condemning ‘terrorism in pursuit of political goals by any group or individual, and all external support for such activities in Kosovo, including the supply of arms and training for terrorist activities’, as well as its financing.\textsuperscript{316} Resolution 1160 characterized terrorism as a non-State activity by condemning ‘all acts of terrorism by the Kosovo Liberation Army (KLA) or any other group or individual’, while in contrast, Serbian police violence against civilians was condemned only as ‘the use of excessive force’.\textsuperscript{317}

Three resolutions asked Kosovar Albanian leaders alone ‘to condemn all terrorist action’ and stressed that their community should pursue its goals peacefully.\textsuperscript{318} One resolution required all States to ‘prevent arming and training for terrorist activities’ in Kosovo, but implicitly recognized underlying causes by stating that ‘the way to defeat violence and terrorism in Kosovo is for the authorities in Belgrade to offer the Kosovar Albanian community a genuine political process’.\textsuperscript{319}

\textsuperscript{311} UNSC Resolution 1044 (1996) paras 1–2; reiterated in UNSC Resolution 1070 (1996) preamble.
\textsuperscript{312} UNSC Resolution 1044 (1996) para 4(a)–(b).
\textsuperscript{313} UNSC Resolution 1054 (1996) paras 1–4.
\textsuperscript{314} UNSC Resolution 1070 (1996) para 3.
\textsuperscript{316} Preambles to UNSC Resolutions 1199 (1998) and 1203 (1998); and 1160 (1998) respectively.
\textsuperscript{317} UNSC Resolution 1160 (1998) preamble.
\textsuperscript{319} UNSC Resolution 1160 (1998) para 8 and para 3 respectively.
Resolution 1244 suggested that State forces may also commit terrorism, by condemning ‘all terrorist acts by any party’. Nonetheless, the Council avoided invoking the IHL of non-international armed conflicts, characterizing the Kosovars as terrorists rather than as belligerent forces in a civil conflict. Even during the NATO bombing of 1999, the KLA was not recognized as an internal self-determination movement. Yugoslavia even claimed that NATO illegally trained KLA terrorists.


In Resolution 1189, the Council condemned ‘terrorist bomb attacks’ in Kenya and Tanzania, which killed hundreds, injured thousands, and caused massive property destruction. It called on all States to assist investigations in Kenya, Tanzania, and the US, ‘to apprehend the perpetrators of these cowardly criminal acts and to bring them swiftly to justice’. More generally, States were called on to prevent terrorism and prosecute and punish the perpetrators. The resolution does not define terrorism, but the preamble describes some of its characteristics as ‘indiscriminate and outrageous’ bomb attacks against civilians.

The resolution did not attribute responsibility for the attacks, nor did it authorize a military response. It is the first resolution to describe terrorism as ‘criminal’. Yet by mentioning national investigations, it is most likely referring to national crimes or sectoral offences, and not a generic international crime. Still, it is normatively significant that the attacks, which targeted US embassies, were described as terrorism, rather than breaches of the inviolability of diplomatic premises. Without complicity between the host States and terrorists, responsibility could not be attributed to those States, and private groups do not have obligations of diplomatic protection.

12. Afghanistan, the Taliban, and Al-Qaeda 1998–2005

Soon after, the Council adopted a series of resolutions demanding that the factions in the Afghan conflict, particularly the Taliban, refrain from harbouring, providing sanctuary for, and training terrorists, and cooperate in bringing indicted terrorists to justice, including Bin Laden. Resolution

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320 UNSC Resolution 1244 (1999) preamble.
1214 also condemned the Taliban’s capture and murder of Iranian diplomats and a journalist as ‘flagrant violations of international law’ (but not as terrorism), and asked the Taliban to investigate and prosecute these crimes and the killings of three UN workers.329

Resolution 1267 demanded that the Taliban surrender Bin Laden for trial for the bombings, to a State (such as the US)330 where he had been indicted, or would be surrendered or tried.331 The Taliban had one month to comply, after which aircraft and financial sanctions would be imposed, monitored by a committee.332 The preamble recalled treaty obligations ‘to extradite or prosecute terrorists’,333 indicating that sectoral treaties and national law were the appropriate frameworks governing terrorism, particularly given US charges for conspiracy to kill US citizens abroad.

Following non-compliance, later resolutions imposed further military, diplomatic, aircraft, and travel sanctions on the Taliban.334 The most far-reaching provisions require States to freeze the funds and assets of Bin Laden and associated individuals and entities, including Al-Qaeda, as listed by the 1267 Committee.335 Resolution 1390 extended sanctions beyond Afghan territory after the fall of the Taliban, focusing on the global activities of Bin Laden, Al-Qaeda, and ‘associates’.336 At the end of 2005, more than 200 individuals and 100 entities were proscribed as associated with Al-Qaeda,337 and over 140 individuals with the Taliban, including in areas of separatist or religious conflict such as Bosnia, Kosovo, Chechnya, Palestine, North Africa, Sudan, Kurdistan, and South-East Asia. Despite its sweeping reach, the sanctions regime is not based on a generalized proscription of ‘terrorists’, but on a connection to specific groups such as the Taliban or Al-Qaeda.

Concern has been expressed about the procedural unfairness of the

332 UNSC Resolution 1267 (1999) paras 3, 6 (‘1267 Committee’), and subject to humanitarian exceptions; para 4.
335 UNSC Resolution 1333 (2000) paras 8(c), 16(b).
337 UNSC (1267 Committee), Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qa’ida Organization (6 Dec 2004).
sanctions regime, particularly the low standard of proof in listing ‘associated’ individuals and entities (initially based on ‘information provided’ to the Committee); the lack of definition of ‘association’; and the lack of a hearing at the listing or delisting stage. A wide range of entities has been regarded as ‘associated with’ Al-Qaeda or the Taliban, including those constituted lawfully under domestic law, such as banking and financial institutions, businesses, and humanitarian relief and charitable organizations. Potentially, the degree of association with Al-Qaeda may not be sufficiently serious to warrant proscription. Some Islamic charitable organizations, for instance, primarily provide humanitarian relief and assistance, while only a small part of their operations is engaged in supporting terrorism. Further, no distinction is drawn between association with Al-Qaeda (a terrorist group) and the Taliban (a quasi-governmental authority). There is also the potential for unrelated terrorist organizations or even militant groups to be wrongly drawn into the orbit of ‘associates’ of Al-Qaeda.

Over time, some improvements to the standard of proof and to the procedure have been made, including requiring better particulars from States and allowing for affected individuals or entities to petition their governments. However, the diplomatic protection model underlying the de-listing process remains ill-suited to protecting the interests of non-State actors—particularly where political opponents lack effective protection by their State, and third States have no interest in objecting to a listing. The Council seems willing to suspend procedural fairness for the purposes of preventive security. One Taliban individual and eight Taliban entities, and five Al-Qaeda individuals and three entities, had been removed from the Consolidated List by the 1267 Committee by December 2005, suggesting a significant error rate.

It may be preferable, on grounds of procedural fairness, to accord limited

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339 UNSC Resolutions 1526 (2004) paras 16–18; 1617 (2005) paras 4–6, 18; UNSC (1267 Committee) Guidelines of the Committee for the Conduct of its Work, 7 Nov 2002, amended 10 Apr 2003, para 5(b) (requiring of States ‘a narrative description of the information that forms the basis or justification for taking action’). A higher standard of proof is required for listing in the EU by Common Position 2001/931/CFSP, Art 1(4) (listing is ‘based on serious and credible evidence or clues, or condemnation for such deeds’).

340 The diplomatic protection model is restricted because a claim cannot be made by a petitioned government where the designating government objects.

341 UNSC (1267 Committee), Consolidated List of Individuals and Entities Belonging to or Associated with the Taliban and Al-Qaida Organization (6 Dec 2004).
legal personality to individuals and entities that are threatened with listing, by providing them with the opportunity to be heard or to present evidence. As it stands, punitive measures may be imposed without any opportunity to respond to untested allegations. Procedural mechanisms for handling sensitive or secret intelligence information could be used. At a minimum, if a prospective hearing is not provided, those affected should have an opportunity to appeal and to seek review of their listing.

13. Terrorist attacks of 11 September 2001

(a) Resolution 1368

The sanctions regime was still in place when the US was attacked on 11 September 2001. In Resolution 1368 the next day, under Chapter VII, the Council condemned ‘in the strongest terms the horrifying terrorist attacks’ and regarded ‘such acts, like any act of international terrorism, as a threat to international peace and security’. The attacks involved hijacking of aircraft and their use, or intended use, as weapons against civilian buildings (the World Trade Center), government offices (the White House and Congress), and military headquarters (the Pentagon). All States were called on to ‘bring to justice the perpetrators, organizers and sponsors’ and hold accountable ‘those responsible for aiding, supporting or harbouring’ them, and to ‘prevent and suppress terrorist acts’.

The preamble recognized ‘the inherent right of individual or collective self-defence in accordance with the Charter’, but it did not explicitly state that the US had a right of self-defence against the attacks. Indeed the Council called the attacks a ‘threat to the peace’ rather than an ‘armed attack’. Most Council members did not immediately conceptualize September 11 as an armed attack, instead invoking a criminal law paradigm by speaking of bringing the perpetrators to justice or referring to crimes rather than acts of war.

It was only later that explicit claims of armed attack and self-defence were articulated, which soon gained acceptance. The resolution reflects the ambivalence felt by States about whether to conceptualize the attacks within a law enforcement or use of force paradigm. A day after the attacks, the Council was confronted with the difficult legal question of whether an ‘armed attack’ can be committed by non-State actors, along with complex factual questions such as whether the scale and effects of the conduct amounted to an ‘armed attack’; whether the attack was continuing; and who was responsible for the attacks, including whether they were attributable to a State. Indeed, nothing in the resolution attributed responsibility to any individuals or entities, which would have been necessary for the Council to endorse a right of self-defence. This omission assumed particular importance in the light of later US claims that it ‘will make no distinction between the terrorists who committed these acts and those who harbour them’, suggesting an attenuation of existing principles of State responsibility for the unlawful use of force.

In spite of expressing ‘readiness to take all necessary steps to respond to the terrorist attacks . . . and to combat all forms of terrorism’, the Council did not authorize military action in Resolution 1368. Instead, the Council deferred to the unilateral, defensive response of a victim State, losing the opportunity to manage collectively the forcible response, including its targets and duration. Questions soon emerged about the immediacy of the US’s defensive response, since there was much deliberation prior to actual military action being taken on 7 October 2001, indicating a tendency towards punitive reprisals rather than self-defence. The proportionality of the response was
also questioned, since the response to localized attacks in the US involved attacking an entire State (Afghanistan) and overthrowing its government.\footnote{363} The Council only became involved in authorizing military force after major powers achieved their objectives. Thus the Council authorized the International Security Assistance Force to assist the Afghan interim government to maintain security in a limited area around Kabul, after the US occupied the country.\footnote{364} The Council was reduced to ‘mopping up’ operations on behalf of powerful States.

Further, the US stated soon after 11 September 2001 that its self-defence may require ‘further actions with respect to other organizations and other states’, beyond Al-Qaeda and the Taliban.\footnote{365} The Council’s abdication of control arguably encouraged US adventurism in Iraq in 2003. In that situation, the unilateral US response to September 11 exceeded the margins of self-defence and entered the realm of pre-emption, partly on the pretext that links existed between Iraq, WMDs, and Al-Qaeda.\footnote{366} Although renunciation of ‘terrorism’ was a cease-fire condition in Resolution 687 (1991), credible evidence of Iraqi links to terrorism was largely absent at the time of the invasion and was confirmed following the invasion.

The Council’s failure to control forcible responses to terrorism may have inadvertently encouraged other States to use force against unrelated terrorist problems,\footnote{367} despite US double standards in insisting on its exceptional defensive claims.\footnote{368} Collective security has been marginalized in the military response to terrorism—subordinated to the interests of a powerful State—with the Council performing ‘quiet background functions’ of regulation and ‘low politics’.\footnote{369} The UN is relegated to performing the ‘peripheral’ or ‘cosmetic’ roles of legitimating unilateral action, while forgoing active management of international threats.\footnote{370} The sidelining of the Council may also have longer-term consequences for the Council’s legitimacy.\footnote{371}
Resolution 1373

In Resolution 1373, the Council required States, under Chapter VII, to suppress terrorism, implicitly approving earlier General Assembly recommendations. In a bout of legislative and regulatory activism, States are foremost required to prevent, suppress, freeze, and criminalize terrorist financing. States must also: (a) refrain from supporting terrorists; (b) prevent terrorist acts; (c) deny safe haven to those who finance, plan, support, or commit terrorist acts, or harbour them; and (d) prevent the use of their territory for international terrorism.

Further, States are required to: (e) bring to justice those who finance, plan, prepare, perpetrate or support terrorist acts, and establish such terrorist acts as serious criminal offences in domestic laws with proportionate penalties; (f) assist other States in criminal investigations or proceedings; and (g) prevent the movement of terrorists by controls on borders, documentation, and counterfeiting. The resolution prefers criminal law and regulatory measures over military responses.

Other provisions are framed as requests rather than obligations. The Council declared that committing, financing, planning, and inciting terrorism are contrary to UN purposes and principles, potentially leading to exclusion from refugee status under the 1951 Refugee Convention. The Council was determined ‘to take all necessary steps’ to implement the resolution. A Counter-Terrorism Committee (CTC) monitored implementation, including through mandatory State reporting, which diverted a large proportion of

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372 Szasz, n 195, 903.

373 Guillaume, n 240, 8; Krisch, n 336, 3, 5–6, 13; Rosand, n 190, 334; Szasz, n 195, 903; Myjer and White, n 351, 6.


376 ibid.

377 Myjer and White, n 351, 6.

378 UNSC Resolution 1373 (2001) paras 3–4: States are called upon to exchange information, cooperate, adopt, and implement treaties and resolutions, and deny refugee status and the political offence exception to terrorists. The Council was also concerned about links between terrorism and transnational organized crime, drugs and arms trafficking, money-laundering, and illegal movements of WMDs.


380 1951 Refugee Convention, Art 1F(c).


UN documentation resources from other activities. In requiring extensive legislative and administrative changes, the resolution imposed a heavy burden on States, with smaller States particularly ‘overwhelmed’. The CTC has not sanctioned States for non-compliance, instead pursuing a cooperative, non-threatening, technical, and regulatory approach. Its primary role is to strengthen the infrastructure against terrorism and to provide technical assistance, rather than to identify particular terrorist acts. There has been a high level of cooperation, compliance, and reporting by States. There remain concerns that these counter-terrorism efforts have diverted resources from more pressing developmental needs and distorted assistance in favour of predominantly western interests. There is also unease about the indefinite duration of the CTC. As the CTC Chairman stated: ‘Do not expect us to declare any member state compliant, because 1373 is open-ended, and the threats posed by various forms of terrorism will evolve’. By positing itself as a regulatory body with perpetual competence, the CTC renders itself as a regulatory body with perpetual competence, the CTC renders


383 Dhanapala, n 194, 19 (citing UN Sec-Gen’s statement of 18 Jan 2002).
384 Ward, n 382, 298–299; see also UNSC, Note by the President, Annex: Report by the Chair of the Counter-Terrorism Committee on the problems encountered in the implementation of Security Council Resolution 1373 (2001), 26 Jan 2004, UN Doc S/2004/70, 15.
385 Rosand, n 190, 335–7. The CTC works through three subcommittees, assisted by experts. It operates by consensus, thus allowing all member States the power of veto. The CTC is not a sanctions committee nor a UN subsidiary organ with delegated decision-making powers under Art 29 of the Charter.
386 Rosand, n 190, 337. Indeed, the Council cannot delegate its power to determine that a threat to, or breach of, the peace exists or ceases to exist: D Sarooshi, The United Nations and the Development of Collective Security (OUP, Oxford, 2003) 32–33. The UN Office on Drugs and Crime and the G8 have worked closely with the CTC to provide technical assistance: UNODC (Terrorism Prevention Branch), Global Programme against Terrorism, Current Developments, Vienna, Aug 2003; ECOSOC (Commission on Crime Prevention and Criminal Justice), Sec-Gen Report on Strengthening international cooperation and technical assistance in preventing and combating terrorism, 13th Sess, Vienna, 11–20 May 2004, UN Doc E/CN.15/2004/8 (17 Mar 2004); the 2003 G8 summit in Evian, France, also adopted a G8 action plan ‘Building International Political Will and Capacity to Combat Terrorism’.
387 Rosand, n 190, 337. In its first 18 months (to April 2003) the CTC had received first reports from 189 member States and five others; 131 States had submitted second reports; and third reports were received from 28 States: Ward, n 382, 298.
388 Ward, ibid, 302, countering that ‘there are development and economic related benefits which accrue from putting in place the legal and administrative infrastructure required by the resolution’.
389 Rostow, n 190, 482.
compliance ‘manifestly uncertain’, although it has structured compliance into different phases.\(^{392}\)

As Judge Kooijmans observed in the *Israel Wall Advisory Opinion*, the ‘completely new element’ in these resolutions is classifying ‘acts of international terrorism, without any further qualification, a threat to international peace and security . . . without ascribing these acts of terrorism to a particular State’.\(^{393}\) The general proscription of terrorism eliminates the selectivity in the Council’s previous ad hoc approach, which disregarded ‘the principle of equal treatment’.\(^{394}\) The serious consequences of the Council’s failure to define terrorism were discussed in Chapter 1, along with concerns about the validity of not identifying specific threats.

Concerns have also been raised that the Council and the CTC have not paid due regard to human rights obligations in supervising States’ implementation of counter-terrorism measures. In later resolutions, the Council belatedly insisted that States ‘ensure that any measure taken to combat terrorism comply with all their obligations under international law . . . in particular international human rights, refugee, and humanitarian law’,\(^{396}\) as well as the law of Charter.\(^{397}\) Proper implementation of human rights law can mitigate the excesses of unilateral definitions of terrorism.\(^{398}\) The CTC also interacts with the UN High Commissioner for Human Rights\(^ {399}\) and its communications with States refer to their human rights obligations.\(^ {400}\) However, concerns about the impact of the CTC’s work on human rights protection remain, and the CTC rejected an offer from the UN High Commissioner for Human Rights to appoint a human rights expert to advise the CTC.\(^ {401}\) The CTC has made it very clear that monitoring human rights is not part of its mandate.\(^ {402}\)

\(^{391}\) Rosand, n 190, 335.
\(^{392}\) Rosand, ibid, 335–336; Stromseth, n 195, 43–44.
\(^{393}\) *Israel Wall Advisory Opinion*, ICJ Case 131 (9 Jul 2004) para 35 (separate opinion of Kooijmans J).
\(^{397}\) UNSC Resolutions 1455 (2003), preamble; 1526 (2004), preamble.
\(^{398}\) See the discussion on the specificity of offences in Ch 1 above.
\(^{399}\) UNSC (4512th mtg), UN Doc S/PV.4512, 15 April 2002, 3; Greenstock, n 391.
\(^{400}\) Ward, n 382, 298; 269–297.
\(^{401}\) Rosand, n 190, 340; see also Stromseth, n 195, 44.
\(^{402}\) Rostow, n 190, 484.
The other legally significant feature of the Council’s response is the quasi-legislative and/or regulatory nature of its response. In requiring all States to adopt provisions drawn from the 1999 Terrorist Financing Convention, not then in force, Resolution 1373 ‘rendered certain purely treaty rules binding’ on all UN members and ‘thus assumed the role of a true international legislator’. In addition, the resolution requires States to pursue broad legislative change in relation to terrorism generally. The trend towards legislative action has been criticized as ‘difficult to reconcile with the general role of the Security Council’s enforcement powers under the UN Charter, which is more of an executive kind and follows a police model’.406

Yet, as long as the Council has lawfully identified a specific threat to security under Chapter VII of the Charter, it is difficult to sustain any legal objection to its use of legislative measures in response to that threat. Resolutions clearly cannot be ‘legislative in the sense of applying outside the framework of particular cases of restoration of international peace and security’. But as the International Criminal Tribunal for the former Yugoslavia (ICTY) stated in Tadic, the Council ‘has a broad discretion in deciding on the course of action and evaluating the appropriateness of the measures to be taken’, whether that discretion derives from the wide reach of Articles 41 and 42 of the Charter, or ‘general powers to maintain and restore international peace and security under Chapter VII at large’. The Council’s enforcement powers under Articles 41 and 42 of the Charter list illustrative but non-exhaustive measures. Domestic legislation may be necessary for States to fulfill their Charter duty to implement binding resolutions, and the Council is not limited to directing ‘enforcement action only against the state responsible for a threat’. In past practice, the Council has required ‘adaptation of legislation and even constitutions’.

States have uniformly and rapidly accepted the obligations in Resolution 1373, indicating agreement on Charter norms through State practice or
acquiescence.414 This builds on acceptance of the Council’s expanding use of legislative measures in the 1990s.415 States have also accepted the quasi-administrative rule-making authority of the CTC, which issues guidelines interpreting resolutions and strengthens the Council’s executive powers.416 This is so even though the Council has allowed the CTC a great deal of discretion in managing its own activities.417

The Council should, however, exercise prudence in assuming the mantle of a global legislator. By requiring States to criminalize terrorism in domestic law, the Council is substituting itself for—or at least interfering in—conventional law-making processes.418 Criminalization of harmful transnational conduct normally takes place in multilateral treaty negotiations, a process marked by broader participation (than 15 unrepresentative Council members)419 and greater precision (of elements of offences, jurisdictional principles and penalties—which resolutions are silent on). Further, Council negotiations on the drafting of legislative resolutions are not publicly recorded,420 creating further uncertainty about the intended meaning of ‘terrorism’. Ultimately, if Council measures become too intrusive, such as by requiring States to pass excessive legislation, then States may refuse to implement the Council’s decisions, further damaging its authority and legitimacy and thus undermining its effectiveness.421

14. Terrorist acts 2002–05

From 2002, the Council adopted a series of formulaic resolutions condemning a particular terrorist bomb attack (Bali and Kenya in 2002, Bogota and Istanbul in 2003, Madrid in 2004, and London in 2005), hostage-taking (Moscow in 2002), or missile attack (Kenya).422 The resolutions regard such acts ‘like any act of international terrorism, as a threat to international peace and security’; urge States to bring the perpetrators, organizers, and sponsors to justice; and express ‘determination to combat all forms of terrorism’.423

414 Krisch, n 336, 7. 415 Nolte, n 199, 325.
417 Rosand, n 190, 335; Stromseth, n 195, 43.
418 Rostow, n 190, 482.
419 cf Talmon, n 195, 179 (Council decisions to use force are open to the same criticism, but this is not a basis for opposing Chapter VII actions).
420 Talmon, ibid, 186.
421 Gowlland-Debbas, n 205, 312.
The Moscow Resolution 1440 (2002) also demanded the release of hostages. That resolution is significant because the Council involved itself in domestic terrorism, as did the resolution addressing the car bomb outside a Colombian social club.\textsuperscript{424} Two presidential statements have also condemned internal terrorist attacks in Russia connected to the Chechen conflict. The first addressed a ‘terrorist bomb attack’ in Grozny in 2004, which killed the President of the Chechen Republic and others.\textsuperscript{425}

The second responded to ‘the heinous terrorist act’ of hostage-taking at a school in Beslan in 2004, and ‘other terrorist attacks’ against ‘innocent civilians’ in Moscow and two Russian airliners.\textsuperscript{426} Both statements urge all States to cooperate with Russia in bringing to justice those responsible for the attacks. While the statements did not attribute responsibility to Chechen rebels, investigations later did so. These attacks illustrate how serious acts of domestic terrorism can affect international interests or values, even in the absence of a strict connection to, or impact on, another State.

Only two of the resolutions attribute responsibility for terrorism. Whereas the Kenyan resolution is inconclusive, condemning only ‘claims of responsibility’ by Al-Qaeda in its preamble,\textsuperscript{427} the Madrid resolution firmly attributes blame to ‘the terrorist group ETA’ in an operative paragraph.\textsuperscript{428} Investigations soon showed that Al-Qaeda was responsible, and the hasty attribution to ETA, on the day of the bombing, was based on erroneous Spanish advice.\textsuperscript{429} The Council abandoned its previously cautious approach in a rush to act, making an avoidable mistake.

The Council’s error raises the wider problem of the evidentiary standard used in Council decision-making.\textsuperscript{430} O’Connell writes that there is no ‘well-established set of rules governing evidence in international law in general’\textsuperscript{431} and the Council has never specified its own standard of proof for decisions about responsibility for breaches of, or threats to, peace and security. The ILC Articles on State responsibility are purposely silent on evidentiary issues,

\textsuperscript{424} UNSC Resolution 1465 (2003); see M Sossai, ‘The Internal Conflict in Colombia and the Fight against Terrorism’ (2005) 3 JICJ 253, 257.
\textsuperscript{427} Evidence suggests Al-Qaeda was indeed responsible: J Risen, ‘US Suspects Qaeda Link to Bombing in Mombasa’, New York Times, 30 Nov 2002.
\textsuperscript{428} UNSC Resolution 1450 (2002) preamble and 1440 (2002) para 1 respectively.
\textsuperscript{431} O’Connell, n 430, 21.
which fall entirely outside the scope of the articles.\textsuperscript{432} Thus the standard of evidence is governed by the primary rules of State responsibility, and different standards may attach to different substantive obligations.

O’Connell suggests that a standard of ‘clear and compelling’ evidence of an armed attack is necessary before resort to force in self-defence,\textsuperscript{433} because of the seriousness of the violent consequences flowing from judgments about responsibility for armed attacks. The standard of ‘clear and compelling evidence’ is drawn from the \textit{Trail Smelter} case, which involved the lesser harm of transboundary environmental damage.\textsuperscript{434} This standard is higher than the standard in civil cases in many common law jurisdictions (the balance of probabilities), but lower than the criminal standard (beyond reasonable doubt). Others speak of a standard of ‘credible evidence’\textsuperscript{435} or a ‘prima facie’ case.\textsuperscript{436} The Council spoke of ‘probable cause’ for believing that Syria was involved in the assassination of the former Lebanese Prime Minister in 2005.\textsuperscript{437} A fairly high standard is certainly implied by the \textit{jus cogens} character of the prohibition on the use of force, and any exception to the prohibition requires a high threshold of justification.\textsuperscript{438} Serious doubts were raised about the sufficiency of evidence on which the US relied to justify bombing Libya in 1986 and a factory in Sudan in 1998.\textsuperscript{439}

An even higher standard of proof was demanded in the \textit{Corfu Channel} case, in which the ICJ stated that the evidence must leave ‘no room for reasonable doubt’.\textsuperscript{440} Although the ICJ drew on the criminal standard of proof, it allowed some flexibility in the nature of evidence admitted to prove this standard. The ICJ stated that the:

... exclusive territorial control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this exclusive control, the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence ... \textsuperscript{441}

This view from 1949 is prescient in the context of international terrorism, where evidence of terrorist activity may be dispersed across multiple


\textsuperscript{433} O’Connell, n 431, 20; see also S Yee, ‘The Potential Impact of the Possible US Responses to the 9–11 Atrocities on the Law regarding the Use of Force and Self-Defence’ (2002) 1 Chinese JIL 287, 289.

\textsuperscript{434} \textit{Trail Smelter (US v Canada)} (1941) 3 RIAA 1905, 1963–1965.

\textsuperscript{435} Charney, n 369, 836.

\textsuperscript{436} Yee, n 434, 290.

\textsuperscript{437} UNSC Resolution 1636 (2005) preamble.


\textsuperscript{439} O’Connell, n 431, 20.

\textsuperscript{440} \textit{Corfu Channel} case (1949) ICJ Reports 4, 18.

\textsuperscript{441} ibid.
jurisdictions, some of which (as with Libya in the Lockerbie dispute, or Afghanistan before 2001) refuse to cooperate transparently in international efforts to combat terrorism. It is arguable that in determining responsibility for terrorist acts as a precondition to international action, the Security Council is justified in relying on circumstantial evidence and inferences of fact, where harder evidence is difficult to come by. The catastrophic potential of terrorist acts further justifies the acceptance of such evidence.

At the same time, caution must be exercised when decisions are based on evidence which is incomplete due to the deliberate withholding of information by States, on the grounds that intelligence information is sensitive and sources need to be protected. As the US invasion of Iraq in 2003 illustrated, States which assert that the evidence justifies Council action, but which withhold details of that evidence, cannot always be trusted actually to possess reliable evidence. Political pressure on intelligence services in some States has compromised the impartiality and accuracy of such evidence that is presented publicly.

Lobel pragmatically observes that ‘in the absence of an international judicial or other centralized fact-finding mechanism, the ad hoc manner in which nations evaluate factual claims is often decisive’. This is also true of decisions made in the Council about questions of fact, since there is equally an absence of an established standard of proof or evidence in its practice. Yet, it is not sufficient for the Council to simply assert that it knows a threat to security when it sees it. The Council operates within legal boundaries, stipulated by the Charter and fundamental norms, and fulfilling its mandate requires it to make predictable, norm-based judgments about the existence of threats and responsibility for them. While there is inevitable political pressure on the Council to act decisively in response to terrorism, the Council’s evidentiary sloppiness and undue haste in erroneously attributing responsibility for the Madrid bombings to ETA could be avoided if the Council were to adopt a rational and prospective evidentiary standard to guide its decision-making about terrorism.

In 2005, the Council made increased use of presidential statements to condemn terrorist attacks in Sharm el-Sheikh (Egypt), Bali (Indonesia), New Delhi (India), and Amman (Jordan). Each statement followed the same formula of emphasizing the need to bring the perpetrators to justice and for all States to cooperate with the victim State; affirming the need to combat terrorism by all lawful means; expressing sympathy for the victims; and affirming that terrorism ‘in all its forms and manifestations constitutes one of the most serious threats to international peace and security, and that any acts

of terrorism are criminal and unjustifiable, regardless of their motivation, wherever, whenever and by whomsoever committed’. There does not, however, appear to be any particular logic in the Council’s choice of whether to condemn a terrorist attack in a resolution as opposed to a presidential statement.

15. Terrorism in the Middle East 2002–05

Despite the prevalence of terrorism in the Middle East for many years, few resolutions have condemned it, due to the political sensitivity of Palestinian self-determination. In 1995, the Council President condemned a ‘terrorist attack’ in Nordiya, Israel, in 1995, and ‘terrorist attacks’ in Jerusalem and Tel Aviv in 1996, and stated that these acts had ‘the clear purpose of trying to undermine Middle East peace efforts’.444 While terrorism was not defined, both attacks involved the targeting of civilians for political purposes. Unusually, the Council expressly mentioned the political motives behind the terrorist acts, which were intended to undermine the peace process.

Only since 2002, however, have resolutions mentioned terrorism. Resolution 1397, dealing with Israeli-Palestinian violence since the second intifadah from late 2000, demanded the ‘immediate cessation of . . . all acts of terror’,445 reiterated in four later resolutions.446 Resolution 1435 called on the Palestinian Authority (PA) to bring to justice persons responsible for terrorist acts, and condemned ‘all terrorist attacks against any civilians, including the terrorist bombings in Israel’ and ‘in a Palestinian school in Hebron’.447 Resolution 1402 expressed concern about ‘suicide bombings’ in Israel, which, given preambular references to terrorism, may be viewed as terrorism.

That resolution was also concerned about Israel’s military attack on Arafat’s headquarters, but did not qualify it as terrorism. Likewise, Resolution 1544 refers to housing demolitions and the killing of Palestinian refugees by Israel in Rafah, but does not classify these as terrorism. Nor does Resolution 1435, demanding that Israel cease destroying Palestinian infrastructure in Ramallah and that it withdraw from Palestinian cities. Resolutions addressing Israeli action have typically referred to the ‘excessive use of force’, as in Resolution 1322 (2000) dealing with Israel’s response to the second Palestinian intifadah in 2000.448

Most references to terrorism do not ascribe responsibility for it, so it may be possible to interpret the condemnation of terrorism as applying equally to Israeli and Palestinian violence against civilians. This even-handed approach is reinforced by the Council’s invocation of respect for IHL and the protection of civilians. 449 Sometimes the Council has attempted to depoliticize its terminology by using more neutral language: ‘all Palestinians will stop all acts of violence against Israelis everywhere and . . . Israel will cease all its military activities against all Palestinians everywhere’. 450

However, given the nature of some Palestinian violence, it is likely that the condemnation of terrorism is primarily directed against Palestinians. Resolution 1435 implies that non-State actors are the main perpetrators, when it calls on the PA to bring terrorists to justice. A statement by the ‘Quartet’ (the UN, the EU, the US, and Russia) involved in the Middle East ‘Roadmap’ peace process, and endorsed by the Security Council, refers to ‘terrorism’ by Palestinian groups and urges the Palestinian Authority to ‘dismantle terrorist capabilities and infrastructure’. 451 In contrast, in nearby Lebanon, the Council has avoided mentioning terrorism and instead referred to the activities of ‘armed militias’. 452 Similarly, in Afghanistan, reference has sometimes been made to ‘illegal armed groups’, ‘extremist groups’, and ‘militia forces’, or simply ‘violence in any form intended to disrupt the democratic process’. 453


In addition to resolutions addressing specific terrorist acts or situations, since 1999 the Council has adopted one binding and three non-binding resolutions dealing with terrorism in more general terms. 454 Reflecting General Assembly resolutions, the Council unequivocally condemned ‘all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever Regional Approaches to an Elusive Public Good’ (2005) 17 Terrorism and Political Violence 37, 44. For examples of the differential labelling of Israeli and Palestinian violence by western States and the international media, see R Fisk, The Great War for Civilization (Fourth Estate, London, 2005) 464, 504–505, 551.


committed’. All resolutions refer to the threat to peace and security posed by terrorism and its danger to life. One resolution states that terrorism endangers human dignity and security, development, global stability, prosperity, and UN purposes and principles.

These resolutions have urged States to prevent and suppress terrorism and its financing; bring perpetrators to justice; deny safe haven by apprehending, prosecuting or extraditing terrorists, and denying them refugee status; exchange information and cooperate; adopt and implement sectoral treaties and Council resolutions; and enhance the UN’s role. Two resolutions stressed the need to broaden ‘understanding among civilizations’ and address regional conflicts and global development. One resolution warned of global links between terrorism, WMDs, and organized crime.

While in 1999 the Council expressed “its readiness to . . . take necessary steps . . . to counter terrorist threats”, the first three resolutions were non-binding, standard-setting instruments, influenced by Assembly resolutions, and lacking any compliance mechanisms. The first resolution was largely ignored, since many States lacked the technical capacity or political will to take effective action.

Resolution 1540 (2004), however, imposes obligations under Chapter VII to deal with the threat to peace and security posed by links between terrorism, non-State actors, and WMDs. States must prohibit non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring, or using nuclear, chemical, or biological weapons and their means of delivery, “in particular for terrorist purposes”. The resolution establishes detailed control measures and a supervisory committee, and aims not to conflict with specialized WMD treaties and agencies.

Unusually, in a footnote, the Council defines certain concepts for the purpose of the resolution, including ‘means of delivery’, ‘non-State actor’, and ‘related materials’. Such definition is a helpful interpretive device in quasi-legislative resolutions, as long as the definition itself is not too vague, but

458 UNSC Resolutions 1269 (1999); 1377 (2001); 1456 (2003).
460 UNSC Resolution 1456 (2003), annexed Declaration, preamble.
461 Ward, n 382, 290.
462 ibid.
464 ibid, paras 1–2.
466 Talmon, n 195, 190.
the device was not used here to define ‘terrorism’. The regime targeting non-State actors is undermined, however, by double standards on the possession and monitoring of nuclear weapons by major nuclear States.468

17. A working definition in 2004

Three years after imposing measures against terrorism, the Council adopted a resolution generically defining it. While not expressly framed as a definition, Resolution 1566 of October 2004 recalls that the following acts are never justifiable:

. . . criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism . . . 469

States were urged to prevent such acts, and punish them ‘by penalties consistent with their grave nature’. The resolution also created a working group to report on measures that could be imposed on individuals, groups, or entities involved in, or associated with, terrorist activities, other than those designated by the 1267 committee.470 The resolution thus seeks to universalize (in a parallel regime) the proscription model developed by the 1267 Committee for the Taliban and Al-Qaeda. It was based on a Russian proposal to proscribe Chechen terrorists, which was opposed by Arab States objecting to the potential designation of Palestinian groups.471

The definition of terrorism provides explicit guidance to States (and the working group and CTC) on the meaning of terrorism, and may also exert pressure in the General Assembly to break the impasse on the Draft Comprehensive Convention. It presents a relatively narrow definition, limited to acts constituting sectoral offences (typically serious violence endangering life or property, and requiring an international element), which are also intended to create terror, intimidate a population, or coerce a government or organization. It thus combines elements of the definitions in the General Assembly’s 1994 Declaration and the 1999 Terrorist Financing Convention.

The definition does not, however, require a political or other motive, thus encompassing private acts which terrorize, intimidate, or coerce.

470 ibid, para 9: measures could include prosecution and extradition, asset freezing, and preventing movement and supply of weapons.
Consequently, some of the distinctiveness of terrorism, explained in Chapter 1, is lost. Pragmatically, the definition may be too little, too late. In the three years to 2004, many States adopted laws implementing their obligations, and it is unlikely that they will further reform their laws to limit ‘terrorism’ in conformity with the resolution (which merely ‘recalls’ that certain acts are never justified and does not require law reform). As discussed earlier, there are also legitimacy costs in circumventing the treaty process.

18. Incitement, justification, and glorification of terrorism 2005

In September 2005 the Council adopted non-binding Resolution 1624 calling 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 resolution also called for greater understanding between civilizations and for States to prevent the subversion of educational, cultural, and religious institutions by terrorists.\(^\text{472}\) The CTC was tasked with reviewing implementation of the resolution.\(^\text{473}\)

The preamble further repudiates ‘attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts’. It asserts that incitement ‘poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, [and] undermines global stability and prosperity’. It further claims that inciting terrorism is contrary to UN purposes and principles, which may thus provide a basis for exclusion from refugee status under Article 1F(c) of the 1951 Refugee Convention.

The resolution does not go as far as the Council of Europe’s 2005 Convention on the Prevention of Terrorism, since it calls for the criminalization of incitement but merely repudiates the justification or glorification of terrorism. Nonetheless, the resolution ambiguously refrains from defining ‘incitement’, so it is unclear whether this term is intended to encompass only direct and public incitement (as under the 1948 Genocide Convention), or whether it also extends to indirect incitement, private incitement, or even vague apologie for terrorism.

The lack of definition is of concern given that the Council in past resolutions has failed to define terrorism itself, resulting in a chain of ambiguous terms. Since incitement offences may interfere in freedom of expression,\(^\text{474}\) the lack of definition may encourage some States to excessively restrict free

\(^{472}\) UNSC Resolution 1624 (2005), para 3.

\(^{473}\) ibid, para 6. The preamble also stresses that the media, civil and religious society, business, and educational institutions should foster an environment that is not conducive to incitement, and that States should prevent the exploitation of technology, communications, and resources for incitement.

\(^{474}\) UNSC Resolution 1624 (2005) preamble.
expression. The lawfulness of any restriction on free expression will depend on how widely the crime of incitement is defined.\footnote{B Saul, ‘Speaking of Terror: Criminalizing Incitement to Violence’ (2005) 28 University of New South Wales Law Journal 868 (generalized incitements which lack a proximate connection to imminent and probable serious harm are likely to be unjustifiable, unnecessary, and disproportionate restrictions on freedom of expression).} While the resolution was sponsored by the UK in the aftermath of the July 2005 terrorist bombings in London, a UK domestic proposal to criminalize condoning or glorifying terrorism\footnote{UK Prime Minister Blair, ‘Statement on Anti-Terror Measures’, (5 Aug 2005) para 17. UK law already enables the prosecution of offences such as incitement to racial hatred or soliciting murder, of which the Muslim cleric Abu Hamza al-Masri was convicted in London in February 2006: ‘Hamza jailed for seven years’, The Guardian, 7 Feb 2006.} was amended to a lesser offence of ‘encouragement’ of terrorism, precisely because of freedom of speech concerns.\footnote{See Ch 3, n 155; Lord Carlile of Berriew QC, Report by the Independent Reviewer on Proposals by Her Majesty’s Government for Changes to the Laws against Terrorism, October 2005.}

19. Summary of Council practice

Prior to 1985, the Council refrained from using the term terrorism, while from 1985 to 2004, it qualified a variety of disparate activities as terrorism, many of them covered by sectoral treaties. In summary, conduct labelled as terrorist includes hostage-taking and hijacking; abduction of UN personnel; unlawful use of plastic explosives; assassination of heads of State or political leaders; destruction of, or attacks on, civilian aircraft; bombings of embassies and civilians; organized, non-State political violence in peacetime, including attacks on civilian, government, and military buildings; and attacks on religious sites in armed conflict. The acts of Al-Qaeda, including its destruction of property,\footnote{Preambles to UNSC Resolutions 1390 (2002); 1455 (2003); 1526 (2004).} have also been described as terrorist, as has the use of WMDs by non-State actors.

It is too soon to judge whether the Council’s measures have contributed to customary norms on terrorism. Before 2001, mention of terrorism was limited to specific situations, while generalized references were preambular and contributed marginally to custom formation, although resolutions often invoked customary norms reflected in the 1970 Declaration.\footnote{Preambles to UNSC Resolutions 1390 (2002); 1455 (2003); 1526 (2004).} The frequent designation of terrorism as a threat to peace and security is significant,\footnote{Kolb, n 1, 77.} but not evidence of delegated universal jurisdiction.\footnote{See ‘E. National Terrorism Legislation’ below.} Reference to the obligation to prosecute or extradite terrorists is also deceptive, since many States prosecute terrorism as ordinary crime or sectoral offences.\footnote{482 See ‘E. National Terrorism Legislation’ below.}
still premature to claim universal jurisdiction over terrorism, given the absence of an agreed definition, though its exercise might not give rise to protest.\(^{483}\)

Mandatory anti-terrorism measures between 2001 and 2004 suffered from lack of definition, but in late 2004, the Council prospectively defined terrorism as serious (sectoral) criminal violence intended to provoke a state of terror, intimidate a population, or compel a government or organization. Following definition, in the long term, Council measures may gradually harmonize national criminal laws, which may in turn constitute evidence of State practice and *opinio juris*. Council practice is, however, but one element in the formation of customary norms on terrorism, notwithstanding that the Council has firmly taken hold of part of the international community’s response to the subject. The next section examines judicial decisions and national laws for evidence of a customary definition of terrorism, outside UN practice.

### D. JUDICIAL DECISIONS DEFINING TERRORISM

Judicial decisions are a subsidiary means for determining international legal rules under Article 38(1)(d) of the ICJ Statute.\(^{484}\) No distinction is drawn between national and international decisions. On one hand, international decisions do not formally constitute State practice, since unlike national courts they are not State organs.\(^{485}\) Even so, international decisions may constitute persuasive evidence of a customary rule and may have an (informal) precedential value,\(^{486}\) although under Article 59 of the ICJ Statute the decisions of the ICJ have ‘no binding force except between the parties and in respect of that particular case’. International decisions may also accelerate the ripening of practice into custom.\(^{487}\) Decisions of international arbitral tribunals may carry less weight than those of courts, given the limited nature of such proceedings.

The decisions of domestic courts are generally less significant than those of international courts and tribunals. In the *Lotus* case, the inconsistency of national decisions was incidentally noted without any attempt to consider the customary significance of such decisions in general.\(^{488}\) In contrast, dissenting Judge Finlay accorded ‘great weight’ to an English decision which applied international law.\(^{489}\) National decisions have subsequently been considered by

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\(^{483}\) Kolb, n 1, 87–88.

\(^{484}\) See also A D’Amato, *The Concept of Custom in International Law* (Cornell University Press, New York, 1971) 43.

\(^{485}\) ICRC Study, n 168, xxxiv. \(^{486}\) ibid.

\(^{487}\) Wolfke, n 13, 73. \(^{488}\) *Lotus* case (1927) PCIJ Series A, No 10, 28. \(^{489}\) ibid, 54.
international tribunals on numerous occasions. Recently, the ICJ took note of an Israeli Supreme Court decision which applied humanitarian law treaties to Israel’s military activities in Rafah.\footnote{Israel Wall (Advisory Opinion), n 393, para 100.}

The significance of national decisions as evidence of customary law may depend on the reputation of the court and whether particular decisions have been endorsed or acquiesced in by other States.\footnote{Wolfke, n 13, 74.} The value of domestic decisions may be limited by the restricted nature of the incorporation of international law into domestic law.\footnote{ibid, 147.} Inconsistent practices between different branches of government within a State may also neutralize the significance of the State’s practice as a whole.\footnote{ICRC Study, n 168, xxxiv.}

Most international judicial decisions dealing with terrorist subject matter are silent on the legal status of terrorism, and instead treat the issue by recourse to other legal norms. Even if hijacking and hostage-taking are customary crimes of universal jurisdiction, these offences fall short of creating a generic terrorist crime. While numerous national judicial decisions address terrorist crimes in national law, few national decisions deal with the status of terrorism in international law. Some national decisions reject the view that terrorism is an international crime, although some judges have been willing to use international definitions of terrorism in non-criminal cases.

1. International decisions

In the Tehran Hostages case, ensuing from the 1979 revolutionary occupation of the US Embassy in Tehran, the ICJ found that Iran had violated obligations owed to the US under international treaties and general international law.\footnote{Tehran Hostages, n 53, para 95.} Despite the terroristic character of the incident, the judgment does not refer to terrorism and instead analyses the dispute within the framework of the law on diplomatic immunity and State responsibility. The ICJ’s finding of illegality turned not on the characteristics of the offenders (‘militants’),\footnote{ibid, paras 57–58.} but on the prohibited character of the acts and the protected nature of the targets. Similarly, the Nicaragua case is a striking example of how relevant subject-matter can be dealt with without the invocation of terrorism’ or State terrorism.\footnote{Nicaragua, n 6.} The paramilitary activities of the contras were not described as terroristic in the judgment, but were dealt with within the framework of obligations on the non-use of force and non-intervention.\footnote{Higgins, n 193, 20.}

The Nicaragua case does not, however, exclude terrorism from international law, since the ICJ approved the 1970 Declaration as evidence of customary norms on non-intervention and the non-use of force. The 1970 Declaration prohibits ‘terrorist’ acts and activities, and the Court did not
qualify its approval of the 1970s Declaration’s customary status by excluding those parts which refer to terrorism. It is also notable that *Nicaragua* was decided in 1986, before the normative shifts in State attitudes in the General Assembly from the mid-1990s, and the Security Council after 2001.

Both the *Tehran Hostages* and *Nicaragua* cases involved issues of State responsibility in a court with jurisdiction limited to disputes between States. Those cases were not dealing with the field of international law in which the precise definition of terrorism is most relevant—individual criminal responsibility. As such, it is not surprising that these decisions did not deal more explicitly with terrorism, since it is less important in resolving disputes between States on matters covered by existing norms.

The *Lockerbie* case in the ICJ also did not turn on any concept of terrorism, notwithstanding the terrorist character of the incident.\(^498\) The case involved a dispute about whether the 1971 Montreal Convention or mandatory Security Council measures governed the response to the bombing. While the Council invoked terrorism in determining that the incident threatened peace and security, triggering enforcement measures, at neither the interim measures (1992) nor the preliminary objections (1998) phase did the ICJ inquire into whether the Council was justified in taking enforcement measures against ‘terrorism’. The discontinuance of the case means the Council’s discretion cannot now be challenged or reviewed at the merits phase.

The term ‘terrorism’ also featured in the *Israel Wall Advisory Opinion* of 2004. The ICJ majority did not invoke the term in any operative legal context, although it referred to Israeli arguments that Palestinian terrorism justified its security measures.\(^499\) No mention was made of terrorism in three Separate Opinions.\(^500\) In contrast, the Opinions of Judges Kooijmans and Owada, and the Dissenting Opinion of Judge Buergenthal, argued that the majority did not pay sufficient regard to the terrorist attacks on Israel in evaluating the lawfulness of the wall.\(^501\) Yet such references were not legal usages so much as facts considered relevant in evaluating the legitimacy and proportionality of Israel’s security response under IHL and human rights law.

More significantly, Judge Kooijmans elaborated a legal concept of terrorism for the first time in the ICJ, stating that attacks on a political opponent, by indiscriminately targeting civilians, are ‘generally considered to be international crimes’.\(^502\) Further: ‘Deliberate and indiscriminate attacks against civilians with the intention to kill are the core element of terrorism which has

\(^{498}\) *Lockerbie (Provisional Measures)*, n 299.

\(^{499}\) *Israel Wall Advisory Opinion*, n 393, paras 46, 116, 127, 138 (majority decision); see also paras 23, 30 (Separate Opinion of Judge Owada) and para 3.2 (Separate Opinion of Judge Elaraby).

\(^{500}\) ibid, (Separate Opinions of Judges Al-Khasawneh, Koroma, and Higgins).

\(^{501}\) ibid, paras 4, 6, 11, 13 (Separate Opinion of Judge Kooijmans); para 31 (Separate Opinion of Judge Owada); paras 2–5 (Dissenting Opinion of Judge Buergenthal).

\(^{502}\) ibid, paras 4–5 (Judge Kooijmans).
been unconditionally condemned by the international community regardless of the motives which have inspired them.\footnote{ibid, para 5; see similarly para 31 (Judge Owada).} In his view, every State has a right and a duty to protect its citizens against terrorist acts,\footnote{ibid, para 5 (Judge Kooijmans); see also 2 (Judge Buergenthal).} suggesting that identification of terrorists, through definition, is necessary for the exercise of security or defensive measures. In commenting on the Security Council’s determination of ‘terrorism’ as a threat to peace and security, without definition,\footnote{ibid, para 35 (Judge Kooijmans).} Judge Kooijmans implicitly sought to limit the boundaries of mandatory Council measures.

\section*{2. National decisions}

In the civil case of \textit{Tel-Oren v Libya} (1984), a US federal appeals court found that terrorism was not an offence against the ‘law of nations’ under the Alien Tort Claims Act (US).\footnote{\textit{Tel-Oren v Libyan Arab Republic} 726 F 2d 774 (DC Cir 1984) (separate concurring Opinions of Judges Edwards, Bork, and Robb), affirming \textit{Tel-Oren} 517 F Supp 542 (DDC 1981). See also Alien Tort Claims Act, 28 USC, §1350 (1976).} The case arose from an El Fatah attack on civilian vehicles in Israel in 1978, which killed 34 people and seriously injured 77 others.\footnote{\textit{Tel-Oren}, n 506, 795 (Judge Edwards), 806–807 (Judge Bork).} Two judges found that there was insufficient international consensus on the definition of terrorism for it to constitute an offence against the law of nations.\footnote{ibid, 795 (Judge Edwards).} As Judge Edwards stated: ‘While this nation unequivocally condemns all terrorist acts, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus.’\footnote{ibid, 823 (Judge Robb).} The third judge believed that terrorism was a non-justiciable ‘political question’.\footnote{Jetter, n 507, 507, 545–552; see Note, ‘Terrorism as a Tort in Violation of the Law of Nations’ (1982) 6 Fordham ILJ 236.} The view of some writers that terrorism did constitute a law of nations violation\footnote{T Meron, ‘When Do Acts of Terrorism Violate Human Rights?’ (1989) 19 IYBHR 271, 273.} has not attracted much support. Meron argues that the court should have disentangled ‘the cluster of norms involved in the terrorist attack . . . instead of focusing on the label of terrorism attached to the operation as a whole’.\footnote{US v \textit{Yunis} 924 F 2d 1086 (DC Cir 1991) 1092; (1991) 30 ILM 403; see also \textit{Burnett v Al Baraka Investment and Development Corporation} 274 F Supp 2d 86 (DDC 2003).} Such was the case in a later US decision, \textit{Yunis} (1991), in which the US Court of Appeals found (\textit{obiter}) that the sectoral offence of aircraft hijacking was a crime of universal jurisdiction.\footnote{ibid, 823 (Judge Robb).}
The US criminal case of Yousef (2003) approved Tel-Oren. Yousef involved an appeal of convictions for conspiracy to bomb US airliners in Asia, and the 1993 bombing of the World Trade Center in New York. On appeal, Yousef argued that customary law did not permit the US to exercise universal jurisdiction over the bombing of a Philippine Airlines flight, outside the US and not harming US citizens. In the absence of an international definition of ‘terrorism’ and consensus on universal jurisdiction over it, Yousef argued that the US could not exercise jurisdiction under customary or domestic law.

The US Court of Appeals swiftly rejected the view that US law was subordinate to customary law. Even so, it found that US offences of the destruction of aircraft and aircraft piracy were based on the 1971 Montreal Convention. Yousef’s conviction was ‘consistent with and required by’ US treaty obligations, regardless of whether the bombing was termed ‘terrorism’ or amounted to ‘terrorism’. The Court also found that the protective, passive personality, and objective territorial principles permitted jurisdiction over a range of acts against aircraft and related activities.

Although it was not decisive of the appeal, the Court agreed obiter that there was no universal jurisdiction over ‘terrorism’, finding that the District Court erred. Universal jurisdiction could only be exercised over ‘a limited set of crimes that cannot be expanded judicially’. In contrast, the Court believed that terrorism ‘is a term as loosely deployed as it is powerfully charged’. The ‘indefinite category’ of terrorism was not condemned by all States, which had failed to achieve consensus on definition, particularly concerning State-sponsored terrorism and freedom fighters. The Court noted that even US law contains several different definitions of terrorism.

The Court of Appeal also criticized the District Court’s reliance on the US Third Restatement as a source of customary law, which suggested that ‘perhaps certain acts of terrorism’ ‘may’ be subject to universal jurisdiction. A Comment in an earlier Draft of the Restatement noted that terrorism was widely condemned, but there was no agreement on its definition. The District Court erred further by drawing a judicial analogy between bombing an aircraft and other ‘heinous’ crimes subject to universal jurisdiction.

The Court approved Tel-Oren, observing that: ‘We regrettably are no closer
Now than eighteen years ago to an international consensus on the definition of terrorism or even its proscription. 530 This conclusion is surprising because the Court relied heavily on sources that have become outdated since Tel-Oren. The Court failed to refer to the end of the Cold War and normative developments in the General Assembly in the 1990s (including political agreement on a working definition in 1994); the practice of the Security Council after 2001; or the adoption of new international and regional treaties in the 1990s. While there is not yet any firm international consensus, it was perhaps closer in 2003 than in 1984.

Finally, while the Court found that there was no definition of terrorism, it incidentally expressed its preferred approach. Noting that terrorism ‘is defined variously by the perpetrators’ motives, methods, targets, and victims’, the Court criticized ‘Motive-based definitions’ for attempting to exempt self-determination struggles, which could potentially ‘legitimate as non-terrorist certain groups nearly universally recognized as terrorist’ (including in US case law, such as the IRA, Hezbollah, and Hamas). 531

Outside the US, acts of terrorism have also rarely been prosecuted as crimes of international terrorism, rather than as sectoral or ordinary offences. In the Ghaddaфи case (2001), the French Court of Cassation found that terrorism was not an international crime entailing the lifting of immunity for heads of State, and proceedings were quashed. 532 The charges included murder for complicity in a terrorist enterprise. 533 That case overturned an earlier appeals court decision that Libya’s Head of State could be prosecuted for involvement in bombing a French aircraft over Niger in 1989. 534

In the Lockerbie criminal trial under Scots law in the Netherlands, a suspect alleged to have destroyed an aircraft in flight was charged with, and convicted of, multiple murders. Despite early accusations of the ‘commission of terrorism’, 535 this was not charged at trial, 536 nor was it clear whether this expression

530 ibid, 58–59.
531 ibid, 59–60.
referred to domestic or international terrorism. At first instance, terrorism was descriptively referred to in the judgment four times, and more often on appeal, but in neither case was the term used operatively to trigger legal consequences. The appeal judgment referred once to ‘terrorist organizations’, 13 times to a hypothetical ‘terrorist’ in expert testimony, once to an ‘act of terrorism’, and twice to ‘terrorist activity’.

After 11 September 2001, leading terrorist suspects in various jurisdictions have more commonly been charged with sectoral or ordinary offences than with terrorism. A US citizen captured in Afghanistan in 2001, John Walker Lindh, was charged with conspiracy to kill US citizens abroad. The British ‘shoe bomber’, Richard Reid, was convicted in a US district court in 2003 of attempted murder and the attempted use of a WMD. A German court convicted a Moroccan, Mounir el Motassadeq, of 3,066 counts of accessory to murder—but also for membership in a terrorist organization—for involvement in September 11. The convictions were quashed in April 2003 because the US had refused to make available a key witness, but a retrial will proceed following subsequent US cooperation.

More broadly, 52 suspects involved in suicide bombings in Casablanca in 2003, which killed 44 people, were charged in Morocco with ‘forming a criminal band, acts against the security of the state, sabotage, homicide, and causing injuries’. In Belgium, 23 Al-Qaeda suspects were charged with explosives, weapons and document fraud offences, and membership of a private militia, for planning to bomb US targets in Europe, and for the killing of an Afghan leader, Ahmed Shah Massood, in 2001. When a German court convicted four Algerians of conspiracy to murder and to plant a bomb, and weapons offences concerning a planned attack on Strasbourg’s Christmas market in 2000, charges of belonging to a terrorist organization were withdrawn to expedite trial.

537 *Al Megrahi* (1999), n 536, paras 42; 82: eg, there was ‘no doubt’ that certain organizations were involved in ‘terrorist activities’, but no evidence of their involvement ‘in this particular act of terrorism’.

538 *Al Megrahi* (2002), n 536, para 143; paras 204, 211, 258–262; para 261; and paras 362, 366 respectively.


541 D Butler, ‘9/11 accomplice guilty in germany’, *New York Times*, 20 Feb 2003; ‘First September 11 suspect on trial sentenced to 15 years’, *Sydney Morning Herald*, 20 Feb 2003. In Feb 2004, Abdelghani Mzoudi was also acquitted of 3,000 counts of accessory to murder in relation to the same attacks for the same reason.


In Turkey, the PKK leader, Abdullah Ocalan, was prosecuted for acts intended to secede part of Turkish territory, while Kurdish parliamentarians allegedly involved with the PKK were convicted of ‘membership in an armed gang’. In 2003, a suspect charged with bombing an Air India flight in 1985 pleaded guilty to 329 counts of manslaughter. In Greece, ‘November 17’ members were convicted of murder in 2003. In Indonesia, terrorism convictions for the Bali bombing were thrown into doubt after the Constitutional Court ruled in 2004 that the anti-terrorism law was retrospective.

The ‘20th hijacker’ on 11 September 2001, French citizen Zacarias Moussaoui, was, however, indicted in the US on charges which including conspiracy to commit acts of terrorism transcending national boundaries. That offence falls short of evidence of universal jurisdiction over terrorism, since the offence of terrorism transcending national boundaries also requires harm to people or property within the US. Moussaoui ultimately pleaded guilty to the six conspiracy charges in April 2005, becoming the first person convicted in the US for the 11 September 2001 attacks. In relation to the same attacks, in September 2005, the Spanish High Court convicted 18 people, and acquitted six, of offences including conspiring on Spanish territory with the Al-Qaeda hijackers, terrorist homicide, and terrorist organization offences.

One line of authority supports terrorism as an international crime. Spain has sought extradition of persons involved in ‘dirty wars’ in Chile, Argentina, Peru, and Guatemala, under a law providing universal jurisdiction over terrorism.

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551 18 USC §2332b(a)(2) and (c); the other charges included conspiracy to: commit aircraft piracy, destroy aircraft, use weapons of mass destruction, murder US employees, and destroy property: see Indictment in US v Moussaoui, filed in the US District Court for the Eastern District of Virginia, 11 Dec 2001; see also US Att-Gen Ashcroft, ‘DOJ To Seek Death Penalty Against Moussaoui’, News Conference Transcript, US Department of Justice, Miami, 28 Mar 2002.
552 Barakat Yarkas et al case, Spanish Sup Ct (Penal Section), Sentence No 36/2005, 26 Sept 2005.
‘terrorism’.554 Terrorism is the commission of listed crimes (such as kidnap-
ning, injuring, and killing) while ‘acting in the service of, or collaborating
with, armed bands, organizations or groups whose objective is to subvert
constitutional order or to gravely alter public peace’.555 The definition applies
not only to order or peace in Spain, but also in other States. In the Cavallo
case, Mexico authorized the extradition to Spain of a former Argentinian
naval officer for his role in terrorism by the Argentine dictatorship in the
1970s and 1980s.556

Spain’s assertion of universal jurisdiction over terrorism, as defined in
Spanish law, is hard to reconcile with the absence of an international de-
finition of terrorism. Rather, it reflects an assertion of extraterritorial, prescrip-
tive jurisdiction over terrorism offences developed in a particular domestic
context.557 Although Mexico has recognized such jurisdiction in agreeing to
extradite, that has more to do with similarities between Mexican and Spanish
legal traditions than any solid foundation in international law.

The meaning of terrorism in national law has also been considered in
situations where the statutory offence of ‘terrorism’ does not define it. In
Singh v State of Bihar, in 2004 the Indian Supreme Court dismissed an appeal
by multiple appellants against convictions under Indian anti-terrorism legis-
lation.558 The appellants argued that there was no evidence that they were
terrorists, or had committed terrorist acts, under section 3 of the Terrorist
and Disruptive Activities (Prevention) Act 1987 (India). The statute did not
define terrorism and the Court found that precise definition was impossible. It
observed that the problem of definition had ‘haunted countries for decades’, not
least because of the difficulties posed by ‘freedom fighters’ and State-
sponsored terrorism. The Court believed that ‘Terminology consensus’ would
be necessary for agreement on a comprehensive international treaty, and

1/98-J, Audiencia Nacional (Central Investigatory Ct No 6), 20 Sept 1998; Cavallo case, Mexican
Sup Ct, 10 June 2003; see J Méndez and S Tinajero-Esquivel, ‘The Cavallo Case: A New Test for
Universal Jurisdiction’ (2000) 8 Human Rights Brief; Scilingo case, Spanish Audiencia Nacional,
14 Apr 2005 (upholding Spanish jurisdiction over crimes against humanity by Argentinians in
Argentina, but rejecting charges of terrorism); see C Tomuschat, ‘Issues of Universal Jurisdiction
in the Scilingo Case’ (2005) 3 JICJ 1074.

554 1985 Judicial Power Organic Law (Spain), art 23(4)(b); see earlier 1971 Code of Military
Justice, art 17; R Wilson, ‘Prosecuting Pinochet: International Crimes in Spanish Domestic Law’
555 Spanish Penal Code, arts 571–572; see also arts 573–580.
556 Excerpts in (2003) 42 ILM 884; see M Becerra, ‘The Cavallo Case: A Case of Universal
557 In Pinochet, counsel suggested that the offence of terrorism in Spanish law is reducible to
conspiracy in English law, but the argument was not dealt with in the judgment: Pinochet (No 3)
558 Madan Singh v State of Bihar [2004] INSC 225 (2 Apr 2004). The appeal arose under s 19
of the Terrorist and Disruptive Activities (Prevention) Act (‘TADA Act’) 1987 (India) for
offences under ss 302, 307, 149, 352 and 379 of the Indian Penal Code 1860, s 3 of the TADA
Act, and s 27 of the Arms Act 1959 (India).
suggested that the ‘lack of agreement’ on definition had been ‘a major obstacle to meaningful international countermeasures’.

The Court listed numerous definitions of terrorism without expressing its preference for any of them, including definitions from: the 1937 League of Nations Convention; General Assembly Resolution 51/210 (1996); Schmid’s 1992 definition as the ‘peacetime equivalent of a war crime’; an ‘academic consensus definition’ in Schmid’s study of 1988; and a range of definitions used by the US Federal Bureau of Investigation. The Court did, however, suggest that Schmid’s 1992 definition attempted to ‘cut through the Gordian definitional knot’ by regarding the core of war crimes—‘deliberate attacks on civilians, hostage-taking and the killing of prisoners’—as a basis for an equivalent crime of terrorism in peacetime.

The Court then proceeded to offer a tentative descriptive definition of terrorism as the use of violence which causes physical or mental damage to victims but also a ‘prolonged psychological effect’ or potential effect on society as a whole. Beyond the physical harm of terrorist violence lies its ‘main objective’: ‘to overawe the Government or disturb the harmony of the society or “terrorise” people and the society . . . with a view to disturb the even tempo, peace and tranquility of the society and create a sense of fear and insecurity’. In addition, the ordinary penal law was thought insufficient to address terrorism, since terrorism is ‘in essence a deliberate and systematic use of coercive intimidation’. The Court also considered it to be a manifestation of ‘increased lawlessness and cult of violence’ and a ‘revolt against a civilized and orderly society’. Terrorism is exploited by criminals aiming ‘to achieve acceptability and respectability in the society’ by being projected as

559 ‘Terrorism is an anxiety-inspiring, repeated violent action, employed by (semi-)clandestine individual, group or State actors, for idiosyncratic, criminal or political reasons, whereby—in contrast to assassination—the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat—and violence—based communication processes between terrorist (organization), (imperilled) victims, and main targets are used to manipulate the main target, turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought’: see A Schmid and A Jongman, Political Terrorism (North Holland Publishing Co, Amsterdam, 1983).

560 Including: ‘Terrorism is the use or threatened use of force designed to bring about political change’: B Jenkins. ‘Terrorism constitutes the illegitimate use of force to achieve a political objective when innocent people are targeted’: W Laqueur. ‘Terrorism is the premeditated, deliberate, systematic murder, mayhem, and threatening of the innocent to create fear and intimidation in order to gain a political or tactical advantage, usually to influence an audience’: J Poland. ‘Terrorism is the unlawful use or threat of violence against persons or property to further political or social objectives. It is usually intended to intimidate or coerce a Government, individuals or groups, or to modify their behavior or politics’: US Vice-President’s Task Force, 1986.

561 Singh, n 558.
heroes. The Court equivocated on whether terrorism only includes attacks on non-combatants and excludes attacks on military targets.

Courts have been more willing to use the term ‘terrorism’ in non-criminal cases. In the *Suresh* case (2002), the Canadian Supreme Court accepted that there was an agreed international definition of terrorism for the limited purpose of interpreting and applying Canadian immigration law. The case involved an appeal against a denial of refugee status and a deportation order issued because Suresh was involved in ‘terrorism’. Terrorism was not defined in the legislation and the Court acknowledged the ‘notoriously difficult’ problem of definition, the absence of an authoritative international definition, and the factual difficulty of determining who falls within any definition.

The Court observed that the absence of definition means ‘the term is open to politicized manipulation, conjecture, and polemical interpretation’. It gave the example of Mandela’s ANC under apartheid, ‘routinely labelled a terrorist organization’ by South Africa and much of the international community. Nonetheless, the Court found it unnecessary to ‘exhaustively’ define terrorism for the limited purpose of the immigration proceeding at hand. Rather, it felt that ‘the term provides a sufficient basis for adjudication and . . . is not inherently ambiguous “even if the full meaning . . . must be determined on an incremental basis” ’.

The Court approved the ‘stipulative’ definition in the 1999 Terrorist Financing Convention, which ‘catches the essence of what the world understands by “terrorism” ’, and is ‘sufficiently certain to be workable, fair and constitutional’, even if marginal cases provoke disagreement. The Court rejected an argument that it should adopt a ‘functional’ definition—by listing specific acts—to ‘minimize politicization’. Conceding that the functional approach was strongly supported by jurists, States, and sectoral treaties, and that the stipulative approach was open to manipulation, the Court still

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562 Further: ‘Crime became a highly politicised affair and greed compounded by corruption and violence enabled unscrupulousness and hypocrisy to reign supreme, supported by duplicity and deceitful behaviour in public life to amass and usurp public power to perpetuate personal aggrandizement, pretending to be for the common good’: ibid.

563 ‘If terrorism is defined strictly in terms of attacks on non-military targets, a number of attacks on military installations and soldiers’ residences could not be included in the statistics’: ibid.

564 *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR; para 93.

565 Immigration Act (Canada), s 19.

566 *Suresh*, n 564, paras 93–95.

567 ibid, para 94.

568 ibid, para 95. Mandela himself admits that the ANC was prepared to use ‘terrorism’, and justified a perfidious attack on military targets in Pretoria which killed many civilians: N Mandela, *Long Walk to Freedom* (Little, Brown, London, 1994) 272, 506.

569 *Suresh*, n 564, para 93.

570 ibid, para 93; also para 96.

571 ibid, paras 96–98.

572 ibid, para 97.
believed that a functional list ‘may change over time’ and ultimately require a term like terrorism to distinguish some illicit acts from others.573

The Court’s belief that there is core global agreement on the definition of terrorism, except in marginal cases, glosses over the very real and wide differences between States. As discussed above, apparent political agreement on a basic definition in the General Assembly masked deep divisions about any definition for the purpose of imposing criminal liability. In this case, the equally serious legal consequences of a security deportation caution against conceptual leaps of judicial reasoning which transpose definitions from one area to a different context. As explained earlier, agreement on the generic definition in the 1999 Terrorist Financing Convention was reached only because the definition triggered financing offences, and not any broader criminal liability or other serious legal disability.

In the UK House of Lords, a similar case arose involving exclusion from refugee status. In T v Home Secretary, Lord Mustill relied on the 1937 League Convention definition of terrorism to limit the meaning of ‘serious non-political’ crime in Article 1F(b) of the 1951 Refugee Convention. While cautious about using the contested term ‘terrorism’ in exclusion cases, he preferred it to more subjective tests such as remoteness, causation, atrocity, and proportionality, since it ‘concentrates on the method of the offence, rather than its physical manifestation’.574 Lord Mustill stated that ‘terrorism is not simply a label for violent conduct of which the speaker deeply disapproves . . . [but] is capable of definition and objective application’.575 In his view, a terrorist targets civilians indiscriminately, rather than striking at ‘the tyrants whom he opposes’.576 In international law, Lord Mustill found ‘a recognition that terrorism is an evil in its own right, distinct from endemic violence, and calling for special measures of containment’.577 He was ‘content to adopt’ the 1937 League definition as ‘serviceable’ for exclusion purposes.578 Lord Slynn agreed, adding that terrorism may also include acts ‘likely to cause injury to persons who have no connection with the government’.579 The views of Lords Mustill and Slynn were not the majority, and courts have generally been reluctant to deploy definitions of terrorism in exclusion cases.580 The finding that terrorism is a discrete concept in international law is overly-optimistic, given ongoing disagreements about definition.

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573 ibid.
574 T v Home Secretary [1996] AC 742, 772 (Lord Mustill).
575 ibid, 773.
576 ibid, 772.
577 ibid, 773.
578 ibid.
579 ibid, 776 (Lord Slynn).
National laws may be evidence of State practice and *opinio juris*; or embody general principles of law. Definitions of terrorism are increasingly found in national law and may contribute to the formation of an international customary definition, and universal jurisdiction over terrorism. Cassese writes that numerous national laws prohibit terrorism and ‘substantially converge’, contributing to a customary definition, although he only provides examples from four similar western democracies. Yet close attention to national laws shows that wide divergences in national definitions make it difficult to ascertain any common, customary definition.

The picture is complicated by the use of different definitions for different purposes, including in a single jurisdiction. While this creates uncertainty, there may be legitimate reasons for using different definitions for different preventive or repressive purposes. Often national definitions do not establish offences or ‘serve as a legal term of art upon which liberty depends’, but are used for jurisdictional, budgetary, or administrative purposes. These include special investigative or prosecutorial powers; different evidentiary rules (such as lower standards of proof, or reversing the onus of proof); reducing lawyer-client confidentiality; enhanced penalties; and forfeiture or freezing of assets. Where terrorism offences are defined to require a political motive, it may be advantageous to remove the motive element in relation to powers to investigate terrorism, since evidence of motive may take some time to establish and it may be necessary to act preventively in the meantime.

Further, definitions may trigger emergency laws and restrictions on, or derogation from, human rights or constitutional protections. In UK

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581 *Hostages* case, VIII UNWCC Law Reports, 34, 49; *Lotus* case, n 488, 96 (Separate Opinion of Judge Altamira); Wolfke, n 13, 77, 148.

582 P Macklem, ‘Canada’s Obligations at International Criminal Law’ in Daniels et al (eds), n 362, 353.

583 Cassese, n 88, 122; see also A Cassese, ‘Terrorism as an International Crime’ in Bianchi (ed), n 55, 213 (referring to the US, the UK, Canada, and Australia).

584 In the US, different definitions of terrorism are used by the State Department, the Defence Department, the FBI, the CIA, and others. Some of these are discussed in *Flatow v Iran* 999 F Supp 1, 17 (DDC 1998).

585 C Walter, ‘Defining Terrorism in National and International Law’ in Walter et al (eds), n 337, 23.


589 Bassiouni, n 587, 27.
immigration law, definition of terrorism permitted non-citizens suspected of terrorism to be indefinitely detained if deportation was impossible, until the House of Lords declared the law was impermissibly discriminatory.\(^590\) There have also been attempts to exclude terrorists from refugee status automatically, or to return recognized refugees to persecution after admission, even though terrorism is undefined and may not be serious enough to warrant exclusion or refoulement in international refugee law. Reference to terrorism may even trigger war—after the Beslan attacks, the Russian Duma considered a law allowing war to be declared in response to a terrorist act threatening national security.\(^591\)

In federal States, the divergences in criminal law definitions may be acute. In the US, the Oklahoma City bomber was prosecuted in a state court for 160 counts of murder.\(^592\) In contrast, the ‘Washington snipers’ were prosecuted under Virginian law for terrorism, a crime ‘with the intent to intimidate the civilian population at large or influence the conduct or activities of the government of the United States, a state or locality through intimidation’.\(^593\)

I. National criminal laws on terrorism

Historically, it was difficult to compare national criminal definitions of terrorism due to the methodological difficulty of accessing national laws.\(^594\) Since late 2001, national approaches can be gleaned from mandatory State reports to the CTC,\(^595\) which detail national compliance with Council Resolution 1373, including the obligation to criminalize terrorist acts domestically (including financing, planning, preparing, and perpetrating such acts), with proportionate penalties.\(^596\) By 30 June 2004, the CTC had received 515 reports from States and international organizations.\(^597\)


\(^594\) While the UN Sec-Gen had been tasked by UNGA with collecting national laws, a compilation was not published until after 11 Sept 2001, and was incomplete and out-of-date: see National Laws and Regulations on the Prevention and Suppression of International Terrorism: Part I, UN Legislative Series, New York, 2002, UN Doc ST/LEG/SER.B/22.

\(^595\) CTC (Chair), Guidance Note for the Submission of Reports: UNSC Resolution 1373 (2001) para 3(2).

\(^596\) UNSC Resolution 1373 (2001) para 2(e).

Analysis of State reports reveals three main patterns in national criminal responses to terrorism: 87 States lack special terrorism offences and hence use ordinary offences; 46 States have *simple generic* terrorism offences; and 48 States have *composite generic* terrorism offences. Each category is examined below. (Fifteen States provided insufficient information on criminal laws, while a further 18 States possess terrorism offences but their definition is unclear from their reports.)

(a) Ordinary offences approach

Despite rapid legislative change in many jurisdictions since September 2001, historical patterns in national legal approaches to terrorism remain fairly clear. Eighty-six States prosecute terrorism as ordinary crime, without any special terrorism offences. Thus terrorism may be prosecuted as murder, assault, false imprisonment, and so on. The physical harm, or threat of harm, is the decisive factor in the legal response, rather than the presence of generic elements such as a political motive or intimidatory aim. Some States treat terrorism as ordinary crime to avoid legitimizing violent terrorists as extraordinary ‘political’ offenders. Most States supplement this approach by incorporating many of the sectoral treaty offences, a process much accelerated after 2001.

Many States also possess broad laws on national security, public emergency, public order, unlawful association, armed bands, hostile expeditions, subversion, treason, sedition, or threats to constitutional order. Terrorist acts

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598 State Reports to CTC available at: <www.un.org/Docs/sc/committees/1373/submitted_reports.html>. For reasons of space, citations to each of the 515 State reports have been omitted.
599 Bangladesh, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Central African Republic, Chad, Comoros, Cook Islands, Equatorial Guinea, Ethiopia, Honduras, Liberia, Mali, Mauritania, and Togo.
600 Bulgaria, Costa Rica, Cambodia, Dominican Republic, Gambia, Guinea Bissau, Guyana, Iraq, Liechtenstein, Malawi, Marshall Islands, Mauritius, Monaco, Norway, Oman, Tajikistan, Uganda, and the UAE.
602 Afghanistan, Andorra, Angola, Antigua and Barbuda, Argentina, Bahamas, Bahrain, Barbados, Benin, Bhutan, Botswana, Brazil, Brunei Darussalam, Burundi, Cameroon, China, Costa Rica, Cote D’Ivoire, Cuba, Dominica, DPR Korea, DR Congo, Eritrea, Fiji, Gabon, Ghana, Grenada, Guatemala, Haiti, Indonesia, Jamaica, Japan, Kenya, Kiribati, Kuwait, Lao PDR, Lesotho, Libya, Madagascar, Malaysia, Malta, Micronesia, Moldova, Myanmar, Namibia, Nauru, NZ, Niger, Nigeria, Niue, Palau, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Rep Congo, Rep Korea, Rwanda, St Kitts and Nevis, Saint Lucia, Sao Tome and Principe, Samoa, San Marino, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, Sri Lanka, Suriname, Swaziland, Switzerland, Tanzania, Timor Leste, Trinidad and Tobago, Tuvalu, Ukraine, Uruguay, Vanuatu, Venezuela, Yemen, Zambia.
often fall within—and are subsumed by—the sovereign, prerogative scope of these wide protective laws, rendering a specific offence of terrorism pragmatically unnecessary. Jurisdiction to prescribe such offences is usually territorially limited, or extended by the objective territorial and protective principles, but universal jurisdiction is not usually exercised.

Some States which prosecute terrorism as ordinary crime possess offences which roughly approximate terrorism, without naming it as such. These include offences such as public intimidation (Argentina); creating panic (Kuwait); and intimidation (Japan, Sri Lanka, and Venezuela). Spreading terror is an element of the crime of collective endangerment in Brazil, and of public intimidation in Guatemala; while in Lesotho, putting the public in fear is an element of subversion.

Occasionally, States have terrorism offences on the books, but terrorism is prosecuted as ordinary crime. In South Africa, an apartheid-era definition has fallen into disuse, and prosecutors rely on ordinary offences—though ironically, members of Afrikaans for Boer Forces were charged with terrorism in 2003, for anti-State violence, including a plot to kill President Mandela. It is rare for ordinary crimes to be categorized as terrorism, without that description adding anything substantive. Thus, Sri Lanka has ‘terrorism’ offences which simply list objective criminal acts, without any generic or purposive elements. Similarly, ‘terroristic’ or subversive ‘indiscriminate mass murder’ in Japan merely describes aggravated common crime.

After September 2001, most States relying on ordinary offences intended to reform their legal approach to terrorism, and few States maintain that ordinary offences are now sufficient. A small number of States consider reform unlikely due to parliamentary opposition to, or rejection of, government proposals. While treating terrorism as common crime is the historically dominant approach, and remains so, this pattern is likely to change as further reforms take place.

(b) Generic definitions of terrorism

Historically, few States generically defined terrorist crimes, or combined generic elements with the enumeration of specific acts. Since 2001, however, States have increasingly adopted generic offences. The CTC has pressured States to criminalize terrorism, without supplying an international definition, or objecting to the unilateral, generic national definitions which go beyond the sectoral treaty offences.

Generic offences fall into two broad categories: simple generic offences, comprising a single generic element; and composite or compound generic

606 eg Singapore.
607 eg Paraguay, NZ, and Switzerland.
offences, constituted by cumulative or conjunctive generic elements. Almost all generic offences require an intent to commit an objective, serious, violent and/or criminal act, to life or property, although the specification of violent acts varies greatly. The focus of this analysis is on the generic elements of terrorist offences, in furtherance of which violence is committed, rather than on the myriad forms violence may take.

To aid analysis, the different language used in national definitions for similar concepts has been simplified into overarching descriptors. Thus the idea of ‘putting civilians in fear’, used below, is variously formulated in national law as creating panic or anxiety, terrorizing, frightening, or intimidating. Reference to ‘civilians’ is shorthand for various protected targets in national law: individuals, entities, populations, peoples, and so on. The limited purpose of this analysis is to appreciate general patterns, rather than to interrogate the precise meaning of different terms. State reports to the CTC often do not make it clear whether terrorism definitions relate to domestic or international terrorism offences. This analysis considers both types of definition together, on the basis that the generic purposeful elements of terrorism (terror, intimidation, coercion, compulsion, and so on) can be analysed independently of whether the targets of terrorism are domestic or international.608

(i) Simple generic terrorism offences

At the narrow end of the spectrum of simple generic offences, nine States define terrorism as violence intended to terrorize or intimidate people.609 These definitions resemble those in the 1937 League Convention and in IHL, which focus on the grave psychological impact of acts. Also at the narrow end are three States defining terrorism as coercing or intimidating a State or international organization,610 regardless of whether it is politically or privately motivated. Eight States define terrorism as either putting civilians in fear, or coercing a government or organization, thus presenting the first two simple generic definitions as alternatives and broadening the definition.611 That approach reflects the 1999 Terrorist Financing Convention.612

At the broader end of the spectrum, 10 States define terrorism as violent acts which damage, weaken, or oppose the State, constitutional, or public order.613 These definitions more closely approximate broad national security

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608 A more refined analysis which distinguishes international from national definitions would be useful, but is beyond the scope of this research.
609 Albania, Algeria, Colombia (aggravated if done to hinder elections), Cyprus, Ecuador, El Salvador, Lebanon, Syrian Arab Republic, and Tunisia.
610 Hungary, Latvia, and Mongolia.
611 Azerbaijan, Belarus, Bolivia, Chile, Lithuania, Mozambique, Thailand, and Tonga.
612 1999 Terrorist Financing Convention, Art 2(1)(b).
613 Czech Republic, Armenia, Guatemala, Malaysia (emergency powers only), Nicaragua, Slovakia, South Africa, Spain, Turkey, Vietnam, and Zimbabwe.
or public order offences, labelled as terrorism. Zimbabwe has a crime of ‘insurgency, banditry, sabotage or terrorism’—without distinguishing the terms—involving insurrection or resistance, or coercion against the State. South Africa’s 1982 definition covers acts with intent to (a) overthrow or endanger State authority, (b) achieve ‘any constitutional, political, industrial, social or economic aim or change’ in the State, or (c) coerce the State in some way.614 Turkey defines terrorism as organized violence to change the State’s constitutional, political, legal, social, secular or economic order, impair territorial or national integrity, endanger the State’s existence or authority, eliminate basic rights or freedoms, or damage safety, public order, or the State’s health.615 Israel defines a ‘terrorist organization’ simply as any group violence or threat of violence ‘calculated to cause death or injury to a person’, irrespective of motive.616

The broadest end of the spectrum includes definitions presenting, as alternatives, multiple simple generic definitions. Six States define terrorism as violence putting civilians in fear, or harming interests such as public order, safety, security, democracy, or the State,617 the environment, public facilities, or resources.618 A further seven States define terrorism as violence putting civilians in fear, or coercing a government or international organization, or harming public safety, order, security, independence, integrity, or the State’s foundations.619 One State defines terrorism as violence putting civilians in fear, or for political ends;620 while another defines it as violence motivated by politics or religion, or to provoke war or conflict.621

(ii) Composite generic terrorism offences

Composite generic offences require proof of multiple generic elements. The elements are similar to those in simple generic definitions, but composite offences are narrower because multiple, conjunctive elements must be present. Thirteen States define terrorism as violence putting civilians in fear, in order to disrupt public order, safety, peace, the State, or constitution; or conversely define terrorism as disrupting order to put civilians in fear.622 One

614 Internal Security Act 1984 (South Africa), s 54.
615 Law No 3713 on Suppression of Terrorism (Turkey), s 1.
616 Prevention of Terrorism Ordinance, No 33 of 5708–1948 (Israel), s 1.
617 Egypt, Italy, Myanmar, Nepal, and India (Prevention of Terrorism Act 2002 since repealed).
618 Sudan.
619 Kazakhstan, Kyrgyzstan, Russia, Turkmenistan, Finland, Portugal, Iceland, and Moldova (emergency powers only).
620 Maldives.
621 Estonia.
622 Denmark, Djibouti, Macedonia, France, Guinea, Jordan, Morocco, Peru, Qatar, Romania, Senegal, Serbia and Montenegro, and Slovenia. The Peruvian Constitutional Court, however, declared too broad a definition of terrorism referring to spreading anxiety, alarm, or fear in the population to change the power structure (by installing a totalitarian government): Decision of 3 Jan 2003, cited in CTC Report: Peru, UN Doc S/2003/896 (17 Sept 2003), 2.
State defines terrorism as putting civilians in fear to coerce a government or international organization, while another defines it in the same way but adds the alternative of jeopardizing the constitutional, political, or economic values of a State or an organization. A further State refers to putting civilians in fear to either coerce a government, disturb the peace, or undermine State authority.

Five States define terrorism as violence for a political or other motive, aiming to (a) coerce a government or international organization, or (b) intimidate a population or civilians. This category resembles the 1994 General Assembly definition, but broadens it by adding the alternative of coercing a government or international organization. Twenty-five EU States define terrorism as acts which seriously damage a State and (a) intimidate a population; (b) coerce a government or international organization; or (c) destroy fundamental structures. Unlike the previous category, there is no requirement of a political or other motive. Another State similarly defines terrorism as violence affecting public security or State interests, by putting civilians in fear, or coercing a State or organization. Finally, one State defines terrorism as coercing a State or international organization for the purpose of disturbing international relations, causing war, or destabilizing the State.

(iii) Summary of analysis

The dominant approach in national laws—almost half of all States—is to prosecute terrorism as ordinary crime. The remaining half of States defines terrorism generically—half simple generic (one quarter of States), and half composite generic (also one quarter). Some generic definitions were the result of reforms after September 2001, increasing the historically small number of States which defined terrorism generically.

Nonetheless, the divergence in generic definitions militates against abstracting—by teleological reduction—a minimum core definition of terrorism in State practice. Even the basic element of an intent to create terror is not found in all definitions. Further, the influence of international definitions (as in the 1999 Terrorist Financing Convention, the 1994 Declaration, Council resolutions, and the 1937 League Convention) on national criminal laws has been fairly limited.
Where definitions do not include terrorizing or intimidating people as an element, they lose their distinctiveness and differentiation from other political violence. For instance, violence for political ends, or to coerce a government, is conceptually different from violence to intimidate the public or put it in fear.631 Unless terrorism is pinned to the idea of terrorizing people—whether or not in addition to political motives, or coercive aims—then such a crime is better described as subversion, coercion, or otherwise.

(c) Jurisdiction over terrorism

The duty to criminalize terrorism in Resolution 1373 is silent on the scope of prescriptive jurisdiction, illustrating the danger of circumventing treaty-making process—which would stipulate bases of jurisdiction—in establishing an international crime. While States clearly must criminalize terrorist acts committed or prepared in their territory, it is not clear what wider bases of jurisdiction the Council envisages.

In requiring States to ‘bring to justice’ and ‘deny safe haven’ to terrorists, Resolution 1373 may simply be referring to a duty to extradite in relation to existing sectoral offences or other serious crimes. On the other hand, by referring specifically to ‘terrorism’ rather than to treaty offences, it may implicitly require the exercise of universal jurisdiction over ‘terrorism’ per se, despite not defining its scope. Indeed the CTC encouraged States to extend jurisdiction over domestic terrorism to cover international terrorism.632 One CTC expert describes this ‘unilateral’ process as evidence of emergent universal jurisdiction over terrorism: ‘that the State concerned considers these criminal acts to be of such gravity that they either threaten the peace, security and well-being of the world, that they constitute such atrocities that they deeply shock the conscience of humanity’.633 Yet the process is more complex than a recognition by States that terrorism is universally punishable, in view of the Council’s pressure to widen jurisdiction, and thus hasten the development of universal jurisdiction. It is difficult to accept universal jurisdiction over terrorism when States define it in radically different ways. Universal jurisdiction presupposes criminalization of common conduct, not widely divergent acts artificially compacted under the nominal umbrella of ‘terrorism’. It is still too early to tell, however, whether the Council’s 2004 definition of terrorism will gradually harmonize national definitions over time.


632 Greenstock, n 390.

Arguments that terrorism is a customary international crime are premature. Attempts in the General Assembly to define terrorism in the 1970s were unsuccessful, although the end of Cold War, by 1987 Gorbachev proposed that a UN tribunal be established to investigate terrorism, and in 1994 Russia remarked that the end of the Cold War had opened up prospects for cooperation. While political consensus was reached on a working definition of terrorism in 1994, disagreement over a national liberation exception hindered agreement on a binding prohibition.

In the Security Council, reference to specific acts or incidents of terrorism was common after 1985, and generalized references with legal consequences appeared after 2001. Yet terrorism has remained legally undefined in Council practice, despite a non-binding definition of late 2004. Most judicial decisions are silent on the international legal status of terrorism, and instead resolve disputes about terrorist-type conduct by recourse to existing legal norms, although some decisions invoke international definitions of terrorism for non-criminal law purposes. National definitions of terrorism, while gradually drifting towards generic definition, are still too divergent to support the existence of a customary international definition or crime of terrorism.

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635 I Blishchenko and N Zhdanov, Terrorism and International Law (Progress, Moscow, 1984) 44.
