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DEFINING TERRORISM: THE EVOLUTION OF TERRORISM AS A LEGAL CONCEPT IN INTERNATIONAL LAW AND ITS INFLUENCE ON DEFINITIONS IN DOMESTIC LEGISLATION

REUVEN YOUNG*

Abstract: This Article examines the evolution of the definition of terrorism at international law and tests the widely held view that international law does not provide a definition of terrorism. It contends that by abstracting from the common elements and themes present in the United Nations General Assembly and Security Council resolutions concerning terrorism, and the multi-lateral anti-terrorism conventions, treaties, and protocols, one can discern a core international law definition of terrorism. The Article then compares this definition to those in the domestic legal systems of the United States, United Kingdom, India, and New Zealand to determine whether (1) international law was influential in the drafting of these definitions or in the anti-terrorism legislative process generally and (2) these definitions are consistent with the international law definition discerned from the existing sources of international law relating to terrorism. It concludes that until a customary international law rule prohibiting terrorism emerges or a comprehensive terrorism convention is concluded, states should draw on the international law definition of terrorism when drafting their domestic anti-terrorism legislation for legal and policy reasons, including to enhance the protection of human rights. The Article also examines the history of the development of the international law anti-terrorism instruments and the development of a comprehensive terrorism convention and model domestic legislation, and serves as a study of the implementation or incorporation of international law treaty obligations into domestic law in the context of terrorism.

* Associate, Davis Polk & Wardwell, New York. This Article is based on a paper that was a co-recipient of the Laylin Prize at Harvard Law School in 2004. The author thanks Professor Detlev Vagts for his advice and his comments on the draft of that paper, and Katie Young and Scott Sheeran for their comments and suggestions. The views expressed in this Article are those of the author and do not necessarily reflect the views or opinions of Davis Polk & Wardwell or those who commented on drafts of this Article.

The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed.

—Geoffrey Levitt, *Is “Terrorism” Worth Defining?*, 13 OHIO N.U. L. REV. 97, 97 (1986).

I. AN OLD PROBLEM OF UNSETTLED SCOPE

Opening his lectures at the Academy of International Law at The Hague in 1938, Antoine Sottile said of international terrorism: “The intensification of terrorist activity in the past few years has made terrorism one of today’s most pressing problems.”¹

Such concerns have been frequently repeated over the last sixty-eight or so years. Terrorism’s grave threat did not start with Al Qaeda. Writing in 1977, M.K. Nawaz and Gurdip Singh quoted Sottile and added that the “verdict is no less true in our contemporary times.”² Popular opinion in the West would endorse the statement’s continuing cogency. Without being asked a question about terrorism, U.S. President George W. Bush referred to “terrorism” (or a variant of the word) twenty-two times in a 2004 televised interview.³ International terrorism is frequently cited by world leaders as the greatest threat to Western democracies, a claim made before⁴ and after September 11, 2001.⁵

Notwithstanding the great concern about terrorism, it is most often said that no universally (or even widely) accepted definition of terrorism exists at international law.⁶ Since at least the 1920s and

¹ Antoine Sottile, *Le Terrorisme International*, in 65 RECUEIL DES COURS 89, 91 (1938).

² M.K. Nawaz & Gurdip Singh, *Legal Control of International Terrorism*, 17 INDIAN J. INT’L L. 66, 66 (1977); see also Bogdan Zlataric, *History of International Terrorism and its Legal Control*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 474, 474 (M. Cherif Bassiouni ed., 1975).

³ John V. Whitbeck, *A World Ensnared by a Word; ‘Terrorism,’* INT’L HERALD TRIB., Feb. 18, 2004, at 6.

⁴ See, e.g., Guy B. Roberts, *Self-Help in Combating State-Sponsored Terrorism: Self-Defense and Peacetime Reprisals*, 19 CASE W. RES. J. INT’L L. 243, 247 (1987).

⁵ See, e.g., Xavier Baron, *Newly-minted EU Anti-terror Unit to Study Casablanca Blasts*, AGENCE FRANCE-PRESSE, May 19, 2003, available at www.eubusiness.com/imported/2003/05/110512/ (quoting Spanish Interior Minister Interior Angel Acebes); Jim Garamone, *Iraq ‘a Grave and Gathering Danger,’ Bush Tells U.N.*, AM. FORCES PRESS SERVICE, Sept. 12, 2002, available at http://www.defenselink.mil/news/Sep2002/n09122002_200209122.html.

⁶ See, e.g., *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) (“[T]he nations of the world are so divisively split on the legitimacy [of terrorism] as to make it impossible to pinpoint an area of harmony or consensus.”), cert. den’d, 470 U.S. 1003 (1985); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 17

1930s many states have recognized terrorism as a transnational problem requiring a solution originating at international law. This Article examines the evolution of terrorism as a legal concept at international law and challenges the commonly accepted view that international law does not contain a definition of terrorism.⁷ This Article contends that “terrorism” has a core, objectively determinable meaning at international law, and that one can discern such a definition from the existing sources of international law relating to terrorism.

The Article is divided into two main sections: Part Two examines the development of the definition of terrorism at international law and Part Three examines four definitions of terrorism in domestic law and considers whether (1) international law was influential in their formation and (2) the domestic definitions are consistent with the international definitional jurisprudence. Through treaty law, the international community has required signatory states to criminalize certain acts of terrorism by enacting domestic legislation. This approach to counter-terrorism makes the definitions of terrorism in domestic counter-terrorism legislation crucial to the effectiveness of international law’s response.

After contextualizing terrorism as a phenomenon, Part Two then examines the evolution of the definition of terrorism at international law. It first examines the failed efforts in the 1920s and 1930s to define terrorism and then considers the United Nations General Assembly’s resolutions with respect to terrorism and, more importantly, the resolutions of the United Nations Security Council. There are thirteen multilateral terrorism conventions, which have attracted widespread support.⁸ This Article analyzes their prohibitions and argues that a core

(D.D.C. 1998) (citing U.S. DEP’T. OF STATE, PATTERNS OF GLOBAL TERRORISM, at vi, 1, 17 (2003), available at <http://www.state.gov/s/ct/rls/pgtrpt/2002/html/19997.htm>) (“Attempts to reach a fixed, universally accepted definition of international terrorism have been frustrated both by changes in terrorist methodology and the lack of any precise definition of the term ‘terrorism.’”); M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1937–2001), at 15 (2001) [hereinafter BASSIOUNI, MULTILATERAL CONVENTIONS]; R.R. Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380, 380 (1974); Kevin J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, 16 VT. L. REV. 461, 462 (1992); Ileana M. Pogras, *On Terrorism: Reflections on Violence and the Outlaw*, 1994 UTAH L. REV. 119, 125; Sami Zeidan, *Desperately Seeking Definition: The International Community’s Quest for Identifying the Spectre of Terrorism*, 36 CORNELL INT’L L.J. 491, 491 (2004); Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE J. COMP. & INT’L L. 281, 294 (2005).

⁷ See sources cited in *supra* note 6.

⁸ See Appendix I.

definition of terrorism is discernable from the overlap of the conventions' prohibitions and the themes present in each of the conventions.⁹ This Article advances the proposition that states should draw on this core international definition of terrorism when enacting domestic definitions for both legal and pragmatic reasons, even though this minimum definition of terrorism has not attained customary international law status.

Part Three of the Article turns to the definitions of terrorism in domestic law. First, it considers the definitions in the United Kingdom, United States, India, and New Zealand (states that have experienced terrorism to varying degrees, but all of which enacted or significantly amended their counter-terrorism legislation after September 11), assessing whether international law influenced the formation of their definitions. Second, the substance of the four domestic definitions of terrorism is compared with the definition of terrorism at international law identified in Part Two.

The Article concludes that there is a core definition of terrorism at international law that provides guidance to states enacting terrorism legislation, but that to have an effect, states must look to international law and accept its guidance. Although the four domestic definitions are substantively similar to the international definition, all states should treat the international law definitional jurisprudence as setting a minimum level, not a maximum. The international definition of terrorism is destined to develop very slowly, and states need to tailor their legislation to specific national circumstances and respond to threats. The ease with which terrorists can cross borders means states cannot protect themselves simply by enacting and enforcing domestic legislation proscribing terrorism within their borders. Rather, every state must have legislation denying terrorists safe havens and safe places of operation. An established minimum international law definition of terrorism that informs states' domestic criminal law is required to ensure a baseline of consistency and to facilitate international cooperation. The core definition identified in this Article provides that minimum as well as a yardstick against which to measure states' legislation.

The existence of a definition of terrorism is important. It shapes states' understanding of the problem, delimits their responses to it, and helps to distinguish lawful from unlawful responses. The perceived absence of an accepted international law definition is said by

⁹ *But see* Jean-Marc Sorel, *Some Questions About the Definition of Terrorism and the Fight Against its Financing*, 14 EUR. J. INT'L L. 365, 368 (2003).

some largely to explain the inadequacy of international law's ability to combat terrorism.¹⁰ Do states share a common definition of international terrorism? Or at least, is there sufficient conceptual consensus to facilitate international cooperation in the "war on terrorism"? Is the enemy in the war sufficiently well defined to give "war" a real meaning?¹¹ Or is the enemy so broad to render speaking of "war" meaningless? Perhaps George Orwell's *Nineteen Eighty-Four* is prophetic?¹² Furthermore, many international instruments require states to take steps to fight terrorism. Without a clear definition of what to fight, states can unduly curtail civil rights and suppress political opposition under the pretext of fighting terrorism.¹³ The grant of police powers triggered by terrorism without defining terrorism is inconsistent with the rule of law.

A. Brief History of Terrorism through Time

Generally speaking, for hundreds of years "terrorism" has been used as a pejorative term, usually applied to "the other side." This is the word's political descriptor role; its significance as a legal term is more recent.¹⁴

The root word "terror" (from the Latin "*terrere*"—"to frighten") entered Western European languages' lexicons through French in the fourteenth century and was first used in English in 1528.¹⁵ "Terrorism" gained its political connotations from its use during the French Revolution. The French legislature led by Maximilien Robespierre, concerned about the aristocratic threat to the revolutionary government, ordered the public execution of 17,000 people ("*regime de la terreur*") to educate the citizenry of the necessity of virtue.¹⁶ Robespierre's sup-

¹⁰ Ved Nanda, *The Role of International Law in Combatting Terrorism*, 10 MICH. ST. U. DCL J. INT'L L. 603, 604 (2001).

¹¹ See Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 347–50 (2002).

¹² See generally GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (1949) (describing a war of ambiguous scope and uncertain duration).

¹³ See, e.g., U.N. Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Egypt*, ¶ 16, U.N. Doc. CCPR/CO/76/EGY (Nov. 28, 2002).

¹⁴ See *infra* Part II(B).

¹⁵ Alex P. Schmid, *The Problems of Defining Terrorism*, in *ENCYCLOPEDIA OF WORLD TERRORISM* 12, 12 (Martha Crenshaw & John Pimlott eds., 1997).

¹⁶ *Id.* at 12–13; see also PETER J. VAN KRIEKEN, *TERRORISM AND THE INTERNATIONAL LEGAL ORDER WITH SPECIAL REFERENCE TO THE UN, THE EU AND CROSS-BORDER ASPECTS* 13 (2002) (describing other instances of government-sponsored terrorism used to engender fear in the citizenry).

porters who turned against him, having supported the use of terror in the first instance, accused him of using terrorism in an attempt to identify the illegitimate use of terror.¹⁷ Terrorism, initially associated with state-perpetrated violence, shifted to describing non-state actors following its application to the French and Russian anarchists of the 1880s and 1890s.¹⁸

Terrorism following World War II harnessed newly developed technology. Terrorist hijackings of civil aviation aircraft were a feared and relatively common occurrence.¹⁹ The international community responded with a series of treaties which, in tandem with increased airport security, successfully reduced the incidence of harm to aircraft and passengers. The United Nations' response to a series of terrorist attacks on diplomats and civilians in the 1970s was similarly reactionary.²⁰ The International Convention Against the Taking of Hostages (Hostages Convention) followed in 1979, although it did not result in fewer hostage-taking incidents.²¹ Of course, law alone is insufficient; it must be buttressed with faithful enforcement and effective prevention strategies.²²

The terrorism that began in the early 1990s differs from that of the 1960s and 1970s²³ (although terrorism motivated by the goal of decolonization still exists, *inter alia*, in the Middle East and around Kashmir).²⁴ This modern variety of terrorism comes from a mix of religious affiliation intertwined with political ideology and geo-political goals.²⁵ It poses a greater threat to society, in part because modern terrorists are harder to deter than the terrorists of the 1960s who were concerned—at least to a greater extent—with the harmful consequences of their

¹⁷ Schmid, *supra* note 15, at 13.

¹⁸ These groups sought to affect political change through violence against symbolic targets that would, they hoped, arouse the masses. *See id.* at 13–14. *See generally* JOSEPH CONRAD, *THE SECRET AGENT* (1907).

¹⁹ *See* Alona E. Evans, *Aircraft Hijacking: Its Cause and Cure*, 63 AM. J. INT'L L. 695, 697–98 (1969).

²⁰ *See* Caleb Pilgrim, *Terrorism in National and International Law*, 8 DICK. J. INT'L L. 147, 151 (1990).

²¹ BASSIOUNI, *MULTILATERAL CONVENTIONS*, *supra* note 6, at 48.

²² *See, e.g.*, Alberto R. Coll, Comment, *The Legal and Moral Adequacy of Military Responses to Terrorism*, 81 AM. SOC'Y INT'L L. PROC. 297, 304 (1987) (noting that Egyptian President Mubarak sent the hijackers responsible for the murder of a U.S. citizen during the seizure of the Achille Lauro away from Egypt to avoid having to exercise Egypt's extradition jurisdiction under foreign pressure).

²³ *See* MICHAEL WHINE, *ANTISEMITISM WORLDWIDE 2000/1: THE NEW TERRORISM*, <http://www.tau.ac.il/Anti-Semitism/asw2000-1/whine.htm> (last visited Oct. 21, 2005).

²⁴ Ownership of provinces of Kashmir and Jammu is disputed by India and Pakistan.

²⁵ *See* BASSIOUNI, *MULTILATERAL CONVENTIONS*, *supra* note 6, at 46, 47, 52.

actions.²⁶ Furthermore, the relationship between the means employed and the terrorists' ends is more attenuated than in the past. Although the frequency of terrorist attacks has been relatively constant since 1989,²⁷ the increasing scale of attacks (as September 11, the Bali and Madrid bombings, the siege at Beslan, and the London bombing tragically illustrate)²⁸ is alarming. September 11, illustrating that terrorism crosses national and ethnic boundaries,²⁹ changed the prevailing attitude to terrorism and certainly the attitude of the most influential states. The proliferation and greater availability of weapons of mass destruction,³⁰ modern society's dependence on computer systems, and the emergence of cyber-terrorism³¹ increases the likelihood of a large-scale high-impact terrorist attack.

The use of civil aviation aircraft to destroy the World Trade Center towers in New York and part of the Pentagon building in Virginia on September 11 is perceived as highlighting deficiencies in international anti-terrorism law and enforcement: the lack of international police and intelligence coordination; the absence of a comprehensive definition of terrorism; and insufficient international criminal law infrastructure.³² The attacks' scale and principal victim jolted world opinion. Consequently, the Security Council issued an interventionist resolution, the U.N. General Assembly took up the terrorism debate with increased vigor, and, generally speaking, states and non-state entities reaffirmed the relevance of international law and cooperation in preventing and punishing terrorism.

²⁶ *Id.* at 52–53.

²⁷ See U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM, *supra* note 6, app. H.

²⁸ On September 11, 2001, hijacked aircraft were flown into the two World Trade Center Towers in New York City and into the Pentagon Building in Virginia. Approximately 3000 people were killed. On October 12, 2002, 202 people were killed in a bombing of a nightclub district in Bali, Indonesia. On March 11, 2004, bombs exploded on commuter trains in Madrid, Spain killing approximately 200 people. On September 3, 2004, at least 339 people were killed in an attack on a school in Beslan, Russia. See Steven Lee Myers, *In Russia, Dissent Grows over Moves to Curb Regional Autonomy*, N.Y. TIMES, Oct. 4, 2004, at A8. On July 7, 2005, four explosions on London's public transport system killed fifty-two people.

²⁹ Nicholas Rostow, *Before and After: The Changed U.N. Response to Terrorism Since September 11th*, 35 CORNELL INT'L L.J. 475, 476 (2002).

³⁰ See NON PROLIFERATION OF WEAPONS OF MASS DESTRUCTION - A G8 DECLARATION ¶ 1 (2003), available at http://www.g8.fr/evian/english/navigation/2003_g8_summit/summit_documents/non_proliferation_of_weapons_of_mass_destruction_-_a_g8_declaration.html.

³¹ See generally Susan W. Brenner & Marc D. Goodman, *In Defense of Cyberterrorism: An Argument for Anticipating Cyber-Attacks*, 2002 U. ILL. J.L. TECH. & POL'Y 1, 12–24, 27.

³² See Asli Bâli, *Stretching the Limits of International Law: The Challenge of Terrorism*, 8 ILSA J. INT'L & COMP. L. 403, 408 (2002).

II. THE DEFINITION OF TERRORISM AT INTERNATIONAL LAW

Despite its prior exclusive use as a pejorative political term of stigmatization, “terrorism” is increasingly used as a legal term³³ and therefore should be accompanied by a discrete meaning. The definition certainly requires something more than “[w]hat looks, smells and kills like terrorism is terrorism.”³⁴

The seven sections in this Part of the Article examine the development of terrorism as a legal concept at international law. Section A considers the methodological issues with defining terrorism and outlines the importance of an agreed upon definition. Section B tracks the pre-United Nations development of the concept. Section C considers the debate in the U.N. General Assembly and its various resolutions and declarations with respect to terrorism. Section D addresses the role of the Security Council, with particular attention given to Resolutions 1373 of 2001 and 1566 of 2004. Section E examines the international anti-terrorism conventions and analyzes their contribution to establishing a definition of terrorism. Section F distills a definition of terrorism from the existing international anti-terrorism conventions and other sources by identifying the substantive overlap in the quasi-definitional statements and the common themes running through the conventions. Finally, Section G concludes that there is considerable agreement regarding the core meaning of terrorism and briefly notes the current definitional developments and those likely in the near future.

A. *It's a Question of Definition*

In 2001, following the September 11 attacks, the United Nations Security Council declared that “acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century,”³⁵ but exactly what constitutes this threat is subject to conjecture. Rather than define and prohibit terrorism *in toto*, international and domestic instruments frequently prohibit particular acts recognized as falling under the banner of terrorism. Such acts are often proscribed without expressly acknowledging

³³ Cf. Christian Walter, *Defining Terrorism in National and International Law*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY?* 23–43 (Cristian Walter et al. eds., 2004).

³⁴ See Sir Jeremy Greenstock, KCMG Permanent Representative of the United Kingdom of Great Britain and Northern Ireland, General Assembly Debate on Terrorism, 1 October 2001, (2001), <http://www.un.org/terrorism/statements/ukE.html>.

³⁵ S.C. Res. 1377, Annex, U.N. Doc. S/RES/1377 (Nov. 12, 2001).

that the acts are considered to be terrorism. Thus, when identifying the content of terrorism as a concept, the inquiry cannot be limited to international instruments that expressly mention terrorism. This Part of the Article, however, limits itself to international law at large (rather than regional international law, such as the law of the European Union or the Organization of African Unity). Part Three considers domestic law definitions.

1. International Terrorism

Legal measures targeting terrorism operate on both the domestic and international planes. To engage the United Nations, as a political and legal matter, terrorism must have a significant international dimension.³⁶ Although a significant proportion of terrorism is intra-state, terrorism is frequently international in character: by crossing borders (as in Kashmir), by the nationality of participant and/or victim (as in September 11), or by target despite being geographically intra-state (for example, attacks on foreign visitors in Bali by Indonesia-based terrorists). Acts may also be considered international in character when they attempt to influence foreign governments and when they implicate the interests of more than one state.

2. The Importance of an Accepted Definition

The exclusion of terrorism from the jurisdiction of the International Criminal Court³⁷ is consistent with the international community's approach of creating a web of overlapping national criminal jurisdictions to outlaw terrorist acts rather than creating a comprehensive international regime. Notwithstanding this approach, a universally accepted definition is crucial, as it harmonizes the operation and interaction of the overlapping domestic criminal jurisdictions (for example, facilitating extradition). An accepted definition would enhance intelli-

³⁶ The United Nations' mandate does not directly authorize addressing intra-state terrorism although this strict international-domestic distinction seems artificial given the pervasive influence of human rights. U.N. Charter art. 1. *Contra* Aaron J. Noteboom, *Terrorism: I Know It When I See It*, 81 OR. L. REV. 553, 559 (2002).

³⁷ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. The exclusion of terrorism from the Court's jurisdiction largely resulted from an inability to define the elements of the crime. Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 HARV. HUM. RTS. J. 13, 14 (2003).

gence sharing and international cooperation³⁸ and permit tighter goal definition in the “war against terrorism,” which might facilitate coalition building and strengthen the legitimacy of the “war.” Imposing sanctions and criticizing states that support terrorism would attract broader support once a definition of terrorism is established.

In the United States, criminal prosecution of terrorists is a critical, if not the dominant, method of counter-terrorism.³⁹ The effectiveness and fairness of such an approach turns on whether there is a clear definition of terrorism in the applicable laws.

The mobility of international terrorists allows them to select their place of operation and strike at targets beyond their home state’s borders. Simply prohibiting terrorism in one state is not sufficient to stop terrorist attacks in all states. A common definition is needed to provide a sufficient “least common denominator” jurisdiction worldwide. Even if all acts done by terrorists—for example, murder, property damage, and kidnapping—*should* be crimes in all domestic jurisdictions notwithstanding the obligations under the various conventions,⁴⁰ the conventions focus international attention, voice the commitment of states to fight terrorism, and help to ensure consistent criminalization.⁴¹

Security Council Resolution 1373 of 2001 imposes significant obligations on states to fight terrorism.⁴² Nevertheless, without a common understanding of against whom or what states should be fighting, counter-terrorism obligations can be avoided or used to mask human rights abuses. Human rights organizations have reported acts of repression against legitimate political opposition or dissidents under the pretext of fighting terrorism,⁴³ and, although not necessarily corrective, an accepted definition would make it harder to engage in such acts.

³⁸ See Jacqueline Ann Carberry, *Terrorism: A Global Phenomenon Mandating a Unified International Response*, 6 IND. J. GLOBAL LEGAL STUD. 685, 711 (1999).

³⁹ See Jacques deLisle, *The New Protracted Conflict: The Roles of Law in the Fight Against Terrorism*, 46 ORBIS 301, 306 (2002); Abraham Sofaer, *Playing Games with Terrorists*, 36 NEW ENG. L. REV. 903, 903 (2002). See generally Ronald Sievert, *War of Terrorism or Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307 (2003).

⁴⁰ See Maurice Flory, *International Law: Instruments to Combat Terrorism*, in TERRORISM AND INTERNATIONAL LAW 31, 31 (Rosalyn Higgins & Maurice Flory eds., 1997).

⁴¹ See J.G. Starke, *The Convention for the Prevention and Punishment of Terrorism*, 19 BRIT. Y.B. INT’L L. 214, 215 (1938). Most terrorist acts (for example, murder) are illegal notwithstanding terrorism prohibitions. Some commentators thus question the need for specific terrorism crimes. See, e.g., Matthew Palmer, *Counter-Terrorism Law*, 2002 N.Z. L.J. 456.

⁴² S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

⁴³ Russia and Egypt, for example, are alleged to have dismantled domestic political opposition under the pretext of fighting terrorism. See HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE (2003), available at <http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf>.

This Article contends that there is a core meaning of terrorism that should be accepted as the minimum international definition. This core definition serves as a useful yardstick against which to measure domestic terrorism legislation. The balance of this Part of the Article argues that a definition emerges from the relevant conventions and resolutions. As Emanuel Gross said: “[T]he majority of the definitions have a common basis—terrorism is the use of violence and the imposition of fear to achieve a particular purpose.”⁴⁴

Similarly, Professor Oscar Schachter remarked that the absence of a comprehensive definition “does not mean that international terrorism is not identifiable. It has a core meaning that all definitions recognize.”⁴⁵ Speaking more broadly than just the legal definition of terrorism, Brian Jenkins said in 1992 that “a rough consensus on the meaning of terrorism is emerging without any international agreement on the precise definition.”⁴⁶ This Article identifies the parameters of this core definition by examining the overlap of existing prohibitions but, more importantly, by identifying recurrent themes present in statements at international law about terrorism. Although the conventions are more a product of political compromise than derived from principle, the extent of the overlap and common elements indicates a broad conceptual consensus regarding terrorism as a legal concept.

B. *Background to the International Law Definitions*

Putting aside the question of whether terrorism breaches customary international law,⁴⁷ acts of terrorism by non-state actors generally do not constitute a breach of international law per se. Since the early twentieth century, the international community has, however, engaged with the non-state actor terrorism issue. The first U.N. General Assembly resolution concerning terrorism was passed in 1972.⁴⁸ From this time onwards, the United Nations, principally the General Assembly, attempted to offer leadership towards eliminating international terror-

⁴⁴ Emanuel Gross, *Legal Aspects of Tackling Terrorism: The Balance Between the Right of a Democracy to Defend Itself and the Protection of Human Rights*, 6 UCLA J. INT'L L. & FOREIGN AFF. 89, 97 (2001).

⁴⁵ Oscar Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 Hous. J. INT'L L. 309, 309 (1989).

⁴⁶ Schmid, *supra* note 15, at 18.

⁴⁷ See *infra* Part II, Section G; see also generally Ross E. Schreiber, *Ascertaining Opinio Juris of States Concerning Norms Involving the Prevention of International Terrorism: A Focus on U.N. Process*, 16 B.U. INT'L L.J. 309 (1998).

⁴⁸ See G.A. Res. 3034 (XXVII), U.N. GAOR, 27th Sess., U.N. Doc. A/RES/3034(XXVII) (Dec. 18, 1972).

ism.⁴⁹ Before the post-September 11 paradigm shift, however, the United Nations viewed terrorism as a social phenomenon and generally exhibited an ambivalent attitude towards it.⁵⁰ Amongst other things, this manifested itself in a failure to agree to a comprehensive definition. September 11, however, converted terrorism from an “issue of ongoing concern” for the General Assembly to an issue sufficiently threatening to international peace and security to engage the Security Council.

Prior to the most recent terrorism convention being opened for signature,⁵¹ the Secretary-General identified twenty-one global or regional treaties pertaining to international terrorism, twelve of which are global.⁵² Most do not refer to terrorism explicitly. In general terms, the international conventions seek to utilize domestic criminal law to eliminate international terrorism rather than to establish “in-

⁴⁹ See, e.g., G.A. Res. 42/159, ¶ 17, U.N. Doc. A/RES/42/159 (Dec. 7, 1987) (“Recognizing that the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism”).

⁵⁰ Rostow, *supra* note 29, at 475.

⁵¹ International Convention for the Suppression of Acts of Nuclear Terrorism (opened for signature Sept. 14, 2005), available at http://untreaty.un.org/English/notpubl/English_18_15.pdf [hereinafter Nuclear Terrorism Convention].

⁵² International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, S. Treaty Doc. No. 106-49, G.A. Res. 54/109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 [hereinafter Financing Convention]; International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, S. Treaty Doc. No. 106-6, 37 I.L.M. 249 [hereinafter Bombings Convention]; Convention on the Marking of Plastic Explosives for the Purpose of Detection, Mar. 1, 1991, U.S. Treaty Doc. No. 103-8, 2122 U.N.T.S. 359 [hereinafter Plastic Explosives Convention]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 27 I.L.M. 685 [hereinafter Fixed Platforms Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. No. 101-1, 27 I.L.M. 668 [hereinafter Maritime Convention]; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation [supplement to the Montreal Convention], Feb. 24, 1988, S. Treaty Doc. No. 100-19, 1589 U.N.T.S. 474 [hereinafter Montreal Airports Protocol]; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. No. 11080, 1456 U.N.T.S. 101 [hereinafter Nuclear Materials Convention]; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 [hereinafter Hostages Convention]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167 [hereinafter Internationally Protected Persons Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 546565, 974 U.N.T.S. 178 (Jan. 26, 1973) [hereinafter Montreal Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 [hereinafter The Hague Convention]; Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

ternational crimes.” This makes domestic law definitions of terrorism crucial, as discussed in Part Three.

1. Early Definitions of Terrorism at International Law

“Terrorism” was probably first used as a legal term in international legal circles in 1931 at the Third Conference for the Unification of Penal Law at Brussels.⁵³ The proposed definition of an act of terrorism was:

[T]he intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas⁵⁴

The Sixth Conference in Copenhagen in 1935 adopted a text that defined terrorism in Article 1 as:

International acts directed against the life, physical integrity, health or freedom of a head of state or his spouse, or any person holding the prerogatives of a head of state, as well as crown princes, members of governments, people enjoying diplomatic immunity, and members of the constitutional, legislative or judicial bodies [if the perpetrator creates] a common danger, or a state of terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance to international relations.⁵⁵

Certain other acts—for example, instigating a calamity—were considered under Article 2 to create a common danger or to provoke a state of terror. As today, in the 1930s there were concerns about the efficacy of international cooperation in combating terrorism.⁵⁶

International efforts to curb terrorist acts first found expression in the League of Nations’ Convention for the Prevention and Pun-

⁵³ See V.S. Mani, *International Terrorism—Is a Definition Possible?*, 18 INDIAN J. INT’L L. 206, 207 (1978); Nawaz & Singh, *supra* note 2, at 66–67; Zlataric, *supra* note 2, at 479.

⁵⁴ Zlataric, *supra* note 2, at 479.

⁵⁵ *Id.* at 481–82.

⁵⁶ See *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations Doc. C.94M.47 1938 V (1938), at 49 [hereinafter *Proceedings of the International Conference*].

ishment of Terrorism (1937 Terrorism Convention).⁵⁷ This followed a resolution stating “that the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation”⁵⁸ Following the assassination of King Alexander I of Yugoslavia and the French Foreign Minister in October 1934 (and Italy’s refusal to extradite the accused under the political crime exception),⁵⁹ France proposed that “international measures” be taken to address the problem. A panel of experts provided a draft of the convention, which was considered in 1937.⁶⁰ The same conference considered a complementary convention creating an international criminal court exercising jurisdiction over the substantive convention.⁶¹

The substantive 1937 Terrorism Convention concerned only transnational terrorism⁶² perpetrated by non-state actors thus avoiding the controversial issue of terrorism by state actors.⁶³ It defined “acts of terrorism” in paragraph 1 as “[c]riminal 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.” States were required to enact legislation criminalizing terrorism and certain other acts.⁶⁴

The 1937 Terrorism Convention was signed by twenty-four states⁶⁵ but was only ratified by India in January 1941.⁶⁶ Neither this nor the

⁵⁷ Convention for the Prevention and Punishment of Terrorism, Nov. 16, 1937, League of Nations Doc. C.546M.383 (1937), *reprinted in* 7 INTERNATIONAL LEGISLATION 862 (Manley O. Hudson ed., 1941) [hereinafter 1937 Terrorism Convention]; Nawaz & Singh, *supra* note 2, at 67.

⁵⁸ Nawaz & Singh, *supra* note 2, at 67.

⁵⁹ Mani, *supra* note 53, at 208.

⁶⁰ The experts were appointed by Belgium, Chile, France, Hungary, Italy, Poland, Romania, Spain, Switzerland, U.K., and U.S.S.R. *Proceedings of the International Conference*, *supra* note 56, at 49.

⁶¹ Convention for the Creation of an International Criminal Court, Nov. 16, 1937, League of Nations Doc. C.547(1)M.384(1) (1937), *reprinted in* 7 INTERNATIONAL LEGISLATION, *supra* note 57, at 878.

⁶² 1937 Terrorism Convention, *supra* note 57, art. 2.

⁶³ *See id.* art. 1(2).

⁶⁴ *See id.* arts. 1(2), 2(1)–(5).

⁶⁵ *Id.* The signatory states were: Albania, Argentina, Belgium, Great Britain, Bulgaria, Cuba, Dominican Republic, Egypt, Ecuador, Spain, Estonia, France, Greece, Haiti, Monaco, India, Norway, The Netherlands, Peru, Romania, Czechoslovakia, Turkey, U.S.S.R., Venezuela, and Yugoslavia. *Id.*

⁶⁶ India’s separate membership of the League of Nations entitled it to sign independently of Britain. This was the first multilateral diplomatic convention that India signed when no other commonwealth states did so. Starke, *supra* note 41, at 215. One author

complementary convention ever entered into force,⁶⁷ and they were overtaken by World War II.⁶⁸ The broad definition of terrorism contributed to the low number of signatures and ratifications. Britain, for example, did not ratify it because of foreseen difficulties with drawing up the required implementing domestic legislation.⁶⁹ Foreshadowing criticism of terrorism conventions generally, J.G. Starke said of the 1937 Terrorism Convention in 1938 that “there can be few, if any, civilised countries in which legislation of the type provided for is not in force” and “for the prevention of terrorist outrages . . . co-operation is likely to be far more effective than the stiffening of the law for the infliction of punishment.”⁷⁰

C. United Nations General Assembly⁷¹

The killing of twenty-eight people at Israel’s Lod airport in May 1972 and of eleven Israeli athletes at the Munich Olympic Games in September 1972 forced the General Assembly to confront the issue of terrorism.⁷² No consensus on definition was reached because, *inter alia*, some states supported the use of terrorism to advance political goals.⁷³ Furthermore, the United Nations maintained an institutional commitment to self-determination that clouded its vision relating to terrorism.⁷⁴ States directly interested in national liberation sought to exclude acts committed in such struggles from any definition of terrorism. The polarization of positions resulting from the division of the world into the West, the Soviet Bloc, and the Non-Aligned States exacerbated the division over terrorism.⁷⁵

noted speculation that India’s ratification was motivated by a desire to suppress nationalist movements within India. Mani, *supra* note 53, at 207 n.4.

⁶⁷ Responsibility for the treaty did not pass to the United Nations so it can be regarded as no longer valid. See Nawaz & Singh, *supra* note 2, at 67.

⁶⁸ See Thomas M. Franck & Bert B. Lockwood Jr., *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT’L L. 69, 70 (1974).

⁶⁹ Starke, *supra* note 41, at 215.

⁷⁰ *Id.*

⁷¹ See generally M. CHERIF BASSIOUNI, *INTERNATIONAL TERRORISM: A COMPILATION OF U.N. DOCUMENTS (1972–2001)* (2002) (providing the text of the major U.N. resolutions related to terrorism).

⁷² John Norton Moore, *Towards Legal Restraints on International Terrorism*, 67 AM. SOC’Y INT’L L. PROC. 88, 88 (1973).

⁷³ See Abraham D. Sofaer, *Terrorism and the Law*, 64 FOREIGN AFF. 901, 903 (1986).

⁷⁴ See U.N. Charter art. 1; José E. Alvarez, *The U.N.’s ‘War’ on Terrorism*, 31 INT’L J. LEGAL INFO. 238, 238 (2003); see also Moore, *supra* note 72, at 88 (arguing that there is no necessary congruence between the pursuit of self-determination and terrorism).

⁷⁵ See VAN KRIEKEN, *supra* note 16, at tit. page, 114; G.A. Res. 3034, *supra* note 48 (an early resolution on terrorism which was a product of the Western states’ view that all ter-

Other attempts to find a comprehensive approach to international terrorism also achieved little. The General Assembly established an ad hoc committee on terrorism in 1972, but its inconclusive debate failed to make any significant progress.⁷⁶ The committee was suspended from 1973 until 1976, during which time responsibility for the terrorism issue fell to the General Assembly's Sixth Legal Committee.⁷⁷

There was no shortage of draft conventions at the United Nations. For example, the United States tabled a draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism⁷⁸ that did not define terrorism but instead instructed states to criminalize offenses of "international significance." These were defined as (1) acts performed with intent to "damage the interests of or obtain concessions from a State or an international organization," (2) involving the unlawful killing, the causing of serious bodily harm, or the kidnapping of another person, (3) that are "committed neither by nor against a member of the armed forces of a state in the course of military hostilities," and (4) are international in character.

The strength of national liberation movements and the solidarity of recently liberated states with people under foreign rule affected the conclusion of multilateral conventions as well. In 1979, Algeria and Libya sought to create an exception to the Hostages Convention that would allow hostage taking in the context of national liberation.⁷⁹ Similarly, Syria argued that individual terrorism was only an international concern when employed solely for personal gain.⁸⁰ The debate over the legitimacy of terrorism hampered the progress towards a definition,⁸¹ although the end of the decolonization period largely

rorism should be universally condemned, the Soviet states' desire to establish a center for terrorism studies within the U.N. Secretariat, and the Non-Aligned states' wish to include a reference to the legitimacy of struggles in pursuit of the right to self-determination against racist, foreign, and colonial regimes).

⁷⁶ See Nawaz & Singh, *supra* note 2, at 69.

⁷⁷ Surya P. Sharma, *International Law: Consensus Still Elusive*, VII(2) WORLD FOCUS, (2000), reprinted in *ENCYCLOPAEDIA OF INTERNATIONAL TERRORISM: HISTORY AND DEVELOPMENT* 100-01 (Verinder Grover ed., 2002).

⁷⁸ Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism, Sept. 25, 1972, U.N. Doc. A/C.6/L.850.

⁷⁹ Suan Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, 9 ILSA J. INT'L & COMP. L. 357, 388 (2003).

⁸⁰ See Ad. Hoc. Comm. on Int'l Terrorism, General Assembly, *Observations of States Submitted in Accordance with General Assembly Resolution 3034 (XXVII)*, at 37, U.N. Doc. A/AC.160/1/Add. 1 (May 16, 1973) [hereinafter *Observations of States*].

⁸¹ See, e.g., Press Release, Hasmy Agam (Malaysia), General Assembly, Speakers Call for Comprehensive International Convention on Terrorism in General Assembly Debate, U.N. Doc. GA/9922 (Oct. 2, 2001) ("Acts of pure terrorism, involving attacks against innocent

settled the legitimacy issue.⁸² Others attribute the slow forming consensus to states that support terrorism preferring to leave the definition vague.⁸³ The U.N. efforts to fight terrorism have been described as “almost totally useless.”⁸⁴ Although this assessment overstates the position, even within U.N. circles it is acknowledged that the “lack of agreement on a clear and well-known definition undermines the normative and moral stance [of the U.N. General Assembly] against terrorism and has stained the United Nations image.”⁸⁵

The end of the Cold War—and more significantly, the withdrawal of Soviet support for radical groups in the Middle East—allowed the General Assembly to more categorically declare the illegitimacy of terrorism in all circumstances.⁸⁶ The decoupling of the right to self-determination and terrorism was a significant step forward.⁸⁷ In contrast to the earlier conventions dealing with specific targets (for example aircraft, marine vessels, and diplomats), the “second generation” agreements⁸⁸ contain wider prohibitions and were concluded under the United Nations’ auspices.⁸⁹ Resolutions were unequivocal in their condemnation.⁹⁰ Another ad hoc committee was established

civilian populations should be differentiated from legitimate struggles of peoples under colonial, alien or foreign domination for self-determination and national liberation”); Press Release, General Assembly, Calls for Resolute Action Against Terrorism Tempered in Assembly by Appeals for Caution in Identifying ‘Enemy,’ U.N. Doc. GA/9962 (Nov. 12, 2001) (“It was unacceptable to label as terrorism the struggle of peoples to protect themselves or to attain their independence”).

⁸² Decolonization struggles still exist. The Israel-Palestinian dispute is often portrayed in this way.

⁸³ See Tiefenbrun, *supra* note 79, at 378.

⁸⁴ Richard Clutterbuck, *International Co-operation Against Terrorism—Treaties, Conventions and Bilateral Agreements*, in INTERNATIONAL TERRORISM: REPORT FROM A SEMINAR ARRANGED BY THE EUROPEAN LAW STUDENTS’ ASSOCIATION 39, 45 (Magnus Sandbu & Peter Nordbak eds., 1987).

⁸⁵ The Secretary General, *Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change*, ¶ 159, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *U.N. High-Level Panel*].

⁸⁶ Flory, *supra* note 40, at 18.

⁸⁷ See G.A. Res. 44/29, at 301-02, U.N. Doc. A/RES/44/29 (Dec. 4, 1989) (referring to the right to self-determination, yet offering an unqualified condemnation of terrorism).

⁸⁸ See José E. Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT’L L. 873, 876 (2003) [hereinafter *Hegemonic International Law Revisited*].

⁸⁹ This is distinguished from other terrorism conventions, for example, which are deposited with the International Civil Aviation Organization. See Montreal Convention, *supra* note 52; Montreal Airports Protocol, *supra* note 52.

⁹⁰ See, e.g., G.A. Res. 49/60, U.N. Doc. A/RES/49/60 (Dec. 9, 1994). While in 1991, U.N. resolutions still included references to national liberation movements (see, e.g., G.A. Res. 46/51, ¶ 15, U.N. Doc. A/RES/46/51 (Dec. 9, 1991)) by 1994, these references were no longer included. See, e.g., *id.*; see also G.A. Res. 55/158, U.N. Doc. A/RES/55/158 (Jan. 30,

in 1996⁹¹ to continue developing treaties criminalizing terrorism-related acts. The General Assembly's most significant resolution to date, the Declaration on Measures to Eliminate International Terrorism of 1994 (Elimination Declaration), states that:

2. Acts, methods and practices of terrorism constitute a grave violation of the purposes and principles of the United Nations, which may pose a threat to international peace and security, jeopardize friendly relations among States, hinder international cooperation and aim at the destruction of human rights, fundamental freedoms and the democratic bases of society;

3. 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 them⁹²

Paragraph 3 repeats but augments the definition in the 1937 Terrorism Convention that was drafted under the auspices of the League of Nations. The Elimination Declaration was endorsed annually in subsequent resolutions.⁹³ The context indicates that paragraph 3 of the Elimination Declaration expands on paragraph 2. Under the approach adopted by the Elimination Declaration and the conventions, the label of terrorism provides an additional "layer of criminality"⁹⁴ and signals greater moral culpability. This definitional statement requires *mens rea* with respect to the criminal act's consequences and excludes any possible justification for the act. Resolutions of the Gen-

2001); G.A. Res. 54/110, U.N. Doc. A/RES/54/110 (Feb. 2, 2000); G.A. Res. 53/108, U.N. Doc. A/RES/53/108 (Jan. 26, 1999); G.A. Res. 52/165, U.N. Doc. A/RES/52/165 (Jan. 19, 1998).

⁹¹ See G.A. Res. 56/88, ¶ 16, U.N. Doc. A/RES/56/88 (Jan 24, 2002) (continuing the mandate provided in Resolution 51/210); G.A. Res. 51/210, ¶ 9, U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

⁹² G.A. Res. 49/60, *supra* note 90.

⁹³ G.A. Res. 57/27, ¶ 10, U.N. Doc. A/RES/57/27 (Jan. 15, 2003); G.A. Res. 56/88, *supra* note 91, ¶ 10; G.A. Res. 55/158, *supra* note 90, ¶ 9; G.A. Res. 54/110, *supra* note 90, ¶ 7; G.A. Res. 53/108, *supra* note 90, ¶ 8; G.A. Res. 52/165, *supra* note 90, ¶ 7; G.A. Res. 51/210, *supra* note 91, ¶¶ 7–8, Annex; G.A. Res. 50/53, ¶ 2, U.N. Doc. A/RES/50/53 (Jan. 29, 1996).

⁹⁴ Noteboom, *supra* note 36, at 564.

eral Assembly do not make law per se, although they can evidence the opinions of states and be declarative of law.⁹⁵

Following the increased Security Council management of the United Nations' anti-terrorism strategy after September 11, the General Assembly continued to adopt resolutions calling on states to eliminate international terrorism.⁹⁶ The Sixth Legal Committee did not incorporate the obligations arising from Resolution 1373 into its recent draft Comprehensive Terrorism Convention.⁹⁷ Although duplicating Resolution 1373's provisions is arguably unnecessary, the exclusion of them may indicate some tension between the General Assembly and the Security Council concerning the United Nations' management of its anti-terrorism efforts. The General Assembly's composition makes it unsurprising that even in the wake of September 11 it failed to achieve clarity of vision sufficient to produce anything new and constructive.⁹⁸ Illustrating the vexed nature of defining terrorism, the Council of Europe—a more homogenous and harmonious congress than the General Assembly—also failed to reach a definitional consensus in the context of European Convention for the Suppression of Terrorism.⁹⁹

In late 2004, the Secretary-General of the United Nations presented the report of the High-level Panel on Threats, Challenges and Change to the General Assembly, which was compiled by a panel of experts appointed by the Secretary-General.¹⁰⁰ Amongst a wide range of other topics, the report recommended that the General Assembly should complete negotiations on a comprehensive convention on terrorism.¹⁰¹ In addition to this direction, however, the report recommended that the definition (1) restate that the acts proscribed by the twelve global terrorism conventions constitute acts of terrorism and declare that such acts are crimes at international law and (2) refer to the definitions in the Financing Convention and Resolution 1566.¹⁰² Noteworthy is the conclusion implicit in the report that the Financing

⁹⁵ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶¶ 187–95, 203–05 (June 27); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 14 (5th ed. 1998).

⁹⁶ See, e.g., G.A. Res. 56/88, *supra* note 91.

⁹⁷ *Infra* note 184.

⁹⁸ *Contra* VAN KRIEKEN, *supra* note 16, at 119 (expressing surprise that so little was achieved).

⁹⁹ Eur. Consult., *European Convention for the Suppression of Terrorism Explanatory Report*, ETS No. 090, ¶ 14 (1977), available at <http://conventions.coe.int/Treaty/EN/Reports/HTML/090.htm>.

¹⁰⁰ U.N. High-Level Panel, *supra* note 85, ¶ 2.

¹⁰¹ *Id.* ¶ 159.

¹⁰² *Id.* ¶ 164.

Convention and Resolution 1566 provide definitions of terrorism.¹⁰³ More important, however, is the suggestion that acts of terrorism (however defined) should be illegal at international law. This appears to advocate for a change in direction from the current approach of using international law to declare that certain acts should be criminalized in the domestic law of each signatory state.¹⁰⁴ Whether this approach will be given serious consideration is unclear at present.

D. *United Nations Security Council*

The Security Council is authorized by Articles 25 and 48 of the U.N. Charter to adopt resolutions that bind U.N. member states. Terrorism is almost certainly within the Security Council's province and the Council proclaimed it one of the "most serious threats to peace and security,"¹⁰⁵ thereby invoking its powers under Chapter VII of the Charter.¹⁰⁶ Following September 11, the Security Council focused on terrorism's domestic and international manifestations.¹⁰⁷ Resolution 1368 condemned the terrorist attacks and, foreshadowing Resolution 1373, called on the international community to "redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorism conventions."¹⁰⁸

Resolution 1373, adopted on September 28, 2001, is the first use of Chapter VII powers to order states to take or refrain from specific actions other than when disciplining a specific country.¹⁰⁹ For Resolution 1373, the Security Council largely adopted existing obligations from the Convention for the Suppression of the Financing of Terrorism (Financing Convention) and the General Assembly's Elimination

¹⁰³ *See id.*

¹⁰⁴ *Id.* ¶ 164(b).

¹⁰⁵ S.C. Res. 1566, pmb., U.N. Doc. S/RES/1566 (Oct. 8, 2004) (stating international terrorism "constitutes one of the most serious threats to peace and security"); *see also* S.C. Res. 1373, pmb., *supra* note 42 (stating international terrorism "constitute[s] a threat to international peace and security").

¹⁰⁶ *See* U.N. Charter arts. 39–42.

¹⁰⁷ This was not the first time the Security Council had considered the issue of terrorism. *See, e.g.*, S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001) (dealing with Afghanistan); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998) (dealing with Afghanistan); S.C. Res. 1054, U.N. Doc. S/RES/1054 (Apr. 26, 1996) (imposing sanctions against Sudan); S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (dealing with Libya following the Pan Am bombing).

¹⁰⁸ S.C. Res. 1368, ¶ 4, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

¹⁰⁹ Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L L. 901, 901 (2002).

Declaration of 1994.¹¹⁰ Indeed, working from a blank slate would have been slower and would have denied the Security Council the advantage of capturing the legitimacy of obligations that many states had already accepted by signing the Financing Convention.

Resolution 1373 seeks to encourage governments to take action against terrorists by, *inter alia*, imposing significant obligations on states to enact domestic legislation. Paragraph 1(b) declares that “all States shall . . . [c]riminalize” the raising of funds and financing of terrorist acts.¹¹¹ It requires tightened border controls, mutual assistance in criminal investigations or proceedings, and the denial of safe haven. Furthermore, it calls upon states to exchange information, to cooperate on prevention, and to become party to relevant conventions and protocols and implement them. Pursuant to paragraph 2, states are also required to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.” Significantly, states are also required to “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws”¹¹²

Resolution 1373 established the Counter-Terrorism Committee (C.T.C.),¹¹³ which monitors the implementation of the obligations under Resolution 1373 and provides assistance to states as required. The onerous obligations imposed by Resolution 1373 and monitored by the C.T.C. are of the variety “usually contained only in treaties developed through the normal treaty-making process.”¹¹⁴ Resolution 1373 departs from the normal language of “calls upon” and “urges” and instead issues mandatory directions in a style characteristic of legislation, such as “all States shall”¹¹⁵ Classical international law, built on state sovereignty and its corollary of state consent,¹¹⁶ denied

¹¹⁰ G.A. Res. 49/60, *supra* note 90.

¹¹¹ S.C. Res. 1373, *supra* note 42, ¶ 1(b).

¹¹² *Id.* ¶ 2(e).

¹¹³ *Id.* ¶ 6. See generally Eric Rosand, *Security Council Resolution 1373, Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333 (2003).

¹¹⁴ Rostow, *supra* note 29, at 482.

¹¹⁵ S.C. Res. 1373, *supra* note 42, ¶¶ 1–3; see Szasz, *supra* note 109, at 901–02; *Hegemonic International Law Revisited*, *supra* note 88, at 874. See generally Eric Rosand, *The Security Council As “Global Legislator”: Ultra Vires or Ultra Innovative?*, 28 FORDHAM INT'L L.J. 542 (2005).

¹¹⁶ See *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7).

all entities the power to legislate for states.¹¹⁷ Professor Jose Alvarez argues that Resolution 1373 illustrates the hegemonic nature of contemporary international law.¹¹⁸

Resolution 1373, despite forty references to terrorism or terrorists (including twenty-nine in operative paragraphs) and their invasive and instructive nature, does not define either term. Significantly, in selecting certain parts of the Financing Convention to make mandatory, the Security Council chose not to replicate the Financing Convention's definition of terrorist act. The C.T.C. has said that it will not attempt to define the term¹¹⁹ and thus Resolution 1373 has left states free to define "terrorism" as each regards appropriate. This omission permits divergent implementation of Resolution 1373's many obligations that turn on how terrorism is defined. Not until October of 2004—three years after Resolution 1373 imposed its mandatory obligations—did the Security Council give a clear indication of how it considers terrorism should be defined.

In this respect, Resolution 1373 represents a lost opportunity. Resolution 1373 could have comprehensively defined terrorism or at least codified the existing meaning of terrorism found in international law. Instead the Resolution's important obligations remained (and possibly still remain) subject to interpretative conjecture and vulnerable to opportunistic and bad faith implementation. States with dubious human rights records actively suppress political opposition, curtail civil and political rights, or simply continue human rights abuses under the new pretext of taking the required steps to fight terrorism.¹²⁰ Reports to the C.T.C. confirm this disturbing trend.¹²¹ Whether the United States' political capital post-September 11 was sufficient for it to press for a definition—no doubt styled with its own pen—is unclear. The absence of an articulated definition in Resolution 1373 does not, however, completely undermine the operation of the obligations if this Article's

¹¹⁷ See Szasz, *supra* note 109, at 901.

¹¹⁸ *Hegemonic International Law Revisited*, *supra* note 88, at 875 (developing on Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843 (2001)).

¹¹⁹ JEREMY GREENSTOCK, CHAIRMAN, COUNTER-TERRORISM COMM. OF THE SEC. COUNCIL, PRESENTATION AT THE U.N. SYMPOSIUM: COMBATING INTERNATIONAL TERRORISM: THE CONTRIBUTION OF THE UNITED NATIONS (June 3, 2002), *available at* <http://www.un.org/Docs/sc/committees/1373/ViennaNotes.htm>.

¹²⁰ See Human Rights Watch, *Opportunism in the Face of Tragedy: Repression in the Name of Anti-Terrorism*, <http://hrw.org/campaigns/september11/opportunismwatch.htm> (last visited Oct. 18, 2005).

¹²¹ See, e.g., S.C. Letter, Report of the Republic of Cuba Submitted Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001), Annex 1, U.N. Doc. S/2002/15 (Jan. 9, 2002) (reporting Cuba's response).

thesis is accepted. The core definition of terrorism provides human rights advocacy groups, governments, and other international actors with a widely accepted yardstick to use in determining the legitimacy of governments fighting what is said to be terrorism.

Resolution 1566, unanimously approved by the Security Council in October 2004, remedies the absence of a definition in Resolution 1373 to some extent. Like previous Security Council and General Assembly Resolutions, Resolution 1566 condemns terrorism in all its forms, irrespective of its motivation, and urges states to cooperate fully in the “fight against terrorism.” But paragraph 3 of Resolution 1566:

Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature¹²²

On its face, this appears to be a definition of terrorism. According to a Security Council press release, Ambassador Ronaldo Mota Sardenberg of Brazil stated to the Security Council during its debate of Resolution 1566 that operative paragraph 3 was not an attempt to define the concept of terrorism but rather a compromise among the Member States that contained a clear political message.¹²³ But over time, paragraph 3 is likely to be recognized as the Security Council’s definition of terrorism, de facto, if not de jure. It is important to note, however, that the definition is qualified by the phrase “which constitute offenses within the scope of and as defined in the international conventions and protocols relating to terrorism.” Thus, the most significant of the Security Council statements on terrorism can be read to support the notion that terrorism is the aggregate of the existing definitions of terrorism in the conventions.

¹²² S.C. Res. 1566, *supra* note 105, ¶ 3.

¹²³ Press Release, Security Council, Security Council Acts Unanimously to Adopt Resolution Strongly Condemning Terrorism as One of Most Serious Threats to Peace, U.N. Doc. SC/8214 (Oct. 8, 2004), available at <http://www.un.org/News/Press/docs/2004/sc8214.doc.htm>.

It is not clear from what point in its history this definition is recalled. Previous Security Council resolutions, as discussed above, have not come close to a definition exhibiting such specificity. Resolution 1566 avoids the contentious issue of whether military targets can be the subject of terrorist attacks by defining the class of victims as “including . . . civilians,” thereby implying further targets fall within the definition. Such targets might include political and state leaders, depending on who is regarded as a civilian, but most likely provides plausible grounds for arguing that the definition includes attacks on military targets as acts of terrorism. Ambassador Jack Danforth of the United States, in his statement to the Security Council, strongly implied that the paragraph 3 definition is not exhaustive, that other terrorists acts occur, and that nothing in paragraph 3 should be read as indicating anything to the contrary.¹²⁴

Irrespective of the intention of the Security Council and whether the definition is exhaustive or otherwise, Resolution 1566’s definition is an important pronouncement and should be read as partially filling the gap in Resolution 1373. The pronouncement, however, remains subject to the legitimate criticism that because it endorses a definition of terrorism ascertainable from the conventions, it adds little new to the development of terrorism as a legal concept. Nevertheless, Resolution 1566, although not of law-making force,¹²⁵ goes some way to clarifying the extent of the obligations in Resolution 1373, and, for this reason, it is significant. The three year delay in imposing various anti-terrorism obligations on states and providing what states might well come to regard as the Security Council’s definition of terrorism is unfortunate to the extent that most states have discharged their obligations and have already delineated what each considers terrorism to be.

E. *Multilateral Anti-Terrorism Conventions and Protocols*¹²⁶

Prior to September 11, the General Assembly had effectively delegated its terrorism responsibilities to the Sixth Legal Committee. The Committee (as well as international organizations such as the Interna-

¹²⁴ *Id.*

¹²⁵ *See, e.g., id.*

¹²⁶ UNITED NATIONS, INTERNATIONAL INSTRUMENTS RELATED TO THE PREVENTION AND SUPPRESSION OF INTERNATIONAL TERRORISM (2001); BASSIOUNI, MULTILATERAL CONVENTIONS, *supra* note 6 (containing conventions and protocols). International law refers to binding international agreements by a variety of names: conventions, charters, treaties, and covenants. JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 42–44 (1996). This Article refers to treaties and conventions interchangeably.

tional Civil Aviation Organization) developed treaties that encouraged states to criminalize some of those acts commonly carried out by terrorists (such as airplane hijackings) and provided for comprehensive jurisdiction combined with a duty to prosecute or extradite.¹²⁷ Other conventions seek to restrict terrorists' access to resources. The thirteen multilateral conventions deal with both punishment and prevention across disparate subject areas. Technological advancement necessitated "prevention conventions" that curb the availability of weapons of mass destruction and unmarked plastic explosives.¹²⁸

The punishment conventions proscribe conduct and, broadly speaking, define the following crimes: physical attacks on internationally protected persons and their (and their government's) property;¹²⁹ the seizure of hostages to compel third parties to act in a certain way;¹³⁰ the use of explosive or other lethal devices against public targets with the intention to cause death, serious injury, or major economic loss;¹³¹ the unlawful possession of radioactive material with the intention to cause death or serious injury or the unlawful use of such material with the intention to cause death, serious bodily injury, substantial property or environmental damage, or to compel a person, organization, or state to do or not do something;¹³² jeopardizing the safety of a civil aviation aircraft or persons or property onboard;¹³³ gaining control of a civil aviation aircraft by use or threat of force or intimidation;¹³⁴ doing things that endanger the safety of a civil aviation aircraft;¹³⁵ acts of violence that cause serious injury or death or endanger safety at a civil aviation airport;¹³⁶ the threat or use of nuclear material that causes or is likely to cause serious injury, death, or property damage;¹³⁷ and gaining control over a vessel or fixed mari-

¹²⁷ But see e.g., John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 HARV. HUM. RTS. J. 1 (1999) (citing an example of an alternative approach).

¹²⁸ The one reported deadly use of weapons of mass destruction by terrorists is the release of sarin gas in the subway in Tokyo, Japan, in 1995. It caused twelve deaths and many people were injured. See Joby Warrick, *An Easier, but Less Deadly Recipe for Terror*, WASH. POST, Dec. 31, 2004.

¹²⁹ Internationally Protected Persons Convention, *supra* note 52, art. 2(1)(a), (b).

¹³⁰ Hostages Convention, *supra* note 52, art. 1(1).

¹³¹ Bombings Convention, *supra* note 52, art. 2(1).

¹³² Nuclear Terrorism Convention, *supra* note 51, art. 2(1)(a), (b).

¹³³ Tokyo Convention, *supra* note 52, art. 1(1)(b).

¹³⁴ The Hague Convention, *supra* note 52, art. 1(a).

¹³⁵ Montreal Convention, *supra* note 52, art. 1(1).

¹³⁶ Montreal Airports Protocol, *supra* note 52, art. II(1).

¹³⁷ Nuclear Materials Convention, *supra* note 52, art. 7(1).

time platform by threat, force, or intimidation or endangering the safe navigation of the vessel or fixed maritime platform.¹³⁸

Despite not necessarily referring to terrorism expressly, these conventions¹³⁹ and their prohibitions are intended to address terrorism. International politics necessitates the incremental criminalization of acts of terrorism, and some agreement on which acts should be proscribed was better than no progress. The Financing Convention, and General Assembly and Security Council resolutions, and statements by other international law actors¹⁴⁰ make a sufficient link between the conventions and the goal of addressing terrorism such that the conventions are very relevant to determining the definition of terrorism at international law.

1. The Punishment Conventions

The international anti-terrorism instruments tend to require specific prohibitions in domestic law but leave states significant latitude in implementing their international obligations. The conventions generally follow a basic model: a type of terrorist activity of particular concern at the time is identified; states are obliged to criminalize this conduct and impose penalties proportional to the act; and states are required to establish jurisdiction at least based on territory, nationality, and place of registration (and in some cases more exten-

¹³⁸ Maritime Convention, *supra* note 52, art. 3(1) (vessels); Fixed Platforms Convention, *supra* note 52, art. 2(1).

¹³⁹ Other relevant international instruments also play a role in international counter-terrorism efforts, although are not exclusively focused on terrorist acts; *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 45; Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, S. Treaty Doc. No. 107-1, 34 I.L.M. 482; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, Dec. 16, 1971, 26 U.S.T. 583, 11 I.L.M. 309; Treaty on the Non-Proliferation of Nuclear Weapons, Jul. 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter Non-Proliferation Treaty]. *See also* General Assembly, *Report of the Ad-Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996*, 6th Sess., U.N. Doc. A/57/37 (Jan. 28- Feb. 1, 2002), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N02/248/17/PDF/N0224817.pdf?OpenElement>. [hereinafter *Draft Comprehensive Terrorism Convention*].

¹⁴⁰ *See, e.g.*, G.A. Res. 44/29, *supra* note 87 (evidencing the link between the listed conventions and terrorism by referring to the “existing international conventions relating to various aspects of the problem of international terrorism, viz” naming all those Convention mentioned in, *supra* note 52 passed before 1989). *See also* G.A. Res. 46/51, *supra* note 90; S.C. Res. 1373, *supra* note 42, pmbl.; Financing Convention, *supra* note 52, art. 2(1)(a), Annex.

sively). The following brief survey pays particular attention to how the conventions' prohibitions and other features relate to the content of the definition of terrorism.

Following the frequent hijackings of the 1960s, the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) (1963), the Convention for the Suppression of the Unlawful Seizure of Aircraft (The Hague Convention) (1970), and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) (1971) were adopted under pressure from the International Civil Aviation Organization to attempt to secure the safety of civil aviation.¹⁴¹

The Tokyo Convention establishes a system for allocating jurisdiction over offenses concerning aircraft, rather than defining particular offenses.¹⁴² "Offenses" are not defined. By contrast, The Hague Convention makes it an offense to "unlawfully, by force or threat thereof, or by any form of intimidation, seize[], or exercise[] control" of a civilian aircraft.¹⁴³ The Montreal Convention provides for further offenses, including acts of violence against persons, damaging aircraft, placing substances likely to destroy or seriously damage aircraft, and damaging or interfering with navigational facilities in a way likely to endanger the safety of an aircraft.¹⁴⁴ States have a duty under each of these conventions to criminalize the conventions' specified conduct.¹⁴⁵ A protocol to the Montreal Convention requires states to criminalize acts of violence or destruction of property committed at international airports serving civil aviation.¹⁴⁶

The Internationally Protected Persons Convention (1973) is structurally similar to The Hague and Montreal Conventions.¹⁴⁷ It defines an "internationally protected person" as a head of state functionary, head of government, Minister of Foreign Affairs, their families, and other representatives of states and international organizations.¹⁴⁸ It requires states parties to criminalize murder, kidnapping, and other attacks on

¹⁴¹ See Montreal Convention, *supra* note 52; The Hague Convention, *supra* note 52; Tokyo Convention, *supra* note 52.

¹⁴² Tokyo Convention, *supra* note 52.

¹⁴³ The Hague Convention, *supra* note 52, art. 1 (a).

¹⁴⁴ Montreal Convention, *supra* note 52, art. 1.

¹⁴⁵ *Id.* arts. 1, 3; The Hague Convention, *supra* note 52, arts. 2, 4.

¹⁴⁶ Montreal Airports Protocol, *supra* note 52, art. II.

¹⁴⁷ Internationally Protected Persons Convention, *supra* note 52.

¹⁴⁸ *Id.* art. 1.

the liberty of such persons, as well as attacks upon their residences, transport, and official premises.¹⁴⁹

The International Convention Against the Taking of Hostages (Hostages Convention) (1979)¹⁵⁰ requires states to make a provision in their domestic law for the crime of seizing, detaining, or threatening to kill, injure, or continue to detain another person in order to compel a state, international intergovernmental organization, person, juridical person, or group of persons to do or abstain from doing an act explicitly or implicitly conditioned on release of the hostage.¹⁵¹

Offenses similar to those required under The Hague and Montreal Conventions are also required with respect to ships (other than police or war ships)¹⁵² by the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Maritime Convention) (1988). States are required to criminalize the seizing of, or the exercising of control over, a ship using force or intimidation; performing acts of violence on a ship or causing damage that is likely to endanger the safe navigation of the ship; placing devices or substances on board a ship that are likely to destroy the ship, damage it or its cargo, or endanger its safe navigation; and destroying or seriously damaging maritime navigational facilities.¹⁵³ A protocol effectively extends the Maritime Convention to apply to fixed platforms on the continental shelf.¹⁵⁴

In 1998, the U.N. General Assembly adopted the International Convention for the Suppression of Terrorist Bombings (Bombing Convention).¹⁵⁵ This convention specifically acknowledges that the existing multilateral conventions are insufficient to address terrorism.¹⁵⁶ In 2002 bombings accounted for 70% of the world's terrorist attacks.¹⁵⁷ The

¹⁴⁹ *Id.* art. 2(1)(a), (b).

¹⁵⁰ Hostage taking is a crime under international humanitarian law during armed conflict not of an international character. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 34, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

¹⁵¹ Hostages Convention, *supra* note 52, arts. 1, 2.

¹⁵² Maritime Convention, *supra* note 52, arts. 1, 2.

¹⁵³ *Id.* arts. 3(1), 5.

¹⁵⁴ *See id.*

¹⁵⁵ *See* G.A. Res. 52/164, ¶ 1, U.N. Doc. A/RES/52/164 (Jan. 9, 1998). The United States initiated negotiations leading to the Convention in July 1996 following the bombings of U.S. Embassies in Kenya and Tanzania and of the Khobar Towers in Saudi Arabia. BASSIOUNI, MULTILATERAL CONVENTIONS, *supra* note 6, at 173.

¹⁵⁶ Bombings Convention, *supra* note 52, Annex ("Noting also that existing multilateral legal provisions do not adequately address these attacks . . .").

¹⁵⁷ *See* U.S. Dep't of State, *supra* note 6, at intro.

Bombings Convention broadly prohibits the use of explosives and other lethal weapons. States must provide for the offenses listed in the Bombings Convention in domestic law.¹⁵⁸ The ease of manufacturing destructive devices and their frequent use by terrorists explains the Bombings Convention's far-reaching requirements. Application of this convention's prohibitions to armed forces during armed conflict is expressly excluded.¹⁵⁹ Article 2(1), the principal offense provision, reads:

Any person commits an offence . . . if that person unlawfully and intentionally delivers, places, discharges or detonates 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:

- (a) With the intent to cause death or serious bodily injury;
- or
- (b) With the intent 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.¹⁶⁰

And by Article 5, mirroring the General Assembly's Elimination Declaration of 1994 quoted above, the Bombings Convention states:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.¹⁶¹

On September 14, 2005 the International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention) was opened for signature. This convention requires states to criminalize¹⁶² the unlawful and intentional possession of radioactive material or devices (both as defined) and the making of such devices

¹⁵⁸ Bombings Convention, *supra* note 52, art. 4(a); *see also* Nuclear Terrorism Convention, *supra* note 51, at pmbl.

¹⁵⁹ *Id.* art. 19(2).

¹⁶⁰ Bombings Convention, *supra* note 52, art. (2)(1).

¹⁶¹ *Id.* art. 5.

¹⁶² Nuclear Terrorism Convention, *supra* note 51, art. 2(1)(a)

with the intent to cause death or serious bodily harm or substantial damage to property or the environment.¹⁶³ It also requires criminalization of the use of radioactive material or devices or the use of or damage to a nuclear facility which releases or risks the release of radioactive material with the intent to cause death, serious bodily injury, substantial damage to property or the environment, or to compel a person, international organization, or state to do or refrain from doing an act. Although similar to other punishment conventions, the Nuclear Terrorism Convention refers to environmental damage as well as to humans and property.

2. The Prevention Conventions

A second class of conventions seeks to prevent terrorism, or at least to mitigate its impact, by denying terrorists materials, finance, support, and equipment. The Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention) (1980)¹⁶⁴ relates to the international transportation and storage of nuclear material.¹⁶⁵ For the purposes of this Article, however, the Nuclear Materials Convention contributes little to the definitional debate, as it applies to all entities handling such materials and not specifically to terrorism.¹⁶⁶ The Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), the first of the conventions to use the word “terrorism,”¹⁶⁷ also seeks to limit the availability of materials to terrorists by requiring states to prohibit and prevent the manufacture of unmarked explosives.¹⁶⁸

The Financing Convention, adopted by General Assembly resolution in 1999,¹⁶⁹ seeks to eliminate terrorism by cutting off funding streams, noting that the “number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain.”¹⁷⁰ It builds on obligations in previous General Assembly state-

¹⁶³ *Id.* art. 5(a).

¹⁶⁴ Nuclear Materials Convention, *supra* note 52, art. 2.

¹⁶⁵ See Non-Proliferation Treaty, *supra* note 139, (limiting the availability of nuclear material and facilitating the application of the International Atomic Energy Agency’s standards and guidelines for the safe handling of nuclear material).

¹⁶⁶ See Nuclear Materials Convention, *supra* note 52, art. 7(1).

¹⁶⁷ Plastic Explosives Convention, *supra* note 52, pmb. (“Conscious of the implications of acts of terrorism for international security . . .”).

¹⁶⁸ *Id.* art. II.

¹⁶⁹ G.A. Res. 54/109, ¶ 1, U.N. Doc. A/RES/54/109 (Feb. 25, 2000).

¹⁷⁰ Financing Convention, *supra* note 52, art. 1.

ments.¹⁷¹ It is the first international convention since 1937, however, to attempt to define terrorism in the abstract. Its offense provision implies this definition:¹⁷²

1. Any person commits an offence . . . if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;^[173]
or

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

F. *Thematic Content of the Concept of Terrorism at International Law*

This section examines the themes and common elements present in the terrorism conventions and the overlap of their prohibitions. Stating these themes abstractly identifies the constituent parts of terrorism as a legal concept at international law and helps to establish the parameters of the definition of terrorism. Nine themes are examined below.

1. The Harm Caused

Causing the death of or serious bodily injury to non-combatant civilians is a proscribed outcome under the Bombings, Financing, and

¹⁷¹ See generally G.A. Res. 51/210, *supra* note 91, ¶ 3(f); see also G.A. Res. 52/165, *supra* note 90.

¹⁷² Financing Convention, *supra* note 52, art. 2; see also *id.* art. 1 (defining various terms in the Convention).

¹⁷³ *Id.* at Annex (listing the Bombings Convention, *supra* note 52; Maritime Convention, *supra* note 52; Fixed Platforms Convention, *supra* note 52; Montreal Airports Protocol, *supra* note 52; Nuclear Materials Convention, *supra* note 52; Hostages Convention, *supra* note 52; Internationally Protected Persons Convention, *supra* note 52; Montreal Convention, *supra* note 52; The Hague Convention, *supra* note 52; see also *id.* art. 23 (stating that the list may be amended).

Nuclear Terrorism Conventions. The other conventions' prohibitions support the principle that killing or harming civilians is terrorism, though their prohibitions apply only in certain contexts (for example, in civil aviation airports or on ships).¹⁷⁴ Causing death or serious bodily injuries is also encompassed by the definition in paragraph 3 of Security Council Resolution 1566,¹⁷⁵ although not only civilians may be the target of terrorists' attacks under this definition.

The standard appears to be "serious bodily injury," a term used in the Financing Convention,¹⁷⁶ Bombings Convention,¹⁷⁷ Nuclear Terrorism Convention,¹⁷⁸ Montreal Airports Protocol,¹⁷⁹ and Security Council Resolution 1566.¹⁸⁰ Although the Maritime Convention and Fixed Platforms Protocol refer simply to "injuries," and the Montreal Convention refers only to "violence against persons," the protection of civilians is not the principal aim of these conventions. Rather, injury or death is only prohibited under these conventions if it is likely to endanger safe navigation, or if the injuries or deaths occur while a prohibited act (such as seizing control of a ship or airplane) is being performed. In contrast, the Bombings Convention, Nuclear Terrorism Convention, Resolution 1566, and (to a lesser extent) the Financing Convention are, *inter alia*, directly concerned with harm to civilians. Any injuries caused in the commission of an otherwise prohibited act suffices as an additional illegal act. Injuries generally must be serious in nature to independently constitute terrorism. Although of less direct relevance, the current draft Comprehensive Convention on International Terrorism¹⁸¹ refers to serious bodily injury. Injuries must be physical; mental harm is insufficient.

¹⁷⁴ Maritime Convention, *supra* note 52, art. 3(1); Montreal Airports Protocol, *supra* note 52, art. II.

¹⁷⁵ S.C. Res. 1566, *supra* note 105.

¹⁷⁶ Bombings Convention, *supra* note 52, art. 2(1)(a).

¹⁷⁷ Financing Convention, *supra* note 52, art. 2(1)(b).

¹⁷⁸ Nuclear Terrorism Convention, *supra* note 51, art. 2(1)(a)(i), (1)(b)(i).

¹⁷⁹ Montreal Airports Protocol, *supra* note 52, art. II(1).

¹⁸⁰ S.C. Res. 1566, *supra* note 105, ¶ 3.

¹⁸¹ *Draft Comprehensive Terrorism Convention*, *supra* note 139, Annex II, cl. 2(1)(a). The definition of terrorism in clause (2)(1) of the Draft Comprehensive Terrorism Convention is:

Any person commits an offence within the meaning of this 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 the environment; or

Unlike in previous conventions and the more recent Nuclear Terrorism Convention, damage to property is not a proscribed harm under the Financing Convention. Nor did the Security Council include such damage in its recent effort to define terrorism in Resolution 1566. Statistically, attacks on private property are significant. On average 298 business facilities were struck annually between 1997 and 2002, compared with thirty-one diplomatic facilities, sixteen governmental, forty-three military, and ninety other facilities.¹⁸² The Bombings Convention contemplates damage to places of public use, state facilities, and public transport systems or infrastructure where it causes or is likely to cause economic harm. Damage to property with respect to ships and airplanes is covered by the maritime and the civil aviation conventions, which evince a concern for the consequences of the prohibited acts beyond their harm to private property. Whether property is privately or publicly owned is not determinative; the criterion is public use, not ownership. The Nuclear Terrorism Convention is broader again and refers only to "substantial damage to property or to the environment."¹⁸³ Although the aviation and maritime conventions do not expressly condition property damage on detrimental economic consequences, the aviation conventions in particular grew out of a concern for confidence in safe air travel. Economic consequences were, at minimum, a relevant consideration indicating that harm to property is only considered sufficiently worrisome if it causes major economic damage.

Pure economic loss (such as a depreciation in share value following a terrorist attack) does not suffice under any convention. In the 1970s, property damage was excluded, for example, from the U.S. draft, as a concession to the Non-Aligned States that were wary of protecting foreign owned property abroad.¹⁸⁴ Western states, however, argued strongly for the inclusion of property damage, especially to transportation systems,¹⁸⁵ and this argument has won out, though not to the extent of pure economic loss.

(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this 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 abstain from doing any act.

Id.

¹⁸² See U.S. Dep't of State, *supra* note 6, app. H.

¹⁸³ Nuclear Terrorism Convention, *supra* note 51, art. 2(1) (a) (ii).

¹⁸⁴ Franck & Lockwood, *supra* note 68, at 76.

¹⁸⁵ *Id.* (citing *Observations of States*, *supra* note 80, at 17).

2. The Criminal Status of the Act Causing Harm

A number of the conventions require acts to be independently “unlawful” to contravene their provisions (see the Bombings, Financing, Nuclear Terrorism, The Hague, Montreal, and Maritime Conventions and the Fixed Platforms Protocol).¹⁸⁶ Independent unlawfulness, presumably a reference to applicable domestic law, is implicit in the other conventions too. For example, the deprivation of liberty of an internationally protected person, prohibited by the Internationally Protected Persons Convention, must be restricted to *unlawful* detention to render results that are not absurd. Some circumstances might warrant detention of such persons. “Unlawful acts” is a broader standard than that used in Resolution 1566, the Elimination Declaration, and Article 5 of the Bombings Convention (and the 1937 Terrorism Convention) which refer to “criminal acts.”¹⁸⁷ The “unlawful” standard is appropriate for the core international definition, as the conventions are more specific than the Elimination Declaration (which is largely aspirational) and the repeat of the Elimination Declaration’s wording in Article 5 of the Bombings Convention.¹⁸⁸ Furthermore, the conventions are much more persuasive as a source of law than the Elimination Declaration, which is soft law, and the Security Council’s Resolution 1566, which is not stated as a binding definition.

3. Intimidation or Coercion

Subclause 2(1)(b) of the Financing Convention requires that the harm be done “when the purpose of such [an] act, by its nature or context” is to intimidate a population or coerce a government or international organization.¹⁸⁹ Intimidation or coercion of some description, also expressly required by the Hostages and Nuclear Materials Conventions and Resolution 1566, is implicit in the other conventions and inherent in the concept of terrorism. For example, the protection of governmental and international organizations’ staff¹⁹⁰ derives partly from the need to protect their principals’ freedom of action. Similarly, the civil aviation—and probably the maritime—conventions are underpinned by a concern for the coercion and intimidation of states and groups of persons.

¹⁸⁶ See also *Draft Comprehensive Terrorism Convention*, *supra* note 139, cl. 2(1).

¹⁸⁷ See S.C. Res. 1566, *supra* note 105, ¶ 3.

¹⁸⁸ See Bombings Convention, *supra* note 52, art. 5.

¹⁸⁹ See Financing Convention, *supra* note 52.

¹⁹⁰ Internationally Protected Persons Convention, *supra* note 52.

Although not required by the Bombings Convention's principal prohibition in Article 2, Article 5 requires states to adopt measures to ensure criminal acts contrary to the Bombings Convention are not justifiable, "in particular where they are intended or calculated to provoke a state of terror." Despite this, which might indicate a modification of the general prohibition, intimidation or coercion is not a requirement of the Bombings Convention. The case for excluding intimidation and coercion from the international definition is bolstered by the Nuclear Terrorism Convention, which provides that intending to compel an act using radioactive material is an alternative to, for example, causing death. As an implicit requirement of the earlier conventions and prominent feature of the Financing Convention, however, intimidation or coercion should be regarded as a necessary element of terrorism as a legal concept at international law.

The use of the indefinite article preceding population¹⁹¹ indicates that intimidation of any state's population or a part thereof is sufficient. The Hostages Convention's wide class of entities that must not be made the subject of compulsion ("a State, an international intergovernmental organization, a natural or juridical person, or a group of persons") is much broader than the other conventions, which are restricted to governments or international organizations, thereby excluding, for example, coercion of multinational corporations.

4. The Range of Victims Generally Includes Persons and Property

Over time this issue has become more, not less, complicated. In 1973, there was general consensus that only innocent persons could be victims of terrorism, which Thomas M. Franck and Bert B. Lockwood defined as persons unconnected with the terrorist's struggle.¹⁹² The present position is that persons and property involved in armed conflict are excluded from the conventions, and thus they cannot be the subject of terrorist attacks under international law.¹⁹³ The aviation, Maritime, and Financing Conventions expressly exclude military and police aircraft and ships. Other conventions refer to doing the proscribed acts "without lawful excuse" or "unlawfully." Placing a bomb in a situation of

¹⁹¹ See, e.g., Financing Convention, *supra* note 52, art. 2(1)(b) ("Any other act . . . is to intimidate a population.").

¹⁹² Franck & Lockwood, *supra* note 68, at 80. See generally *Observations of States*, *supra* note 80.

¹⁹³ There is academic support for requiring that the victims of terrorism be innocents. See, e.g., Benjamin Netanyahu, *Defining Terrorism*, in *TERRORISM: HOW THE WEST CAN WIN* 7, 9 (Benjamin Netanyahu ed., 1986).

armed conflict would not constitute an offense against the Bombings Convention if the circumstances of an armed conflict would make the placement “lawful.”¹⁹⁴ Thus, one can conclude that terrorist acts directed towards combatants do not fit within the core definition of terrorism at international law. It is notable that the definition in Resolution 1566 refers to the range of victims of terrorism as including civilians, thereby avoiding the debate on terrorism directed against military targets.

There is pressure from the United States to regard off-duty and unarmed service personnel as non-combatants under the Draft Comprehensive Terrorism Convention that is currently being debated.¹⁹⁵ Notwithstanding this debate, the scope of “non-combatant” is unclear. Certain governmental officials are expressly protected when overseas.¹⁹⁶ Whether military leaders, businesses that manufacture weapons, civilians employed in military enterprises, and so forth are protected is unclear. It is relatively clear, however, that only non-combatants may be the subject of terrorism attacks at international law.

5. Motivation of the Attacker

The conventions are not limited by the attacker’s motivation. For example, neither the Nuclear Terrorism Convention nor the Financing Convention definition require a religious, political, or ideological motive, nor does Resolution 1566.¹⁹⁷ Similarly, the Internationally Protected Persons Convention, which criminalizes intentional attacks against certain persons, does not expressly require knowledge of the person’s status. Although some states’ domestic law may imply this additional mens rea element,¹⁹⁸ it is not a requirement at international law¹⁹⁹ (although there is academic support for this being a necessary

¹⁹⁴ At the very least, there is a strong inference of the legality of killing combatants under certain conditions arising from the Geneva Conventions, *infra* note 221. Whether criminal law defenses (such as necessity) constitute lawful authorization of killings for the purposes of the conventions, as implemented, is unclear.

¹⁹⁵ See U.S. DEPARTMENT OF DEFENSE, *MILITARY COMMISSION INSTRUCTION No. 2* (2003), available at <http://www.dtic.mil/whs/directives/corres/mco/mci2.pdf>. The definition is asserted to be a “distillation . . . of customary international law.” Eugene R. Fidell & Michael F. Noone in *MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK* 95 (2003).

¹⁹⁶ See Internationally Protected Persons Convention, *supra* note 52, arts. 1, 2.

¹⁹⁷ Financing Convention, *supra* note 52, art. 2.

¹⁹⁸ *Contra* Internationally Protected Persons and Hostages Act, No. 6, § 7(a) (1982) (Cook Islands).

¹⁹⁹ See generally Convention of the Organisation of the Islamic Conference on Combating International Terrorism, July 1, 1999, <http://www.oic-un.org/26icfm/c.html> [herein-

element of terrorism).²⁰⁰ Such a motivation usefully separates terrorist groups from organized crime and limits the parameters of the concept of terrorism thereby reducing the potential for abuse by governments.²⁰¹ Proving a higher motivation (such as political, ideological, or religious) may make prosecutions unduly difficult. Once the act and the purpose elements are proven, the motivation is arguably irrelevant.²⁰² Furthermore, incorporating motivation opens the vexing issues of moral and political legitimacy that have severely hampered the definitional debate in the past.²⁰³

6. Mens Rea Elements Are Relevant to Both the Commission of the Act Itself and the Creation of the Intimidatory or Coercive Consequences

Each act proscribed in the conventions requires some form of mens rea, usually intent. For example, the Bombings Convention's prohibition in Article 2 refers to "intentionally" and the Financing Convention to "willfully" and "intentionally" doing certain acts.²⁰⁴ The Nuclear Terrorism, Internationally Protected Persons, Montreal, Nuclear Materials, and Maritime Conventions, the two Protocols, and Resolution 1566 require the act of terrorism specified to be an intended act.²⁰⁵

The Financing Convention also requires a form of desired foresight with respect to the consequences of the act, stating "when the purpose of [the proscribed act], by its nature or context, is to intimidate"²⁰⁶ Similarly, Resolution 1566 refers to acts done "with the

after OIC]. Furthermore, in the debate concerning the Draft Comprehensive Terrorism Convention, the OIC argued for the exclusion of acts done in the pursuance of liberation struggles and proposed the following paragraphs to be included in the Draft Convention: "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 shall not be considered a terrorist crime." *Id.*

²⁰⁰ See Tiefenbrun, *supra* note 79, at 362 ("The overriding purpose is a necessary element of the definition").

²⁰¹ COMMONWEALTH SECRETARIAT, DRAFT MODEL LEGISLATION ON MEASURES TO COMBAT TERRORISM 42 (2002).

²⁰² *Id.*

²⁰³ Franck & Lockwood, *supra* note 68, at 78.

²⁰⁴ Bombings Convention, *supra* note 52; Financing Convention, *supra* note 52.

²⁰⁵ Fixed Platforms Convention, *supra* note 52; Maritime Convention, *supra* note 52; Montreal Airports Protocol, *supra* note 52; Nuclear Materials Convention, *supra* note 52; Internationally Protected Persons Convention, *supra* note 52; Montreal Convention, *supra* note 52; S.C. Res. 1566, *supra* note 105.

²⁰⁶ Financing Convention, *supra* note 52, art. 2(1)(b).

purpose to provoke a state of terror . . . [or] intimidate”²⁰⁷ Yet the General Assembly’s Elimination Declaration and Article 5 of the Bombings Convention refer to the “intended or calculated” formulation, which first appeared in the 1937 Terrorism Convention.²⁰⁸ Construed contextually, the mens rea of “calculated” must be a standard below intention. This broader formulation is attached to the creation of terror (i.e. the consequences) not the commission of the act itself. In this way, it is an additional mental element relating to the creation of some special state of affairs. This is what differentiates terrorism from everyday crimes. Hence, the international definition requires first that the act is intended and second that the consequences are either intended or perhaps calculated.

7. The Conventions Are Primarily Concerned with International Terrorism²⁰⁹

International efforts to eliminate terrorism largely relate to preserving peace and security, and the friendly relations of states. Therefore, bombings to intimidate one’s own citizenry might not come under an international definition of terrorism, however worthy they may be of condemnation. An increased international commitment to human rights, however, might provide a foundation for extending the prohibition against intra-state targets. The need for protection of a state’s population against its own state is pressing. Sources estimate that more than 70 million people died during the twentieth century from “state-sponsored terror-violence,” whereas 100,000 casualties resulted from terror attacks by small groups or individuals.²¹⁰ In the future, human rights norms may serve as the “internationalizing element.”²¹¹ Presently, such attacks do not come within the core definition.

Daniel Partan has argued that the aircraft hijacking and hostage-taking prohibitions in the conventions relate more strongly to protecting civilians than government.²¹² The protection of civilian popula-

²⁰⁷ S.C. Res. 1566, *supra* note 105, art. 3.

²⁰⁸ Bombings Convention, *supra* note 52, art. 5; 1937 Terrorism Convention, *supra* note 57; G.A. Res. 49/60, *supra* note 90, Annex (I)(3).

²⁰⁹ Nuclear Terrorism Convention, *supra* note 51, art. 3; Bombings Convention, *supra* note 52, art. 3; Maritime Convention, *supra* note 52, art. 4(1); Montreal Convention, *supra* note 52, art. 4(2). *But see id.* art. 4 (listing limited exceptions to the general rule that the convention is only concerned with international terrorism).

²¹⁰ BASSIOUNI, MULTILATERAL CONVENTIONS, *supra* note 6, at 46 (citations omitted).

²¹¹ *See* Daniel G. Partan, *Terrorism: An International Law Offense*, 19 CONN. L. REV. 751, 763 (1987).

²¹² *Id.*

tions, however, is more recent. Early hijackings and hostage-takings were performed to compel governments, principally democratic ones, to act in a certain way.²¹³ Harm to civilians is the means not the end, as recognized by, for example, the Financing Convention making harm to civilians contingent on some intimidatory or coercive purpose.²¹⁴ The Bombings Convention does not condition harm to civilians by means of bombings on intimidation but these attacks on civilians are performed to pressure governments.²¹⁵ Civil unrest and/or the democratic process translate intimidation of the populous into compelled governmental action. Because civilians are a sufficiently important means to coercing government (particularly in democracies), the conventions protect them. Furthermore, under most, if not all, legal systems, attacks on civilians are illegal whether or not they are intended to compel a government to act. The conventions are not needed to cement adherence to the prohibition against civilian murder. Rather, the conventions exist to protect governments.²¹⁶

8. All Multilateral Conventions Concern Terrorist Acts by Individuals

The conventions speak to individual, not state or group, conduct. The Nuclear Terrorism, Financing, Maritime, The Hague, and Hostages Conventions speak of “person,” and clearly individuals may perform acts of terrorism. Whether state actors can commit acts of terrorism has been, and remains, a contentious issue.²¹⁷ Interestingly, Resolution 1566 avoids specifying what type of entities may engage in terrorism, whereas the Nuclear Terrorism Convention expressly provides that the activities

²¹³ The Internationally Protected Persons Convention, *supra* note 52, art. 3, was also designed to protect the governments for whom such protected persons worked.

²¹⁴ Financing Convention, *supra* note 52, art. 2(1)(b).

²¹⁵ The timing of the bombing in Madrid, which preceded the Spanish general elections, appears to have been planned to influence the election, particularly the position of the then incumbent government, which supported the military measures against Iraq. Tony Karon, *Did Al-Qaeda Change Spain's Regime?*, TIME, Mar. 15, 2004, available at www.time.com/time/world/article/0,8599,601306,00.html.

²¹⁶ See, e.g., Internationally Protected Persons Convention, *supra* note 52, pmbl. (“Having in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of friendly relations and co-operation among States . . .”); see also Financing Conventions, *supra* note 52, pmbl.; Bombings Convention, *supra* note 52, pmbl.; Maritime Convention, *supra* note 52, pmbl.; Hostages Convention, *supra* note 52, pmbl. (starting with similar language).

²¹⁷ Walter, *supra* note 33, at 35. Certainly there is not universal agreement on excluding state acts from what constitutes terrorism. See, e.g., Zeidan, *supra* note 6, at 492–96. Zeidan, at the time, was a Lebanese Diplomat at the Permanent Mission of Lebanon to the United Nations.

of armed forces during an armed conflict are not governed by the convention.²¹⁸ The reference to “person”²¹⁹ in the conventions might be thought to bind state officials, and the conventions do not textually exclude application to states. Nevertheless, given that self-enforcement is unlikely,²²⁰ the conventions would have explicitly bound states if that was intended.

Furthermore, application is unnecessary for two reasons. First, state action is already restricted by, *inter alia*, the U.N. Charter, the Geneva Conventions,²²¹ the Genocide Convention,²²² customary and conventional rules against torture,²²³ human rights obligations, international humanitarian law, and, in time, perhaps the emerging principle of civilian inviolability.²²⁴ Thus, gross human rights violations, war crimes,²²⁵ and like acts are already breaches of international law. Second, acts done by individuals sufficiently connected to a state engage state responsibility for breaches of the above rules.²²⁶ State involvement in terrorism can be usefully categorized as (1) states supporting terrorism (provision of ideological, logistical, financial, military, or operational support to a terrorist entity); (2) states operating terrorism (initiating and directing terrorism through non-state agents); and (3) states performing terrorist acts (acts of terrorism performed by state

²¹⁸ Nuclear Terrorism Convention, *supra* note 51, art. 4(2).

²¹⁹ *E.g.*, Financing Convention, *supra* note 52, art. 2(1).

²²⁰ *See* Walter, *supra* note 33, at 37, for a similar conclusion.

²²¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Fourth Geneva Convention, *supra* note 150; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539.

²²² Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277 (entered into force for U.S. Feb. 23, 1989). The text of S. Exec. Doc. O, 81-1, may be found in S. Ex. Rep. 98-51 (1984).

²²³ *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

²²⁴ *See generally* Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1 (2002).

²²⁵ *See, e.g.*, Rome Statute, *supra* note 37, art. 8.

²²⁶ INTERNATIONAL LAW COMMISSION, ARTICLES ON STATE RESPONSIBILITY, arts. 4–11, <http://daccessdds.un.org/doc/UNDOC/GEN/N01/557/81/IMG/N0155781.pdf?OpenElement>; *see* G.A. Res. 56/83, Annex, arts. 4-11, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) (citing and welcoming the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts); *see, e.g.*, *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. at 14.

agents).²²⁷ Inter-state or other transborder acts of terrorism performed by the state that would otherwise constitute terrorism under the international definition, as distilled by this Article, would constitute a transborder use of force and are prima facie illegal. States that operate terrorism through intermediaries will breach the clear obligation not to support terrorism, directly or indirectly,²²⁸ and may also result in the use of force itself if being attributed to the state that supported the act of terrorism. To a large extent, the difficult question is of evidence, not of principle, when establishing state responsibility for engaging in terrorist acts through supporting non-state actors. Thus, states do not escape responsibility for terrorism. Rather, conduct that constitutes terrorism by an individual breaches the states' international obligations. Intra-state violence is significantly less regulated, although the prohibition against genocide and human rights norms constrain state behavior.²²⁹

Finally, agreement on "state-perpetrated terrorism" will be hard to achieve. Intra-state acts of violence usually attract less pressure from other countries than those with cross-border effects, which explains the current consensus. Whether for the pragmatic considerations of obtaining state consent, or on conceptual grounds, excluding state action from the definition of terrorism is desirable. Presently, the Draft Comprehensive Terrorism Convention excludes acts by armed forces despite some states' contrary urgings (such as those of Iraq).²³⁰

9. Political Exceptions

The first convention, signed in Tokyo in 1963, did not require the application of criminal law with respect to offenses of a political nature, thereby recognizing the political exception that motivated France to push for a comprehensive approach to terrorism in the 1930s. A political exception was not included in either the Montreal or The Hague

²²⁷ See Boaz Ganor, *Countering State-Sponsored Terrorism* (Apr. 25, 1998), <http://www.ict.org.il/articles/counter.htm>.

²²⁸ See, e.g., S.C. Res. 1373, *supra* note 42; G.A. Res. 2625, U.N. Doc. A/RES/2625 (Oct. 24, 1970).

²²⁹ See, e.g., generally David Vesel, *The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World*, 18 *BYU J. PUB. L.* 1 (2003) (discussing the possibility of humanitarian intervention).

²³⁰ CENTER FOR NONPROLIFERATION STUDIES, DRAFT CONVENTION ON INTERNATIONAL TERRORISM 3 (2002).

Conventions of the early 1970s and is expressly excluded in the modern conventions²³¹ and Resolution 1566.

G. A Core Definition of Terrorism at International Law

The conventions exhibit high levels of ratifications, signaling their widespread acceptance.²³² This is illustrated in Appendix 1.²³³

There is striking consistency in the form, themes, and philosophy of the various conventional statements on terrorism. Abstracting from their particular prohibitions (or viewing the prohibitions more broadly than in the narrow context in which they appear and considering their underlying policy goals) illustrates that terrorism as a legal concept at international law has a core content. The serious harming or killing of non-combatant civilians and the damaging of property with a public use causing economic harm done for the purpose of intimidating a group of people or a population or to coerce a government or international organization are proscribed outcomes. The act, which must be independently unlawful, must be intentional, and its consequences must at least be foreseen and desired. No particular motivation need explain the act and none can justify it. Group action or involvement is not a requirement, but the act must be perpetrated by a sub-state actor. The act and/or its effects must be international in character. States ought to ensure that the definition of terrorism in their domestic legal systems is consistent with this minimum definition of terrorism at international law. Although the case can be made for a broader definition based on recent and more expansive conventions, such as the Nuclear Terrorism Convention, it is unrealistic to think the definition may be extended by one convention, particularly one relating to a narrow set of circumstances. Rather, the approach of this Article is to look at the recurrence of themes over time in determining the parameters of the core definition of terrorism at international law.

Signature to and/or ratification of the conventions has been particularly rapid following September 11.²³⁴ Although the conventions received widespread approval in their own terms, abstracting from the specific prohibitions to analyze the emerging trends and themes is a

²³¹ See, e.g., Financing Convention, *supra* note 52, art. 14; Bombings Convention, *supra* note 52, art. 5.

²³² See United Nations Treaty Collection, Conventions on Terrorism, Oct. 20, 2003, <http://untreaty.un.org/english/terrorism.asp> (offering signature and ratification status information).

²³³ See Appendix 1.

²³⁴ See Rosard, *supra* note 115, at 337–38.

valid analytical technique because states neither consider nor sign conventions relating to terrorism in isolation. Although states' anti-terrorism commitments are made in a specific context, there is little reason to restrict this view to that particular context, especially when the view is expressed in multiple contexts and given the trend of the conventions towards less context-specific prohibitions (for example, compare the Montreal Convention with the Bombings Convention).²³⁵

This Article does not argue that the elements of the definition of terrorism as identified above form a customary rule. The formation of customary international law requires the coexistence of general and settled state practice and *opinio juris*.²³⁶ The evident willingness of states to rapidly assume binding treaty obligations illustrates the momentum and extent of state practice and the emerging *opinio juris*. Treaty behavior can establish the dual elements of custom.²³⁷ Although the potential for "instant custom" was recognized in the *North Sea Continental Shelf* case, it requires extensive and virtually uniform state practice, including that by particularly affected states.²³⁸ The terrorism conventions are certainly norm-creating²³⁹ but are unlikely to satisfy this heightened state practice requirement. Furthermore, debate persists in key areas (such as military targets). In time, a customary prohibition may crystallize, but its existence is very doubtful at present.

Given the broad support, considerable overlap in obligations, recurring themes in the conventions, and the endorsement of the definition of terrorism in Resolution 1566 by the Security Council, a powerful definitional jurisprudence exists in international law sufficient for states to draw on in forming their own definition of terrorism in domestic law.²⁴⁰ Because international and domestic

²³⁵ See generally Bombings Conventions, *supra* note 52; Montreal Convention, *supra* note 52.

²³⁶ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. at 98-103; North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20).

²³⁷ N. Sea Cont'l Shelf, 1969 I.C.J. at 3.

²³⁸ *Id.* at 43, ¶¶ 73-74.

²³⁹ *Id.* at 41, ¶ 71.

²⁴⁰ Note too the similarity of the core definition of terrorism at international law distilled by this Article and the recommended "description" of terrorism in the report of the High-level Panel on Threats, Challenges and Change:

[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, 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.

definitions exist due to the dangers posed by terrorism, the definitions in the two systems should be substantively similar,²⁴¹ although the needs and constraints of domestic legal systems may necessitate particular drafting. Domestic definitions, to be consistent with the international obligations arising under the various conventions and Resolution 1373, should meet this standard.²⁴² The international definition offers a useful standard against which to measure the domestic definitions.

H. *Current Developments*

States may receive legislative guidance on defining terrorism from sources other than just the conventions and resolutions. International organizations are presently advancing model definitions of terrorism (often as part of model terrorism legislation), the development of which is influenced by the existing terrorism conventions. The United Nations Office on Drugs and Crime produced a guide to implementing the terrorism conventions that provides model domestic legislation for states to consider and notes the desirability of consistent implementation of the conventional obligations for procedural reasons.²⁴³ The Commonwealth Secretariat—an organization representing the fifty-three member states of the British Commonwealth—has also produced model legislation,²⁴⁴ which provides a definition of “terrorist act”²⁴⁵ based on the conventions, resolutions, and national defini-

U.N. High-Level Panel, *supra* note 85, ¶ 44.

²⁴¹ *Cf.*, Walter, *supra* note 33, at 31-32.

²⁴² *Cf.*, *id.* at 13.

²⁴³ U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDE TO THE UNIVERSAL ANTI-TERRORISM CONVENTIONS AND PROTOCOLS ¶ 18 (2003).

²⁴⁴ *See* COMMONWEALTH SECRETARIAT, *supra* note 201.

²⁴⁵ *See id.* The text of the Commonwealth Secretariat’s draft legislation states:

- (1) [A]n act or omission in or outside [country name] which constitutes an offence within the scope of a counter terrorism convention; or
- (2) [A]n act or threat of action in or outside [country name] which—
 - (a) involves serious bodily harm to a person;
 - (b) involves serious damage to property;
 - (c) endangers a person’s life;
 - (d) creates a serious risk to the health or safety of the public or a section of the public;
 - (e) involves the use of firearms or explosives;
 - (f) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to—
 - (i) any dangerous, hazardous, radioactive or harmful substance;
 - (ii) any toxic chemical;
 - (iii) any microbial or other biological agent or toxin;

tions.²⁴⁶ The definition is not limited to the acts proscribed by the conventions and provides an abstract definition principally based on the Financing Convention. Unlike the international approach to defining terrorism, however, the model legislation narrows its definition by expressly excluding labor strikes and protests. Notably, the Secretariat suggests the *possibility* of requiring a political, ideological, or religious motivation but does not give a recommendation either way. This, like the express exclusion of protestors, is a suggestion rooted in domestic rather than international law. In addition, the C.T.C. was reported to be developing model anti-terrorism legislation,²⁴⁷ most likely heavily influenced by the United States.²⁴⁸

A parallel development is the possibility of a Comprehensive Terrorism Convention that provides a definition of terrorism.²⁴⁹ The cur-

(g) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;

(h) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;

(i) involves prejudice to national security or public safety; and is intended, or by its nature and context, may reasonably be regarded as being intended to:

(i) intimidate the public or a section of the public; or

(ii) compel a government or an international organization to do, or refrain from doing, any act [and

(iii) is made for the purpose of advancing a political, ideological, or religious cause.]

(3) [A]n act which—

(a) disrupts any services; and

(b) is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c) or (d) of subsection (2).

Id. at 4–6. The Commonwealth Secretariat recommends two alternative definitions. The bracketed text in clause 2(i) (iii) is the only difference between the two definitions.

²⁴⁶ *Id.* at 41.

²⁴⁷ See John D. Negroponte, U.S. Permanent Representative to the U.N., Statement at U.N. Headquarters on the Release of the U.S. Report on Counter-Terrorism, (Dec. 19, 2001), available at http://www.un.int/usa/01_195.htm.

²⁴⁸ *Hegemonic International Law Revisited*, *supra* note 88, at 875. American officials are also reported as saying at the C.T.C.'s inception that it would export U.S. anti-terrorism legislation around the world. See Serge Schmemmann, *United Nations to Get a U.S. Antiterror Guide*, N.Y. TIMES, Dec. 19, 2001, at B4.

²⁴⁹ Under G.A. Res. 51/210 (1996), *supra* note 91, art. 3, ¶ 9, the Ad Hoc Committee established by that resolution, *inter alia*, drafting a comprehensive legal framework of conventions dealing with international terrorism. See also G.A. Res. 54/110, *supra* note 91, ¶ 12 (calling upon the Ad Hoc Committee to begin work on a comprehensive convention.)

rent sectoral approach of the conventions is recognized as undesirable.²⁵⁰ Although negotiations are still in progress, the current draft²⁵¹ seeks to fill in the gaps left by the sectoral conventions.²⁵² Like the existing conventions, Article 2 lists offenses, and states are obliged to provide for these offenses in their domestic legal systems.²⁵³ It comprehensively (not limited by means or target) defines the scope of terrorist acts in terms very similar to the core definition distilled from the existing terrorism conventions,²⁵⁴ although the draft is subject to criticism.²⁵⁵ Notably, the draft defines “terrorist act” and does not provide a conceptual definition of “terrorism.”²⁵⁶

III. DOMESTIC LAW DEFINITIONS OF TERRORISM

A. Introduction

As outlined above, international law seeks to work through domestic law to eliminate terrorism. Unlike international law where the lack of a comprehensive and clear definition is not fatal, a domestic anti-terrorism statute must provide a precise definition of terrorism. Although not all jurisdictions have a void for vagueness doctrine, all the jurisdictions in this study require that criminal laws be sufficiently knowable.²⁵⁷ For example, the United States Constitution precludes punishment pursuant to a vague criminal provision.²⁵⁸ Such restrictions protect against the arbitrary application of the laws. This protection is

²⁵⁰ See, e.g., BASSIOUNI, MULTILATERAL CONVENTIONS, *supra* note 6, at 6.

²⁵¹ See *Draft Comprehensive Terrorism Convention*, *supra* note 139, Annex I.

²⁵² See *Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December, 1996*, 7th Session, U.N. Doc. A/58/37 (Mar. 31-Apr. 2, 2003).

²⁵³ *Draft Comprehensive Terrorism Convention*, *supra* note 139, cls. 4, 5.

²⁵⁴ For the text of the definition, see *Draft Comprehensive Terrorism Convention*, *supra* note 139.

²⁵⁵ See Alexandra V. Orlova & James W. Moore, “Umbrellas” or “Building Blocks?": *Defining International Terrorism and Transnational Organized Crime in International Law*, 27 HOUS. J. INT'L L. 267, 273–76 (2005).

²⁵⁶ *Id.* at 272.

²⁵⁷ See *Kokkinakis v. Greece*, 17 EUR. CT. H.R. 397, 423 (1994); ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 67 (2d ed. 1995); A.P. SIMESTER & W. J. BROOKBANKS, PRINCIPLES OF CRIMINAL LAW ¶ 2.1.3 (2d ed. 2002); see also RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 214–15 (1979).

²⁵⁸ See U.S. CONST. amends. V, VI, XIV; (providing, respectively, the modern basis for the federal void for vagueness doctrine, the early foundation of the void for vagueness doctrine, and applying the doctrine to the states). In fact, early common law practice was for courts to refuse to enforce legislation deemed too uncertain to be applied. Ralph W. Aigler, *Legislation in Vague or General Terms*, 21 MICH. L. REV. 831, 836 (1923).

particularly important with respect to politically motivated crimes.²⁵⁹ The requirement that the laws be sufficiently knowable also ensures satisfaction of the fair notice requirement implicit in the rule of law.

A domestic law definition of terrorism has four major functions. First, most domestic regimes provide for a designation process whereby persons or entities are certified as a “terrorist” or a “terrorist organization.” Such a designation often permits asset seizure or freezing, heightened monitoring, questioning, and detention. The definition determines who may be designated. Second, the definition forms an element of many terrorism-related offenses.²⁶⁰ Third, it allocates responsibility within government. In the United States, for example, a crime of terrorism is primarily investigated by the Federal Bureau of Investigations (F.B.I.) and the Department of Justice rather than local police²⁶¹ and may permit intelligence agencies to become involved. Fourth, the definition of terrorism is crucial for delimiting responses to the problem.²⁶² Particularly because of the first and second functions, the definition must be precise in order to provide adequate notice of what constitutes unlawful conduct.²⁶³ Given the invasive police investigative and detention powers conferred specifically for countering terrorism,²⁶⁴ clear parameters of terrorism as a concept protect the public as well as facilitate the apprehension and punishment of terrorists. Clear parameters also serve to distinguish organized and other crime from terrorism.

²⁵⁹ See generally *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). But see *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968); WAYNE R. LAFAVE, *CRIMINAL LAW* ¶ 2.3(c) (4th ed. 2003) (suggesting that language that is so vague that it makes detection of arbitrary enforcement very difficult is problematic).

²⁶⁰ See, e.g., *Terrorism Act 2000*, 2000, c. 11, § 15 (U.K.) (criminalizing the funding of terrorism), available at <http://www.opsi.gov.uk/acts/acts2000/20000011.htm> (last visited Oct. 19, 2005).

²⁶¹ PHILIP B. HEYMANN, *TERRORISM AND AMERICA: A COMMON SENSE STRATEGY FOR A DEMOCRATIC SOCIETY* 4–5 (1998).

²⁶² W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT'L L.* 3, 9 (1999).

²⁶³ See generally *Crandon v. United States*, 494 U.S. 152, 158 (1990); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

²⁶⁴ See, e.g., *The Prevention of Terrorism Act, 2002*, No. 15, §§ 52(4), 62, Acts of Parliament, 2002, (India), available at <http://mha.nic.in/poto-02.htm#pnm> (preventing an accused's lawyer from being present throughout interrogation and providing for administrative detentions in various jurisdictions); BASSIOUNI, *MULTILATERAL CONVENTIONS*, *supra* note 6, at 20 (stating that “[n]early every proposed or enacted piece of legislation in the world that purports to prevent and control individual terrorism exists in the nature of repressive penal and administrative measures”).

Most states adopted or amended their anti-terrorism laws following September 11 or are currently doing so. The purpose of this Part is to assess the extent to which international obligations and the international jurisprudence on the definition question are influential in domestic law by (1) considering the drafting history of domestic definitions of terrorism with respect to the role played by international law and (2) comparing the domestic definitions with the core international definition to assess the degree of substantive similarity. The former task is made more difficult by legislative drafters' reports, which tend not to be particularly detailed. To make the inquiry manageable, this Article considers the position of four common law jurisdictions that actively participate in international law but in which international law does not have automatic authority.²⁶⁵ The United States, United Kingdom, New Zealand, and India, all liberal democracies, are currently threatened by terrorism and have experienced terrorism over the last 100 years to quite different extents. This Part of the Article argues that, given the high degree of similarity between the domestic and international definitions, one can infer that international law, through its obligations and definitional jurisprudence, has been influential.

Although the four jurisdictions examined in this Article exhibit a relatively strong commitment to the rule of law, doubts are frequently expressed (to varying degrees) about the propriety of each state's anti-terrorism legislation. Some criticism is leveled directly at the definition of terrorism.²⁶⁶ For example, Amnesty International has expressed concerns that the vagueness of the Indian definition might permit the government to silence legitimate political dissent.²⁶⁷ Many of the recently created police powers and criminal offenses are triggered by, or require a determination of, terrorist activity. Thus, the definition acts as a gatekeeper to invasive police powers and criminal liability. A broad and open definition has the effect of conferring greater powers on the police than a narrow definition does.

²⁶⁵ Each of the United States, United Kingdom, New Zealand, and India follow the common law approach to the relationship between domestic and international law whereby each legal system is viewed as a separate sphere (a "dualist" conception). The Netherlands and Greece, for example, use a different approach. *See* ANTONIO CASSESE, INTERNATIONAL LAW 179 (2002).

²⁶⁶ *See, e.g.,* Nanda, *supra* note 10, at 604.

²⁶⁷ *See* SA Law Commission Project 105 Review of Security Legislation (Aug. 2002) 316.

B. *The Relationship of International Law and Domestic Law*

Modern international law has a significant impact on states' domestic legal systems, often requiring states to enact domestic legislation in order to achieve objectives mandated by international law. Treaties—binding international agreements between states governed by international law²⁶⁸ and a source of public international law²⁶⁹—increasingly shape the international regulatory system. Significantly, the anti-terrorism conventions require signatory states to implement domestic legislation criminalizing certain acts that the international community has declared to be acts of terrorism.

Broadly speaking, in both monist and dualist legal systems,²⁷⁰ treaties require some form of national approval before becoming part of domestic law. Professor Antonio Cassese believes that “international law cannot work without the constant help, co-operation, and support of national legal systems.”²⁷¹ The influence that international law has on domestic law depends almost completely on domestic law rules and political will. International law is relatively silent on this matter.²⁷² It simply asks for the good faith implementation of its treaties.²⁷³

In those states closely following the British common law tradition (including the United Kingdom, New Zealand, and India), international obligations accepted by the executive by exercise of its prerogative must be transformed into domestic law by the legislature before such international obligations affect private rights or liabilities, mod-

²⁶⁸ KLABBERS, *supra* note 126, at 37–38; *see also* Vienna Convention on the Law of Treaties, art. II (1)(a), May 23, 1969, 1155 U.N.T.S. 331 (providing a definition of the term “treaty”) [hereinafter Vienna Convention]. This definition has been largely accepted as declarative of custom. *See, e.g.*, Qatar v. Bahrain, 1994 I.C.J. 112, 137 (Oda, J., dissenting).

²⁶⁹ Statute of the International Court of Justice, art. 38, 3 Bevans 1179; 59 Stat. 1031; T.S. No. 993. (1945).

²⁷⁰ *See* BROWNIE, *supra* note 95, at 32–34 (providing a discussion of dualist and monist theories of international law).

²⁷¹ ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 15 (1986) [hereinafter CASSESE, DIVIDED WORLD].

²⁷² *See* Francis G. Jacobs, *Introduction*, in THE EFFECT OF TREATIES IN DOMESTIC LAW, at xxiii, xxiv (Francis G. Jacobs & Shelley Roberts eds., 1987).

²⁷³ Vienna Convention, *supra* note 268, art. 26 (“Every treaty in force is binding upon the parties to it and must be performed by them in good faith”); *see* CASSESE, DIVIDED WORLD, *supra* note 271, at 169 (noting the “wish of sovereign States to regulate international relations as they thought best, without any obligation being imposed from outside”); *see also* Stefan Kadelbach, *International Law and the Incorporation of Treaties into Domestic Law*, 42 GER. Y.B. INT’L L. 66, 67 (1999) (noting that deep—or often any—analysis of implementation is also absent from most textbooks on international law).

ify the existing law, or require public funds.²⁷⁴ Broadly speaking, this common law division of powers still persists despite minor deviations²⁷⁵ and codifications.²⁷⁶ In the United States, the treaty-making power is vested in the President acting with the advice and consent of the Senate.²⁷⁷ Once a treaty is adopted by the Senate, it becomes part of the “supreme Law of the Land.”²⁷⁸ The terrorism conventions cannot be regarded as self-executing²⁷⁹ because they create crimes and confer jurisdiction. Thus, in each of the four states, implementing legislation is required to give effect to the treaty obligations.

Some courts and commentators, most notably Professor Ian Brownlie, posit a general duty to bring national law into conformity with international law,²⁸⁰ arising from the “nature of treaty obligations and from customary law.”²⁸¹ A survey of contemporary state practice powerfully questions the existence of such a norm.²⁸² Irrespective of this duty, failure to enact the appropriate implementing legislation would put the state in breach of its international treaty obligations as well as those obligations under Security Council Resolution 1373. The conventions’ benefits are maximized by consistent and widespread implementation of their prohibitions and provisions, *inter alia*, because terrorists can select a home base jurisdiction but strike other states utilizing modern transborder transportation and communication systems.

C. Domestic Law Definitions

This section very briefly considers the definitions of terrorism in the four domestic jurisdictions with a particular view as to the influence international law has had on the definitions’ development. As illus-

²⁷⁴ BROWNIE, *supra* note 95, at 47–48; Attorney Gen. for Canada v. Attorney Gen. for Ontario, [1937] A.C. 326, 347.

²⁷⁵ See, e.g., generally Mai Chen, *A Constitutional Revolution? The Role of the New Zealand Parliament in Treaty-Making*, 19 N.Z.U.L. REV. 448 (2001) (noting the increased role of Parliament in approving treaties in New Zealand).

²⁷⁶ See, e.g., INDIA CONST. art. 253: amended by the Constitution (Eighty-sixth Amendment) Act, 2002 (providing the legislature’s power to implement treaty obligations).

²⁷⁷ U.S. CONST. art. II, § 2, cl. 2.

²⁷⁸ *Id.* art. VI.

²⁷⁹ See *Foster v. Neilson*, 27 U.S. 253 (1829); *United States v. Noriega*, 808 F. Supp. 791 (S.D. Fla. 1992); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1986).

²⁸⁰ Exchange of Greek and Turkish Populations, Advisory Opinion, 1925 P.C.I.J. (ser. B) No. 10, at 20 (Feb. 21); BROWNIE, *supra* note 95, at 35; PETER MALANCZUK, *AKELURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 64 (7th ed. 1997).

²⁸¹ BROWNIE, *supra* note 95, at 36.

²⁸² Cf. CASSESE, *DIVIDED WORLD*, *supra* note 271, at 167-99.

trated below, international law influenced some states but appears not to have played even an indirect role in others. Examining the domestic definitions is an important precondition to assessing their substantive similarity with the international definition, which follows this section.

1. United Kingdom

Between 1969 and the 1998 “Good Friday” peace accord in Northern Ireland, 3289 people were killed by terrorism in Northern Ireland.²⁸³ Between 1976 and 1998, there were ninety-four incidents of international terrorism in the United Kingdom (including over Lockerbie).²⁸⁴

The United Kingdom was one of the first states to specifically criminalize terrorism.²⁸⁵ Parliament responded to bombings by the Irish Republican Army with the Prevention of Violence (Temporary Provisions) Act 1939.²⁸⁶ Although temporary in title, it was extended annually until 1954. Frequent bombings in mid-1974 prompted passage of the Prevention of Terrorism (Temporary Provisions) Act 1974, which followed the 1939 model.²⁸⁷ This Act, of six months temporary duration, was temporary in name only; it remained on the books (as amended) until 2000. It very broadly defined terrorism as “the use of violence for political ends, and includes any use of violence for the purpose of putting the public, or any section of the public in fear.”²⁸⁸

Following an official inquiry,²⁸⁹ the Terrorism Act 2000 was passed as a permanent statute.²⁹⁰ In response to September 11, the Anti-Terrorism, Crime and Security Act 2001 was hurriedly passed,²⁹¹ con-

²⁸³ SECRETARY OF STATE FOR THE HOME DEPARTMENT & THE SECRETARY OF STATE FOR NORTHERN IRELAND, LEGISLATION AGAINST TERRORISM, A CONSULTATION PAPER, 1998, Cm. 4178, at ch. 2.3 [hereinafter LEGISLATION AGAINST TERRORISM, A CONSULTATION PAPER], available at <http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm>. See generally LORD LLOYD OF BERWICK, INQUIRY INTO LEGISLATION AGAINST TERRORISM, 1996, Cm. 3420, vol. 1, ch. 1, vol. 2, app. F.

²⁸⁴ LEGISLATION AGAINST TERRORISM, A CONSULTATION PAPER, *supra* note 283.

²⁸⁵ See generally CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW (2nd ed. 1992) (discussing the history of terrorism).

²⁸⁶ *Id.* at 31.

²⁸⁷ *Id.* at 31, 40.

²⁸⁸ This definition is also used in the Prevention of Terrorism (Temporary Provisions) Act, 1989, c. 4, § 20(1) (U.K.).

²⁸⁹ LLOYD, *supra* note 283.

²⁹⁰ David Williams, *The United Kingdom's Response to International Terrorism*, 13 IND. INT'L & COMP. L. REV. 683, 689–90 nn.37–41 (2003) (citing the numerous times the Terrorism Act has been used).

²⁹¹ It has been subject to criticism including being labeled “the most draconian legislation Parliament . . . passed in peacetime in over a century.” Adam Tomkins, *Legislating*

ferring new powers and creating new offenses. The Terrorism Act 2000 introduced a general definition of terrorism not limited by geography.²⁹² “Terrorism” is an act or threat thereof that is designed to influence the United Kingdom (or a foreign government) or to intimidate a population that is done for the purpose of advancing a political, religious, or ideological cause that brings about a prohibited outcome. The listed prohibited outcomes are: endangering another person’s life or creating a serious risk to the public’s health or safety; acts designed to interfere seriously with or to disrupt an electronic system; and acts

Against Terror: the Anti-terrorism, Crime and Security Act 2001 PUB. L. 205, 205 (2002); see also Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724, 724 (2002).

²⁹² Terrorism Act 2000, c. 11, § 1 (U.K.). See the definition in the Reinsurance (Acts of Terrorism) Act, 1993, c. 18, § 2(2) (U.K.) (“In this section ‘acts of terrorism’ means acts of persons acting on behalf of, or in connection with, any organisation which carries out activities directed towards the overthrowing or influencing, by force or violence, of Her Majesty’s government in the United Kingdom or any other government de jure or de facto”). This definition, based on the Association of British Reinsurers’ wording may be more concerned with business than terrorism. CLIVE WALKER, BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2002) [hereinafter BLACKSTONE’S GUIDE]. In the Terrorism Act 2000, c. 11, § 1 (U.K.), the definition of terrorism is:

- (1) In this Act “terrorism” means the use or threat of action where-
 - (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
- (2) Action falls within this subsection if it-
 - (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section—
 - (a) “action” includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) “the government” means the government of the United Kingdom, of a part of the United Kingdom or of a country other than the United Kingdom.

Id.

involving serious violence to or death of another person or serious property damage.

The new definition is significantly broader in scope but is more tightly framed than the definition in the 1974 and 1989 Acts. The preparatory work evidences little direct influence of international law. Rather, the definition's roots are in the Lloyd Report's recommended adoption of the F.B.I. working definition.²⁹³ A later report, however, doubted that the F.B.I. definition was sufficiently comprehensive and voiced concern regarding property otherwise not protected (for example, harm to computer systems and data).²⁹⁴ How the definition's substance compares to international law is examined in Section D below.

2. United States

The creatively titled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 is the most recent U.S. legislative measure dealing with terrorism.²⁹⁵ Its forerunners include the Act to Combat International Terrorism of 1984 (which established a system of rewards for information regarding terrorism);²⁹⁶ the Diplomatic Security and Antiterrorism Act of 1986 (which facilitated sanctions against states that sponsored terrorism and criminalized murder or the causing of serious harm to Americans abroad if the Attorney General judged that the act was "intended to coerce, intimidate or retaliate against a government or civilian population");²⁹⁷ the Antiterrorism Act of 1990 (defining terrorism and providing for civil remedies);²⁹⁸ and the Vio-

²⁹³ According to LEGISLATION AGAINST TERRORISM, A CONSULTATION PAPER, Lord Loyd recommended the UK government adopt the F.B.I.'s working definition of terrorism, which is stated to be: "[T]he use of serious violence against persons or property, or the threat to use such violence, to intimidate or coerce a government, the public, or any section of the public in order to promote political, social, or ideological objectives." LLOYD, *supra* note 283, at ¶ 3.14–15.

²⁹⁴ *Id.* at 11.

²⁹⁵ For a full discussion of the legislation enacted immediately following September 11, see Joshua D. Zelman, *Recent Developments in International Law: Anti-Terrorism Legislation—Part One: An Overview*, 11 J. TRANSNAT'L L. & POL'Y 183, 183–93 (2001). For an overview of U.S. antiterrorism and a brief summary of the major acts, see NORMAN ABRAMS, ANTI-TERRORISM AND CRIMINAL ENFORCEMENT 5–20 (2003).

²⁹⁶ Pub. L. No. 98–533, 98 Stat. 2706 (codified as amended at 18 U.S.C.A. § 3071 (1984)).

²⁹⁷ Pub. L. No. 99–399, § 1202(e), 100 Stat. 853 (codified as amended at 18 U.S.C.A. 2331 (1986)).

²⁹⁸ Pub. L. No. 101–519, § 132, 104 Stat. 2240 (codified as amended at 18 U.S.C.A. 2331–38 (1990)).

lent Crime Control and Law Enforcement Act of 1994 (which criminalized providing material support to terrorists).²⁹⁹ Following the Oklahoma City bombing in 1995, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996 that provided, *inter alia*, for the designation of foreign organizations, the consequential freezing of assets, and the extraterritorial extension of jurisdiction over terrorist acts.³⁰⁰

Also noteworthy is an exception to the Foreign Sovereign Immunities Act. It carves out an exception to the broad grant of immunity for foreign states in federal and state courts by permitting certain suits for money damages against foreign states that sponsor terrorism.³⁰¹

Following September 11, there was a widely perceived need to enact legislation that would protect the United States from international terrorism.³⁰² The response—the Patriot Act—was passed at record-breaking speed³⁰³ and signed by President George W. Bush on October 26, 2001. It is comprehensive (342 pages covering 350 subject areas),³⁰⁴ and it expands the powers of the federal government to combat terrorism in the areas of surveillance and interception of communications. It provides for greater information sharing, greater inter-agency coordination, and closer policing of financial transactions. It also strengthens the anti-money-laundering regulations with a view to disrupting terrorists' resource flows, tightens immigration laws and enhances their enforcement, creates new crimes connected to terrorist acts, and expands existing crimes. The Patriot Act also authorizes administrative detentions.³⁰⁵

United States federal law contains nineteen definitions or descriptions of terrorism.³⁰⁶ Although many of the definitions are simi-

²⁹⁹ Pub. L. No. 103-322, § 120005, 108 Stat. 1796 (codified as amended at 18 U.S.C.A. 2339A (1994)).

³⁰⁰ Pub. L. No. 104-132, §§ 301-03, 321-30, 110 Stat. 1214, (codified as amended in scattered sections of 18 U.S.C.A. 2339B (1996)).

³⁰¹ 28 U.S.C.A. § 1605(a) (2002); *see, e.g.*, Weinstein v. Islamic Republic of Iran, 184 F. Supp. 2d 13 (D.D.C. 2002).

³⁰² Zelman, *supra* note 295, at 183. *See generally* Charles Doyle, *The USA PATRIOT Act: A Legal Analysis*, in *THE USA PATRIOT ACT* (Aphonse Ewing ed., 2002).

³⁰³ Phillip A. Thomas, *Emergency and Anti-Terrorist Powers 9/11: USA and UK*, 26 *FORDHAM INT'L L. REV.* 1193, 1210 (2003).

³⁰⁴ *Id.* at 1209.

³⁰⁵ Pub. L. No. 107-56, § 412, 115 Stat. 272 (codified as amended at 8 U.S.C.A. § 1226(a) (2001)).

³⁰⁶ Nicholas J. Perry, *The Numerous Federal Legal Definitions of Terrorism: The Problem of Too Many Grails*, 30 *J. LEGIS.* 249, 255 (2004).

lar, they vary considerably with respect to material matters.³⁰⁷ This fact demonstrates that different circumstances and departmental functions are best served by tailored definitions.³⁰⁸ Courts have said that the United States “characterizes rather than enumerates acts [of terrorism] for the purposes of designating foreign state sponsors of terrorism and defining criminal terrorist offenses under federal law” because of the uncertainty with respect to what constitutes terrorism.³⁰⁹ The United States may suffer from a lack of consistent conceptual clarity³¹⁰ due to many and differing definitions of terrorism.³¹¹ A Congressional subcommittee found that “practically every agency of the United States Government . . . with a counterterrorism mission uses a different definition of terrorism [and that all such agencies] should agree on a single definition, so that it would be clear what activity constitutes terrorism and who should be designated as a terrorist.”³¹² In addition, each U.S. state has its own criminal law definition of ter-

³⁰⁷ Although a full review of all the federal definitions of terrorism is beyond the scope of this Article, a helpful collection of the federal definitions together with analysis may be found in Perry, *supra* note 306, at 254–69.

³⁰⁸ Different agencies and other parts of government have different definitions suiting their own needs. For example, the definition used by the Department of State to prepare its annual report on terrorism states that terrorism means “premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine agents” 22 U.S.C. § 2656f(d)(2) (2004). The current F.B.I. definition of terrorism is “the unlawful use of force and violation against persons or property to intimidate or coerce government, the civilian population, or any segment thereof, in furtherance of political or social objectives.” 28 C.F.R. § 0.85(l) (2004); *see* FEDERAL BUREAU OF INVESTIGATION, *TERRORISM IN THE UNITED STATES*, at ii (1999). Noteworthy too is the definition of terrorism in Executive Order 13224 issued by President George W. Bush on Sept. 23, 2001 which defines terrorism as “an activity that (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and (ii) appears to be intended (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.” Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism 66 Fed. Reg. 49,079, 49,080 (Sept. 23, 2001).

³⁰⁹ *Flatow*, 999 F. Supp. at 17.

³¹⁰ Yonah Alexander, *Terrorism: A Definitional Focus*, in *TERRORISM AND THE LAW* 3 (Yonah Alexander & Edgar H Brenner eds., 2001).

³¹¹ *See* Levitt, *supra* introductory quote, at 103–08 (considering the U.S. attempts to define terrorism in legislation in the 1970s and early 1980s).

³¹² *See* STAFF OF H. SUBCOMM. ON TERRORISM AND HOMELAND SECURITY, HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, 107TH CONG., REPORT ON COUNTERTERRORISM CAPABILITIES AND PERFORMANCE PRIOR TO 9–11, (July 2002), available at http://www.fas.org/irp/congress/2002_rpt/hpsci_ths0702.html (recommending that the “standard definition” of terrorism is, “the illegitimate, premeditated use of politically motivated violence or the threat of violence by a sub-national group against persons or property with the intent to coerce a government by instilling fear amongst the populace”).

rorism.³¹³ Significantly for the purposes of this study, the U.S. implementation of the Financing Convention contains a carbon copy of the Convention's definition, which is used only for the purposes of the implementing act.³¹⁴

Chapter 113B of Title 18 deals with terrorism. Sections 802 and 808 of the Patriot Act amended two of the existing criminal law definitions of terrorism. One of the most significant definitions, 18 U.S.C.A. § 2331(1) (inserted in 1992)³¹⁵ presently defines international terrorism as activities involving violent acts (or those acts dangerous to human life) that constitute crimes in the United States (or would do so if committed within U.S. jurisdiction) that appear to be intended "(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping" and that occur primarily outside U.S. territorial jurisdiction or transcend boundaries in some way.³¹⁶ This definition, however, does not form part

³¹³ *E.g.*, ALA. CODE § 13A-10-151(1) (1975).

³¹⁴ *See* Federal Courts Administration Act of 1992, Pub. L. No. 102-572, tit. X, § 1003(a)(3) 106 Stat. 4506 (1992) (codified at 18 U.S.C.A. § 2331, *amended by* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, § 802(a)(1), 115 Stat. 272 (2001)); *see also* Antiterrorism Act of 1990, Pub. L. No. 101-519, § 132(b)(3), 104 Stat. 2240 (1990) (*repealed by* Act of Apr. 10, 1991, Pub. L. No. 102-27, tit. IV, § 402, 105 Stat. 130 (1991)). Under § 2331, the definition of terrorism is:

- (1) [T]he term "international terrorism" means activities that—
- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended—
- (i) to intimidate or coerce a civilian population;
- (ii) to influence the policy of a government by intimidation or coercion; or
- (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.

Id.

³¹⁵ *See* Federal Courts Administration Act of 1992 § 1003.

³¹⁶ It is noteworthy that the definition of terrorism in the Homeland Security Act of 2002 is substantially similar to the § 2331 definition. Pub. L. No. 107-296, § 2(15), 116 Stat. 2135, 2141 (codified as amended at 6 U.S.C.A § 101 (2002)); Perry, *supra* note 306, at 256-57. Another definition—relating to using and possessing anti-terrorism technology—is provided in the Homeland Security Act, *supra*, § 865(2)(B).

of a criminal offense. Rather, it functions in a variety of contexts including allowing the disclosure of tax information during investigations,³¹⁷ granting warrants for investigations relating to terrorism,³¹⁸ and allowing financial information disclosure rules.³¹⁹ Second, 18 U.S.C.A. § 2332b, inserted by the Anti-terrorism Act of 1996, concerns acts of terrorism that transcend national boundaries.³²⁰ It defines the “federal crime of terrorism” in (g)(5) as a breach of a listed provision of U.S. criminal law that is “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”³²¹ The long list of offenses includes a range of

³¹⁷ 26 U.S.C.A. § 6103(b)(11) (2002).

³¹⁸ FED. R. CRIM. P. 41(b)(3).

³¹⁹ 31 C.F.R. § 103.90(b) (2002).

³²⁰ See Pub. L. No. 104–132, tit. VII, § 702(a), 110 Stat. 1291 (1996) (codified as amended at 18 U.S.C.A. § 2332b (2001)). This definition is closely modeled on the definition that appeared in the Foreign Intelligence Immunity Act which was enacted in 1978. 50 U.S.C. § 1801 (2000).

³²¹ The term “Federal crime of terrorism” in 18 U.S.C.A. § 2332b(g)(5) mean an offense that:

(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of—

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnapping), 831 (relating to nuclear materials), 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or main persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A)(i) resulting in damage as defined in 1030(a)(5)(B)(ii) through (v) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnapping), 1992 (relating to wrecking trains), 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems), 2155 (relating to destruction of national defense materials, premises, or utilities), 2280 (relating to violence against maritime navigation), 2281 (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides

crimes against persons and property and does not necessarily involve transnational acts.

Historically, the United States has not taken a completely isolationist approach to the definition question. Legislation enacted in 1985 that prohibited foreign assistance to countries shielding persons guilty of international terrorism³²² chose not to define the term and preferred that its definition be the product of international negotiations in which the President was called upon to engage.³²³ There is no evidence, however, that international law was an important consideration when drafting the criminal law definitions considered above.

3. India

On October 16, 2001, the President of India promulgated The Prevention of Terrorism Ordinance 2001 (Terrorism Ordinance) which remained in effect for six weeks.³²⁴ Despite India's history of terrorism, there was significant opposition in Parliament to the legislation in bill form partly because it replicated the Terrorism Ordinance's provisions. Between 1988 and 1999, Indian authorities estimate that 20,506 people

and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism[]), or 2340A (relating to torture) of this title;

(ii) section 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284); or

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49.

Id.

³²² International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, § 503, 99 Stat. 190 (1985) (codified as amended at 22 U.S.C.A. § 2371 (2004)).

³²³ *Id.* § 507 (noting that the treaty was to be concluded between "those democratic nations . . . most victimized by terrorism" and "should incorporate an operative definition of terrorism").

³²⁴ Prevention of Terrorism Ordinance, 2001, No. 9, Acts of Parliament, 2001, available at http://www.indianembassy.org/policy/Terrorism/poto_2001.htm; see INDIA CONST. art. 3, § 123, cls. 1, 2. Ordinances have the same force of law as statutes but are of limited duration and automatically expire unless approved by the legislature.

were killed in Jammu and Kashmir provinces alone,³²⁵ mostly in attacks of an international character. Although the Indian Parliament itself was attacked by terrorists on December 13, 2001,³²⁶ the legislation was not passed until March 28, 2002.³²⁷ Opposition parties complained that the government was using September 11 to push through legislation reenacting the draconian Terrorist and Disruptive Activities (Prevention) Act 1985 (TADA), which had lapsed in 1995.³²⁸ The government responded by claiming that the measures were required by Resolution 1373,³²⁹ although amendments were made that softened the bill.³³⁰ International comparisons were drawn to justify the need for the legislation.³³¹ The Prevention of Terrorism Act 2002 criminalizes various acts,³³² including terrorist acts and fundraising for the purposes of terrorism. Membership in terrorist organizations is also prohibited as is providing support and funds to such organizations.³³³

Much of the criticism of the legislation comes from India's experiences with TADA. Of the 75,000 arrests made under the Act, only 1–2% resulted in convictions,³³⁴ leading to widespread criticism of the Act.³³⁵

³²⁵ See LAW COMMISSION OF INDIA, 173RD REPORT ON PREVENTION OF TERRORISM BILL, 2000, § II 1.3 (2000), available at <http://www.lawcommissionofindia.nic.in/tada.htm> [hereinafter LAW COMMISSION REPORT].

³²⁶ Amy Waldman, *India-Pakistan Talks Make No Specific Gains on Kashmir*, N.Y. TIMES, June 29, 2004 at A8.

³²⁷ Prevention of Terrorism Act 2002, (India).

³²⁸ See Krisna Prasad, *Everything You Wanted to Know About POTO*, Nov. 11, 2001, <http://www.rediff.com/news/2001/nov/19spec.htm>; interview by Kota Neelima with Justice Ranganath Misra, former Chief Justice of India and Chairperson of the National Human Rights Commission, *POTO Is an Easy Way out for Govt, There Should Be No Shortcuts for Human Rights*, THE INDIAN EXPRESS, Nov. 2, 2001, available at <http://www.indian-express.com/ic20011102/op4.html>. Justice Misra said the Ordinance was an easy way out for law-enforcement. Another repressive act was the Rowlatt Act of 1919, which was a British statute enacted to entrench colonial rule and suppress dissidents in India. C. Raj Kumar, *Human Rights Implications of National Security Laws in India: Combatting Terrorism While Preserving Civil Liberties*, 33 DENV. J. INT'L L. & POL'Y 195, 199 (2005).

³²⁹ See Prasad, *supra* note 328.

³³⁰ E.g., clause 3(8) of the Prevention of Terrorism Ordinance 2001, *supra* note 324, which compels disclosure of information known to be of material assistance in preventing terrorist offences unless reasonable to do otherwise, was excluded.

³³¹ See LAW COMMISSION REPORT, *supra* note 325, § VI(b) (putting forward the case for permanent anti-terrorism legislation by arguing that if the United Kingdom needs it, India definitely does).

³³² Prevention of Terrorism Act 2002, § 3 (India).

³³³ *Id.* §§ 21, 22.

³³⁴ See Prasad, *supra* note 328.

³³⁵ See Amnesty Int'l, *Submission to the Human Rights Committee Concerning the Application of the International Covenant on Civil and Political Rights*, AI Index ASA 20/027/1997, July 1, 1997, <http://web.amnesty.org/library/Index/ENGASA200271997?open&cof=ENG-IND>.

The following frequent objection has been leveled against counter-terrorism legislation more generally:³³⁶

[E]very criminal act defined in [the 2002 Act] is already contained in the Indian Penal Code. . . . What [the Act] does is to merely criminalise the intent i.e. intention to cause terror, threaten the unity, integrity and sovereignty of the country, supporting terrorists, being a member of a terrorist organisation, etc [sic].

The Law Commission of India (Law Commission), which was responsible for drafting the legislation, considered the U.S. Antiterrorism Act 1996 and the U.K. Prevention of Terrorism Act 1989 in its preparatory work³³⁷ and noted that Security Council Resolution 1269 called upon all states to implement their international obligations under the international terrorism conventions. Thus, both comparative law analysis and India's international obligations were relevant to the Law Commission's thinking. Although intended to introduce a new definition of terrorism less open to government abuse than that in TADA,³³⁸ the Law Commission's proposed definition was similar to that in TADA.³³⁹ It exhibits the influence of the U.S. and U.K. definitions, not of international law.³⁴⁰

The definition of terrorist in the Prevention of Terrorism Act is to be inferred³⁴¹ from the definition of "terrorist act" in section 3(1),³⁴²

³³⁶ Vijay Nagaraj, *India: The Politics of Anti-Terrorism Legislation*, Commonwealth Human Rights Initiative Seminar 4 (June 5–6, 2003).

³³⁷ Law Commission of India, *Working Paper on Legislation to Combat Terrorism in LAW COMMISSION REPORT*, *supra* note 325, Annex. I.

³³⁸ Asia Pacific Human Rights Network, *Submission to the Advisory Council of Jurists*, Jan. 2004, http://www.asiapacificforum.net/jurists/terrorism/aphrn_india.pdf.

³³⁹ LAW COMMISSION REPORT, *supra* note 325, § II, 1.16.1 (noting that the proposed bill is basically modeled on the TADA (Prevention) Act 1987").

³⁴⁰ *See generally id.* at Part 2.

³⁴¹ The Prevention of Terrorism Act 2002, § 2(1)(g) (India).

³⁴² *Id.* § 3(1) (India), defined terrorism as:

[W]ith intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people does any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature or by any other means whatsoever, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community or causes damage or destruction of any property or equipment used or intended to be used for the

which is ambiguous, poorly drafted, and confusing. Section 3(1) states that a terrorist act is committed by someone who intends to “threaten the unity, integrity, security or sovereignty of India” or terrorize the population by use of explosives, firearms, or other lethal weapons; poisons, toxins, or other chemicals; or by “any other means whatsoever” to kill or injure persons, damage or destroy property, disrupt essential supplies or services, damage or destroy national defense or other government property, or detain a person to compel the government or another person to act in a certain way.

Substantively, this definition bears some similarity to those in international law. Its phrasing, however, offers no indication that international law’s various definitions have been influential. Parts of the Indian definition are inconsistent with the core international law definition, as discussed below.

4. New Zealand

New Zealand’s principal anti-terrorism statute is the Terrorism Suppression Act 2002 (Terrorism Suppression Act), as supplemented by the Counter-Terrorism Act 2003.³⁴³ Both evidence international law’s role as the statutes’ guiding force. As a liberal Western democracy, the threat highlighted by the September 11 attacks resonated with New Zealand, despite its limited experiences with terrorism.³⁴⁴

When considering the Terrorism Suppression Act in bill form, which was amended following September 11 to comply with New Zealand’s international obligations, a Parliamentary review committee specifically noted the obligations incumbent on New Zealand under Resolution 1373 and their binding nature under Article 41 of the U.N. Charter.³⁴⁵ New Zealand was anxious to be “seen to be playing its part”

defense of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government or any other person to do or abstain from doing any act[.]

Id.

³⁴³ Terrorism Suppression Act 2002, §§ 3-4 (N.Z.), available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/034.html>.

³⁴⁴ In July 1985, agents of the Government of France detonated a bomb on board of a Greenpeace ship docked in Auckland harbor, killing two people. As a state perpetrated act, however, it does not constitute terrorism.

³⁴⁵ FOREIGN AFFAIRS, DEFENCE AND TRADE COMM., INTERIM REPORT ON THE TERRORISM (BOMBINGS AND FINANCING) BILL 5 (2001) (N.Z.), <http://www.clerk.parliament.govt.nz//content/91/fd121int.pdf>.

in addressing international terrorism.³⁴⁶ The House of Representatives, sitting under urgency, passed the bill. After the law received royal assent but before the Terrorism Suppression Act came into force, the bombing in Bali, Indonesia occurred, killing three New Zealanders and thus bringing the specter of international terrorism closer to home.

The Terrorism Suppression Act refers to New Zealand's international law obligations in framing its purpose as to "make provision to implement New Zealand's obligations under—(i) the Bombings Convention; (ii) the Financing Convention and (iii) [Resolution 1373],"³⁴⁷ each of which are appended as schedules to the Terrorism Suppression Act. Like other acts, it defines "terrorist act" and criminalizes causing a terrorist bombing³⁴⁸ and financing terrorism.³⁴⁹ It establishes a procedure for the designation³⁵⁰ of "terrorists" and associated entities.³⁵¹

The manifest intention to discharge the country's international obligations, combined with the lack of immediate terrorist threats (which can distort a legislature's vision), explains New Zealand's close attention to international law. Although Resolution 1373 did not provide a definition, the Parliamentary committee reviewing the draft legislation speculated about the Security Council's intentions when recommending changes to the proposed definition.³⁵² New Zealand's request of the C.T.C. underlines the shortcoming of the United Nations in regards to the definition of terrorism: "Given the complexity of some of the issues that arise in defining terrorist acts, the New Zealand Government would welcome guidance from the Security Council on what conduct it aims to cover by the term 'terrorist acts'" in resolution 1373"³⁵³

³⁴⁶ *Id.*

³⁴⁷ Terrorism Suppression Act 2002, §§ 3-4 (N.Z.). "Anti-Terrorism Resolution" is defined in § 4 to mean S.C. Res. 1373, *supra* note 42.

³⁴⁸ *Id.* § 7(1).

³⁴⁹ *Id.* § 8(1). Section 8(2) subjects § 8(1) to a specific exemption for collecting and providing funds intended to be used for advocating democratic government or the protection of human rights. *Id.*

³⁵⁰ *Id.* §§ 20-21 (interim designation), 22-23 (final designation).

³⁵¹ *Id.* §§ 26-29. The act also states that decisions are reviewable (§ 33), revocable (§ 34) and self terminating (§ 35). *Id.* §§ 36-41 (outlining procedure).

³⁵² See FOREIGN AFFAIRS, DEFENCE AND TRADE COMM., SELECT COMMITTEE REPORT ON THE TERRORISM (BOMBING AND FINANCING (SUPPRESSION)) BILL 3 (Mar. 22, 2002) (N.Z.) [hereinafter SELECT COMMITTEE REPORT], <http://www.clerk.parliament.govt.nz//content/667/121bar2.pdf>.

³⁵³ See Letter from Permanent Representative of N.Z. to the U.N. to the Chairman of the C.T.C. (Dec. 24, 2001) *annexed to* Letter from the Chairman of the C.T.C. Concerning Counter-Terrorism Addressed to the President of the Security Council (Dec. 27, 2001), S/2001/1269, 6 [hereinafter Letter to the Counter-Terrorism Committee].

New Zealand concluded that the Security Council's conception of terrorist offenses included acts beyond the terrorism conventions' prohibitions. Changes were made to the legislation to reflect the "wording used in similar European Union, Canadian and American legislation" and to clarify the scope of the definition.³⁵⁴ For example, the terms "intimidation," "population," and "lawful government" were abandoned in favor of phrases such as "induce terror" and "civilian population."³⁵⁵ The term "serious bodily injury" was introduced to, *inter alia*, "ensure consistency with the definition [from the Financing Convention] of the term 'terrorist act in armed conflict.'"³⁵⁶ Concerns particularly important in New Zealand motivated other changes, such as the prohibition on releasing disease-bearing organisms, which was important given the state's strong agricultural sector. New Zealand reported to the C.T.C. that the definition was drafted "in the same terms" as the Financing Convention.³⁵⁷

Under the Terrorism Suppression Act, there are three ways actions can constitute terrorism.³⁵⁸ First, "an act against" The Hague,

³⁵⁴ SELECT COMMITTEE REPORT, *supra* note 352, at 3.

³⁵⁵ *Id.* at 4.

³⁵⁶ *Id.*

³⁵⁷ See Letter to the Counter-Terrorism Committee, *supra* note 353, at 6.

³⁵⁸ See Terrorism Suppression Act 2002, §§ 5(1)–(5) (N.Z.), available at <http://rangi.knowledge-basket.co.nz/gpacts/public/text/2002/an/034.html>. This act defined a "terrorist act" in section 5 as:

- (1) (a) the act falls within subsection (2); or
 - (b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
 - (c) the act is a terrorist act in armed conflict (as defined in section 4(1)).
- (2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
 - (a) to induce terror in a civilian population; or
 - (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.
- (3) The outcomes referred to in subsection (2) are—
 - (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);
 - (b) a serious risk to the health or safety of a population;
 - (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d);
 - (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
 - (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

Montreal, Internationally Protected Persons, Hostages, Maritime, Bombings, and Nuclear Materials Conventions, or the Airports or Fixed Platforms Protocols constitutes terrorism in New Zealand. Second, acts done during an armed conflict against persons not actively involved in the armed conflict and not wholly domestic in nature are terrorism if done to compel a government or international organization to act in a certain way. Third, acts done to advance an ideological, political, or religious cause and to induce terror in any population or to compel a government or international organization to act in a certain way are terrorism if they cause one of the following outcomes: death or serious injury; serious risk to public health or safety; destruction or serious damage to property of great value or importance; major economic loss or major environmental damage if it threatens injury, death, endangers life or the public health and safety; serious interference with infrastructural facilities likely to endanger life; and releasing disease-bearing organisms likely to devastate the national economy. Acts done according to international law and during an armed conflict situation are excluded from this definition.³⁵⁹

Although structurally similar to the U.K. definition, international law was influential in determining the parameters of the definition, although concerns specific to New Zealand also shaped it. The Australian counter-terrorism legislation³⁶⁰ also exhibits a structural similarity

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).

Id.

³⁵⁹ Terrorism Suppression Act 2002, (N.Z.).

³⁶⁰ The Australian Government rejected long-standing advice against enacting specific anti-terrorism legislation. Michael Head, 'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights, 26 MELB. U. L. REV. 666, 670-71 (2002). See generally NATHAN HANCOCK, DEP'T OF THE PARLIAMENTARY LIBRARY INFO. & RESEARCH SERVS., RESEARCH PAPER NO. 12 2001-02, *TERRORISM AND THE LAW IN AUSTRALIA: LEGISLATION, COMMENTARY AND CONSTRAINTS* (2002). Since September 2001, Australia has enacted six statutes designed to protect against terrorism such as: the Security Legislation Amendment (Terrorism) Act, 2002; Suppression of the Financing of Terrorism Act, 2002; Criminal Code Amendment (Espionage & Related Matter Act) Act, 2002; Telecommunications Interception Legislation Amendment Act, 2002; Border Security Legislation Amendment Act, 2002; and Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act, 2003. The Criminal Code Amendment (Terrorism) Act,

2003, was also passed to provide for federal terrorism offenses. The Security Legislation Act, 2002, amends the Criminal Code Act, 1995. Specifically it defines and criminalizes engaging in "terrorist acts" and preparing for or planning terrorist acts. Criminal Code Act 1995 §§ 100.1, 101.1, 101.6 (Austl.).

As amended, the Australian Criminal Code defines terrorism as a threat or action that causes a prohibited terrorist outcome and is done with the intention of advancing a political, religious, or ideological cause and with the intention of coercing or influencing by intimidation an Australian or foreign government or intimidating the public in Australia or elsewhere. Prohibited terrorist outcomes are enumerated: causing serious physical harm or death to a person; endangering another person's life or creating a serious risk to the health and safety of a section of the public; causing serious property damage; and destroying or seriously interfering or disrupting an electronic system (such as telecommunications, financial or public utility system). Industrial, advocacy or protest action not intended to harm, kill, or endanger others or create a risk to the public's health and safety are expressly excluded from the list of proscribed outcomes Criminal Code Act 1995, § 100.1 (Austl.). Specifically, it states:

- (1) Terrorist act means an action or threat of action where:
 - (a) the action falls within subsection (2) and does not fall within subsection (3); and
 - (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
 - (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.
- (2) Action falls within this subsection if it:
 - (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.
- (3) Action falls within this subsection if it:
 - (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or

to the U.K. definition. Yet, whereas international law was a motivation and guide to New Zealand's legislation, it played an advocacy role in the debate on the definition of terrorism in the Australian legislation when it was open to public comment. The Australian Senate Legal and Constitutional Committee (Committee), expressing concern at the bill's principal definition, specifically noted the difficulties with defining terrorism at international law³⁶¹ but cited with approval a submission that listed various definitions at international law (including the Elimination Declaration) and in U.S. legislation.³⁶² The Committee later concluded:

The Committee considers that there is no compelling reason why Australian legislation should reach further than legislation enacted in the United Kingdom, the USA or Canada, or as proposed in New Zealand While the Committee acknowledges the difficulties that have been experienced internationally in defining terrorism, all the definitions that have been drawn to the Committee's attention during this inquiry contain some element of intent to cause extreme fear to the public and/or coerce the government. The Committee considers that this element is at the very heart of the nature of terrorism.³⁶³

The reference to "internationally," in this context, appears to refer both to international law and comparative law. Through comparisons with international law and like jurisdictions, the Committee recommended that the concept of terrorism be given a meaning consistent with other definitions. On this basis, for example, the Committee rec-

(iv) to create a serious risk to the health or safety of the public or a section of the public.

(4) In this Division:

(a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and

(b) a reference to the public includes a reference to the public of a country other than Australia.

Id.

³⁶¹ S. Legal and Constitutional Comm., *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] [and related legislation]*, ¶ 3.53 (2002) (Austl.), available at http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/terrorism/report/report.pdf.

³⁶² *Id.* ¶¶ 3.56–.59 (citing Submission 136).

³⁶³ *Id.* ¶ 3.76.

ommended the inclusion of an element of intent, which was previously absent from the legislation.

D. *Comparison with the Core International Law Definition*

Having briefly examined the domestic definitions of four states, this section compares these domestic definitions with the core definition of terrorism identified in Part Two. Although significant and important differences are discernable, the domestic definitions are broadly similar to the international law definition.

The following nine topics correspond to the nine themes present in the international law definition of terrorism and examined in Part 2, Section F. As discussed, the international definition can be seen as a minimum definition; its subject matter is less controversial than some other aspects of defining terrorism, as illustrated by the high rate of ratification of the conventions from which the minimum definition arises. The following discussion examines whether the United Kingdom, United States, India, and New Zealand—all of which are committed to the rule of law and well-resourced—meet these minimum conditions. Appendix 2 compares, in summary form, the elements of the international law definition with the equivalent parts of the domestic definitions and may provide the reader with a useful guide to this section of the Article.³⁶⁴

1. International Law Contemplates Serious Injury, Death, and Serious Property Damage Causing Economic Harm as Proscribed Terrorist Outcomes

Causing death or serious harm to persons is a sufficient harm under each statutory definition. Only in New Zealand and the United Kingdom, however, must the injury be serious. In India and under section 2331(1) in the United States, lesser harms suffice. Endangering life, acts dangerous to human life, and activities creating a serious risk to public safety or health are also prohibited in the United Kingdom and New Zealand. While seemingly consistent with the international prohibition's thrust, the conventions are directed at actual, not potential, harm, and thus these potential harms go beyond the international law definition.

Property damage suffices under each domestic definition (although section 2332b (U.S.) refers to particular kinds of property dam-

³⁶⁴ See Appendix 2.

age). At international law, only significant (“extensive” in the Bombings Convention) property damage is a prohibited outcome and such property damage must result in economic harm. Furthermore, the property must have some public function (for example, transportation systems or markets), although this is not a settled distinction at international law.

The domestic definitions do not require wider economic consequences. For example, the United Kingdom and Australia simply require “serious damage to property” and, under the Indian Act, *any* loss, destruction, or damage to property is sufficient. In contrast, New Zealand’s provision for bio-terrorism (that it must devastate a country’s economy), and serious damage to property, major environmental damage, and causing major economic loss (each of which must harm or endanger persons) shows a standard broadly consistent with international law if the contingent consequences at international law include not only economic harm but also harm to people. Such a conclusion is supported by one reading of the aviation and Maritime conventions. New Zealand is, however, the only jurisdiction providing for pure economic harm, which is clearly beyond international law’s definition.

Section 2332b’s listed offenses encompass property damage and to a certain extent resemble the international conventions’ subject matter, although the offenses are not generally limited to serious damage. This provision, like the United Kingdom definition, provides that harm to electronic systems or services also constitutes terrorism. If restricted to serious harm or disruption (as in the United Kingdom), this seems consistent with the international concept of serious property damage. Such damage can cause significant economic and physical harm. But specifically proscribing harm to property and electronic systems, which would otherwise be included under the general property damage heading, indicates that the definitions might contemplate cyber-terrorism (including, for example, attacks on banking services through the internet).³⁶⁵ Destruction of computer-stored data might arguably be covered. Cyber-terrorism is not specifically provided for at international law and whether international law and/or the domestic definitions protect pure information is open to conjecture. India’s prohibition on “disruption of essential supplies and services essential to the life of the community” appears to contemplate any damage to essential services or supplies. Simply cutting a telephone line and thereby disrupting tele-

³⁶⁵ See Peter Lichtenbaum & Melanie Schneck, *The Response to Cyberattacks: Balancing Security and Cost*, 36 INT’L LAW. 39, 40-43 (2002) (discussing the U.S. response to cybersecurity threat); Brenner & Goodman, *supra* note 31, at 27-44 (discussing cyberterrorism scenarios).

communications would probably not constitute terrorism at international law, but it would in India.

Although the domestic definitions appear generally consistent with the international law concept, their prohibitions are wider, encompass less serious harm and potential harm, and do not condition property damage on detrimental economic consequences.

2. At International Law the Terrorist Act Must Be Independently Criminal

This feature is present in both U.S. definitions. Although not present in the other states' definitions, the general approach is still influential. To commit the offense of terrorist bombing contrary to section 62 of the U.K. Act, the conduct must fall within the definition of terrorism and violate a listed offense. The U.K. drafters consciously excluded criminality from the definition because they thought it would unduly narrow the definition.³⁶⁶ By requiring underlying criminality as an element of the terrorist offences, however, an act of terrorism must still be independently criminal despite the definition of terrorism, thereby providing a similar type of protection to the accused. Independent criminality is not a feature of the Indian definition, however, and simply committing a "terrorist act" in India is an offense (the same is true in Australia).³⁶⁷

Although underlying criminality is unnecessary in India, whether as part of the definition or the offense provisions, it is required in the United States, United Kingdom, and New Zealand. Given that many police powers are triggered by a determination of terrorism or the designation of an entity as such, the definition-offense distinction is significant. The latter allows police powers to be exercised in more circumstances than the former would.

3. International Law Requires Intimidation of a Population or Coercion of a Government or an International Organization

Each domestic jurisdiction reflects this foundational requirement. The definitions typically speak of coercing, influencing, and compelling governments, and intimidating the population or part thereof, or

³⁶⁶ H.L. Deb. vol. 611, col. 1484-85, Apr. 6, 2000, *available at* <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/vo000406/text/00406-08.htm>.

³⁶⁷ Prevention of Terrorism Act 2002, § 3(1) (India); Criminal Code Act 1995, § 100.1 (Austl.).

of striking terror.³⁶⁸ Notably, New Zealand uses a higher standard by requiring the *undue* compulsion or forcing of government policy³⁶⁹ (which oddly implies that some compulsion, as opposed to mere political pressure, is acceptable) while section 2331(1) requires a lower intimidation standard when the harm is mass destruction, assassination, or kidnapping (compare “affect the conduct of a government” in the case of mass destruction, assassination, or kidnapping with “influence the policy of a government by intimidation or coercion” for other harms). India’s definition requires more than intimidation. It states that acts must “threaten the unity, integrity, security or sovereignty of India,”³⁷⁰ which is a wholly indigenous formulation and *facially* sets a high bar, although its ambiguity may permit a less restrictive reading.

Section 2332b, which is restricted to effects on government, does not require intimidation or coercion if the act is calculated to “retaliate against government policy.” Potentially, this is a very wide exception to the usual requirement of intimidation or coercion. The U.K. definition also waives the intimidation or coercion requirement when firearms or explosives are employed to achieve the proscribed harms.³⁷¹ This exception may also swallow the rule, and it undermines a fundamental element of what constitutes terrorism. It has some support at international law, however, to the extent that the Bombings Convention’s principal prohibition does not require intimidation or coercion.³⁷²

Under the definitions, with the exception of India, the target of the intimidation or coercion is not restricted by geography. All definitions contemplate coercion of either the state’s government(s) or a foreign government (with the exception of India, which is restricted to Indian governments).³⁷³ This is consistent with developments at international law. Section 2331(1) and the New Zealand definition implicitly contemplate the intimidating of *a* (meaning any) civilian population, whereas the U.K. definition expressly applies to civilian popula-

³⁶⁸ 18 U.S.C. §2331(1)(B); Prevention of Terrorism Act 2002, § 3(1) (India); Terrorism Suppression Act 2002, § 5(2) (N.Z.) Terrorism Act 2000 §1(1)(b) (U.K.).

³⁶⁹ Terrorism Suppression Act 2002 § 5(2)(b) (N.Z.).

³⁷⁰ Prevention of Terrorism Act 2002 § 3(1) (India).

³⁷¹ Terrorism Act 2000 § 1(3) (U.K.).

³⁷² Bombings Convention art. 2(1); *see also* Nuclear Terrorism Convention, *supra* note 51, art. 2 (which, although open for signature after the legislation was passed, offers support for this approach.).

³⁷³ *See* 18 U.S.C. §2331(1)(B); Prevention of Terrorism Act 2002, § 3(1) (India); Terrorism Suppression Act 2002, § 5(2) (N.Z.) Terrorism Act 2000 §1(1)(b) (U.K.).

tions inside and outside the state's territorial jurisdiction.³⁷⁴ India appears to require terror in an Indian population.

A further target at international law is international organizations. Compelling such entities constitutes terrorism only under the New Zealand definition.³⁷⁵

All the definitions require that the intimidation or coercion (or equivalent) be "intended" (India, New Zealand, and section 2331(1)); "designed" (U.K.); or "calculated" (section 2332b). Given that the act causing the intimidation or coercion must be intended, employing a mens rea standard other than intent for these consequences is not of heightened concern, and international law does not appear to direct that the intimidation or coercion be intended. Section 2331 employs an objective determination by stating "appears to be intended," unlike the subjective approach of the other jurisdictions and the prevailing approach at international law. This is consistent, however, with international law that uses the standard "calculated" (also used in section 2332b). "Calculated" was first used in the 1937 Terrorism Convention and repeated in the 1994 General Assembly Elimination Declaration in the context of "intended or calculated" (although it is used elsewhere in Title 18, so it does not necessarily reflect international law's direct influence).

4. The Range of Victims at International Law Excludes Military Targets but Expressly Includes Internationally Protected Persons and Civilians

Most domestic definitions do not expressly define a class of victims; rather, they refer just to persons and property. Because the definitions do not limit property damage to government-owned property, the destruction of private property is sufficient to constitute a terrorist attack. Unlike at international law, there is no suggestion that such property must have a public function.

Section 2332b's listed offenses include the destruction of national defense installations. The case for the international law definition excluding violent acts against military targets is strong, thus indicating section 2332b is inconsistent with international law in this regard. The

³⁷⁴ *Id.* c. 11, § 1(4)(c) (U.K.); Terrorism Suppression Act 2002, § 5(2)(a)(a) (N.Z.).

³⁷⁵ India's definition may also be taken to extend to international organizations if "persons" includes legal persons (and the provision is given extraterritorial applicability). This runs contrary to the context and the other uses of the term in the provision. *See* Prevention of Terrorism Act 2002, § 1(3) (India).

U.S. Department of State considers unarmed and off-duty military personnel to be noncombatants.³⁷⁶ This approach classifies the October 23, 1983 attack on a Beirut Marines barracks that killed 242 servicemen as terrorism.³⁷⁷ Similarly, the State Department considers attacks on military installations during a period without hostilities to be terrorism. The domestic definitions' references to "persons," "public," and "population" arguably include military personnel. The use of "citizenry," and perhaps "public," might exclude military personnel although perhaps also government officials that must be protected under the international conception of the range of victims. The line between when military personnel are "civilians" (for example, reservists living at home during time of non-hostilities) and when engaged in military service (for example, on active patrol) is hard to draw. For the clarification of doubt, if states wish to deviate from international law's exclusion of military targets, express reference should be made (as in section 2332b and the Indian definition).³⁷⁸ It is certainly within a state's interest to define the range of victims widely, as this increases the number of attacks the state can classify as terrorist (thereby triggering, *inter alia*, increased investigative powers). It also gives greater protection to the military. Similarly hard cases are presented by non-military enterprises involved in war efforts (for example, factories producing weapons) and civilians employed in military operations. Notably the offense of terrorism drafted for the U.S. Military Commission simply refers to "persons," without further elaboration.³⁷⁹

India's definition also expressly protects "property [and] equipment used or intended to be used for the defence of India." Given the anomaly that protecting military property but not servicepersons would present, one might infer that India considers the reference to "persons" to include military personnel. The same may be said of the United States. In light of the state's signature and intention to implement the conventions, a domestic court might interpret "person" in light of the state's international obligations. When two interpretations are possible,

³⁷⁶ Brian Whitaker, *The Definition of Terrorism*, THE GUARDIAN UNLIMITED, May 7, 2001, available at <http://www.guardian.co.uk/elsewhere/journalist/story/0,7792,487098,00.html>.

³⁷⁷ U.S. Dep't of State, *Significant Terrorist Incidents, 1961-2003: A Brief Chronology* (2004), <http://www.state.gov/r/pa/ho/pubs/fs/5902.htm>.

³⁷⁸ Cf. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (clarifying that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country").

³⁷⁹ U.S. MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK, *supra* note 195, at 13, § 2.

the one consistent with international law should be preferred. Textual ambiguity should be construed in favor of harmony with international law.³⁸⁰ Furthermore, while attacks on civilians are likely to intimidate the public, small-scale attacks on military personnel are unlikely to have this effect. It is also not clear such attacks “coerce the government” either.

By implication, the New Zealand definition of terrorism excludes attacks on military personnel “taking an active part in the hostilities,” although it is unclear whether this is broader or narrower than the U.S. Department of State approach.³⁸¹

The vexing issue of the legitimacy of military targets is very much a live issue. The international law position is clear, as is that in New Zealand, India, and the United States. Ambiguity in the United Kingdom’s definition may be interpreted to avoid a conflict with international law, although the laws of armed conflict may interpose a contrary interpretative guide.

5. International Law’s Approach to Terrorism Does Not Require That “Terrorist” Acts Are Carried Out for the Purpose of Advancing a Political, Religious, or Ideological Cause

The U.S. and Indian definitions are similar in not requiring a specific motivation. The United Kingdom and New Zealand, however, require that the act is done with the “purpose” of advancing a political, religious, or ideological cause. The 1994 General Assembly Elimination Declaration refers to these three causes as well as philosophical, racial, and ethnic causes in declaring terrorist acts unjustifiable. The U.K. legislation influenced the New Zealand draftsmen, so the similarity of the clauses is not coincidental. The three motivations selected and the others in the General Assembly Elimination Declaration certainly overlap

³⁸⁰ See, e.g., *Charming Betsy*, 6 U.S. at 118; *New Zealand Pilots’ Ass’n Inc. v. A-G*, [1997] 3 N.Z. L.R. 269, 289 (C.A.); *J.H. Rayner Ltd. v. Dep’t of Trade and Indus.*, [1990] 2 A.C. 418 (H.L.); see also *Ahmad v. Inner London Educ. Auth.*, [1978] 1 Q.B. 36, 48 (C.A.). Note, however, the question of whether international law is sufficiently precise to be of interpretative assistance would have to be addressed by the court.

³⁸¹ The New Zealand definition states that a terrorist act occurring in an armed conflict is an act “(a) that occurs in a situation of armed conflict; and (b) the purpose of which, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act; and (c) that is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation; and (d) that is not excluded from the application of the Financing Convention by art. 3 of that Convention.” *Terrorism Suppression Act 2002*, § 4(1) (N.Z.).

to a significant extent. But given that the requirement of a particular motivation restricts the scope of terrorism and the state's interest in defining terrorism widely, it is unclear why these three were chosen. Their absence from the definition arising from the conventions indicates that this qualification of the definition is not a part of the international definition of terrorism.

6. At International Law, Causing a Prohibited Terrorist Outcome Must Be Intended

Aside from the New Zealand definition, none of the definitions surveyed in this study attach a mens rea requirement to the proscribed outcomes. In New Zealand the act must be intended to cause one of the prohibited terrorist outcomes, whereas under section 2331(1) an act only need be, for example, dangerous to human life to constitute a proscribed terrorist outcome. Although all states require that the intimidation or coercion be intended, the action producing this consequence need not be intended. Some states utilize the independent criminality approach (noted above) so that to constitute terrorism, an act must meet the definition of terrorism and be independently criminal. Some states include independent criminality in their definition, while others include it in offense provisions. Thus, terrorist crimes generally incorporate the definition and either a mens rea standard relating to performing the act or another crime. In India, however, where the definition does not include independent criminality or an intention to do the act causing the harm, simply engaging in an act of terrorism is illegal. The intent requirement in the Indian definition relates only to threatening the state rather than, for example, detonating a bomb. Not requiring independent criminality and not attaching a mens rea standard to performing the act is inconsistent with international law. In contrast, sections 2331(1) and 2332b in the United States require the violation of a criminal law as an element of international terrorism thereby incorporating a mens rea standard.

Unlike the other jurisdictions, the New Zealand legislation requires that the act's outcome be intended. Some crimes in the Terrorism Suppression Act—such as financing terrorism—incorporate the definition and also require, for example, funding to be “wilful and without lawful excuse.” Although this duplicates the mens rea requirement, the same evidence might satisfy both requirements. Furthermore, in New Zealand an offense against a terrorism convention is also

terrorism under New Zealand domestic criminal law³⁸² and each convention offense specifies a mens rea standard.

7. The International Definition Focuses on Terrorism of an International Character

The Indian definition does not expressly address whether elements of the act of terrorism can be extra-territorial, whereas the U.K. and New Zealand definitions expressly contemplate acts and harms irrespective of location. Both the U.S. definitions indicate an international focus.³⁸³ Section 2331(1) is limited to acts that transcend national boundaries. Some of section 2332b's listed crimes are international in orientation (for example, murdering, kidnapping, and maiming persons abroad or even committing violence at international airports), but others appear to be largely domestic in character (for example, the killing of Supreme Court Justices).³⁸⁴

Despite their extraterritorial jurisdiction, with the exception of section 2331(1), the definitions also cover purely domestic acts. Although not the focus of the international conception of terrorism, prohibiting purely intra-state terrorism is a strong state interest and a necessary implication of international law's approach to counter-terrorism. International law certainly does not preclude the criminalization of purely domestic terrorism and, to a large extent, state internal stability is to the advantage of the international system.

8. The International Definition and the Domestic Definitions Speak to Acts of Terrorism by a Single Person as Terrorism; Group Conduct or Participation Is Not a Requirement

Each of the definitions is the same as international law in this regard. Furthermore, none of the definitions expressly exclude government or official conduct (even if acting through individual actors) from the definition. Although one commentator has identified that national definitions are split on whether terrorist acts must be perpetrated by groups or if individuals can commit terrorist crimes,³⁸⁵ the jurisdictions examined here are unambiguous in not requiring group conduct.

³⁸² See *id.* § 5(1)(b) (N.Z.).

³⁸³ There is a domestic analogue to § 2331(1) in 18 U.S.C.A. § 2331(5).

³⁸⁴ 18 U.S.C.A. § 351(a) (2004).

³⁸⁵ Walter, *supra* note 33, at 30-31.

9. Justifications and Defenses

Like international law, none of the domestic definitions, nor the statutes they sit within, provide for a political exception whereby terrorism committed for a particular purpose is excused or justified.

E. *The Domestic Implementation of the Minimum Definition of Terrorism*

Terrorists frequently operate transnationally and terrorism's cross-border effects motivated the international community to create treaties obligating states to criminalize certain acts of terrorism in their domestic criminal law. Resolution 1373 buttresses these obligations. The conventions and resolutions evidence the international community's desire to facilitate a common approach. States do not legislate to prohibit terrorism in a vacuum and must be cognizant of their international obligations. Given the transnational nature of terrorism, anti-terrorism measures, initiatives, and legal instruments will operate more efficiently if states define terrorism consistently. Given the pursuit of common and equivalent jurisdiction, legislating in harmony with international law is crucial and drawing on international law's jurisprudence concerning the definition of terrorism is logical. Speaking descriptively, have states done this?

The content of the concept of terrorism at international law and the definitions enacted by the four states is broadly similar. The international definition's major elements are common to the domestic definitions. There are differences, however, some of which reflect areas of relative uncertainty at international law. For example, the states proscribe a wider range of harms than international law does. Other differences are a result of drafting technique. As discussed, on their face, some jurisdictions do not use the underlying criminality concept in their definition of terrorism in contrast to international law. But others effectively make this a requirement by requiring that the acts that constitute a terrorist offense are independently unlawful.

The two issues on which there is substantive divergence are the legitimacy of military targets and the need for a particular motivation. Consistent with international law, New Zealand regards persons involved in active hostilities as outside the range of victims. The other states' laws are less clear and arguably protect military personnel and property under their general prohibition against harm. States are the primary actors in the international system and a powerful force in determining the conventions' content, the focus of which is usually on the position that best protects that state's interests. Reference has been made to one example: the United States is pushing for the in-

clusion of some military targets in the definition in the Draft Comprehensive Terrorism Convention. National agendas, usually reflected in domestic law, influence the formation of international law, as international law influences the formation of domestic definitions. The relationship is one of cross-fertilization.

The United States, United Kingdom, and New Zealand implemented the prohibitions in the Bombings and Financing Conventions faithfully and closely followed the conventions' phrasing.³⁸⁶ Despite differences, India's definition is also broadly consistent with international law. Given this apparent willingness to follow international law, why are there distinctions between the international law concept of terrorism and the domestic definitions?

First, as illustrated above, extracting the definition of terrorism from the relevant international sources requires one to abstract from the specific prohibitions and resolutions. This process generates a concept of terrorism that sits above the particular sources. States must actively search for and distill the definition. It is not found in a single instrument that states are required to implement, although the international organizations' model definitions—such as that of the Commonwealth Secretariat—draw on international conventional law. In other words, states must actively seek definitional guidance from international law because it is not readily apparent. Second, because the definition is arrived at by abstraction, within bounds, there can be legitimate disagreement over the parameters of the definition. Third, states view international law differently. New Zealand was very eager for international guidance and actively sought to follow international law. Other states more jealously guard their sovereign right to determine their own laws, either based on a normative commitment to independence or simply because doing so is conducive to national interest. Fourth, international law is only one of the relevant considerations taken into account in the anti-terrorism law-making process and may be “outweighed” by other considerations, which are likely to be weighty when national security issues are implicated.

Strong policy reasons exist to induce states to deviate from the core definition identified in Part Two. If some states simply discharge their international treaty obligations while others go further, however, we are denied some of the benefits of a consistent definition and anti-

³⁸⁶ Terrorism Act, 2000, c. 11, §§63, 64 (U.K.); Terrorist Bombings Convention Implementation Act of 2002, Pub. L. No. 107-197, §§ 201-203, 116 Stat. 721 (2002); Terrorism Suppression Act, 2002, §§ 7, 8 (N.Z.).

terrorism regime. To take a simple example, if bio-terrorism is a crime only in New Zealand, India may be reluctant (or even unable) to assist with the investigation and extradition of the alleged terrorist. States may, however, legitimately conclude that the cost of defining terrorism differently than other states is outweighed by the benefit of the heightened protection. Notwithstanding this, the international definition should set a floor, or the minimum conditions, of the definition, not a ceiling.

States are, and must be, entitled to proscribe conduct beyond that which they are required to proscribe pursuant to international obligations. As stressed throughout the Article, the *core* international definition that arises is derived from the existing conventions. To find expression in a convention, a significant number of states must consent to the prohibition. This causes the formation of international terrorism treaties to be a slow process. The lack of a provision in international law for prohibiting cyber-terrorism, in contrast to some states' laws, shows that often international law lags behind domestic law. The international definition should be regarded as a minimum; states' definitions should be assessed against this standard. States are entitled to proscribe further conduct, as states in this study have done (for example, India's protection of military equipment). To think otherwise would wrongly construe international law, rather than the state, as the source of sovereignty.³⁸⁷ The acute need to address threats such as cyber-terrorism underline why states cannot be bound by international law's slow-developing definition. Particular state interests (for example, the protection of New Zealand's large agricultural sector) necessitate national tailoring of terrorism legislation.

The above analysis shows that, in most instances, the four states have met the minimum conditions provided by the core definition at international law, although there are some exceptions (for example, the requirement that the commission of the act itself be intended, which is not met in India). Is the similarity coincidental or the product of international law's influence? The New Zealand Parliamentary review committee strove to harmonize New Zealand's then-draft legislation with international law obligations. Specific changes were made to adopt the wording of the Financing Convention, and the C.T.C. was consulted regarding the Security Council's intended definition. Substantive guidance was, although not forthcoming from the C.T.C.,

³⁸⁷ See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 39, 43 (Apr. 9) (separate opinion of Judge Alvarez).

found in the terms of the conventions and might now be found, to an extent, in Resolution 1566. International law was also influential in Australia where it (and other domestic jurisdictions) served as a yardstick by which to assess Australia's draft legislation. Providing a point of comparison is an important function, as non-governmental entities can build law reform arguments on this basis. International law does not appear to have been particularly persuasive in either the United States or India, although their definitions are substantively similar to the international definition.

New Zealand's experience indicates that some states will seek to follow international law. Furthermore, states without significant drafting resources might willingly adopt "pre-made" definitions. To this end, the model definitions based on the existing conventional law being developed and recommended by international agencies such as the Commonwealth Secretariat and U.N. Office for Drugs and Crime might become popular. Together these two effects will produce, in time, a large number of states with definitions of terrorism satisfying this minimum condition supplied by international law.

It is unclear when, if ever, agreement will allow the Comprehensive Terrorism Convention to be opened for signature. Even if this does not receive sufficient support, a customary rule might arise in time, based on the evidence of consistent domestic definitions motivated by a sense of obligation to harmonize their definitions of terrorism with the international definition for legal and practical reasons, notwithstanding that some states continue to support terrorism and inhibit the development of a comprehensive treaty.

CONCLUSION

"Terrorism" no longer describes state conduct. It now refers to the acts of sub-state actors. Similarly, its function is no longer just a term expressing moral condemnation. It is now used as a legal term, and thus should be accompanied by a legal definition. There are dangers in using terrorism as a legal term without defining it, as the widespread potential for (and some actual) avoidance and abuse of Security Council 1373's obligations illustrates.

The first attempt to define terrorism in the 1937 Terrorism Convention failed. Its abstract definition was not acceptable to states, at least partially due to the difficulty of implementing the definition in domestic legislation. Similarly, the U.S. draft in 1972, which defined terrorism in the abstract, did not attract sufficient support to be opened for signature. Rather than continue to attempt to establish a

universal jurisdiction with respect to terrorism,³⁸⁸ the international community, through conventions and Security Council and General Assembly resolutions, opted for a system whereby states exercise domestic criminal jurisdiction over acts of terrorism. This incremental criminalization has produced a list of disparate proscribed acts reflecting those acts that most harm states' interests but upon which agreement can be reached.

On its face, this approach does not provide a definition of terrorism. As shown, when the overlap of the individual prohibitions is viewed alongside the consistent themes that run through the conventions, however, a core definition of terrorism is discernable. It represents a minimum condition that states' definitions ought to satisfy. States may adopt a definition consistent with the minimum international law definition through three mechanisms (aside from the possibility of a comprehensive treaty): first, states voluntarily enacting definitions of terrorism that are consistent with international law and its obligations; second, states adopting draft model legislation provided by international organizations and potentially the C.T.C.; and third, the development of a customary rule demanding that states criminalizing terrorism. The first and second factors may establish sufficient state practice to allow a plausible case for the existence of a customary rule requiring states to prevent and punish terrorism to be put forward. Whether this rule will crystallize before the conclusion of a comprehensive anti-terrorism multilateral treaty solution is unlikely yet possible. In the interim—which could be lengthy—international law is capable of providing leadership on the definition of terrorism but, as is the case so often with international law, states must be willing to be lead. The extent to which there is bilateral and/or multilateral pressure on states to implement international treaty obligations is most likely to be directly related to whether terrorist entities continue to strike (or perhaps simply threaten) the interests of powerful states.

³⁸⁸ See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 121 (Feb. 14) (separate opinions of Judges Higgins, Kooijmans & Buergenthal), *reprinted in* 41 I.L.M. 536, 537 (2002) (stating that the jurisdiction established by the terrorism conventions is not universal jurisdiction).

Appendix 1: International Anti-Terrorism Instruments and Their Signature and Ratification Statuses ¹		
Instrument (with adopted or opened for signature)	Signatory states	Ratification, accession or succession
Tokyo Aviation Convention (1963)	40	178
The Hague Aviation Convention (1970)	76	178
Montreal Aviation Convention (1971)	59	180
Internationally Protected Persons Convention (1973)	25	153
Hostages Convention (1979)	39	145
Nuclear Material Convention (1980)	44	100
Montreal Airports Protocol (1988)	68	148
Maritime Navigation Convention (1988)	41	115
Fixed Platforms Protocol (1988)	39	104
Plastic Explosives Convention (1991)	51	113
Terrorist Bombings Convention (1997)	58 (0 since September 11, 2001)	132 (108 since September 11, 2001)
Financing Convention (1999)	132 (88 since September 11, 2001)	132 (128 since September 11, 2001)
Nuclear Terrorism Convention (2005) ²	63	0

¹ As of December 31, 2004. (Report of the Secretary-General on Measures to Eliminate International Terrorism, Doc. A/59/210, Dec. 31, 2004).

² As of September 16, 2005.

Appendix 2: Comparison of the Definitions of Terrorism in the U.K., U.S., India, New Zealand and at International Law					
Element/Theme	International Law	United Kingdom	United States	India	New Zealand
1. Proscribed terrorist outcome	<ul style="list-style-type: none"> ● Death, serious injury. ● Serious property damage causing economic harm. 	<ul style="list-style-type: none"> ● Serious violence against persons; death; endangering another's life or the public health or safety. ● Serious property damage; acts designed to seriously interfere with or disrupt an electronic system. 	<ul style="list-style-type: none"> ● § 2331: "[V]iolent acts or acts dangerous to human life". ● § 2332b: Specifies a large range of harms including to persons, property and military installations. 	<ul style="list-style-type: none"> ● "Causing or likely to cause". ● Death or injuries. ● Detaining and threatening to kill or injure. ● Loss, damage or destruction of property; (including national defense and other government property). ● Disruption of essential supplies and services essential to life of community. 	<ul style="list-style-type: none"> ● Death or serious bodily injury; serious risk to public health or safety. ● Destruction or serious damage to property of great value; major economic loss; major environmental damage; serious interruption or destruction of infrastructure facility <i>if</i> endangering or harming people. ● Bio-terrorism if likely to devastate an economy.
2. Act's Independent Criminality	<ul style="list-style-type: none"> ● Unlawful. 	<ul style="list-style-type: none"> ● Not required by the definition. 	<ul style="list-style-type: none"> ● § 2331: Violate U.S. criminal law. ● § 2332b Violates listed crime. 	<ul style="list-style-type: none"> ● Not required by the definition. 	<ul style="list-style-type: none"> ● Not required by the definition.
3. Intimidation or coercion	<ul style="list-style-type: none"> ● Intimidation or coercion. ● Targets: governments, international organizations, populations or part thereof. ● Mens rea: calculated or intended. 	<ul style="list-style-type: none"> ● Influence a government; intimidate a section of the population. ● Mens rea: "designed". ● Not required if: using of firearms or explosives. 	<ul style="list-style-type: none"> ● § 2331: Intimidate or coerce a civilian population. ● Influence a government's policy by intimidation/coercion; affect conduct using certain means. ● Mens rea: intent (objective). ● § 2332b: Influence or affect a government by intimidation or coercion. 	<ul style="list-style-type: none"> ● "Threaten the unity, integrity, security or sovereignty of India." ● Striking terror into any section of the people. ● Mens rea: intention. ● Detaining government employees requires additional purpose to compel the government or persons to act in a certain way. 	<ul style="list-style-type: none"> ● Terror in a civilian population. ● Unduly compel or force a government or international organization. ● Mens rea: intent.

				<ul style="list-style-type: none"> •Mens rea: calculated. •Not required if: retaliating against government conduct. 		
4. Range of victims	<ul style="list-style-type: none"> •Civilians. •Property with some public function. •Excludes military targets. 	<ul style="list-style-type: none"> •Not expressly limited. 	<ul style="list-style-type: none"> •§ 2331: Implies persons and governments. •§ 2332b: Enumerated offenses include against persons and property (including military targets). 	<ul style="list-style-type: none"> •Not expressly limited. •Military property included. 	<ul style="list-style-type: none"> •Not expressly limited. •Excludes acts done in armed conflicts. 	
5. Higher Motivation	<ul style="list-style-type: none"> •Not required. 	<ul style="list-style-type: none"> •“[P]urpose of advancing a political, religious, or ideological cause.” 	<ul style="list-style-type: none"> •§§ 2331 and 2332b: Not required. 	<ul style="list-style-type: none"> •Not required. 	<ul style="list-style-type: none"> •“[P]urpose of advancing an ideological, political or religious.” 	
6. Mens rea (as part of definition)	<ul style="list-style-type: none"> •Proscribed outcome must be indented. 	<ul style="list-style-type: none"> •No express requirement for proscribed outcome. 	<ul style="list-style-type: none"> •§§ 2331 and 2332b: No express requirement. 	<ul style="list-style-type: none"> •Not expressly required for the proscribed outcome. 	<ul style="list-style-type: none"> •Proscribed terrorist outcome must be intended. 	
7. International character	<ul style="list-style-type: none"> •Must be an international character. 	<ul style="list-style-type: none"> •No distinction between transnational and intra-state acts. 	<ul style="list-style-type: none"> •§ 2331: “[O]ccur[s] primarily outside... [U.S. territory], or transcends boundaries.” •§ 2332b: <i>Most</i> listed crimes are cross-border in nature. 	<ul style="list-style-type: none"> •No distinction between transnational and intra-state acts. 	<ul style="list-style-type: none"> •Expressly applies to acts done exclusively in N.Z. and those with cross-border effects. 	
8. Individual acts	<ul style="list-style-type: none"> •Individuals’ acts suffice. 	<ul style="list-style-type: none"> •Individuals’ acts suffice. 	<ul style="list-style-type: none"> •§§ 2331 and 2332b: Individuals’ acts suffice. 	<ul style="list-style-type: none"> •Individuals’ acts suffice. 	<ul style="list-style-type: none"> •Individuals’ acts suffice. 	
9. Political Exception	<ul style="list-style-type: none"> •Expressly excluded. 	<ul style="list-style-type: none"> •Not provided for. 	<ul style="list-style-type: none"> •§§ 2331 and 2332b: Not provided for. 	<ul style="list-style-type: none"> •Not provided for. 	<ul style="list-style-type: none"> •Not provided for. 	