Typology of Conflict: Terrorism and the Ambiguation of the Laws of War

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1.1. Introduction

Despite wide universal acceptance as an international crime, confusion over a precise definition of terrorism and its corollary state-sponsored terrorism has hampered any effective development in the discourse regarding acceptable and permitted countermeasures. Notwithstanding the fact that terrorist acts are the commonly employed *modus operandi* in modern asymmetric warfare (i.e. circumstances where there is a differential in fighting resources between the parties to a conflict) the international legal response has been piecemeal and inadequate. In the absence of an agreed definition, countermeasures including targeted laws, criminal procedures and extradition/deportations arrangements have been stalled in preference to global response that centers its concentration upon the legal justification for the use of force under article 51 of the UN Charter (i.e. self defense).

General agreement by states at a philosophical level on what constitutes terrorism masks serious disagreements in practice. A central problem has been that international debate, about the problems of defining terrorism, has historically centered on the response of the General Assembly. Yet, up until 2001, the Security Council adopted a varied range of measures addressing threats to peace and security. However 11 September 2001 changed the landscape fundamentally. Notwithstanding the event of terrorist attacks on the American World Trade Center Towers in New York City and The Pentagon in Washington, there has been limited...
progress by the Security Council (aside from the adoption of general measures) towards enshrining an agreed and acceptable delineation of the crime of terrorism. Further, this is exacerbated by the fact that States have unilaterally defined terrorism in national law, permitting wide and divergent domestic definitions. Yet still, this unsustainable situation is perpetuated through the continued use of a non-binding 2004 Council characterization of the crime, which fails to remedy the confusion caused by the lack of an operative definition in practice.¹

Terminology consensus, however, is necessary for a single comprehensive international convention on terrorism. Accordingly, this paper assesses the definition of terrorism, long a divisive and illusive legal notion, with a view to discussing a convergence of some common principles which prove instructive as to the content and meaning of the term. It will be proffered that an emerging consensus, which has been prompted by the need to foster law enforcement cooperation, is a necessary prerequisite to a consistent and effective response to treats to international peace and security.

However if we begin from the simple standpoint that a person who practices terrorism is a terrorist we immediately stumble at the first legal definitional hurdle.². As we will see, depending on how wide we cast the definitional net - there are a broad array of organizations; political, nationalistic, and religious groups, (be they revolutionary or ruling governments) whose actions potentially come within the scope. In deed the presence of non-state actors in widespread armed conflict has not only created controversy regarding the application of the laws of armed conflict but confronted international lawyers with a delineation challenge. The

object then becomes one of how to contain the legal definition so that it has a clearly
identifiable subject matter and definitive list of elements.

The difficulty of providing a precise definition is greatly compounded by the fact that the
word is politically and emotionally charged. The term "terrorism" connotes violence or
threat of violence by certain actors as immoral and unjustified in the pejorative sense. As well
as a legal ambiguity there is a moral ambiguity that surrounds the term. As a consequence,
when agreeing upon what the definition should be it is important to remember that all
definitions of crime are socially constructed. It is therefore vital to the universal acceptance of
the agreed legal definition that there is sensitivity to sociological factors such as the value
systems of different socio-economic, demographic, religious and racial groups. The interface
of the law, politics and morality creates difficult problems. For example from a legal
perspective: If the objectives the terrorist organization wishes to achieve may be regarded as
justified (i.e. self determination) does this justification become relevant to the nature of the
prohibited act. Clear-cut legal standards are tightly bound up with moral and legal
considerations making bright line, logical legal assessments and conclusions hazy.

This is not to suggest that there is any value judgment that could vindicate or exculpate a
violent terrorist act. In essence, the terrorists respects no law—not criminal law, not moral

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4 In his book Bruce Hoffman “Inside Terrorism” Use of the term implies a moral judgment; and if one party can
successully attach the label terrorist to its opponent, then it has indirectly persuaded others to adopt its moral
viewpoint.’ Hence the decision to call someone or label some organization ‘terrorist’ becomes almost
unavoidably subjective, depending largely on whether one sympathizes with or opposes the person/group/cause
concerned.
5 See the work of Jorgen Habermas. Derrida Giovanna Borradori Philosophy in a Time of Terror Dialogues with
Jurgen Habermas and Jacques Derrida Published by University of Chicago Press, 2003 According to
Habermas, “political terrorists fuelled by religious fundamentalism don’t misunderstand modern values; they
reject them” See also Corbett, Lee. “Regarding others: Habermas and Derrida on terrorism.” Review of
Australian Review of Public Affairs 15 March 2004.)
law, and not the law of peace or the law of war. In short, they do not play by any rules. There is no disagreement that the indiscriminate targeting of civilians is reprehensible, rather it is simply to acknowledge that if there is to be universal condemnation of terrorist acts then the international community needs to arrive at a satisfactory legal definition devoid of moral and political ambiguities. This move to reach an agreed legal description of terrorism is unfolding in a context where there exist compelling factors contributing to its utility. In its simplest terms, terrorism as a weapon has proven to be cheap and to have a synergistic effect in its impact. Like other forms of low-intensity warfare, terrorism is ambiguous. The fact that it throws its victims off balance and that they must grope for an appropriate means of response, or a determination if any response is appropriate only increases its effectiveness. “In its modern manifestations, terror is the totalitarian form of war and politics. It shatters the war convention and the political code. It breaks across moral limits beyond which no further limitation seems possible.”

One of the reasons that terrorism is unconventional and viewed as beyond the pale is because it adopts an arbitrary stance. War is the predictable and directed waging of armed conflict against an enemy, where as terrorism can not be anticipated or calculated because it’s ominous and malevolent actions do not discriminate between the enemy and civilians. In deed the greater the number of civilian casualties the greater the prominence they bring to their political cause. The distinction here is that we can seek to place limits on war because both sides agree to the terms under which they fight and both stand to gain from the benefits of limitation. But acts of terror rely upon the absence of limitation (including the absence distinction, proportionality, military necessity) for psychological impact such that there is no

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mutual benefit of placing constraints or confines on actions taken. Thus terrorism has passed
over the parameters of warfare and into the realm of criminal conduct or alternatively it is
employing the methods of warfare with a criminal intent. It seems therefore that terrorists
should either be thought of as criminal behavior, in which case they might be accused of
violating criminal law, or they should be thought of as acting within the scope of war and
peace, in which case they might be accused of violating either the law of war or the law of
peace.\(^8\) However, they do not seem to fall clearly in either scenario thus despite being law
violators, they have situated themselves in an impossible place, located somewhere outside of
the law.\(^9\)

Historically states have initiated a legal response as their first reaction to international terrorist
activities. From the legal perspective, managing the terrorist threat requires identification of
the threat and a selection from within the range of counter terrorism measures usually within
the framework of international conventions that generally provide for prosecution through the
aut dedere, aut judicare—extradite and prosecute—mechanism and state responsibility
concept. These legal mechanisms are primary examples of legal responses used by states
against international terrorists.\(^10\)

1.2. Historical Overview of Terrorism and the International Community

The modern English term terrorism dates back to 1795 when it was used to describe the
actions of the Jacobin Club in their rule of post-Revolutionary France, the so-called Reign of

\(^8\) Ibid.
\(^9\) Ibid., 142.
for the United States to prosecute terrorists for acts committed against Americans overseas); see also Ethan A
Nadelmann (1990), ‘The Role of the United States in the International Enforcement of Criminal Law’, 31
Harvard International Law Journal 37, 64-71 (noting the United States efforts to renegotiate extradition treaties
in order to prosecute international terrorists).
Terror, a period of the bloody French Revolution in which the French State asserted its authority by knitting a fabric of fear over the populace through the summary executions of thousands. However, it was not until 1934, following the assassination of French statesman Jean-Louis Barthou and King Alexander of Yugoslavia, that terrorism entered the international agenda. This event induced the League of Nations to draft the first ever penal instrument making terrorism an international offence—the Convention for the Prevention and Punishment of Terrorism (“CPPT”). The CPPT defined terrorism in a broad way, as “criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public.” The CPPT never entered into force.

The United Nations subsequently came into being at a time when the seeds for the dissolution of imperial and colonial possessions had been sown. During the early years of the UN the distinction between terrorists and revolutionaries was the subject of much disagreement as there were numerous national liberation struggles. Many acts of “terror-violence” occurred in the context of armed conflicts, specifically in the context of de-colonization and wars of

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14 Ibid., 23.
15 For example when Nelson Mandela first visited the US, he was on the State Department’s list of international terrorists. Mandela is now a Nobel Peace Prize Laureate and pre-eminent international statesman. In the Middle East, another ‘international terrorist’, Yasir Arafat, won the Nobel Peace Prize, but questions remain as to whether he is an architect of peace or a purveyor of terrorism. As recently as February 2001, Mr Hasmy, a Malaysian representative to the Ad Hoc Committee of the General Assembly created to draft a comprehensive convention on terrorism, spoke on behalf of the Organisation of the Islamic Conference and commented that a definition of terrorism was desirable so that terrorism could be ‘differentiated from the legitimate struggles of peoples under colonial or alien domination and foreign occupation for self-determination and national liberation, as recognised by the relevant resolutions of the United Nations’: Measures to Eliminate International Terrorism, U.N. GAOR, 56th sess, 14th plen mtg, 11, UN Doc A/56/PV.14 (2001).
At first, these acts were labelled “terrorism” by colonial powers as they sought to cling to their colonial possessions through military violence. Soon the language changed as self-determination became increasingly recognised at the international level as a group right. In any case acceptance of the right to self-determination crowded out the methods of terror frequently employed by both parties.

Though most armed struggles for national liberation ended in the 1970s, new ones emerged, which concerned the rights of self-determination by ethnic groups seeking secession from the states in which they lived. Regrettably, the world community remained unable to find ways to peacefully resolve these conflicts, which gave rise to massive victimization. New and emerging states were mired in civil strife and internecine power struggles in which “terror” was a tool. In addition, ideological and geopolitical differences between states were fuelling the proliferation of ideologically motivated non-state entities, frequently with uncertain agendas but always certain about their methods-terror.

Ideological and political quagmires laid down fertile ground for a dichotomy of terrorism to come into being. In the 1960s and 1970s, focus on terrorism mainly targeted ideologically motivated individuals and small groups. The international community increasingly targeted manifestations of individual and small group acts of “terror-violence” sidestepping the

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politically volatile issue of state/insurgent sponsored and orchestrated “terror-violence”. Attacks by individuals and small groups soon came to comprise the category of “terrorists.” These attracted international attention and gained prominence in the 1960s with the hijacking of several commercial airliners and again in 1972 at the Munich Olympic Games with the kidnapping and assassination of nine Israeli athletes by Black September terrorists.

The trend towards ever more convoluted semantic obfuscations to side-step terrorism’s pejorative overtones was most clearly demonstrated in the exchanges between Western and non-Western member states of the United Nations following the 1972 Munich Olympics massacre. The then UN Secretary-General, Kurt Waldheim, raised the issue at the General Assembly noting that the UN should not remain a “mute spectator” to the acts of terrorist violence then occurring throughout the world but should take practical steps that might prevent further bloodshed.

While a majority of the UN member states supported the Secretary-General, a disputatious minority mainly the ascendant Third World bloc derailed the discussion, arguing that “people who struggle to liberate themselves from foreign oppression and exploitation have the right to use all methods at their disposal, including force.” As a consequence, individual or small

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21 Though there are no reliable statistics, a number of official and non-official publications provide estimates. The most reliable source is the US Department of State’s annual report assessing international terrorism. For the latest of these reports, see Office of Counter terrorism, Department of State (2001), Patterns of Global Terrorism 2000, Washington D.C., Government Printing Office, (Appendix C). Available online at http://www.state.gov/s/ct/rls/pgtrpt/2001/, 21 September 2008.

group acts of terror increasingly gained attention while terror orchestrated by states or insurgents slipped out of the international legal agenda into the interstices of politico-diplomatic chicanery. Not surprising. It was the height of the Cold War and the two superpowers engaged in wars of proxy were busy supporting or laying fertile ground for “terror-violence” albeit under the guise of supporting national liberation movements and furthering the right of self-determination.

1.2.1. The UN’s Ambivalent Attitude

In order to mobilize consensus, the international community adopted a piecemeal approach to combating terrorism, choosing to target very specific acts of terrorism, occurring in specific situations, circumstances or places and generally providing for extradition and prosecution regimes. With a large segment of international society vulnerable to random and unexpected terrorist threats, in the wake of repeated attacks on international civil aviation\(^23\) the international community reacted with a series of international conventions adopted between 1969-1988.\(^24\) A rash of assassinations and kidnappings of diplomats from the 1960s to the 1990s brought about the adoption of several multilateral conventions.\(^25\) Similarly a rapid


increase in the kidnappings of civilian hostages for ransom brought about the adoption of a specialised UN Convention in 1979.\textsuperscript{26}

Against this background, UN efforts began to tentatively address state-sponsored terrorism. In 1971, the UN General Assembly passed the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The declaration affirmed the duty of all states “to refrain from organizing, instigating, assisting or participating in ... terrorist acts in another State.”\textsuperscript{27} By the 1980s with international terrorism coming of age and proliferating, the General Assembly took the big step in passing a resolution condemning terrorism. Entitled, in part, Measures to Prevent International Terrorism.\textsuperscript{28} It “unequivocally condemned, as criminal, all acts, methods and practices of terrorism wherever and by whoever committed...”\textsuperscript{29}

However, these resolutions and declarations while important have one key plank missing—an accepted definition of terrorism and/or terrorist acts. Thus they provide scant insight into the essential characteristics of terrorist violence. These declarations are similar to existing multilateral antiterrorist conventions in that they reflect a pragmatic, \textit{ad hoc} approach that criminalises specific practices without reference to the underlying political objectives of the offenders. However, a seemingly insurmountable obstacle to such cooperation and response has been the lack of international consensus as to an acceptable definition of terrorism, mainly due to the “politically charged nature of terrorist activity,” and the related question of whether

\begin{itemize}
\item \textsuperscript{26} \textit{International Convention Against the Taking of Hostages}, U.N. GA Res. 34/154 (XXXIV), UN GAOR, 34 Sess, Supp No 46 at 245, UN Doc A/34/146 (1979) reprinted in 18 ILM 1456.
\item \textsuperscript{27} \textit{1979 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States}, GA Res 2625, UN GAOR, 25th Sess, Supp No 28, UN Doc A/8028 (1970) 123.
\item \textsuperscript{28} \textit{Measures to Prevent International Terrorism}, GA Res 61, UN GAOR, 40th Sess, Supp No 53, at 301, UN Doc A/40/53 (1986).
\item \textsuperscript{29} Ibid., 302.
\end{itemize}
definitions of terrorism can or should encompass national liberation movements.\textsuperscript{30} In this charged climate, the nations of the Third World and the then communist Eastern European bloc nations rejected attempts to condemn or criminalize all political violence irrespective of the political context of the act or the political motivation of the actor.

Many if not a majority, of Third World and communist nations achieved independence from colonial domination through wars of national liberation or from established regimes by violent revolutionary struggle. As a consequence many of these nations argued (and occasionally still do) that otherwise impermissible violence may be legitimate in the context of revolutionary or anti-colonial struggle. The 1979 \textit{UN Ad Hoc Committee on Terrorism Report}\textsuperscript{31} underscored ideological or geopolitical divisions which centred on the efforts of Third World nations to distinguish national liberation movements from acts of international terrorism.\textsuperscript{32} The Committee recommended instead that the UN try to eliminate the causes of terrorism, including colonialism, racism, and situations involving alien occupation; the United States rejected this position.\textsuperscript{33} In the absence of a blanket condemnation of all forms of political violence, actors committed to remedying perceived injustice through violence predictably reject the “criminal terrorist” label that states attach to their conduct, and appeal to higher moral concepts for justification.

The volatile Cold War era loomed large over any effort to establish a firm international definition of terrorism as it relates to states that sponsor or support terrorists. The UN was presented with its greatest opportunity to bring terrorism within the ambit of the UN Charter


\textsuperscript{32} Ibid., 32.

\textsuperscript{33} Ibid.
through the key 1974 UN General Assembly Resolution defining “aggression”, Resolution 3314. Sidestepping the volatile issue, the UN elected to ignore using the word “terrorism” choosing instead to classify the activities of states who send, organise, or support “armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State” as engaging in unlawful aggression in direct violation of the UN Charter.

During the 1970s and 1980s, the attempts of the UN to define the term failed mainly due to differences of opinion between various members about the use of violence in the context of conflicts over national liberation and self-determination. In spite of its failure to define terrorism, in 1985 the UN General Assembly adopted Resolution 40/61,

[unequivocally condemn[ing], as criminal, all acts, methods and practices of terrorism wherever and by whomever committed … call[ing] upon all States to fulfil their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in activities within their territory directed towards the commission of such acts.]

Similar language can be found in a number of subsequent General Assembly and Security Council resolutions over the last thirty years, many of which state that terrorism is contrary to the purposes and the principles of the UN and represents a “threat to international peace and security”. Various definitions of terrorism refer to unlawful force as opposed to lawful force. However, the problem arises on the fundamental aspect of the definitions—the distinction between unlawful and lawful force.

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35 Ibid, art. 3(g).
In choosing to avoid defining terrorism conclusively, the UN has either used it in a more
general sense or selected specific acts as constituting terrorist activity. Consequently, the
international community has taken a piecemeal approach and addressed the problem of
international terrorism by identifying particular criminal acts inherently terrorist in nature to
be prevented and punished by domestic law. The result has been the adoption of numerous
global treaties, regional conventions, and bilateral agreements, which are relevant to the
suppression of international terrorism, and corresponding domestic laws that implement those
arrangements.

Today the UN Member States still have no agreed-upon definition. Instead there are 12
separate conventions and protocols which serve as the global regime against terrorism and as
an important framework for international cooperation in adopting counter-terrorism measures.

39 “The international conventions by and large address the form or target of the terrorist attack, rather than the terrorists themselves”. Leah Campbell, ‘Defending against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan’, 74 Tulane Law Review 1067, 1071–2 (2000).
1.3. Defining Terrorism

To date, efforts by the UN to draft a single broad definition of terrorism acceptable to all states, such as that found in the CPPT have failed. Conventional international law on terrorism is presently limited to a relatively small number of widely accepted conventions that proscribe particular types of terrorism, which likely reflect customary norms of international law. The most common types of terrorism covered by these conventions include crimes against the safety of civil aviation and maritime navigation, the taking of hostages, the use of nuclear and chemical weapons, and crimes against internationally protected persons.

This current legal framework is more convoluted and complex than it need be. An effective response, centered on a common legal understanding of the elements of the crime, dictates a tightening of the existing regime. This avoids states drafting and adopting idiosyncratic definitions into their domestic legislation such as the following:

Terrorism is an anxiety-inspiring method of 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), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), 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.

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international instruments and to fully implement them through passage of the domestic legislation necessary to fulfill obligations imposed by the conventions. In addition, there are now a number of important UN Security Council and General Assembly Resolutions on international terrorism, dealing with specific incidents.


1.3.1. Elements of Terrorism

In the absence of consensus on a broadly accepted and concise definition it is nevertheless possible to list some basic features that describe the Who? What? Why? Where? And How? of a terrorist act.

(i) WHO- Who is the perpetrator?
This criterion is commonly accepted as “any person who…” acts in a manner consistent with the definition. This attributes not only individual responsibility but a universal applicability.

(ii) WHAT -What is the Act or Ommission?
The criterion of violence act alone does not produce a useful definition, as it includes many acts not usually considered terrorism (i.e. assault, murder, destruction of property injurious to life, rioting). The violence therefore must (i) be unlawful and (ii) be accompanied by the requisite motive/object. However the notion of an unlawful violence act is not as simple as it might look. This is because to separate a ‘legitimate’ from an ‘illegitimate’ basis for the action is a difficult task. This criterion is critical most notably for governments to distinguish between actions authorized by a "legitimate" government (and thus "lawful") and those of other actors. However, notwithstanding the need to make this distinction, it is inherently problematic, because any attempt to provide for legitimate/lawful violence is not only as misnomer but also denies the existence of state terrorism (see below). As we shall see, because "legitimacy" and "lawfulness" are subjective concepts and as such most definitions of the term do not include this criterion.
(iii) WHY - What are the Motives / Objectives?

When analyzing a terrorist act forensically - motive and objective are separate issues. A terrorist act must be carried out with a particular intention and for a specific purpose. The motive or intention is the mental element of the crime and usually is described as a desire to generate a psychological fear in minds of others. Characteristically, the attack is carried out in such a way as to maximize the severity and length of the psychological impact. Secondly the objective of a terrorist attack is usually to further a political purpose be that a (i) nationalist-separatist (ii) religious fundamentalist (iii) new religious or (iv) social revolutionary cause.45

WHERE DIRECTED - Who/What is/are the target/s?

It is commonly held that the distinctive nature of terrorism lies in its intentional and specific selection of civilians as direct targets. Much of the time, the victims of terrorism are targeted not because they are threats, but because of what they represent (i.e. the symbolism).46

HOW is the act/s omission/s perpetrated?

Disguise is a common feature of terrorist methodology and arguably an element – The reverse proposition is also true. That is to say that when an enemy is readily identifiable as a

45 In 1975, the United States formed the National Advisory Committee on Criminal Justice Standards and Goals set up a Task Force on Disorders and Terrorism See; Disorders and Terrorism, National Advisory Committee on Criminal Justice Standards and Goals (Washington D.C.;1976) This task force identified 6 categories of terrorism, namely; (i) Civil Disorders – A form of collective violence interfering with the peace, security, and normal functioning of the community. (ii) Political Terrorism – Violent criminal behavior designed primarily to generate fear in the community, or substantial segment of it, for political purposes. (iii) Non-Political Terrorism – Terrorism that is not aimed at political purposes but which exhibits conscious design to create and maintain high degree of fear for coercive purposes, but the end is individual or collective gain rather than the achievement of a political objective. (iv) Quasi-Terrorism – The activities incidental to the commission of crimes of violence that are similar in form and method to genuine terrorism but which nevertheless lack its essential ingredient. (v) Limited Political Terrorism – Genuine political terrorism is characterized by a revolutionary approach; limited political terrorism refers to acts of terrorism which are committed for ideological or political motives but which are not part of a concerted campaign to capture control of the State. (vi) Official or State Terrorism – referring to nations whose rule is based upon fear and oppression that reach similar to terrorism or such proportions. Otherwise known as Structural Terrorism defined broadly as terrorist acts carried out by governments in pursuit of political objectives.

combatant, the word terrorism is rarely used. Terrorists invariably assimilate with the civilian population.

Through attempts to dismantle and therefore understand the crime of terrorism some general themes emerge that have been variably articulated. These include:

- The unlawful use or threatened use of force or violence by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes. 47

- The unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives. 48

- Premeditated, politically motivated violence perpetrated against non-combatant targets by sub national groups or clandestine agents. 49

- Violent criminal conduct apparently intended: (a) to intimidate or coerce a civilian population; (b) to influence the conduct of a government by intimidation or coercion; or (c) to affect the conduct of a government by assassination or kidnapping. 50

A synthesis of these elements is broadly consistent with most definitions in academic literature, which generally require two elements: actual or threatened violence against civilians or persons not actively taking part in hostilities and the implicit or explicit purpose of the act being to intimidate or compel a population, government or organisation into some course of action. 51 This broad definition is supported by a proposed convention drafted by the International Law Association, which defines an international terrorist offence as

any serious act of violence or threat thereof by an individual whether acting alone or in association with other persons, organizations, places, transportation or communications systems or against members of the general public for the purpose of intimidating such persons, causing injury to or the death of such persons, disrupting the activities of such international organisations, of causing loss, detriment or damage to such places or property, or of interfering with such transportation and

47 US Department of Defence.
48 Judicial Administration, 28 CFR § 0.85.
49 Foreign Relations and Intercourse, 22 USC § 2656f(d).
50 US Department of Justice.
communications systems in order to undermine friendly relations among States or among the nationals of different States or to extort concessions from States.52

In 1994, the UN General Assembly encapsulated the basic elements of the ILA proposal when it defined terrorism as:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes 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.53

Under this formulation, terrorism includes the deliberate targeting of civilians for political or religious purposes in attacks designed to incite terror in a general population. In November 2004, a United Nations Security Council report described terrorism as any act intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing any act. This report however does not constitute international law and while states are in agreement on the general principles, there remains a lack of uniformity in practice.

Some states lack the resolve to rein-in certain groups that engage in terror. There are also concerns that some of the terrorism is state-sponsored. Terror attacks upon civilian populations are an almost a weekly, if not daily, occurrence in the Middle East. Whilst most are blamed on non-state actors such as al Qaeda, there is from time to time compelling evidence of state-sponsored terrorism. A lack of will among some states to curb these activities has been one of the principal barriers to conclusion of a comprehensive treaty on terrorism.

1.3.2. Defining State-Sponsored Terrorism

Historically, rules on the lawful use of force developed within a framework of state-to-state relationships. This poses a dilemma when this framework is applied to terrorist acts. As a rule terrorist groups are those organizations listed or designated by governments as terrorist organizations. This creates a problem when states sponsor, fund or harbor such organizations. Furthermore it denies the possibility of state terror directed at its own citizens. While the use of force by states is already thoroughly regulated under international law there is no provision in the event of terrorist act/s by governmental agents or government forces in peace time, such as the taking or executing or civilian hostages, extrajudicial elimination or the direct targeting of civilians for the purposes of political repression and the generation of fear.

James Terry states that “Terrorism’s uniqueness lies in its use of armed force against targets that would be exceptional or aberrational in regular warfare, with results that have little relationship to traditional military necessity.”\(^{54}\) He notes that the involvement in terrorist activity by states may result from both practical and ideological influences. For example, where traditional forms of warfare are considered overtly costly or would result in uncertain outcomes, terrorism may be regarded as an appropriate substitute. This may result in state provision of a range of support mechanisms to militia, paramilitary groups or other non-statal entities adopting violence (more often than not in the form of terror) as a vehicle to achieve their aspirations whether they be revolutionary, political or ideological in character. The support ranges from propaganda, financial aid and training to intelligence, weapons and even direct involvement.\(^{55}\)


\(^{55}\) Ibid.
However, just like terrorism, the notion of state-sponsored terrorism lacks a universal definition. Furthermore, the confusion over a precise definition of state-sponsored terrorism is in large part reflective of the basic disagreement over the elements of terrorism itself. There are, however certain basic elements of state-sponsored terrorism: a politically subversive violent act or threat thereof; a state sponsor; an intended political outcome; and a target, whether civilian, military or material, whose death, injury or destruction can be expected to influence to some degree the desired political outcome.56

State sponsorship of terrorism involves both acts of commission and omission.57 This can range from a state directly supporting the terrorist attacks, to less direct state involvement such as providing training, financing, or support one way or another. This may include a toleration of particular terrorist groups which base their activities in a state’s territory.58 From as far back as 1977, commentators suggested that the attempt “to hold states responsible in damages for the acts of terrorists when such acts can be attributed to them represents a strategic use of traditional international law norms which may produce short-run benefits and … contribute to long-run interests of the world community.”59

56 In defining state-sponsored terrorism, Cline and Alexander sum up this category thus:

The deliberate employment of violence or the threat of use of violence by sovereign States (or subnational groups encouraged or assisted by sovereign states) to attain strategic and political objectives by acts in violation of law intended to create overwhelming fear in a target population larger than the civilian or military victims attacked or threatened.


This position has been actively pursued by the International Law Commission ("ILC")\(^{60}\) in its quest to codify customary international law relating to state responsibility in its Articles on Responsibility of States for Internationally Wrongful Acts.\(^{61}\) Articles 8 and 11 codify the relevant rules pertaining to state responsibility for terrorist acts committed by private persons. Article 8 is the classic formulation of the \textit{de facto} agency principle. It reads: “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”\(^{62}\)

Historically, the ILC has firmly insisted that in order to meet this test, it must be proved in each and every case that the person or persons “had really been charged by the State organs to carry out that specific act.”\(^{63}\) In contrast, Article 11 does not require proof of a state’s prior knowledge, instruction or control of a terrorist act in order to attribute a private person’s conduct to the state. Under this rule, conduct ordinarily not attributable to a state under antecedent articles shall nevertheless be attributed to a state if they acknowledge such conduct as their own.\(^{64}\)


\(^{61}\) Ibid., 45.

1.4. An Ascendant International Law Model for Conceptualizing Terrorism

The perceived threat that transnational terrorism poses to states, impacts the laws and policies used to thwart it. Terrorists now use more sophisticated and devastating weapons, seeking targets that inflict the greatest damage on human life and property. “Terrorists now look to multi-millionaires and entire nations for financial support” and have steadily developed their capabilities with a lethal combination of professionalism and advanced weaponry. This poses ‘an alarming national security threat, providing terrorists with the ability to destabilize entire regions … and to inflict massive harm against [] citizens and property.”

The challenge to states and the international community is compounded when states (actively or passively) support terrorism, thus enhancing the capabilities of terrorist organizations, as well as their ability to avoid both domestic and international enforcement regimes paving the way for impunity.

The corresponding need to give traction to counter-terrorism enforcement measures has contributed to the ascendance of the view that terrorists, though criminals, are persons

65 See Agencies’ Efforts to Fight Terrorism: Hearings before the Subcomm. on National Security, International Affairs and Criminal Justice of the House Comm. Gov’t Reform and Oversight, 105th Cong. (1998), available in LEXIS online, Cong. Rec. [hereinafter Agencies’ Efforts To Fight Terrorism] (statement of Richard Davis, Director of National Security Analysis, National Security and International Affairs Division) (asserting that since the 1970s, the United States’ policy toward terrorism abroad has evolved concurrently with the perception and nature of the terrorist threat).
66 See Counter-terrorism Policy Hearings before Senate Judiciary Comm., 105th Cong. 123 (1998) [hereinafter Counter-terrorism Policy Hearings] (announcing that the trend of international terrorism is to inflict the maximum amount of destruction to property and human life and create a sense of terror to gain media recognition).
69 Ibid., 1480.
jeopardizing national security and thus necessitating the use of military force. This view has become especially dominant in the post-September 11 international climate with the US branding the bid to combat terrorism as a “War on Terror” and noting that it will be a long and difficult struggle and a very different kind of war where the enemy combatants wear no uniforms, have no fixed bases and pursue uncertain goals.70

1.4.1. Terrorism and the International Criminal Framework

When armed violence is used outside the context of an armed conflict in the legal sense or when a person suspected of terrorist activities is not detained in connection with any armed conflict, humanitarian law does not apply. Instead, domestic laws, as well as international criminal law and human rights govern. Yet there is a general perception that a strict criminal model fails to adequately respond to the modern day menace posed by terrorism.

Neil C Livingstone argues that legal means do not conform to the new nature of the international terrorism threat, and the legal strategy does not deter international terrorists from acting.71 Despite numerous antiterrorism conventions, extradition agreements, and other forms of jurisdictional cooperation, there has been a recent trend for states to favor a conflict management (and thus use of force) approach, rather than a law enforcement viewpoint.72

In the face of the apparent inability of the Security Council to control the spread of international terrorism, during the Cold War era, several states (particularly the US and Israel)

72 Ibid.
sought to circumvent the provisions of the UN Charter or to stretch them arguing that they would legitimately use military force to counter terrorism. Several states argue that in the face of the seriousness of contemporary potentially devastating terrorist threats, there seems an urgent need to take action before a terrorist attack occurs rather than respond to an attack through the legal process paradigm.\textsuperscript{73} “It has been argued that international law actually plays into the hand of terrorists. They protect themselves by exploiting various lacunae in the law and use these to their advantage. Further, it is argued that if it is desired to wage war against terrorism, then terrorists must be seen, not as criminals, but as persons jeopardizing national security.”\textsuperscript{74}

1.4.2. Terrorism and Self Defense

This has precipitated an international response not unlike a war - between those who choose to pursue violent indiscriminant acts of terror as a means of highlighting their political/religious objectives and those that use military force to prevent these attacks from occurring. Some states have argued that they have a prerogative to utilize force to defend themselves against threats.\textsuperscript{75} For many decades, Israeli has regarded terrorist acts—real or perceived—as acts of war. In the 1980s, the US followed suit, increasingly perceiving transnational terrorism as acts of war (war on terror)\textsuperscript{76}

\textsuperscript{73} See 143 Cong. Rec. H651-03 (daily ed. 26 February 1997) (describing law enforcement proactive measures as “prevention, immediate incident response, and post-incident response”).


\textsuperscript{75} For example US Secretary of State George P Shultz predicted in 1984: “We can expect more terrorism directed at our strategic interests around the world in the years ahead. To combat it, we must be willing to use military force.”Address Before the Park Avenue Synagogue, 25 October 1984, reprinted in Dep’t of State Bull. 12, 16 (December 1984) [hereinafter Park Avenue Synagogue Address].

\textsuperscript{76} See 144 Cong. Rec. S2989, SS3002-3 (daily ed. 1 April 1998) (statement of Senator Domenici) (emphasizing that the international terrorist threat is not the same as in the past and depicts warlike qualities).
Like an enemy in a war, terrorists aim to kill and attack strategic governmental and non-governmental targets. Although terrorism does not exactly comport with the definition of war, scholars classify it as irregular or low intensity warfare that involves armed attacks against both government and non-government personnel for political purposes. Thus, approaching terrorism as a war may be a more appropriate tack because the military is better equipped for low intensity warfare and is not limited by restrictions placed on law enforcement.

The logical argument is that while attacks on a nation’s citizens cannot routinely be treated as attacks on the nation itself; but where a citizen is attacked because he/she is a citizen of a particular state, in order to punish his/her state of nationality or to coerce his/her state into accepting a political position, it would appear that the attack is one in which the victim state has a sufficient interest to justify extending its protection through necessary and proportionate actions. No nation should be limited to using force to protect its citizens, from attacks based on their citizenship only to situations in which the attacks occur within its territorial boundaries. In deed to suggest that the notion that self defense relates only to a use of force that materially threatens a state’s “territorial integrity or political independence,” (as proscribed in Article 2(4)) ignores the UN Charter’s preservation of the “inherent” scope of that right. Nations such as Israel and the US have “traditionally defended their military personnel, citizens, commerce, and property from attacks even when no threat existed to their

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77 Ibid.
78 See Black’s Law Dictionary, (6th ed. 1990), 1583 (defining “war” as “hostile contention by means of armed forces, carried on between nations, states, or rulers, or between citizens in the same nation or state”).
79 Timothy F. Malloy, ‘Military Responses to Terrorism’, 81 American Society International Law Proceedings 109, 287, 299 (asserting that the military should destroy terrorist planning and training facilities in nations harboring those terrorists).
80 Ibid.
81 Ibid., 287 (arguing that the use of military action against terrorism as a form of low intensity warfare would be more effective and beneficial in long-term deterrence, short-term prevention, and punishment than political, diplomatic, economic, and legal responses).
territory or independence.” This stance is premised on the long standing consideration that the military facilities, vessels, and embassies of a nation are its property, and for some purposes its territory.

There is no doubt that this line of argument has blurred the distinction between “armed attacks” and “terrorist acts” in the aftermath of the acts that took place on September 11, possibly because of the enormous consequences of this event. By “recognizing the inherent right of individual or collective self-defense in accordance with the Charter” a preambular paragraph of Resolution 1368 appeared to imply that the terrorist acts in New York, Washington and Pennsylvania represented an “armed attack” within the meaning of Article 51 of the UN Charter. A similar preambular paragraph was also included in Resolution 1373.

Even more explicit was the statement that “an armed attack” occurred was more explicit in the statement made by NATO on 12 September 2001, which states that if it were deemed that the attack on the US was from abroad, it would fall within the ambit of Article 5 of the Washington Treaty, thereby rendering it “an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.”

The significance of September 11 lies in the apparent official recognition by states that acts of terrorism carried out by independent private actors fit, albeit somewhat uneasily, within the parameters of Article 51.

83 Ibid.
84 Resolution 1368.
85 Resolution 1373.
86 Statement of the North Atlantic Council, above n 144. Neither the Security Council Resolutions nor the NATO statement attempted to establish a link between the terrorist acts and a particular state. However, these texts do not provide a clear indication whether they intend to refer to a wide concept of “armed attack” which would also comprise acts which are not attributable to a state. The issue whether the acts in question could be regarded as state acts depends on factual elements which are still controversial.
However, the events of September 11 have another more profound impact on the law of self-defense—they affect the system itself. Stahn has postulated that the effects of September 11 are likely to be a strengthening of Article 51 as a “Grundnorm governing the unilateral use of force by states against armed violence.”\(^\text{87}\) The corollary of this is a broadened concept of “armed attack” with a relaxation of the nexus concerning the act of terrorism to state actors. Stahn postulates that the relaxation in the nexus will to a long-run increase in the invocation and extension of the scope of Article 51.\(^\text{88}\) Another ramification of September 11 is “a growing focus on the use of force in response to violence under Article 51. The lowered threshold for attributing terrorist acts to non-State actors will push States to rely on Article 51 to justify military means, rather than invoke a right to self-defense under customary law or the existence of a State of necessity.”\(^\text{89}\)

1.4.3. The Terrorism and the Law of Armed Conflict Framework

Terrorism is generally directed at persons who are not combatants and who are completely innocent.\(^\text{90}\) Frequently though, terrorist activities also target military personnel or government officials largely owing to the “symbolic” value of this individuals who represent important pillars of the state—security and governance. The conundrum is that terrorism is generally conducted by persons who do not fall within the category of combatants, but they are also not in the nature of non-combatants or protected persons.\(^\text{91}\)

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\(^{88}\) Ibid., (citation omitted).

\(^{89}\) Ibid.


\(^{91}\) Coll, 298.
The definition of the term “civilians” or “civilian population” appears in Article 50 of Additional Protocol I of the Geneva Convention of 1977:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

…

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.92

In an analysis of the implications of the provisions of the above Article, Professor Emmanuel Gross observes:

Prima facie, as this Article is formulated in the negative, one may think that if certain persons do not fall within the category of combatants, they must be civilians. However, in my opinion, it would not be right to interpret the Article in this way as the drafters of the Convention did not intend to grant terrorists the status of civilians. In addition, the defenses granted to civilians are broader than the defenses granted to combatants.93

To be a civilian who does not belong to the armed forces and who is not a combatant is one thing. To be a civilian who fights against those whom he/she regards as his/her enemy, is something else completely. International law distinguishes between those who participate in the armed conflict and those who do not94 as do the various Geneva Conventions.95 Generally, soldiers fall within the former definition, as indeed do members of other armed militias.96 These Conventions afford defenses to combatants who have been captured by the enemy during the course of the fighting.97 Those captured fighters are deemed to be prisoners of war.98 However, the various Geneva Conventions do not refer to the legal status of civilians who do not fall within the scope of the term “combatant,” yet take an active part in the

95 Ibid.
96 Ibid.
97 Ibid.
98 Ibid.
fighting. “This phenomenon is completely disregarded by the various Geneva Conventions.” \(^{99}\) Accordingly, in 1977, this issue was added to Additional Protocol I to the original Geneva Conventions. \(^{100}\) Additional Protocol I amended the Geneva Conventions “to embrace a new type of combatant, one who had not been recognized as a combatant within the classic structure of European wars, and grant him the rights of a prisoner of war, on the condition that he conducted himself in accordance with the rules applicable to combatants under international law.” \(^{101}\)

The amended Geneva Conventions now provide prisoner of war protection to fighters who did not previously fall within the structure of conventional wars—(i.e. the guerilla fighters). Even with regard to these other groups, it is contemplated that the fighters are “rebel groups” or “non-state actors” such as organized armed militia or paramilitary groups with an element of organization and command structure approximate to, or inherent in, armed forces, especially of a political or revolutionary nature. Importantly, they should conduct themselves in accordance with the rules of combat in international law in order to benefit from the various protections. \(^{102}\)

It is evident from the final draft of the Protocol that the “protection of the interests of the civilian population was preferred over full protection of unconventional fighting groups. This is emphasizes by the requirements that they refrain from intermingling with the civilian


\(^{102}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 10 June 1977, Article 1 sets out the threshold of the material field of application of the rules to non-regular forces. See generally Peter Rowe (1995), ‘Liability for “War Crimes” During a Non-International Armed Conflict’, (XXXIV (1-4) Revue De Droit Militaire et de Droit de la Guerre 149.)
population, that they wear uniforms or other recognizable means of identification, and that they carry their weapons openly. Undoubtedly the legislative intent was to ensure that other parties to the conflict would know against whom they were fighting. These requirements were “meant to ensure that civilians who were not combatants would not be endangered.”

On the basis that Additional Protocol I expanded the definition of combatants to include unconventional fighters as bearer of rights under the Convention many countries (including Israel, the US, and the United Kingdom) have all refused to sign Additional Protocol I. The argument is inter alia, that the Article would enable terrorist organizations to be recognized as combatants, and thereby allow them to be granted the rights of prisoners of war.

Generally speaking then, terrorists are not entitled to the broad protection given to civilians under international law, and at the same time are not combatants. The difficult question then becomes what are the legal and justifiable means of fighting the menace of terrorism.

1.5. Conclusion

The current international climate dictates that there is an immediate need to clarify the legal definition of terrorism and ”to realign the existing rules on the use of force to match the

104 See Cristopher C. Burris (1997), ‘Re-Examining the Prisoner of War Status of PLO Fedayeen’, 22 North Carolina Journal of International Law and Commercial Regulation 943, 975-976. See also Gregory M. Travallo (2000), ‘Terrorism, International Law, and the Use of Military Force’, 18 Wisconsin International Law Journal 145, 176, 190. See also; Gross, ‘Thwarting Terrorist Acts’, above note 2, 206..Note that Professor Frits Kalshoven in a panel dealing with the question “Should the Law of War Apply to Terrorists?” asserted that terrorist organizations and terrorists are not entitled to the status of combatants: In these circumstances, a simple statement that the law of armed conflict is applicable to terrorists seems of little practical utility. Who would be bound by such an instrument, and to what effect? Would, for instance, the authorities acquire any additional legal powers that they do not already possess under their constitutional provisions? Would they become bound to respect any special rights of terrorists not ensuing from existing human rights instruments? Again, are we to assume that terrorists must respect the law of armed conflict - with its express prohibition on acts of terror?”
altered international security environment and yet maintain meaningful limits on the use of force in the face of unconventional threats.

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