

**ATTEMPTS TO DEFINE ‘TERRORISM’ IN INTERNATIONAL LAW****by Ben Saul\***

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## 1. INTRODUCTION

On numerous occasions since the 1920s, the international community has attempted to arrive at a *generic definition* of terrorism for the purposes of prohibition and/or criminalization, suggesting that it attaches considerable importance to definition. The variety and extent of attempts to generically define terrorism have rarely been considered holistically, unlike the twelve well-known anti-terrorism treaties, or even the lesser known regional treaties.<sup>1</sup> None of the sectoral treaties defines specifically ‘terrorist’ offences.<sup>2</sup> Instead, many of the treaties require states to prohibit and punish in domestic law certain physical acts – such as hostage taking or hijacking – without requiring, as an element of the offence, proof of a political motive or cause behind the act,<sup>3</sup> or an intention to coerce, intimidate or terrorize certain targets. The substantive provisions of these treaties never refer to the terms terrorism or terrorist.<sup>4</sup>

This article analyzes the many unsuccessful attempts by the international community to define terrorism generically, in treaty form, since the 1920s (excluding the extensively discussed efforts of the General Assembly since the early 1970s). As Brownlie notes, ‘[e]ven an unratified treaty may be regarded as evidence of generally accepted rules, at least in the short run’.<sup>5</sup> While these sources do not carry great weight as evidence of customary law, they illustrate the recurring normative and political disputes surrounding definition and elucidate the basic features of terrorism, as perceived by different actors in the international legal system. The article concludes by considering current debates about generic definition in the negotiation of the UN Draft Comprehensive Convention against Terrorism in the UN Sixth Committee.

## 2. 1920s-30s UNIFICATION OF CRIMINAL LAWS

Attempts to exclude terrorist ‘outrages’ – such as the assassination of state officials – from the political offence exception to extradition had been steadily made in some national laws from the late 19th century, beginning with the Belgian *attentat* clause. Yet the idea of systematically defining terrorism as an international criminal offence only gathered momentum in the 1920s and 30s. In

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1. The international and regional treaties are available at: <<http://untreaty.un.org/English/Terrorism.asp>>.

2. S. Witten, ‘The International Convention for the Suppression of Terrorist Bombings’, 92 *AJIL* (1998) p. 774 at p. 775.

3. J. Lambert, *Terrorism and Hostages in International Law: A Commentary on the Hostages Convention 1979* (Cambridge, Grotius 1990) p. 49.

4. *Ibid.*

5. I. Brownlie, *Principles of Public International Law*, 5th edn. (Oxford, Clarendon Press 1998) p. 12.

1926, Romania asked the League of Nations to consider drafting a 'convention to render terrorism universally punishable' but the request was not acted on.<sup>6</sup>

Terrorism was more systematically considered in a series of International Conferences for the Unification of Criminal Law between 1930 and 1935.<sup>7</sup> The term 'terrorism' first appeared at the Third Conference in Brussels in 1930:

'The intentional use of means capable of producing a common danger that represents an act of terrorism on the part of anyone making use of crimes against life, liberty or physical integrity of persons or directed against private or state property with the purpose of expressing or executing political or social ideas will be punished.'<sup>8</sup>

The political or social motives behind specified violent acts, and the risk of producing a common danger, were the defining features of terrorism.<sup>9</sup> At the Fourth Conference in Paris in 1931, two rapporteurs proposed different definitions, although each shared the core element of imposing a political or social doctrine through criminal violence.<sup>10</sup> Ultimately a resolution was adopted which avoided reference to political or social objectives, and instead emphasized the effects of specified violent acts:

'Whoever, for the purpose of terrorizing the population, uses against persons or property bombs, mines, incendiary or explosive devices or products, fire arms or other deadly or deleterious devices, or who provokes or attempts to provoke, spreads or attempts to spread an epidemy, a contagious disease or other disaster, or who interrupts or attempts to interrupt a public service or public utility will be punished ...'<sup>11</sup>

The Fourth Conference also recommended the adoption of a convention 'to assure the universal repression of terrorist attempts'.<sup>12</sup>

At the Fifth Conference in Madrid in 1934, terrorism and crimes creating a common danger were considered separately and the discussion focused on

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6. League of Nations (LoN), Committee of Experts for the Codification of International Criminal Law, Replies of Governments 1927, LoN Doc. C.196.M.70.1927.V, p. 221.

7. Terrorism was discussed at the 3rd (Brussels 1930), 4th (Paris 1931), 5th (Madrid 1933) and 6th (Copenhagen 1935) International Conferences for the Unification of Criminal Law: G. Bouthoul, 'Definitions of Terrorism', in D. Carlton and C. Schaerf, eds., *International Terrorism and World Security* (London, Croom Helm 1975) p. 72; B. Zlataric, 'History of International Terrorism and its Legal Control', in M.C. Bassiouni, ed., *International Terrorism and Political Crimes* (Springfield, Illinois, Charles C. Thomas 1975) p. 474 at pp. 478-482; T. Franck and B. Lockwood, 'Preliminary Thoughts towards an International Convention on Terrorism', 68 *AJIL* (1974) p. 69 at pp. 75-76.

8. Final Commission Proposal, quoted in Zlataric, op. cit. n. 7, at p. 479.

9. Zlataric, op. cit. n. 7, at p. 479.

10. Definitions quoted in Zlataric, op. cit. n. 7, at pp. 479-480.

11. *Ibid.*, at p. 480.

12. *Ibid.*

terrorism. Whereas Rapporteur Roux concentrated on the definition from the Fourth Conference, Rapporteur Lemkin avoided the notion of terrorism and instead developed the idea of *crimina juris gentium* (including provoking international catastrophe, destroying art works, and participating in massacres or collective atrocities against the civilian population).<sup>13</sup> While notions of political and social terrorism were discussed, ultimately only social rather than political terrorism formed part of the concept adopted by the Conference: ‘He, who with the scope of undermining social order, employs any means whatsoever to terrorize the population, will be punished.’<sup>14</sup> The Fifth Conference accordingly reduced the notion of terrorism to the crime of anarchy,<sup>15</sup> avoiding earlier references to political motives or aims.

In 1935, the Sixth Conference at Copenhagen adopted model national legislation for the repression of terrorism.<sup>16</sup> Article 1 proposed the offence of ‘intentional acts directed against the life, physical integrity, health or freedom’ of specified protected persons, where the perpetrator has created ‘a common [or public] danger, or state terror that might incite a change or raise an obstacle to the functioning of public bodies or a disturbance in international relations’.<sup>17</sup> Article 2 listed acts which create a common danger or provoke a state of terror.<sup>18</sup>

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

‘it is necessary that certain acts should be punished as special offences, apart from any general criminal character which they may have under the laws of the State, whenever such acts create a public danger or a state of terror, of a nature to cause a change in or impediment to the operation of the public authorities or to disturb international relations, more particularly by endangering peace ...’<sup>19</sup>

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

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13. *Ibid.*, at p. 480.

14. *Ibid.*

15. *Ibid.*, at p. 481.

16. LoN Committee for the International Repression of Terrorism (CIRT), ‘Texts adopted by the 6th International Conference for the Unification of Criminal Law (Copenhagen, 31 Aug-3 Sept 1935)’, Geneva, 7 January 1936, LoN Doc. CRT.17 (‘Copenhagen Draft’).

17. Quoted in Zlataric, *op. cit.* n. 7, at p. 482.

18. Including instigating a catastrophe or calamity, polluting drinking water, spreading contagious diseases, destroying public utilities and using explosives in a public place.

19. Copenhagen Draft, *supra* n. 16, at p. 1.

to the League, and was submitted to the CIRT at its first session.<sup>20</sup> The prohibited acts in the Vienna Draft differed from the French Proposal only in elaboration: protected persons and property were specified in more detail; the list of prohibited weapons was expanded; and methods of incitement were listed. Significantly, the Vienna Draft stated that ‘acts of terrorism’ are enumerated offences punishable ‘as ordinary crimes’. In contrast, the Copenhagen Draft stated that ‘it is necessary that certain acts should be punished as special offences, apart from any general criminal character’.<sup>21</sup>

### 3. 1937 LEAGUE OF NATIONS CONVENTION

The most significant early modern attempt to define terrorism as an international crime was undertaken by the League of Nations between 1934 and 1937.<sup>22</sup> In October 1934, King Alexander I of Yugoslavia was assassinated by Croatian separatists while on a state visit to France;<sup>23</sup> the French Foreign Minister, Louis Barthou, and two by-standers were also killed. The suspects fled to Italy and France requested their extradition under a treaty of 1870, which excluded political crimes from extradition. The Court of Appeal of Turin refused to surrender the accused on the ground that the offences were politically motivated and thus non-extraditable.<sup>24</sup> The Court found that ‘the assassination of a sovereign is a political crime if it is prompted by political motives ... and offends against a political interest of a foreign state’, as are ‘crimes committed or attempted in the course of the said regicide’.<sup>25</sup>

The League of Nations faced immediate political pressure to respond. The memory of the assassination of Chancellor Dolfuss of Austria three months

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20. LoN (CIRT), ‘Preliminary Draft Convention drawn up by the Executive Bureau of the International Criminal Police Commission’, Geneva, 11 April 1935, LoN Doc. CRT.3 (‘Vienna Draft’), p. 9.

21. Copenhagen Draft, *supra* n. 16, at p. 1.

22. H. Donnedieu De Vabres, ‘La repression internationale du terrorisme – les conventions de Genève (16 novembre 1937)’, 62 *Rev. D Int. Lég. Comp.* (1938) p. 45; G. Marston, ‘Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937’, 73 *BYIL* (2002) p. 293; P. Kovacs, ‘La Société des Nations et son action après l’attentat contre Alexandre, roi de Yougoslavie’, 6 *J History International L* (2004) p. 65; J. Starke, ‘The Convention for the Prevention and Punishment of Terrorism’, 19 *BYIL* (1938) p. 214; B. Saul, ‘The Legal Response of the League of Nations to Terrorism’, *J International Criminal Justice* (forthcoming 2005).

23. F. Walters, *A History of the League of Nations* (London, Oxford University Press 1969) p. 599.

24. *In re Pavelic and Kwaternik*, *Ann. Dig. and Reports of PIL Cases* (1933-34), Case No. 158, p. 372; B. Ferencz, *An International Criminal Court*, Vol. I (London, Oceana Publications 1980) p. 48; Walters, *op. cit.* n. 23, at p. 602.

25. Cited in *R v. Governor of Pentonville Prison Ex p Cheng* [1973] AC 931.

earlier in July 1934 was still fresh,<sup>26</sup> as was an attempt on the life of Romanian Minister Duca.<sup>27</sup> The League had faced a similar international crisis in 1923, when General Tellini of Italy was assassinated while delimiting the frontier between Albania and Greece, resulting in Italy's bombardment and occupation of Corfu.<sup>28</sup> Seasoned diplomats had not forgotten the assassination of Archduke Franz Ferdinand in Sarajevo in 1914 and its catastrophic consequences for global peace.<sup>29</sup>

Following two months of intensive diplomacy, in a resolution of December 1934, the League Council noted that 'the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation'.<sup>30</sup> It established an expert committee, CIRT, to draft a preliminary international convention 'to assure the repression of conspiracies or crimes committed with a political and terrorist purpose'. The terms 'terrorist activity' and 'political and terrorist purpose' were not defined. The CIRT comprised 11 states and met in three sessions between April 1935 and April 1937.<sup>31</sup>

The Committee was further guided by a League Assembly resolution of October 1936, which stated that the proposed convention must be founded 'upon the principle that it is the duty of every State to abstain from any intervention in the political life of a foreign State'. The resolution confined the scope of the convention further by stating that it should have 'as its principle objects': '(1) To prohibit any form of preparation or execution of terrorist outrages upon the life or liberty of persons taking part in the work of foreign public authorities and services'; (2) to prevent and detect such outrages; and (3) to punish terrorist outrages which 'have an international character'.<sup>32</sup>

The convention was drafted in a number of phases between 1935 and 1937.<sup>33</sup> An international diplomatic conference met in November 1937 to draft and adopt a convention based on the final draft submitted by CIRT. The Final Act of the diplomatic conference adopted two international conventions – the first

26. Walters, *op. cit.* n. 23, at p. 604.

27. Zlataric, *op. cit.* n. 7, at p. 481.

28. Walters, *op. cit.* n. 23, at pp. 244-255.

29. *Ibid.*, at pp. 246, 600.

30. LoN (CIRT), Geneva, 10 April 1935, LoN Doc. CRT 1.

31. 1st Session, April-May 1935; 2nd Session, January 1936; 3rd Session, April 1937. Members included Belgium, UK, Chile, France, Hungary, Italy, Poland, Romania, USSR, Spain and Switzerland.

32. By virtue of the place of preparation or execution, or the nationality of perpetrators or victims: LoN, International Conference Proceedings on the Repression of Terrorism, Geneva, 1-16 November 1937, LoN Doc. C.94.M.47.1938.V, annex I, p. 183.

33. LoN (CIRT), Reports to Council, Geneva: 1st Session (8 May 1935, LoN Doc. C.184.M.102.1935.V); 2nd Session (10 February 1936, LoN Doc. A.7.1936.V); 3rd Session (26 April 1937, LoN Doc. V. Legal 1937.V.1); see also LoN Assembly (17th Ordinary Session), Records – Committee Mtgs (1st Committee: Constitutional and Legal Questions), Geneva, *LoN OJ* (1936) (Special Suppl.) p. 156.

defining international terrorist offences, and the second creating an international criminal court to punish the offences in the first treaty.<sup>34</sup>

The first treaty, the 1937 Convention for the Prevention and Punishment of Terrorism, required states to criminalize terrorist offences and encouraged states to exclude the offences from the political offence exception to extradition.<sup>35</sup> It attracted 24 signatories: 12 were European states, seven were Caribbean, Central or South American states, and five others included major states from other regions.<sup>36</sup> The Convention was only ratified by one (colonial) state – India, which had separate League membership to Britain<sup>37</sup> – and never entered into force. The Second World War diverted attention from the Convention and with the demise of the League of Nations, interest in the Convention never revived.

Despite never entering into force, the 1937 League Convention indicates the early views of states on terrorism. Article 1(1) reaffirms as a ‘principle of international law’ that it is ‘the duty of every State to refrain from any act designed to encourage terrorist activities directed against another State and to prevent acts in which such activities take shape’. States were, however, careful to exclude armed forces from the scope of the Convention, including acts committed in civil wars.<sup>38</sup>

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

34. LoN Final Act of Conference, Geneva, 16 November 1937, LoN Doc. C.548.M385.1937.V; 19 *LoN OJ* (1938) p. 23, in Y. Alexander, et al., eds., *Control of Terrorism: International Documents* (New York, Crane Russak 1979) p. 19; Ferencz, *op. cit.* n. 24, at p. 380.

35. 1937 League Convention, in International Conference Proceedings, *supra* n. 32, annex I, p. 5; and 1937 Convention for the Creation of an International Criminal Court, in International Conference Proceedings, *supra*, n. 32. The latter treaty attracted fewer signatories and never came into force. A State Party was entitled, instead of prosecuting, or extraditing a suspect to another State Party, to send the suspect for trial before the international criminal court.

36. European states: Albania, Belgium, Bulgaria, Czechoslovakia, France, Greece, Monaco, Netherlands, Norway, Romania, Spain, Yugoslavia. American states: Argentina, Cuba, Dominican Republic, Ecuador, Haiti, Peru, Venezuela. Other regions: USSR, Turkey, (British) India and Egypt, along with a small state, Estonia. Monaco subsequently signed: Starke, *op. cit.* n. 22, at p. 214.

37. Starke, *ibid.*, at p. 215.

38. 3rd Session Report, *supra* n. 33, at p. 2; 1st Committee Records, *supra* n. 33, at p. 30 (Romania), p. 36 (Yugoslavia), p. 38 (Sweden); LoN (CIRT), Observations by Governments (Series I), 7 September 1936, LoN Doc. A.24.1936.V (Norway); LoN (CIRT), Observations by Governments, 30 March 1937, LoN Doc. C.194.M.139.1937.V, pp. 1-2 (Czechoslovakia); Letters from H. McKinnon-Wood (UK Foreign Office, Geneva) to L. Brass (UK Home Office, London) and J. Fischer-Williams (Oxford), 30 March 1937, LoN Archives Geneva Doc. 3A/20521/15085/XIX.

the meaning of Article 1'. The acts include crimes against persons and property, weapons offences, and ancillary offences.<sup>39</sup>

Consequently, terrorism is defined by the intended aim (a state of terror), the ultimate target (a state), and the prohibited means used, but not by reference to political motives or coercive objectives.<sup>40</sup> Proposals to define terrorism as a means to a political end were not accepted.<sup>41</sup> 'Acts of terrorism' was defined circularly or tautologically by reference to 'a state of terror',<sup>42</sup> despite objections that the term was ambiguous and open to abuse.<sup>43</sup> The meaning of a 'state of terror' is not explained in the treaty or in the drafting record.

On a literal construction, it suggests acute or extreme fear, with the words 'a state of' indicating a more durable or continuing fear than the word 'terror' on its own. At the time, some states thought a 'state of terror' did not mean a subjective fear in the mind of one person, but a more objective state involving many individuals.<sup>44</sup> However, the text of the provision refers to 'a state of terror *in the minds of particular individuals* [emphasis added]', which envisages that a subjective state of terror in the minds of a small number of persons could amount to terrorism.<sup>45</sup>

It is also unclear from the record whether acts 'directed against a State' narrowly referred to attempts to overthrow the state,<sup>46</sup> or encompassed acts against broader state interests, including state 'honour', security or public order.<sup>47</sup> Further, only acts directed against a state, and not against private persons or groups, were regarded as terrorism. A French proposal to crimi-

39. Including wilfully: 'causing death or grievous bodily harm or loss of liberty' to protected persons and public officials (Art. 2(1)); destroying or damaging public property of another state (Art. 2(2)); endangering the lives of the public (Art. 2(3)); attempting to commit offences (Art. 2(4)); manufacturing, obtaining, possessing, or supplying arms, ammunition, explosives or harmful substances with a view to committing an offence in any country (Art. 2(5)); and conspiracy, incitement, direct public incitement, wilful participation, and knowing assistance (Art. 3).

40. International Conference Proceedings, *supra* n. 32, at p. 72 (Yugoslavia), p. 63 (Spain).

41. LoN CIRT, 'Legislation regarding political terrorist crimes: Study by T. Givenovitch', Geneva, 3 May 1935, LoN Doc. CRT.9, p. 4.

42. International Conference Proceedings, *supra* n. 32, at p. 81 (Yugoslavia), p. 80 (Spain), p. 78 (France).

43. 1st Committee Records, *supra* n. 33, at p. 32 (Belgium); Observations by Governments (1937), *supra* n. 38, at p. 2 (Czechoslovakia); 2nd Session Report, *supra* n. 33, appendix III, p. 16 (Romania).

44. Observations by Governments (1937), *supra* n. 38, at p. 3 (Czechoslovakia); 1st Committee Records, *supra* n. 33, at p. 45 (Romania); International Conference Proceedings, *supra* n. 32, at p. 77 (Netherlands), p. 75 (Poland).

45. *Ibid.*, at pp. 75-76 (UK, USSR, Poland).

46. As proposed in the 2nd Session Draft, Art. 2, in 2nd Session Report, *supra* n. 33; and by the UK: CIRT, 'Suggestion by the British expert for an article to be inserted in the draft convention', Geneva, 1 May 1935, LoN Archives Doc. 3A/17592/15085/VII.

47. International Conference Proceedings, *supra* n. 32, at p. 72 (Yugoslavia) and 2nd Session Report, *supra* n. 33, appendix III, p. 15 (Romania).



nalize attacks on ‘private persons by reason of their political attitude’ (such as political activists, academics, suffragettes or trade unionists) was not accepted. (Likewise, a Latvian proposal to regard attacks on private property as terrorism was not accepted.<sup>48</sup>)

As a result, the killings of Karl Liebknecht and Rosa Luxemburg in Weimar Germany in 1919<sup>49</sup> would not be considered terrorism, despite the German Social Democratic Party, exiled in Prague, bringing assassinations of its members in the 1920s and 30s to the attention of the CIRT in 1937.<sup>50</sup> With chilling prescience, Leon Trotsky, exiled in Mexico, also warned the League of Soviet terrorism against its enemies – just a few years before he was assassinated by Soviet agents.

The utility of the Convention was always doubtful because its extradition provisions did not exclude terrorism from the political offence exception.<sup>51</sup> In a climate of mounting authoritarianism, many states were reluctant to confine their sovereign discretion in extradition matters, including the scope of political offences,<sup>52</sup> and were at pains to protect asylum from degradation.<sup>53</sup> The drafting of the Convention was primarily a means of averting the escalation of the international crisis precipitated by King Alexander’s assassination,<sup>54</sup> rather than a progressive process of legal reform. A contemporary writer viewed its provisions as not of ‘major importance’, and suggested that practical cooperation was more important than ‘stiffening’ the law.<sup>55</sup> Despite definition, the term ‘terrorism’ remained open to abuse, with Hitler justifying the Nazi occupation of Bohemia and Moravia in March 1939 as designed to disarm ‘terrorist bands threatening the lives of [German] minorities’.<sup>56</sup>

Nonetheless, the Convention is normatively significant in the debate about defining terrorism, since its drafting elucidated major substantive issues which remained relevant in the post-war period. Its definition served for many years as a benchmark definition of terrorism, surfacing early in the drafting of the 1954 ILC Draft Code of Offences,<sup>57</sup> and most influentially, shaping a much

48. 2nd Session Report, *supra* n. 33, appendix III, p. 14.

49. E. Hobsbawm, *Age of Extremes* (London, Abacus 1995) p. 68.

50. Letter from the Sozialdemokratischen Partei Deutschlands (Prague) to CIRT (Geneva), 30 October 1937, LoN Archives Doc. 3A/15105/15085/XIII.

51. 1937 League Convention, Art. 8.

52. 1st Committee Records, *supra* n. 33, at p. 40 (UK); International Conference Proceedings, *supra* n. 32, at p. 53 (UK), p. 54 (Norway), p. 62 (Belgium); Observations by Governments (Series I), *supra* n. 38, at p. 3 (Belgium).

53. 1st Committee Records, *supra* n. 33, at p. 48 (Finland), p. 37 (Norway), p. 39 (Netherlands), p. 41 (Sweden, France), pp. 33, 43 (Belgium); Observations by Governments (Series I), *supra* n. 38, at p. 11 (Netherlands).

54. Walters, *op. cit.* n. 23, at p. 605.

55. Starke, *op. cit.* n. 22, at p. 215.

56. Quoted in I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press 1963) p. 340.

57. See below, section 4.

cited 1994 General Assembly Declaration.<sup>58</sup> In 1996, the League definition was approved by an English judge (in the minority) to limit the scope of the exclusion clauses in the 1951 Refugee Convention.<sup>59</sup> It is significant that the main dispute surrounding the drafting was the scope of the extradition provisions, rather than difficulties with the definition of terrorism itself.

#### 4. 1954 ILC DRAFT CODE

The International Law Commission considered terrorism when drafting its 1954 Draft Code of Offences against the Peace and Security of Mankind (Part I).<sup>60</sup> Although the 1954 ILC Draft Code was never formally adopted by the General Assembly or in treaty form, it provides an insight into mid-20th century thinking about terrorism in international law. Terrorism was explicitly linked to the concept of aggression. Article 2(6) defines an offence ‘against the peace and security of mankind’ of the

‘undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.’

Under Article 1, offences in the Code ‘are crimes under international law, for which the responsible individuals shall be punished’. The offence only covers conduct by those acting for the state,<sup>61</sup> and not the activities of non-state actors, despite an early 1950 draft provision covering acts of private persons.<sup>62</sup> Further, it only covers state toleration of terrorist activities where those activities are sufficiently ‘organized’ to affect peace (such as acts of political parties directed against another state), thus excluding acts of single persons without any organized connection.<sup>63</sup> Further, arguments to include private terrorism with international effects were not accepted,<sup>64</sup> the requirement being that acts be directed against another state.<sup>65</sup>

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58. UNGA Res. 49/60 (1994), annexed Declaration on Measures to Eliminate International Terrorism, para. 3.

59. *T v. Home Secretary* [1996] AC 742, at pp. 772-773 (Lord Mustill).

60. 1954 ILC Draft Code of Offences against the Peace and Security of Mankind (Part I), in ILC 6th Session Report (3 June-28 July 1954), UN Doc. A/2693, as requested by UNGA Res. 177(II) (1947).

61. *ILC Yearbook* (1950-II) p. 59.

62. 1950 Draft Code, crime no. IV, in Report by Special Rapporteur Spiropoulos, 26 April 1950, UN Doc. A/CN.4/25, *ILC Yearbook* (1950-II) p. 253 at p. 263; see also *ILC Yearbook* (1950-I) pp. 127-128 (Rapporteur Spiropoulos).

63. *ILC Yearbook* (1950-I) p. 126 (Rapporteur Spiropoulos), p. 166 (Cordova); *ILC Yearbook* (1951-II) p. 58 (Rapporteur Spiropoulos), the latter conduct being left to national law. A proposal to delete ‘organized’ was not accepted: *ILC Yearbook* (1950-I) p. 127 (François).

64. *ILC Yearbook* (1950-I) pp. 129, 166 (ILC Chairperson).

65. *Ibid.*, at p. 129 (Amado).

As the UK noted at the time, the terms ‘terrorist activities’ and ‘terrorist acts’ are not defined,<sup>66</sup> and one ILC member stated that the first expression was as vague as another expression that had been rejected – ‘fifth column’.<sup>67</sup> In contrast, the Special Rapporteur argued that terrorism had a ‘fairly precise meaning in international law’, deriving from the 1937 League Convention,<sup>68</sup> which, while not in force, expressed the legal views of 40 states.<sup>69</sup> The Rapporteur decided, however, to make the provision more general in character than the 1937 definition.<sup>70</sup> At the same time, the drafting record also refers to concepts of terrorism developed elsewhere:<sup>71</sup> (a) ‘systematic terrorism’ developed in 1919; (b) the war crime of ‘indiscriminate mass arrests for the purpose of terrorizing the population’ from 1944; and (c) terrorism in national law.<sup>72</sup>

Yet, some ILC members found references to terrorism too vague unless linked to the ‘excellent’ 1937 definition.<sup>73</sup> As a result, a 1951 draft provision incorporated the League definition,<sup>74</sup> but this disappeared after objections that the 1937 expression ‘a state of terror’ was ‘too literary’ and antiquated, and would embarrass a judge,<sup>75</sup> with the modern term ‘terrorist activities’ preferred.<sup>76</sup> Others also questioned the meaning of the 1937 definition, or found the draft definition too confused.<sup>77</sup> As such, it was omitted from the 1954 provision, but contextualizes the meaning of terrorism.

Higgins argues that the inclusion of terrorism in the 1954 ILC Draft Code in relation to state aggression serves only as a ‘term of convenience’ or political expediency.<sup>78</sup> In her view, this is because international law on the use of force and the law of state responsibility already address terrorist acts, or support for such acts, by states of the kind envisaged by Draft Article 2(6). Consequently, the description of such acts as terrorist is considered legally redundant, particularly in the absence of any definition of ‘terrorist activities’ in Article 2(6).

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66. *ILC Yearbook* (1954-II) p. 117 (UK).

67. *ILC Yearbook* (1954-I) p. 130.

68. *Ibid.*, at p. 131.

69. *ILC Yearbook* (1950-I) p. 218 (Alfaro).

70. *Ibid.*, at p. 126.

71. *ILC Yearbook* (1950-II) p. 253 at pp. 264-266.

72. See, respectively: (a) UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (London, HMSO 1948) ch. III, and Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report to the Preliminary Peace Conference, 29 March 1919, in 14 *AJIL* (1920) p. 95 at p. 113; (b) UN War Crimes Commission, Legal Committee Report, 9 May 1944; (c) Australian War Crimes Act 1945, s. 3(ii): ‘murder or massacres – systematic terrorism’, and Chinese Law, 24 October 1946, Art. III(1): war crime of ‘Planned slaughter, murder or other terrorist action’.

73. *ILC Yearbook* (1950-I) p. 127 (Hudson, François).

74. 1951 Draft Code, Art. I(5), in *ILC Yearbook* (1951-II) p. 58.

75. *ILC Yearbook* (1950-I) p. 63 (Alfaro and Kerno respectively).

76. *Ibid.*

77. *Ibid.*, at pp. 127-128 (Amado and Yepes respectively).

78. R. Higgins, ‘The General International Law of Terrorism’, in R. Higgins and M. Flory, eds., *Terrorism and International Law* (London, Routledge 1997) p. 13 at pp. 26-27.

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

However, Higgins' analysis is misleading in one important respect. The purpose of Article 2(6) was to establish *individual criminal responsibility* for the state commission, encouragement or toleration of 'terrorist activities'. Individual criminal responsibility is a different type of international legal liability than that provided for by the law of state responsibility or the law on the use of force. The article on terrorism was adopted by the ILC by 10 votes to 0, with three abstentions, suggesting that ILC members believed reference to terrorism served some purpose. Further, the view that the provision was similar to a draft provision on civil strife did not result in the amalgamation of the provisions as suggested,<sup>79</sup> indicating that the ILC felt justified in preserving a distinct provision on terrorism.

Due to insurmountable disagreement about the definition of aggression, in 1954 the General Assembly postponed further consideration of the 1954 ILC Draft Code until a Special Committee on defining aggression had reported.<sup>80</sup> Subsequent attempts to define aggression have eschewed any reference to terrorism and severed the early linkage between these concepts. A (non-exhaustive) General Assembly resolution defining 'aggression' in 1974 makes no reference to terrorism,<sup>81</sup> nor does the definition in the 1996 ILC Draft Code or in the 1998 Draft Rome Statute.<sup>82</sup>

## 5. 1972 US DRAFT CONVENTION

In response to terrorist attacks on Israeli athletes at the Munich Olympics in September 1972 and other terrorist acts,<sup>83</sup> the US presented a Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism to the General Assembly in late September 1972.<sup>84</sup> The proposed offences were

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79. *ILC Yearbook* (1950-I) p. 127 (El Khoury).

80. UNGA Res. 897 (IX) (1954).

81. UNGA Res. 3314 (XXIX) (1974).

82. ICC PrepCom Report, UN Diplomatic Conference of Plenipotentiaries on an ICC, Rome, 15 June-17 July 1998, UN Doc. A/Conf.183/2/Add.1 (14 April 1998), Art 5. Aggression may be defined by future amendment to the 1998 Rome Statute.

83. In particular, the killing of 26 persons at Lod Airport in Israel and a shooting at the apartment of a Soviet diplomat at the UN in NY: J. Murphy, 'United Nations Proposals on the Control and Repression of Terrorism', in Bassiouni, ed., op. cit. n. 7, p. 493 at p. 496.

84. UN Doc. A/C.6/L.850 (1972), reprinted in 11 *ILM* (1972) p. 1382; see also J. Moore, 'Toward Legal Restraints on International Terrorism', 67 *ASIL Proc.* (1973) p. 88 at pp. 91-93;

not designated as ‘terrorist’, but as offences of ‘international significance’,<sup>85</sup> although the title of the Convention signaled its intention to address terrorist crimes.

Article 1 proposed three principal offences of unlawfully killing, causing serious bodily harm, or kidnapping, if such acts have an international dimension,<sup>86</sup> and are ‘intended to damage the interests of or obtain a concession from a State or an international organization’.<sup>87</sup> Sectoral anti-terrorism treaties were to take precedence in the event of a conflict with the US Draft Convention.<sup>88</sup> The decision whether to prosecute or to extradite was left to the discretion of the custodial state.

The US Draft Convention was limited to *international* rather than domestic acts of terrorism, excluding most acts by self-determination movements.<sup>89</sup> It was also designed to focus on individual terrorist acts, rather than state support for terrorist activity.<sup>90</sup> The US Draft Convention excluded acts committed by, or against, ‘a member of the Armed Forces of a State in the course of military hostilities’,<sup>91</sup> and applicable international humanitarian law (IHL) treaties would take precedence in case of a conflict.<sup>92</sup> The US Draft Convention further stated that it does not ‘make an offence of any act which is permissible under’ IHL, nor does it ‘deprive any person of prisoner of war status if entitled to such status’ in IHL.<sup>93</sup>

As a result, a prohibited act committed *against* a military member *in peacetime* may amount to terrorism. Secondly, a prohibited act committed *by* a military member in peacetime may amount to terrorism, so admitting the punishment of ‘State terrorism’ (subject to state immunities). Acts committed by non-state forces in the course of military hostilities are not privileged by exclusion from the Convention, so guerilla, national liberation or self-determination forces may be punished as terrorists in some circumstances. Since the Convention was proposed in 1972, its exclusionary provisions in relation to IHL did not refer to the recognition extended to non-state forces in the 1977 Protocols. The affirmation of the entitlement to POW status signals that the US

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J. Dugard, ‘Towards the Definition of International Terrorism’, 67 *ASIL Proc.* (1973) p. 94 at pp. 98-100.

85. Murphy, *op. cit.* n. 83, at p. 505.

86. Acts must be committed by a foreign national (Art. 1(a)), and outside the target state, or inside the target state but against a foreign national (Art. 1(b)). A state’s territory includes all territory under its jurisdiction or administration: Art. 2(c).

87. 1972 US Draft Convention, Art. 1(d).

88. *Ibid.*, Art. 14.

89. J. Murphy, ‘Defining International Terrorism: A Way Out of the Quagmire’, 19 *Israel Yearbook on Human Rights* (1989) p. 13 at p. 16; J. Norton Moore, ‘The Need for an International Convention’, in Bassiouni, ed., *op. cit.* n. 7, p. 437 at p. 443.

90. Murphy, *op. cit.* n. 83, at p. 496.

91. 1972 US Draft Convention, Art. 1(c).

92. *Ibid.*, Art. 13.

93. *Ibid.*, Art. 13(a)-(b).

did not intend to create any exceptional category of ‘terrorist’ in IHL, and the ordinary liability of POWs for war crimes would still apply.

Despite these limitations, the US Draft Convention envisaged broad liability, since the concept of intending to damage the ‘interests’ of a state is ambiguous and open-ended. There need only be an *intention* to damage; no *actual* damage is required. The idea of ‘damage’ is not limited by any minimum degree of seriousness or severity. States have any number of ‘interests’ of varying importance and there is no attempt to circumscribe the types of interests which deserve special protection through criminalization. There is similarly no gradation of the concept of ‘concessions’ in terms of their political significance. There were, however, no terrorist offences against property stipulated in the Convention,<sup>94</sup> which focused on threats to human life, and few states other than Israel expressed support for protecting property.<sup>95</sup>

There was little support for the US initiative in a General Assembly deadlocked by Cold War politics and the ideological divide between developed and developing states, particularly over self-determination. The US sought to convene a conference to adopt the treaty, but was opposed by Arab and African states, and China, which believed that it was an attempt to criminalize self-determination movements.<sup>96</sup> General Assembly Resolution 3034 (XXVII) (1972) initiated a study of the causes of terrorism but did not pursue criminal law or treaty measures. An Italian compromise to both study the causes and request the ILC to prepare a draft treaty was rejected.<sup>97</sup> The timing of the US proposal ensured its defeat, given the ‘heated atmosphere engendered by the Munich killings and by the charges and countercharges passing between Israel and the Arab States’.<sup>98</sup>

## 6. 1991 AND 1996 ILC DRAFT CODE OF CRIMES

After the postponement of 1954, the ILC resumed consideration of the Draft Code in 1982.<sup>99</sup> Following nine reports by a Special Rapporteur between 1983 and 1991, the ILC adopted a first reading of a Draft Code in 1991.<sup>100</sup> Article 24 of the 1991 ILC Draft Code, based on Article 2(6) of the 1954 Draft Code,<sup>101</sup> proposed an offence where a state agent or representative commits or orders the following:

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94. Franck and Lockwood, loc. cit. n. 7, at p. 76.

95. Ibid.

96. Murphy, op. cit. n. 89, at p. 17; Murphy, op. cit. n. 83, at p. 499.

97. Murphy, op. cit. n. 83, at p. 500.

98. Ibid., at p. 502.

99. UNGA Res. 36/106 (1981).

100. *ILC Yearbook* (1991-II) p. 94, para. 175; see also ILC (47th Session), 13th Report of Special Rapporteur (1995), UN Doc. A/CN.4/466.

101. *ILC Yearbook* (1990) p. 336.

'undertaking, organizing, assisting, financing, encouraging or tolerating acts against another State directed at persons or property and *of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.*'<sup>102</sup>

Compared with the 1954 draft, this provision partially incorporates the 1937 League definition; added the notions of 'organizing', 'assisting' and 'financing'; and included an express reference to acts against property. Some ILC members objected that the definition was tautological and that it would be better to refer to 'a state of fear' rather than a 'state of terror'.<sup>103</sup> The difficulty of proving subjective fear was also raised.<sup>104</sup>

The proposed offence did not apply to private individuals and requires a state connection.<sup>105</sup> Some ILC members thought, however, that groups of individuals could threaten peace and security,<sup>106</sup> and regretted that acts by liberation movements, and international corporations, were not covered.<sup>107</sup> Some governments also believed that terrorism should cover private as well as state conduct.<sup>108</sup> Other governments felt that the provision was too imprecise to impose criminal liability,<sup>109</sup> or that terrorism was too sensitive to be entrusted to an international tribunal.<sup>110</sup>

In 1995, a renumbered draft Article 24 retained similar wording to the 1991 draft, but added that acts must be committed 'in order to compel' the victim state 'to grant advantages or to act in a specific way'.<sup>111</sup> While this narrowed the scope of the offence, it had the disadvantage of excluding nihilist or other violence designed to terrorize but not also to compel.<sup>112</sup> Some thought it better to avoid altogether any reference to subjective motives and objectives of the act.<sup>113</sup>

As alternatives to a 'state of terror', reference was made to 'a state of fear'

102. Emphasis added. Draft Art. 16(1) of 1990 is similar: *ILC Yearbook* (1990) p. 336.

103. *ILC Yearbook* (1990) p. 338 (Koroma), p. 339 (Pellet, Rao).

104. *Ibid.* (Koroma).

105. *Ibid.*, at p. 338 (Mahiou, Calero Rodríguez); L. Sunga, *The Emerging System of International Criminal Law* (The Hague, Kluwer Law International 1997) p. 200.

106. *Ibid.*, at p. 338 (Njenga), p. 339 (Benama).

107. *Ibid.*, at p. 338 (Pellet, Tomuschat, Njenga) and p. 338 (Pellet) respectively. Cf., 1999 Terrorist Financing Convention, Art. 5, establishing corporate liability where a person 'responsible for the management or control' of a financial entity 'in that capacity' commits a financing offence.

108. ILC (45th Session), Comments and Observations from Governments (1993), UN Doc. A/CN.4/448; Sunga, *op. cit.* n. 105, at p. 202 (Belarus, Denmark, Finland, Iceland, Norway, Paraguay, Sweden and the UK).

109. Sunga, *op. cit.* n. 105, at p. 202 (referring to Australia and the Netherlands).

110. *Ibid.*

111. ILC, Report on 47th Session (2 May-21 July 1995), UNGAOR Suppl. 10, UN Doc. A/50/10, 58.

112. *ILC Yearbook* (1995-I) p. 38 (Al-Khasawneh).

113. *Ibid.*, at p. 18 (Vargas Carreño).

or a 'state of dread'. New offences of 'ordering' or 'facilitating' terrorist acts emerged, while the offence of 'assisting' from 1991 disappeared. While some ILC members continued to insist that the meaning of terror was generally understood,<sup>114</sup> others maintained that the term was imprecise and the provision should be deleted.<sup>115</sup> Suggestions to refer to the sectoral anti-terrorism treaties, or to designate terrorism as a crime against humanity, were not accepted, nor was the view that the determination of terrorism should be left to the Security Council.<sup>116</sup>

The final ILC Draft Code (Part II) was adopted in 1996.<sup>117</sup> While earlier drafts between 1990 and 1995 had included distinct articles on 'international terrorism',<sup>118</sup> a discrete terrorist offence was subsumed by, and recast within, final Article 20 on 'war crimes'.<sup>119</sup> The war crime of 'acts of terrorism' in Article 20 embodied the simple prohibition in Article 4(2)(d) of Protocol II.<sup>120</sup> There was no longer any broader offence of creating a state of terror outside of armed conflict.

## 7. 1998 DRAFT ROME STATUTE

While the 1996 ILC Draft Code was not adopted as a treaty, the General Assembly drew it to the attention of the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).<sup>121</sup> Ultimately, Article 5 of the 1998 Draft Rome Statute, presented to the 1998 Rome Diplomatic Conference,<sup>122</sup> included 'crimes of terrorism' comprising three distinct offences. The first offence was:

Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures,

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114. *Ibid.*, at p. 45 (Chairperson Rao).

115. *Ibid.*, at p. 41 (Rosenstock) and pp. 6-7 (Pellet), p. 8 (Rosenstock), p. 15 (Mikulka) respectively.

116. *Ibid.*, at p. 21 (Jacovides), p. 26 (Kramer), p. 40 (Razafindralambo), p. 8 (Rosenstock) respectively.

117. ILC, Report on 48th Session (6 May-26 July 1996), UN Doc. A/51/10, ch. II(2), paras. 46-48.

118. See 1990 Draft, Art. 16, in ILC, Report on 42nd Session (1990), UN Doc. A/45/10, ch. II, paras. 20-158; 1991-1995 Drafts, Art. 24, ILC 43rd-47th Session, in 13th Report of Special Rapporteur, *supra* n. 100, and ILC, Report on 47th Session, *supra* n. 111, ch. II(B)(1)-(3), paras. 41-125, 126-139.

119. ILC, Report on 47th Session, *ibid.*, ch. II, paras. 27-143.

120. ILC, Report on 48th Session, *supra* n. 117, ch. II, commentary on draft Art. 20, para. 14.

121. UNGA Res. 51/160 (1996).

122. 1998 Draft Rome Statute, Art. 5, in ICC PrepCom Report, UN Diplomatic Conference of Plenipotentiaries on an ICC, Rome, 15 June-17 July 1998, UN Doc. A/Conf.183/2/Add.1 (14 April 1998), p. 2.



groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them [emphasis added].

This first offence resembles the 1991 ILC Draft Code and was not limited to armed conflict (as in the 1996 ILC Draft Code). It also shares elements of the 1937 League definition and a 1994 General Assembly working definition. The second offence comprised any offence in six sectoral treaties.<sup>123</sup> The third offence involved ‘the use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups or persons or populations or serious damage to property’.

At least 12 states spoke in favour of including terrorism,<sup>124</sup> particularly those that had been victims of it. Some states took the view that terrorism should be included as a crime against humanity.<sup>125</sup> Those in favour of including terrorism argued that it shocked the conscience of humanity; had grave consequences for human suffering and property damage; occurred increasingly frequently and on a larger scale; and threatened peace and security.<sup>126</sup> The option of referring terrorism to the ICC was also intended to avoid jurisdictional disputes between states, and supply the Security Council with a means of referring terrorist threats for resolution.<sup>127</sup>

Terrorism was not included in the 1998 Rome Statute as adopted. A conference resolution ‘regretted’ that ‘despite widespread international condemnation of terrorism, no generally acceptable definition ... could be agreed upon’.<sup>128</sup> Terrorism was not included for a variety of reasons: its legal novelty and lack of prior definition; disagreement about national liberation violence; and a fear that it would politicize the ICC.<sup>129</sup> More pragmatically, some states felt that terrorism was better suited to national prosecution, due to investigative

123. 1971 Montreal Convention; 1970 Hague Convention; 1973 Protected Persons Convention; 1979 Hostages Convention; 1988 Rome Convention and 1988 Rome Protocol.

124. K. Kittichaisaree, *International Criminal Law* (Oxford, Oxford University Press 2001) p. 227; Algeria, Armenia, Congo, India, Israel, Kyrgyz Republic, Libya, Macedonia, Russia, Sri Lanka, Tajikistan and Turkey; see also C. Silverman, ‘An Appeal to the United Nations: Terrorism must come within the Jurisdiction of an International Criminal Court’, 4 *New England and Comp. L Ann.* (1998), available at <<http://www.nesl.edu/intljournal/VOL4/CS.HTM>>.

125. Kittichaisaree, op. cit. n. 124 (Algeria, India, Sri Lanka, Turkey); see UN Doc. A/CONF.183/C.1/L.27/Corr.1 (29 June 1998).

126. ICC PrepCom, Summary of Proceedings, 25 March-12 April 1996, UN Doc. A/AC.249/1 (7 May 1996), para. 66.

127. *Ibid.*

128. Res. E, annexed to the Final Act of the UN Diplomatic Conference of Plenipotentiaries on an ICC, 17 July 1998, UN Doc. A/Conf.183/10.

129. ICC PrepCom, *supra* n. 122, para. 67; Kittichaisaree, op. cit. n. 124, at pp. 227-228; A. Cassese, *International Criminal Law* (Oxford, Oxford University Press 2003) p. 125; see also N. Boister, ‘The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed International Criminal Court: Law, Pragmatism, Politics’, 3 *J of Armed Conflict Law* (1998) p. 27.

complexities and the need for immunities.<sup>130</sup> The US felt that investigation, rather than prosecution, was the main problem in combating terrorism.<sup>131</sup> Others believed that terrorism was not always serious enough to be internationally prosecuted.<sup>132</sup> Sri Lanka and Turkey abstained from voting on the Rome Statute partly because terrorism was excluded.<sup>133</sup> The conference affirmed, however, that the Statute provides for future expansion of jurisdiction, which might provide an opportunity for future inclusion of terrorism.<sup>134</sup>

In addition, the Rome Conference responded to terrorism in a different sense. In Article 7(2)(a) of the Rome Statute, crimes against humanity require ‘multiple commission of acts ... pursuant to or in furtherance of a State or organizational policy to commit such attack’. The reference to organizations was ‘intended to include such groups as terrorist organizations’,<sup>135</sup> although express reference to terrorism as a crime against humanity was not adopted. Thus terrorist groups which commit acts constituting crimes against humanity are liable. This includes acts in armed conflict or peacetime, as long as the conduct is ‘part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>136</sup> Such attacks need not be both widespread *and* systematic; either is sufficient.<sup>137</sup>

## 8. 1996 – DRAFT NUCLEAR TERRORISM CONVENTION

Between 1997 and 2000 an *Ad Hoc* Committee established by the General Assembly in 1996<sup>138</sup> successfully drafted the 1997 Terrorist Bombings Conven-

130. M. Arsanjani, ‘The 1998 Rome Statute of the International Criminal Court’, 93 *AJIL* (1999) p. 22 at p. 29; Cassese, *op. cit.* n. 129, at p. 125; see also ICC PrepCom, *supra* n. 122.

131. D. Scheffer, ‘Developments at Rome Treaty Conference’, Testimony of US Ambassador at Large for War Crimes Issues and Head of US Delegation to the Rome Conference, US Senate Foreign Relations Committee, Washington DC, 23 July 1998.

132. Cassese, *op. cit.* n. 129, at p. 125; A. Cassese, ‘Terrorism is Also Disrupting Some Crucial Legal Categories of International Law’, 12 *EJIL* (2001) p. 993 at p. 994.

133. Kittichaisaree, *op. cit.* n. 124, at p. 227.

134. Res. E, *supra* n. 128; see also V. Proulx, ‘Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes against Humanity?’, 19 *American Univ. International L Rev.* (2004) p. 1009; F. McKay, ‘US Unilateralism and International Crimes: The International Criminal Court and Terrorism’, 36 *Cornell ILJ* (2004) p. 455; A. Rubin, ‘Legal Response to Terror: An International Criminal Court?’, 43 *Harvard ILJ* (2002) p. 65; T. Sailer, ‘The International Criminal Court: An Argument to Extend its Jurisdiction to Terrorism and a Dismissal of US Objections’, 13 *Temple International and Comp. LJ* (1999) p. 311; S.W. Krohne, ‘The United States and the World Need an International Criminal Court as an Ally in the War against Terrorism’, 8 *Indiana International and Comp. L Rev.* (1997) p. 159; G. Abi-Saab, ‘The Proper Role of International Law in Combating Terrorism’, 1 *Chinese JIL* (2002) p. 305 at pp. 311-312; Cassese, *op. cit.* n. 129, at p. 131.

135. Arsanjani, *loc. cit.* n. 130, at p. 31.

136. 1998 Rome Statute, Art. 7.

137. Arsanjani, *loc. cit.* n. 130, at p. 31.

138. UNGA Res. 51/210 (1996), para. 9.

tion and the 1999 Terrorist Financing Convention. The General Assembly also tasked the Committee with drafting a treaty to suppress nuclear terrorism, based on a draft text submitted by Russia in 1997,<sup>139</sup> as subsequently revised.<sup>140</sup> The draft text was influenced by the 1980 Vienna Convention and the 1997 Terrorist Bombings Convention.<sup>141</sup> Despite annual discussions, by the end of 2004, agreement had still not been reached on the draft<sup>142</sup> and little progress was made after 1998.

As it stands, the draft Preamble expresses the Convention's rationale, stating that 'acts of nuclear terrorism may result in the gravest consequences and may pose a threat to international peace and security' and that 'existing multilateral legal provisions do not adequately address those attacks'. The Convention aims to fill lacunae left by 1980 Vienna Convention, by covering a wider range of 'targets, forms and acts of nuclear terrorism'.<sup>143</sup> In contrast, the 1980 Vienna Convention is limited to offences relating to nuclear material while in international transport or in domestic use, storage and transport.<sup>144</sup>

Draft Article 2(1) establishes objective offences where a person unlawfully and intentionally *possesses* or *uses* radioactive material or devices with the intent to cause death or serious bodily injury, or to cause substantial damage to property or the environment. It creates the further offences of using radioactive material or devices, or using or damaging a nuclear facility,<sup>145</sup> with the intent to compel a natural or legal person, an international organization or a state to do or refrain from doing an act.<sup>146</sup> States must legislate to punish these acts, 'in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons'. While deriving from a 1994 General Assembly definition, itself similar to the 1937 League definition, the notion of a 'state of terror' is not an element of the offences, nor are the offences described as 'nuclear terrorism' as such.

By 2003, the principal unresolved issue was the treaty's scope of application.<sup>147</sup> Draft Article 4 proposes to exclude the 'activities of armed

139. UNGAOR (53rd Session), *Ad Hoc* Committee Report (1998), Suppl. 37 (A/53/37), p. 6; UNGAOR (52nd Session), *Ad Hoc* Committee Report (1997), Suppl. 37 (A/52/37), p. 1.

140. UNGA (53rd Session) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 22 October 1998, UN Doc. A/C.6/53/L.4, annex I, pp. 4-15.

141. *Ad Hoc* Committee Report (1998), *supra* n. 139, annex III, p. 47.

142. UNGAOR (58th Session), *Ad Hoc* Committee Report (2003), Suppl. 37 (A/58/37), p. 11; UNGAOR (57th Session), *Ad Hoc* Committee Report (2002), Suppl. 37 (A/57/37); UNGAOR (56th Session), *Ad Hoc* Committee Report (2001), Suppl. 37 (A/56/37).

143. H. Corell, 'The International Instruments against Terrorism', Paper at Symposium on Combating International Terrorism: The Contribution of the UN, Vienna, 3-4 June 2002, p. 12.

144. 1980 Vienna Convention, Art. 7.

145. '[I]n a manner which releases or risks the release of radioactive material'.

146. Ancillary offences are found in Draft Nuclear Terrorism Convention, Arts. 2(2)(a)-(b), 3, 4(a)-(c).

147. *Ad Hoc* Committee Report (2003), *supra* n. 142, at pp. 11-12.

forces during an armed conflict' which are 'governed' by IHL. It further excludes the 'activities' of state military forces 'in the exercise of their official duties, inasmuch as they are governed by other rules of international law'.<sup>148</sup> Although an identical provision was adopted in the 1997 Terrorist Bombings Convention,<sup>149</sup> some states wanted the Draft Nuclear Terrorism Convention to apply to the activities of state armed forces, and/or state-sponsored nuclear terrorism.<sup>150</sup> This position is understandable given that states are the primary possessors of nuclear material. Some felt that the 1997 provision was ambiguous, while others believed it should take into account the contested legality of the use of nuclear weapons in armed conflict.

Lesser disagreements surrounded whether radioactive dumping should be covered,<sup>151</sup> and whether reference to the 'environment' should be retained.<sup>152</sup> There was also unease about the relationship between the Draft Convention and other relevant instruments, particularly the nuclear non-proliferation regime.<sup>153</sup> Some were further concerned that the offence of using or damaging a nuclear facility might criminalize peaceful protests at nuclear facilities.<sup>154</sup> The ICRC warned that the Convention should not be interpreted as legalizing new means of warfare.<sup>155</sup>

The difficulty in reaching agreement on the Convention reflects the highly politicized nature of the legality of the use and possession of nuclear weapons by states. The mandate of the *Ad Hoc* Committee drafting the Convention was renewed in 2004.<sup>156</sup> Agreement on the Convention may depend on states first reaching agreement on the definition of terrorism in the Draft Comprehensive Convention, or even on the resolution of conflicts in the Middle East and over Kashmir.<sup>157</sup>

## 9. 2000 – DRAFT COMPREHENSIVE CONVENTION

A similar deadlock plagues an attempt to draft a comprehensive treaty generically defining terrorist offences, within the General Assembly's *Ad Hoc*

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148. Draft Nuclear Terrorism Convention, Art. 4.

149. 1997 Terrorist Bombings Convention, Art. 19.

150. *Ad Hoc* Committee Report (1998), *supra* n. 139, annex III, p. 50.

151. *Ad Hoc* Committee Report (2003), *supra* n. 142, at pp. 11-12.

152. *Ad Hoc* Committee Report (1998), *supra* n. 139, annex III, pp. 46, 47.

153. Especially relating to a proposal to draft a protocol to the 1980 Vienna Convention; and the 1997 Terrorist Bombings Convention and the 1968 Nuclear Non-Proliferation Treaty: *ibid.*, at p. 45.

154. *Ibid.*, at pp. 47, 49.

155. *Ibid.*, at p. 50.

156. UNGA Res. 58/81 (2004), paras. 15-19.

157. N. Rostow, 'Before and After: The Changed UN Response to Terrorism since September 11th', 35 *Cornell ILJ* (2002) p. 475 at p. 489.

Committee.<sup>158</sup> In 2000, India informally circulated a revised draft treaty originally submitted to the Sixth Committee in 1996.<sup>159</sup> Substantial drafting progress was made in 2001-2002, spurred on by the 'shock of recognition' of September 11,<sup>160</sup> and by 2002 agreement was reached on most of the 27 articles.<sup>161</sup> However, by 2003, some states had reached their 'bottom-line' positions on disputed matters.<sup>162</sup> It was the view of the Coordinator that resolving outstanding issues – the Preamble, definitions in Article 1 and definition of offences in Article 2<sup>163</sup> – would depend on agreeing Article 18 (applicability to armed forces and armed conflict).<sup>164</sup> The drafting mandate was renewed in 2004.<sup>165</sup>

The draft Preamble condemns 'all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed'.<sup>166</sup> Draft Article 2(1) proposes an offence if a person 'unlawfully and intentionally' causes: '[d]eath or serious bodily injury to any person'; '[s]erious damage to public or private property'; or '[d]amage to property, places, facilities, or systems ... resulting or likely to result in major economic loss'.<sup>167</sup> The purpose of any such conduct, 'by its nature or context', must be 'to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act'.<sup>168</sup> Put another way, the prohibited acts must be motivated by purposes of intimidation or compulsion, but there is no requirement that acts be motivated by political aims or objectives. The treaty proposes to exclude the offences from the political offence exception to extradition.<sup>169</sup>

Unlike the 1997 Terrorist Bombings Convention, the Draft Convention

158. UNGA Res. 54/110 (1999); UNGAOR (55th Session), *Ad Hoc* Committee Report (2000), Suppl. 37 (A/55/37); see S. Subedi, 'The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law', 4 *International L Forum* (2002) p. 159; L. Bondi, 'Legitimacy and Legality: Key Issues in the Fight against Terrorism', *Fund for Peace*, Washington DC, 11 September 2002, pp. 26-30.

159. *Ad Hoc* Committee Report (2000), *supra* n. 158, at p. 4.

160. Abi-Saab, loc. cit. n. 134, at pp. 311-312.

161. See *Ad Hoc* Committee Report (2001), *supra* n. 142; UNGA (57th Session) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 16 October 2002, A/C.6/57/L.9, annex II, pp. 7-8.

162. *Ad Hoc* Committee Report (2003), *supra* n. 142, at p. 8.

163. *Ibid.*, at p. 6.

164. UNGA, *Ad Hoc* Committee, 'Finalizing Treaty Requires Agreement on "Armed Forces", "Foreign Occupation", Anti-Terrorism Committee Told', PR L/2993, 1 February 2002.

165. UNGA Res. 58/81 (2004), paras. 14-19.

166. *Ad Hoc* Committee Report (2002), *supra* n. 142, annex I (Discussion paper by the Bureau).

167. UNGA (56th Session) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 29 October 2001, UN Doc. A/C.6/56/L.9, annex I, p. 16 (informal Coordinator texts); *Ad Hoc* Committee Report (2002), *supra* n. 142, at pp. 6-7.

168. Ancillary offences are found in Draft Comprehensive Convention, Arts. 2(2), (3) and (4)(a)-(c).

169. Draft Comprehensive Convention, Art. 14.

proposes to protect private property as well as public property. It captures a wider range of acts against property than the EU Framework Decision on Combatting Terrorism,<sup>170</sup> by referring to ‘serious *damage*’ rather than ‘extensive *destruction*’. Like the Bombings Convention, the Draft Convention protects only states or international organizations from compulsion, and not NGOs, political parties, corporations or other social groups.

While there was a basic consensus on the definition of offences,<sup>171</sup> disagreement arose when Malaysia, on behalf of the OIC, sought to exclude ‘[p]eople’s struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination’.<sup>172</sup> The aim was to balance the exclusion of the activities of state armed forces by also excluding national liberation forces. The proposal was taken from Article 2 of the 1999 OIC Convention and is significant in voting terms because the OIC comprises 56 states, and was also supported by Arab states and the Non-Aligned Movement. Other states objected to the proposal, believing that ‘a terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination’.<sup>173</sup> Further, the obvious point had been made that self-determination was already governed by existing law, including obligations to comply with IHL in Protocol I.<sup>174</sup>

No such exclusionary provision was included in the 1997 Terrorist Bombings Convention. When Pakistan lodged a reservation purporting to exclude the application of that Convention from self-determination struggles, numerous states formally objected.<sup>175</sup> The UK and the US stated that the reservation amounted to a unilateral limitation on the scope of the Convention, contrary to its object and purpose (suppressing terrorist bombings, irrespective of location or perpetrator).<sup>176</sup> It was further objected that the reservation was contrary to Article 5 of the Convention, which requires criminalization regardless of any justifications.

As with the Draft Nuclear Terrorism Convention, a remaining dispute is the application of the Convention to armed forces and armed conflicts. The

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170. 2002 European Union Framework Decision on Combating Terrorism (2002/475/JHA) (adopted 13 June 2002, *OJ* L164/3, 22 June 2002, entered into force 22 June 2002), recital 11.

171. Although NGOs have raised concerns about aspects of definition in Arts. 2 and 18: Amnesty International, ‘Draft Comprehensive Convention on International Terrorism: A Threat to Human Rights Standards’, Statement to UNGA 56th Session (2002), AI Index IOR 51/009/2001, 22 October 2001; Amnesty International and Human Rights Watch, ‘Comprehensive Convention against International Terrorism’, Joint Letter to Ambassadors, 28 January 2002.

172. Subedi, *loc. cit.* n. 158, at p. 163.

173. *Ibid.*

174. *Ibid.*, at p. 165.

175. Austria, Australia, Canada, Denmark, Finland, France, Germany, India, Israel, Italy, Japan, Netherlands, New Zealand, Norway, Spain, Sweden, UK, US.

176. 1969 Vienna Convention on the Law of Treaties, Art. 19(c), does not permit reservations which are incompatible with the object and purpose of a treaty.

1997 Terrorist Bombings Convention excludes the ‘activities of armed forces during an armed conflict’ from that Convention, as well as the activities of state military forces exercising their official duties ‘inasmuch as they are governed by other rules of international law’.<sup>177</sup> This approach is also followed in the EU Framework Decision. Part of the 1999 Financing Convention protects ‘civilians’ or ‘any other person not taking an active part in the hostilities in a situation of armed conflict’. Proposed Article 18 of the Draft Comprehensive Convention is based on 1997 Terrorist Bombings Convention, but is subject to three disagreements.

One dispute is whether the Draft Convention should exclude the activities of the ‘parties’ – rather than the ‘armed forces’ – during an armed conflict, since reference only to ‘armed forces’ might exclude other participants in armed conflict under IHL,<sup>178</sup> particularly as ‘parties’ are mentioned in the Hague Regulations and the Geneva Conventions.<sup>179</sup> Reference to the ‘parties’ is specifically aimed at exempting organizations such as the PLO, Hamas, Islamic Jihad and Hezbollah.<sup>180</sup> The ICRC suggested that the term ‘armed forces’ should be defined to cover both government forces and those of organized armed groups,<sup>181</sup> which would seem an appropriate approach. The 1997 Terrorist Bombings Convention refers to armed forces ‘as understood’ under IHL, but definition in the Draft Convention itself would provide further clarity, particularly concerning application to non-state forces in non-international armed conflicts under Protocol II.<sup>182</sup> Clearly, reference to the ‘parties’ would be too broad,<sup>183</sup> since it would exclude all state activity in armed conflict – not just military activities – as well as numerous non-state armed groups.<sup>184</sup>

A second disagreement is whether situations of ‘foreign occupation’ should

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177. 1997 Terrorist Bombings Convention, Art. 19(2), also stating that the terms ‘armed forces’ and ‘armed conflict’ are understood according to, and governed by, IHL. Thus non-state armed forces may also be covered: Witten, loc. cit. n. 1, at p. 780. Some state bombings outside armed conflict, and not by armed forces in their official duties, might still be unlawful, such as France’s bombing of the Rainbow Warrior in New Zealand in 1986: R. Maruhn, ‘Terrorism: Addendum’, in R. Bernhardt, ed., *Encyclopaedia of Public International Law*, Vol. 4 (Amsterdam, North Holland 2000) p. 849 at p. 853.

178. OIC proposal, in *Ad Hoc* Committee Report (2002), *supra* n. 142, at p. 17.

179. UNGAOR (59th Session), *Ad Hoc* Committee Report (2004), Suppl. 37 (A/59/37), p. 11, para. 6.

180. S. von Schorlemer, ‘Human Rights: Substantive and Institutional Implications of the War on Terror’, 14 *EJIL* (2003) p. 265 at p. 272; C. Walter, ‘Defining Terrorism in National and International Law’, in C. Walter, et al., eds., *Terrorism as a Challenge for National and International Law* (Heidelberg, Springer 2003) p. 23 at pp. 39-40.

181. ICRC Report, ‘Terrorism and International Law: Challenges and Responses: The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law’, Geneva, 2002, p. 5.

182. Walter, op. cit. n. 180, at pp. 17-18.

183. *Ad Hoc* Committee Report (2003), *supra* n. 142, at p. 9.

184. *Ad Hoc* Committee Report (2004), *supra* n. 179, at p. 11, para. 7.

also be excluded from the Convention, in addition to ‘armed conflict’.<sup>185</sup> This is part of the same OIC proposal to exclude the activities of the ‘parties’ and is intended to cover situations where there are no hostilities and IHL may not strictly apply. Politically, it is aimed at excluding non-state violence against Israel in the Palestinian Occupied Territories and against India in Kashmir.<sup>186</sup>

It has been argued that this OIC proposal would ‘eviscerate’ the Convention, by reintroducing a national liberation exception.<sup>187</sup> Other states wanted even more explicit exemptions for self-determination movements.<sup>188</sup> Since many terrorist acts take place in armed conflict or under foreign occupation, this proposal would neuter much of the treaty’s purpose. Such acts would remain punishable under national law, or under IHL to the extent that it applies, but would not be punishable as terrorism. In calling for ‘moral clarity’ in the drafting of the Convention, the UN Secretary-General has also implicitly criticized this approach.<sup>189</sup> Others have called for liberation fighters to be exempted only to the extent that they do not terrorize civilians.<sup>190</sup>

A third disagreement is whether state military forces exercising their official duties<sup>191</sup> are excluded from the Convention if they are merely ‘governed’ by international law or required to be ‘in conformity’ with it. The OIC proposes that military forces would be liable for terrorism if they were not ‘in conformity’ with international law, including genocide, torture, IHL, or state responsibility. These states felt that the Convention should cover state and state-sponsored terrorism, notwithstanding the application of existing international law to state conduct.<sup>192</sup> The OIC proposal lacks balance since the activities of non-state

185. OIC proposal, in *Ad Hoc* Committee Report (2002), *supra* n. 142, annex IV, p. 17.

186. Rostow, *loc. cit.* n. 157, at p. 488.

187. M. Halberstam, ‘The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whom-ever Committed’, 41 *Columbia J Transnational L* (2003) p. 573 at p. 582.

188. UNGA (52nd Session) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 10 October 1997, UN Doc. A/C.6/52/L.3, p. 19 (Syria), p. 31 (Egypt); UNGAOR (52nd Session), *Ad Hoc* Committee Report (1997), Suppl. 37 (A/52/37), p. 38 (Pakistan).

189. UN Secretary-General, ‘Addressing Assembly on Terrorism, Calls for “Immediate, Far-Reaching Changes” in UN Response to Terror’, UN PR, UN Doc. SG/SM/7977 GA/9920, 1 October 2001.

190. *Ad Hoc* Committee Report (2004), *supra* n. 179, at p. 7, para. 16; p. 11, para. 8.

191. In the 1997 Terrorist Bombings Convention, ‘military forces of a State’ is defined in Art. 1(4) as ‘the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defence or security and persons acting in support of those armed forces who are under their formal command, control and responsibility’. Proposals to explicitly refer to official duties such as law enforcement, evacuation operations, peace operations, UN operations, or humanitarian relief were not adopted: Working Group Report (1997), *supra* n. 188, at p. 58 (Australia, Germany), p. 59 (Rep. Korea, Costa Rica, NZ).

192. Including IHL, human rights law, international criminal law, the law on the non-use of force and non-intervention, and the law of state responsibility.



forces are not similarly classified as terrorism if they are not in conformity with international law.

In response, the ICRC warned of the danger of criminalizing acts that are not already unlawful in IHL.<sup>193</sup> The ICRC stated that as a result, ‘third states would be under an obligation to prosecute or extradite persons who have not in fact committed an unlawful act under IHL’.<sup>194</sup> The preferred position of the ICRC was to exclude acts covered by IHL (committed in the course of an armed conflict) from the scope of the Convention.<sup>195</sup> Acts of terror or terrorism committed in armed conflict are already specifically prohibited and criminalized in armed conflict under IHL.<sup>196</sup>

The ICRC position aims to maximize clarity and simplicity in the Draft Convention’s relationship to IHL. On one hand, criminalizing political violence against civilians as terrorism would seldom conflict with the objectives of IHL, just as prohibitions on genocide, crimes against humanity and torture apply concurrently with IHL and complement it. An alternative approach would be to exclude the application of the Convention only where it directly conflicts with IHL.<sup>197</sup> Yet since the Draft Convention also criminalizes violence against ‘any’ person and against property, its application to situations covered by IHL would interfere with the carefully constructed parameters of violence set by IHL, unravelling compliance with it.

The case for applying terrorist offences to the activities of state armed forces is strongest in situations where IHL does not apply, and the conduct in question does not rise to the level of crimes against humanity. Such application would confer legitimacy on the Convention for the many states, and others, who object to ‘State terrorism’. Under the present draft, only acts of state armed forces outside their official duties, and not covered by IHL, may be regarded as terrorism.<sup>198</sup> Deliberate or ‘official’ state action designed to terrorize remains excluded.

Finally, as with the Draft Nuclear Terrorism Convention, the relationship between the Draft Comprehensive Convention and sectoral anti-terrorism

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193. ICRC, *supra* n. 181.

194. *Ibid.*

195. *Ibid.*

196. 1949 Fourth Geneva Convention, Art. 33(1) (prohibiting ‘all measures ... of terrorism’); 1977 Protocol I, Art. 51(2) and 1977 Protocol II, Art. 13(2) (prohibiting ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’); 1977 Protocol II, Art. 4(2)(d) (prohibiting ‘acts of terrorism’); see also 1923 Hague Draft Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, in 17 *AJIL* (1923) Suppl. p. 245; 1994 ICTR Statute, Art. 4(2)(d); 2000 Statute of the Special Court for Sierra Leone (annexed to UNSC Res. 1315 (2000), Art. 3(d)). In the *Galic* case, ICTY-98-29-T (5 December 2003), the ICTY found that the prohibition in Art. 51(2) of 1977 Protocol I gives rise to individual criminal liability as an implicit grave breach of Protocol I.

197. Walter, *op. cit.* n. 180, at pp. 18-19.

198. See discussion of an identical provision in the 1997 Terrorist Bombings Convention: *Ad Hoc* Committee Report (1997), *supra* n. 188, at p. 53 (Rapporteur).

treaties is undecided. Some states preferred no provision at all,<sup>199</sup> in which case the sectoral treaties would only apply to the extent that they are compatible with the Draft Convention, as a treaty later in time.<sup>200</sup> In contrast, Article 2 *bis* presently states that where the Convention and a sectoral treaty would apply to the same act, between parties to both, the sectoral treaty prevails,<sup>201</sup> thus being regarded as *lex specialis*. While this provision was widely supported, some states objected that since it was designed to ‘fill gaps’ in the existing law, the Draft Convention established ‘a separate and autonomous regime’ applicable ‘in parallel with’ the sectoral treaties.<sup>202</sup> This view correctly recognizes that terrorism is a special offence with additional and distinct elements to sectoral offences – that the Draft Convention itself is *lex specialis*. The provision may depend on resolving other disagreements.<sup>203</sup>

## 10. CONCLUSION

The repeated and industrious attempts by the international community to generically define terrorism over the past 80 years indicate the normative importance of generic definition to the international community. In contrast to the objective enumeration of offences in sectoral anti-terrorism treaties, generic definition can capture, and condemn, the motive elements which distinguish terrorism from ordinary crime.<sup>204</sup> Reference to political motives helps to conceptually distinguish international terrorism from transnational organized crime, which is motivated by ‘financial or material benefit’<sup>205</sup> rather than political aims. Generic definition avoids the rigidity of enumerative definitions,<sup>206</sup> which may not cover ever-changing terrorist methods.

The principal disadvantage of generic definition is the difficulty and subject-

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199. UNGA (57th Session) (6th Committee), Measures to Eliminate International Terrorism: Working Group Report, 16 October 2002, A/C.6/57/L.9, annex II, p. 8.

200. 1969 Vienna Convention on the Law of Treaties, Art. 30.

201. *Ad Hoc* Committee Report (2002), *supra* n. 142, at p. 7; an approach adopted by the 1972 US Draft Convention.

202. *Ad Hoc* Committee Report (2003), *supra* n. 142, at p. 9; *Ad Hoc* Committee Report (2004), *supra* n. 179, at p. 12, para. 14.

203. Particularly Draft Comprehensive Convention, Art. 18.

204. G. Levitt, ‘Is “Terrorism” Worth Defining?’, 13 *Ohio Northern Univ. L Rev.* (1986) p. 97 at p. 111.

205. 2000 UN Convention against Transnational Organized Crime, Arts. 2, 5. The UN General Assembly has often expressed concern at links between terrorist groups and violent organized crime: Preambles to UNGA Res. 44/29 (1989); 46/51 (1991); 48/122 (1993); 49/60 (1994); 49/185 (1994); 50/186 (1995); 54/164 (1999); 58/136 (2003). Since the 1980s the categories increasingly converge: W. Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (London, Phoenix Press 2001) pp. 210-225.

206. G. Fitzmaurice, ‘The Definition of Aggression’, 1 *ICLQ* (1952) p. 137 at pp. 143-144; Brownlie, *op. cit.* n. 56, at p. 355.

tivity of proving motive elements, such as an aim to intimidate or compel, or a political motive.<sup>207</sup> Generic definitions are wider and more ambiguous than enumerative ones,<sup>208</sup> although all definitions generalize,<sup>209</sup> and the problem is lessened by combining generic and enumerative features in a single definition. Combined definitions are narrower than enumerative ones – since listed offences only amount to terrorism when they also satisfy a motive element – and are the most likely type of definition to satisfy the principle of legality, or specificity, in criminal offences.

After 11 September 2001, the international community is closer than ever to securing agreement on generic definition in the Sixth Committee of the General Assembly. The definition currently proposed in the Draft Comprehensive Convention has been substantially endorsed in the report of the UN High-Level Panel on Threats, Challenges and Change in late 2004, and in the 2005 report of the UN Secretary-General on progress towards achieving the Millennium Development Goals.<sup>210</sup> While agreement remains to be reached on exceptions, if any, to the definition, much of the argument about exceptions is rhetorical or ideological, not substantive. Global implementation and application of international humanitarian law, as enshrined in Protocol I of 1977, would help clear a path for consensus on definition and criminalization of ‘terrorism’, as such.

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207. Levitt, loc. cit. n. 204, at p. 112; Lambert, op. cit. n. 3, at p. 51; Murphy, op. cit. n. 89, at p. 28; Franck and Lockwood, loc. cit. n. 7, at pp. 78-79; M.C. Bassiouni, ‘A Policy-Oriented Inquiry into the Different Forms and Manifestations of “International Terrorism”’, in M.C. Bassiouni, ed., *Legal Responses to International Terrorism* (Dordrecht, Martinus Nijhoff 1988) pp. xv, xxix. Political motives may also be difficult to distinguish from criminal or even pathological ones: M. Ignatieff, ‘Human Rights, the Laws of War, and Terrorism’, 69 *Social Research* (2002) p. 1137 at p. 1146; see also J. Burke, ‘What exactly does al-Qaeda want?’, *Observer*, 21 March 2004.

208. Fitzmaurice, loc. cit., n. 206, at pp. 143-144; Brownlie, op. cit. n. 56, at p. 355.

209. Brownlie, op. cit. n. 56, at p. 356.

210. UN High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (UN, December 2004) p. 52; UN Secretary-General’s Report, ‘In larger freedom: towards development, security and human rights for all’, UNGA (59th Session), 21 March 2005, UN Doc. A/59/2005, at para. 91.

