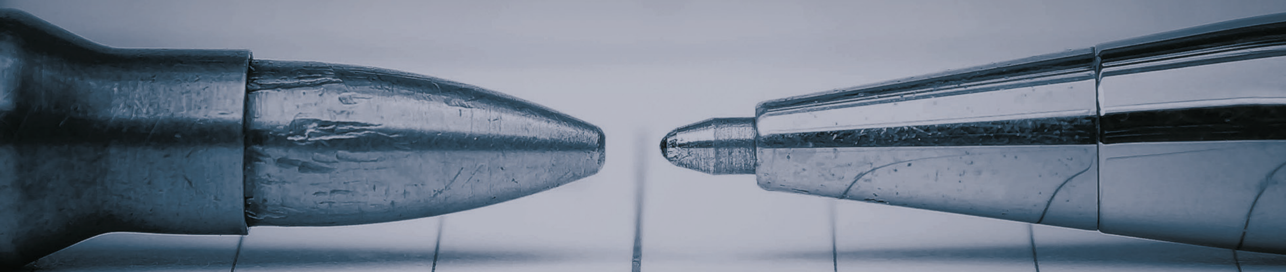
International Counterterrorism Law: Key Definitions and Core Rules

Geneva Paper 30/23

Stuart Casey-Maslen

February 2023



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I. Introduction

This Geneva Paper describes the main components of international counterterrorism law. In addition to the sectoral United Nations (UN) conventions on terrorism, international counterterrorism law encompasses rules across international humanitarian law and international criminal law, and its application is regulated by international human rights law. Also considered is the manner in which *jus ad bellum* (the law on the inter-state use of force) pertains to acts of terrorism, for this continues to be disputed. Key definitions of terrorism – for there are many, not one – are also discussed, including the difference between international terrorism and domestic terrorism, and between terrorism in peacetime and terrorism in armed conflict.

A. "Terrorism" before the modern era

Terrorism, defined in the vernacular as actions designed to subjugate through extreme brutality and fear, is probably as old as human society. Some rulers or leaders, whether of a state or a group of people of some kind, have used atrocities to maintain their hold on power, while others seeking to secure power used similarly violent means to intimidate their opponents and overthrow rulers or leaders. Crucifixion; the use of the rack; and hanging, drawing and quartering were all instruments of terror employed by certain regimes from the classical world through to the medieval. Other forms of torture, such as waterboarding, "wet submarine",[1] "cattle prod"[2] or "Palestinian hanging",[3] have been refined more recently.

The word "terrorism", whose etymology traces back to ancient Greek and then late-age Latin, entered the English political lexicon only relatively recently, stemming from the so-called "Reign of Terror" that followed the French revolution. The label derives from the terms used to describe the newly installed republican government's tactics used to eliminate its vanquished monarchist foes and violently repress its "counter-revolutionary" enemies. These goals were most visibly attained through decapitation by the guillotine – ironically an instrument perfected by a French physician, Dr Joseph-Ignace Guillotin, with the aim of offering a touch of mercy to those who were condemned to be executed.[4] Maximilien Robespierre and the delegates elected to draft the constitution of the French Republic had deliberately adopted terror as the *policy* of the new state.[5] Speaking before the Constitutional Convention, he declared, "Terror is merely justice; prompt, severe, and inflexible". But terror was not only cruel by design: it was also arbitrary in both its nature and consequences.

The term in French – *la Terreur* – thus entered the *Dictionnaire de l'Académie française* in 1798 to describe a "system, regime of terror".[6] In

1840 Noah Webster's final revision of his famous dictionary in English would include the following definition of terrorism: "A state of being terrified, or a State impressing terror". More than 130 years later, however, a second meaning was added to the relevant entry in Merriam-Webster's dictionary: "violent or destructive acts (such as bombing) committed by groups in order to intimidate a population or government into granting their demands". By the 1970s the pendulum had thus swung from the state as terroriser to focus more on terrorism perpetrated by non-state actors. Nevertheless, as events in Syria and Ukraine, among many other contexts, have shown, both types of actors engage in terrorism in the modern world. Terrorism is a terribly persistent reality.

B. Content and layout

Five sections follow this introduction. Section 2 addresses the definitions of terrorism, looking at the distinction drawn in international law between "international" terrorism and what is considered as purely domestic terrorism. Based on the definitions of international terrorism in peacetime, the next section summarises the content of selected core UN treaties on terrorism and the current content of the draft UN Comprehensive Convention on International Terrorism. Section 4 turns to the notions and proscriptions of terrorism in armed conflict, as delineated in international humanitarian law (IHL; also called the law of armed conflict). It is explained why it is necessary that the applicable prohibitions in the context of armed conflict differ from those that pertain in peacetime.

Discussion of the extent to which acts of terrorism and counterterrorism operations are regulated by the rules of *jus ad bellum* follows in Section 5, with two questions meriting particular attention. Firstly, it is questioned whether, as a matter of international law, a non-state armed group operating independently of the responsibility of a state can perpetrate an "armed attack" on a state. Secondly, if the preceding question is answered in the affirmative, this gives rise to the "inherent" right of states to use force in self-defence under the UN Charter and customary law.

The final section of the paper concerns the extent to which terrorism exists as an international crime. It illustrates why international terrorism, at the least outside the regulation of IHL or when committed as a crime against humanity, is not – or at least, not yet – an international crime as such. Of course, this reality is not immutable. Proposals have come before the states parties to the Rome Statute of the International Criminal Court (hereinafter Rome Statute)[7] to add terrorism to the list of international crimes whose prosecution is within the jurisdiction of the court. While such proposals were not accepted in the past, states may yet decide differently in the future.

II. Definitions of terrorism

There has never been a simple definition of terrorism in international law,[8] and there may never be one. This is indeed, as Ben Saul has described it, "a normative black hole",[9] and one that is not without consequences. That said, if states do manage at some time in the future finally to adopt the UN Comprehensive Convention on International Terrorism (which has remained in draft form for the last two decades),[10] we may at last have an agreed definition of international terrorism outside a situation of armed conflict. A League of Nations treaty concluded in 1937 did contain a definition of terrorism – its negotiation was motivated by the assassinations of senior officials of European nations three years earlier – but it never entered into force as binding international law.[11]

This section looks firstly at the definitions of international terrorism in peacetime, in particular in five key "sectoral" (theme-specific) terrorism treaties concluded under UN auspices. It then briefly examines the definitions of terrorism under IHL in a situation of armed conflict – an issue addressed in depth in Section 4. As will be seen, however, the demarcation of terrorism generally, as well as its differing definitions in peacetime and in a situation of armed conflict, are neither strictly demarcated in law nor strictly observed in state practice.

A. Defining international terrorism in peacetime

Following the murder of the Israeli Olympic athletes at Munich in September 1972, the United States proposed a draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism.[12] The heart of the US draft text was its Article 1(1), which stipulated that "Any person who unlawfully kills, causes serious bodily harm or kidnaps another person ... commits an offence of international significance". The definition was subject to three conditions: the act needed to have an international element; it must not be committed either "by or against a member of the armed forces of a State in the course of military hostilities"; and it must have been intended to "damage the interests or obtain concessions from a State or an international organization". While the general definition has not been accepted, these latter three elements have been incorporated into many of the more limited UN treaties dedicated to particular themes (the so-called "sectoral" treaties).

At the time of its drafting in the early 1970s, the US text was opposed by Arab and African states and China, which all perceived the initiative as an attempt to criminalise national liberation movements.[13] The Non-Aligned Movement was instead seeking to have international law condemn Israel

for its occupation of Palestine and South Africa for its policy and practice of apartheid.[14] A schism of legal ideology had thus manifested itself in the international community that persists to this day. As a consequence, the UN turned instead to the negotiation of the sectoral treaties in order to bypass these socio-political divides.

1973 Internationally Protected Persons Convention

The 1973 Convention on Crimes against Internationally Protected Persons[15] is considered the first of the UN sectoral treaties aimed at suppressing specific forms of terrorism, even though the word "terrorism" or "terrorist" does not appear in it. The text draws on the regional Convention on Acts of Terrorism against Persons of International Significance,[16] a treaty promulgated by the member states of the Organization of American States in 1971.[17]

Under the 1973 convention an internationally protected person is defined as a head of state, head of government, and minister of foreign affairs (as well as their family members) when travelling abroad.[18] Also falling within the ambit of the convention are other state and government officials housed abroad who are entitled to special protection under international law (together with the family members in their households). Just as was the case in 1937, concern focused on the assassination of political leaders as the embodiment of international terrorism.

However, the problems that continue to bedevil the negotiation of the Comprehensive Convention on International Terrorism were already apparent in the negotiation and application of the 1973 Internationally Protected Persons Convention. When depositing its instrument of ratification, Burundi formally declared that it would decline to criminalise such acts "where the alleged offenders belong to a national liberation movement recognized by Burundi". Italy responded by declaring that such a reservation was incompatible with the aim and purpose of the convention.[19] Iraq went a step further than Burundi, asserting that the convention's central subjects for protection (i.e. government diplomats) "shall cover the representatives of the national liberation movements recognized by the League of Arab States or the Organization of African Unity". Germany, Israel, Italy and the United Kingdom all objected to what they termed a prohibited "reservation".[20]

1979 Hostage-Taking Convention

In contrast to the 1973 convention, the 1979 Convention Against the Taking of Hostages did make reference to hostage-taking as a "manifestation" of "international terrorism", albeit only in a preambular paragraph.[21] The core definition outlines the principal offence to be proscribed in national law as the seizure of a person together with a threat to kill, injure or detain them. To contravene the proscribed conduct, the offence must have been committed to compel a state or international organisation to do something

specific in exchange for the release of the hostage.[22]

The material scope of the convention is not strictly limited to peacetime, even though proposals were made during the drafting for such a clear demarcation.[23] It does exclude certain acts of hostage-taking in armed conflict, but only where states are party to IHL treaties that obligate the prosecution of a hostage-taker.[24] This pertains to international armed conflict, including, potentially, situations where peoples fight in pursuit of their right of self-determination.[25]

1997 Terrorist Bombings Convention

The first UN treaty to contain the word "terrorist" in its title was the 1997 International Convention for the Suppression of Terrorist Bombings.[26] The convention, negotiated at the instigation of the United States following the bombing of its forces in Dhahran, Saudi Arabia a year earlier, requires the criminalisation in domestic law of the act of intentionally delivering, placing, discharging or detonating

> an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility, with the intent to cause death or serious bodily injury or to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.[27]

Following its conclusion, an adhering state again made a distinction between criminal acts and legitimate struggle for self-determination. Pakistan declared that nothing in the convention would apply to "struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law". Many states objected to this position.[28] Finland, for instance, considered the declaration to contradict the convention's object and purpose, i.e. the suppression of terrorist bombings "wherever and by whomever carried out".[29]

Russia stated that the realisation of the right of peoples to self-determination

> must not conflict with other fundamental principles of international law, such as the principle of the settlement of international disputes by peaceful means, the principle of the territorial integrity of States, and the principle of respect for human rights and fundamental freedoms.[30]

1999 Terrorist Financing Convention

The core definition under the 1999 Terrorist Financing Convention is set forth in Article 2(1). The first subparagraph merely referred states parties to the list of UN treaties on terrorism adopted by 1999, and the offences

provided for under those conventions. The second subparagraph, however, contains what might be considered a general understanding of a terrorist offence under international law. Although explicitly circumscribed to the 1999 convention, funding must not knowingly be provided for:

> Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.[31]

The focus is thus on protecting civilians against acts seeking to terrorise a population or compel government conduct. Several leading commentators praise the definition in the Terrorist Financing Convention: Yoram Dinstein, for instance, terms it a most "useful and relevant definition" and "certainly the clearest".[32]

In contrast, Di Filippo argues that the Terrorist Financing Convention adopts the approach of the lowest common denominator.[33] But even this was not sufficient to attract universal support from states. Upon its ratification of the convention, Egypt, for instance, declared that it would not consider "acts of national resistance in all its forms, including armed resistance against foreign occupation and aggression with a view to liberation and self-determination" as terrorist acts "within the meaning" of the convention. Jordan made a broadly similar declaration to Egypt's, as did Namibia and Syria.[34] A considerable number of states formally objected to one or more of these declarations or reservations.[35]

2005 Nuclear Terrorism Convention

The 2005 International Convention for the Suppression of Acts of Nuclear Terrorism [36] took seven years to negotiate in a committee established under UN General Assembly auspices.[37] It covers the unlawful and intentional possession of radioactive material and the making or possession of a device with intent either to cause death or serious bodily injury, or inflict substantial damage on property or the environment.[38] It also applies to the unlawful and intentional use of radioactive material or a device, or damage to a nuclear facility in a manner that releases (or risks the release of) radioactive material, where serious physical harm or property or environmental damage is sought, or to compel some form of conduct by a state.[39] These are instances of nuclear terrorism.

Not included are attacks against nuclear power plants that are perpetrated as a method of warfare in the course of armed conflict, such as those by Russian forces fighting in Ukraine.[40] As is the case with the 1997 Terrorist Bombings Convention,[41] the activities of armed forces during an armed conflict fall outside the 2005 Nuclear Terrorism Convention.[42]

B. Defining domestic terrorism

Domestic terrorism is indirectly defined in four of the five sectoral treaties. Its effective exclusion from these treaties is on the basis that purely home-grown terrorism in peacetime is not a direct matter of concern for international law, but rather one for domestic law and policy.[43] The issue was not addressed under the 1973 Protected Persons Convention for good reason (because there was inherently an international dimension to the convention, given the protection afforded to dignitaries of foreign states). The 1979 Hostage-Taking Convention, however, does not apply where the offence is committed within a single state: the hostage and alleged offender are both nationals of that state, while the alleged offender is present in the territory of the same state, whatever their nationality.[44]

An exclusionary clause for domestic terrorism would be similarly applied in the 1997 Terrorist Bombings Convention,[45] the 1999 Terrorist Financing Convention,[46] and the 2005 Nuclear Terrorism Convention.[47]

C. Defining terrorism in armed conflict

It was necessary to define terrorism differently under international law when it occurs during and in connection with a situation of armed conflict. This is because one of the fundamental principles of IHL – distinction – obligates parties to any armed conflict to distinguish between civilians and civilian objects, on the one hand, and military objectives (persons or objects) on the other, and to target only the latter. In peacetime, however, attacks against the military are typically proscribed as terrorist; this is the case, for instance, under the 1997 Terrorist Bombings Convention.

In armed conflict, then, under the 1949 Geneva Conventions terrorism is only prohibited in the convention that protects civilians, i.e. Geneva Convention IV. In the conduct of hostilities, terrorism is defined as acts whose “primary purpose” is to spread terror among the civilian population. These issues are addressed in the next section.

III. International terrorism in peacetime

The 1937 Convention for the Prevention and Punishment of Terrorism concluded under League of Nations auspices, but which never entered into force, made it explicit that each state was obligated under a "principle of international law" to refrain from *encouraging* terrorist activities directed against another state and to prevent and punish such activities.[48] The implication was thus that terrorism was largely the preserve of non-state actors, even though the convention did not exclude the possibility that an agent of a state could engage in acts of terrorism.

The sectoral UN terrorism treaties similarly focus on the actions of non-state actors. As discussed below, one of the sticking points precluding the conclusion of the UN Comprehensive Convention on International Terrorism is the desire by the United States to exclude the actions of states from the scope of application of that future treaty. But the main obstacle continues to be the consideration of national liberation movements as terrorist and any use of force by such movements as a terrorist act.

A. Core prohibitions in the sectoral UN terrorism treaties

The sectoral treaties do not create offences as such, much less establish new international crimes, but require their states parties to incorporate offences as defined in the conventions into their domestic law. Thus, the 1973 Internationally Protected Persons Convention obligates its 180 states parties to make it a criminal offence in their domestic law to murder, kidnap, or attack internationally protected persons, or to engage in violent attacks on their official premises, private accommodation, and transport.[49] Hence, according to the 1973 Convention, attacks against both the personal safety of diplomats and on state property in a foreign country were required to be criminalised domestically.

The same approach was incorporated into the 1979 Hostage-Taking Convention. But in adhering to it, Iran made an interpretative declaration whereby it categorically condemned "each and every act of terrorism, including taking innocent civilians as hostages" while expressing its belief that "fighting terrorism should not affect the legitimate struggle of peoples under colonial domination and foreign occupation in the exercise of their right of self-determination". Austria, Canada, France, Germany, Italy, Japan, the Netherlands, Portugal, Spain, the United Kingdom and the United States all objected to this declaration, with several decrying it as an unlawful reservation to the provisions.[50] Iran's declaration, though, remains in place.

The 1997 Terrorist Bombings Convention proscribes conduct that, "regardless of its motivation, is condemned internationally and therefore

is an appropriate subject of international law enforcement cooperation".[51] In addition to the explosive and incendiary devices its title indicates, the convention also applies to weapons or devices that can cause serious physical harm or material damage through the "release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material".[52]

Since targeting military objectives is not just permissible to parties to armed conflict, but is effectively *obligated* by the IHL principle of distinction,[53] an exclusion for the conduct of hostilities and for their actions in relations to persons protected under IHL is set forth in the convention. Thus, it is stipulated that "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention".[54]

The notion of "armed forces" in the 1997 Convention encompasses both state armed forces and organised non-state armed groups where they are party to an armed conflict (whether international or non-international in character).[55] Despite opposition from a small number of commentators to the breadth of scope of the exclusion, this seems clear from the text, which refers first to "armed forces" and then to "military forces of a state" in the same provision.[56]

Potentially, however, a civilian who decides to engage in prohibited conduct but who is not a member of any armed forces would fall outside the exclusion for armed conflict.[57] While unpalatable to some, this would imply that any Ukrainian civilians who threw Molotov cocktails at Russian forces in March 2022 were engaging in international terrorism – at the least as this concept is defined in the 1997 Terrorist Bombings Convention.

The 1999 Terrorist Financing Convention has particular resonance, given that it is the most widely ratified sectoral treaty on the suppression of terrorism, with 189 states parties to it as of this writing.[58] Each state party is required to "adopt such measures as may be necessary" to "establish as criminal offences under its domestic law" the offences set forth in the convention and to make those offences "punishable by appropriate penalties which take into account the grave nature of the offences".[59]

A similar obligation exists under the 2005 Nuclear Terrorism Convention.[60] In addition, non-state actors are – indirectly – precluded from ever having access to a radiological device under UN Security Council Resolution 1540 (2004). Under the resolution, which applies in both peacetime and armed conflict, the Security Council decided that all states shall refrain from providing any form of support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer, or use nuclear, chemical, or biological weapons and their means of delivery, in particular for terrorist purposes.[61]

B. Draft Comprehensive Convention on International Terrorism

Because it is not yet adopted, the UN Comprehensive Convention on International Terrorism has no binding effect under international law. It is nonetheless noteworthy that it is the scope of the draft convention that is the main sticking point in the negotiations. The definition of the offence of international (peacetime) terrorism under the convention[62] is extremely broad, protecting persons and property against attack when the intent behind the violence is to change action either by government or (for instance) the UN, or to intimidate the public. It would thus extend not only to what one might naturally consider terrorist acts, but also potentially to more mundane protests against a regime in power. This would be so at least when they involve foreign nationals,[63] and when the protests are, or become, violent. This is so whether the violence is directed at law enforcement officials or the authorities or against property, whether public or private.[64]

However, exclusions are incorporated into the definition of international terrorism that are broadly similar to those under the 1997 Terrorist Bombings Convention, largely excluding application in a situation of armed conflict.[65] Further excluded are the acts of "the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law".[66] This would exclude acts of "law enforcement" by a state's armed forces, including counterterrorism operations, that do not amount to the conduct of hostilities. This is one of the sticking points preventing the finalisation of the convention. That said, acts such as the 1985 bombing of the Greenpeace vessel *Rainbow Warrior* by French security service agents operating covertly[67] would not be excluded from coverage because the agents were not part of the French armed forces.

The main blockage to the convention's adoption, however, remains the situation of peoples involved in armed struggle for their right of self-determination. Western nations oppose an exclusion on this basis. Members of the Non-Aligned Movement, and especially those who also belong to the Organisation of Islamic Cooperation (OIC),[68] insist that peoples seeking to achieve statehood and using force to do so should not be treated as terrorists.[69] The current draft text of the convention would exclude from its purview the actions of an armed group fighting on behalf of a people struggling for self-determination when the group was a party to an armed conflict, but not other members of such a people. Outside a situation of armed conflict, all of them would be considered terrorists if they engaged in armed struggle against the state.

The OIC has proposed language to amend the draft treaty text. Thus:

> 2. The activities of the parties during an armed conflict, *including in situations of foreign occupation*, as those terms are understood under

> international humanitarian law, which are governed by that law, are not governed by this Convention.
>
> 3. The activities undertaken by the military forces of a State in the exercise of their official duties, *inasmuch as they are in conformity with international law*, are not governed by this Convention.[70]

This is not acceptable to many Western nations. In 2005 the coordinator of the negotiations proposed to add a preambular paragraph to the draft comprehensive convention. This was based on operative paragraph 15 of General Assembly Resolution 46/51 of 9 December 1991:

> *Reaffirming* that nothing in this Convention shall in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right or the right of these peoples to struggle to this end in conformity with international law.[71]

This did not suffice to break the impasse. Two decades later, the draft convention remains just that.

C. A customary law definition of international terrorism in peacetime?

Despite the impasse in the negotiation of the UN comprehensive convention, in a 2011 decision the Appeals Chamber of the Special Tribunal for Lebanon (STL), led by Judge Antonio Cassese, held that a definition existed in customary international law of terrorism in peacetime. This assertion was surprising for a number of reasons. First and foremost, of course, given the disagreement among states as to the definition of international terrorism, how could one credibly argue that the threshold of general agreement, including among "specially affected States", had been reached? Secondly, the determination of any customary rules was materially irrelevant to the case at hand. The STL was an ad hoc mechanism created in relation to the bombing that killed former Lebanese prime minister Rafik Hariri on 14 February 2005. Its mandate, which was issued by the UN Security Council, explicitly stated that Lebanese law was the legal basis for the offences to be tried by the tribunal.[72] Thirdly, before the tribunal decision the prosecution and the defence had been in general agreement that no definition of terrorism existed in customary international law.[73]

Notwithstanding these obstacles, the Appeals Chamber averred not only that international terrorism during peacetime was already defined under customary international law, but also that the offence was criminalised under international criminal law. The Appeals Chamber thus declared that the international crime of international terrorism comprised the following three key elements:

> (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson ...; (ii) the intent to spread fear among the population ... or ... to coerce a national or international authority to take some action or to refrain from taking it; (iii) when the act involves a transnational element.[74]

The tribunal's *Interlocutory Decision on the Applicable Law* received scant support among states and leading jurists. Cassese's attempt to rewrite both history and international law failed even to persuade fellow judges on the tribunal itself. Thus, in its trial judgment of four accused, issued nine years later in August 2020, the tribunal not only affirmed that the Appeals Chamber's consideration of the "apparent existence of a customary international law definition of terrorism" was *obiter dicta*, but also declared that it was "not convinced that one exists".[75]

IV. Terrorism in armed conflict

The two branches of IHL are Geneva Law and Hague Law. These are addressed in turn below. Geneva Law protects persons in the power of the enemy, in particular when they are detained or in territory occupied by a foreign state. In international armed conflict "measures" of terrorism are explicitly prohibited against the civilian population. In non-international armed conflict acts of terrorism are similarly unlawful, but the prohibition also extends to those who formerly took a direct part in hostilities.

A. Acts of terrorism against persons in the power of the enemy

Prohibited acts in international armed conflict

The 1949 Geneva Convention IV generally deals with the protection of civilians in international armed conflict. In addition to prohibiting hostage-taking, it contains an express prohibition of "all measures" of terrorism against civilians in occupied territories or against protected persons in the territory of a party to an armed conflict.[76]

The 1958 commentary of the International Committee of the Red Cross (ICRC) on the provision offers little in the way of clarification of the unusual formulation, nor does it elucidate precisely what the provision envisages. The commentary does, however, observe that

> in resorting to intimidatory measures to terrorise the population, the belligerents hoped to prevent hostile acts. Far from achieving the desired effect, however, such practices, by reason of their excessive severity and cruelty, kept alive and strengthened the spirit of resistance. They strike at guilty and innocent alike.[77]

Surprisingly, however, in its detailed study of customary IHL, the ICRC did not identify a discrete rule prohibiting measures or acts of terrorism against persons in the power of the enemy (as opposed to the customary rule prohibiting terror tactics in the conduct of hostilities).

Prohibited acts in non-international armed conflict

Article 3 common to the four 1949 Geneva Conventions, which applies to all situations of non-international armed conflict, does not specifically refer to acts of terrorism, although many of the prohibited acts, such as murder, mutilation, torture, the taking of hostages and arbitrary executions, clearly constitute predicate offences. There is, however, a specific prohibition of "acts of terrorism" under Article 4 of the 1977 Additional Protocol II,[78] which binds parties to the non-international armed conflicts falling within its

scope.[79] The provision is broad in ambit, applying to protect "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted".[80] Thus, exceptionally, acts of terrorism may be committed against those who formerly participated directly in hostilities (e.g. by taking part in fighting) and not only against civilians.

In the view of the ICRC, the term "acts of terrorism" in the protocol covers "not only acts directed against people, but also acts directed against installations which would cause victims as a side-effect".[81] Thus, for example, the deliberate destruction of civilian homes, schools, or medical facilities, as well as the murder or torture of civilians or those *hors de combat*, at least where the intent or effect was to terrorise the population, would be encapsulated by the prohibition.

B. The definition of terrorism in the conduct of hostilities

The other branch of IHL, Hague Law, regulates the conduct of hostilities, i.e. combat.[82] During the conduct of hostilities the use of terror tactics against the civilian population is explicitly prohibited, in identical terms, by the two 1977 Additional Protocols to the four Geneva Conventions. It is thus stipulated that "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".[83] As the ICRC confirms, this is also a customary rule applicable to all armed conflicts.[84]

The ICRC suggests that the acts proscribed by the prohibition constitute a "special type of terrorism".[85] According to its commentary on the Additional Protocols:

> Air raids have often been used as a means of terrorizing the population, but these are not the only methods. For this reason the text contains a much broader expression, namely "acts or threats of violence" so as to cover all possible circumstances.[86]

The International Criminal Tribunal for the former Yugoslavia (ICTY) would define the concept of "terror" as "extreme fear".[87]

The ICRC commentary notes that acts of violence during conflict "almost always give rise to some degree of terror among the population", and further that "attacks on armed forces are purposely conducted brutally in order to intimidate the enemy soldiers and persuade them to surrender". Accordingly, the Hague Law prohibition on terrorising civilians is limited to acts of violence whose primary purpose is to spread terror among the civilian population "without offering substantial military advantage".[88]

As Dinstein has observed, large-scale aerial bombardments that are "pounding" military objectives and "breaking the back of the enemy armed

forces" are not unlawful according to this rule, even if they lead to a "collapse of civilian morale".[89] In its judgment in the *Prlić* case, reversing the decision at trial, the ICTY Appeals Chamber held that the destruction of the Old Bridge at Mostar could not amount to the terrorisation of the civilian population since it constituted a lawful military objective in the circumstances prevailing at the time.[90]

Indiscriminate bombing of cities was widely practised in the Second World War, especially of German cities by the United States Air Force (USAF) and the British Royal Air Force, and of Japanese cities by the USAF. The Allied bombing of Hamburg and later Dresden, in particular, killed tens of thousands of German civilians for negligible military advantage.[91]

In the last decade, the link between acts carried out with a view to terrorising civilians, such as indiscriminate bombardment or that targeted on civilian areas, and the commission of crimes against humanity, has been widely seen in the armed conflicts in Syria. In 2014 the UN Commission of Inquiry on Syria found that the Syrian government had employed a military strategy targeting the civilian population, combining long-lasting sieges with continuous air and ground bombardment. In neighbourhoods around Damascus civilians were targeted on the basis of their perceived opposition to the government. Innocent civilians would be attacked for merely residing in or originating from these neighbourhoods. The Commission of Inquiry concluded that the Syrian regime "has carried out a widespread and systematic attack against the civilian population of Aleppo to punish and terrorize civilians for supporting or hosting armed groups, in an apparent strategy to erode popular support for those groups".[92]

V. Terrorism and the law on the inter-state use of force

The prohibition on the inter-state use of force is the cornerstone of the contemporary international normative framework for the maintenance of international peace and security. The general prohibition, as codified in the UN Charter, stipulates that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".[93] Serious violations of this customary rule amount to aggression, whose prohibition is a peremptory norm of international law (*jus cogens*).[94]

Acts of aggression can only be committed by a state. This includes a state's "sending" of armed groups instead of its own armed forces to attack another state. But according to certain authorities, non-state armed groups operating independently of a state may commit an armed attack. Under Article 51 of the UN Charter and customary law, a state that is the victim of an armed attack is entitled to use force in self-defence. These issues are addressed with respect to acts of terrorism below.

A. Terrorism as an act of aggression

Under the UN Charter, the Security Council is obligated to determine whether any act of aggression has taken place and then required to make recommendations or decide what measures shall be taken in order to maintain or restore international peace and security.[95] Aggression is now also punishable as an international crime within the purview of the International Criminal Court (ICC), for the first time since the International Military Tribunal was established in 1945 to prosecute the Nazis for the planning and launching of an aggressive war as crimes against peace.[96] Under the amendment to the Rome Statute, which was adopted by the 2010 Review Conference in Kampala,

> For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[97]

For the purpose of this provision, "act of aggression" means "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations".[98] Although the assassination of a

foreign leader is not listed as one of the acts constituting aggression, it is hard to conceive of a more manifest violation of the political independence of another state. The Statute of the STL declared the killing of the former Lebanese prime minister, Rafik Hariri, a terrorist crime.[99] The question thus arises as to whether the Syrian regime was responsible for Hariri's killing.

In its verdict in August 2020, the STL found Salim Jamil Ayyash guilty on numerous counts for the killing of Hariri in a bombing in Beirut on 14 February 2005. Ayyash is not a Syrian national, but a member of the Lebanese group Hezbollah. The judges in the STL Trial Chamber stated, however, that there was "no evidence" that Hezbollah's leadership had any involvement in Hariri's murder, but only that there was no "*direct* evidence of Syrian involvement in it".[100] As of this writing, the prosecution was appealing the STL's decision to acquit the co-defendants Hassan Merhi and Hussein Oneissi.[101]

B. Can terrorism amount to an "armed attack" under *jus ad bellum*?

The right of self-defence is set forth in Article 51 of the UN Charter. But in its codified formulation it is made clear that the right is "inherent" and thus existed also as a rule of general international law. What is more, the UN Study Group on the fragmentation of international law has referred to the right to self-defence of a state as one of the most frequently cited candidates for the status of *jus cogens* in international law.[102] Article 51 provides in full as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Under customary law, the right of self-defence, permitting a use of force in violation of that prohibited under the terms of Article 2(4), is thus available to any state "if an armed attack occurs". This ostensibly means "if, and only if", an armed attack occurs,[103] since any other interpretation of Article 51 would be "counter-textual, counter-factual, and counter-logical".[104] But the precise determination under *jus ad bellum* of what amounts to an armed attack is not settled in either fact or law.[105]

In its judgment in 1986 on the merits in the *Nicaragua* case, the International Court of Justice (ICJ) declared that it saw

> no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces.[106]

But whether a non-state actor rather than a state can autonomously carry out an armed attack (in the sense of Article 51 of the UN Charter) is heavily contested.

Dinstein is correct in pointing out that, under the wording of Article 51, while the target of an armed attack must be a state, the same is not true of the perpetrator.[107] That said, in his separate opinion to the judgment of the ICJ in 2005 in the *Armed Activities in the Congo* case, Judge Simma effectively accepted that the court's implicit position – and that of general international law – was that only a state could perpetrate an armed attack. Indeed, he called for this position "urgently to be reconsidered, also by the Court".[108] His justification for the need for a change in the law was the 11 September 2001 terrorist attacks against the United States.

Dinstein accepts that these terrorist attacks could not be imputed to the Taliban regime *ex post facto*, but argues that the harbouring of al-Qaeda in the aftermath of the attacks meant that Afghanistan *qua* state had "endorsed" the armed attack against the United States.[109] That a state harbouring a non-state actor that has perpetrated an armed attack against another state is itself responsible for the armed attack was certainly not the position in law prior to 11 September 2001.[110] Indeed, Michael Byers distinguishes the situation in Afghanistan from that addressed by the ICJ in its judgment in the *Tehran Hostages* case,[111] where the approval of the Ayatollah Khomeini and other organs of the Iranian state "translated continuing occupation of the Embassy and detention of the hostages into acts of that State".[112] But he concludes nonetheless – and despite opposition on this point from a number of commentators – that the support of more than a hundred states and "acquiescence on the part of all but two others" resulted in an almost instantaneous new rule of customary law following the 11 September 2001 attacks.[113]

Dinstein also claims that the earlier al-Qaeda terrorist bombings in Kenya and Tanzania in 1998 "were definitely armed attacks laying the ground for the exercise of self-defence against the non-State actors wherever they are".[114] But this would considerably broaden the scope of the right of self-defence, because neither Kenya nor Tanzania had offered any support to al-Qaeda, in stark contrast to the situation in Afghanistan under the Taliban. UN Security Council Resolution 1189 described the terror attacks in Nairobi

and Dar es Salaam as "indiscriminate and outrageous acts of international terrorism",[115] but did not refer to the inherent right of self-defence under the UN Charter. Nonetheless, the United States invoked its right to self-defence in a letter to the Security Council a week later. Cannizzaro and Razi believe that the Security Council regarded the attacks as a threat to peace under Chapter VII of the UN Charter.[116]

Kimberley Trapp observes that initial proposals during the elaboration of Article 51 of the UN Charter included the wording "an attack by any State" against a UN member state, but these were not retained.[117] She argues that the "refusal" of the ICJ thus far to address the circumstances under which a state may lawfully use force in self-defence against – and only against – non-state actors may be explained away on the basis of "judicial economy and the facts of the case", and accordingly "should not be read as precluding such uses of defensive force".[118]

Trapp discerns "room", in the language of the UN Charter and from analysis of the ICJ's decisions, for the right to use defensive force in foreign territory against non-state actors that have launched an unattributable armed attack.[119] More controversially still, she would consider al-Qaeda's actions as unattributable in any way to the state of Afghanistan, yet would support the use of force in self-defence against the armed forces of that country.[120]

Trapp ultimately concludes that the "unable or unwilling" test for the territorial state on which the armed non-state actor is located is to be justified as the determinant criterion for the right to use force in self-defence.[121] This would apply where the armed non-state actor has used force equating to an armed attack against another state. Such an approach would, however, significantly circumscribe the notion of sovereignty under international law.

VI. Terrorism as an international crime

This final section describes how terrorism is punishable under international criminal law. This body of international law holds individuals criminally responsible for the perpetration of international crimes. In defining international criminal law,[122] Antonio Cassese specifically cited "international terrorism" as one of the proscribed categories of conduct. In this, however, he was mistaken. As Rob Cryer had earlier suggested, the more accurate view was that individual acts of terrorism that do not fall within the definitions of war crimes, crimes against humanity or genocide were not directly criminalised by international law.[123]

A distinct offence of terrorism is a notable absentee from the crimes falling under the jurisdiction of the ICC. This is despite support for its inclusion prior to the Rome diplomatic conference that adopted the Statute of the Court in 1998 by the special rapporteur of the International Law Commission on the "Draft code of crimes against the peace and security of mankind ... including the draft statute for an international criminal court".[124] During the negotiations a small number of states pushed hard for this;[125] indeed, a number of proposed definitions of a discrete international crime of terrorism were formally tabled at the conference.[126] However, the decision to omit the crime was in part due to the inability to agree on a definition and in part the result of opposition from the United States, which argued that the ICC could obstruct the country's ability to investigate and penetrate terrorist groups effectively.[127]

Nonetheless, a resolution adopted at the Rome conference did explicitly recognise that "terrorist acts, by whomever and wherever perpetrated and whatever their forms, methods or motives, are serious crimes of concern to the international community" and recommended that a review conference of the Rome Statute consider terrorism "with a view to arriving at an acceptable definition" and its inclusion in the list of crimes within the jurisdiction of the ICC.[128] In preparation for the first Review Conference of the Rome Statute, the Netherlands proposed to add terrorism as a crime, but this did not attract broad support.[129]

Nonetheless, acts of terrorism within and outside situations of armed conflict have been prosecuted before a number of international and hybrid criminal tribunals. This is notably the case with the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), where the offence was inscribed in the relevant statutes as a war crime.[130] Terrorising civilians in the conduct of hostilities was deemed by a majority of judges in the Trial and Appeals Chambers of the ICTY a war crime under customary international law. The "internationalised" STL contained the crime of terrorism within its statute, but as noted above this concerned

peacetime acts, and the crime as such was based on domestic Lebanese law, not international law.[131]

A. Terrorism as a crime against humanity

Crimes against humanity were first formally defined and then punished by the Nuremburg Tribunal that followed the end of the Second World War. Today, crimes against humanity are punishable before the ICC where acts of violence are perpetrated "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[132] The essence of crimes against humanity is thus an attack of significant scale against civilians, which may occur in a situation of armed conflict or during peacetime.[133]

Many terrorist acts would amount to crimes against humanity when the contextual requirement of a widespread or systematic attack directed against any civilian population was met. It has, for instance, been widely argued that the 11 September 2001 attacks against the United States amounted to a crime against humanity. According to Human Rights Watch, for example, the attacks were "a crime against humanity that flouted the fundamental values of international human rights and humanitarian law".[134]

B. Terrorism as a war crime

Acts of terrorism committed against civilians during and in connection with an armed conflict are prohibited under customary and conventional law, and are likely to amount to war crimes. As noted in Section 3, these rules are found, distinctly, within Geneva Law and Hague Law. The ILC Draft Code of Crimes against Peace and the Security of Mankind, published in 1996 and submitted to the UN General Assembly for its consideration, had stipulated as a war crime "acts of terrorism" when committed in violation of IHL applicable in armed conflict not of an international character.[135]

Terrorism within the Statute of the International Criminal Tribunal for Rwanda (ICTR)

On 8 November 1994 the UN Security Council adopted Resolution 955 establishing the ICTR. The provision in Article 4 of the 1977 Additional Protocol II that prohibited acts of terrorism against "all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted" was included as a war crime under the jurisdiction of the ICTR.[136] Also prosecutable was a threat to commit an act of terrorism against any such person.[137] These acts could certainly have been sustained against many of the defendants before the ICTR. None was, however, prosecuted and convicted for a threat or act of terrorism.

Terrorism as a war crime in the Special Court for Sierra Leone (SCSL)

Similar provisions on threats or acts of terrorism as war crimes were included in the SCSL Statute.[138] The armed conflicts in Sierra Leone in the late 1980s and the 1990s saw the use of terror tactics by non-state armed groups, in particular the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC). These included amputations of the arms of civilian women and children. Human Rights Watch documented "how entire families were gunned down in the street, children and adults had their limbs hacked off with machetes, and girls and young women were taken to rebel bases and sexually abused".[139]

The so-called "AFRC" judgment was issued by the SCSL in June 2007.[140] The indictment against the three defendants alleged that they ordered armed attacks to be carried out primarily to terrorise the civilian population, but also to punish the population for failing to provide sufficient support to the AFRC/RUF, or for allegedly providing support to the government or to pro-government forces.[141] The indictment further alleged that as part of the campaign of terror and punishment the AFRC/RUF routinely captured and abducted members of the civilian population, raped women and girls, and used many as sex slaves and forced labour. It further alleged that men and boys who were abducted were also used as forced labour and that many abducted boys and girls were given combat training and used in active fighting. It alleged that the AFRC/RUF also physically mutilated men, women and children, including amputating their hands or feet and carving the letters AFRC and RUF on their bodies.[142]

In delineating the crime of terror under the Statute of the SCSL, the court borrowed from the jurisprudence of the ICTY relating to terrorising the civilian population during the conduct of hostilities. The Trial Chamber adopted a two-step approach to the examination of the crime of terror:

1. Were acts of violence particularised in the Indictment wilfully directed against protected persons or their property by members of the AFRC?
2. If so, is there evidence which proves beyond a reasonable doubt that these acts were committed with the primary intent of spreading terror among the civilian population?[143]

But in setting out this test, the SCSL was transposing the elements of the IHL rule applicable in the conduct of hostilities whereby "acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited"[144] rather than the Geneva Law prohibition on acts of terrorism under Article 4 of the 1977 Additional Protocol II. This is a questionable decision in legal terms.

Surprisingly, in its judgment the Trial Chamber held that

> the primary purpose behind commission of sexual slavery was not to spread terror among the civilian population, but rather was committed by the AFRC troops to take advantage of the spoils of war, by treating women as property and using them to satisfy their sexual desires and to fulfil other conjugal needs.[145]

With no military or "utilitarian" purpose, however, the amputation of limbs of civilians did, the court held, amount to terrorising the civilian population, and moreover that it was intended to do so.[146] One AFRC operation, Operation Cut Hand, involved civilians being given the cruel choice of having either "short sleeves" or "long sleeves", meaning amputations of the arm at the bicep or of the hand at the wrist. Civilians whose hands were amputated by members of the AFRC were told to ask Sierra Leonean president Ahmad Tejan Kabbah for new hands.[147]

Terrorism as a war crime within the International Criminal Tribunal for the former Yugoslavia (ICTY)

Within the conduct of hostilities, the use of terror tactics against the civilian population is explicitly prohibited, in identical terms, by the two 1977 Additional Protocols to the four Geneva Conventions. This is a customary rule applicable to all armed conflicts.[148] Whether terrorising civilians in the conduct of hostilities is a distinct *war crime* under customary international law is, however, not entirely settled. In their respective judgments in the *Galić* case, an ICTY Trial Chamber and then the Appeals Chamber declared itself satisfied that it was a customary war crime.[149] But there were strong dissents at trial[150] and on appeal.[151] Judge Schomburg, for instance, questioned the state practice on which the majority of the Appeals Chamber relied, observing that none of the permanent members of the UN Security Council "or any other prominent State" had penalised terrorisation against a civilian population as a war crime.[152] He also considered it relevant that the Rome Statute did not have jurisdiction over such a war crime.[153]

In its trial judgment against Radovan Karadžić in 2016, the ICTY (citing the *Galić* appeal judgment) extended the scope of the crime to potentially also encompass indiscriminate attacks: "as is the case with unlawful attacks on civilians, the acts or threats of violence constituting terror need not be limited to direct attacks on civilians or threats thereof, but may include indiscriminate or disproportionate attack".[154] The Trial Chamber reaffirmed its view that the *mens rea* of terror consists of both general and specific intent. To have general intent, the perpetrator must wilfully make the civilian population or individual civilians the object of acts or threats of violence. The specific intent for the crime is the intent to spread terror among the civilian population.[155] Karadžić was convicted of terrorising civilians in violation of the laws or customs of war (and thus a war crime).

In June 2021 the Residual Mechanism of the ICTY that followed the tribunal's closure once again addressed the issue of whether terrorising civilians in the conduct of hostilities was a war crime under customary law in adjudicating the appeal against conviction of Ratko Mladic. Mladic had asserted that the prohibition of spreading terror among the civilian population did not extend to its criminalisation under customary international law, at least when the siege of Sarajevo was ongoing, "due to insufficient evidence of settled, extensive, or uniform state practice".[156] The Residual Mechanism rejected his assertion.[157] It therefore appears that indiscriminate attacks on populated areas, such as during a siege, as well as directly attacking civilians in such a context may indeed amount to the war crime of causing terror. This is so where the primary purpose is to spread terror among the civilian population.

VII. Outlook

That both states and non-state actors can commit acts of terrorism – as this terminology is generally understood in the vernacular – is beyond doubt. But which acts are to be held to account under international law remains very much in dispute, as this Geneva Paper has discussed. At the time of writing, the war in Ukraine continued to rage, with fears – and threats – of the use of a battlefield nuclear weapon by Russia[158] and acts of sabotage against the gas pipelines from Russia to Germany, as yet unattributed.[159] Both could potentially be acts of terrorism. The adoption of the UN Comprehensive Convention on International Terrorism is thus ever more pressing, even while it seems to be still far away.

To such kinetic terror attacks must be added the increasing threat of cyber warfare, including cyber terrorism. The same challenges that exist in defining terrorism evidently apply to cyber terrorism, but the key elements of the offence are known. There must be a cyber attack, defined as a subset of a cyber operation. External attacks, such as a distributed denial of service attack, focus on disrupting or degrading an adversary system's ability to communicate or access data, while internal cyber attacks involve gaining unauthorised access to an adversary's cyber system (e.g. by hacking) in order to steal data, manipulate information, or degrade or disrupt the system's functionality.[160] Both can under certain circumstances be conducted with a view to provoking terror among the civilian population, the second main element. This would undoubtedly be the case, for instance, where the intended or predictable effect of the cyber attack was to trigger a nuclear plant meltdown; open a dam above a populated area, causing terrible destruction and loss of life; or disable air traffic control systems, resulting in aircraft crashes.[161]

Cyberterrorism is not specifically considered in the current draft of the UN Comprehensive Convention on International Terrorism. Before it is finally adopted, this is one change that must be made. The adoption of the treaty will not change the world for the better in one fell swoop. But it would certainly be an important and a positive step forward.

Endnotes

1. Forcible immersions of a person's head in water often contaminated with urine, faeces, vomit or other impurities.
2. Administering electric shocks by means of wires or a device connected to a source of electricity.
3. Suspension from a ligature tied around the elbows or wrists with the arms behind the back; or the forearms bound together behind the back with the elbows flexed to 90 degrees and the forearms tied to a horizontal bar. See Office of the UN High Commissioner for Human Rights, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, New York/Geneva, 2017, Table 2: Torture techniques and related findings.
4. Indeed, some among the public audiences for executions derided the guillotine as being overly humane (R. Schurr, *Fatal Purity: Robespierre and the French Revolution*, London, Vintage Books, 2007, pp.134, 201, 202).
5. Ibid., pp.134, 234.
6. *Dictionnaire de l'Académie française*, 1798, Vol.I, p.775, https://bit.ly/3rFAEdw.
7. Rome Statute of the International Criminal Court (ICC); adopted at Rome, 17 July 1998; entered into force 1 July 2002, https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.
8. Thus, in 2003 the International Criminal Tribunal for the former Yugoslavia (ICTY) stated that the offence of *international* terrorism has "never been singly defined under international law" (ICTY, *Prosecutor* v. *Galić*, Judgment (Trial Chamber, Case No. IT-98-29-T), 5 December 2003, para. 87, note 150).
9. B. Saul, "The Legal Black Hole in United Nations Counterterrorism", IPI Observatory, 2 June 2021, https://bit.ly/3GTe8nn.
10. Draft Comprehensive Convention against International Terrorism, in UNGA (UN General Assembly), "Letter dated 3 August 2005 from the Chairman of the Sixth Committee addressed to the President of the General Assembly", A/59/894, 12 August 2005, Appendix II, http://bit.ly/2sVRhYm.
11. The 1937 Convention for the Prevention and Punishment of Terrorism defined terrorism as follows: "'acts of terrorism' means 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" (Convention for the Prevention and Punishment of Terrorism; signed at Geneva, 16 November 1937; never entered into force, art. 1(2)).
12. UNGA (UN General Assembly), US Draft Convention for Prevention and Punishment of Terrorism Acts, A/C.6/L.850, reprinted in *International Legal Materials*, Vol.11(6), November 1972, pp.1382-1387.
13. B. Saul, "United Nations Measures to Address the 'Root Causes' and 'Conditions Conducive' to Terrorism and to Prevent Violent Extremism (PVE): 1972-2019", in B. Saul (ed.), *Research Handbook on International Law and Terrorism*, Cheltenham, Edward Elgar, 2021, p.531.
14. As Saul notes, South Africa was accused of ruling by terror (ibid., p.333). The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid describes apartheid as a crime against humanity, but does not use the word "terrorism" in its provisions (International Convention on the Suppression and Punishment of the Crime of Apartheid; adopted at New York, 30 November 1973; entered into force 18 July 1976).
15. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; adopted at New York, 14 December 1973; entered into force 20 February 1977.
16. Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance; adopted at Washington DC, 2 February 1971; entered into force 16 October 1973.
17. M. Sossai, "The Legal Response of the Organization of American States in Combatting Terrorism", in Saul (ed.), 2021, p.626.
18. Internationally Protected Persons Convention, art. 1(1)(a).
19. Declarations available at https://bit.ly/3rBRmvD.
20. Ibid.
21. International Convention Against the Taking of Hostages; adopted at New York, 17 December 1979;

entered into force 3 June 1983, Preamble, para. 5.

22. Ibid., art. 1(1).
23. W. Verwey, "The International Hostages Convention and National Liberation Movements", *American Journal of International Law*, Vol.75(1), 1981, pp.84-86.
24. International Hostage-Taking Convention, art. 12.
25. Thus, if a relevant state is party to the 1977 Additional Protocol I to the four Geneva Conventions and has not made a reservation with respect to Articles 1(4) and 96(3) of the protocol.
26. International Convention for the Suppression of Terrorist Bombings; adopted at New York, 15 December 1997; entered into force, 23 May 2001.
27. Ibid., art. 2(1).
28. Australia, Austria, Canada, Denmark, Finland, France, Germany, India, Ireland, Israel, Italy, Japan, Moldova, Netherlands, New Zealand, Norway, Poland, Russia, Spain, Sweden, United Kingdom, United States.
29. Declaration of Finland, 17 June 2003, http://bit.ly/2YbSI1g.
30. Declaration of the Russian Federation, 22 September 2003, in endnote 10 on the UN Treaty Series website entry for the 1997 Convention, http://bit.ly/2YbSI1g.
31. 1999 Terrorist Financing Convention, art. 2(1)(b).
32. Y. Dinstein, *Non-International Armed Conflicts in International Law*, Cambridge, Cambridge University Press, 2021, p.226, para. 637.
33. M. Di Filippo, "The Definition(s) of Terrorism in International Law", in Saul (ed.), 2021, p. 6.
34. Text of the declarations available on the UN webpage dedicated to the status of adherence to the convention, https://bit.ly/3LiTzUJ.
35. Austria, Belgium, Canada, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Netherlands, Norway, Poland, Portugal, Spain, Sweden, United Kingdom, United States.
36. International Convention for the Suppression of Acts of Nuclear Terrorism; adopted at New York, 13 April 2005; entered into force 7 July 2007.
37. The Ad Hoc Committee, which was established by General Assembly Resolution 51/210, adopted without a vote on 17 December 1996, concentrated first on the elaboration of the Terrorist Bombings Convention.
38. 2005 Nuclear Terrorism Convention, art. 2(1)(a).
39. Ibid., art. 2(1)(b).
40. See, for example, "Russia-Ukraine updates: Russia Strikes Land Near Nuclear Power Plant", *Deutsche Welle*, 19 September 2022, https://bit.ly/3S0e779.
41. See the following section in this regard.
42. 2005 Nuclear Terrorism Convention, art. 4(2).
43. Of course, international human rights law will take a keen interest, including in an overly broad definition of terrorist offences, along with any assaults in counterterrorism laws on the right to liberty and security of person, the imposition of cruel punishment for terrorist offenders, and impediments to the right to a fair trial.
44. 1979 Hostage-Taking Convention, art. 13.
45. 1997 Terrorist Bombings Convention, art. 3.
46. 1999 Terrorist Financing Convention, art. 3.
47. 2005 Nuclear Terrorism Convention, art. 3.
48. 1937 Convention for the Prevention and Punishment of Terrorism, art. 1(1).
49. 1973 Internationally Protected Persons Convention, arts. 1(1)(b), 2(1), 2(2).
50. Texts available at https://bit.ly/3J9Pn7Q.
51. S.M. Witten, "The International Convention for the Suppression of Terrorist Bombings", *American Journal of International Law*, Vol.92(4), October 1998, pp.774-781, https://doi.org/10.2307/2998146.
52. 1997 Terrorist Bombings Convention, art. 1(3)(b).
53. Thus, "the Parties to the conflict shall at all times distinguish between the civilian population and

combatants and between civilian objects and military objectives and accordingly *shall direct their operations only against military objectives*" (1977 Additional Protocol I, art. 48, emphasis added).

54. 1997 Terrorist Bombings Convention, art. 19(2).

55. Witten, 1998.

56. D. Kretzmer, "Terrorism and the International Law of Occupation", in Saul (ed.), 2021, p.216.

57. B. Saul, "From Conflict to Complementarity: Reconciling International Counterterrorism Law and International Humanitarian Law", *International Review of the Red Cross*, Nos. 916-917, February 2022, p.186.

58. Only Burundi, Chad, Eritrea, Iran, Palestine, Somalia, South Sudan and Tuvalu were states not party at the time of writing, and of these both Burundi and Somalia are signatories.

59. 1999 Terrorist Financing Convention, art. 4.

60. 2005 Nuclear Terrorism Convention, art. 5.

61. UN Security Council Resolution 1540 (2004), S/RES/1540 2004, 28 April, operative para. 1.

62. "Any person commits an offence within the meaning of the present Convention if that person, by any means, unlawfully and intentionally, causes: (a) Death or serious bodily injury to any person; or (b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or to the environment; or (c) Damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act" (UNGA, 2005, Appendix II, art. 2(1)).

63. Draft Article 4 stipulates in part that "The present Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 7, paragraph 1 or 2, of the present Convention to exercise jurisdiction". Among other things, Article 7 concerns an offence committed on national territory, but in the embassy of a foreign state.

64. As O'Donnell remarks, "Expanding the material element to include serious damage to private property of any kind is a significant departure from existing definitions, since the main thrust of existing international standards against terrorism is to safeguard the public interest" (D. O'Donnell, "International Treaties against Terrorism and the Use of Terrorism during Armed Conflict and by Armed Forces", *International Review of the Red Cross*, Vol.88(864), December 2006, p.873).

65. Draft Comprehensive Convention on International Terrorism, art. 20(2).

66. Ibid., art. 20(3).

67. See, for example, BBC, "The Sinking of the Rainbow Warrior", 8 July 2014, https://bbc.in/3DGxhuw.

68. OIC English language homepage, https://bit.ly/3JbGafg.

69. The OIC Convention on Combatting International Terrorism exempts from the crime of terrorism "Peoples' struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law" (OIC, Convention of the Organisation of the Islamic Conference on Combating International Terrorism, Annex to Resolution 59/26-P, adopted at Ouagadougou, 1 July 1999, art. 2). A similar exemption was incorporated in the corresponding 1999 Organization of African Unity (OAU) Convention on Terrorism (OAU Convention on the Prevention and Combating of Terrorism; adopted at Algiers, 1 July 1999; entered into force 6 December 2002, art. 3). As of 1 January 2023, 43 States were party to the OAU Convention and a further nine were signatories.

70. UN doc. A/58/37, 11 February 2002, Annex IV, incorporated in UNGA, *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, A/68/37, 2013, p.18 (emphasis added).

71. UNGA, 2005, Appendix I, pp.3-4.

72. Statute of the STL (Special Tribunal for Lebanon), annexed to UN Security Council Resolution 1757, S/RES/1757 (2007), 30 May, art. 2, https://bit.ly/3MA4bj6. The resolution was adopted by ten votes to nil, with five abstentions (China, Indonesia, Qatar, Russia, South Africa).

73. Ibid., p.590.

74. STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Appeals Chamber Case No. STL-11-01/I), 16 February 2011, para. 85, https://bit.ly/3CRAGpG.
75. STL, *Prosecutor* v. *Salim Jamil Ayyash and others*, Judgment (Trial Chamber Case No. STL-11-01/T/TC), 18 August 2020, para. 6192.
76. Convention (IV) Relative to the Protection of Civilian Persons in Time of War; adopted at Geneva, 12 August 1949; entered into force 21 October 1950, art. 33.
77. ICRC (International Committee of the Red Cross), "Commentary of 1958", 1958, p.226, https://bit.ly/2LbfkLJ.
78. 1977 Additional Protocol II, art. 4(2)(d).
79. These are where dissident armed forces or other organised armed groups fighting state armed forces have effective control of part of that state's territory such as to enable them to carry out sustained and concerted military operations and to implement the protocol (ibid., art. 1(1)).
80. Ibid., art. 4(1).
81. ICRC, "Commentary of 1987: Fundamental Guarantees", 1987, para. 4538, http://bit.ly/2IGhscP.
82. Ibid., p.xxvii.
83. 1977 Additional Protocol I, art. 51(2); 1977 Additional Protocol II, art. 13(2).
84. ICRC, "Rule 2. Violence Aimed at Spreading Terror among the Civilian Population", IHL Database: Customary IHL, http://bit.ly/2ONFTT7.
85. Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Martinus Nijhoff, 1987, para. 4538.
86. ICRC, 1987, para. 4785.
87. ICTY, 5 December 2003, para. 135. This interpretation was effectively confirmed in the judgment at trial in the *Blagojević* case two years later, even though the charge itself was of persecution as a crime against humanity (ICTY, *Prosecutor* v. *Blagojević and Jokić*, Judgment (Trial Chamber, Case No. IT-02-60-T), 17 January 2005, para. 590). In making its determination, the Trial Chamber explicitly referred to the IHL rule in the 1977 Additional Protocol I (ibid., para. 589).
88. ICRC, 1987, para. 1940.
89. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, Cambridge University Press, 2016, p.146, para. 390.
90. ICTY, *Prosecutor* v. *Prlić*, Judgment (Appeals Chamber, Case No. IT-04-74-A), 29 November 2017, paras. 411, 425-426.
91. A. Marr, *The Making of Modern Britain*, London, Pan Books, 2009, p.423. That is not to downplay the illegality or inhumanity of the Blitz and the later use of the indiscriminate V1 and V2 weapons. Sixty thousand people, the overwhelming majority civilians, would be killed in the Blitz, around half in London (ibid. p.354).
92. UNGA, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/27/60, 13 August 2014, para. 104, https://bit.ly/3rSFQvq.
93. Charter of the United Nations; adopted at San Francisco, 26 June 1945; entered into force 24 October 1945, art. 2(4).
94. ILC (International Law Commission), *Report of the International Law Commission*, advance unofficial version, A/74/10, 20 August 2019, Annex, https://bit.ly/3EG9Dz2.
95. Charter of the United Nations, 1945, art. 39.
96. 1945 Charter of the International Military Tribunal, art. 6, https://bit.ly/3nfdN78.
97. Rome Statute of the ICC, art. 8 *bis* (1), https://bit.ly/34lgyO4.
98. Ibid., art. 8 *bis* (2).
99. Chapeau to the 2007 Statute of the STL, annexed to UN Security Council Resolution 1757.
100. STL, *Prosecutor* v. *Salim Jamil Ayyash and others*, para. 787 (emphasis added).
101. Ibid.
102. Study Group of the ILC, *Fragmentation of International Law: Difficulties Arising from the Diversification*

and Expansion of International Law, Report, para. 374, A/CN.4/L.682 and Add.1, 13 April 2006, https://bit.ly/3VrJg5R.

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106. ICJ (International Court of Justice), *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua* v. *United States of America*), Judgment (Merits), 27 June 1986, para. 195.

107. Dinstein, 2017, para. 634.

108. ICJ, 1986, para. 11.

109. Dinstein, 2017, para. 639.

110. M. Byers, "The Intervention in Afghanistan – 2001", in T. Ruys and O. Corten (eds), *The Use of Force in International Law: A Case-Based Approach*, Oxford, Oxford University Press, 2018, p.631.

111. Ibid., p.633.

112. ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States* v. *Iran*), Judgment (Questions of jurisdiction and/or admissibility), 24 May 1980, para. 74.

113. Byers, 2018, p.634.

114. Dinstein, 2017, para. 567.

115. UN Security Council, Resolution 1189 (1998), S/RES/1189 (1998), 13 August 1998, first preambular paragraph, https://bit.ly/3CT4Ngf. The resolution was adopted by unanimous vote.

116. E. Cannizzaro and A. Razi, "The US Strikes in Sudan and Afghanistan – 1998", in Ruys and Corten (eds), 2018, pp.543, 541.

117. K. Trapp, "Can Non-State Actors Mount an Armed Attack", in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law*, Oxford, Oxford University Press, 2015, pp.684-685.

118. Ibid., pp.686, 689.

119. Ibid., p.689.

120. Ibid., p.690.

121. Ibid., p.695.

122. In 2013 Cassese described international criminal law as a body of international rules designed to proscribe certain categories of conduct and which renders those who engage in such conduct criminally liable (A. Cassese, *International Criminal Law*, Oxford, Oxford University Press, 2013, p.3).

123. R. Cryer, "International Criminal Law", in D. Moeckli et al. (eds), *International Human Rights Law*, Oxford, Oxford University Press, 2010, p.541.

124. UNGA, *Thirteenth Report on the Draft Code of Crimes against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur*, A/CN.4/466, 24 March 1995, para. 111, https://bit.ly/3MuwPSD.

125. Algeria, India, Israel, Sri Lanka, Turkey (R. Arnold, "Terrorism, War Crimes and the International Criminal Court", in Saul (ed.), 2021, p.273). None of these states has adhered to the Rome Statute, although Algeria and Israel are signatories. Israel subsequently declared its intention not to ratify the Rome Statute.

126. J. van der Vyver, "Prosecuting Terrorism in International Tribunals", *Emory International Law Review*, Vol.24(2), 2010, pp.537-540.

127. Ibid., pp.535-556. For a discussion of the negotiations around the possible inclusion of terrorism as a distinct war crime, see G. Venturini, "War Crimes" in F. Lattanzi and W.A. Schabas (eds), *Essays on the Rome Statute of the International Criminal Court*, Italy, Il Sirente, 1999, pp.180-181.

128. UN, Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/10, 17 July 1998, Resolution E.

129. The Netherlands proposed including "terrorism" as a core crime within the jurisdiction of the ICC, based on the argument that "The fact that there was no universally agreed definition of terrorism should not be grounds for the lack of jurisdiction of the Court over the crime" ("Annexes" to *Report on the Eighth Meeting of the Assembly of States Parties*, https://bit.ly/3Bpl2PW, para. 41 and Appendix III; see also Van

der Vyver, 2010, p.540).

130. Statute of the ICTR (International Criminal Tribunal for Rwanda), 2007, art. 4(d), https://bit.ly/3vsollD; Statute of the Special Court for Sierra Leone (SCSL), art. 3(d), https://bit.ly/3vByDji.

131. Statute of the STL, art. 2, https://bit.ly/3wFXPp2.

132. Rome Statute of the ICC, art. 7(1).

133. ILC, Draft Articles on Prevention and Punishment of Crimes against Humanity, with commentaries, UN doc. A/72/10, 2017, at: https://bit.ly/3MwSXvx, para. 45, commentary, para. 1.

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136. Statute of the ICTR, 2007, art. 4(d).

137. Ibid., art. 4(h).

138. Statute of the SCSL, art. 3(d) and 3(h).

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141. Ibid., para. 1431.

142. Ibid., para. 1432.

143. Ibid., para. 1440.

144. 1977 Additional Protocol II, art. 13(2).

145. Ibid., para. 1459.

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149. ICTY, *Prosecutor* v. *Galić*, Judgment (Appeals Chamber, Case No. IT-98-29-A), 30 November 2006, para. 86.

150. ICTY, *Prosecutor* v. *Galić*, Judgment (Trial Chamber), Dissenting Opinion of Judge Nieto-Navia, paras. 113, 114.

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152. Ibid., paras. 8-12, 18.

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155. Ibid., paras. 463, 464.

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